

Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption about Human Behavior

*Michael J. Kaufman**

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* Professor of Law and Associate Dean for Academic Affairs at Loyola University Chicago School of Law. I am grateful to Seattle University School of Law for hosting an outstanding colloquium regarding the 25th Anniversary of the Supreme Court's Summary Judgment Trilogy. I am also grateful to the *Loyola University Chicago Law Journal* for publishing the symposium articles. In particular, I wish to thank Professor Brooke Coleman for her vision and leadership in creating a forum for dialogue about this critical aspect of civil litigation. I thank as well each of the outstanding scholars who participated in the symposium for their exceptional research and insight into summary judgment, including Judge Lee Rosenthal, Jeff Stempel, Suja Thomas, Steve Gensler, Ed Brunet, Linda Mullinex, and Norman Spaulding. Thanks also to *Loyola University Chicago Law Journal* Editor-in-Chief Bruce Van Baren and Executive Editor of Lead Articles Wes Webendorfer, and to Michelle Burwell and John M. Wunderlich for their outstanding editorial and research assistance.

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I. INTRODUCTION

As we reflect upon the influence of the Supreme Court's summary judgment trilogy,¹ we should recall Elie Wiesel's warning: "[W]e must not see *any* person as an abstraction. Instead, we must see in every person a universe with its own secrets, with its own treasures, with its own sources of anguish and with some measure of triumph."² In this Article, I suggest that the Supreme Court's opinion in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*³ is particularly influential because it has encouraged the federal courts to approach summary judgment by treating human beings as abstractions. *Zenith* enabled those courts to prejudge factual issues based on a presumption about human behavior that is: (1) profound, (2) pervasive, and (3) problematic.⁴

1. The trilogy refers to three Supreme Court opinions regarding summary judgment issued in the spring of 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. Elie Wiesel, *Foreword* to NAZI DOCTORS AND THE NUREMBURG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION, at ix (George J. Annas & Michael A. Grodin eds., Oxford Univ. Press 1992).

3. 475 U.S. 574 (1986).

4. In her path-breaking work, Professor Suja Thomas has brilliantly demonstrated that the Supreme Court's approach to summary judgment constitutes an unconstitutional usurpation of the fact-finding role of the jury, in violation of the Seventh Amendment. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007); Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA

This Article begins by showing that *Zenith* promulgates an evidentiary presumption that is profound because that presumption incorporates a judicial predetermination about the essence of human nature, human behavior, and human motivation.⁵ In particular, the Supreme Court in *Zenith* invites the federal courts to see human beings as abstractions by promulgating a strong presumption that persons and businesses make purely rational choices with a singular intent to maximize their wealth. Part III then demonstrates that *Zenith*'s rationality presumption has become pervasive.⁶ Federal courts have transported the presumption of human rationality into procedural stages before summary judgment and into substantive areas beyond antitrust.⁷ In Part IV, this Article shows that *Zenith*'s judicial rationality presumption is problematic because the view of human nature on which it is based has been discredited in the twenty-five years since the trilogy.⁸

The overwhelming evidence from behavioral science confirms Elie Wiesel's admonition: we must not see *any* person as an abstraction. Human behavior is not so predictably rational as to justify any judicial presumption of rationality—let alone one that would prevent a jury from resolving quintessential fact questions about human behavior, motives, and credibility. Finally, Part V concludes by suggesting that the problematic behavioral model of rational wealth-maximization has permeated the scholarship regarding summary judgment itself.⁹

II. ZENITH PROMULGATES A BEHAVIORAL PRESUMPTION THAT IS PROFOUND

In his outstanding article in this Symposium issue, Professor Stempel refines the scholarship demonstrating that the Supreme Court's trilogy has empowered federal judges to approach summary judgment with "cognitive illiberalism."¹⁰ Professor Stempel and others define that concept as the "failure to recognize the connections between

L. REV. 1667, 1671–72 (2000). In this Article, I attempt to build on Professor Thomas's scholarship by suggesting the genius of the framers in presenting to the jury the role of resolving questions of fact, particularly those involving nuances and multi-layered questions about human behavior, lies in the jury's unique ability to resolve complex issues that go to the heart of what it means to be human.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part III (A)–(B).

8. See *infra* Part IV.

9. See *infra* Part V.

10. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 651, 654–55 (2012).

perceptions of societal risk and contested visions of the ideal society.”¹¹ Under this concept, we are unable or unwilling to perceive the possibility that persons with different cultural experiences perceive things differently.¹² Professor Stempel broadens contemporary understanding of cognitive illiberalism: not only are judges unable or unwilling to accept the possibility that people with different cultural experiences would perceive the same set of facts in a different way, but Professor Stempel also astutely shows that judges are blind to the degree to which similarly situated persons belonging to the same demographic groups can reasonably disagree about a set of facts.¹³

This cognitive illiberalism¹⁴ is a particular problem in the context of the judicial resolution of summary-judgment motions. When judges resolve a dispute on a motion for summary judgment, they must draw on their own experience and common sense to drive decision-making. The problem with asking judges to rely on their experience and common sense is that experience *shapes* our common sense: persons of different backgrounds, and even similar backgrounds as Professor Stempel shows,¹⁵ see things—literally—very differently.¹⁶ Judges do

11. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009); see also Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117–18 (2007) (discussing cognitive illiberalism).

12. Professor Donald Braman explains how cultural cognition can shape our view of the “reasonable person” standard under the law:

When deliberating about what course of action is just, individuals will rarely have direct access to the answers themselves. Instead, they must judge whether the stories in which the information is embedded are plausible and are consistent with one another. And when interpreting a legal standard, they must consider which of the norms implicit in the standard are relevant, given the facts as they know them. All the empirical evidence we have suggests that persons will do this through interlocking social and cognitive mechanisms that cause them to rely on a culturally contingent situation sense; an implicit knowledge of how the material and social world works.

Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1468 (2010).

13. Stempel, *supra* note 10, at 644–45; see also Braman, *supra* note 12, at 1463 (expounding that even when jurors are confronted by the same set of facts, their interpretation of those facts is colored by their cultural heritage).

14. Professor Stempel uses the term “cognitive illiberalism” more broadly than just blindness to the differing views of those in different demographic views, and hence, he eschews the term “cognitive illiberalism” in favor of terms such as the “false certainty bias” or “consensus bias,” terms that he claims do not “rely so heavily on race, gender, and ethnic differences or use a word that has become problematic because of years of imprecise political rhetoric.” Stempel, *supra* note 10, at 635. This Article likewise uses “cognitive illiberalism” in the broader sense employed by Professor Stempel.

15. Stempel, *supra* note 10, at 644–45.

16. RICHARD A. POSNER, *HOW JUDGES THINK* 67–68 (2008) (arguing that judges’ cultural backgrounds and political leanings subconsciously affect how they view a case).

not always recognize this problem and are prone to cognitive illiberalism, or a false certainty bias in which they neglect to account for the ways that their individual experience shapes their common sense.¹⁷

The problem of cognitive illiberalism, which Professor Stempel persuasively explores, however, may be even more profound than we can imagine. *Zenith* creates a judicial bias in favor of a particular understanding of human behavior, human motivation, and human nature: that persons and businesses predictably engage in rational, wealth-maximizing behavior.¹⁸ In *Zenith*, the Supreme Court held that summary judgment was proper in favor of Japanese manufacturers and distributors of consumer electronic products on the claim that they conspired to set predatory prices in the American market with an intent to monopolize that market.¹⁹ The plaintiffs argued that the Japanese firms conspired to fix and maintain artificially high prices in Japan while cutting prices in American markets; the Japanese firms would then use their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and drive the other businesses from the American market.²⁰

In support of their claim, the plaintiffs produced an expert who showed how the plaintiffs were harmed. First, the plaintiffs' expert explained

that the price-raising scheme in Japan resulted in lower consumption of [the Japanese firms'] goods in that country, and the exporting of more of [the Japanese firms'] goods to this country, than would have occurred had prices in Japan been at the competitive level. Increasing exports to this country resulted in depressed prices here, which harmed [the plaintiffs].²¹

Second, the plaintiffs' expert showed that the Japanese firms "exchanged confidential proprietary information and entered into agreements such as the five-company rule with the goal of avoiding

17. Dan M. Kahan et al., *supra* note 11, at 842–43. The false certainty bias is consistent with Kahneman's path-breaking research demonstrating that persons are prone to overconfidence and that they harbor an illusion of their own validity. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 209–12 (2011) (illustrating cognitive illusions in context of stress test for army leadership positions).

