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Judicial Mindsets: The Social Psychology of Implicit Theories and the Law

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I. INTRODUCTION

Legal scholars and social scientists from a range of disciplines have converged on a question that legal realists posed long ago: Does the actual practice of judging differ from the traditional account of judicial decision-making and if so, then how?[1] To examine this question,

* J.D., Georgetown University Law Center, 2004. Staff Law Clerk of the United States Court of Appeals for the Seventh Circuit. I dedicate this Article to Carol Dweck, an inspiration to so many. I thank her, Mary Murphy, and the Mind & Identity in Context Lab of the University of Illinois at Chicago for sharing their insights on the social psychological aspects of this Article. I thank Robin West, Vicki Jackson, and Will Rhee for their excellent comments. This Article will be presented at the Law & Society Association's 2012 Annual Meeting. The views expressed in this Article do not reflect those of the United States Court of Appeals for the Seventh Circuit. Errors of thought and expression are solely my own.

1. *See* FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM (1933); JEROME FRANK, LAW AND THE MODERN

large-scale qualitative and quantitative studies have flourished.[2] From the field of political science, we are discerning that, while precedent constrains judging, political ideology subtly influences judicial behavior in a number of contexts.[3] From the field of law and psychology, we are uncovering that cognitive biases, preconceptions, and prejudice lead reasoning and judgment to depart from normative theories of rationality.[4] We are actively investigating the heuristics that judges employ, their cognitive biases, and the potential shortcomings of their judgment. These research paradigms confirm the contempo-

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MIND (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Karl Llewellyn, *A Realistic Jurisprudence-The Next Step*, 30 COLUM. L. REV. 431, 444 (1930).

2. *See, e.g.*, Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). *See generally* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be,"* 2005 WIS. L. REV. 365, 385–87 (2005); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008).

3. *See, e.g.*, CORNELL CLAYTON & HOWARD GILLMAN, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1 (1999); FRANK B. CROSS, DECISION-MAKING IN THE U.S. COURT OF APPEALS 77 (2007); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (2003); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Cornell W. Clayton & Howard Gilman eds., 1999); Frank Cross et al., *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (2004); Lee Epstein, Jack Knight & Andrew Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583 (2001); Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making,* in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES 15, 20 (Cornell W. Clayton & Howard Gillman eds., 1999); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. Rev. 301 (2004).

4. *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) [hereinafter Guthrie, *Inside the Judicial Mind*] ("[W]e found that each of the five illusions we tested had a significant impact on judicial decision making. Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment."); Stephen Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Juries in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (reporting results of experiment suggesting that judges and jurors may be similarly influenced by exposure to potentially biasing information); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999) (reporting results of a study of judges' biases); Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 776, 786 (1999) (studying the factors that contribute to judges' assessments of the severity of injuries and judges' awards for damages); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

rary relevance of Justice Holmes's theory that judging is not merely a deductive feat,[5] that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do [with legal reasoning] than the syllogism. . . ."[6]

The law and psychology community has studied jury decision-making extensively, and in the past decade, the field has turned to investigating the psychology of judging.[7] This research has primarily examined the cognitive and motivational dimensions of judging, i.e., heuristics, motivation, biases, schemas, attitudes, and motivated cognition.[8] The line of inquiry, however, has largely left unexplored the social, contextual, and situational nature of judging: one of social psychology's unique contributions to understanding judicial behavior.

This Article introduces science and research on the social psychology of judging with the aim of advancing a research agenda designed to examine the influence of social, contextual, and situational forces on judicial decision-making: *situated cognition*.[9] This research agenda investigates the social nature of judging from the perspective of "Behavioral Realism."[10] In exploring this aspect of judicial behavior, the

5. *See* O. W. Holmes, Jr., *Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897) ("The danger of which I speak of is . . . the notion that a given system, ours, for instance can be worked out like mathematics from some general axioms of conduct . . . [T]he logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

6. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark DeWolfe Howe ed., 1963) (1881)).

7. *See generally* Phoebe C. Ellsworth & Robert Mauro, *Psychology and Law*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 684 (Daniel T. Gilbert et al., eds., 1998); Neil Vidmar, *The Psychology of Trial Judging*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 58 (2011).

8. *See, e.g.*, Vidmar, *supra* note 7, at 58–61.

9. *See* Eliot R. Smith & Elizabeth C. Collins, *Situated Cognition*, 126–40, in BATJA MESQUITA ET AL., THE MIND IN CONTEXT (2010); Eliot R. Smith & Gün R. Semin, *Socially Situated Cognition: Cognition in Its Social Context*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 53, 53 (2004).

10. "Behavioral Realism" as used in this Article emerged from a symposium in July 2006 discussing how advances in social and cognitive psychology lend new perspective to jurisprudence. After the symposium, jurists and social and cognitive psychologists produced several noteworthy articles: Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Linda H. Krieger, *Behavioral Realism in Law: Reframing the Discussion About Social Science's Place in Antidiscrimination Law and Policy*, in BEYOND COMMON SENSE:

approach draws on multiple techniques, including experimental methods and theories in the field of social psychology.[11] The field of social psychology offers a unique vantage point to examine how societal forces, social environments, and situations influence judging.[12] For the social psychologist, the level of analysis is the individual *in the context of a social situation*.[13] The field studies the individual within social context to understand how social contexts, situations, and environments influence attitudes, cognitions, and behavior.[14] Further, while much quantitative research on judicial behavior employs the technique of empirically studying federal case law, a research line premised on social psychology would adopt both empirical legal studies and experimental methods to study judicial behavior.[15] Because the field draws largely on experiments to investigate social and situa-

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PSYCHOLOGICAL SCIENCE IN THE COURTROOM 383 (Eugene Borgida & Susan T. Fiske eds., 2008). *See also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 490–92 (2010) (articulating the paradigm of Behavioral Realism); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011) (drawing on the framework of Behavioral Realism when studying the effects of *Iqbal* on civil rights claims).

11. *See, e.g.*, Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance* in BLACKWELL HANDBOOK OF JUDGMENT & DECISION MAKING 567 (Derek J. Koehler & Nigel Harvey eds., 2004); *see also* HUNTINGTON CAIRNS, LAW AND THE SOCIAL SCIENCES 219 (1935) ("The development of the synthesis of law and psychology will be a long and perhaps a tedious process; but it is a process, however much patience it may require, which for the law will yield a fruitful harvest.").

12. *See generally* ELLIOT ARONSON, THE SOCIAL ANIMAL 9 (1995) ("The social psychologist studies social situations that affect people's behavior."); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 34 (1991); Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 7, at 151; Kurt Lewin, *Behavior and Development as a Function of the Total Situation* (1946), reprinted in RESOLVING SOCIAL CONFLICTS & FIELD THEORY IN SOCIAL SCIENCE 337–38 (Amer. Psych. Ass'n. 2d ed. 2000); Shelley E. Taylor, *The Social Being in Social Psychology*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 7, at 58 ("[F]irst . . . individual behavior is strongly influenced by the environment, especially the social environment. The person does not function in an individualistic vacuum, but in a social context that influences thought, feeling, and action. . . . [S]econd . . . the individual actively construes social situations. We do not respond to environments as they are but as we interpret them to be.").

13. *See* ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY 10 (Prentice Hall 7th ed. 2010); Taylor, *supra* note 12, at 58.

14. *See* ARONSON ET AL., *supra* note 13, at 3.

15. Recent empirical legal studies on how social forces influence judicial decision-making are of excellent quality. *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010). Yet one limitation with these empirical legal studies is the difficulty of identifying a causal mechanism that explains the relationship between social influences and judicial decision-making. *Id.* at 280; *see infra* Part IV.

tional influences, the field offers both theoretical insights and an array of scientific methods to study the social and situational dimensions of judicial behavior. A law and social psychology approach to studying judicial behavior may, one day, illuminate psychological processes by which American society acculturates and socializes judges and, thereby, shapes law.[16] As Justice Cardozo famously observed, "[t]he great tides and current which engulf the rest of men do not turn aside in their course and pass the judges by."[17] In this way, a law and social psychology approach may, one day, uniquely contribute to the study of how American law evolves to reflect change in American society.

An important theoretical contribution of social psychology is research on implicit theories. This research has revealed that humans hold implicit theories about human nature, social institutions, and society. At the forefront of this science, Dr. Carol Dweck and her colleagues have shown that humans operate with different implicit theories about whether these phenomena are fixed versus dynamic, static versus malleable.[18] For example, in certain circumstances, we might believe that one's moral character may change and develop—a transgression today, but temperance tomorrow; in other circumstances, we might believe that moral character is static and cannot change—once a scoundrel always a scoundrel. These implicit belief systems often operate outside of our awareness. They shape the meaning we draw from social contexts, the decisions we make and our predictions, and how we attribute blame to others. Implicit theories are often called mindsets. This psychological research shows that these different implicit theories are social constructions: the implicit beliefs are shared, expressed, and transmitted within society, organizations, and environments.[19] That is, social influences and situa-

16. The line of scholarship advanced by this Article focuses on the psychological processes behind judicial decision-making—*both* the cognitive *and*, critically, the *social psychological* processes underlying judicial behavior. This line broadens current scholarship by drawing on the experimental method and from social psychological theory to study how society, culture, social influences, and situations affect judicial behavior: judges' cognitions, attitudes, and behaviors. This line of law and social psychology, therefore, intersects with several lines of jurisprudential scholarship, including: Behavioral Realism, see Krieger & Fiske, *supra* note 10, at 1000, Situationism, see Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003), and the turn toward naturalism in jurisprudence, see BRIAN LEITER, NATURALIZING JURISPRUDENCE (2007).

17. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

18. Carol S. Dweck et al., *Implicit Theories and Their Role in Judgments & Reactions: A World From Two Perspectives*, 6 PSYCHOL. INQUIRY 267, 282 (1995).

