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## ARTICLES

### LEGAL ACADEMIC BACKLASH: THE RESPONSE OF LEGAL THEORISTS TO SITUATIONIST INSIGHTS

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INTRODUCTION .....	1089
A. <i>A Conundrum in the Marketplace of Ideas</i> .....	1089
1. <i>Conditions Encouraging Naïve Cynicism</i> .....	1092
2. <i>Methods of Encouraging Naïve Cynicism</i> .....	1092
3. <i>A Pervasive Dynamic</i> .....	1095
B. <i>Social Psychologists in a Dispositionist World</i> .....	1097
I. THREE MOMENTS OF NAÏVE CYNICISM .....	1103
A. <i>Introduction</i> .....	1103
B. <i>Moment I: Early Situationist Advances by Calabresi and Latin</i> .....	1104
1. <i>Origins of the Field: Calabresi</i> .....	1104
a. <i>Conditions Encouraging Naïve Cynicism</i> .....	1104
b. <i>Methods of Encouraging Naïve Cynicism</i> .....	1106
2. <i>A Critique: Latin</i> .....	1109
a. <i>Conditions Encouraging Naïve Cynicism</i> .....	1109

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<i>b. Methods of Encouraging Naïve Cynicism</i> .....	1113
<i>C. Moment II: Behavioralist Challenges to the “Rationality” of the Rational Actor</i> .....	1116
1. <i>Conditions Encouraging Naïve Cynicism</i> .....	1117
2. <i>Methods of Encouraging Naïve Cynicism</i> .....	1122
<i>D. Moment III: Situationist Challenges to the “Actor” Element of the Rational Actor</i> .....	1127
1. <i>Conditions Encouraging Naïve Cynicism</i> .....	1128
2. <i>Methods of Encouraging Naïve Cynicism</i> .....	1134
CONCLUSION .....	1143

*Most men . . . think themselves in possession of all truth, and that wherever others differ from them it is so far error.*

—Benjamin Franklin<sup>1</sup>

*The tendency to deny bias in oneself while imputing it to others is likely to foster interpersonal conflict and misunderstanding. When others have shown just the same amount of self-interest in their political views as we have, or when they have shown just the same amount of intergroup bias in their decisions about whom to reward and whom to punish, we are likely to see them as biased and ourselves as objective—especially when those others' views and decisions diverge from our own. Conflict is likely to ensue, and feelings of enmity are likely to worsen, as we resent their accusations of us as biased, when we are certain that we have not been, and when we are certain that they have been.*

—Emily Pronin & Mathew Kugler<sup>2</sup>

## INTRODUCTION

### A. *A Conundrum in the Marketplace of Ideas*

Implicit in all realms of law and explicit in most legal theories is a vision of the human animal.<sup>3</sup> The law, which is largely focused on influencing human behavior in one way or another, is built on assumptions about what moves and motivates people. And every attempt to assess culpability requires attributions of causation, responsibility, and blame across all relevant actors. Those theories of human action, although generally based on nothing more than intuition or common sense, are nonetheless presumed to be accurate.

Often, however, they are not. Social psychology, social cognition, and mind sciences have devoted themselves to testing and refining theories of human behavior and have demonstrated that the conceptions embraced by

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<sup>1</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 653 (Adrienne Koch ed., 1966).

<sup>2</sup> Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blindspot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 465, 465 (2006).

<sup>3</sup> See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1 (1988).

laypeople and the law are not only flawed, but upside down. The factors that we imagine are significant determinants of behavior usually are not, and we disregard or fail even to see many of the most influential factors.

Several articles have examined the nature of the gap between what the law and most legal theories assume moves human beings and what actually moves them.<sup>4</sup> This Article, which is one in a series of pieces described in the paragraphs that follow, takes up a different but related question: Why and how is that gap maintained?

As we explained in the first article in this series, *The Great Attributional Divide*,<sup>5</sup> there is a rift that runs across many of our major policy debates, and it is built upon contrasting attributional tendencies. One side embodies the less-accurate view that outcomes and behavior can be explained by people's dispositions (i.e., personalities, preferences, and the like), while the other assumes a more accurate approach, which attributes causation and responsibility to unseen or overlooked influences within us and around us. The simplistic, commonsensical, disposition-oriented attributions that dominate policy discourse we term "dispositionist." The latter approach—attributional accounts that tend to defer to social science regarding what actually motivates human behavior—we call "situationist."<sup>6</sup>

As we described in *The Great Attributional Divide*, attributional tendencies are largely the result of situation. Consequently, in that article, we were able to develop a set of predictions concerning the factors that are likely to lead

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<sup>4</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*]; 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*]; 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>5</sup> 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*].

<sup>6</sup> For more complete descriptions and definitions of dispositionist and situationist attributions, see Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, and Hanson & Yosifon, *The Situational Character*, *supra* note 4.

individuals and institutions to situationist insights. In other words, we identified a number of situational elements that likely foster more accurate attributions of human behavior.<sup>7</sup>

In a second companion article, *Naïve Cynicism*,<sup>8</sup> we explored a paradox: dispositionism maintains its dominance *despite* missing much of what actually moves us. We suggested that an important part of the explanation for this apparent contradiction lies in a subordinate dynamic and discourse—what we termed *naïve cynicism*: the basic subconscious mechanism by which dispositionists discredit and dismiss situationist insights and their proponents. Naïve cynicism predicts that, like most humans, dispositionists put great faith in the veracity of their perceptions and conceptions of how the world works. They see themselves as objective and reasonable and expect other reasonable and objective people to reach the same conclusions as they do. As a result, when a dispositionist encounters a situationist attribution that conflicts with his own causal story, he experiences a cognitive conflict that naïve cynicism helps to resolve: explaining the opposing attribution as the product of bias, ignorance, or some other flaw. Rather than engage the substance or merits of the conflict, naïve cynicism involves an attack on the motivations or dispositions of the individuals and institutions associated with the situationist conception. 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

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<sup>7</sup> In identifying the important situational elements, we relied on research on conditions of decreased schema reliance and general debiasing. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 331–38. The first prediction identified the interior factors that encourage people to see disposition and miss situation, including perceptual limitations; motives for achieving closure and simplicity; and the desire for self-, group-, and system-affirmation. See *id.* at 328. The second prediction identified exterior situations that may break the dispositionist schema, epitomized by the situation where one is routinely asked to make causal attributions of behavior, presented with evidence that is not easily accommodated by the dispositionist model, encouraged to interpret that evidence in unconventional ways, provided with adequate time to consider the role of situation, confronted with a diverse array of situations, and held accountable for the accuracy of one's attributions. See *id.* at 338. The third prediction examined the manifestation of those situationism-encouraging conditions across different occupational settings and, based on that, suggested that academics, judges, and journalists might be relatively well positioned to gain situational sensitivity and promote situationist attributions. See *id.* at 381–82. In addition, we forecast the potential importance of other group-identity and cultural effects in making individuals and groups more sensitive to the power of situation. See *id.* at 377–81.

<sup>8</sup> Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008) [hereinafter Benforado & Hanson, *Naïve Cynicism*].

is, thus, critically important to explaining how and why certain legal policies manage to carry the day.<sup>9</sup>

### 1. *Conditions Encouraging Naïve Cynicism*

Based on what we described in the *Great Attributional Divide* as the interior sources of dispositionism,<sup>10</sup> we predicted 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;
- (2) are complex or counterintuitive;
- (3) fail to provide clear answers or cognitive closure;
- (4) are made by—or otherwise involve—outgroup members;
- (5) threaten our conceptions of ourselves or the groups with which we identify; and/or
- (6) threaten the legitimacy of larger systems (or arise during periods when the system is threatened generally).<sup>11</sup>

Each of those factors will likely contribute to naïve cynicism because each encourages dispositionism, amplifying the motives behind naïve cynicism.

### 2. *Methods of Encouraging Naïve Cynicism*

Next, we offered a prediction about how the backlash against situationism is likely to unfold. As to a particular policy debate, we predicted that naïve

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<sup>9</sup> It is important to note that the brief summary we are providing here about conclusions reached and predictions made in our earlier articles is just that, a brief summary. Space constraints preclude us from offering the support for those conclusions, again, here. Because the conclusions in this Article by rejecting the assumptions as undefended (and indefensible), even though those assumptions are extensively defended in other works. This difficulty does not exist, or at least not to the same degree, for authors who embrace the widely shared dispositionist view of the human animal (for them, there are no basic assumptions to challenge) or for scholars who have unlimited space in which to make their case (for them, seemingly indefensible claims can be rendered plausible in other sections).

As a result, we urge any reader who finds the conclusions and predictions made in this section hard to swallow to invest in reading the previous articles from which they came. To be sure, even familiarity with the full arguments behind this summary may not persuade some readers; nonetheless, it will ensure that any disagreement that does remain is informed and that any actual insights contained here are not hastily or unfairly dismissed simply because they *seem* wrong.

<sup>10</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 499.

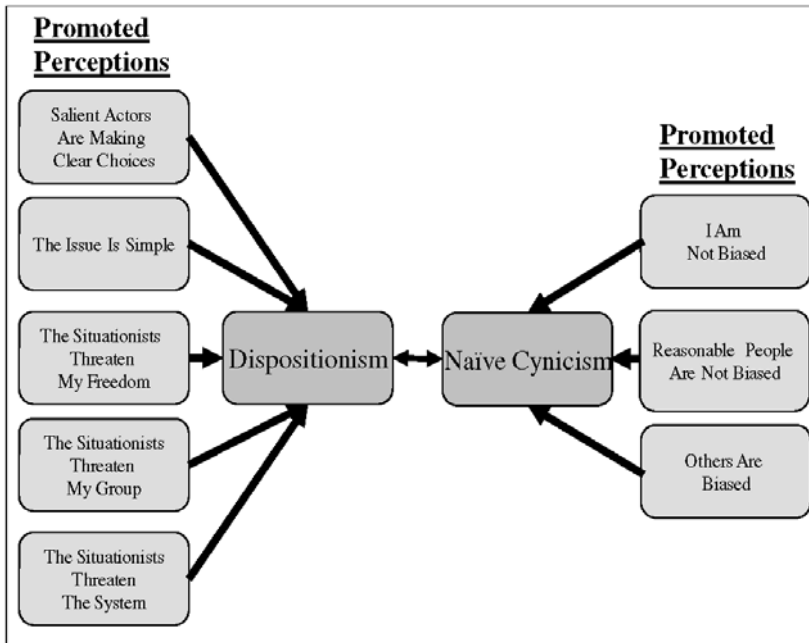
<sup>11</sup> See Benforado & Hanson, *Naïve Cynicism*, *supra* note 8, at 536 (Prediction IV).

cynics would, within reason, tend to frame any and all relevant issues in ways that advance dispositionist attributions (playing upon the six factors that we just highlighted) and that directly encourage naïve cynicism.

This dynamic is loosely depicted in *Figure 1* below. The perceptions on the left contribute to dispositionist attributions. The perceptions on the right contribute to naïve cynicism. Dispositionist attributions and naïve cynicism are mutually reinforcing. Someone hoping to promote dispositionism, such as a *dispositionist entrepreneur*,<sup>12</sup> can do so by promoting any and all of those perceptions and associated conclusions.

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<sup>12</sup> See *id.* at 541–42.

**Figure 1**

More specifically, we forecasted that spokespersons for the dispositionist backlash would 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;
- (3) the situationalized subjects are actually outgroup members
  - (a) with flawed dispositions and
  - (b) who pose a threat to “us,” and our control, options, values, beliefs, and systems;
- (4) the situationists are outgroup members who
  - (a) are paternalistically challenging “our” ability to make good choices,

- (b) are ill-informed, naïve, biased, extreme, whiney, stupid, greedy, opportunistic, intermeddling, paternalistic, “political,” trouble-making, power-hungry, elitist, or otherwise ill-motivated, and
  - (c) pose a threat to “us” and our control, options, values, beliefs or systems; and
- (5) the situationist ideas
- (a) are extreme, dubious, complex, unclear, impractical, counterproductive, or radical, and
  - (b) pose a threat to “us” and our control, options, values, beliefs, or systems.<sup>13</sup>

Thus, in protecting dispositionism, the backlash against situationism will often involve an affirmation of existing dispositionist notions and an assault on (1) the situationist attributions themselves; (2) the individuals, institutions, and groups from which the situationist attributions appear to emanate; and (3) the individuals whose conduct has been situationalized.<sup>14</sup> If one were to boil down those factors to one simple naïve-cynicism-promoting frame for minimizing situationist ideas, it would be something like this: *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

### 3. A Pervasive Dynamic

To offer a case study testing some of the predictions we made in *Naïve Cynicism*, we looked at the *popular* reception of situationist explanations of a *particular* controversy—detainee abuse at Abu Ghraib, Guantánamo Bay, and elsewhere.<sup>15</sup> We showed how, consistent with our thesis, members of the Bush

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<sup>13</sup> See *id.* at 536–39. (Prediction V).

<sup>14</sup> The final two predictions in *Naïve Cynicism* (Predictions VI and VII) focused on (1) the types of individuals and institutions that are likely to be subjected to backlash (for instance, judges and the judiciary, journalists and the press, and scholars and academia); and (2) the fact that commercial interests—large, profit-oriented corporations in particular—have a stake in the continued dominance of dispositionism and therefore will be active in framing policy issues in ways that encourage naïve cynicism. See *id.* at 539–42. Our focus here on legal academic backlash is consistent with Prediction VI, but a more developed analysis of those two predictions is the basis of other work now in progress. See *infra* note 42 (discussing a work in progress, Adam Benforado & Jon Hanson, *Backlash: The Response of Dispositionists to Twentieth Century Situationism* (Oct. 5, 2007) (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, *Backlash*]).

<sup>15</sup> See Benforado & Hanson, *Naïve Cynicism*, *supra* note 8, at 542–72. In previous critical-realist works, those predictions have been implicitly confirmed in several other settings (although without the aid of the framework utilized in this project). For instance, reactions to Galileo’s heliocentric evidence had many of the predicted components. See Hanson & Yosifon, *The Situation*, *supra* note 4, at 206–25 (summarizing the Catholic Church’s reaction to Galileo). More recently reactions to public-health accounts of the obesity epidemic have met with naïve cynical backlash. With regard to what causes obesity, for example, the backlash has involved an affirmation of the dispositionist belief that getting fat is the result of bad individual choices; an

Administration, conservative talk-show pundits, and others employed naïve cynicism to discredit and dismiss situationist ideas about the causes of abuse and to attack the individuals and groups associated with those accounts.<sup>16</sup>

Our thesis, however, is far broader than that. We predict that naïve cynicism is a pervasive dynamic that shapes policy debates big and small. We argue that it can operate at a particular moment or over long periods of time, and that it is embraced and encouraged by both elite knowledge-producers and the average person on the street.

Having demonstrated the dynamic at work during a flash in the news cycle, we expand our lens in this Article to focus on how naïve cynicism can operate over many years to shape a broad scholarly discipline. Thus, while the case study in *Naïve Cynicism* focused on influential pundits and politicians like Rush Limbaugh and Donald Rumsfeld, this Article examines the reactions of prominent academics, like Richard Posner and Samuel Issacharoff, to situationist scholarship. The leap between pundits and scholars is, at least by our measure, narrower than it might seem.<sup>17</sup>

As we argue in this Article, naïve cynicism, operating as we predict above, has played a significant role in retarding the growth and influence of more accurate situationist insights of social psychology and related fields within the dominant legal theoretical frameworks of the last half-century.<sup>18</sup>

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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. See Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 4, *passim*. For similar evidence confirming similar predictions regarding victims of Hurricane Katrina, see Hanson & Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 454–78 (2006). Finally, to read a brief essay arguing that naïve cynicism has played a role in the dynamics of the 2008 U.S. presidential campaign, see Posting of Adam Benforado & Jon Hanson to The Situationist Blog, <http://thesituationist.wordpress.com/2008/05/05/naive-cynicism-in-election-2008-dispositionism-v-situationism/> (May 5, 2008).

<sup>16</sup> See *id.* at 460–78.

<sup>17</sup> Space constraints prevent us from widening our lens still further to examine the legal-academic debates across the entire twentieth century. In work now in progress, however, that examination is being initiated—particularly with regard to how dispositionist legal scholars have responded to the legal realists’ relatively situationist challenge to legal formalism.

<sup>18</sup> We use the term “social psychology” to refer to not only the traditional field of research that goes by that name, but also a number of interrelated scholarly fields, including social cognition and cognitive neuroscience. For accessible overviews of the history of relationships between the various fields, see SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 1–18 (1991), and ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 1–7 (1999).