18. See generally GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 3–14 (1976) (defining the economic model of human behavior).

19. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986). A horizontal conspiracy to engage in predatory pricing is a per se violation of the antitrust laws. 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

20. *Zenith*, 475 U.S. at 584.

21. *Id.* at 601–02 (White, J., dissenting).

intragroup competition in the United States market.”²² The expert opined that the Japanese firms’ restrictions on intragroup competition caused the plaintiffs to lose business that they would not have lost had the Japanese firms competed with one another.²³

Nonetheless, the district court held that summary judgment was proper for the Japanese firms because “some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents,” and “the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market, and not to monopolize it.”²⁴ The Third Circuit reversed because in the court’s view, the plaintiffs produced both direct and indirect evidence of an illicit agreement to fix prices.²⁵

The Supreme Court, however, held that the district judge properly entered summary judgment for the defendants.²⁶ The Court reasoned that if the defendants had “no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, [then] the conduct does not give rise to an inference of conspiracy.”²⁷ The Court further declared that “expert opinion evidence of below-cost pricing has little probative value in comparison with economic factors that suggest . . . that such conduct is irrational.”²⁸ In particular, “if the factual context renders [the plaintiff’s] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”²⁹ According to the Court, “lack of [economic] motive bears on the range of permissible conclusions” that can be found by a jury from “ambiguous” evidence.³⁰ The district court therefore properly entered summary judgment because no reasonable jury could infer from merely circumstantial evidence that the defendants engaged in irrational economic behavior.

In reaching its result, the Supreme Court presumed that businesses naturally engage in rational wealth-maximizing behavior.³¹ The Court

22. *Id.* at 602.

23. *Id.*

24. *Id.* at 579 (majority opinion).

25. *Id.* at 580–82.

26. *Id.* at 598.

27. *Id.* at 596–97.

28. *Id.* at 594 n.19.

29. *Id.* at 587.

30. *Id.* at 596.

31. *See id.* at 595 (“[A]s presumably rational businesses, petitioners had every incentive not to

next concluded that no rational wealth-maximizing institution would enter into a long-term agreement to set below-cost pricing because no institution would expect to recover substantial short-term losses with uncertain long-term gains or would trust their coconspirators to maintain their agreement.³² In support of this declaration, the Court cited Robert Bork's textbook on antitrust laws, *The Antitrust Paradox: A Policy at War with Itself*.³³ Robert Bork, and the Chicago School of Law and Economics more generally, argued that predatory pricing was an irrational strategy for trying to gain or maintain a monopoly and, therefore, companies are unlikely to adopt predatory pricing in practice.³⁴ The Court accepted Bork's extra-judicial view of economic behavior and found that the contrary view offered by the plaintiffs' expert was not worthy of jury consideration.³⁵

The Supreme Court's presumption that no rational entity would engage in predatory-pricing behavior alleged in the case also led the Court to erect a novel evidentiary standard: In response to the summary-judgment motion, the plaintiffs adduced "direct evidence" of an agreement by the defendants to fix maximum prices in Japan, as well as evidence of their actual below-cost pricing practices and success in the U.S. market.³⁶ In fact, the plaintiffs had garnered admissions from the defendants—direct evidence—of their agreement to set prices in the Japanese market.³⁷ According to the Court, however, that direct

engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains.").

32. *Id.* at 597.

33. *Id.* at 589 (citing ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 144 (1978)).

34. BORK, *supra* note 33, at 144–45. Robert Bork did not argue that predatory pricing was impossible, however, but stressed that it was unlikely: "[T]here seems to be nothing inherently impossible in the theory [of predatory pricing]. The issue is the probability of the occurrence of predation and the means available for detecting it." *Id.* at 145; *see also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981) (similarly explaining that predatory pricing is unlikely under a traditional economic model of behavior); Paul Milgrom & John Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. ECON. THEORY 280, 280–81 (1982) (same); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 186 (1976) (same).

35. *Zenith*, 475 U.S. at 594 n.19.

36. *Id.* at 594–95.

37. The plaintiffs offered evidence that the Japanese firms entered into "check price agreements: formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry that fixed minimum prices for products exported to the American market." *Id.* at 581. The plaintiffs also offered evidence that the defendants distributed their products in the United States according to a "five company rule": each Japanese producer was allowed to sell to only five American distributors. *Id.* The Supreme Court held that this evidence was not direct evidence of antitrust violation for three reasons: First, the antitrust laws do not regulate the competitive conditions of other nations' economies; second, the plaintiffs could not recover

evidence of an agreement to fix prices in Japan was only “circumstantial evidence” of an agreement to set predatory prices in the U.S. market.³⁸ In the Court’s construct, therefore, the plaintiffs had offered only circumstantial evidence of an agreement to engage in predatory pricing in the American market. The Court then concluded that no reasonable jury could infer from this circumstantial evidence that the defendant engaged in irrational economic behavior.³⁹ After *Zenith*, plaintiffs seeking to avoid summary judgment on their claims that defendants conspired to set predatory prices with an intent to monopolize must present more than circumstantial evidence.

Although the Supreme Court’s opinion addressed the evidentiary burden incumbent on the nonmoving party at summary judgment, its result was driven by its fundamental understanding of human behavior. The Court’s reasoning proceeded as follows:

- (1) Federal Rule of Civil Procedure 56 requires courts to enter summary judgment if there is no genuine dispute of material fact such that judgment becomes proper as a matter of law;
- (2) The plaintiffs as the nonmoving party have the burden of presenting admissible evidence demonstrating a genuine issue of material fact for trial;
- (3) To meet that burden, the plaintiffs must provide evidence from which a reasonable jury could find in its favor by the burden of proof at trial, generally a preponderance of the evidence;
- (4) The plaintiffs presented circumstantial evidence that the defendants had intentionally entered into an agreement to set predatory prices in the U.S. market;
- (5) Circumstantial evidence is evidence from which there are at least two reasonable inferences;
- (6) The circumstantial evidence provided by plaintiffs gives rise to two reasonable inferences: (a) a jury could infer from the plaintiffs’ circumstantial evidence that the defendants unlawfully conspired to set predatory prices with an intent to monopolize the U.S. market; or (b) a jury could infer from the plaintiffs’ circumstantial evidence that the defendants lawfully engaged in separate, competitive behavior;

damages for a conspiracy to charge higher-than-competitive market prices in American markets, even though this would violate the antitrust laws, because the plaintiffs would not have suffered any injury; and third, the plaintiffs could not recover for a conspiracy to impose non-price restraints that have the effect of either raising market price or limiting output because these restrictions, though harmful to competition, actually benefit competitors by making supra-competitive pricing more attractive. *Id.* at 582–83.

38. *Id.* at 595–96.

39. *Id.* at 598.

- (7) No reasonable jury could infer from circumstantial evidence that the defendants entered into a conspiracy with an intent to monopolize the American market;
- (8) The inference that the defendants conspired to set predatory prices and monopolize the American market is implausible;
- (9) That behavior is implausible because the defendants had no rational economic motive to conspire;
- (10) If the defendants entered into a conspiracy to set predatory prices with an intent to monopolize the American market, then they would have engaged in economically irrational behavior;
- (11) Persons and firms do not engage in behavior that is economically irrational;
- (12) To the contrary, persons and firms make rational choices with an intent to maximize their wealth; and
- (13) Human beings by nature make purely rational choices intended to maximize their wealth.

Accordingly, the Court's interpretation of Rule 56 rests ultimately upon its profound view of human behavior.

III. *ZENITH'S* PROFOUND PRESUMPTION HAS BECOME PERVASIVE

Zenith encourages the use of summary judgment when the plaintiff produces only circumstantial evidence that the defendant engaged in behavior that a federal judge determines would be irrational under an abstract, neoclassical economic, wealth-maximizing model. Since *Zenith*, federal courts have employed this presumption about human behavior to prevent juries from inferring culpable behavior from merely circumstantial evidence at procedural stages before summary judgment and in substantive areas beyond antitrust law.

A. *The Profound Presumption has been Extended Beyond Summary Judgment*

The Supreme Court is so enamored with the law-and-economics model of human behavior that it has extended this theory to the pleading stage. Indeed, Professor Linda Mullinex, in her excellent article published in this Symposium Issue, concludes that *Zenith* has been "swallowed" by the Court's more recent decisions regarding pleading standards.⁴⁰ In both *Bell Atlantic Corp. v. Twombly*⁴¹ and *Ashcroft v. Iqbal*,⁴² the Court, in requiring plausibility in pleadings, concluded that

40. Linda S. Mullinex, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 565 (2012).

41. 550 U.S. 544 (2007).

