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

Victor D. Quintanilla
Indiana University Maurer School of Law, vdq@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Judges Commons, and the Law and Psychology Commons

Recommended Citation
https://www.repository.law.indiana.edu/facpub/713

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
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? To examine this question,

© Copyright held by the NEBRASKA LAW REVIEW.

* 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

611
large-scale qualitative and quantitative studies have flourished. 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. 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. 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-


JUDICIAL MINDSETS

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. This research has primarily examined the cognitive and motivational dimensions of judging, i.e., heuristics, motivation, biases, schemas, attitudes, and motivated cognition. 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. This research agenda investigates the social nature of judging from the perspective of “Behavioral Realism.” 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. 606 (1908).


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


approach draws on multiple techniques, including experimental methods and theories in the field of social psychology. The field of social psychology offers a unique vantage point to examine how societal forces, social environments, and situations influence judging. For the social psychologist, the level of analysis is the individual in the context of a social situation. The field studies the individual within social context to understand how social contexts, situations, and environments influence attitudes, cognitions, and behavior. 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. Because the field draws largely on experiments to investigate social and situa-
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. 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." 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. 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. 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).

19. See infra section II.C.
tional factors influence whether we adopt fixed versus dynamic mindsets.\(^2\)

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.\(^2\)^\(^1\) 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.\(^2\)^\(^2\) 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.\(^2\)^\(^3\) Experimental research is warranted to investigate how this science may enrich our understanding of legal reasoning and judicial behavior.\(^2\)^\(^4\)

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.\(^2\)^\(^5\) 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.\(^2\)^\(^6\) 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.
\(^26.\) 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
JUDICIAL MINDSETS

liefs powerfully shape their perception, judgment, and decision-making. These mindsets influence the meaning people draw from their observations of others and how they understand their own experiences. The theories are implicit because, unlike most scientific theories, the theories are rarely elaborated and often operate outside of awareness. 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. These mindsets shape people's attributions and inferences, along with social events.

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. One theory is termed an entity mindset. When an entity theory is salient, people believe human nature is static, fixed, immutable, and unchangeable. 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.
32. See Murphy & Dweck, supra note 25, at 283.
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. 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.

The second theory is an incremental mindset. When an incremental theory predominates, people believe human nature is malleable, changeable, and consisting of qualities that can be enhanced and developed over time. 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. When this theory is salient, people expect that human nature and moral conduct are dynamic qualities that have the potential to change across situations. Those holding an incremental theory tend to believe a person can substantially change the kind of person that he or she is.

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. 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. 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. For example, when an entity theory predominates, we would

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 id.
42. See id.
43. See id.
44. See Ross & Nisbett, supra note 12, at 34.
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. 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.

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. 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. 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. 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. For example, subjects were provided with a brief scenario in which they observed Jack behaving friendlier than Joe. When an entity mindset predominated, subjects believed that Jack would always behave friendlier than Joe. In contrast, when an incremental mindset predominated, subjects predicted that Jack's friendly behavior would not generalize across situations. 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.

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.
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. With an entity theory, people attend more closely to character-trait consistent information. 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. When an entity mindset predominates, people pay closer attention to and readily recall stereotype-consistent information. 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). 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. 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. In contrast, when an incremental mindset was salient, subjects drew on and paid attention to both stereotype-consistent and stereotype-inconsistent information. 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.


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. 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. 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. 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. 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.

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. 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)).


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

Dweck and her colleagues have researched implicit theories about social institutions (e.g., systems, rules, norms, hierarchies). 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. With an entity mindset, people often treat as most important conformity to stable norms, role expectations, hierarchies, and rules within a system. 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. People believe that social institutions can be shaped and improved for the better. 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.

These contrasting implicit theories are interrelated with differences between conservative and liberal ideologies: attitudes toward tradition versus social change. Conservative ideology is more closely associated with an entity view of institutions and society, exalting tradition, order, hierarchy, authority, and the status quo. 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.

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.
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. 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 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. 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. 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.

Unlike a status quo (entity) theory, when people hold an incremental theory of social institutions and society, people tend to believe that...
social institutions and society can be changed for the better. And these judgments about the likelihood of change are often interrelated with the desirability for change. In other words, when an incremental theory of social arrangements is salient, people tend to view change as desirable. 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.

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. 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. Threats occur in many forms, ranging from terrorist attack, to economic sturm and drang, to public criticism of the legitimacy of the system. This may explain why, even among liberals, the shock of the 9/11 terrorist attacks resulted in increased nationalism and support for conservative policies. Under conditions of pronounced uncertainty, moreover, people who tend to hold an incremental mindset often shift to a status quo mindset. 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.