Because we focus in this Article on the language and rhetoric of policy and legal-theoretic debates, we will, more than we otherwise would, draw heavily on the particular language of the individuals whose

### B. *Social Psychologists in a Dispositionist World*

Despite their central importance to marketing, public relations, fundraising, lobbying, and business organizations, social psychologists have had a surprisingly small voice, and have generally lacked credibility, in elite policy and academic circles. That is true notwithstanding the fact that social psychology, as a field, is fairly stable and operates, more or less, according to the standards and processes of the best social sciences. A big part of the problem, we believe, is simply that what social psychologists have to teach us about ourselves is hardly welcome news—except to those entities and enterprises that seek to be advantaged by that information. As Phil Zimbardo explains,

[O]ur whole society is . . . wedded to the disposition[ist] perspective: Good people do good deeds, and bad people do bad deeds. It's part of our institutional thinking. It's what psychiatry is all about. It's what medicine is all about. It's what the legal system is all about. And it's what religious systems are all about. We put good inside of people, and we put bad inside of people. It's so ingrained in the way we think, but [in contrast] the situationist's perspective says that although that may sometimes be true, we need to acknowledge that there can be powerful, yet subtle social forces in given settings that have potentially transformative power over us.<sup>19</sup>

In short, social psychologists and scholars in related fields tend to be situationists in a dispositionist world; and their relatively situationist findings are met with the very sort of naïve cynicism that we would predict.

The naïve cynical backlash to such ideas is plainly evident in the *popular* reception of much of the social psychology upon which the critical realist project builds.<sup>20</sup> An illustrative recent example comes in the response to John

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arguments we are analyzing. Put differently, we will include a higher rate of direct quotations, including block quotations, than we would ordinarily include or prefer.

<sup>19</sup> Philip Zimbardo, *You Can't Be a Sweet Cucumber in a Vinegar Barrel*, EDGE: THE THIRD CULTURE, Jan. 18, 2005, <http://www.edge.org/documents/archive/edge153.html>.

<sup>20</sup> For example, Stanley Milgram's obedience experiments were, "[m]ore than any other research in social psychology, . . . embroiled from the beginning in a number of controversies." Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. PERSONALITY & SOC. PSYCHOL. 398, 398 (1991) (internal citations omitted). Some of these controversies likely stemmed from the experiments' "power . . . [to] demonstrat[e] . . . how strong situational determinants are in shaping behavior." Robert Helmreich, Roger Bakeman & Larry Scherwitz, *The Study of Small Groups*, 24 ANN. REV. PSYCHOL. 337, 343 (1973). And uneasiness about the obedience experiments seem to have contributed to Milgram's denial of tenure at Harvard. See Thomas Blass, *The Man Who Shocked*

Jost, Arie Kruglanski, Frank Sulloway, and Jack Glaser's scholarship on the motivations behind conservatism, which we summarized in *The Great Attributional Divide*.<sup>21</sup> That work is situationist because it rejects a conception of ideology as freely and consciously chosen or reasoned, and embraces an empirically grounded model of interior situational motivations—among them, dogmatism and intolerance of ambiguity; lack of openness to experience; uncertainty avoidance; personal needs for order, structure, and closure; and sense of system threat.<sup>22</sup> As such, the motivated-ideology account poses a menacing challenge to the average person. It not only calls into question her self-image as a reasoning actor able to consider all the different political philosophies and choose the best one on the merits,<sup>23</sup> it also conflicts with a conception of our political system as being ultimately controlled by principles and the conscious and free “will” of the people, rather than unseen proclivities.<sup>24</sup>

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*the World*, PSYCHOL. TODAY, Mar.–Apr. 2002, at 68, 72, available at <http://www.psychologytoday.com/htdocs/prod/ptoarticle/pto-20020301-000037.asp>.

<sup>21</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 385–89 (discussing John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, *Exceptions That Prove the Rule—Using a Theory of Motivated Social Cognition to Account for Ideological Incongruities and Political Anomalies: Reply to Greenberg and Jonas* (2003), 129 PSYCHOL. BULL. 383 (2003) [hereinafter Jost, Glaser, Kruglanski & Sulloway, *Exceptions*]; John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003) [hereinafter Jost, Glaser, Kruglanski & Sulloway, *Political Conservatism*]).

<sup>22</sup> Jost, Glaser, Kruglanski & Sulloway, *Exceptions*, *supra* note 21, at 390.

<sup>23</sup> Indeed, to many, Jost and his colleagues' study felt like a personal attack. Andrea Irvin, the President of the Berkeley College Republicans, demanded an apology for an “offensive” press release of the study and explained, “I believe they set out to prove being politically conservative is a psychologically inferior position.” Vicki Haddock, *The Right Stuff: Getting in Touch with the Mussolini Inside—A Trip Inside the Conservative Mind Is a Perilous Journey Indeed*, S.F. CHRON., Aug. 3, 2003, at D2.

<sup>24</sup> As Jost and his coauthors have hypothesized, “situations of crisis or instability in society will, generally speaking, precipitate conservative, system-justifying shifts to the political right, but only as long as the crisis situation falls short of toppling the existing regime and establishing a new status quo for people to justify and rationalize.” Jost, Glaser, Kruglanski & Sulloway, *Political Conservatism*, *supra* note 21, at 351. It is a very disturbing thought to imagine, for instance, that increased terrorism is likely to push American citizens to be more politically conservative, resulting in the election of more conservative leaders who then adopt more conservative policies. If this is true, then we are not choosing the country that we want to live in—the terrorists are. It is also an unsettling thought that some leaders might be able to build support for themselves by amplifying fears regarding threats to the system.

In addition, one of Jost and his colleagues' key examples—demonstrating both a resistance to change and tolerance of inequality—is one of the right's most beloved leaders, Ronald Reagan. Jost, Glaser, Kruglanski & Sulloway, *Exceptions*, *supra* note 21, at 384. For the conservative, in particular, it is deeply troubling to consider that Reagan's actions in the “name of restoring traditional American values, including individualism, religion, capitalism, family values, and law and order” and his policies that resulted in “increased social and economic inequality and limited the redistribution of wealth” were even partially the result of base psychological needs to reduce ambiguity and uncertainty, to seek closure, and to eliminate a sense of system threat. *Id.*

An examination of public reactions to such findings reveals a naïve cynical backlash. Among most critics—including conservative politicians and columnists—scarce-to-no attention has been given to the actual evidence explored in the study or to the possibility that it might shed any light on what ideology really is or where it comes from.<sup>25</sup> Instead, the evidence has been largely evaded through naïve cynicism.

One recurring theme, for instance, has been that Jost and his collaborators, as well as the institutions with which they were affiliated, are biased and “political.” Conservative columnist Cal Thomas drove the point home by noting that “two of the researchers are professors at Berkeley, which apparently remains imprisoned in ’60s dysfunctionality.”<sup>26</sup> Jonah Goldberg went further, suggesting that the work reflected not simply a university’s political partiality but that of an entire field. In his words, the entire “psychiatric-therapeutic establishment is politically biased.”<sup>27</sup> Therefore, as with the work of most psychologists, these scholars’ data was “skewed.” More specifically, they “found what they wanted to find. They were only looking for their car keys where the light is good.”<sup>28</sup>

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<sup>25</sup> To be sure, there are a few substantive critiques to be found. Nonetheless, even those critiques are often framed and bolstered by naïve cynical assertions. For the most substantive response that we have discovered, see Jeff Greenberg & Eva Jones, *Psychological Motives and Political Orientation—The Left, the Right, and the Rigid: Comment on Jost et al. (2003)*, 129 *PSYCHOL. BULL.* 376–82 (2003).

<sup>26</sup> Cal Thomas, *I’m Not Disturbed*, *TIMES-PICAYUNE* (New Orleans), July 31, 2003, at B-7. The study’s affiliation with the University of California, Berkeley seemed particularly damning to commentators. In researching this Article, an Internet search for Ann Coulter’s column reacting to the study was not helpful when the search terms included the name of the study or the primary author; searching “Ann Coulter” and “Berkeley,” however, promptly returned the relevant link.

<sup>27</sup> Jonah Goldberg, *They Blinded Me with Science*, *NAT’L REV. ONLINE*, July 24, 2003, <http://www.nationalreview.com/goldberg/goldberg072403.asp> (last visited Mar. 29, 2008). Goldberg also tied the bias he discovered in Jost and his colleagues’ work to the larger bias in academia as a whole—the broad privileging of liberal voices over conservative ones:

In more recent times, we’ve seen a sharp rise in what I would call the left’s medicalization of dissent. Today, on college campuses, liberal and left-wing students who burn newspapers, shout down opponents, accuse conservatives of racism, rape, whatever, are generally treated with dignity. Conservative students whose behavior falls far short of this sort of thing are often sent to counseling or therapy. My guess is that drugging conservatives will come next.

*Id.*

<sup>28</sup> *Id.* Columnist George Will also disparaged the study, its authors, and their academic field: “The industry of studying the sad psychology of conservatism is booming. It began with a European mixture of Marxism and Freudianism. It often involves a hash of unhistorical judgments, including the supposedly scientific, value-free judgment that conservatives are authoritarians, and that fascists—e.g., the socialist Mussolini and Hitler, the National Socialist who wanted to conserve *nothing*—were conservatives.” George F. Will, *Theories of Right Thinking*, *WASH. POST*, Aug. 10, 2003, at B7.

Critics have maintained that the damage done is far worse than simply the promulgation of politically motivated twaddle. The nonsense comes at a cost to the rest of us. Florida Republican Representative Tom Feeney underscored the social scientists' liberal bias at the same time that he highlighted the attack on the pocketbooks of regular folks: "Taxpayers shouldn't be required to pay for [academics] . . . to study ridiculous hypotheses for political agendas . . . [W]hen you are basically confiscating money from taxpayers to fund left-wing rhetoric and dress it up as scientific study, I think you have a real problem with credibility."<sup>29</sup>

Moreover, according to detractors, social scientists add insult to injury by, in addition to stealing from hard-working Americans, denigrating them, too. Conservative critics have repeatedly claimed that the study of ideology portrayed conservatives as abnormal, or even pathological.<sup>30</sup> Cal Thomas, for instance, explained that "[w]hat amaze[d] [him most] about this 'research' [wa]s the presumption that . . . to be conservative is to be psychologically disturbed. These guys seem to think conservatism is a dormant affliction, ready to break out into a plague at any moment."<sup>31</sup> That sort of claim ignores the social scientists' argument that all the tendencies that they examine, such as intolerance for ambiguity, "pertain to normal cognitive and motivational functioning," and all of them have both advantages and disadvantages.<sup>32</sup>

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<sup>29</sup> Byron York, *The "Conservatives Are Crazy" Study: Paid for by Taxpayers*, NAT'L REV. ONLINE, Aug. 2, 2003, <http://www.nationalreview.com/york/york080103.asp>.

<sup>30</sup> See Goldberg, *supra* note 27; Haddock, *supra* note 23.

<sup>31</sup> Thomas, *supra* note 26.

<sup>32</sup> Arie W. Kruglanski & John T. Jost, *Political Opinion, Not Pathology*, WASH. POST, Aug. 28, 2003, at A27 [hereinafter Kruglanski & Jost, *Political Opinion*]. While warning that "intolerance of ambiguity [can] lead people to cling to the familiar, to arrive at premature conclusions, and to impose simplistic clichés and stereotypes" (tendencies, we would point out, that seem evidenced in the naïve cynical responses of their critics), Jost, Glaser, Kruglanski & Sulloway, *Political Conservatism*, *supra* note 21, at 346, Kruglanski and Jost have emphasized that "any trait or motivation has potential advantages and disadvantages, depending on the situation":

Our "trade-off" model of human psychology assumes that any trait or motivation has potential advantages and disadvantages, depending on the situation. A heightened sensitivity to threat and uncertainty is by no means maladaptive in all contexts. Even close-mindedness may be useful, provided one tends to have a closed mind about appropriate values and accurate opinions; a reluctance to abandon one's prior convictions in favor of new fads can be a good thing. The important task for social scientists is to identify the conditions under which each of these cognitive and motivational styles is beneficial, rather than touting one or the other as inherently and invariably superior.

Kruglanski & Jost, *Political Opinion*, *supra* note 32.

Critics also have attempted to ratchet up the perceived threat by asserting that their own ideology is justified by the presence of a major danger from outsiders into whose hands Jost and his fellow social scientists are playing. Consider, for instance, Ann Coulter's mocking summary of the study's description of conservative reactions to 9/11:

According to the study, "terror management" is among "the common psychological factors linked to political conservatism." This feature, we learn, "can be seen in post-Sept. 11 America, where many people appear to shun and even punish outsiders and those who threaten the status of cherished worldviews."

Liberals, by contrast, think outside the box. For example, the left's "cherished worldview" prohibits racial profiling. But after Sept. 11, liberals approached the issue with an open mind. In recognition of the fact that 19 Arab immigrants with the identical hair color, eye color and skin color, half of whom were named Mohammed, had just murdered thousands of our fellow countrymen, liberals decided to keep prohibiting racial profiling.

Meanwhile, conservatives, with their simple-minded lack of nuance, tried to "turn back the clock" to a time when angry barbarians did not fly planes into our skyscrapers. They shunned—and even punished—outsiders who threatened their cherished worldview of a country free of savage terrorist attacks.<sup>33</sup>

Cal Thomas echoed those themes:

[T]he researchers wrote that post-9/11 many conservatives "appear to shun and even punish outsiders and those who threaten the status of cherished world views." Conservatives would like to do more than punish "outsiders" if they come to our nation in order to do harm to us who are inside. They would like to keep them from getting here in the first place and arrest or expel those who make it through with plans to kill us.

Most conservatives welcome "outsiders" so long as they are seeking to become insiders—that is, Americans—and not to undermine our way of life.<sup>34</sup>

From this perspective, "conservatism" is simply a reflection of correctly understanding the truly immense threat of violence that "they" pose to "us." Although Jost and his colleagues are not being described as terrorists, they are

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<sup>33</sup> Ann Coulter, *Just Making Things Perfectly Clear*, SAN DIEGO UNION-TRIB., Aug. 1, 2003, at B9.

<sup>34</sup> Thomas, *supra* note 27.

being characterized as unconcerned about the clear threat we face by certain “outsiders.” Coulter expressed the differences in perspective this way:

Whenever you have backed a liberal into a corner—if he doesn’t start crying—he says, “It’s a complicated issue.” Loving America is too simple an emotion. To be nuanced you have to hate it a little. Conservatives may not grasp “nuance,” but we’re pretty good at grasping treason.<sup>35</sup>

So, why are conservatives conservative? Is it because they are resistant to change? Well, sort of. As Cal Thomas explained, they are resistant to change *for a reason*—that is, they believe “that certain ideas about life, relationships and morality are true for all time regardless of the times.”<sup>36</sup>

As with the detainee-abuse scandal, the attack on Jost and his colleagues’ work demonstrates the way that the backlash against situationism often avoids confronting or downplays the details of the situationist account, and instead focuses on the threat posed by a caricature of the situationist ideas.<sup>37</sup> To review, according to the dispositionist critics, (1) the social scientists performing the study were, much like the institutions to which they belong, biased and politically motivated; (2) conservatives are conservatives because being conservative is what reasonable people do; and (3) the possibility that ideology might reflect factors such as tolerance or intolerance for ambiguity or fear of threat is obviously wrong in light of the clear and present threat confronting “us” and the morality that is “true for all time.”<sup>38</sup> In short: *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

While reactions to Jost and his coauthors’ research illustrates the *popular*-political response to situationist insights, naïve cynicism influences policy discussions at every level of knowledge production, including those taking place within legal academia. Over the last several decades, the dominant legal-theoretic approaches—particularly law and economics—have remained anchored to dispositionism, while begrudgingly allowing in only as much

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<sup>35</sup> Coulter, *supra* note 33.

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

<sup>37</sup> Goldberg’s review of Jost and his colleagues’ study is typical: despite being over 2,400 words long, it refuses to get beyond the summary press release. Goldberg, *supra* note 27. *But see* Greenberg & Jones, *supra* note 25, at 376–82 (addressing individual aspects of the research of Jost and his colleagues and offering specific research to present an alternative view).

<sup>38</sup> Thomas, *supra* note 27.

situationism as necessary.<sup>39</sup> Naïve cynicism, among other influences, has played a vital role in that resistance, as legal economists—and other legal scholars—have been slowly dragged away from the hardcore rational-actor model toward a boundedly situationist perspective associated with economic behavioralism and, more recently, toward partial situationism.<sup>40</sup>

## I. THREE MOMENTS OF NAÏVE CYNICISM

### A. Introduction

This section breaks that progression down into three overlapping phases. During the first phase, legal economists gaining in influence within the academy were confronted with evidence and criticisms, which, although lacking the rigor of later work by social psychologists and others, demonstrated a situationist impulse and offered a strong challenge to their core assumptions. We focus particularly on the reaction to Guido Calabresi's situationist attributions in *The Costs of Accidents* and Howard Latin's critique of law and economics, which explicitly drew from social psychology.

In the second phase, psychologists and economic behavioralists began studying how risky decisions, judgments, or choices were made and discovered a number of heuristics and biases that led to systematic deviations from the rational-actor model. Their work, thus, challenged the “rational” component of the “rational actor” model. That phase involved a Nobel Prize-winning psychologist and several prominent pathbreaking economists (economic behavioralists) who challenged and, only after considerable resistance, began to make inroads among conventional neoclassical economists and, eventually, among legal scholars.