19. *See infra* section II.C.

tional factors influence whether we adopt fixed versus dynamic mindsets.[20]

Dweck's research suggests these implicit theories about human nature, social institutions, and society may shape the deep, often unconscious, presuppositions and beliefs that jurists bring to legal decisions.[21] Like lenses through which we examine the world, these implicit belief systems shape how jurists find facts in particular disputes, the inferences jurists draw, and the punishment judges impose.[22] As well, these implicit theories may influence how jurists reason and resolve questions of interpretation under the common law, statutes, and the Constitution, a matter I turn to below.[23] Experimental research is warranted to investigate how this science may enrich our understanding of legal reasoning and judicial behavior.[24]

This Article proceeds in three parts. Part II introduces the reader to social psychological research on implicit theories. Part III presents a general discussion of how these implicit theories likely affect judicial fact finding and the interpretation of common law, statutes, and the Constitution. Part IV offers closing remarks and recommendations for a research framework to investigate these questions.

II. THE SOCIAL PSYCHOLOGY OF IMPLICIT THEORIES

In recent decades, experimental psychologists have studied the implicit theories people hold about personality, social arrangements, and society.[25] Leading this important line of research, Dweck and her colleagues have conducted seminal experiments demonstrating that people hold markedly different implicit theories about whether human nature and institutions are primarily fixed and static *versus* dynamic and malleable.[26] This research has shown that people's implicit be-

20. *See infra* section II.C.
21. *See infra* section III.A.
22. *See infra* section III.A.
23. *See infra* section III.B.
24. *See infra* Part IV.
25. *See* Chi-yue Chiu et al., *Implicit Theories and Conceptions of Morality*, 73 J. PERSONALITY & SOC. PSYCHOL. 923 (1997); Carol S. Dweck et al., *Implicit Theories: Individual Differences in the Likelihood and Meaning of Dispositional Inference*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 644 (1993); Daniel C. Molden & Carol S. Dweck, *Finding "Meaning" in Psychology: A Lay Theories Approach to Self-Regulation, Social Perception, and Social Development*, 61 AM. PSYCHOLOGIST 192 (2006); Mary C. Murphy & Carol S. Dweck, *A Culture of Genius: How an Organization's Lay Theory Shapes People's Cognition, Affect, and Behavior*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 283 (2009). *See generally* CAROL S. DWECK, MINDSET, THE NEW PSYCHOLOGY OF SUCCESS (2006).
26. The distinction between static and dynamic implicit theories has roots in the philosophy of Alfred N. Whitehead and Stephen C. Pepper. *See* ALFRED NORTH WHITEHEAD, MODES OF THOUGHT (1938); STEPHEN C. PEPPER, WORLD HYPOTHESES, A STUDY IN EVIDENCE (1961). Their scholarship discussed and contrasted

liefs powerfully shape their perception, judgment, and decision-making.[27] These mindsets influence the meaning people draw from their observations of others and how they understand their own experiences.[28] The theories are *implicit* because, unlike most scientific theories, the theories are rarely elaborated and often operate outside of awareness.[29] Like systems of folk psychology, or larger meaning systems, these implicit beliefs strongly influence how people organize their experience in, knowledge about, and transactions in the world.[30] These mindsets shape people's attributions and inferences, along with social events.[31] The implicit theories are not mere individual differences or personality differences. Instead the mindsets are expressed and shared socially and culturally within situations and environments, which powerfully influence the degree to which these mindsets operate.[32]

A. Implicit Theories of Human Nature

There are two contrasting implicit theories about personality and moral character: human nature is static and fixed versus dynamic and malleable.[33] One theory is termed an *entity* mindset. When an *entity theory* is salient, people believe human nature is static, fixed, immutable, and unchangeable.[34] People tend to interpret human nature based on immutable, static traits (e.g., caring, honest, intelligent,

different systems of meaning. Whitehead and Pepper contended that understanding the world as consisting of essential units with fixed properties leads to the desire to measure these enduring properties and to build taxonomies from them; in contrast, understanding the world as consisting of fluid processes and dynamic contexts leads to the desire to analyze and understand the processes and contexts shaping the world.

27. *See generally* Dweck et al., *supra* note 25, at 644.
28. *See* Molden & Dweck, *supra* note 25, at 197; Gail D. Heyman & Carol S. Dweck, *Children's Thinking About Traits: Implications for Judgments of the Self and Others*, 64 CHILD DEV. 391 (1998).
29. *See* Chi-yue Chiu et al., *Lay Dispositionism and Implicit Theories of Personality,* 73 J. PERSONALITY & SOC. PSYCHOL. 19 (1997).
30. *See generally* JEROME BRUNER, ACTS OF MEANING 33–66 (1990); GEORGE H. MEAD, MIND, SELF & SOCIETY, 135–226 (1934); Isaiah Berlin, *Introduction* in VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS xiii-xxvii (1977).
31. *See* Benjamin M. Gervey et al., *Differential Use of Person Information in Decisions about Guilt Versus Innocence: The Role of Implicit Theories*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 17 (1999); Daniel C. Molden et al., *"Meaningful" Social Inferences: Effects of Implicit Theories on Inferential Processes*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 738 (2006).
32. *See* Murphy & Dweck, *supra* note 25, at 283.
33. *See* Dweck et al., *supra* note 25, at 645–46; Sheri R. Levy et al., *Modes of Social Thought: Implicit Theories and Social Understanding* in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 179–201 (1999).
34. *See* Levy et al., *supra* note 33, at 192 ("[T]he entity model is built around the core belief that people's qualities are fixed—over time and across situations. This model then guides what information will be attended to and how it will be en-

criminal, reckless). With an entity mindset, people expect that behavior is driven by essential character traits and, therefore, anticipate that human behavior will be highly consistent across situations.[35] People, moreover, draw on character traits when making predictions about how others will behave.[36] Those holding an entity theory tend to believe the kind of person someone is, is something very basic about that person that cannot be changed.[37]

The second theory is an *incremental* mindset.[38] When an *incremental theory* predominates, people believe human nature is malleable, changeable, and consisting of qualities that can be enhanced and developed over time.[39] When operating under an incremental mindset, people are sensitive to and search for psychological causes (e.g., beliefs, goals, hopes, fears) and situational causes of behavior.[40] When this theory is salient, people expect that human nature and moral conduct are dynamic qualities that have the potential to change across situations.[41] Those holding an incremental theory tend to believe a person can substantially change the kind of person that he or she is.[42]

These mindsets influence both the frequency and the nature of dispositional inferences. That is, whether we view the world through an entity versus incremental mindset shapes whether we engage in lay dispositionism. An entity mindset results in lay dispositionism.[43] Lay dispositionism refers to the use of personality/character traits as the main unit of analysis when evaluating human behavior, which tends to result in the Fundamental Attribution Error.[44] The Fundamental Attribution Error occurs because people over attribute other people's actions to personality/character traits, while under appreciating the degree to which situations and environments influence behavior.[45] For example, when an entity theory predominates, we would

coded and organized, which in turn influences the judgments that are based on this information.").

35. *See id.*
36. *See* Molden et al., *supra* note 31, at 742.
37. *See id.*
38. *See* Levy et al., *supra* note 33, at 13 ("[T]he incremental mental model is built around the core belief that people's attributes are changeable—over time and across situations. The mental model then orients information processing toward more dynamic variables and flexible judgments.").
39. *See id.*
40. *See id.*
41. *See* Molden et al., *supra* note 31, at 742.
42. *See id.*
43. *See* Chiu et al., *supra* note 29, at 19.
44. *See* Ross & Nisbett, *supra* note 12, at 34.
45. *See* Susan T. Fiske & Shelley E. Taylor, Social Cognition 67 (2d ed. 1991); Ross & Nisbett, *supra* note 12; Ellsworth & Mauro, *supra* note 7, at 113; Victor D. Quintanilla, *(Mis)Judging Intent: The Fundamental Attribution Error in Federal Securities Law*, Vol. 7 NYU L. & Bus. 195, 221–24 (2010).

likely believe that a bystander is callous and cold for turning a deaf ear to a neighbor's cries for help by failing to dial 911. We may believe that the bystander's callous personality animated her to disregard her neighbor's cries. With an incremental mindset, however, people tend to avoid lay dispositionism. They instead believe that personality consists of dynamic qualities that alter across situations.[46] In this scenario, we may search for a situational explanation—for example, perhaps the number of bystanders had a powerful effect on whether any single bystander was likely to help the victim—we may consider whether the bystander effect or pluralistic ignorance diminished helping behavior.[47]

In seminal experiments, Dweck and her colleagues demonstrated that people draw different meaning from human behavior when operating with an entity versus an incremental mindset.[48] When an entity theory is salient, people draw dispositional inferences from behavior in one situation and, often then, generalize from those dispositions to predict that people will behave consistently in the future.[49] In these experiments, subjects predicted a person's behavior in either a social domain (honesty or friendliness) or an ability domain (academic or sports) after observing that person's behavior in a single prior situation.[50] In sum, when holding an entity mindset, subjects readily drew dispositional inferences and then predicted that people would conform to those dispositions in future situations.[51] For example, subjects were provided with a brief scenario in which they observed Jack behaving friendlier than Joe.[52] When an entity mindset predominated, subjects believed that Jack would always behave friendlier than Joe.[53] In contrast, when an incremental mindset predominated, subjects predicted that Jack's friendly behavior would not generalize across situations.[54] Instead, they predicted that Joe would behave friendlier than Jack in some situations, so that Jack's relative friendliness over Joe would tend to even out across time.[55]

One psychological mechanism for this effect is that, when these mindsets are salient, they alter the way people process social information, shifting the degree to which people attend to expectancy consis-

46. *See* Chiu et al., *supra* note 29, at 20–21.
47. *See generally* BIBB LATANÉ & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? (1970); John M. Darley & C. Daniel Batson, *"From Jerusalem to Jericho": A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973).
48. *See* Chiu et al., *supra* note 29, at 27–28.
49. *See id.* at 20–21.
50. *See id.* at 23.
51. *See id.*
52. *See id.* at 23–28.
53. *See id.*
54. *Id.*
55. *Id.* at 22–23.