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.

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.
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. The emerging paradigm of situated cognition is useful for understanding these dynamic processes. Experiences in social environments subtly shape human cognitions, attitudes, and behaviors. 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.

Murphy and Dweck have conducted experiments investigating this situational dimension of mindsets. 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. 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. People interact with environments that reflect implicit theories about intelligence, personality, moral character, or society. These implicit theories may, in turn, shape how people operate within those environments.

Implicit theories—held at the group level—shape the inferences and decisions of individuals. 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?").


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. 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. For example, Murphy and Dweck investigated organizational implicit theories about the static versus dynamic nature of intelligence. 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. 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." 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. And after displaying an organizational implicit theory, people drew on the theory to evaluate others in unrelated environments. 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.

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 piece-meal through the judicial process." 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

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.
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. 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. 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." 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. 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. A judge's unique traits, dis-

121. See Lawrence Friedman, A History of American Law 19 (2d ed. 1985); Berlin, supra note 30, at xii-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).
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. 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. In numerous studies, Dweck and colleagues provided participants with summary transcripts of a murder trial, and experimentally manipulated impressions about the defendant’s respectability. 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. 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. These participants found the defendant’s appearance, interests, and style of clothing highly informative of the defendant’s global moral character. 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. In contrast, with an incremental theory of moral character, subjects were unmoved by these character traits. 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. 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.

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

...uals tend to impose greater levels of punishment for undesirable behavior and to withhold rewards for good behavior. In contrast, with a malleable view of moral character, people are more likely to punish for the purpose of rehabilitation. 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. People with an incremental theory use incentives to punish in a more nuanced way with the aim of changing behavior.

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. 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. 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.

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-


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

rists must apply the law deductively from positive law sources—prece-
dents, 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.\footnote{152}

An incremental conception of law, in contrast, regards law as dy-
namic. 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 al-
lowed to draw on the discretion and leeway that the law affords them
to address the particular patterns before them. When approaching le-
gal questions, jurists may reason instrumentally and improve upon
jurisprudence, not simply in common law cases, but also in cases in-
volving statutes and the Constitution. This incremental conception is
exemplified by pragmatism.\footnote{153} As Judge Posner has explained, this
form of pragmatic adjudication turns on a concern for consequences,
rather than abstract concepts or generalities.\footnote{154}

While these different conceptions of law persist in the background
of American jurisprudence, judicial decision-making tends to be rea-
sonably predictable.\footnote{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.\footnote{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 am-
biguities when facing novel circumstances, questions, and problems.\footnote{157}In these circumstances, the law provides judges leeway
to adapt jurisprudence in instrumental fashion.\footnote{158} These legalisti-

\footnotesize{\begin{footnotes}
\footnote{152. \textit{See} Llewellyn, supra note 151; Posner, supra note 148, at 175-76, 230-31,
254-55; Charles D. Breitel, \textit{The Courts and Lawmaking in Legal

\footnote{153. \textit{See} Llewellyn, supra note 151; Posner, supra note 148, at 175-76, 230-31,
254-55; Breitel, \textit{supra} note 152, at 1-39.


\footnote{155. \textit{See} Llewellyn, \textit{supra} note 151, at 42-44; Karl Llewellyn, \textit{The Common Law
Tradition} 19-50 (1960); Posner, \textit{supra} note 148, at 1179-80;.

\footnote{156. \textit{See} H.L.A. Hart, \textit{supra} note 120, at 141; Llewellyn, \textit{supra} note 151, at 42-44;
Llewellyn, \textit{supra} note 155, at 19-50.

\footnote{157. \textit{See} Levi, \textit{supra} note 151, at 1-5; Llewellyn, \textit{supra} note 151, at 42-44; Duncan
Kennedy, \textit{Three Globalizations of Law and Legal Thought: 1850-2000} in \textit{The
New Law and Economic Development} 45 (David M. Trubek & Alvaro Santos
eds., 2006); Hart, \textit{supra} note 120, at 128, 272-76; Llewellyn, \textit{supra} note 1;
Bound, \textit{supra} note 147.

\footnote{158. \textit{See}, e.g., Benjamin N. Cardozo, \textit{The Growth of the Law} 73 (1924); Hart, \textit{supra}
note 120, at 272 ("[I]n any legal system there will always be certain legally unreg-
ulated 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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{incremental conception of law}.