During the third phase, which is currently in full swing, social-scientific evidence is confronting and questioning the “actor” component of the familiar model. Scholars in the fields of social psychology, social cognition, and other disciplines are discovering that people are moved by forces within them and around them about which they are largely unaware (at least as significant causal forces in their behavior); that work has in turn been taken up by a

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<sup>39</sup> This dynamic is described in detail in the *Situational Character*, which chronicles how different scholars have contained situationism in their theories. See Hanson & Yosifon, *The Situational Character*, *supra* note 4. The question of how much situationism is “necessary” is taken up in other work. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 381–82.

<sup>40</sup> See Benforado & Hanson, *Naïve Cynicism*, *supra* note 8, at 572–74.

growing number of legal scholars. As with the first two phases, those asserting such situationist insights are encountering strong naïve cynicism. The history of ignoring, trivializing, and attacking social psychological research and insights within law and economics (and other theories), we argue, has had little to do with the logic of economics (or other theoretical frameworks); instead, it reflects an unwillingness by scholars to take the lessons of social science seriously<sup>41</sup>—a response that is partially motivated and justified by naïve cynical backlash.<sup>42</sup>

*B. Moment I: Early Situationist Advances by Calabresi and Latin*

*1. Origins of the Field: Calabresi*

*a. Conditions Encouraging Naïve Cynicism*

As we have described in other work, in the infancy of the law and economics movement, two important paths emerged for scholars to embrace: one, embodied by the work of Richard Posner, was solidly dispositionist; the other, offered by Guido Calabresi, led off in a relatively situationist direction, toward a space where social-psychological insights might be countenanced.<sup>43</sup> Despite adopting a more accurate attributional posture, Calabresi's outlook and approach—the situationist aspects of his scholarship—was exceptional among legal economists and ultimately hampered his success because of the power of naïve cynicism.

Calabresi's seminal work, *The Costs of Accidents*, while powerfully informed by dispositionism, nonetheless offered a strong challenge to dispositionist assumptions, which in turn incited a backlash of naïve cynicism.<sup>44</sup>

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<sup>41</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 138–70.

<sup>42</sup> Again, the predictions we test in this Article were developed in *Naïve Cynicism*. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 8, at 509–12. We do not directly address the second two predictions (Predictions VI and VII) offered in *Naïve Cynicism* and save that analysis, concerning the targets of backlash and dispositionist entrepreneurs, for other work in which we explore the broader attack on legal academics and academia as a whole. See Benforado & Hanson, *Backlash*, *supra* note 14; Jon Hanson, *Deep Capture, History of an Idea in the 20th Century* (July 17, 2007) (unpublished manuscript, on file with authors).

<sup>43</sup> See generally Benforado & Hanson, *The Costs*, *supra* note 4 (focusing on the divergent attributional proclivities of the two “founders”).

<sup>44</sup> GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter CALABRESI, *THE COSTS OF ACCIDENTS*].

For one thing, Calabresi wrote about automobile accidents, a topic in which there are particularly salient actors—the injurer and the victim—who appear to have taken very clear actions. Calabresi, however, eschewed the obvious dispositionist approach embodied in the fault system: instead, he focused on institutional and systemic forces and considered lowering accident costs through relatively complex and counterintuitive means.<sup>45</sup> Moreover, his scholarship proved ripe for backlash because it failed to provide the simple, clear policy answers and closure that relatively dispositionist work, like Richard Posner’s, presented.<sup>46</sup> Just as important, Calabresi’s work suggested that liability should attach, not to the individuals proximate to the accident and conventionally blamed, but to the less salient individuals and institutions that exercised the most significant control over the situation in which accidents occur. Indeed, under Calabresi’s framework, it might make sense to hold “innocent corporations” liable for harms caused by products that people “freely” chose to buy.

In many ways, Calabresi’s situationist attributions stood as a threat to ourselves, our groups, and our larger system. He argued, for instance, that people were not the reasonable and reasoning actors that they believed they were (and wanted to be). Instead of rational actors—in control of our lives, making choices and realizing our inner desires—Calabresi’s work suggested that humans were quite malleable,<sup>47</sup> often unable to make reliable judgments

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<sup>45</sup> Calabresi explained:

The effect of case-by-case decisions is to center on the particular or unusual cause of an accident. If one asks, as case-by-case determinations tend to do, “What went wrong in this case?” the answer will most likely center on the peculiar cause. Yet there is a very good argument for the notion that the cheapest way of avoiding accident costs is not to attempt to control the *unusual* event but rather to modify a recurring event. It may be that absentmindedness is a cause of one particular accident, too much whiskey the cause of another, and drowsiness the cause of a third. But it may also be that a badly designed curve or inadequate tires are causes of each of these as well.

*Id.* at 256.

<sup>46</sup> Indeed, in his first review of *The Costs of Accidents*, Posner referred to Calabresi’s style as “sinuous and elusive” and found the lack of answers in the book very frustrating:

Calabresi concludes that the fault system is “absurd” and “ineffective” as a system of accident control. But while asserting that we could do better, Calabresi proposes no alternative system. The last part of his book is devoted to an inconclusive discussion of the same proposals for reform with which he opened. He finds that they cannot be accepted or rejected without further study.

Richard A. Posner, 37 U. CHI. L. REV. 636, 642 (1970) (book review) (footnote omitted).

<sup>47</sup> Indeed, Calabresi suggested that “wants” may come from actions rather than the other way around. For example, Calabresi pointed out that “people do not save up for doctors’ bills, do not provide for their

even when fully informed.<sup>48</sup> He also indicated that our current system of assigning blame in tort law was not accomplishing its purported goals; indeed, some individuals were suffering, not because of their bad choices, but because of the poor design of our legal rules.<sup>49</sup>

Complex, counterintuitive, and challenging to our affirming self-conceptions, Calabresi's early work in tort law had all of the elements necessary to spark a powerful backlash—which is exactly what it would eventually do.

*b. Methods of Encouraging Naïve Cynicism*

Calabresi's situationist ideas, and similar ideas being embraced by a number of prominent jurists and academics working in the accident context, set off a strong naïve cynical response, both inside and outside academia. Dispositionists reinforced simple, commonsense conceptions of causation and blame, while attacking Calabresi and other situationists for concocting such counterintuitive and complicated theories that seemed to remove significant responsibility from the salient actors at the scene of the accident. For instance, in his highly influential book on the need for tort reform,<sup>50</sup> Peter Huber pointed

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retirement, do not insure adequately, and yet are basically happy if they are forced to do so.” CALABRESI, *supra* note 44, at 57.

<sup>48</sup> In Calabresi's words,

[E]ven if individuals had adequate data for evaluating . . . [certain] risk[s], they would be psychologically unable to do so. The contention is that people cannot estimate rationally their chances of suffering death or catastrophic injury. Such things always happen to “the other guy,” and no amount of statistical information can convince an individual that they could happen to him.

*Id.* at 56.

<sup>49</sup> Cf. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 18 (1985) (arguing that the fault system underlying our legal rules “emphasizes choices that are often illusory and makes use of scapegoats”). For a fuller treatment of Calabresi's criticisms of the legal system's use of fault-based liability (as compared to Posner's dispositionism-grounded defense of that use), see generally Benforado & Hanson, *The Costs*, *supra* note 4.

<sup>50</sup> PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1987); see Kenneth J. Cheseboro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1645 (1993) (“[I]t is fair to say that Huber's fame and influence in this area are unequalled. The *Wall Street Journal* described Huber as the ‘superstar’ of the movement for ‘civil justice reform.’ The *Washington Post* echoed that Huber and his Manhattan Institute colleague Walter Olson are ‘the intellectual gurus of the tort-reform movement.’ One law professor[] . . . described him as ‘the leading tort politician-academic of these times.’”); see also *id.* at 1644–50 (detailing Peter Huber's “remarkable prominence in the tort reform debate” in both academic and public spheres following the publication of his first book).

out how obviously incorrect it was to focus on systems instead of individual choices in thinking about accidents:

A cardinal though unstated principle of the modern rules is that it is wrong to blame a victim, or indeed anyone who lacks the funds to pay, for to do so means to give up the quest for victim compensation. The impulse here is surely generous. But accommodating it requires systematic evasion of the truth. It means sending women the message that their own hygiene or sexual habits are not all that important a risk factor in uterine infection or infertility; responsibility lies with the remote corporations that make contraceptives and tampons. It means sending workers the message that lung disease is primarily a function not of their own decision to smoke heavily on the job, or the acts of their employer who happens to be shielded by workers' compensation laws; responsibility lies instead with the distant company that originally made the insulation. . . . It means telling the individuals close to the accident that they are rarely in a position to make the difference in terms of safety; the ones with real control are the faraway institutions. Such beliefs have been indispensable in accomplishing the objectives of the new tort system. They have been repeated so often in the courts, and then in the press, that many now accept them as true. But they are all in fact dangerously false.<sup>51</sup>

Huber's examples are telling, not only because they have been framed to make the correctness of the dispositionist attribution appear particularly apparent but also because they characterize the situationalized subjects as outgroup members with flawed dispositions: "loose women" trying to blame corporations for their own promiscuity and uncleanness and chain smokers at asbestos factories looking to play the tort lottery when they fall ill from their own chosen habit and job.<sup>52</sup> The situationist understandings, according to Huber, do not merely "eva[de] the truth," they are "dangerously false."

Captains of the backlash, like Huber, offered up a series of explanations for why the Calabresian school had come to such counterintuitive conclusions, all

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<sup>51</sup> HUBER, *supra* note 50, at 16.

<sup>52</sup> In part because of the success of books like Huber's, much of the American public tends to blame the "tort crisis" on the flawed disposition of lawyers, plaintiffs, and other players associated with the tort system. See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1156 ("In a recent survey, over half the public thought it a fair criticism of most lawyers that '[t]hey file too many lawsuits and tie up the court system.'") (alteration in original); Stephen Daniels & Joanne Martin, "The Impact that It Has Had Is Between People's Ears:" *Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 461-72 (2000) (describing the construction and marketing of a vision of the civil justice system).

of which pointed to bias.<sup>53</sup> The “new tort Founders,” Huber emphasized, were at best uninformed and “naïve.”<sup>54</sup> More likely, however, they were self-interested actors actively creating a system to better assert their own interests. As Huber put it,

For all practical purposes, the omnipresent tort tax we pay today was conceived in the 1950s and set in place in the 1960s and 1970s by a new generation of lawyers and judges. In the space of twenty years they transformed the legal landscape, proclaiming sweeping new rights to sue. Some grew famous and more grew rich selling their services to enforce the rights that they themselves invented.<sup>55</sup>

If not to get rich, their intermeddling was motivated by a misguided, elitist desire to create a perfect world. They were, in other words, just “traditional utopians”—the kind of ivory tower liberals who thought they knew what was best for the rest of us:

Their vision was a shining one, grand enough to stir the mind, thrill the heart, and inspire the young lawyer. Theirs was a promise of society made more just, generous, and compassionate through the ministrations of activist litigators. Where the private buyer and seller lacked the incentive or the knowledge to make wise judgments about safety, the courts would intervene to substitute their own greater insight. Where the individual lacked the prudence, the foresight, or perhaps merely the wherewithal to secure insurance against misadventure, the courts would intervene once again to correct the error. The objectives were grand, the intentions were good, the promises were wonderfully beneficent. Utopian promises always are.

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<sup>53</sup> See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 11–13 (1991) (describing Calabresi's work as the center of the (junk) “liability science” school of thought and referring to adherents to his approach as “Calabresian[s]”).

<sup>54</sup> In Huber's estimation,

The Founders can hardly be faulted for their intentions, which were honorable, or their dispositions, which were kindly. But they were remarkably naïve [sic] and optimistic about the legal system in particular and the world in general, and much further from omniscience than they so earnestly believed. Theirs was a tidy, linear world where simple stimuli in the courts would produce simple responses among producers and insurers. They thought they were dealing with a mule, which if prodded judiciously in the rear would proceed forward. But the beast was really an octopus, with no discernible rear to speak of, and capable of the most unpredictable reactions from the most unexpected directions.

HUBER, LIABILITY, *supra* note 50, at 17.

<sup>55</sup> *Id.* at 4.

But utopia, at least along the lines traditionally described, is unattainable, and when the utopians succeed politically, they deliver only tyranny in practice.<sup>56</sup>

Thus, it was not just that Calabresi's ideas were "false" that bothered Huber; it was also that they could lead us into manacles. Outsiders were coming after our freedoms.<sup>57</sup> Actually taking up Calabresi's situationist suggestions in the context of tort law could mean sacrificing liberties that we take for granted; it could mean moving to a frightening totalitarian state. Such ideas, as Friedrich von Hayek famously argued, paved "The Road to Serfdom."<sup>58</sup> *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

## 2. A Critique: Latin

### a. Conditions Encouraging Naïve Cynicism

Although Calabresi's groundbreaking work did help to usher in a new legal-theoretical era, most legal economists in the decades following the publication of *The Costs of Accidents* did not share his conclusions or his relatively situationist approach. Instead, they embraced the more dispositionist mode typified by the other great founding father of the field, Richard Posner.<sup>59</sup> Thus, as law and economics burgeoned into the most influential legal theory in

<sup>56</sup> *Id.* at 231.

<sup>57</sup> Huber argued that there were numerous outgroup members, in addition to Calabresi, using the tort system to come after "us" and what was ours. As Ken Cheseboro summarized,

[Huber] claims to have uncovered an ongoing scheme against corporations, the public good, and science itself, carried out by seven co-conspirators: (1) liberal, ivory-tower law professors and social engineers, led by the dean of the Yale Law School, Guido Calabresi, who care more about fairness than about legitimate science and economic efficiency and have propagated the idea that legal liability should be imposed on "deep pocket" corporations . . . ; (2) injured consumers and workers looking for a quick buck, who bring suit on exaggerated grievances at the drop of a hat; (3) rapacious attorneys who file such baseless claims; (4) out-of-the-mainstream scientists who prostitute themselves by proffering novel and ridiculous conjectures . . . ; (5) trial judges who . . . abdicate their duties and "let in all the evidence," that is, the patent nonsense offered by plaintiffs' paid expert witnesses; (6) ignorant jurors who believe such alchemical drivel; and (7) appellate judges who ignore the truth to uphold undeserved victories and unjustifiably generous awards won by plaintiffs.

Cheseboro, *supra* note 50, at 1639–40 (citations omitted).

<sup>58</sup> See Chen & Hanson, *The Illusion of Law*, *supra* note 4, at 7–33 (describing how such dispositionist arguments, particularly those of Austrian-School and Chicago-School economists, Hayek among them, transformed policy scripts in the last decades of the twentieth century).

<sup>59</sup> See Benforado & Hanson, *The Costs*, *supra* note 4, at 34–84.

the second half of the twentieth century, few scholars offered much in the way of a situationist challenge to the basic assumptions of the field.<sup>60</sup>

Arguably, it was not until 1985 that the first article to offer a situationist critique of the rational-actor model of law and economics *and* to elicit a sizeable response from a legal economist was published. In that article, Professor Howard Latin set out to challenge the dispositionist presumptions of law and economics.<sup>61</sup> In fact, Latin articulated exactly the types of arguments and evidence that we have maintained are likely to encourage a naïve cynical reaction.

To begin with, Latin, like Calabresi, focused on tort law, an area that had particularly salient actors who seemed to be making clear choices: a ship captain electing to save his ship in a storm by retying it to a dock;<sup>62</sup> one boy deliberately kicking another in the leg;<sup>63</sup> a girl getting hit by a foul ball at a baseball game that she chose to attend despite the obvious risk.<sup>64</sup> Latin's analysis suggested that, in a number of cases, liability should be removed from the individuals who were proximate to the injury and who seemed intuitively blameworthy, and placed on individuals and entities that appeared far more distant to the incident at issue.<sup>65</sup> Thus, under Latin's proposal, a corporation

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<sup>60</sup> That is not exactly right. There were, in fact, some extraordinarily powerful challenges leveled at the basic assumptions of early law and economics that were never fully acknowledged, much less answered. Duncan Kennedy's 1981 article, *Cost-Benefit Analysis of Entitlement Problems*, is a case in point. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). For another example, see Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769. Kennedy's article was relatively situationist in the sense that it raised doubts about the simplistic preference-based rational-actor model that had long characterized law and economics. Specifically, Kennedy articulated and then examined some consequences of what he called "the offer-asking problem," a phenomenon that has since become known as "the endowment effect." See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003). Although widely cited by legal scholars generally, Kennedy's article was largely ignored by prominent self-identified legal economists at the time. That response—or non-response—reflects a common means of dealing with early criticisms. In fact, ignoring challenges that are viewed as "marginal" is often the best way to disarm them. Cf. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 325, n.178 & 337–40 (2000) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously III*] (describing the incentives that an industry would have to not "sell safety" when risks are not perceived).

<sup>61</sup> Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985) [hereinafter Latin, *Problem-Solving Behavior*].

<sup>62</sup> *Id.* at 705–10 (discussing *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910)).

<sup>63</sup> *Id.* at 724–25 (discussing *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891)).

<sup>64</sup> *Id.* at 719–23 (discussing *Davidoff v. Metro. Baseball Club, Inc.*, 463 N.E.2d 1219 (N.Y. 1984)).