42. 129 S. Ct. 1937 (2009).

allegations based purely on circumstantial evidence are insufficient to state a plausible claim when that claim asserts that the defendants engaged in irrational behavior.⁴³

1. *Bell Atlantic Corp. v. Twombly*

In *Twombly*, the Supreme Court held that an agreement to carve up territories and prevent new entrants would be irrational. The plaintiff sued Bell Atlantic Corp. and other local telephone-line operators and internet-service providers, claiming that they maintained regional monopolies in violation of the antitrust laws by engaging in parallel conduct⁴⁴ in their respective regional territories to prevent other telephone companies from entering the telephone market.⁴⁵ Parallel conduct can suggest either that the defendants are acting independently and thus lawfully, or that the conduct is a product of a horizontal agreement to fix prices and thus is unlawful.

On the basis of the pleadings alone, the Supreme Court held that no jury could infer from circumstantial evidence of conscious parallelism that the defendants engaged in an unlawful agreement. According to the Court, this circumstantial evidence “falls short” of plausibly suggesting a conspiracy.⁴⁶ The Court asserted that conscious

43. Several scholars have noted the parallels between the summary judgment trilogy and *Twombly* and *Iqbal*. See, e.g., Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 145–54 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 24–28 (2010).

44. Professor Michael K. Vaska explains in *Conscious Parallelism and Price Fixing: Defining the Boundary*, why plaintiffs rely on an allegation of conscious parallelism as circumstantial evidence of a conspiracy to fix prices:

Section 1 of the Sherman Antitrust Act has eliminated most overt price-fixing arrangements. In order to avoid sanctions under this law, firms wishing to engage in collusive, anticompetitive practices are forced to enter into secret agreements to fix prices. The detection of these covert agreements has become the central focus of section 1 enforcement. Direct evidence of such agreements is difficult to obtain, however, and courts must often rely on indirect or circumstantial evidence of conspiracies to fix prices. Frequently, an important factor in establishing the existence of such a conspiracy is similar conduct by rival firms that suggests they are attempting to set prices or carve up the market for a particular product. Such ‘conscious parallelism’ by itself does not constitute concerted action in violation of the Sherman Act, however, and courts have disagreed over what additional evidence (‘plus factors’) must be produced in order to permit a trier of fact to infer the existence of a price-fixing agreement.

Michael K. Vaska, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 U. CHI. L. REV. 508, 508 (1985).

45. *Twombly*, 550 U.S. at 553.

46. The Supreme Court put to rest the “no set of facts” pleading system under *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). In *Twombly*, the Court said that the “no set of facts” language under *Conley* should not be read literally because a literal reading would allow a

parallelism is more likely a reaction of rational firms in a concentrated market that recognize their shared economic interests and interdependence with respect to price and output decisions.⁴⁷ In other words, even at the pleading stage, the Court held that federal courts should presume that businesses behave rationally.

2. *Ashcroft v. Iqbal*

In *Iqbal*, the Supreme Court held that any intent to discriminate against people based on their religion and national origin would be irrational in light of “more” rational motives to foster national security. The FBI detailed the plaintiff in a maximum security prison after identifying the plaintiff as a person of “high interest” in connection with immigration law violations.⁴⁸ The plaintiff alleged that the FBI designated him a person of “high interest” on account of his race, religion, or national origin.⁴⁹ According to the complaint, the FBI arrested and detained thousands of Arab Muslim men as part of an investigation of the terrorist attacks of September 11, 2001, that the FBI held these men in highly restrictive conditions, and that the FBI Director and Attorney General knew of and condoned this process as a matter of policy, solely on account of the plaintiff’s race.⁵⁰

The Supreme Court held that the inference that the defendants intended to discriminate against Arab Muslim men was implausible.⁵¹ The Court acknowledged that the plaintiff’s allegations were consistent with a policy of detaining persons on account of their race, religion, or national origin, but, according to the Court, the acts “were likely lawful and justified by . . . nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”⁵² Faced with precise allegations of defendants’ unlawful intent to discriminate, the Court again rejected

conclusory statement of a claim to survive a motion to dismiss where it merely leaves open the possibility that later facts will be revealed to support recovery. *Twombly*, 550 U.S. at 561–63.

47. *Id.* at 553–54, 564–70. Justice Stevens in dissent argued that an inference of an agreement to set prices is indeed plausible: “Many years ago a truly great economist perceptively observed that ‘[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’” *Id.* at 591 (Stevens, J., dissenting) (quoting A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in 39 GREAT BOOKS OF THE WESTERN WORLD 55 (R. Hutchins & M. Adler eds., 1952)).

48. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943–44 (2009).

49. *Id.*

50. *Id.*

51. *Id.* at 1950–52.

52. *Id.* at 1951.

the plaintiff's allegations based on the Court's assumption that such an intent would be irrational and thus likely did not exist.

B. The Profound Presumption Has Been Extended Beyond Antitrust

Not surprisingly, the presumption of human rationality has had a dramatic impact on antitrust jurisprudence since *Zenith*.⁵³ But the impact has spread. Professor Spencer Weber Waller has perceptively likened the neoclassical Chicago School of Law and Economics' model of human behavior to a virus, "captur[ing] the dynamics of how the Chicago School has spread by penetrating a new area of the law, replicating itself, and transmitting itself to new host bodies of law or legal jurisdictions."⁵⁴ He writes that "Law and Economics has . . . spread from its origins in antitrust law to a wide variety of legal fields, so that virtually any area of U.S. law can be analyzed from a law and economics perspective."⁵⁵ In this Article, I focus on the extension by the federal courts of the rationality presumption into two specific areas where liability requires a showing of intentional conduct: intentional discrimination claims and securities fraud claims.

1. Intentional Discrimination Claims

Federal courts have extended *Zenith's* profound rationality presumption to cases involving intentional discrimination based on "irrational" characteristics, such as race, gender, disability, age, and national origin. As Professor Ann McGinley has concluded based on her extensive research of federal court decisions: "In response to the trilogy, lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive, thereby denying to employment discrimination plaintiffs their 'day in court' historically provided by the American model of litigation."⁵⁶

In *American Nurses Association v. Illinois*,⁵⁷ the Seventh Circuit built the foundation for the development of a rationality bias in discrimination cases. In that case, the court warned that plaintiffs will

53. See Maurice E. Stucke, *Behavior and Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 514–15 (2005) (arguing that Richard Posner's and Robert Bork's works on antitrust analysis continue to influence antitrust decisions and antitrust economists).

54. Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 369 (2009).

55. *Id.* at 368.

56. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 207 (1993).

57. 783 F.2d 716 (7th Cir. 1986).

“lose eventually on summary judgment” if they are only able to present circumstantial evidence supporting claims of intentional gender discrimination.⁵⁸ There, a class of female employees alleged that their employer, the State of Illinois, intentionally discriminated against them because of their gender by paying them less than male employees who were doing comparable jobs.⁵⁹ The plaintiffs based their claims on undisputed evidence that the State knew of significant wage disparities between men and women, continued to pay workers according to those disparities, and did nothing to correct the disparities.

Nonetheless, in an opinion written by Judge Richard Posner, the court concluded that the State’s failure to achieve comparable worth would not permit an inference that the State intentionally discriminated against its female employees because of their gender. To the contrary, the court presumed that any such failure would be attributable to “passive acceptance of a market-determined disparity in wages.”⁶⁰ Significantly, Judge Posner accepted the notion that the defendant’s failure to achieve comparable worth could have been motivated either by an irrational desire to treat men better than women or by a rational desire to maximize wealth by paying men and women market wages.⁶¹ Yet, the court declared that if all the plaintiffs could present was circumstantial evidence of the State’s irrational desire to favor men over women, then they had “no case.”⁶²

The court thus presumed that employers invariably make rational employment choices that are intended to maximize wealth, and that employers do not engage in irrational employment decisions based on characteristics such as gender. That presumption led the court to reject the plaintiffs’ circumstantial evidence of gender discrimination. Put another way, circumstantial evidence, which gives rise to two equally plausible inferences, was not sufficient to rebut the court’s presumption that the defendants were motivated by rational wealth-maximization rather than gender discrimination. As a result, plaintiffs wishing to avoid summary judgment must provide direct evidence of a defendant’s intent to discriminate.

Similarly, in *Troupe v. May Department Stores, Co.*,⁶³ the Seventh Circuit upheld the federal district court’s grant of summary judgment

58. *Id.* at 730.

59. *Id.* at 718–19.

60. *Id.* at 720.