Humans strive for congruence, consistency, integration, and balance among various cognitions: their beliefs, values, attitudes, and implicit theories.\textsuperscript{162} When we experience our cognitions as inconsistent, especially when the cognitions are important, we feel psychological tension—cognitive dissonance.\textsuperscript{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.\textsuperscript{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,

\textsuperscript{159} Posner, \textit{supra} note 148, at 1180.
\textsuperscript{160} \textit{Posner, supra} note 148, at 231.
\textsuperscript{161} \textit{See supra} section II.C.; \textit{see, e.g.}, Murphy & Dweck, \textit{supra} note 25.
\textsuperscript{164} \textit{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. 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. Society, social groups, and organizations socialize and acculturate members in habits, belief structures, ideologies, patterns of thinking, and in implicit theories. Though people are often motivated to view institutions and society as stable and the status quo as legitimate, some people hold incremental theories of institutions. Yet contextual and situational factors heighten entity (status quo) mindsets even for those who tend to hold incremental mindsets. 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. 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.

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.
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

---


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 petrifaction 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 Progressivism, 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).


on a taxonomy harkening back to Aristotelian biology and Euclidean geometry. The common law existed as a corpus of rules, with corollaries directly deducible from these antecedent rules. 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). 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. Formalism viewed jurisprudence as fundamentally fixed. While the common law applied new cases to antecedent legal premises, these premises were merely “found” and applied in syllogistic fashion to resolve disputes.

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. Their scholarship questioned the entity theory of the common law, including the belief the common law deterministically derived from a taxonomy of antecedent rules. Their scholarship advanced a sociological jurisprudence and proposed innovation of the common law to reflect changing conditions in American society. The scholarship of this group is known as Legal Realism.

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.” Legal Realism regarded the systemization of the common

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.
184. See generally American Legal Realism, supra note 147, at xi–xv.
185. See id.
186. See id.
188. Holmes, supra note 6, at 1.
law as an instrument, not as an end. 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. One key insight was that the deductive exposition in legal decisions set forth the result of thinking, rather than the operation of thinking. 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." 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.

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. 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. Thus, the common law is often conceived of as a "moving classification system." 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. 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 199, at 23–24.
192. Cardozo, supra note 158, at 57.
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. 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; 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. In American law, these divergent modes of statutory interpretation coexist. Under appropriate conditions, our le-

---

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. Professor Frank Cross has, therefore, aptly termed this form of interpretive diversity, interpretive pluralism. The methods differ regarding the kinds of information that jurists may consider when interpreting and applying statutes. Nonetheless, these methods share common ground—including, a commitment to the rule of law and democratic legitimacy.

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. 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-


204. William N. Eskridge et al., Legislation and Statutory Interpretation 219–52 (2d ed. 2006).


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.”).
Legal 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. 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. When drawing on these techniques of statutory interpretation, jurists look no further than the plain meaning of the statute without resorting to legislative history. The text of the statute is said to bind decision-making and to express the intent of the drafters. Proponents argue these methods narrow the range of judicial discretion and prevent jurists from weaving in their ideological preferences onto statutes. 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. 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. Nor would these methods prevent jurists from applying prior precedent on the statutory provision in dispute. In this way, even strict constructionism allows leeway for statutory interpretation: at times, less contextualized (more static and entity oriented), at times more contextualized (dynamic and more incremental oriented).


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


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.


215. See id.
The methods most congruent with an incremental mindset are purposivism and pragmatic modes of statutory interpretation. 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. Related, the pragmatic method is oriented toward partnering with the legislature to ensure a reasonable legal system. This pragmatism varies in potency, but tends to be exercised in modest fashion, tailoring legal language to circumstances in a consequentialist style of reasoning. 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.

3. Constitutional Law

The Constitution, the oldest and among the shortest constitutions in the world, 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. 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.


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.jsp?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

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.”).
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-


\(^{230}\) 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).

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." 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, the common law method of constitutional interpretation, and the pragmatic methods of constitutional decision-making articulated by Justice Breyer and Judge Posner, 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. 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.

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


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.”).


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. 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, 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.

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." 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.

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.

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. 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 indepen-
dent 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 condi-
tion and controlled manipulations of independent variables, experi-
ments 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 dimen-
sion of judicial decision-making, we hope one day to understand the
processes by which American society comes to shape law by accultur-
ating 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 Behav-
ioral Science 26–70 (Transaction Pub. 2004); Chava Frankfort-Nachmias, et
2000).