<sup>65</sup> According to Latin, the "problem-solving attributes [that are of central importance in determining which individual or entity should face liability] are especially prevalent in organizational, commercial, and professional settings, which means that the imposition of accident losses on problem solving actors would often lead to an expansion of enterprise liability." *Id.* at 693.

might face liability for failing to install an airbag in a car despite the fact that the particular accident involved a man falling asleep at the wheel and running into a tree. Where common sense would lead us to see a man snoring while driving, Latin, like Calabresi, called the reader's attention to the driver's situation, including things well out of the frame—like the design decisions of the automobile manufacturer.

In addition, Latin attacked the simple, obvious, and affirming person schema that “people act efficiently in their own interests[,] . . . learn all the presently knowable things it pays them to know—always on average—and act with due regard for this knowledge.”<sup>66</sup> Not only does that dispositionist conception resonate with common sense but it was also actively championed by Chicago-School economists. Problematizing the rational-actor model, which offered clear and comfortable answers to questions like “who is to blame?” and “who should pay?” Latin suggested that “[t]he degree of care individuals exercise in any situation depends on several variables, including (1) their knowledge, which is a function of information, interpretive skills, and access to computational facilities; (2) their personality traits and motivation levels; and (3) the competing demands for their time and attention.”<sup>67</sup> Embracing contextual complexity in the interests of accuracy, his relatively “situational analysis” acknowledged that

the social engineering effects of tort liability are dependent on the actual behavior of people in diverse accident contexts, and that risk-avoidance behavior varies greatly in different contexts and among different categories of actors. [Thus, p]recisely because people respond differently to diverse risks, no single liability theory or alternative compensation system can achieve efficient results in all circumstances.<sup>68</sup>

Although the complexity and counterintuitive nature of Latin's article would be expected to increase the potential for a naïve cynical backlash in and of itself, Latin's work also embodied a powerful threat to conceptions of ourselves, our groups, and our systems.

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<sup>66</sup> George Stigler, *Economists and Public Policy*, REG., May–June 1982, at 13, 16. According to Latin, “This Chicago-school conception is inconsistent with the research findings on cognitive limitations . . . . Human decisionmaking appears flawed, sometimes disastrous, from any ‘objective’ viewpoint.” Latin, *supra* note 61, at 685.

<sup>67</sup> Latin, *Problem-Solving Behavior*, *supra* note 61, at 682 (citations omitted).

<sup>68</sup> *Id.* at 745.

Latin's suggestion that most people "cannot act as independent rational maximizers for most decisions"<sup>69</sup> is unsettling to some and insulting to others.<sup>70</sup> Most of us do not welcome evidence that we "tend to distort information, and hence analytical results, in response to prior expectations, desired outcomes, and socioeconomic affiliations,"<sup>71</sup> or that we "employ highly simplified decisional criteria or 'rules of thumb' to reduce decision-making costs, time requirements, and cognitive strain [even though these] . . . criteria often introduce biases that can distort computational results."<sup>72</sup> Latin asserted further that our flawed risk-analysis extends to decisions of real importance—that, for example, we "often do not consider low-frequency hazards even when catastrophic losses would occur if the risks materialize."<sup>73</sup> His article indicated not only that we may be making bad decisions with serious consequences but also that we have less control over our own lives and destinies than we like to imagine.<sup>74</sup> Moreover, it suggested that our position—or our groups' positions—in society might be less a matter of having made good choices and more a matter of situational elements beyond our conscious control.

Latin's scholarship also raised the possibility that our systems might have serious imperfections. Indeed, his basic conclusion was that the existing system of tort law was not efficient because "[i]n many settings, people lack sufficient information and expertise to assess risks properly; . . . are inattentive to known risks; . . . do not understand the applicable liability doctrines; and compelling nonlegal incentives shape their behavior."<sup>75</sup> If correct, Latin's

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<sup>69</sup> *Id.* at 682.

<sup>70</sup> Many academics have since become more comfortable with such findings; at the time, however, these claims were quite unorthodox, and resistance among legal economists was robust. See *infra* notes 79–98 and accompanying text.

<sup>71</sup> Latin, *Problem-Solving Behavior*, *supra* note 61, at 683.

<sup>72</sup> *Id.* at 684 (citations omitted).

<sup>73</sup> *Id.* at 687.

<sup>74</sup> In particular, Latin asserted that "[m]any forms of behavior are 'programmed' or habitual, which means preestablished activity patterns are followed without any consideration of alternatives. Some modes of behavior are imitative in the sense that choices are adopted largely because other people or groups have also selected them." *Id.* at 684 (citations omitted).

<sup>75</sup> *Id.* at 692. Latin also called into question the many policies based around the need to provide the public with better information to facilitate good decisionmaking: "Even well-informed people often do not modify their actions in light of 'known' risks and liability rules because at the critical moment their limited attention and cognitive capacity are focused elsewhere." *Id.* at 679 (citation omitted).

work meant that we are making people absorb costs based on flawed justifications.<sup>76</sup> Our current regime, it followed, is unfair.

*b. Methods of Encouraging Naïve Cynicism*

Predictably—given the extent to which they undermined common perceptions regarding our systems and ourselves—Latin’s situationist arguments were dismissed through naïve cynicism, perhaps best exemplified in Richard Posner’s harsh response.<sup>77</sup>

Posner gave short shrift to the situationist evidence that Latin brought to the debate. Instead, his focus seemed to be on offering reassurance—to himself and his readers—that the efficiency-oriented dispositionist view of tort law remained unscathed.<sup>78</sup> More specifically, Posner evaded the challenge to the dominant attributional framework by arguing that (1) the issues involved were obviously dispositional and simple, and, thus, that the dispositionist way—in this case, the law and economics way—of viewing tort law was accurate and sensible; (2) that the individuals Latin situationalized were outgroups with flawed dispositions; (3) that Latin himself had a problematic disposition inasmuch as he was naïve, ill-informed, and biased; and (4) that Latin’s scholarship was extreme, impractical, and dangerous.<sup>79</sup>

In constructing his attack, Posner began by seizing on one of Latin’s proposals for an accident setting that seems to involve salient, individual actors making choices—auto accidents. Latin, Posner explained, wanted “to make automobile manufacturers strictly liable in tort for personal injuries resulting from automobile accidents—whether or not the automobile [wa]s defective.”<sup>80</sup> In other words, Latin wanted to remove liability from the careless driver and

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<sup>76</sup> See, e.g., *id.* at 681–82 (“If no problem-solving actor can be identified, or if liability rules impose losses on parties who do not engage in problem-solving, the social engineering goals of tort law will not be attained.”).

<sup>77</sup> Richard A. Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CAL. L. REV. 747 (1985) [hereinafter Posner, *Can Lawyers*].

<sup>78</sup> See *id.* at 747 (“The editors have asked me to comment on Professor Howard Latin’s Article in this Symposium, I suppose because they regard the Article as a challenge to views with which I am associated. . . . [But] having read and reflected on his article, I am not persuaded to abandon my approach for his.”) (citation omitted).

<sup>79</sup> See generally *id.* Thus, despite its highly pedigreed source and relatively muted tone, the backlash against Latin’s work followed the same pattern that naïve cynics—like Rush Limbaugh and Bill O’Reilly—employed against those situationalizing detainee abuse at Abu Ghraib and Guantánamo, and that Peter Huber used to dismiss the work of Calabresi and his contemporaries. See *supra* text accompanying notes 40–45.

<sup>80</sup> Posner, *Can Lawyers*, *supra* note 77, at 747 (citation omitted).

place it on a distant (and innocent) entity with no apparent control over the incident. Indeed, “the logic of [Latin’s] argument point[ed] to making the automobile manufacturer liable for drunk-driving accidents.”<sup>81</sup> The example is particularly powerful because drunk driving involves a stigmatized outgroup that is commonly seen as making an especially egregious choice. The idea that this obviously “guilty” party should get off paying nothing seems unthinkable. As Posner explained, “[t]his is an astounding suggestion” and a threatening one: “Some 50,000 people die every year in auto accidents in the United States” and many others face nonfatal injuries and property damage making the cost of such a plan astronomical.<sup>82</sup> Latin’s proposal was not only extreme but also a danger to one of America’s most important industries: a threat that would inevitably be borne by regular consumers (that is, “us”), given that “[a]utomobile prices probably would skyrocket.”<sup>83</sup>

In addition to describing Latin’s work as extreme, unproductive, and threatening, Posner spent much of his response assailing the article’s lack of rigor and credibility. Posner asserted, for instance, that Latin’s arguments should not be countenanced because they did not fit into an existing category of, or approach to, legal research.<sup>84</sup> That his analysis was “rootless”<sup>85</sup> and failed to take up “realistic implementation constraints”<sup>86</sup> was particularly worrisome to Posner, given that Latin was proposing “radical legal change.”<sup>87</sup>

As an effective naïve cynic, Posner did not spend much time delving into the details of Latin’s situationist proposal or the social psychology on which it was based. Instead, he focused on attacking the motivations of the messenger (Latin) and those like him. Posner himself put it this way: “I am interested less

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<sup>81</sup> *Id.* at 748.

<sup>82</sup> *Id.* at 747.

<sup>83</sup> *Id.* Posner did concede that, with Latin’s proposal, “automobile liability and accident insurance rates would fall,” which makes his claim that the proposal is “astounding” a bit difficult to parse. *Id.* Posner must have assumed that prices would rise more than insurance rates would fall.

<sup>84</sup> *Id.* at 748. As Posner asked, “What are we to call legal scholarship that comes up with proposals of this sort, on grounds of this sort?” *Id.* It is “neither legal-doctrinal scholarship nor economic scholarship;” it is not an “empirical scholarship,” nor “an engineering study,” nor “is his article a legislative study.” *Id.* at 751–52.

<sup>85</sup> *Id.* at 753.

<sup>86</sup> *Id.* at 752 (quoting Latin, *Problem-Solving Behavior*, *supra* note 61, at 718 n.179). Posner also criticized Latin for never “provid[ing] concrete illustrations where all relevant considerations are balanced.” *Id.*

<sup>87</sup> *Id.*

in the proposal than in the reason for it, and less in the reason than in what it tells us about a certain type of legal scholarship.”<sup>88</sup>

So what would motivate someone like Latin to advance such absurdities? Latin was, in Posner’s estimation, “doctrinaire”<sup>89</sup>—out of touch with the real world, inflexibly attached to his flawed idealist notions. Latin was *not* a social scientist. Rather, he “persuaded himself” through “intuition” that enterprises “ought to be made liable for all, or almost all, accidents in which they are involved”; had Latin not been so disposed, Posner indicated, he might have used “scientific study” to identify and correct his own errors.<sup>90</sup> Posner further admonished readers not to be seduced by Latin’s dangerous notions: Latin’s paper embodied a “massive reconstitution of tort law” that was “bound to have very serious problems of implementation and efficacy.”<sup>91</sup> Rather than proposing a realistic, positive set of reforms, Latin, it turned out, was just another radical critic “pointing out the obvious failings of the present tort system”—a project that Posner found “not very constructive.”<sup>92</sup> And although Latin’s extreme ideas would be a threat if implemented, according to Posner they would actually accomplish little in terms of Latin’s purported goals; after all, “if people [we]re as irrational as Professor Latin believe[d], shifting liability from individuals to organizations—which are simply groups of

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<sup>88</sup> *Id.* at 747.

<sup>89</sup> *Id.* at 753.

<sup>90</sup> *Id.* at 747–48. By “scientific study,” Posner appears to have meant law-and-economics analysis. What is interesting is that, at the time, there was little evidence that law and economics was empirical or social scientific. What the field enjoyed was a growing number of adherents and the legitimating patina of science.

It is noteworthy, from the standpoint of this Article, that in offering evidence of Latin’s clear bias, Posner was oblivious to the fact that the same charges might be leveled against him. Posner’s bias blind spot is evinced numerous times in his article. For instance, at one point, he complained that Latin “provides no data to counter the economic evidence that he so summarily dismisses,” *id.* at 753, but then Posner failed to provide data to support his own assertions:

[Latin] says, moreover, that high insurance premiums for risky drivers may lead them to buy cheaper and smaller cars in order to keep down their driving costs, but that this won’t increase safety, because small cars are more vulnerable in crashes. He is wrong; safety will be increased. A pedestrian or another driver is likely to suffer less severe injuries if hit by a small car than a large one. This is all to the good; and since a driver is more vulnerable in a small car, he may drive more safely—all the better.

*Id.* at 749. For Posner, the dispositionist outlook seemed so commonsensical and existing arrangements seemed so desirable that it needed none of the empirical support that he found so lacking in Latin’s scholarship.

<sup>91</sup> *Id.* at 751.

<sup>92</sup> *Id.*

individuals—[would be] unlikely to reduce the costs of accidents by much, if anything.”<sup>93</sup>

At the same time, Posner framed Latin’s scholarship as more than just a potential economic threat; he indicated that Latin’s ideas about liability also posed a hazard to the beloved activities of “any redblooded American.”<sup>94</sup> Indeed, according to Posner, some of Latin’s arguments were not only “paternalistic”<sup>95</sup> but also had a distinct “killjoy quality” about them.<sup>96</sup> In particular, Posner took issue with Latin’s suggestion that “owners of baseball and other athletic stadiums [ought to] be strictly liable to any spectator hit by a ball, or injured while scrambling for a ball, or beaten up by a drunk, or otherwise injured at the game.”<sup>97</sup> It was easy for Posner to see paternalism when he continued to view the underlying harms as attributable to nothing more than the victim’s choice—or, perhaps, that of the violent drunkard. As Posner summarized, “[t]he dangers are hardly concealed and for the most part are best prevented by the potential victims themselves”; by meddling with a perfectly efficient and fair existing system, Latin wanted to raise “our” prices and ruin “our” fun.<sup>98</sup> *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

*C. Moment II: Behavioralist Challenges to the “Rationality” of the Rational Actor*<sup>99</sup>

The sort of challenges to the rational-actor model that Posner (and other economists and legal economists) summarily dismissed in the 1970s and 1980s did not disappear. After being forced into a temporary retreat by the overwhelming momentum of the still-burgeoning law and economics

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<sup>93</sup> *Id.* Clever though it may seem, Posner’s response overlooks the fact that enterprises are situational and may react more sensibly to liability because they face particular constraints and incentives that help encourage them to perform the problem-solving necessary for reducing the costs of accidents or to behave as if they had. See Hanson & Yosifon, *The Situation*, *supra* note 4, at 199–201.

<sup>94</sup> Posner, *Can Lawyers*, *supra* note 77, at 753.

<sup>95</sup> *Id.* at 749 (“It is one thing to force people to take account of the costs that they impose on unwilling others. Such ‘external’ costs are a traditional and relatively uncontroversial concern of public policy. It is another and more dubious thing to force people to protect themselves.”).

<sup>96</sup> *Id.* at 754.

<sup>97</sup> *Id.* at 753.

<sup>98</sup> *Id.*

<sup>99</sup> Portions of the history sketched in this section draw from, and are more fully described in, Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 138–39, 153–70.

movement,<sup>100</sup> the psychology-based work gained strength and returned with greater force and legitimacy. By the mid-1990s, the tide was turning; legal economists, purportedly committed “to a more social-science-oriented research,”<sup>101</sup> could no longer ignore or dismiss all of the insights of social psychologists—particularly those focusing on “choice” biases.<sup>102</sup> By 2005, as Anita Bernstein observed, “the dilemma for law and economics [was] clear. Neoclassical assertions of rationality—abstract, laboratory-crystalline, severed from ordinary experience—stray too far from empirical fact to explain or predict much.”<sup>103</sup> In dealing with that dilemma, legal economists, over the last decade, have been begrudgingly acknowledging, and attempting to minimize, the threat posed by relatively situationist insights.<sup>104</sup> As we predicted—and for the reasons we predicted—naïve cynicism has been an important part of that dynamic.

### *1. Conditions Encouraging Naïve Cynicism*

During this period, one influential group of efficiency-minded scholars tried to reconcile the methodology of law and economics with some of the increasingly persuasive psychological evidence challenging economic theory. That group came to be known by several names, most of which contained a variation of the word “behavioral.”<sup>105</sup> Although many *behavioralists* continued to adhere to the general principles of economics,<sup>106</sup> the research and evidence that they attempted to introduce and incorporate into the basic economic model was unsettling. Economic behavioralists were “steadily” discovering “evidence that human decisionmaking processes are prone to nonrational, yet systematic, tendencies,” that people are subject to cognitive illusions that “are

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<sup>100</sup> See *id.* at 145 (describing how “in the 1980s the field [of law and economics] exploded into respectability and prominence . . . a force that transformed many facult[ies]”) (citing Thomas S. Ulen, *Firmly Grounded: Economics in the Future of Law*, 1997 WIS. L. REV. 433, 434).

<sup>101</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 145.

<sup>102</sup> See *id.* at 145–70.

<sup>103</sup> Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 311 (2005).