61. *Id.*

62. *Id.* at 723.

63. 20 F.3d 734 (7th Cir. 1994).

against the alleged victim of employment discrimination on the basis of her pregnancy. The plaintiff presented evidence that she was terminated immediately after being told by her supervisor that he did not think she would return to work after she had given birth.⁶⁴ Although it insisted that plaintiff need not present direct evidence of discriminatory intent to avoid summary judgment, the court nonetheless rejected the plaintiff's evidence of that intent on the ground that it was inadequate circumstantial evidence.⁶⁵ The court reasoned that the undisputed evidence that Troupe's supervisor fired her because of his belief that she would not return to work after her pregnancy could give rise to two inferences: (1) the inference that her supervisor's motive for termination was her pregnancy; and (2) the inference that the supervisor terminated her not because of her pregnancy, but because he did not expect her to return to work after her pregnancy.⁶⁶

Despite the fact that the plaintiff had presented circumstantial evidence giving rise to an inference that the employer terminated her because of her pregnancy, the court concluded that she presented "no evidence from which a rational trier of fact could infer that she was a victim of pregnancy discrimination."⁶⁷ Instead, the court presumed that the employer was motivated by only rational choices to maximize wealth, determining that the evidence showed that the plaintiff was fired "not because she was pregnant but because she cost the company more than she was worth to it."⁶⁸

Similarly, in *Ashcroft v. Iqbal*, the Supreme Court considered factual allegations that FBI officers, under the knowing direction of the Attorney General and the FBI Director, purposely detained thousands of Arab men, including the plaintiff, after September 11, 2001, because of their race, religion, or national origin.⁶⁹ The majority acknowledged that these allegations were "confinement" with an unlawful intent to discriminate against the plaintiff.⁷⁰ Nonetheless, the Court declared: "[G]iven more likely explanations, they do not plausibly establish this purpose."⁷¹ Rather, the Court found that the only plausible explanation

64. *Id.* at 735–36.

65. *Id.* at 738.

66. *Id.* at 737–738.

67. *Id.* at 738.

68. *Id.* For an insightful analysis of how Judge Posner's law-and-economics presumptions dictated the result in *Troupe*, see Ann C. McGingley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994).

69. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

70. *Id.*

71. *Id.*

for the defendants' conduct was their desire to "keep suspected terrorists in the most secure conditions available" ⁷² In rejecting the complaint's specific allegations of the defendants' unlawful purpose, the Court simply presumed that this purpose was implausible. ⁷³ The Court offered no support for its presumption that discrimination based on race, religion, or national origin would be implausible. The Court merely concluded that it would be irrational for the defendants to confine the plaintiff for any reason other than their belief that he posed a threat. ⁷⁴ Armed with its presumption that the defendants would not rationally intend to discriminate against the plaintiff because of race, religion, or national origin, the Court even rejected detailed allegations of that intent at the pleading stage. ⁷⁵

The presumption of rationality also has led federal courts to preclude jury consideration of disability-discrimination cases. ⁷⁶ In *The Law and Economics of Disability Accommodations*, Professor Michael Stein reported that because of the federal courts' "propensity" to use summary judgment, 93% of Title I disability-discrimination cases are resolved in favor of defendants. ⁷⁷ After conducting a thorough empirical study of cases, Professor Ruth Coker concluded that the

72. *Id.* at 1952.

73. *Id.*

74. *Id.*

75. Justice Souter explained in dissent:

Iqbal alleges that after the September 11 attacks the Federal Bureau of Investigation (FBI) 'arrested and detained thousands of Arab Muslim men,' . . . , that many of these men were designated by high-ranking FBI officials as being 'of high interest,' . . . , and that in many cases, including Iqbal's, this designation was made 'because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity,' The complaint further alleges that Ashcroft was the 'principal architect of the policies and practices challenged,' . . . , and that Mueller 'was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged,' According to the complaint, Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.' . . . The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller [sic] affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Id. at 1958–59 (Souter, J., dissenting) (internal citations omitted).

76. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 118–19 (1990); McGinley, *supra* note 56, at 203–06.

77. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 92 & n.74 (2003).

inability of plaintiffs to succeed in cases involving disability discrimination is because “[c]ourts are abusing the summary judgment device by refusing to send normative factual questions” to juries.⁷⁸ Professor Stein has suggested that courts abuse summary judgment in part by assessing an employer’s decision not to make reasonable accommodations for a disabled employee by presuming that the employer only makes wealth-maximizing decisions in an efficient labor market.⁷⁹

The extension of the presumption of rationality to discrimination claims is particularly troubling because those cases commonly rest on circumstantial as opposed to direct evidence. If allegations of discriminatory intent based on circumstantial evidence are inadequate to state a claim, then victims will be forced to adduce direct evidence of that intent at the pleading stage. Yet, because we cannot read minds, direct evidence of a defendant’s mental state is extremely rare.⁸⁰ That requires evidence of an actual admission by the defendant under oath or perhaps testimony of a witness based on personal knowledge. This direct evidence, if it exists at all, will be difficult to unearth during discovery and virtually impossible to unearth before filing. As a result, meritorious claims will be prematurely dismissed.⁸¹ If, as the Supreme Court said in *Iqbal*, circumstantial evidence is not enough to “nudge”⁸² a claim from conceivable to plausible, then many victims of intentional discrimination will not be able to get to a jury.⁸³

2. Securities Fraud Claims

Similarly, in securities fraud litigation, federal judges have found that no reasonable jury could infer from circumstantial evidence that persons harbored an intent to deceive investors into purchasing securities

78. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999).

79. Stein, *supra* note 77, at 123–29.

80. McGinley, *supra* note 56, at 214.

81. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 125–26 (2011). “[C]ases that are most vulnerable to dismissal for having thin pleadings are ones that rely on state of mind allegations, which are the heart of most civil rights and private discrimination claims.” *Id.* at 159.

82. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

83. In her outstanding article, *The Vanishing Plaintiff*, Professor Brooke D. Coleman shows how summary judgment works to the unique disadvantage of marginalized victims of racial or gender discrimination. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908359.

because of the judicial presumption that fraud is economically irrational.⁸⁴

Under the Private Securities Litigation Reform Act of 1995, plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”⁸⁵ The required state of mind is scienter, which is recklessness or intent to deceive, manipulate, or defraud.⁸⁶ In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court interpreted “strong inference” to mean that a securities fraud complaint will survive dismissal only if “a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged,”⁸⁷ and that courts must “take into account plausible opposing inferences.”⁸⁸ This weighing process enables federal courts to discount the kind of circumstantial evidence of scienter that would otherwise be sufficient to meet the plaintiff’s burden of proof at trial.

Before the Supreme Court introduced the “plausible opposing inference” standard in *Tellabs*,⁸⁹ scienter could be inferred from circumstantial evidence that the defendant had a motive and an opportunity to engage in fraud and had access to information that discussed the fraud or concerned the company’s core operations.⁹⁰ Since *Tellabs*, some federal courts have discounted circumstantial evidence of scienter.⁹¹ Even though federal courts have continued to

84. In securities fraud cases, similar to intentional discrimination cases, judicial behavior suggests that judges themselves are boundedly rational. Professors Stephen M. Bainbridge and G. Mitu Gulati have catalogued some of the flawed decision-making heuristics and mental shortcuts that judges employ as a substitute for analyzing the complexity of cases when deciding securities fraud suits. They explain that as a substitute for an analysis of “materiality,” judges rely on doctrines derived from heuristics such as puffery, bespeaks caution, zero price change, and trivial matters. They find that judges rely on doctrinal heuristics that substitute for analysis of whether the defendant likely acted with scienter such as fraud by hindsight, internal forecasts, whether something sounds in fraud, and unusual insider stock sales. Last, they find that judges rely on heuristics that substitute for analysis of whether the defendant had a duty to disclose information such as routine forecasts and extreme departures. Stephen M. Bainbridge & G. Mitu Gulati, *How do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 118–36 (2002).

85. 15 U.S.C. § 78u-4(b)(2)(A) (2006).

86. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *see also* *Konkol v. Diebold, Inc.*, 590 F.3d 390, 396 (6th Cir. 2009) (stating that recklessness is sufficient).

87. 551 U.S. 308, 324 (2007).

88. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011) (internal quotation marks omitted).

89. *Tellabs*, 551 U.S. at 323.

90. *See* J. ROBERT BROWN, JR., *THE REGULATION OF CORPORATE DISCLOSURE* § 1.05(4)(e) (3d ed. 2010) (discussing the methods of alleging scienter in securities fraud litigation).