tent versus expectancy inconsistent information.[56] With an entity theory, people attend more closely to character-trait consistent information.[57] Once a person forms an expectation of another's disposition (e.g., that another is good, bad, friendly, careless, intelligent), one is especially attentive to information that confirms this character-trait expectation. This expectancy confirming information provides support for a dispositional understanding of that person. In contrast, when an incremental theory is salient, people show less preference for expectancy confirming information and instead attend to expectancy disconfirming information.[58] When an entity mindset predominates, people pay closer attention to and readily recall stereotype-consistent information.[59] In experiments, Dweck and her colleagues placed participants under cognitive load and then presented them with information that was either consistent, inconsistent, or irrelevant to stereotypes about targets (i.e., stereotypes about priests versus neo-Nazi skin heads).[60] When operating with an entity mindset about personality, people clung to their preconceptions and diminished the attention they paid to highly relevant stereotype-inconsistent information.[61] These studies suggested that, for those holding entity theories of personality, character-inconsistent information may have been unpleasant and, hence, these entity theorists were motivated to avoid undesirable, theory-inconsistent information.[62] In contrast, when an incremental mindset was salient, subjects drew on and paid attention to both stereotype-consistent and stereotype-inconsistent information.[63] In sum, when holding an entity theory, rather than an incremental theory, people attend more closely to stereotype-consistent information than to stereotype-inconsistent information.[64]

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56. *See* Molden et al., *supra* note 31, at 738; Jason E. Plaks et al., *Person Theories and Attention Allocation: Preferences for Stereotypic Versus Counterstereotypic Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 876, 888–91 (2001).

57. *See* Molden et al., *supra* note 31, at 738.

58. *See* Plaks et al., *supra* note 56, at 889–91.

59. *See id.* at 879–80.

60. *See id.*

61. *See id.* at 889–91.

62. *See id.*

63. *See id.*

64. *See* Molden & Dweck, *supra* note 25, at 197–99; Plaks et al., *supra* note 56, at 889–91. This line of psychological research also suggested that, when operating under an entity theory, people are more likely to engage in "entitativity," of social groups, meaning they are less likely to individuate members of social groups and less likely to perceive within-group variability among group members. *See* Levy et al., *supra* note 33, at 198; *see also* Brock Bastian & Nick Haslam, *Psychological Essentialism and Stereotype Endorsement*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 228 (2006) (explaining the phenomena of essentialism in relation to entity theories).

This line of research also examined the effect of holding implicit theories of moral character.[65] People with an entity theory of moral character are more likely to make a global judgment about another's moral worth based on a single instance of morally relevant behavior.[66] With an entity mindset, a single instance of behavior colors the overall view of another's moral goodness or badness. For example, experiments have shown that, when an entity theory is salient, people make global moral character judgments about another after witnessing a single instance of lying, aggression, or cooperation.[67] When holding an entity theory, people are more likely to believe that if a person lies, cheats, or steals in a prior situation, then that person is an immoral person. While this line of research initially studied adults, similar results have been shown with early elementary school-aged children.[68] These studies demonstrated that children with entity mindsets are more likely than children with incremental mindsets to believe moral behavior is closely linked to fixed character traits.[69]

B. Implicit Theories of Society and Social Institutions

Social, cognitive, and political psychologists have converged on the finding that people hold implicit belief systems about the nature of society and social institutions. That is, people hold implicit theories about whether society and social institutions are static and fixed *versus* dynamic and malleable.[70] While some operate with an entity (or

65. *See* Chiu et al., *supra* note 25; Dweck et al., *supra* note 18, at 275–78; *see also* PHILIP ZIMBARDO, THE LUCIFER EFFECT, UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 6–7 (2008) ("The idea that an unbridgeable chasm separates good people from bad people . . . creates a binary logic, in which Evil is *essentialized*. Most of us perceive Evil as an entity, a quality that is inherent in some people and not in others. . . . An alternative conception treats evil in *incrementalist* terms, as something of which we are all capable, depending on circumstances. . . . Our nature can be changed, whether toward the good or the bad side of human nature." (emphasis added)).

66. *See* Claude H. Miller et al., *The Effects of Implicit Theories of Moral Character on Affective Reactions to Moral Transgressions*, 25 SOC. COGNITION 819 (2007).

67. *See* Cynthia A. Erdley & Carol S. Dweck, *Children's Implicit Personality Theories as Predictors of Their Social Judgment*, 64 CHILD DEV. 863 (1993); Miller et al., *supra* note 66, at 937–38.

68. *See* Heyman & Dweck, *supra* note 28.

69. *See id*. at 399–401.

70. *See* Chiu et al., *supra* note 25, at 923 ("Because other people and the world are the sources of moral actions, people's beliefs about these factors should have important implications for their moral beliefs. People can believe, for example, that the world and its people have fixed natures. Alternatively, they can believe that the world, its institutions, and its people have a character that can be shaped."); John T. Jost, *The End of the End of Ideology*, 61 AM. PSYCHOLOGIST 651, 654 (2006).

incremental) theory more chronically than other people,[71] a pivotal finding is that these implicit theories are situational—contexts and situations powerfully affect the salience of these mindsets.[72]

Dweck and her colleagues have researched implicit theories about social institutions (e.g., systems, rules, norms, hierarchies).[73] Findings indicate that, when people hold an *entity* theory of social institutions, people tend to believe that rules, norms, and hierarchies are static—these social institutions are fundamentally fixed and immutable in nature.[74] With an entity mindset, people often treat as most important conformity to stable norms, role expectations, hierarchies, and rules within a system.[75] People are especially concerned with violations of these social arrangements. In contrast, when people hold an *incremental* theory of social institutions, people tend to believe that social institutions and existing arrangements are malleable, variable, and changeable.[76] People believe that social institutions can be shaped and improved for the better.[77] When holding an incremental theory of social arrangements, people are especially attuned to whether existing social institutions might be improved and whether existing arrangements harm others or operate unjustly.[78]

These contrasting implicit theories are interrelated with differences between conservative and liberal ideologies: attitudes toward tradition versus social change.[79] Conservative ideology is more closely associated with an entity view of institutions and society, exalting tradition, order, hierarchy, authority, and the status quo.[80] Liberal ideology is more closely associated with an incremental view of institutions and society, valuing social reform and change that unfastens tradition with the possibility of improvement.[81]

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71. *See* John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 260, 261–62 (2005).

72. *See* Aaron C. Kay & Mark P. Zanna, *A Contextual Analysis of the System Justification Motive and Its Societal Consequence* in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 158 (John T. Jost et al. eds., 2009).

73. *See* Chiu et al., *supra* note 25, at 923–34.

74. *See id.*

75. *See id.* at 924–30.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See* Jost, *supra* note 70, at 654; John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003) [hereinafter Jost et al., *Political Conservatism*]; John T. Jost et al., *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).

80. *See* Jost et al., *Political Conservatism*, *supra* note 79, at 342–44.

81. *See id*.

These findings, moreover, interconnect with research on the phenomenon of system justification.[82] An entity theory of social institutions closely relates to a status quo mindset. People often equate (and conflate) their belief about what *is* (an entity mindset) with their prescription of what *ought* to be (a status quo mindset). This naturalistic fallacy results in the status quo bias[83] and, often, the "belief in a just world," which is the tendency for people to believe that the world is a fair place where people get what they deserve and, often, deserve what they get.[84] When an entity view of social institutions predominates, people tend to believe that institutions not only *are* fixed, but that institutions *ought* to remain fixed.[85] In turn, people justify the status quo and existing social arrangements. Scores of studies have documented a system justification motive: a motivational tendency to rationalize the status quo.[86] People view existing social, economic, and political institutions as fair, legitimate, and desirable.[87] This psychological phenomenon reflects the need to imbue the status quo with legitimacy, to see it as fair and natural,[88] rather than illegitimate, unfair, and arbitrary.[89] Belief in a just world provides psychological benefits, including coping with feelings of uncertainty and fulfilling a range of existential, epistemic, and relational needs.[90]

Unlike a status quo (entity) theory, when people hold an incremental theory of social institutions and society, people tend to believe that

82. *See* Jost & Hunyady, *supra* note 71, at 261–62.

83. *See* Scott Eidelman & Christian S. Crandall, *A Psychological Advantage for the Status Quo* in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION, *supra* note 72. *See generally* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

84. *See* Carolyn L. Hafer & Becky L. Choma, *Belief in a Just World, Perceived Fairness, and Justification of the Status Quo* in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION, *supra* note 72. *See generally* MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980).

85. *See* Aaron C. Kay et al., *Sour Grapes, Sweet Lemons, and the Anticipatory Rationalization of the Status Quo*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1300, 1301 (2002).

86. *See generally* John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 887 (2004); Hulda Thorisdottir et al., *On the Social and Psychological Bases of Ideology and System Justification*, 3–26 in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION, *supra* note 72.

87. Experimental psychologists have termed this phenomenon the *injunctification* effect. *See* Aaron C. Kay et al., *Inequality, Discrimination, and the Power of the Status Quo: Direct Evidence for a Motivation to See the Way Things Are as the Way They Should Be*, 97 J. PERSONALITY & SOC. PSYCHOL. 421 (2009).

88. *See* Jost et al., *supra* note 86, at 887.

89. *See* Aaron C. Kay et al., *Victim Derogation and Victim Enhancement as Alternate Routes to System Justification*, 16 PSYCHOL. SCI. 240, 240 (2005).