<sup>104</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 153 (describing the range of responses from efficiency-oriented scholars, “from efforts to minimize the problem of unrealism by denying that the model of humanity in conventional economic analysis is in fact terribly unreal, to paying lip service to the problem but otherwise ignoring it, to more elaborate efforts that involve pursuing the limits of the rational actor model as a research agenda”).

<sup>105</sup> For an edited collection of some of that early work, see *BEHAVIORAL LAW & ECONOMICS* (Cass R. Sunstein ed., 2000).

<sup>106</sup> See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475 (1998) (“Behavioral economics is a form of economics, and our goal is to strengthen the predictive and analytic power of law and economics, not to undermine it.”).

not . . . capable of being unlearned,” and that those biases “affect us all with uncanny consistency and unflappable persistence.”<sup>107</sup> Others explained that there are “important ‘bounds’ on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information.”<sup>108</sup>

As with Calabresi and Latin, the situationist insights that the behavioralists focused on were direct challenges to the standard economic analysis of the legal settings where law and economics had seemed to apply most unproblematically—situations with clearly identifiable “actors” seemingly making clear “choices.” However, unlike Calabresi and Latin, who focused solely on the spheres of accident and tort law, the behavioralists’ work addressed a much broader swath of canonical legal discourses, including constitutional law,<sup>109</sup> employment law,<sup>110</sup> and environmental law,<sup>111</sup> as well as tort law.<sup>112</sup> In many cases, the challenges were to causal stories that seemed all but settled: consumers agreed to boilerplate contracts when they bought television sets because the specific terms were not objectionable; criminals decided to rob banks because they valued the expected payoff over the expected punishment;<sup>113</sup> and legislators rushed to pass harsh laws restricting asbestos in schools because exposure to asbestos for school children was a grave and immediate danger.<sup>114</sup> By drawing insights from psychology and undermining those well-entrenched “commonsense” explanations, the behavioralists were threatening not only to revolutionize law and economics, but also to destabilize the foundation stone beneath the edifice of dispositionist legal scholarship.

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<sup>107</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 633 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously I*]; see *id.* at 633–86 (summarizing behavioralist insights).

<sup>108</sup> Jolls, Sunstein & Thaler, *supra* note 109, at 1476.

<sup>109</sup> See *id.* at 1516–17.

<sup>110</sup> See *id.* at 1505–08.

<sup>111</sup> See *id.* at 1518–22.

<sup>112</sup> See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 107, at 693–721. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously II*] (illustrating the problem of market manipulation and suggesting ways that an enterprise liability regime might address it); Hanson & Kysar, *Taking Behavioralism Seriously III*, *supra* note 60 (describing the benefits of an enterprise liability system as applied to the problem of market manipulation).

<sup>113</sup> See Jolls, Sunstein & Thaler, *supra* note 106, at 1538–41.

<sup>114</sup> See *id.* at 1519.

Other features of behavioralism further encouraged naïve cynical reactions. The relatively situationist attributions of behavioralists, for example, were more complex and less intuitive than the attributions offered by neoclassical economists. Similarly, the policy implications of behavioralist analysis were more conditional and qualified than those typically offered by law and economics scholars. As soon as behavioralism began to gain some traction, many conventional legal economists denigrated the new approach for lacking a single, simple theory that could generate at-the-ready testable behavioral predictions.<sup>115</sup> As behavioralists Christine Jolls, Cass Sunstein, and Richard Thaler acknowledged,

A possible objection to our approach is that conventional economics has the advantage of simplicity and parsimony. At least—the objection goes—it provides a theory. By contrast, a behavioral perspective offers a more complicated and unruly picture of human behavior, and perhaps that picture will make prediction more difficult, precisely because behavior is more complicated and unruly. Everything can be explained in an ex post fashion—some tool will be found that is up to the task—but the elegance, generalizability, and predictive power of the economic method will be lost. Shouldn't analysts proceed with simple tools?<sup>116</sup>

The “tools” of the behavioralists were anything but simple.<sup>117</sup> The tradeoff of parsimony for accuracy, however, is one that behavioralists argued was worth making.<sup>118</sup> As we would predict, however, that loss of simplicity has been frequently cited by rear-guard dispositionists as a reason to reject the new approach.<sup>119</sup>

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<sup>115</sup> See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 107, at 687–88; see, e.g., Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 334 (1986); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 380 (1988).

<sup>116</sup> Jolls, Sunstein & Thaler, *supra* note 106, at 1487.

<sup>117</sup> See, e.g., Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 107, at 693–722 (describing the indeterminacy of behavioralist research with regard to the key question in products liability theory of the baseline risk perceptions of consumers).

<sup>118</sup> See Jolls, Sunstein & Thaler, *supra* note 106, at 1477–79. According to Jolls, Sunstein, and Thaler, by operating with more accurate assumptions about human behavior while otherwise preserving the law-and-economics methodology, behavioralism could produce “law and economics with a higher ‘R<sup>2</sup>.’” *Id.* at 1487; see also *id.* at 1474 (“The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law.”).

<sup>119</sup> See *infra* text accompanying notes 141–48; see, e.g., Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO.

In addition, the attributions asserted by behavioralists made certain disfavored parties appear less “blameworthy.” Behavioralist evidence began to undermine, albeit only slightly, the popular conceptions of outgroup members—that they choose or are otherwise responsible for their own plights, that they are morally degenerate relative to the majority, and that they compete on a level playing field for social resources. Indeed, the “rational”—but bad—decisions of criminals to commit crimes or poor individuals to take on great amounts of credit card debt seem far less rational when one views the decisions through a behaviorist lens: rational actors become creatures of “bounded rationality” and “bounded willpower.”<sup>120</sup> Such insights threatened the status quo further when used to support arguments that outgroup members should receive more favorable treatment: for example, that smokers and their families should be compensated by tobacco manufacturers for their smoking-related diseases,<sup>121</sup> that criminals should be given shorter sentences when they are unable accurately to compute the costs and benefits of their crimes,<sup>122</sup> and that debtors should be given a “fresh start” under bankruptcy law because they do not fully cognize the likely consequences of their purchasing decisions.<sup>123</sup>

Behavioralist evidence not only threatened the dominant view of “outgroups,” it also challenged conventional conceptions of ourselves and our ingroups and raise doubts about the legitimacy of our larger systems. Human beings are not, as Nobel Laureate Gary Becker, among others, had assumed, individuals “maximiz[ing] their utility from a stable set of preferences and accumulate[ing] an optimal amount of information and other inputs in a variety of markets”;<sup>124</sup> rather, humans “display bounded rationality, bounded

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L.J. 67, 119–25 (2002) (arguing that the lack of parsimony behind behavioralists’ irrationality assumption strengthens the case for maintaining the conventional rationality assumption of law and economics).

<sup>120</sup> Jolls, Sunstein & Thaler, *supra* note 106, at 1477–79.

<sup>121</sup> See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998); Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 112, at 1467–1548.

<sup>122</sup> See Jolls, Sunstein & Thaler, *supra* note 106, at 1538–41.

<sup>123</sup> See *id.* at 1523 (discussing Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1394–95, 1399–1401 (1985)).

<sup>124</sup> GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–4 (5th ed. 1998) (“The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 17 (3d ed. 2000) (“The construction of the economic model of consumer choice begins with an account of the preferences of consumers. Consumers are assumed to know the things they like and dislike and to be able to rank the available alternative combinations of goods and services according to their ability to satisfy the consumer’s preferences.”); William S. Waller, *Decision-Making Research in Managerial Accounting: Return to Behavioral-Economics Foundations*, in *JUDGMENT AND DECISION-MAKING RESEARCH IN ACCOUNTING AND*

willpower, and bounded self-interest,”<sup>125</sup> and their perceptions and preferences are highly manipulable.<sup>126</sup> Few of the behavioralists’ insights into human nature flatter us, while much of their evidence suggests that our self conceptions tend toward myopia and hubris: human beings “have limited computational skills and seriously flawed memories,”<sup>127</sup> and “often take actions that they know to be in conflict with their own long-term interests.”<sup>128</sup> More specifically, we humans are “faulty scientists,”<sup>129</sup> “unwarranted optimists,”<sup>130</sup> “poor statisticians,”<sup>131</sup> “hasty impressionists,”<sup>132</sup> and “inconsistent preference-holders”<sup>133</sup>—in short, we are all far more biased, irrational, and manipulable decisionmakers than we are prone to recognize and acknowledge.<sup>134</sup>

Just as discomfoting, the work of the behavioralists implied that many of our laws are (1) not fair—because they, for instance, punish people who are inclined, “irrationally,” to engage in “bad” behavior;<sup>135</sup> (2) not effective—because they are, for instance, based on deterring individuals who are unable to make accurate calculations with respect to the consequences of their actions;<sup>136</sup> or (3) simply wrongheaded—because, for instance, they involve serious expenditures to address risks that are incorrectly perceived (based on the biased assessment of evidence) to be grave but, in fact, amount to minimal dangers.<sup>137</sup> In turn, this suggested that our very system might not be legitimate and might require potentially radical reconfiguring.

All of the basic features that we have argued would likely motivate rejection of a new, relatively situationist theory were, therefore, present in the

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AUDITING 29, 32 (Robert H. Ashton & Alison H. Ashton eds., 1995) (“Individuals are assumed to act *as if* they maximize expected utility. That is, an individual’s preferences are taken as given, consistent, and representable in the form of a utility function. An individual knows a priori the set of alternative actions and chooses the action with the highest utility or expectation thereof.”).

<sup>125</sup> Jolls, Sunstein & Thaler, *supra* note 106, at 1476 (emphasis omitted).

<sup>126</sup> See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 107, at 645–87.

<sup>127</sup> Jolls, Sunstein & Thaler, *supra* note 106, at 1477.

<sup>128</sup> *Id.* at 1479.

<sup>129</sup> Jon D. Hanson & Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation*, in *SMOKING: RISK, PERCEPTION, AND POLICY* 229, 240–44 (Paul Slovic ed., 2001).

<sup>130</sup> *Id.* at 244–45.

<sup>131</sup> *Id.* at 245–46.

<sup>132</sup> *Id.* at 246–47.

<sup>133</sup> *Id.* at 248–54.

<sup>134</sup> See Jolls, Sunstein & Thaler, *supra* note 106, at 1477–79.

<sup>135</sup> *Id.* at 1529, 1532.

<sup>136</sup> See *id.* at 1542.

<sup>137</sup> See *id.* at 1519.

work of the behavioralists, and, as we recount below, the resistance took the predictable forms of naïve cynical backlash.<sup>138</sup>

## 2. *Methods of Encouraging Naïve Cynicism*

As predicted by the naïve cynicism hypothesis, a primary way to defend or maintain the dispositionist assumptions of law and economics against behavioralist research has been to emphasize that these relatively situationist approaches do not build from a one-size-fits-all theoretical foundation and, thus, fail to deliver clear answers or tractable solutions to a wide range of policy puzzles. For instance, in 1986, legal economist Robert Scott reported being “struck by the atheoretical quality of [the behavioralist research] taken as a whole.”<sup>139</sup> As he explained, “[n]o general theories have been advanced linking the separate processes of searching for information, forming judgments and making choices.”<sup>140</sup> Alan Schwartz echoed the theme two years later:

If the psychologists had a general theory about how people make decisions, and the theory generated predictions about what people will do in various circumstances, their experiments could be regarded as testing these predictions. . . . Psychologists lack such a theory, however. They have instead a large set of observations about how experimental subjects behave.<sup>141</sup>

In bemoaning the behavioralists’ lack of a general theory, Schwartz was untroubled that their “large set of observations” about human behavior seemed to contradict the rational-actor model upon which legal economists had erected their entire positive and normative apparatus.

A decade later, Jennifer Arlen took the same route as Schwartz, Scott, and other legal economists when she wrote an article assessing “the future of behavioral economic analysis of law.”<sup>142</sup> Although she began her analysis by conceding that “[c]onventional law and economics scholars must take behavioral research into account in analyzing legal issues,”<sup>143</sup> the bulk of her piece seemed to marginalize the relevance of that research. Where she might have delved into the subject of how a more situationist understanding of

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<sup>138</sup> See *supra* text accompanying notes 129–35 (summarizing those features and their predicted effects).

<sup>139</sup> Scott, *supra* note 115, at 334.

<sup>140</sup> *Id.*

<sup>141</sup> Schwartz, *supra* note 115, at 380.

<sup>142</sup> Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765 (1998).

<sup>143</sup> *Id.* at 1787.

human behavior might undercut existing laws and legal theories, her focus, instead, was on downplaying the implications of some well-known behavioral heuristics (such as the endowment effect, over-optimism, and fairness and self-serving biases).<sup>144</sup> She defended conventional law and economics by highlighting the lack of clarity and normative closure offered by the more situationally sensitive economic behavioralism:

[B]ehavioral economic analysis of law is likely to remain as a set of suggestions for amending conventional law and economics, together with an associated set of problems that require sustained attention. It is not likely to emerge as an alternative framework for analyzing legal issues. Behavioral economic analysis of law is unlikely to replace conventional law and economics unless it can formulate a superior model of human behavior suitable for making normative decisions about optimal legal regimes.<sup>145</sup>

In this way, Arlen upheld the rational-actor model as the best model for law and legal theory—on the grounds that it was simple to use and provided a basis for assessing and designing policy—even while acknowledging it to be highly inaccurate.

Beyond the critique that situationist insights make theoretical modeling hopelessly complex, and, thus, not useful, legal scholars have gone so far as to suggest that such approaches are actually a threat to us, our freedom, and our system. Arlen, for instance, warned of the possibility that situationist ideas might be employed to “justify additional intervention” into the lives and choices of citizens.<sup>146</sup> Of course, if such freedom-thwarting interventions were deemed appropriate on the grounds that a more complete and accurate understanding of human behavior supports them (or reveals that, in fact, they are freedom-enhancing), then “additional intervention” should be seen as desirable.

In that way, it is the potential *implications* of behavioralism (the perceived threat, for instance, of greater intervention in our lives) that seems to motivate many people’s negative reactions to behavioralist evidence—not flaws in the evidence.

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<sup>144</sup> See *id.*; see also Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 159–61 (providing a detailed summary of Arlen’s critique of those heuristics).

<sup>145</sup> Arlen, *supra* note 142, at 1787–88.

<sup>146</sup> *Id.* at 1772.

Sam Issacharoff, who has written extensively about economic behavioralism and its relevance for law and economics, has defined the boundaries of relevance for situationist insights this way:

There is no doubt that in order to perfect its models of rational conduct, law and economics requires a terribly reductionist account of human behavior. . . . It is certainly the case that the mechanical simplifications of *Homo economicus* strongly caution against most forms of regulatory restraints on the market. It is further true that the tools of psychology may yet yield a richer understanding of how . . . human wants and desires play out in the institutional setting of law.

*But this cannot possibly translate into a justification for greater constraints on individual decision making.* Bounded rationality should not become the pretext for the imposition of an overarching regulatory structure on individuals. . . . [F]undamentally, it would indeed be ironic if greater insight into the complexity of human decision making became the justification for taking the freedom to decide, even if imperfectly, from those very individuals.<sup>147</sup>

Thus, according to Issacharoff, gaining “greater insight into the complexity of human decision making” poses a risk to our liberty: psychology untempered might mean the end of our own “freedom to decide.” Not science, but the motive to see ourselves as preference-based free-choosers seems to determine what evidence is deemed authoritative and which theories are embraced.

In light of the concern that behaviorist insights potentially threaten our self-conceptions and our perceived liberties, it is little surprise that legal economists have clung to dispositionism. And, consistent with the naïve cynicism hypothesis, it is also predictable that those scholars legitimate their dispositionist worldviews, in part, by assuring themselves that the lessons of psychology are incapable of undermining the cogency of simpler economic models.<sup>148</sup>

Similarly, in considering the possibility raised by behaviorist research that human perceptions and preferences are highly manipulable, Professors James Henderson and Jeffrey Rachlinski cautioned readers:

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<sup>147</sup> Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1745 (1998) (footnotes omitted; emphasis added).

<sup>148</sup> *See, e.g., id.* at 1744 (“[Behavioral economics] has not yet achieved the results that would allow for a triumphal declaration that it is the emergent approach to sophisticated understandings of legal regulation. There is every reason to believe that modesty is the most prudent course for its proponents.”).

The notion that manufacturers distort consumer risk-perception assumes that there is some natural and appropriate risk-benefit assessment from which manufacturers lead consumers astray. If we take seriously the psychological proposition that all preferences are constructed, then there is no magical correct level of risk that consumers should endure.<sup>149</sup>

Beyond making it, Henderson and Rachlinski made no effort to consider the implications of their observation. In other words, they concluded their article, which had been largely devoted to defending existing tort law rules (behavioralist insights notwithstanding), cautioning readers to be careful to not take psychology too seriously. Doing otherwise would require relinquishing conventional dispositionist assumptions and the concomitant illusion of clear, correct policy answers.

Of course, few scholars have had a greater stake in defending the dispositionist-actor model than Richard Posner.<sup>150</sup> As the tide of situationist criticism began to swell, Posner again offered his firm response, this time to an important article by three prominent scholars<sup>151</sup>—Jolls, Sunstein, and Thaler—regarding the positive and normative implications of behavioralist insights.