91. One federal court forthrightly stated:

If a plaintiff cannot provide direct evidence of scienter, he may nevertheless

acknowledge that allegations of circumstantial evidence are sufficient to create a “strong inference” of scienter, and have even reiterated that recklessness is enough to satisfy the pleading standard, some courts in their application have found that the inference of scienter is less likely than virtually any other nonculpable mental state, including negligence, ignorance, motive to improve the business, and belief that undisclosed information was not material.⁹² According to these courts, it is “unthinkable” that defendants would commit fraud and subject themselves to the expense and notoriety of a securities fraud jury trial.⁹³

In *Durgin v. Mon*, for example, the plaintiffs alleged that the defendants knew that representations regarding certain loans were with recourse as opposed to nonrecourse because the loans made up 70% of the company’s net worth and because the defendants signed guarantees to that effect.⁹⁴ But the Eleventh Circuit held that the inference of scienter was not as compelling as an inference that the defendants acted with inexcusable neglect.⁹⁵ The court wanted the plaintiffs to allege direct evidence of fraud, for example, that the defendants had told someone that the loan was not nonrecourse.⁹⁶

Similarly, in *Cozzarelli v. Inspire Pharmaceuticals Inc.*,⁹⁷ the plaintiffs alleged that Inspire, a manufacturer of an experimental drug (and “one of the company’s flagship products”) to treat dry-eye disease, misstated the results of its clinical trials. The Fourth Circuit held that the plaintiffs did not allege a strong inference of scienter because the drug that was the subject of the misstatements was so essential to the company’s success that “[i]t is improbable that Inspire would stake its existence on a drug and a clinical trial that the company thought was doomed to failure. Plaintiffs’ inference of fraud . . . is thus not even plausible, much less convincing.”⁹⁸

establish the requisite mental element circumstantially, either by alleging that the fraud was in the interest of the defendants, . . . or by other ‘circumstances indicating conscious behavior by the defendant;’ . . . where the fraud is shown to be irrational however, the circumstantial evidence must be stronger . . .

In re First Chi. Corp. Sec. Litig., 769 F. Supp. 1444, 1455 (N.D. Ill. 1991) (internal quotations and citations omitted).

92. Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 LAW & CONTEMP. PROBS. 55, 56-58 (2012) (collecting cases).

93. *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017, 1035 (4th Cir. 1997).

94. 415 F. App’x 161, 166 (11th Cir. 2011) (per curiam) (nonprecedential decision).

95. *Id.* at 167.

96. *Id.* at 165.

97. 549 F.3d 618, 621–22 (4th Cir. 2008).

98. *Id.* at 627.

In *Curry v. Hansen Medical, Inc.*, as well, the plaintiffs sued Hansen Medical Inc., claiming that during the class period, the company improperly recognized revenue on twenty-four of the fifty-nine medical robotic systems sold, which made up “the bulk of [the company’s] revenue.”⁹⁹ The plaintiffs insisted that the defendants knew, must have known, or were reckless in not knowing that the revenue recognitions were false because: (1) the fraud involved twenty-four out of fifty-nine of the company’s most important transactions—the company’s core operations; (2) the defendants conducted two equity offerings during the fraud to raise capital while the stock was inflated, suggesting that they had motive and opportunity to commit fraud; and (3) all these allegations were corroborated by twelve confidential witnesses. The court, however, discounted all these allegations because according to the court, “while this might be suggestive of willful ignorance on Defendants’ part, the argument is entirely circumstantial and does not support a strong inference of scienter.”¹⁰⁰

IV. THE PROFOUND AND PERVASIVE PRESUMPTION ABOUT HUMAN BEHAVIOR IS PROBLEMATIC

In the twenty-five years since the trilogy, *Zenith*’s profound and pervasive presumption about human nature has been discredited.¹⁰¹ Social science research, including neuroscience, psychology, behavioral economics, and hedonics, has established that persons and businesses do not always engage in rational wealth-maximizing behavior. Because human behavior is not predictably rational, the judicial presumption that defendants engage in rational economic behavior is misplaced. That presumption has been specifically undermined in antitrust, discrimination, and securities fraud cases.¹⁰²

A. *Persons and Businesses Do Not Predictably Choose to Maximize Wealth*

The premise underlying *Zenith* that entities engage in rational wealth-maximizing behavior is descriptive rather than normative.¹⁰³ The

99. *Curry v. Hansen Med. Inc.*, No. 5:09-cv-05094-JF (HRL), 2011 WL 3741238, at *1 (N.D. Cal. Aug. 25, 2011).

100. *Id.* at *5.

101. *See infra* Part IV(A).

102. *See infra* Part IV(B)–(D).

103. Maurice E. Stucke has carefully tracked the evolution of the Chicago School of Law and Economics and the adherents of the neo-classical economic, wealth-maximizing model that shows that: “[R]ational choice theory long ago abandoned any pretensions of being a normative theory . . . the Law and Economics’ remaining currency is as a descriptive theory . . .” Stucke,

Supreme Court and lower federal courts presume that parties engage in rational wealth-maximization as an aid to determine the likelihood that a certain alleged behavior occurred in a particular case. Because the courts presume that the likelihood that a defendant engaged in irrational behavior is slim, they require heightened proof of that behavior. The viability of the presumption thus rests upon its predictability.¹⁰⁴ If defendants do not in fact typically engage in rational, wealth-maximizing behavior, then it would be improper and inefficient to presume that they do so for evidentiary purposes. Indeed, even if a defendant's motives are nuanced or mixed, the presumption that behavior is invariably or purely "rational" would be improper.

The presumption that persons or businesses engage in rational, wealth-maximizing behavior can no longer be justified as a reliable predictor of actual behavior. The predominant behavioral science research demonstrates that "the rational choice model of human motivation was at best grossly incomplete, and at worst, simply wrong."¹⁰⁵ Building on research from neuroscience, psychology, and sociology, behavioral economists have discovered that individual choices are not purely rational. To the contrary, individual choices are "bounded"—they are driven by limited information-processing abilities, systemic information-processing biases, mistaken information processing, and by an irrational reliance on the behavior of others within a community.¹⁰⁶ In other words, persons suffer from bounded rationality, bounded willpower, and bounded self-interest.

supra note 53, at 526.

104. Legal presumptions often arise because: (1) public policy inclines courts to favor one contention by giving it the benefit of a presumption; (2) direct proof is rendered difficult, and a presumption corrects an imbalance resulting from one party's superior access to proof; or (3) proof of one fact renders the inference of another fact so probable that courts save time presuming the truth of the inference until it is disproved. 29 AM. JUR. 2D *Evidence* §§ 201, 202 (2008). Most presumptions come into existence because of probability—the proof of one fact renders the existence of another so probable that judges save time by assuming the truth of the second fact. *See, e.g.*, Malack v. BDO Seidman, LLP, 617 F.3d 743, 751–52 (3d Cir. 2010) (rejecting plaintiff's probability argument as vague and unsupported by empirical evidence, unlike the fraud-on-the-market theory, which was so supported); *see also* Ross v. Bank S., N.A., 885 F.2d 723, 738 (11th Cir. 1989) (Hill, J., concurring) (noting many courts presume a plaintiff's reliance based on the fraud-on-the-market theory).

105. Stucke, *supra* note 53, at 514 n.4 (citing Charles R.P. Pouncy, *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263, 302 (2002)).

106. Behavioral science has also entered the mainstream. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); ORI BRAFMAN & ROM BRAFMAN, SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR (2008); CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US (2009); CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007).

1. Bounded Rationality

In their seminal articles, Professors Daniel Kahneman and Amos Tversky¹⁰⁷ report the compelling evidence that human beings employ cognitive heuristics or information processing short-cuts to assign probabilities to uncertain results from their choices. Rather than make choices based on whether the alternatives would increase or decrease their net wealth, persons actually evaluate the alternatives only within a tight contextual framework.

The empirical evidence amassed by Kahneman and Tversky gave rise to Prospect Theory, which states that human beings do not engage in unadorned, rational wealth-maximization; rather, they make choices based on the manner in which their particular choices are framed.¹⁰⁸ For example, persons are more likely to make risky choices to prevent losing something of value than they are to make risky choices to gain something of the same value.¹⁰⁹ Put simply, the owner of property values the property owned more than a potential buyer values that same property because the owner is faced with the prospect of losing something already owned, while the buyer is faced with the prospect of gaining something not yet owned. The actual choices that humans make to buy or sell property cannot be explained purely by rational wealth-maximization. Persons are also irrational in their belief that they are endowed with certain possessions and therefore will assign more value to an object that they already have than they would to the same object that they have not yet received.¹¹⁰

107. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) [hereinafter Tversky & Kahneman, *Judgment under Uncertainty*]; Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AMERICAN PSYCHOLOGIST 341 (1984).