90. *See* Kristin Laurin et al., *Social Disadvantage and the Self-Regulatory Function of Justice Beliefs*, 100 J. PERSONALITY & SOC. PSYCHOL. 149, 150 (2011).

social institutions and society can be changed for the better.[91] And these judgments about the likelihood of change are often interrelated with the desirability for change.[92] In other words, when an incremental theory of social arrangements is salient, people tend to view change as desirable.[93] With an incremental theory, people believe that social institutions, such as systems, rules, and norms, can and likely may change for the better—these judgments closely relate to preferences in favor of changing these institutions.[94]

Importantly, social situations and environments powerfully affect whether people operate with a status quo (entity) mindset versus an incremental mindset. The expression of a status quo mindset is context and situation dependent.[95] That is, situational variables alter the degree to which people view social institutions and society with an entity versus incremental theory. For example, status quo mindsets are enhanced when people perceive that the system is under threat.[96] Threats occur in many forms, ranging from terrorist attack, to economic sturm and drang, to public criticism of the legitimacy of the system.[97] This may explain why, even among liberals, the shock of the 9/11 terrorist attacks resulted in increased nationalism and support for conservative policies.[98] Under conditions of pronounced uncertainty, moreover, people who tend to hold an incremental mindset often shift to a status quo mindset.[99] Even for those who generally operate with an incremental theory of institutions, societal influences, including threats to and uncertainty in the system, lead to a shift toward an entity and status quo mindset of institutions and society.[100]

C. The Social and Situational Dimension of Implicit Theories

A recent line of Dweck's research explores how social environments interact with and affect the salience of particular implicit theories.[101]

91. *See* Chiu et al., *supra* note 25, at 923–34.
92. *See* Kay et al., *supra* note 85, at 1301 ("[T]he relevant actors engage in a rationalization of anticipated outcomes so that events that are perceived as more likely come to be seen as more desirable and events that are perceived as less likely come to be seen as less desirable.").
93. *See id.* at 1300–05.
94. *See id.*
95. *See* Kay & Zanna, *supra* note 72, at 158–64; Jost & Hunyady, *supra* note 71, at 261–62.
96. *See* Kay & Zanna, *supra* note 72, at 158–64; Jost & Hunyady, *supra* note 71, at 261–62.
97. *See* Kay & Zanna, *supra* note 72, at 161.
98. *See, e.g.*, Johannes Ullrich & J. Christopher Cohrs, *Terrorism Salience Increases System Justification: Experimental Evidence*, 20 SOC. JUST. RES. 117 (2007).
99. *See* Jost & Hunyady, *supra* note 71, at 261–62.
100. *See id.*
101. *See* Murphy & Dweck, *supra* note 25, at 287.

While some people hold one implicit theory more chronically than another, contexts powerfully affect the degree to which particular implicit theories predominate in the mind.[102] The emerging paradigm of situated cognition is useful for understanding these dynamic processes.[103] Experiences in social environments subtly shape human cognitions, attitudes, and behaviors.[104] That implicit theories emerge from experience in social environments may be one reason why different cultures tend to have different implicit theories about human nature and the world.[105]

Murphy and Dweck have conducted experiments investigating this situational dimension of mindsets.[106] Their research examines organizational implicit theories: implicit theories held, not at the level of the individual, but rather at the level of organizations and environments.[107] These experiments broadened the traditional conception of lay theories from an individual difference measure (varying between individuals) to a situational measure that examines how mindsets vary between organizations and environments.[108] People interact with environments that reflect implicit theories about intelligence, personality, moral character, or society.[109] These implicit theories may, in turn, shape how people operate within those environments.[110]

Implicit theories—held at the group level—shape the inferences and decisions of individuals.[111] One psychological reason for this pro-

102. *Id.* It is well established that the use of schemas is affected by their *accessibility*, i.e., the extent to which a particular schema is at the forefront of one's mind. *See* ARONSON ET AL., *supra* note 13, at 56. That is, schemas can become chronically accessible because of repeated past experiences, and schemas can be primed and become temporarily accessible because of recent exposure and experiences. *Id.*; *see* FISKE & TAYLOR, *supra* note 45, at 144–45.

103. *See* Smith & Collins, *supra* note 9, at 126–27.

104. *See generally* ARONSON, *supra* note 12, at 9; ROSS & NISBETT, *supra* note 12, at 34; Taylor, *supra* note 12, at 58 ("[I]ndividual behavior is strongly influenced by the environment, especially the social environment. The person does not function in an individualistic vacuum, but in a social context that influences thought, feeling, and action."); ZIMBARDO, *supra* note 65, at 8 ("Social psychologists ask: To what extent can an individual's actions be traced to factors outside the actor, to situational variables and environmental processes unique to a given setting?").

105. *See* Craig A. Anderson, *Implicit Personality Theories and Empirical Data: Biased Assimilation, Belief Perseverance and Change, and Covariation Detection Sensitivity*, 13 SOC. COGNITION 25 (1995); Chi-yue Chiu et al., *Motivated Cultural Cognition: The Impact of Implicit Cultural Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J. PERSONALITY & SOC. PSYCHOL. 247 (2000); Curt Hoffman et al., *The Linguistic Relativity of Person Cognition: An English-Chinese Comparison*, 51 J. PERSONALITY & SOC. PSYCHOL. 1097 (1986).

106. *See* Murphy & Dweck, *supra* note 25, at 285–93.

107. *See id.* at 283.

108. *Id.*

109. *Id.* at 284.

110. *Id.* at 293.

111. *Id.*

cess is self presentation; that is, as Dr. Erving Goffman established in his acclaimed work, humans self present the attributes that others most value in particular environments.[112] Over time, these habituated behavioral displays shape one's self-concept. When an organizational lay theory is salient, people tend to self present the implicit theory that permeates in that particular environment, and these behavioral displays subtly shift one's self-concept to reflect the implicit theory held by the environment.[113] For example, Murphy and Dweck investigated organizational implicit theories about the static versus dynamic nature of intelligence.[114] When humans view the world through an entity theory, intelligence is largely seen as a fixed trait (you either have intelligence or you don't); with an incremental mindset, intelligence is seen as a quality that is malleable and expandable.[115] When study participants were motivated to gain acceptance from a social group that endorsed an entity or incremental theory of intelligence, these participants presented characteristics consistent with the social group's theory, highlighting either their "smarts" or "love for developing intellect."[116] The studies showed that, when people self present to gain acceptance from a social group, this behavioral display affects how they later define their core sense of self.[117] And after displaying an organizational implicit theory, people drew on the theory to evaluate others in unrelated environments.[118] That is, once a person adopts an organization's theory, this subtly shifts one's self-concept, and may influence how that person later judges others in unrelated contexts.[119]

III. JUDICIAL DECISION-MAKING AND IMPLICIT THEORIES

The psychological research introduced in Part II offers valuable insight and an empirical methodology to illuminate how American society and American law interact. As H.L.A. Hart observed, "The law . . . shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process."[120] The making of American law is a social endeavor shaped by jurists, legal professionals, and legal actors. American law is a product of society, of its institutions and social

112. *Id.*; *see* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).
113. *See* Murphy & Dweck, *supra* note 25, at 293–95.
114. *Id.* at 293–95.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 285.
119. *Id.*
120. *See* H.L.A. HART, THE CONCEPT OF LAW 199 (Oxford Univ. Press 1982).

arrangements, its aims and aspirations, and of its problems and progress. As the nature of our society, its social institutions, ideologies, and narratives, and the legal profession have changed, so has American law across time.[121] Crosscurrents in American society shape our legal system.[122] The lines of inquiry discussed in Part II offer a unique social psychological and empirical vantage point to study these processes.

Society shapes our legal system, in part, through the acculturation of legal actors.[123] Social environments subtly shape implicit theories held by jurists, which in turn affects judicial behavior and judicial decision-making. As Karl Llewellyn once observed of jurists, "By virtue of environment and upbringing, the ethical values affecting him, the thought patterns and mental images absorbed from his surroundings, a man is conditioned, limited, and unconsciously constrained."[124] Legal decision-making, while articulated in terms of reasoning about antecedent rules, is subtly influenced by how we think: how we categorize and draw metaphors, and our belief systems.[125] When deciding legal disputes, jurists are subtly influenced by implicit theories about human nature, social institutions, and society. In this Part, I present several ways in which these mindsets may affect how jurists interpret facts, draw inferences, attribute blame, and impose punishment. I will then turn to how these mindsets may affect how jurists interpret the nature of common law, statutes, and the Constitution.

A. Implicit Theories and Fact Finding

Jerome Frank once wrote that how judges find facts in particular cases is not a mechanical act; instead the interpretation of facts turns on the attributes of a particular judge.[126] A judge's unique traits, dis-

121. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 19 (2d ed. 1985); Berlin, *supra* note 30, at xiii-xxvii.

122. *See* FRIEDMAN, *supra* note 121, at 16, 37. I leave to one side Brian Tamanaha's masterful examination of the variegated connections between law and society. *See* BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001).

123. *See, e.g.*, PETER L. BERGER, THE SOCIAL CONSTRUCTION OF REALITY 75–78 (Anchor 1967) ("By virtue of the roles he plays the individual is inducted into specific areas of socially objectivated knowledge, not only in the narrow cognitive sense, but also in the sense of the "knowledge" of norms, values, and even emotions."); D.J. GALLIGAN, LAW IN MODERN SOCIETY 320–27 (2007); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 232–45 (2000) (explaining that people define themselves in comparison to others, and that this trait is unique only to human beings).

124. KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 9–12 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

125. *See* AMSTERDAM & BRUNER, *supra* note 123, at 287.

126. FRANK, *supra* note 1 at 110; *see also* Jerome Frank, *Say It With Music*, 61 HARV. L. REV. 921, 936–37 (1948) ("For in the last push, a judge's decisions are the outcome of his entire life-history. . . . I must say emphatically that when I speak of

positions, and habits of mind often work in shaping decisions not only about the law, but also in the very process of perceiving and interpreting what the relevant facts are.[127] Research on implicit theories of personality and moral character suggest that, on this point, Frank was prescient.