After attempting to challenge or trivialize many of the behaviorists' insights, Posner complained that “the human being that [the behaviorists] draw is one of unstable preferences and (what turns out to be related), infinite manipulability.”<sup>152</sup> As he lamented,

On the one hand . . . [i]t seems then that the politically insulated corps of experts that [the behaviorists] favor would be charged with determining the populace's authentic preferences, which sounds totalitarian. On the other hand, . . . [t]he expert, too, is behavioral man. Behavioral man behaves in unpredictable ways. Dare we vest responsibility for curing irrationality in the irrational?<sup>153</sup>

According to Posner, then, taking behavioralist insights seriously means not only surrendering our self-conceptions but also surrendering ourselves to an irrational, unpredictable tyrant. And who wants that?

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<sup>149</sup> James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 258 (2000).

<sup>150</sup> See *supra* text accompanying notes 77–98 (reviewing Posner's response to Howard Latin's early critique).

<sup>151</sup> See Jolls, Sunstein & Thaler, *supra* note 106.

<sup>152</sup> RICHARD POSNER, *FRONTIERS OF LEGAL THEORY* 286 (2001).

<sup>153</sup> *Id.* at 287.

Gregory Mitchell, a psychologist whose work we examine in more detail below, has similarly warned readers to remain vigilant against legal scholars who suggest that psychological findings have important implications for law and legal theory. Mitchell attempts to both discredit and raise worries about the sizeable implications of the new research by claiming that “the controls on the use of legal decision theory scholarship as persuasive authority are weak (particularly when the work is published in non-peer-reviewed journals), whereas the stakes associated with the use of this scholarship as the basis for judicial, legislative, and administrative decisions may be very high.”<sup>154</sup> According to Mitchell, a little bit of psychology can be a dangerous thing, particularly in the wrong hands: “If the policy prescriptions drawn from legal decision theory are based on faulty assumptions, bad research, or incomplete understandings of behavior, then unintended results may ensue following implementation of the suggested reforms and the intellectual integrity of the field may suffer.”<sup>155</sup>

More recently, Mitchell and Jonathan Klick have argued that a “new paternalism” follows quite directly “from the emerging behavioral law and economics movement.”<sup>156</sup> Further, they caution that undue attention to insights from social psychology are, in light of the problem of “self-fulfilling prophecies,” likely to lead individuals “to become the weak decision makers envisioned by paternalistic policy makers, as paternalistic regulations undercut personal incentives to invest in cognitive capital and the regulated parties conform to the expectancies of the paternalist.”<sup>157</sup> The message is clear: in light of what social psychology teaches about what actually moves us, we should be reluctant to take seriously the arguments of those who challenge any aspect of what we imagine, or believe, moves us.<sup>158</sup>

Not only are situationist ideas represented as posing a threat to our freedom but also all those who raise serious doubts about the dispositionist model of

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<sup>154</sup> Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1929 (2002).

<sup>155</sup> *Id.* at 1936. Ironically, Mitchell’s critique emphasizes the need to pay greater attention to situational forces. *See id. passim.*

<sup>156</sup> Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1620 n.2 (2006).

<sup>157</sup> *Id.* at 1626–27 (2006).

<sup>158</sup> Put differently, as long as legal scholars accept conventional, common-sense, dispositionist understandings that reinforce existing arrangements, there is far less need for concern.

human behavior—for instance, in the form of the “sovereign consumer”<sup>159</sup>—are lumped together as one outgroup that poses a unitary threat. In this instance, the unreasonable outgroup members are “the paternalists.” This type of discrediting technique is an old one. When John Kenneth Galbraith, a relative situationist among economists of his day, argued that commercial enterprises did not so much respond to consumer demand as create it, “bring[ing] into being wants that previously did not exist,” he raised serious questions about who the sovereign actually was and provided an unflattering image of human psychology and decisionmaking.<sup>160</sup> Milton Friedman, perhaps the most influential intellectual leader behind the dispositionist surge of the late twentieth century,<sup>161</sup> responded as follows:

When you hear people objecting to the market or to capitalism and you examine their objections, you will find that most of those objections are objections to freedom itself. What most people are objecting to is that the market gives people what the people want instead of what the person talking thinks the people ought to want. That is true whether you are talking of the objections of a Galbraith to the market, whether you are talking of the objections of a Nader to the market, whether you are talking of the objections of a Marx or an Engels or a Lenin to the market.<sup>162</sup>

And, just like that, any critic of dispositionism is made to answer for every critic of the economic status quo, and Galbraith and Lenin are yoked together as comrades engaged in a pastiche-campaign against “freedom itself” and aimed at bending the whole world to their own desires.<sup>163</sup> *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

#### *D. Moment III: Situationist Challenges to the “Actor” Element of the Rational Actor*

While the work of challenging the “rationality” of the actor at the core of law and economics and other legal theories has continued, a number of

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<sup>159</sup> See Michelle Everson, *Legal Constructions of the Consumer*, in *THE MAKING OF THE CONSUMER: KNOWLEDGE, POWER AND IDENTITY IN THE MODERN WORLD* 99 (Frank Trentmann ed., 2006).

<sup>160</sup> JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (4th ed. 1998).

<sup>161</sup> See Chen & Hanson, *The Illusion of Law*, *supra* note 4, at 14–19 (summarizing Friedman’s arguments and influence).

<sup>162</sup> MILTON FRIEDMAN, *BRIGHT PROMISES, DISMAL PERFORMANCE* 89 (1983) (emphasis added).

<sup>163</sup> See Benforado & Hanson, *Naïve Cynicism*, *supra* note 8, at 126–28 (describing how outgroup views tend to be homogenized); Chen & Hanson, *Categorically Biased*, *supra* note 4, at 1160–63 (reviewing evidence that outgroup members tend to be seen as more alike than they are in fact).

scholars in the fields of social psychology, social cognition, and law have been marshaling evidence that draws into question the “actor” element of the familiar model.<sup>164</sup> Those scholars have shown that the problem with the rational-actor model is not just that humans make “irrational” decisions or predictably “biased” judgments about risk, but also, more generally, that humans often are moved by forces that exist outside of their conscious awareness, and their resulting behaviors, thus, cannot be attributed to willed, preference-based “decisions” and “choices.” Research in many areas—including motivation, affect, stereotype threat, and knowledge structures—shows that people, as situational characters, are buffeted by unseen gravitational forces, winds, currents, and webs within them and around them about which they have little or no awareness.<sup>165</sup> Like the situationist insights of the behavioralists just discussed, this work possesses the exact features that are likely to encourage naïve cynicism. For illustrative purposes, we focus here on scholarship that uncovers, describes, and considers the policy implications of implicit associations and attitudes. As we would predict, this scholarship has spawned a powerful dispositionist backlash.

### 1. *Conditions Encouraging Naïve Cynicism*

As has been detailed elsewhere,<sup>166</sup> one of the most important questions facing Americans is how to account for existing disparities across culturally and historically defined groups—particularly in light of the fact that Americans purport to value fairness and equality (at least of opportunity, but often more).<sup>167</sup> Although situationists have made occasional inroads over the years,

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<sup>164</sup> See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9 (2000); R. Richard Banks, Jennifer L. Eberhart & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819 (2006); Note, *War, Schemas, and Legitimation: Analyzing the National Discourse About War*, 119 HARV. L. REV. 2099 (2006); David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOYOLA L.A. L. REV. 507 (2006).

<sup>165</sup> For an overview of those influences, see Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 34–133.

<sup>166</sup> See Hanson & Hanson, *The Blame Frame*, *supra* note 15, *passim*.

<sup>167</sup> See *id.* at 415; see also CATHARINE A. MACKINNON, *SEX EQUALITY 2* (2d ed. 2007) (“Equality in human societies, in the sense of parity of rank among social groups, is commonly affirmed but rarely

the conversation about racial disparities in income, wealth, opportunities, and privilege is one that dispositionists have generally dominated.<sup>168</sup> Indeed, the emergent conventional wisdom over the last third of the twentieth century is a “color blind” dispositionist account (sometimes supplemented with naïve situationism<sup>169</sup>) that is widely accepted and that helps to legitimate differing outcomes across different groups: individuals are relatively successful or unsuccessful, rich or poor, and powerful or weak, as a result of the choices that they make. Racism can be controlled because it, similarly, is the product of conscious and self-regulated thoughts and choices. All of this, of course, is the same basic model of the human agent at the foundation of neoclassical economics and conventional law and economics.<sup>170</sup>

Recently, that set of assumptions—which has adherents both inside and outside the academy—has been seriously challenged by work on implicit associations. Numerous studies demonstrate that certain words and concepts are strongly linked in many individuals’ minds, while others demonstrate little or no unconscious connection. Utilizing the Implicit Association Test (IAT),<sup>171</sup> which measures the amount of time it takes individuals to pair

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practiced.”). Mitchell and Tetlock describe what they call “borderline platitudinous, observations about American society” this way:

First, . . . there is little disagreement about the raw facts: across the spectrum, African-Americans have, on average, fewer of the good things in life (high incomes and net worth, college educations, etc.) and more of the bad things in life (higher rates of imprisonment, violence, drug abuse, out of wedlock births, etc.). [And, s]econd, . . . no one has seriously argued that racial inequalities of the magnitude present in American society would likely go unnoticed by the majority of the American population . . . .

Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1086 (2006).

<sup>168</sup> For instance, for much of the late nineteenth and early twentieth centuries, racial differences were seen as the consequences of biology and heredity. Those particular dispositionist accounts have, in most circles, been thoroughly discredited and those who continue to offer them are seen as “racist.” However, the ultimate result has not been a general rejection of dispositionism, but only that mode of dispositionism. The shift in the late twentieth century has been from nature frames to a choice frame. According to the now-dominant (and seemingly “enlightened”) point of view, there are actually two relevant groups of “bad apples”—the individual choosers who choose badly (and therefore end up with less wealth, income, and influence) and the bigots, who view those bad apples as inferior by race instead of inferior by choice. See Hanson & Hanson, *The Blame Frame*, *supra* note 15, at 444–47.

<sup>169</sup> See *id.* at 426 n.50 (defining “naïve situationism” as the phenomenon whereby only the most salient situational factors are considered).

<sup>170</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 138–44 (examining and comparing “the dispositionist actor of lay and law-and-economic theories”).

<sup>171</sup> See Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464,

different concepts, Mahzarin Banaji, Brian Nosek, and others have shown—in hundreds of research studies with millions of subjects—that many people carry implicit biases against racial minorities, women, homosexuals, and others.<sup>172</sup>

While the IAT reveals the presence of implicit stereotypes and prejudices, but not actions, other research suggests that these implicit biases have real-world behavioral effects.<sup>173</sup> For instance, in a study of 1250 employers who had placed job advertisements (many of whom professed a strong desire to hire more minorities), economists at the University of Chicago and the Massachusetts Institute of Technology found that identical resumes with white-sounding names triggered fifty percent more interview callbacks than those with black-sounding names. Moreover, low-skilled, white-named candidates received considerably more interview offers than highly skilled black-named candidates.<sup>174</sup> In a similar study, researchers at Massachusetts General Hospital provided trainee doctors with two hypothetical cases involving a man stricken with chest pain. The only difference between the scenarios was that, in one case, the patient was black. When asked to suggest treatment options, the doctors were less likely to give life-saving medication to the black patient. Their individual decisions correlated with their previously measured levels of unconscious racial bias.<sup>175</sup>

The results of such studies have gained considerable attention within both academia and the press. Such findings are bound to be unsettling to most of us because they are in tension with the dominant person schemas which attribute beliefs, attitudes, and behavior largely to our mostly conscious preferences, reasoning, will, and intentions—not to subconscious, automatic, inaccessible knowledge structures.<sup>176</sup> Further, this research raises the disturbing possibility that individuals and groups might be seriously hampered (or advantaged) in

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1464–80 (1998); see also Project Implicit, <https://implicit.harvard.edu/implicit/>; Project Implicit Demonstration, <https://implicit.harvard.edu/implicit/demo/>.

<sup>172</sup> See Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12. Indeed, the biases are exhibited by even the victims of such biases. See *id.*

<sup>173</sup> See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and the Law*, 3 ANNUAL REV. L. & SOC. SCI. 427, 435–37 (2007).

<sup>174</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–1013 (2004).

<sup>175</sup> See Stephen Smith, *Tests of ER Trainees Find Signs of Race Bias in Care*, BOSTON GLOBE, July 20, 2007, at A1; Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED., 1231 (2007).

<sup>176</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 4, at 83, *passim*.

achieving wealth, success, power, and privilege by largely unseen stereotypes and prejudices.

As we would expect, the work has elicited a strong dispositionist backlash. All of the factors that are apt to encourage naïve cynicism are in place. First, the implicated issues appear to involve salient actors and clear choices: a black woman is impoverished because she is lazy and not self-disciplined enough to progress up the career ladder; a black man is in prison because he is greedy and immoral and made the bad decision to sell drugs. In the latter example, it is the choices—owing to a defective character, odd preferences, or a weak will—that pose the problem, not the situation of the convicted criminal or our system of criminal justice.<sup>177</sup> After all, examples of African Americans who made good decisions and have enjoyed great success come immediately to mind: LeBron James, Jay-Z, Bill Cosby, Colin Powell, Condoleezza Rice, and Oprah Winfrey. Race and, certainly, *racism* have nothing to do with it. When racism is involved, we know it. It is recognizable—indeed, unmistakable. Racism is a backwoods skinhead with a Confederate flag in the window of his pickup truck burning a cross in a black family’s yard. Or maybe it is an elderly senator, with a thick southern drawl who, behind closed doors, has a penchant for jokes about “colored people.” At the very least, racism is the product of conscious and self-regulated thoughts and intentions. It is explicit and, to many, it reveals the ugly disposition or the uninformed cognitions of the racist.

Furthermore, the situationist description of implicit biases leads to complex and complicated explanations for disparities. Implicit bias can seem downright counterintuitive when we learn that, for instance, blacks, women, and gays frequently exhibit bias against their own racial, gender, or sexuality ingroups. Likewise, it is hard to understand how educated people with diverse interactions and backgrounds, who believe they harbor no racist feelings and, indeed, may even care about racial justice issues, can receive scores on the IAT that reveal implicit bias.<sup>178</sup> There is no consensus about what causes our sometimes bizarre implicit biases, and no simple fix is readily imagined.

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<sup>177</sup> For one recent, brief summary of research indicating ways that implicit biases may influence features of the criminal justice system, see R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 *passim* (2006). For a discussion of how the disposition of “criminality” is sometimes superficially attributed to one or two situational forces, such as “culture” or specific government policies, see Hanson & Hanson, *Blame Frame*, *supra* note 15, at 448–50, 465–68.

<sup>178</sup> Banaji, herself, exhibited bias when she took an IAT. See Vedantam, *supra* note 172.

The picture is clouded further by the fact that explicit prejudice still does exist and many judgments about people may reveal nothing about stereotypes or prejudice of any sort. As a result, insights from research on implicit attitudes fail to provide the comfort of cognitive closure. Although implicit bias may result in qualified black candidates not getting called in for job interviews, that is obviously not always the reason why black candidates do not land a job. And even if implicit bias is to blame, what is to be done about it?<sup>179</sup> At best, current research can only hint at possibilities. Living in a neighborhood with a high level of diversity may not change IAT scores, but strong friendships with minorities may.<sup>180</sup> Being exposed to counter-stereotypes prior to taking the IAT appears to alter implicit attitudes,<sup>181</sup> but it is unclear how lasting the effect may be or how it may transfer to the real world. Our lives are filled with potentially implicated cues, and it is a daunting task to sort out which matter and which do not.<sup>182</sup>

Another reason to expect a naive cynical backlash is that the situationist account offered by Banaji, Nosek, and others involves groups that have been culturally and historically associated with disadvantage and prejudice—including racial minorities, the elderly, obese people, women, and homosexuals.<sup>183</sup> There is, therefore, already a habit of victim-blaming as well as a heightened desire to deny that existing disadvantages are in any way connected to historical oppression of those groups.

But perhaps most important with respect to spawning a powerful naive cynical response, implicit bias research threatens the conceptions we have of

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<sup>179</sup> See, e.g., Banks, Ebehardt & Ross, *supra* note 177, at 1184–89, *passim* (discussing the complexity and indeterminacy of terms like bias and discrimination and the difficulty that poses for constructing responsive, useful policies).

<sup>180</sup> See Vedantam, *supra* note 172, at 41.

<sup>181</sup> See *id.* (by having the test administered by an African American, for instance, implicit bias against blacks was decreased); see also Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 255, 257 (2002) (reviewing evidence for the malleability of automatic stereotypes and prejudice and concluding that those responses are not “immutable and inescapable” but rather that they can change “in response to the perceiver’s motives and strategies, and to variations in the situation”).

<sup>182</sup> Moreover, implicit bias researchers resist a number of real-world applications. For instance, they “argue against the use of the IAT as a selection tool or a means to prove discrimination” because, among other things, it assumes that someone who shows bias on the test will, in a significant manner, act upon such bias. Vedantam, *supra* note 172, at 41.