108. Tversky & Kahneman, *Judgment under Uncertainty*, *supra* note 107, at 1130–31; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).

109. People are loss averse: they are more motivated by the prospect of a loss than by a gain. Nava Ashraf et al., *Adam Smith, Behavioral Economist*, in EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION 87, 90–91 (Loewenstein ed., 2007); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 7 (2008); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, in CHOICES, VALUES, AND FRAMES 143, 150 (Kahneman & Tversky eds., 2000).

110. “Contrary to the traditional assumption in economics that preferences are fixed in the short-term, the endowment effect indicates that preferences can change rapidly and systematically because of changes in an individual’s transient asset position.” Leaf Van Boven et al., *Mispredicting the Endowment Effect: Underestimation of Owners’ Selling Prices by Buyers’ Agents*, in EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION, *supra* note 109, at 328, 328.

Moreover, the model of rationality is flawed because of the empirical evidence that humans in fact are irrational in their over-valuation of retaining the status quo;¹¹¹ irrational in their assessment of the probability that an event will occur by reference to their own recent experiences;¹¹² irrational in their reliance on the way others (including advertisers) frame a choice;¹¹³ irrational in their belief that the way in which an object or an event is displayed (including by advertisers) mirrors the reality of that event or object; and, irrational in their belief that they are more likely to experience good fortune than the average person.¹¹⁴

2. Bounded Willpower

Persons not only are prone to these heuristic biases in their decision-making, they are often incapable of making some choices that they know to be rational and wealth-maximizing. Humans simply lack the willpower to reject irrational choices; for instance, they will pay more in taxes, for example, to enable them to continue to make the knowingly self-destructive choice to continue smoking. Additionally, emotion plays a large role in behavior as well. Professor George Lowenstein argues that emotions are not only goals of behavior (i.e., earning and spending money to make one happy), but that emotions also “exert a more immediate influence” on behavior.¹¹⁵ He reports that

[p]eople often act against their self-interest in full knowledge that they are doing so; they experience a feeling of being ‘out of control.’ This . . . phenomenon [is attributable to] the operation of ‘visceral factors,’

111. The fact that people often demand much more to give up an object than they are willing to pay to get is known as the endowment effect or status-quo bias. Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, in CHOICES, VALUES, AND FRAMES, *supra* note 109, at 159, 159–60.

112. The availability heuristic posits that the probability assessments that people make are frequently based upon how easily we can think of examples. BEHAVIORAL LAW & ECONOMICS 5 (Cass R. Sunstein ed., 2000). Timur Kuran and Cass Sunstein have found that this individual heuristic interacts with social mechanisms to generate “availability cascades,” in which individual responses make these perceptions appear increasingly plausible through their rising availability in public discourse and may result in mass delusions that may last indefinitely. *See generally* Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in BEHAVIORAL LAW & ECONOMICS, *supra*, at 374 (explaining availability cascades and collective availability errors).

113. Framing effects “refer to the fact that the very same choice can be perceived as a gain or a loss based purely on its formal presentation.” Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspective on Pain and Suffering Awards*, in BEHAVIORAL LAW & ECONOMICS, *supra* note 112, at 259, 262.

114. Stucke, *supra* note 53, at 527–28.

115. George Lowenstein, *Out of Control: Visceral Influences on Behavior*, in EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION, *supra* note 109, at 523, 523–24.

which include drive states such as hunger, thirst and sexual desire, moods and emotions, physical pain, and craving for a drug one is addicted to.¹¹⁶

These visceral factors then “crowd out virtually all goals other than that of mitigating the visceral factor,” and “people underweigh, or even ignore, visceral factors that they will experience in the future, have experienced in the past, or that are experienced by other people.”¹¹⁷

3. Bounded Self-interest

In a similar vein, evidence adduced by behavioral psychologists and game theorists also shows that persons reject rational choices where they believe them to be unfair.¹¹⁸ For example, when considering settlement, litigants are interested in not just purely wealth-maximization, but also consider other values like fairness when deciding whether to accept a settlement offer.¹¹⁹ As Professor John Bronsteen concludes, after surveying the credible research regarding human behavior over the past twenty-five years: “[S]ince 1984, substantial empirical evidence has emerged to support the view that human beings in general, and parties to litigation in particular, care not just about money but also about fairness.”¹²⁰ As Professor Bronsteen also reports, the most recent and credible psychological research in hedonics shows that humans are motivated not by rational wealth-maximization, but by the desire to experience happiness.¹²¹ Persons

116. *Id.* at 526.

117. *Id.* Behavioral scholars even document the phenomenon that emotion can have on economic transactions even if the emotion arises from a prior, irrelevant situation. *See generally* Baba Shiv et al., *Investment Behavior and the Negative Side of Emotion*, in EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION, *supra* note 109, at 613, 613 (explaining the “dark side” of emotions and the role they play in self destructive behavior).

118. Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000).

119. George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 139 (1993).

120. John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1138 (2009).

121. Bronsteen, *supra* note 120, at 1140. Hedonic psychology has contributed two major findings to human behavior: First, hedonic psychology posits that persons adapt amazingly quickly to change and that many positive and negative life experiences have little long-term effect on well-being; rather, people undergo hedonic adaptation and their levels of happiness returns to pre-event levels of well-being. John Bronsteen, et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1517, 1528 (2008); John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1040 (2009). Second, hedonic psychology also finds that people do a surprisingly poor job of predicting the intensity and duration of future feelings, a concept called affective forecasting. Bronsteen, *Hedonic Adaptation*, *supra*, at 1531–32; *see also* Bronsteen, *Happiness and Punishment*, *supra*, at 1040 (noting that studies show people often overestimate both the size and length of hedonic experiences).

experience a great deal of well-being when they treat others with fairness and dignity, and when they make decisions that result in their being treated by others with fairness and dignity.¹²²

B. The Research Challenging the Presumption of Rationality Undermines the Use of that Presumption in Antitrust Cases

The presumption that persons and businesses are rational wealth-maximizers that has led the courts to find antitrust claims implausible has been specifically undermined in the antitrust context itself. In *Zenith*, the Supreme Court presumed that rational actors would not engage in a predatory conspiracy because their short-term losses are certain, while the possibility of recovering these losses with monopolistic profits in the long-term is uncertain.¹²³ Yet, empirical evidence demonstrates that organizations do in fact take on that risk, and that predatory-pricing agreements do in fact exist.¹²⁴

C. The Research Challenging the Presumption of Rationality Undermines the Use of that Presumption in Discrimination Cases

The judicial presumption of rational wealth-maximizing behavior also has been significantly undermined in the specific context of claims

122. BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING 143, 149–150 (2002).

123. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986).

124. *See* Stucke, *supra* note 53, at 517 (describing how corporate behavior in the antitrust context is not consistent with the presumption of rationality). *See generally* KURT EICHENWALD, THE INFORMANT (2000) (detailing the massive lysine price-fixing conspiracy of Archer Daniel Midlands in the 1990s); WILLIAM L. GREENE ET AL., ABA ANTITRUST SECTION, MONOGRAPH NO. 22, PREDATORY PRICING 44 (1996) (discussing when predatory pricing can be successful); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000). For examples of price fixing, see generally *Execs Admit Guilt in Auto Parts Price-fixing Case*, ASSOCIATED PRESS, Oct. 24, 2011, available at http://www.boston.com/cars/news/articles/2011/10/24/execs_admit_guilt_in_auto_parts_price_fixing_case/ (discussing price-fixing agreement between two Japanese auto-parts manufacturers); *Samsung Is Guilty in Price-Fixing Case*, N.Y. TIMES (Dec. 1, 2005), <http://www.nytimes.com/2005/12/01/business/01samsung.html> (memory-chip manufacturer pleads guilty to price-fixing); *De Beers Pleads Guilty in Price Fixing Case*, MSNBC (July 13, 2004), http://www.msnbc.msn.com/id/5431319/ns/business-world_business/t/de-beers-pleads-guilty-price-fixing-case/ (diamond seller pleads guilty to price fixing); *Signapore Airlines Pleas Guilty to Price-Fixing*, J. COM. (July 4, 2011), <http://www.joc.com/international-air/singapore-airlines-pleas-price-fixing> (airline pleads guilty to price fixing). For examples of companies convicted of predatory pricing, see generally George White, *Wal-Mart Guilty of Predatory Price Cutting*, L.A. TIMES (Oct. 13, 1993), <http://articles.latimes.com/1993-10-13/business/fi-45290predatory-pricing> (noting that Wal-Mart was convicted of predatory pricing); *National Stock Exchange Found Guilty of Predatory Pricing*, INT'L LAW OFFICE (Sept. 29, 2011), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=3b6cf15b-4234-497f-9462-fa1e3678427a> (National Stock Exchange found guilty of predatory pricing).

involving intentional discrimination based on characteristics such as race, gender, religion, age, and national origin. The presumption induces courts to assume that these acts of intentional discrimination do not occur because they are irrational. Persons or businesses who make employment decisions because of characteristics such as race, for example, act irrationally because the racial composition of an employee is irrelevant to wealth-maximization. According to the logic of the presumption, rational wealth-maximizing entities do not engage in racial discrimination; in fact, if they do make decisions based on the racial composition of their employee rather than the quality of their work, then they will be punished for them in the marketplace.