Experimental psychologists have investigated how implicit theories of human nature and moral character affect legal decision-making.[128] In numerous studies, Dweck and colleagues provided participants with summary transcripts of a murder trial, and experimentally manipulated impressions about the defendant's respectability.[129] These studies experimentally manipulated whether a defendant appeared to be a businessman versus a mobster, and whether the defendant arrived at the scene of the murder after walking from a library versus arriving on a motorcycle after visiting an adult bookstore.[130] With an entity theory, participants were more significantly affected by cues about the defendant's global moral character: that is, cues about the respectability of the defendant.[131] These participants found the defendant's appearance, interests, and style of clothing highly informative of the defendant's global moral character.[132] These participants concluded that such traits were unlikely to change and, in turn, drew inferences from the defendant's moral character to assess the likelihood that the defendant might have perpetrated the murder.[133] In contrast, with an incremental theory of moral character, subjects were unmoved by these character traits.[134] When granted the opportunity to ask for additional evidence before rendering a verdict, participants with an entity mindset asked for disposition-relevant evidence—character evidence.[135] In contrast, participants with an incremental mindset asked for information more directly relevant to the crime itself, such as information about the murder scene and murder weapon.[136]

When doling out punishment, people with an entity mindset are more likely to punish for the purpose of retribution.[137] These individ-

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the obscure influences—reflecting the trial judge's life history—which affect his decisions, I refer primarily to his biases and predilections not with respect to the rules . . . but with respect to the witnesses . . . . Those prejudices are usually deeply buried, unknown to others, often unknown to the judge himself.").

127. *See* FRANK, *supra* note 1, at 110–12.
128. *See* Gervey et al., *supra* note 31, at 17.
129. *See id.* at 19.
130. *See id.* at 21.
131. *Id.* at 18.
132. *Id.* at 26–27.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 25.

uals tend to impose greater levels of punishment for undesirable behavior and to withhold rewards for good behavior.[138] In contrast, with a malleable view of moral character, people are more likely to punish for the purpose of rehabilitation.[139] With an incremental theory, people are more likely to reward good behavior and less likely to impose as high a level of punishment for undesirable conduct.[140] People with an incremental theory use incentives to punish in a more nuanced way with the aim of changing behavior.[141]

This social psychological research highlights that implicit theories of personality and moral character can affect how particular judges find facts, draw inferences, and reason about intent, causality, and blame.[142] This research offers one explanation why different judges offer diverse factual assessments when deciding similar cases.

Further, implicit theories likely shape the degree to which a judge believes that a party's behavior was caused by stable dispositions versus the force of situations. When viewing a party's actions with an entity mindset, a judge would implicitly consider a party's character most informative, and pay greatest attention to evidence about that party's personal attributes and characteristics. In this scenario, a judge would anticipate that a party will behave consistent with past behavior—without attending closely to whether the same psychological forces will be in place in the future and without attending closely to whether a party will be interacting with the same contexts and situations. In contrast, with an incremental mindset, a judge would find most informative a party's psychological processes and the force of particular contexts or situations, and closely attend to that information. In this scenario, judges would be less likely to engage in the Fundamental Attribution Error.[143] That is, with an incremental mindset, judges would be less likely to attribute blame based upon dispositions or character traits and more likely to evaluate whether situational forces affected behavior. Lastly, the social psychological research suggests that, with an incremental mindset, a judge would tend to impose rehabilitative punishment, rather than retributive punishment.[144]

These insights are particularly significant because, in the American legal system, federal judges are now far more active in managing the pre-trial procedural phases of federal litigation. In federal civil litigation, federal district court judges now play a large role in deci-

138. *See* Chiu et al., *supra* note 25, at 933–35.
139. *See* Gervey et al., *supra* note 31, at 25; Miller et al., *supra* note 66, at 826–28.
140. *See* Chiu et al., *supra* note 25, at 933–35.
141. *See id.*
142. *See supra* Part II.
143. *See supra* Part II.
144. *See* Chiu et al., *supra* note 25, at 933–35.

phering and drawing inferences from facts in a variety of stages: including the pleading stage, the class certification stage, expert witness screening, and summary judgment.[145] Further, in criminal cases, federal district court judges are granted wide discretion when selecting and imposing sentences, especially because the federal sentencing guidelines are now advisory.[146]

B. Implicit Theories and Jurisprudence

Dualities have persisted across time in American jurisprudence: Legal Formalism versus Legal Realism,[147] Legalism versus Pragmatism,[148] Originalism versus Non-originalism.[149] Behind these dualities are different conceptions about whether American law is fixed and static versus dynamic and incremental. Some contend that jurists must approach American law as fixed and static when resolving disputes.[150] Yet legal actors—judges, legal scholars, advocates, and other officials—are acculturated in both conceptions of the law, and make use of them in different circumstances.[151]

These distinct conceptions of law largely differ in the degree to which they afford judges discretion to adapt jurisprudence to reflect societal change and changed circumstances. An entity conception of law regards law as fixed. Under this mindset, people believe that ju-

145. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 328 (2007). *See generally* Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 1–17 (2010); Quintanilla, *supra* note 10.

146. *See* 18 U.S.C. § 3553(a) (2006); *see, e.g.*, Gall v. United States, 552 U.S. 38, 51 (2007).

147. *See, e.g.*, *Introduction* in AMERICAN LEGAL REALISM xi-xv (William W. Fisher III et al., eds., 1993); Llewellyn, *supra* note 1, at 457–60; Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011).

148. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 230–65 (2008); Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177 (2010).

149. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW (1997); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Phillip Bobbitt, *The Modalities of Constitutional Argument*, CONST. INTERPRETATION 12–22 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Thomas B. Colby & Peter J. Smith, *Living Originalism,* 59 DUKE L.J. 239, 258 (2009); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

150. *See* POSNER, *supra* note 148, at 41–44 (critiquing Legalism as a theory of judicial behavior).

151. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); KARL LLEWELLYN, THE THEORY OF RULES 42–44 (Frederick Schauer ed., 2011); POSNER, *supra* note 148, at 230–31; BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, THE ROLE OF POLITICS IN JUDGING, 181–199 (2010).

rists must apply the law deductively from positive law sources—precedents, statutes, constitutional text or original intent. Judges should reason formalistically without improving rules to reflect societal change, change in institutions and social arrangements, or tailoring rules to reflect the particular circumstances of the case before them.[152]

An incremental conception of law, in contrast, regards law as dynamic. When an incremental theory of law is salient, people believe that judges must be sensitive to whether they are grappling with new problems, contexts, or situations. People believe that judges are allowed to draw on the discretion and leeway that the law affords them to address the particular patterns before them. When approaching legal questions, jurists may reason instrumentally and improve upon jurisprudence, not simply in common law cases, but also in cases involving statutes and the Constitution. This incremental conception is exemplified by pragmatism.[153] As Judge Posner has explained, this form of pragmatic adjudication turns on a concern for consequences, rather than abstract concepts or generalities.[154]

While these different conceptions of law persist in the background of American jurisprudence, judicial decision-making tends to be reasonably predictable.[155] In many circumstances, rules are clear (or clear enough) that the result of legal reasoning by officials trained in the law is reasonably certain.[156] In other circumstances, however, rules are unclear, even to jurists steeped in the law. Jurists are forced to interpret rules, to grapple with gaps, and to resolve conflicts or ambiguities when facing novel circumstances, questions, and problems.[157] In these circumstances, the law provides judges leeway to adapt jurisprudence in instrumental fashion.[158] These legalisti-

152. *See* LLEWELLYN, *supra* note 151; POSNER, *supra* note 148, at 175–76, 230–31, 254–55; Charles D. Breitel, *The Courts and Lawmaking* in LEGAL INSTITUTIONS TODAY AND TOMORROW 1–39 (1959).

153. *See* LLEWELLYN, *supra* note 151; POSNER, *supra* note 148, at 175–76, 230–31, 254–55; Breitel, *supra* note 152, at 1–39.

154. *See* POSNER, *supra* note 148, at 238.

155. *See* LLEWELLYN, *supra* note 151, at 42–44; KARL LLEWELLYN, THE COMMON LAW TRADITION 19–50 (1960); Posner, *supra* note 148, at 1179–80;.

156. *See* H.L.A. HART, *supra* note 120, at 141; LLEWELLYN, *supra* note 151, at 42–44; LLEWELLYN, *supra* note 155, at 19–50.

157. *See* LEVI, *supra* note 151, at 1–5; LLEWELLYN, *supra* note 151, at 42–44; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000* in THE NEW LAW AND ECONOMIC DEVELOPMENT 45 (David M. Trubek & Alvaro Santos eds., 2006); HART, *supra* note 120, at 128, 272–76; Llewellyn, *supra* note 1; Pound, *supra* note 147.

158. *See, e.g.*, BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 73 (1924); HART, *supra* note 120, at 272 ("[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly party indeterminate or incomplete. . . . If in such cases the judge is to reach a decision . . . he must exercise his *discretion* and *make* law

cally indeterminate cases tend to shape American law. Put another way, "[t]oday's law, insofar as it is the product of judicial decision, is the product of decisions that were stabs in the dark rather than applications of settled law."[159] This may explain why, as Judge Posner has observed, while the pragmatist label describes many American judges, most American judges are legalists in some cases and pragmatists in others.[160] This mirrors social psychological research on implicit theories: while one theory may be more chronically salient for some people, situations and contexts can shift people to hold the opposite mindset—both are plausible.[161]

The research presented in Part II provides important insight, revealing social psychological reasons why (and better, when) jurists may operate under either an entity versus incremental conception of law. Because social psychologists have not fully investigated how implicit theories affect legal reasoning and reasoning from precedent, I propose a research line be designed to better understand the conditions when these implicit theories shape judicial behavior. An initial hypothesis: when jurists operate with an entity (status quo) theory of society and social institutions, jurists would tend to believe that society and its social arrangements *have not changed*, jurists would likely draw on a *fixed conception of law*. In contrast, with an incremental theory of society and social institutions, jurists would tend to believe that society and its social arrangements *have changed*, jurists would likely draw on an *incremental conception of law*.