<sup>183</sup> See, e.g., Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: II. Method Variables and Construct Validity*, PERSONALITY & SOC. PSYCHOL. BULL., Feb. 2005, at 166.

ourselves, our groups, and our systems. With respect to our individual selves, Mahzarin Banaji has summed up the common reaction this way:

[T]he discovery that . . . the immediate situation may have [its] influence outside consciousness is hard to contend with . . . . The inability to draw the parallel to oneself, to realize the possible lack of control over one's thoughts and actions is stark and, I would add, psychologically interesting in its own right. It is difficult to see the power of the situation in oneself when the outcome is unpalatable, just as it is difficult to see the influence of any cause that is not immediate.<sup>184</sup>

A situationist perspective poses a threat to “us” collectively as well, inasmuch as situationist attributions indicate that “we” may be causally implicated in, say, existing racial disparities. The message of the implicit bias scholars is clear: there are biases hidden within us that may nonetheless have significant consequences in creating substantial advantages and disadvantages among groups in our country; in essence, we may be—and hence, our system may be, regardless of our conscious intentions—a partial cause of suffering and injustice. Particularly in light of our motive to believe our system is legitimate and justified, such attributions are disconcerting.<sup>185</sup>

By contrast, choice-centric dispositionism that typifies current discourse ensures a positive self- and group-view for many of us. Because the choice frame is distinguishable from previous, largely discredited dispositionist frames, it allows those who embrace it to separate themselves from the few “racists” who still employ the old frames. New dispositionists see “preferences” or “attitudes” or “values” and resultant “choices” where old dispositionists saw the hand of God or Satan or genetics and heredity.<sup>186</sup> Individuals holding such outdated views are viewed by many as particularly repugnant because they are seen as “dispositionally racist” in the sense that they are presumed to have a stable set of explicit attitudes and intentions that lead to racist behavior. With those frames in place, “racists” are, thus,

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<sup>184</sup> Mahzarin R. Banaji, *Ordinary Prejudice*, PSYCHOL. SCI. AGENDA, Jan.–Feb. 2001, at 8. Indeed, Banaji describes her own reaction to her first encounters with the IAT this way: “I was deeply embarrassed . . . . I was humbled in a way that few experiences in my life have humbled me.” See Vedantam, *supra* note 172, at 15.

<sup>185</sup> Cf. Mitchell & Tetlock, *supra* note 168, at 1120 (“[I]t is a sweeping claim to say that, after half a century of legal, political and educational efforts to check prejudice, the vast majority of Americans remain prejudiced.”). See generally Blasi & Jost, *supra* note 164 *passim* (summarizing evidence of system justification motive); Hanson & Hanson, *Blame Frame*, *supra* note 15 *passim* (discussing “injustice dissonance” and the effects of the “craving” to alleviate it).

<sup>186</sup> See Hanson & Hanson, *The Blame Frame*, *supra* note 15, at 444–45.

narrowed down to a manageable number of “bad apples” from whom it is psychological child’s play for the rest of us to distinguish and distance ourselves.

The threat to the system posed by research on implicit biases is grave. The situationist evidence raises the possibility that the popular image of America as a meritocratic land of opportunity is largely a myth. It suggests that automatic, subconscious tendencies could pervade any, even all, of our institutions—from specific to general and from small to large. If implicit biases are as prevalent and powerful as the scientists studying them tell us, we cannot be sanguine in the face of disparities—whether they come in the form of education levels, life expectancies, incarceration rates, wealth, or influence—across today’s society. With the system’s legitimacy in peril, naïve cynicism is all but certain to uncoil.

## 2. *Methods of Encouraging Naïve Cynicism*<sup>187</sup>

With backlash against the situationist insights of scholars writing about the implicit sources of racial disparities so ripe, it is little surprise that it is easy to find. Some of the reaction has been study-specific. For instance, in response to recent research finding that race may play a role in when referees call fouls in NBA games, the reaction was swift and vociferous.<sup>188</sup>

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<sup>187</sup> As is true throughout most of this Article, we will not attempt to rebut much of the specific substance of what we are claiming is evidence of naïve cynical backlash, though we understand that that substance cannot be gainsaid simply by observing, as we do, that those arguments align with our predictions. *See infra* note 219.

<sup>188</sup> In early May of 2007, *The New York Times* published an article summarizing the reports of a study by Justin Wolfers and Joseph Price on NBA refereeing. Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, at A1. The study found that white referees called fouls against black players more often than against white players. *See* Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat’l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206>. The study was immediately met with staunch criticism and skepticism from the NBA, sports critics, players, and fans, despite the endorsement of the study by three experts. *Bad Calls: Race Bias on the Basketball Court?* (NPR broadcast May 3, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=9977707>. David Stern, commissioner of the NBA, spoke out publicly against the study, claiming that the NBA had conducted its own study, though they refused to release it. Stern asserted that the NBA study showed no referee bias existed, and focused on his belief that there is a pervasive societal bias against referees. *NBA’s Stern Rejects Report on Referees’ Bias* (NPR broadcast May 4, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10000169>. In an NPR interview, sportswriter and critic Rose Scott criticized the study and found it telling that none of the players had complaints about systemic racism by referees (Scott ignored the fact that Wolfers and Price made it clear in their study that the bias was not identifiable in specific instances but rather only from an aggregate statistical analysis). *Foul Bias on the Court?* (NPR broadcast May 4, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10001066>. These reactions demonstrate the great reluctance of the public to believe

The most significant and sustained backlash, however, has been directed to the entire line of implicit association research. In particular, four scholars—three of whom are themselves social psychologists<sup>189</sup>—have been especially prolific in penning both substantive critiques of, and naïve cynical reactions to, IAT research: Hal Arkes,<sup>190</sup> Gregory Mitchell,<sup>191</sup> Philip Tetlock,<sup>192</sup> and Amy Wax.<sup>193</sup>

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that there is racism that is the result of systemic bias stemming from implicit bias and snap reactions rather than the conscious behavior of individuals in control of their actions. Rush Limbaugh, in his discussion of a similar study that found racism among baseball umpires, took the naïve cynicism a step further, alleging that the underlying study was intended to call “us” and our system racist:

I didn't read the whole story here. I must be missing something. I actually only printed out the first page because thought the whole thing is patently ridiculous. It's just another attempt to keep the country roiled. Now there's racism in baseball! Gasp! Racism in basketball! Racism in America! We so suck as a country! Racism, sexism, bigotry, homophobia; everybody in this country is a reprobate! We don't deserve to be a country! We are such a bunch of slime buckets, . . . .

Rush Limbaugh, *Study: Baseball Umpires Racially Biased*, Aug. 17, 2007 [http://www.rushlimbaugh.com/home/daily/site\\_081407/content/01125104.guest.html](http://www.rushlimbaugh.com/home/daily/site_081407/content/01125104.guest.html).

<sup>189</sup> The relevant work of those scholars sprang up in reaction to the research of social psychologists who argued that, in effect, our interior situations are far more influential than generally acknowledged, and conventional dispositionist models of human behavior are, therefore, substantially deficient. While several of the naïve cynics have considerable expertise in social psychology, the bulk of their work relevant to this Article has been to *raise doubts* about the evidence and conclusions of other social psychologists studying implicit associations and provide assurances that conventional, dispositionist understandings of the human animal of concepts such as “bias” and “prejudice” should be maintained.

<sup>190</sup> Hal Arkes is a Professor of Psychology at Ohio State University. He received his masters and Ph.D. in psychology from the University of Michigan. Professor Arkes has served on the editorial boards of psychology journals, as the President of the Society for Judgment and Decision Making, and has published extensively on social psychology and decisionmaking. Ohio State University, Hal Arkes, Ph.D.—College of Public Health, <http://cph.osu.edu/divisions/hsm/hsmfacstaff/arkesh/> (last visited Mar. 29, 2008).

<sup>191</sup> Gregory Mitchell is the E. James Kelly Jr.—Class of 1965 Research Professor at the University of Virginia Law School. His research, writing, and teaching focus on the intersection of law and psychology. Professor Mitchell also has a Ph.D. in psychology, with an emphasis on social psychology, from the University of California, Berkeley, where he studied under Philip Tetlock. See University of Virginia School of Law, Home Page for Gregory Mitchell, <http://www.law.virginia.edu/lawweb/Faculty.nsf/PrFHPbW/pgm6u> (last visited Mar. 29, 2008).

<sup>192</sup> Philip Tetlock is a psychologist and professor at the University of California, Berkeley. He received a masters degree in psychology from the University of British Columbia and a Ph.D. in psychology from Yale University. In addition to writing extensively on social psychology, he has served on the editorial boards of many journals of psychology, including *The Journal of Personality and Social Psychology*. Tetlock's bio on the Berkley website states that he is an “Expert Witness on the hypothesized power of implicit prejudice/stereotyping in the work place.” University of California at Berkeley Faculty and Executive Leadership Directory, Biography of Philip Tetlock, <http://www.haas.berkeley.edu/faculty/tetlock.html> (last visited Mar. 29, 2008).

<sup>193</sup> Amy Wax is the Robert Mundheim Professor of Law at the University of Pennsylvania. Professor Wax received an M.D. from Harvard Medical School and a J.D. from Columbia Law School. Her current work focuses on the intersection of evolutionary psychology and the law. Professor Wax has published

Many of those scholars' critiques have been framed as we would predict. For example, they have repeatedly emphasized that the common dispositionist way of accounting for racial disparities is correct, sensible, and widely held and that the underlying issues are simple, clear, and obviously dispositional. In their 2005 op-ed, responding to the research on IAT, Tetlock and Wax began by highlighting that "racists" are widely seen as malignant individuals, that significant progress had been made against that brand of racism since the 1960s, and that there nonetheless remains a group of hard-to-satisfy academics who are prone to seeing everyone but themselves as racists:

It was once easy to spot a racial bigot: The casual use of the n-word, the sweeping hostility, and the rigid unwillingness to abandon vulgar stereotypes left little doubt that a person harbored prejudice toward blacks as a group. But 50 years of survey research has shown a sharp decline in overt racial prejudice. Instead of being a cause for celebration, however, this trend has set off an ever more strident insistence in academia that whites are pervasively biased.<sup>194</sup>

The op-ed appeals to readers to defer to what they already know—that is, real racism is no longer much of a problem. We know what racists look, sound, and act like, and we also know that those types have died off, changed their views, or otherwise been silenced and marginalized. Today we should be celebrating our progress. After all, in Tetlock's words, "We've come a long way from Selma, Alabama, if we have to calibrate prejudice in milliseconds."<sup>195</sup> From that perspective, if negative racial associations and attitudes are not explicit—the sort that we attribute to Bull Connor and his ilk—then those beliefs and attitudes are not racist.

More recently, Tetlock and Mitchell started their long law-review article criticizing IAT scholarship by emphasizing the same themes—that the straightforward, commonsensical versions of "racism" are under attack from growing coterie of academics. According to Tetlock and Mitchell, those scholars are not only changing accepted definitions of racism, they are lowering the bar to such depths that "most, if not all, of us" will be branded "bigots most, if not all, of the time."<sup>196</sup>

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multiple times in conjunction with Philip Tetlock. Penn Law Faculty: Amy Wax, <http://www.law.upenn.edu/cf/faculty/awax/> (last visited Mar. 29, 2008).

<sup>194</sup> Amy Wax & Philip E. Tetlock, Op-Ed., *We Are All Racists at Heart*, WALL ST. J., Dec. 1, 2005, at A16.

<sup>195</sup> See Vedantam, *supra* note 172, at 40.

<sup>196</sup> Mitchell & Tetlock, *supra* note 185, at 1024.

As our hypothesis predicts, the naïve cynics have argued that minorities for whom many hold negative associations are, indeed, outgroup members who pose a threat to “us” and our systems. In their recent work, Tetlock and Arkes, for example, asserted that such negative associations might represent rational reflections about the true state of the world. They noted that data from recent violent crime statistics and census figures suggest that violent crimes are more often committed by blacks than whites, and they concluded that, given the numbers, biases held by individuals against African Americans would be rational.<sup>197</sup> Implicit biases “might reflect simple awareness of the social reality: Some groups are more disadvantaged than others, and more individuals in these groups are likely to behave in undesirable ways.”<sup>198</sup>

The naïve cynics have also indicated that the implicit bias scholars have bad dispositions and are a threat. Among their other minatory qualities, IAT advocates are paternalistic, ill-informed, and politically motivated.<sup>199</sup> According to Tetlock and Wax, the situationists are so bent on finding bias that they go to Herculean efforts to be able to label most people as racists.<sup>200</sup> In response to the obvious progress our culture has witnessed in the elimination of racism,

[s]ome psychologists . . . simply expanded the definition of racism to include any endorsement of politically conservative views grounded in the values of self-reliance and individual responsibility. Opposition to busing, affirmative action or generous welfare programs were tarred as manifestations of “modern” or symbolic racism.

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<sup>197</sup> See Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, Or “Would Jesse Jackson ‘Fail’ the Implicit Association Test?”*, 15 PSYCHOL. INQUIRY 257, 273 (2004).

<sup>198</sup> Wax & Tetlock, *supra* note 194, at A16.

<sup>199</sup> Mitchell and Tetlock have treated the collection of scholars who they criticize as if they have a single disposition and intent—a bad one at that. Sometimes in their work that dispositionalizing assumption is explicit. See, e.g., Mitchell & Tetlock, *supra* note 185, at 1085 (referring to “the collective mindset of the IAT research community”); *id.* at 1100 (“A specious but seductive syllogism resides at the heart of the implicit prejudice argument that legal scholars wish to import into American law.”).

<sup>200</sup> Mitchell and Tetlock have summarized the history as follows:

Following passage of civil rights legislation in the 1960s, overt expressions of racism declined significantly, but large disparities in group outcomes persisted. This disjunction led many racism researchers to suspect that intergroup hostility persisted but had begun manifesting itself in more disguised, socially acceptable, forms. Accordingly, these psychologists developed less obtrusive methods for measuring racism and reconsidered the psychological mechanisms that lead to discrimination.

Mitchell & Tetlock, *supra* note 185, at 1041–42.

Others took a high-tech path: Racists could be identified by ignoring expressed beliefs and tapping into the workings of the unconscious mind. Thus was born the so-called “implicit association test.”<sup>201</sup>

In addition, the naïve cynics have emphasized that, with regard to that high-tech approach, the IAT scientists are anything but scientific—eager as they are to make a racist mountain out of a rational molehill. For IAT scholars, “facts have nothing to do with it. What began as science has morphed into unassailable faith.”<sup>202</sup> Whether motivated by guilt, self-righteousness, or something else, the IAT scholars just cannot be satisfied. As Tetlock and Wax have explained:

Advocates want to have it both ways. On the one hand, any steps taken against discrimination are by definition insufficient, because good intentions and traditional checks on workplace prejudice can never eliminate unconscious bias. On the other, researchers and “diversity experts” purport to know what’s needed and do not hesitate to recommend more expensive and strenuous measures to purge pervasive racism. There is no more evidence that such efforts dispel supposed unconscious racism than that such racism affects decisions in the first place.<sup>203</sup>

Toward the end of their article, Mitchell and Tetlock made clear what they had only implied until then—that the underlying motive of the IAT scholars is political or ideological. In their words, this is a “select group of social psychologists and law professors—with a self-declared agenda to transform American law.”<sup>204</sup> This cabal is dressing up its politics as science. For instance, Mitchell and Tetlock have described

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<sup>201</sup> Wax & Tetlock, *supra* note 194, at A16. Mitchell and Tetlock echoed and expanded on those arguments:

Two themes dominate the history of social psychological research on intergroup conflict: (a) continual adjustment of measures and standards for assessing the prevalence of intergroup hostility and (b) constant revision of the psychological explanations for the sources of intergroup hostility. For the second theme, the focus has shifted with prevailing intellectual fashions from psychodynamic theories to social-identity theories to cognitive-bias theories to the recent fascination with reaction-time-based associationist theories. The implicit prejudice research program falls into the reaction-time-based associationist theoretical camp.

*Id.* at 1041.

<sup>202</sup> Wax & Tetlock, *supra* note 194, at A16.

<sup>203</sup> *Id.*

<sup>204</sup> Mitchell & Tetlock, *supra* note 185, at 1032.

the repeated failure of [IAT] researchers to acknowledge the role that political values unavoidably play in where they set their thresholds of proof . . . . The resulting distortions help to explain widespread interpretive over-reaching: the willingness to claim revolutionary discoveries well before ruling out alternative, more pedestrian accounts of what implicit measures of prejudice assess.<sup>205</sup>

Elsewhere, they have likened the IAT research to “research on the heritability of intelligence” and indicate that “this branch of psychology is better classified as a form of social activism than of science.”<sup>206</sup> As Tetlock and Arkes have concluded,

[W]e suspect that, when the history of social psychology is written at the end of the 21st century, implicit prejudice research will be a prime exhibit of how society became so obsessed with avoiding stereotypes that it skewered citizens as racists for displaying even trace awareness of politically painful realities.<sup>207</sup>

Finally, Mitchell, Tetlock, and Wax have emphasized that theories of implicit bias are extreme, counterproductive, and radical and pose a threat to “us” and “our system.” Their primary approach in this regard has been to mischaracterize the implicit associations argument, which is that the roots of racial disparities are to be discovered less in our intentions and more in our subconscious. The sources of racism, by this account, are different from (or, perhaps, in addition to) popular conceptions. Tetlock and Wax, by contrast, have misleadingly summarized the implicit bias theory to be that “[w]e are all racists at heart” (a phrase they use as both the title and the last sentence of their article): “However we think, feel or act, and however much apparent progress has been made, there is no hope for us.”<sup>208</sup>

Therefore, Tetlock and Wax have warned, “if one accepts the approach taken by IAT advocates to the definition of implicit prejudice, then one also accepts that it is reasonable to set one’s threshold for labeling people prejudiced so low that virtually everyone—even rational observers of the social scene—qualifies as prejudiced.”<sup>209</sup> In fact, by that definition, even the IAT crowd, most of whose membership admits to having “failed” the IAT, is

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<sup>205</sup> *Id.* at 1116–17.