Humans strive for congruence, consistency, integration, and balance among various cognitions: their beliefs, values, attitudes, and implicit theories.[162] When we experience our cognitions as inconsistent, especially when the cognitions are important, we feel psychological tension—cognitive dissonance.[163] When an entity (status quo) theory of society and social institutions is salient, jurists would perceive that society, its social arrangements, norms, customs, traditions, and behaviors remain unchanged.[164] In this mindset, the most congruent cognition is an entity conception of law, where law is considered to be static, fixed, immutable, and predetermined. Within American law,

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for the case instead of merely applying already pre-existing settled law."); LEVI, *supra* note 151, at 3–4.

159. Posner, *supra* note 148, at 1180.

160. POSNER, *supra* note 148, at 231.

161. *See supra* section II.C.; *see, e.g.*, Murphy & Dweck, *supra* note 25.

162. *See* Joel Cooper, *Cognitive Consistency* in THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 99–104 (Antony S.R. Manstead & Miles Hewstone eds., 1996) (collecting social psychological studies).

163. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); Caryl E. Rusbult, *Cognitive Dissonance Theory* in THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY, *supra* note 162, at 104–08.

164. *See supra* section II.B.

this theory tends to be reflected as Formalism or Legalism in the common law, as strict textualism in statutory interpretation, and as Originalism in constitutional law.

In contrast, when an incremental theory of society or social institutions is salient, jurists would perceive that society and its social arrangements, norms, customs, traditions, and behavior have either changed or anticipate that such social institutions can be improved for the better. In this mindset, the most congruent cognition is an incremental conception of the law, where law is considered dynamic, flexible, and malleable.[165] Within American law, this theory tends to be reflected as Legal Realism or Pragmatism in the common law, as allowing the use of legislative history and purpose in statutory interpretation, and as non-Originalism or minimalism in constitutional law.

The pivotal question then becomes when—in what situations and contexts—will an entity versus incremental mindset of institutions and society be salient? The research presented in Part II reveals that social and situational forces strongly influence this psychological phenomenon.[166] Society, social groups, and organizations socialize and acculturate members in habits, belief structures, ideologies, patterns of thinking, and in implicit theories.[167] Though people are often motivated to view institutions and society as stable and the status quo as legitimate,[168] some people hold incremental theories of institutions.[169] Yet contextual and situational factors heighten entity (status quo) mindsets even for those who tend to hold incremental mindsets.[170] For example, when American society is perceived as threatened or when the legitimacy of the system is challenged, even those who often view institutions with incremental mindsets tend to shift toward entity (status quo) mindsets resistant of change.[171] Finally, on politically charged issues, political ideology might influence how jurists achieve consistency among their cognitions: for example, political ideology might influence perception and whether some jurists view the status quo as fixed and, if so, their beliefs about whether the status quo should remain unchanged.[172]

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165. *See supra* section II.B.
166. *See supra* section II.C. *See generally* Kay & Zanna, *supra* note 72, at 158–81; Murphy & Dweck, *supra* note 25, at 283.
167. *See generally* BERGER, *supra* note 123, at 47–128; BRUNER, *supra* note 30, at 33–66; MEAD, *supra* note 30, at 135–26; Berlin, *supra* note 30, at xiii-xxvii.
168. *See, e.g.*, Jost et al., *supra* note 86, at 887; Kay et al., *supra* note 87, at 422.
169. *See supra* section II.B.
170. *See supra* section II.C. *See generally*, Kay & Zanna, *supra* note 72, at 158–81; Murphy & Dweck, *supra* note 25, at 283.
171. *See* Kay & Zanna, *supra* note 72, at 158–81.
172. *See* Lawrence Baum, *Motivation and Judicial Behavior: Expanding The Scope of the Inquiry* in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING 16–17 (David Klein & Gregory Mitchell eds., 2010); E. Braman & T.E. Nelson, *Mechanism of Motivated Reasoning?: Analogical Perception in Discrimination Disputes*, 51 AM.

1. The Common Law

A vivid illustration of the tension between entity and incremental conceptions of American law is the friction between adherents of Formalism versus Legal Realism at the beginning of the twentieth century. In reasoning under the common law, on the one hand, courts apply precedents, which provide a sense of stability and certainty in the common law system. Reasoning under a system of precedent pools experience from past eras to problems in the present day.[173] On the other hand, while past experience offers a guide, the common law provides leeway for new approaches to contemporary problems.[174] Under the common law, courts are permitted to adapt jurisprudence to bring the common law in line with current social conditions. The tension between these contrasting conceptions was especially pronounced in American jurisprudence during the 1920s–40s after the tectonic societal and economic transformations brought about by the Industrial Revolution and New Deal.[175]

Christopher Langdell, dean of the Harvard Law School from 1870 to 1895, was one of the chief proponents of Formalism.[176] Formalism reflected an entity theory, or fixed mindset, of the common law, espousing the view that legal rules were fixed and mechanically applied.[177] Langdell advanced a metaphysics of the common law based

J. POL. SCI. 940 (2007). *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

173. *See* CARDOZO, *supra* note 17, at 149–50; LLEWELLYN, *supra* note 124, at 5–9; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 893–94 (1996); *cf.* Edmund Burke, *Reflections on the Revolution in France* in THE PORTABLE EDMUND BURKE 416–51 (Isaac Kramnick ed., 1999).

174. *See, e.g.*, CARDOZO, *supra* note 158, at 70, 73, 85; HART, *supra* note 120, at 273; Pound, *supra* note 5, at 606 ("The effect of all system is apt to be petrification of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon anther. This is so on all departments of learning."); Strauss, *supra* note 173, at 893–94.

175. *See generally* AMERICAN LEGAL REALISM, *supra* note 147; MAUREEN A. FLANAGAN, AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS, 1880–1920 (2007); Karl Llewellyn, *Some Realism About Realism–Responding To Dean Pound*, 44 HARV. L. REV. 1222 (1931). By no means do I suggest that all jurists in the first epoch behaved as Formalists and that all jurists in the second epoch behaved as Legal Realists. *See* TAMANAHA, *supra* note 151. Nonetheless, the social conceptions of law as more or less static and dynamic during these periods altered. During these periods philosophies and approaches in a number of disciplines changed markedly. *See generally* JOHN DEWEY, CREATIVE INTELLIGENCE, ESSAYS IN THE PRAGMATIC ATTITUDE (1917).

176. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 170–74 (1995).

177. *See* Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992); BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 183 (4th ed. 2006);

on a taxonomy harkening back to Aristotelian biology and Euclidean geometry.[178] The common law existed as a corpus of rules, with corollaries directly deducible from these antecedent rules.[179] Each legal decision fit neatly into the classification system as an example of a particular legal proposition (in much the same way that under Aristotelian biology, each species fits into a genus).[180] Legal decisions were directly deducible and determinable from the rules themselves. Langdell advanced the classification system as both a description of the common law system and a normative vision of what the common law system should aspire to be.[181] Formalism viewed jurisprudence as fundamentally fixed.[182] While the common law applied new cases to antecedent legal premises, these premises were merely "found" and applied in syllogistic fashion to resolve disputes.[183]

The dawn of the twentieth century transformed American society, art, culture, philosophy, technology, and science. During this period of flux, a progressive group of legal scholars incorporated insights from the philosophical pragmatism of William James and John Dewey, Darwin's theory of evolution, Einstein's theory of physics, and new approaches in the behavioral sciences, including experimental psychology and anthropology, into American law and legal reasoning.[184] Their scholarship questioned the entity theory of the common law, including the belief the common law deterministically derived from a taxonomy of antecedent rules.[185] Their scholarship advanced a sociological jurisprudence and proposed innovation of the common law to reflect changing conditions in American society.[186] The scholarship of this group is known as Legal Realism.[187]

Legal Realism advanced an incremental theory of the common law, one rooted in dynamic notions of judicial decision-making. Justice Holmes inspired the thinking of these scholars with his celebrated insight: "The actual life of the law has not been logic: it has been experience."[188] Legal Realism regarded the systemization of the common

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STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 3 (2d ed. 1995).

178. *See* KRONMAN, *supra* note 176, at 170–74.
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.*
183. *See generally* Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).
184. *See generally* AMERICAN LEGAL REALISM, *supra* note 147, at xi–xv.
185. *See id.*
186. *See id.*
187. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1147–48 (1999).
188. HOLMES, *supra* note 6, at 1.

law as an instrument, not as an end.[189] If Formalism reflected the fixed and final nature of Aristotle's biology, then Legal Realism reflected the dynamic and ever-changing nature of Darwin's theory of evolution. Rules were instruments of inquiry, providing the means of improving, facilitating, and clarifying the process that leads to concrete decisions. Rules operated as hypotheses to be tested and evaluated when reaching prudent decisions in particular cases.[190] One key insight was that the deductive exposition in legal decisions set forth the *result* of thinking, rather than the *operation* of thinking.[191] Deductive exposition often obscured the process of judicial decision-making and the search for solutions. As Justice Cardozo once wrote, "The problem stood before me in a new light when I had to cope with it as a judge. I found that the creative element was greater than I had fancied; the forks in the road more frequent; the signposts less complete."[192] Faith in mechanical jurisprudence provided the illusion of impersonal, objective, and rational decision-making, and the illusion of theoretical certainty. Yet Legal Realists believed that, in times of flux, theoretical certainty was myth: that practical certainty was incompatible with fixed antecedent rules and required intelligent consideration of the consequences of legal rules in particular contexts.[193]

This incremental conception of law strongly influences contemporary American legal thought. Most jurists and legal scholars agree that non-legal factors (extra-legal variables) affect judicial behavior.[194] Further, even those who generally espouse entity conceptions of statutory and constitutional law grant that, in certain contexts, common law judges may engage in instrumental reasoning.[195] Thus, the common law is often conceived of as a "moving classification system."[196] Today, judging under the common law is a process where precedents evolve, where there is a legitimate role for judgments about fairness and public policy.[197] Development and adaptation is viewed as a dynamic quality of the common law, a means for the com-

189. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23–24 (1924).
190. *See* CARDOZO, *supra* note 158, at 73; KRONMAN, *supra* note 176, at 196; Dewey, *supra* note 189, at 23–24.
191. *See* Dewey, *supra* note 189, at 23–24.
192. CARDOZO, *supra* note 158, at 57.
193. *See* LEITER, *supra* note 16, 28–30; Llewellyn, *supra* note 1, at 457–60.
194. *See supra* notes 2–4 and accompanying text; LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE xiii (1998); Charles Gardner Geyh, Can the Rule of Law Survive? Can the Rules of Law Survive Judicial Politics? (forthcoming 2012) (unpublished manuscript) (on file with author) (collecting empirical scholarship on judicial behavior); Gregory Sisk, *Book Review, The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision-Making*, 93 CORNELL L. REV. 873, 876 (2008).
195. *See* POSNER, *supra* note 148, at 84–87.
196. *See* LEVI, *supra* note 151, at 4–5.
197. *See* STRAUSS, *supra* note 149, at 38–39.

mon law to express changing conditions, social arrangements, and ideals within the community.[198]

To summarize, these different conceptions of law are subtle; and, in many cases, operate outside of awareness. Social, contextual, and situational factors likely influence the degree to which an entity or incremental theory of social institutions or society is salient in a jurist's mind, which in turn, influences the degree to which jurists approach legal questions with either static versus dynamic conceptions of law. When an entity theory is salient in a jurist's mind, the most congruent conception is an entity conception of law, emphasizing the static, fixed, final aspects of legal rules. Under this entity mindset, jurists would attend to antecedent rules without examining the open texture within them. Jurists would tend to syllogistically apply those rules to the dispute at hand.[199] Holding this mindset, jurists would likely regard the common law as mainly matured and closed. In contrast, when an incremental theory predominates, the most congruent belief is an incremental conception of law, one that allows for adaptation, innovation, and change. With an incremental mindset, jurists would perceive the conflict, gaps, and ambiguity in the common law and open texture within rules. Jurists would perceive the leeway afforded to them for instrumental consideration of public policy.

2. Statutory Interpretation

Having described how implicit theories may affect legal reasoning under the common law, I now turn to how implicit theories may shape statutory interpretation. Statutes have largely displaced the common law;[200] hence, understanding how jurists interpret statutes is critical for discerning how our society addresses the social problems of its day: civil rights, economic, consumer, and environmental, among other challenges.

Scholars have produced excellent scholarship on the myriad of legitimate modes for interpreting statutes: strict construction, purposive, and pragmatic.[201] In American law, these divergent modes of statutory interpretation coexist. Under appropriate conditions, our le-

198. *See* LEVI, *supra* note 151, at 102–04.

199. *Cf.* Pound, *supra* note 5, at 607.

200. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) ("The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."); *see also* SCALIA, *supra* note 148, at 13 ("We live in an age of legislation, and most new law is statutory law.").

201. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES LAWS AND THEIR INTERPRETATION 51 (2010); Breitel, *supra* note 152, at 1–39.

gal culture regards each as legitimate.[202] Professor Frank Cross has, therefore, aptly termed this form of interpretive diversity, interpretive pluralism.[203] The methods differ regarding the kinds of information that jurists may consider when interpreting and applying statutes.[204] Nonetheless, these methods share common ground—including, a commitment to the rule of law and democratic legitimacy.[205]

In light of this interpretive pluralism, implicit theories likely influence how jurists select among the divergent modes. All else being equal, jurists would likely select a form of statutory interpretation most congruent with the implicit theory salient in mind. When jurists view society with a status quo (entity) mindset, jurists would tend to believe that Congress anticipated the static problem at issue, addressed the problem with the precise statutory provision at issue, and that the court's role is merely to serve as a "faithful agent" applying the directions set forth in the statute.[206] The congruent jurisprudential techniques would tend to be static methods of statutory construction.

In contrast, with an incremental mindset, jurists would view dynamic societal problems as potentially unanticipated by Congress and as presenting novel and nuanced questions of statutory interpretation. Jurists would likely draw on congruent techniques of statutory interpretation that afford flexibility to accomplish the purposes of the statute—how the legislature may have solved the problem under new conditions. This mode of judicial decision-making is more closely aligned with a pragmatic and "instrumental theory" of statutory inter-

202. *See, e.g.*, Karl N. Llewellyn*, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 398-401 (1950).

203. *See* CROSS, *supra* note 201, at 167–70; Nicholas Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992); *see also* William Eskridge, Jr. & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (describing different modes of statutory interpretation).

204. WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 219–52 (2d ed. 2006).

205. *See* SOLAN, *supra* note 201, at 51; ESKRIDGE ET AL., *supra* note 204, at 219–52; Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185 (2011).

206. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116 (1998) ("[L]egislators are the lawgivers . . . [and so] courts deciding statutory cases are bound to follow commands and policies embodied in the enacted text—commands and policies the courts did not create and cannot change."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature.").

pretation.[207] Legislative context also matters. That is, an incremental mode of statutory interpretation may be chronically salient when dealing with particular statutes. For example, some federal statutes task judges with applying broad, sweeping provisions, such as the Sherman Act. Most jurists agree that such statutes are essentially common law statutes that delegate a law making function to federal courts.[208] Thus, many jurists adopt incremental theories when applying these common law statutes.

The methods most congruent with an entity mindset are strict constructionism and new textualism.[209] When drawing on these techniques of statutory interpretation, jurists look no further than the plain meaning of the statute without resorting to legislative history.[210] The text of the statute is said to bind decision-making and to express the intent of the drafters.[211] Proponents argue these methods narrow the range of judicial discretion and prevent jurists from weaving in their ideological preferences onto statutes.[212] At surface, these entity methods seem quite rigid and inflexible and seem to limit judicial discretion. Jurists are said to apply statutes syllogistically—comparing the plain meaning of the statute to the particular facts of each case—answering any lingering questions of statutory meaning from an ordinary reader's perspective supplemented with rules of interpretation.[213] Slightly below the surface, however, even these techniques offer sub-doctrinal leeway for jurists to interpret the plain meaning of statutes in light of background and context. For example, jurists may select among varied connotations of plain meanings premised on "ordinary" versus "dictionary" usage; and if dictionary usage is chosen, jurists may select among different dictionaries.[214] Nor would these methods prevent jurists from applying prior precedent on the statutory provision in dispute.[215] In this way, even strict constructionism allows leeway for statutory interpretation: at times, less contexualized (more static and entity oriented), at times more contextualized (dynamic and more incremental oriented).

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207. *See* ESKRIDGE, *supra* note 201, at 116–18; Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 3–7 (2000) (describing the "instrumentalist" approach).

208. *See* Zeppos, *supra* note 203, at 1100.

209. *See* SCALIA, *supra* note 149, at 3–47. *See generally* William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

210. *See generally* Eskridge, *supra* note 209, at 623–24.

211. *See* CROSS, *supra* note 201, at 11; SCALIA, *supra* note 149, at 3–47.

212. *See* CROSS, *supra* note 201, at 11; SCALIA, *supra* note 149, at 13.

213. *See* CROSS, *supra* note 201, at 11, 24–57; ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 183–228 (2006).

214. *See* CROSS, *supra* note 201, at 28–30.

215. *See id*.

The methods most congruent with an incremental mindset are purposivism and pragmatic modes of statutory interpretation.[216] These dynamic techniques allow jurists to consider legislative materials when grappling with novel or nuanced questions of construction. Proponents of purposivism believe jurists should resolve questions of statutory interpretation in light of legislative purposes and what the legislature likely would have intended when facing new aspects of the problem.[217] Related, the pragmatic method is oriented toward partnering with the legislature to ensure a reasonable legal system.[218] This pragmatism varies in potency, but tends to be exercised in modest fashion, tailoring legal language to circumstances in a consequentialist style of reasoning.[219] Both purposivism and pragmatism are more dynamic and flexible than strict construction and textualism and allow jurists to consider how society and social arrangements have changed.[220]

3. Constitutional Law

The Constitution, the oldest and among the shortest constitutions in the world,[221] is a broad framework for our democratic system of government. Our venerable Constitution has an enduring vitality, in part, because many constitutional provisions sweep in broad, open-textured terms—"liberty," "due process of law," "cruel and unusual punishment," "equal protection"—open to construction by each passing generation.[222] In articulating a theory of judicial review, Chief

216. *See* CALABRESI, *supra* note 200, at 164; ESKRIDGE, *supra* note 204, at 245–51; ESKRIDGE, *supra* note 201.

217. *See* ESKRIDGE, *supra* note 204, at 228–30; *see, e.g.*, Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

218. *See* CROSS, *supra* note 201, at 13, 102–33. *See generally* ESKRIDGE, *supra* note 201.

219. *See* CROSS, *supra* note 201, at 13, 102–33.

220. *See id. See generally* ESKRIDGE, *supra* note 201.

221. *See* Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399–401 (2008).

222. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 460–61 (2007); *see* Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), http://teachingamericanhistory.org/library/index.sp?document=459 ("Some men look at constitutions with sanctimonious reverence, and . . . ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well . . . It was very like the present, but without the experience of the present . . . [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.").

Justice John Marshall, famously observed the Constitution was not meant to have the

> prolixity of a legal code, its nature . . . requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a constitution we are expounding. . . . [A] constitution, intended to endure for ages to come, and consequently, to be adapted to the various crisis of human affairs.[223]

Chief Justice Marshall's pronouncement raised then, and to this day raises, the enduring question of how the Constitution may be interpreted.

Throughout history, jurists have drawn on different methods of constitutional interpretation.[224] No single modality is mandatory (i.e., the Constitution does not expressly require a single, specific technique of constitutional interpretation); and no single modality has remained ascendant across time.[225] As with statutory interpretation, interpretive pluralism best describes how the Constitution is interpreted today.[226] In some contexts, and for some constitutional provisions, jurists draw on a textual mode of constitutional interpretation, drawing on common understandings of the Constitution's text. In other contexts, and for other constitutional provisions, jurists draw on Originalism: attempting to decipher the original intent of the framers[227] or the original meaning of the Constitution as understood by the American public at the time of its adoption.[228] In still other contexts, jurists infer rules from democratic theory or the structure of the

223. McCulluch v. Maryland, 17 U.S. 316, 407 (1819).

224. *See generally* PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991); PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

225. *See, e.g.*, CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS, WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 19 (2009) ("Many people claim that the Constitution must be interpreted in their preferred way. They insist that the very idea of interpretation requires judges to adopt their own method of construing the founding document. These claims are wrong. No approach to constitutional interpretation is mandatory.").