<sup>206</sup> *Id.* at 1120–21

<sup>207</sup> Philip E. Tetlock & Hal R. Arkes, Authors’ Response, *The Implicit Prejudice Exchange: Islands of Consensus in a Sea of Controversy*, PSYCHOL. INQUIRY, 2004, at 311, 320.

<sup>208</sup> Wax & Tetlock, *supra* note 194, at A16.

<sup>209</sup> Mitchell & Tetlock, *supra* note 185, at 1085.

made up of bigots, “on par with children reared in prejudiced households and taught to hold mean-spirited beliefs about minorities and to act out these prejudices.”<sup>210</sup>

The problem with Tetlock and Wax’s stinging conclusions is that they seem to have missed the point of those they are claiming to rebut. They have conflated conventional understandings of “racism” with the unconscious biases that situationist theorists seek to bring to light.<sup>211</sup> Conventional understandings of “racism”—the stuff of “bigots”—entail that a “racist” has consciously chosen to harbor (or at least consciously understands that she harbors) negative preconceptions of racial minorities. Most of us “know” from introspection that we are not racists, so defined, leaving us feeling offended by such a claim.<sup>212</sup> In fact, the conventional conception of racism is associated with attributions of blame precisely because it assumes conscious knowledge, intention, and malice. However, that is *precisely* the conception of racial bias that the IAT research is contesting. In fact, situationists are attempting to demonstrate that the conventional understanding of racism is incorrect—their concern is with something attributionally less blameworthy, though perhaps no less influential over the lives and opportunities of its victims.

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<sup>210</sup> *Id.* at 1088.

<sup>211</sup> At times, Mitchell and Tetlock seem to have been a bit confused themselves about what they were arguing. Compare *id.* at 1053 (recognizing that implicit associations are “widespread and *not dependent on conscious animus* toward minorities”) (emphasis added) with *id.* at 1083 (attempting to suggest that implicit associations are tantamount to explicit prejudice by criticizing IAT scholars for failing to give a reason “to presume that the results are attributable to racial *animus*”). On occasion, they seem to have anticipated this criticism by attempting to preempt any claim that the dispute boils down to a definitional one. See *id.* at 1117 (“This debate should not be dismissed as an esoteric feud among psychological insiders about the proper technical definitions of prejudice; it is a debate about whether social psychologists are entitled to co-opt a value laden concept to advance their policy agenda. *Prejudice* and *racism* are not the sorts of value-neutral descriptive terms one would expect to encounter in the data language of a positivist science committed to the dispassionate weighting of rival hypotheses.”). But their claim, again, misses the point. The IAT research does not co-opt a concept to advance a policy agenda as much as it helps to clarify or, at least, to offer an alternative explanation for, why people behave as they do—which has or may have policy implications.

<sup>212</sup> Perhaps reflecting or perhaps exploiting this common reaction, Tetlock and Mitchell frequently emphasize that IAT scholars are tarring everyone as racists or bigots. Cf. *id.* (using “bigot,” or one of its variations, nineteen times, and “racism,” or one of its variations, roughly seventy-five times, in an article containing roughly 50,000 words, including the text and footnotes); *id.* (referring to the theory as “implicit prejudice” roughly 130 times in the text alone). By comparison, in their article, Banaji and Kang are more sparing in their use of such words. See Banaji & Kang, *supra* note 164 (using the word “bigot,” or one of its variations, zero times, and “racism” or one of its variations, seven times, in an article containing roughly 30,000 words); *id.* (referring to “implicit prejudice” only once, in a footnote parenthetical summarizing an article that used the term, and instead employing the slightly less charged term, or so it seems to us, “implicit bias”).

<sup>212</sup> Mitchell & Tetlock, *supra* note 185, at 1085.

For example, IAT theory suggests that most of us make implicit associations that may have different consequences for different racial groups. Those consequences, in part, reflect something within most of us that is quite different from explicit racism. We are not the “bad bigots” that we think of when we think of “racists.” Racism “in our hearts” is very different than race-based implicit associations in our knowledge structures. Of course, the situationists’ argument is that these implicit associations, contributing to behavior that has significant racial implications, occur beyond the purview of introspection and that, therefore, such implicit associations may be contributing to racial disparities despite our being unaware of their role.

Elsewhere, the naïve cynics have ratcheted up the threat posed by the implicit bias scholarship by highlighting just how dramatic the implications of the IAT project are. As Tetlock and Wax have asserted,

Because most of us are biased, these individuals claim, we can safely assume that every aspect of social life—every school, institution, organization and workplace—is a bastion of discrimination. The most strenuous measures, whether they be diversity programs, bureaucratic oversight, accountability or guilt-ridden self-monitoring, cannot guarantee a level playing field.<sup>213</sup>

The suggestion seems to be that if IAT scholars carry the day, they will call for a massive and intrusive response to their histrionic discoveries of widespread unconscious biases. In the words of Mitchell and Tetlock, “It is difficult to overstate the legal significance of this new research if it correctly diagnoses the pervasiveness and potency of implicit prejudice and related discriminatory tendencies.”<sup>214</sup> In addition, the naïve cynics stress that this would mean an expansion of the very policies that have frightened conservatives most: “If we accepted at face value the most ambitious claims about the pervasiveness and potency of unconscious prejudice, then the factual case for more aggressive

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<sup>213</sup> Wax & Tetlock, *supra* note 194, at A16.

<sup>214</sup> Mitchell & Tetlock, *supra* note 185, at 1054; *see also id.* at 1118 (“Our fear is that the stage has been set for an epistemic disaster of minor epic proportions”). As they have explained further,

The shape of the next generation of antidiscrimination law hinges on how legislators and judges respond to the argument that prejudice in America has mutated into new insidious forms . . . .

Were these insidious associations limited to a small percentage of the population, then wholesale changes to the psychological assumptions of antidiscrimination law would be unwarranted. But if recent claims are to be believed, unconscious processes of discrimination operate pervasively . . . .

*Id.* at 1023–24. Thus, Tetlock and Mitchell imply, if IAT scholars are right, large-scale and disruptive alterations are necessary.

government intervention to fight discrimination in a wide range of domains would be strengthened.”<sup>215</sup> Elsewhere they explain:

Antidiscrimination law scholars have seized on this new research to argue for changes in the legal landscape . . . [including] greater use of affirmative action programs . . . [and] that the IAT be used to read the minds of legislators for evidence of unconscious discriminatory intent in their enactments.

These specific examples are but a small part of an ambitious project to use implicit prejudice research to remake the law.<sup>216</sup>

Of course, the threat is not just to the future of our legal system but to the self-confidence of the nation, race relations, and even the goal of eliminating racism:

If the knowledge claims of IAT advocates are as exaggerated as we maintain, IAT advocates are already causing substantial harm to American society by: (a) stimulating excessive suspicion of Whites among Blacks, suspicion that can crystallize into conspiracy theories that poison race relations; (b) convincing Blacks that they are held in contempt, thereby inducing “stereotype threat” and “social-identity threat” that, respectively, increase the likelihood of self-fulfilling prophecies in which Blacks act in ways that confirm the ill opinions they imagine others hold and heighten preconscious attention to subtle cues that confirm the devalued role of minority groups; (c) providing authoritative-sounding but false feedback to a million-plus visitors to IAT websites that they are prejudiced; and (d) providing authoritative-sounding but false grounds for commonality-of-cause requirements in class action litigation.<sup>217</sup>

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<sup>215</sup> *Id.* at 1116.

<sup>216</sup> *Id.* at 1026–28; *see also* Wax & Tetlock, *supra* note 194, at A16 (“Anything short of straight group representation—equal outcomes rather than equal opportunity—is ‘proof’ that the process is unfair.”).

In light of the fact that the dominant legal theories reflect the dominant dispositionist conceptions of the human animal, it is not surprising that those legal theories would not have a ready handle for understanding, much less addressing, evidence of implicit bias. Given the absence of such a handle, however, dispositionist scholars have tended to argue that the law should not address the problem, as if it is not the sort of problem that the law is meant to address. For example, Amy Wax argued in her first article on the topic that “extending the framework created by existing antidiscrimination statutes to cover unconscious workplace disparate treatment is not a good idea because it is unlikely to serve the principal goals of a liability scheme—deterrence, compensation, insurance—in a cost effective manner.” Amy L. Wax, *Discrimination as Accident*, 74 *IND. L.J.* 1129, 1132–33 (1999). Of course, the real question raised by the situationist insights is whether the law should be redesigned in light of evidence that we are not exactly who we thought we were and that the sources of bias are not always as we imagined.

<sup>217</sup> Mitchell & Tetlock, *supra* note 185, at 1119–20.

The implicit bias work, thus, “shake[s] the ontological foundations of American political culture . . . . [It implies that] the American dream is vastly more elusive than popularly supposed.”<sup>218</sup> *Unreasonable outgroup members are attacking us, our beliefs, and the things we value.*

Again, relatively situationist insights, such as those uncovered by IAT scholars, provoked naïve cynical reactions by relatively dispositionist scholars. Today, while the situationist scholarship continues to develop, its influence continues to be inhibited by the backlash dynamic. The net result is that valuable insights into human thinking and behavior are kept shrouded beneath the dark veil of flawed intuitions.

## CONCLUSION

Legal scholars debate substance—at least that is the story we tell ourselves. Go to any law school in the country and you will find us trading in ideas—intellectual jousting, with the sturdiest conceptions and analyses carrying the day. In truth, however, legal academics often exhibit the same behaviors as editorialists, radio talk-show hosts, and, more broadly, members of the general population. As this Article has shown, policy scholars devote significant time and energy to commenting or speculating about the explicit motives, biases, and prejudices of those with whom they disagree. At the same time, they are unaware of the implicit motives (for, among other things, closure and system affirmation) that influence their own work. They deny in themselves what they impute to others. Of course, a similar process occurs between virtually all conflicting individuals and groups. But what is particularly troubling is that the imputation—the allegations of slant and distortion—matters. Better ideas and more accurate understandings can be stymied, and worse ideas and distorted attributions, maintained.

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<sup>218</sup> *Id.* at 1120. According to Mitchell and Tetlock, because of the threat to our system by the research on IAT, the IAT scholars should face a higher standard of proof than those scholars whose research does not suggest that our system is unfair or unjust:

Empirical claims that carry serious policy implications require serious scrutiny—and the more sweeping the claims, the heavier the burden of proof their promoters should bear. And it is a sweeping claim to say that, after half a century of legal, political and educational efforts to check prejudice, the vast majority of Americans remain prejudiced. When psychological and legal scholars join forces to call for wholesale changes in American antidiscrimination law on the basis of this implicit-prejudice charge, more is at stake than professorial reputations.

*Id.*

Thus, the narrative of high-minded engagement and the inevitable triumph of the meritorious theory is, in significant part, a myth.<sup>219</sup> The naïve cynical

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<sup>219</sup> Of course, it is not our contention that *every* article that challenges situationist scholarship demonstrates naïve cynicism or that critiques of situationist work are *never* valid. Nor do we want to be misunderstood as claiming that all the pieces that we have highlighted as examples of naïve cynicism are wholly lacking in substantive arguments or merit. The focus of this piece has been on exploring the underappreciated power of naïve cynicism, not on the logical or scientific components that occupy some of the work that we have described. See *supra* note 187. Although we believe that, in a number of cases, the arguments advanced in the articles we have reviewed are seriously flawed (independent from their employment of naïve cynicism), summarizing and rebutting that work substantively would be a major undertaking, requiring far more space than this already sizeable Article can afford.

It is worth noting, however, that much of the naïve cynical reaction described in previous sections to Phase I and Phase II situationism has already been at least partially abandoned, even by many legal economists. Substantive arguments that seemed sufficient at the time now seem quite clearly mistaken, and come across, in hindsight, as pretext. With respect to Phase III naïve cynicism, described in the previous section, many of the naïve cynical arguments are already being persuasively addressed in other work. See, e.g., Mahzarin R. Banaji, Brian A. Nosek & A.G. Greenwald, *No Place for Nostalgia in Science: A Response to Arkes and Tetlock*, 15 PSYCHOL. INQUIRY 279 (2004); Jerry Kang, *Implicit Social Cognition and the Law: A Future History* (2007) (unpublished manuscript, on file with authors); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 480 (2007).

There are several other reasons why we think omitting discussions of substance does not undermine our conclusions about the significance of legal-academic backlash. First, some of the pieces that we have cited do not actually offer any significant substantive arguments and instead are, more or less, fully engaged in naïve cynicism. See, e.g., Wax & Tetlock, *supra* note 194. In such pieces, it is fairly clear that substance is barely playing a supporting role, much less a leading role. Second, those articles that do offer substantive arguments usually close with naïve cynical arguments, indicating the significance of the dynamic in this work. See, e.g., Mitchell & Tetlock, *supra* note 185, at 1116–21.

More important, as we have already illustrated, many of the substantive arguments that naïve cynics do offer are based on the very same dispositionist logic that the situationists are challenging. For instance, many of the criticisms made in Mitchell and Tetlock's extensive critique of IAT research is that the "implicit biases" are not problematic because they do not correspond with the dispositionist, explicit version of racism that most people imagine when they think of "racism." If it is not dispositionist racism, they argue, it is not a real problem. But that is just the point that situationist scholars are contesting. See *supra* notes 171–77 and accompanying text. Granted, implicit bias is different from explicit bias, but that does not imply that implicit bias does not pose a significant social problem. In his recent superb essay, Sam Bagenstos made this related observation: "Mitchell and Tetlock's argument is . . . best understood, not as a scientific critique of implicit bias research, but as an argument about the normative bases for antidiscrimination law." Samuel R. Bagenstos, *supra* note 225, at 480. As Bagenstos explains, Mitchell and Tetlock view discrimination narrowly,

as a wrong perpetrated by a discriminator who acts self-consciously and irrationally. But advocates of using the law to respond to implicit bias do not take that narrow view. To the contrary, they understand discrimination as a social problem that—whether or not it reflects the "fault" of any individual discriminator—has systematically harmful effects on the life chances of members of particular socially salient groups. Under that broader view of the problem of discrimination, the "scientific" evidence that Mitchell and Tetlock dismiss remains highly relevant and telling.

*Id.*

process seems to be shaping policies more than the cold hard data are.<sup>220</sup> Social psychology has struggled for acceptance within the legal academy, not because the insights of the field lack merit but because social psychology tells us things about ourselves that seem wrong, uncomfortable, and threatening, engendering a strong backlash.

If we want to know what is influencing legal theory and policy, we cannot continue to confine ourselves to studying numbers and graphs, and weighing the strengths of logic-driven arguments. Legal scholars, lawyers, and law students must also consider the operation of unseen dynamics around us and within us that may be the critical factors determining winners and losers in our major debates.

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Finally, we have argued and provided some evidence to suggest that naïve cynicism is playing a role in defending dispositionist presumptions; even if there may be substantive merit to a subset of the dispositionist challenges to situationism, that does not imply that the dynamics of naïve cynical backlash are not also in play.

<sup>220</sup> It may be tempting to assume that the legal academic backlash to social psychology over the last few decades is a unique occurrence. It is not. In fact, naïve cynicism has been a key dynamic in responding to the situationist insights of numerous legal-theoretic schools of thought—including legal realism and its critically oriented offspring. In part for that reason, a kind of (dispositionist) formalism persists in our legal system and practices long after the premises of formalism have been exposed as, more or less, a fantasy.

Those claims we hope to take up in future work. Here we can offer only a taste. Consider this quotation from libertarian legal scholar Richard Epstein in his rejection of legal realist insights regarding the situational coerciveness of many purportedly private, voluntary arrangements: “I think in the end, it is an invitation to totalitarianism if you cannot distinguish between markets and coercion. The willingness to use coercion will be the death of the market and of personal liberty.” Richard A. Epstein, *Discussion: The Classical Theory of Law*, 73 CORNELL L. REV. 310, 325 (1988). For examples of the realist arguments to which Epstein is responding, see Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626 (1943), and Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 563 (1933). Classical liberal theorist Charles Fried may also exhibit naïve cynicism when he writes that “when we are deprived of our power of choice, . . . we are dehumanized.” CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 50 (2006).