226. *See* Laurence H. Tribe, *An Open Letter to Readers of American Constitutional Law*, 9 (Apr. 29, 2005), http://www.scotusblog.com/movabletype/archives/Tribe-Treatise-Green%20Bag%202005%20low20res.pdf (noting that divisions in constitutional interpretation "have become too plain—and too pronounced—to paper over by routine appeals to the standard operating procedures of the legislative-judicial division of authority, the routine premises of the federal-state allocation of power, and the usual methods for extracting meaning from notoriously ambiguous texts").

227. *See, e.g.*, Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811–12 (1983); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).

228. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999); SCALIA, *supra* note 149, at 38; Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 531 (2008).

Constitution, or draw on a pragmatic method that turns on the consequences for how constitutional provisions are applied. In other circumstances, jurists stand by well-established constitutional precedents and understandings.

Originalism is a modality of constitutional interpretation that is often congruent with an entity conception of law (in particular, the moderate varieties described below).[229] Originalism purports to interpret the meaning of the Constitution's broad contours as fixed, static, and unchanging: "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."[230] Proponents advance this technique of constitutional interpretation on the theory that it constrains judicial discretion and results in a fixed and determinate form of constitutional interpretation across time.[231] Under this modality, a jurist finds a right to exist in the Constitution only if that right is expressly provided in the Constitution or was intended by the Constitution's framers or ratifiers. This modality presumes that amending the Constitution is the only legitimate means for altering constitutional understandings.

Yet Originalism cannot describe many vistas of constitutional law and would result in tectonic shifts in constitutional law if pressed into these well-settled areas. To name a few, Originalism would abrogate the protection against sex discrimination under the Equal Protection Clause,[232] application of the Equal Protection Clause to the federal government, application of the Equal Protection Clause to segregation in public schools,[233] and expansion of the Commerce Clause to permit the federal government to regulate much commercial activity.[234]

In contrast, non-Originalism represents several diverse modalities of constitutional interpretation that are congruent with an incremen-

229. SCALIA, *supra* note 149, at 3, 38. For a history of Originalism, see John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83–86 (2003); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 908 (2008) ("The idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, emerged only in the 1970's and 1980's."); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 94–110 (2005).

230. South Carolina v. United States, 199 U.S. 437, 448 (1905).

231. *See* SCALIA, *supra* note 149, at 3, 38.

232. *Compare* The Slaughter-House Cases, 83 U.S. 36 (1872) (holding that the equal protection clause was designed to protect only racial minorities), *with* Reed v. Reed, 404 U.S. 71 (1971) (applying equal protection clause to invalidate gender discrimination).

233. While the Congress that ratified the Fourteenth Amendment approved segregation in District of Columbia schools, see RONALD DWORKIN, LAW'S EMPIRE 360 (1986), segregation in schools is of course now illegal and unconstitutional. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

234. *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006).

tal conception of law.[235] These incremental techniques view American constitutional law as changing, dynamic, and as evolving to address current conditions and new problems: "[i]t is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."[236] These incremental modes view any decipherable original understanding as a hypothesis for understanding the Constitution, but one that must be tested in light of new experience. In characterizing non-Originalism approaches as incremental, I am primarily referring to the tradition of redemptive constitutionalism,[237] the common law method of constitutional interpretation,[238] and the pragmatic methods of constitutional decision-making articulated by Justice Breyer[239] and Judge Posner,[240] though as recently articulated Professor Balkin's theory of framework Originalism, which allows for living constitutionalism also connects with an incremental mindset of the Constitution.[241] A rational minimalist approach to constitutional jurisprudence is consistent to an incremental conception of the law, in so far as the approach unfolds deliberately and slowly from prior precedents, while making room for subtle shifts and social evolution.[242]

The critical point is that American society influences the degree to which jurists select between entity and incremental modalities of constitutional law.[243] As Sunstein has argued, "constitutional change has occurred through the judgments of many minds and succeeding generations . . ."[244] When an entity (status quo) theory of society is

235. I place to one side the morality-based modality urged by Ronald Dworkin. *See* Ronald Dworkin, *Introduction: The Moral Reading and the Majoritarian Premise* in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–4, 7–11 (Cambridge: Harvard Univ. Press 1997).

236. Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

237. *See* Jack M. Balkin & Reva B. Siegel, *Introduction* in THE CONSTITUTION IN 2020 1–7 (Oxford Univ. Press 2009).

238. *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

239. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

240. *See* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

241. *See* Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549 (2009).

242. *See*, *e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1998) ("Let us describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, as "decisional minimalism.").

243. *Cf.* BARRY FRIEDMAN, THE WILL OF THE PEOPLE, HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14–18 (2009); Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465, 1473 (2006).

244. SUNSTEIN, *supra* note 225, at 3.

salient in mind, jurists would likely believe American society has not changed on a particular issue—its constitutional understandings, practices, norms, institutions, social arrangements, and ways of behaving. A jurist with an entity (status quo) theory of society would likely draw on a congruent modality of constitutional law that is static. With an entity (status quo) mindset, a jurist may tend to draw on well-settled precedent or moderate versions of Originalism that do not alter constitutional understandings.[245] In contrast, when an incremental mindset is salient in mind, jurists would likely believe American society has transformed on a particular issue—that the American public has markedly changed its practices, norms, institutions, social arrangements, and ways of behaving—or that conditions of American government have markedly changed. A jurist with an incremental theory would draw on a congruent mode of constitutional interpretation that is dynamic. This technique would be sufficiently flexible to accommodate the transformations in American society. With an incremental mindset, jurists may draw on non-Originalism techniques of constitutional interpretation.

Of course, some constitutional issues are politically and attitudinally charged, and for some jurists, political ideology may well engulf the field of perception and cognition,[246] including the determination of what counts as a well-settled constitutional understanding and whether American society has changed practices or constitutional understandings on a particular issue. I have articulated this social psychological account of the ways in which implicit theories of society may interact with judicial interpretation as a hypothesis to be tested and refined. Inquiry will be directed toward evaluating the conditions under which implicit theories influence the selection of congruent modalities of constitutional interpretation. I offer this social psychological bridge between society and constitutional modalities as *descriptive* theory to be experimentally examined, rather than as a *prescriptive* theory.[247]

245. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("[I]n a crunch I may prove a faint-hearted originalist.").

246. *See* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 18–25 (2011).

247. Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's The Will of the People*, 13 U. PA. J. CONST. L. 413 (2010). For another day, I leave the normative implications of social psychological research on situated cognition and implicit theories. *See generally* ROBIN WEST, NORMATIVE JURISPRUDENCE AN INTRODUCTION (Cambridge Univ. Press 2011).

IV. STUDYING THE SOCIAL DIMENSION OF JUDICIAL DECISION-MAKING

We return where we began, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[248] The experimental psychology I have introduced suggests that implicit theories about the static versus dynamic aspects of human nature, social arrangements, and society are part and parcel of the psychological process that Justice Holmes described—shaping the deep, often unconscious, presuppositions and expectations that jurists bring to legal decisions. These implicit theories likely shape how judges find facts in particular disputes, shape the inferences judges draw, and the punishment judges impose. These implicit theories likely also shape how jurists approach novel questions under the common law, statutes, and the Constitution, especially when jurists perceive that American society and its social arrangements have transformed.

This Article has elaborated why the social psychological research on implicit theories is pivotal for understanding judicial behavior. I have outlined a perspective that focuses on the social psychological and situational dimensions of judicial behavior, one connecting judging with society and perceptions of change in society. In doing so, I have introduced science on how social, contextual, and situational forces likely influence judicial decision-making, and discussed the theory of situated cognition.[249]

The degree to which implicit theories affect judicial behavior is an empirical question, one warranting experimental research. These subtle psychological processes would be difficult to investigate using traditional methods of empirical legal research, which apply statistical methods to evaluate federal case law coded for a variety of factors. For example, recent empirical legal studies on how public opinion shapes judicial behavior have lamented the difficulty of identifying a causal mechanism in the relation between changes in public opinion and changes in patterns of judicial behavior.[250]

A fruitful line of inquiry will be psychological experiments. Research on implicit theories has shown that many of the judgments and reactions related to implicit theories can be experimentally induced by manipulating participants' implicit theories.[251] Psychological experiments would, therefore, allow scholars to draw causal inferences and

248. HOLMES, *supra* note 6, at 1.
249. *See* Smith, *supra* note 9, at 126–127.
250. *See, e.g.*, Lee Epstein & Andrew Martin, *supra* note 15.
251. *See, e.g.*, Murphy & Dweck, *supra* note 25, at 284.

observe, with relatively little difficulty, whether or not the independent variable caused changes in the dependent variable. With other designs, however, the causal relation and psychological mechanism cannot be easily determined. Through random assignment to condition and controlled manipulations of independent variables, experiments provide unambiguous inferences about causality, thus the outcomes of experiments are essential to consider when exploring the underlying mechanisms by which jurists make decisions.[252]

In conclusion, by investigating the social and situational dimension of judicial decision-making, we hope one day to understand the processes by which American society comes to shape law by acculturating legal actors. This research may one day broaden and deepen our understanding of how American law can seem at once both static and dynamic.

252. *See* ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY—METHODOLOGY FOR BEHAVIORAL SCIENCE 26–70 (Transaction Pub. 2004); CHAVA FRANKFORT-NACHMIAS, ET AL., RESEARCH METHODS IN THE SOCIAL SCIENCES 92–93 (Worth Pub. 6th ed. 2000).