The assumption that intentional discrimination is unlikely because it is irrational, however, is flawed because rationality is bounded, willpower is bounded, and self-interest is bounded. Choices are made based upon characteristics such as race and gender, no matter how irrational they may seem. In fact, the evidence indicates that employers not infrequently make employment decisions based on characteristics that are unrelated to the ability of an employee to maximize the wealth of the business.¹²⁵ As Professor Stein concludes, the assumption that employers do not discriminate but act only in a rational, profit-maximizing way is “empirically invalid.”¹²⁶ To the contrary, employers commonly act on implicit biases against employees because of characteristics like race.¹²⁷

Moreover, the market does not in fact consistently punish or sanction employers who make such presumably irrational decisions. There is no empirical support for the related assumption that market forces will punish and eradicate employers who in fact make employment decisions based on irrational factors, like disability, race, or gender.¹²⁸ Professor Stein concludes: “[C]ontrary to the neoclassical labor market account, empirical studies . . . demonstrate the persistence of employment discrimination.”¹²⁹ The notion that discriminatory businesses would be driven from the market by their nondiscriminatory competitors cannot

125. See, e.g., IAN AYERS, *PERVASIVE PREJUDICE?* (2001); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, in *REASSESSING CIVIL RIGHTS* 22, 36 (Ellen Frankel Paul ed., 1991).

126. Stein, *supra* note 77, at 128.

127. See, e.g., Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 *HARV. L. & POL'Y REV.* 477, 485–86 (2007) (discussing how evidence of experimental psychology demonstrates bias).

128. Stein, *supra* note 77, at 128–29 nn.321–26.

129. *Id.* at 127.

be sustained in the wake of the evidence of persistent discrimination in the labor markets.¹³⁰

The persistence of irrational, even subconscious biases is even confirmed by a recent study of judicial attitudes toward minority litigants.¹³¹ First, the study finds that African-American plaintiffs are 2.66 times more likely to have their claims dismissed under *Twombly* and *Iqbal* than they were under the Supreme Court's prior *Conley v. Gibson*¹³² "no set of facts" pleading standard.¹³³ Second, the study finds that African-American pro se plaintiffs are 2.10 times more likely to have their claims dismissed than other pro se plaintiffs after the *Twombly/Iqbal* pleading standard.¹³⁴ Last, the study finds that after *Iqbal* and *Twombly*, Caucasian judges dismiss African-American plaintiffs' claims of race discrimination at a higher rate (57.5%) than African-American judges (33.3%).¹³⁵ These findings, the study concludes, suggest that district judges, without the opportunity to consider live testimony at trial, rely on presumptions, stereotypes, and implicit associations about race and discrimination that often turn out to be wrong when deciding actual claims.¹³⁶

*D. The Research Challenging the Presumption of Rationality
Undermines the Use of that Presumption in Securities Cases*

The presumption of rationality also has been undercut in cases involving securities fraud. First, the rationality of individual directors, officers, and other executives is bounded. Professor Donald C. Langevoort observes:

[Even the] modern transaction-cost economics on which most contemporary corporate scholarship is based concedes that the rationality of officers, directors, and other managers is 'bounded' (that is, that they do not have perfect information or unlimited time, skill, and attention) and acknowledges that these agents have self-interests that differ from those of their firms' owners.¹³⁷

130. *Id.* at 128–29 nn.321–26.

131. 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).

132. 355 U.S. 41 (1957).

133. Quintanilla, *supra* note 131, at 41.

134. *Id.* at 43. Another study likewise found that the percentage of 12(b)(6) motions granted in all cases brought by pro se plaintiffs grew from *Conley* (67%) to *Bell Atlantic* (69%) to *Iqbal* (85%). Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 615 (2010).

135. Quintanilla, *supra* note 131, at 44.

136. *Id.* at 23–24.

137. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations*

For example, behavioral analysis teaches that persons—including corporate executives, officers, and directors—suffer from several biases that may set the stage for misleading investors including: (1) over-optimism: a systemic overrating of their abilities and contributions, resulting in inflated sense of ability to control events and risk; (2) path-dependence: managers are overcommitted to decisions already made and may ignore or discount new information that contradicts earlier beliefs; and (3) the sunk-cost fallacy: managers may incrementally make good faith (but overly optimistic) decisions that cause harm to the firm once an unexpected event occurs.¹³⁸

Second, rationality is bounded by context, and the rationality of management in particular is bounded by the regulatory context established by the securities laws. The regulatory context of the securities laws may encourage deception in two ways. First, if the risk of legal liability or sanction under the securities is *de minimis*, then persons may be primed to commit fraud. Indeed, even under the pure rationality model, where the benefit from false disclosures outweighs the risk of sanctions, securities fraud becomes perfectly rational.¹³⁹ The judiciary and Congress have erected a number of access barriers that diminish the threat of legal liability or sanction under the securities laws.¹⁴⁰ Thus, as the risk of sanction becomes *de minimis*, the choice to

Mislead Stock Market Investors (and Cause Other Social Harms), in *BEHAVIORAL LAW & ECONOMICS*, *supra* note 112, at 144, 144. He also calls managerial rationality “a holy grail [rather] than as an observable reality.” *Id.* at 145.

138. See, e.g., A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 *WAKE FOREST L. REV.* 4, 5–7 (2003); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CALIF. L. REV.* 1051, 1091–93 (2000); William H. Starbuck, *Congeeing Oil: Inventing Ideologies to Justify Acting Ideologies Out*, 19 *J. MGMT. STUD.* 3, 8 (1982) (describing studies that show that managers depart substantially from the rational-human model).

139. See, e.g., Daniel T. Ostay, *When Fraud Pays: Executive Self Dealing and the Failure of Self-Restraint*, 44 *AM. BUS. L.J.* 571, 574, 601 (2007) (stating “[t]raditional economic analysis assumes that people, including corporate executives, are motivated by pecuniary, or material, self-interest” and finding that fraud can be rational, wealth-maximizing behavior when the expected payout of the fraud is greater than the deterrent force of the law). Professors Jennifer Arlen and William Carney also find that open-market lies are predictable if managers face a “last period problem” where managers the disclosure of the truth would cause the company to go bankrupt and cost the managers their jobs. Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 *U. ILL. L. REV.* 691, 724–27.

140. Kaufman & Wunderlich, *supra* note 92, at 56. Under the law of loss causation, for example, it may be *optimal* for companies subject to the federal securities laws to obscure or delay negative information in order to maximize investor welfare. Companies can control the timing of their disclosures in order to enable them to manipulate the extent to which the company’s stock price reacts to new information. And thus, for companies with multiple projects, companies can over-represent their value and minimize the consequences of fraud by offsetting fraud in one project with success in another. Patrick J. Coughlin et al., *What’s Brewing*

engage in lucrative fraud becomes rational, and ironically, the judicial presumption that securities fraud is irrational, which leads to a reduced risk of sanctions by the courts, in turn actually makes securities fraud more likely (more rational) because the financial benefits from the fraud further outweigh the lessened risk of sanctions. Second, if fraud is rational, that is, the risk of reward outweighs the risk of sanction, then corporate officers may choose to pursue fraudulent actions to keep with their fiduciary duties. Indeed, the idea that fraud may be rational, wealth-maximizing behavior is what causes Professors Jonathan R. Macey and Geoffrey P. Miller to argue that, at times, fraud is even consistent with executives' fiduciary duties.¹⁴¹

Third, behavioral analysis finds that contrary to the rationality presumption for firms, even firms themselves can generate belief systems that are the source of possible corporate misrepresentations about its risks and future prospects. Using behavioral science and institutionalist theory, Professor Langevoort explains that corporate cultures can actually determine what individual actors prefer and how they make sense of what is happening.¹⁴² If a corporate culture is characterized by over-optimism, illusions of control, and other self-serving biases, then these biases can come to control a company's belief system and then the tendency to underestimate or rationalize risk in preparing publicity and disclosure will be exacerbated.¹⁴³

in Dura v. Broudo? A Review of the Supreme Court's Opinion and its Import for Securities Fraud Litigation, 37 LOY. U. CHI. L.J. 1, 26 (2005). And for single-project companies, requiring plaintiffs to pinpoint a post-transaction decline and to attribute that decline to only the fraud encourages companies to create intervening causes and commingle revelation of the fraud with other bad news or even fabricate other news to mask the effect of the revelation of the fraud. James C. Spindler, *Why Shareholders Want Their CEOs To Lie More After Dura Pharmaceuticals*, 95 GEO. L.J. 653, 680–85 (2007).

141. Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1060 (1990).

142. Langevoort, *supra* note 137, at 145.

143. *Id.* at 150. The federal courts presume that fraud on the part of an independent auditor is economically irrational, and thus pleading scienter is "exceedingly difficult." *Reiger v. Price Waterhouse Coopers, LLP*, 117 F. Supp. 2d 1003, 1008 (S.D. Cal. 2000). For example, when a plaintiff sues an independent auditor for violating Section 10(b) and Rule 10b-5, the courts have noted that it is almost always more difficult to establish scienter because the courts have concluded that a "large independent accounting will rarely, if ever, have any rational economic incentive to participate in its client's fraud." *Id.* at 1007; *see also Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994) (affirming the district court opinion that there was not sufficient facts to show the company's participating in fraudulent auditing). Rather, according to Chief Judge Frank H. Easterbrook of the Seventh Circuit, "An accountant's greatest asset is its honesty, followed closely by its reputation for careful work. Fees for two years' audits could not approach the losses [the defendant] would suffer from a perception that it would muffle a client's fraud." *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990). Professor Robert Prentice, relying on insights from behavioral psychology, completely debunks this idea. *See* Robert A. Prentice,

V. THE PROBLEMATIC MODEL OF RATIONAL WEALTH-MAXIMIZATION HAS PERMEATED THE SCHOLARSHIP REGARDING THE ROLE OF SUMMARY JUDGMENT IN CIVIL LITIGATION

The presumption of rationality that informs much of the scholarship regarding pre-trial adjudication has also been questioned by social science research.¹⁴⁴ Scholars and judges typically assess procedural devices by their utility, particularly their propensity to maximize the wealth of private parties by decreasing the cost of litigation and hastening dispute resolution through settlement.¹⁴⁵ In seriously examining the trilogy and summary judgment, scholars have employed the same framework. The academy tends to debate summary judgment under the shared presumption that its worth must be measured only by its utility in reducing the cost of resolving disputes—in maximizing the wealth of the private parties.¹⁴⁶

The Case of the Irrational Auditor: A Behavioral Insight Into Securities Fraud Litigation, 95 NW. U. L. REV. 133, 135 (2000). He writes that (1) auditors themselves are boundedly rational, *id.* at 145–79, and have bounded willpower, *id.* at 179–81; (2) auditing firms are not always rational actors, *id.* at 184–86; and (3) reckless or fraudulent audits may at times be rational, *id.* at 145–81, 184–217.

144. For an excellent analysis of the spectrum of summary judgment scholarship, see Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 705–06 (2012).

145. See, e.g., Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 401 (1973) (using economic theory to determine how to resolve legal disputes); George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 163–64 (1982) (analyzing the contradictory nature of regulating the volume of litigation and encouraging litigation); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 55 (1982) (discussing four ways to allocate legal costs). For example, the Chicago School has greatly affected the law surrounding pleadings. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 53–54 (2010) (arguing that heightened pleading under *Twombly* and *Iqbal* are motivated out of concerns of decreasing costs for defendants at the pleading stage); Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 634 (2010) (stating there is no working definition for “frivolous” and cataloguing the different heightened pleadings standards and stating that they stem from a desire to save defendants the cost of litigating frivolous cases); John M. Wunderlich, Note, *Tellabs v. Makor Issues & Rights Ltd.: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 651–79 (2008) (arguing that heightened pleading under the PLSRA and *Tellabs* is motivated by a desire to spare defendants cost of litigation but neglects vital role of discovery and Seventh Amendment concerns). In addition, the Chicago School has influenced the law surrounding class certification. Judges, convinced that class actions impose too great a cost on defendants, have erected merits barriers to class certification to balance the scale but they neglect the considerable benefit discovery and trial have for society. See, e.g., Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 354–381 (2010) (arguing that class-certification merits trials neglect the Seventh Amendment right to trial by jury and the considerable role discovery plays in enforcing the securities laws).

146. See, e.g., Jonathan Molot, *An Old Judgment Role for a New Litigation Era*, 113 YALE

Professor Bronsteen, however, insightfully shows that private parties in litigation do not make decisions solely or primarily to maximize their wealth.¹⁴⁷ Rather, as Prospect Theory shows, their decisions regarding dispute resolution must be framed.¹⁴⁸ Plaintiffs are more willing to take risks than defendants in the context of dispute resolution and settlement.¹⁴⁹ Plaintiffs seek benefits from litigation. Defendants try to avoid losses. Accordingly, defendants are more risk-averse than plaintiffs, and hence plaintiffs will accept a settlement that is lower than would be true if the parties only engaged in rational wealth-maximization.

The lessons of game theory have precise application in the context of settlement as well.¹⁵⁰ The parties make decisions to settle or to continue to litigate based on their perceptions of fairness. They will reject a value-maximizing settlement they deem to be unfair.¹⁵¹ Similarly, hedonics research suggests that parties will make litigation decisions to maximize their well-being rather than their net wealth.¹⁵² The social science research, therefore, calls into question the rational wealth-maximization model of civil litigation.

The research supports Professor Owen Fiss's prescient challenge to that model, which he offered just before *Zenith*. In 1984, as the Chicago School ascended, Professor Fiss wrote *Against Settlement* in the Yale Law Journal.¹⁵³ In that article, Professor Fiss pushed against the coming trend of the law-and-economics view of trials as a dead weight loss¹⁵⁴ that the parties would avoid through settlement if they

L.J. 27, 44, 91 (2003) (explaining that summary judgment is "less dangerous" if the goal is to ensure that settlements are fair); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 892 (2006). Prominent members of the judiciary likewise view summary judgment in terms of wealth-maximization for private parties. See, e.g., Spellman v. Commissioner, 845 F.2d 148, 152 (7th Cir. 1988) (Posner, J.) ("When it is plain that a trial could have but one outcome, summary judgment is properly granted to spare the parties and the court the time, the bother, the expense, the tedium, the pain, and the uncertainties of trial.").

147. Bronsteen, *supra* note 120, at 108–13.

148. *Id.* at 109.

149. *Id.* at 110 (citing Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996)).

150. *Id.*

151. *Id.* (citing *Comparison of Experimental Results*, 11 J. ECON. PSYCHOL. 417, 447 (1990); Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000)).

152. *Id.* at 111–12; see also Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 746 (2007) (discussing adapting the circumstances based on adaptive preferences); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S157–S158 (2008) (explaining how people adapt to adverse conditions).

153. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

154. William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 62 (1971)

only acted rationally.¹⁵⁵ Professor Fiss reminds us that: (1) because parties have different levels of resources, a settlement does not always maximize the wealth of all parties; and (2) more importantly, that trials also benefit community members apart from the private parties involved in the litigation—i.e., they articulate and refine the law in a way that creates public standards that may reduce future wrongdoing.¹⁵⁶ To presume that the civil jury system serves only private, utilitarian, wealth-maximizing persons is incomplete. The civil jury system performs a dual role, including public articulation of the law.¹⁵⁷ Accordingly, the role of summary judgment since the trilogy must be assessed not merely by its utility in maximizing the wealth of the private parties, but also by its capacity to shape legal standards in a process deemed by that community to be dignified and fair.

By those criteria the Supreme Court's approach to the resolution of civil disputes through summary judgment erected in *Zenith* is wanting. As Professor Bronsteen has shown, if summary judgment were not as common, the courts would produce a greater number of opinions that clearly and objectively articulate legal standards for the community.¹⁵⁸ By removing quintessential fact questions regarding human credibility and intent from the jury, the judicial reliance on the rationality presumption also threatens a community's perception that the dispute was fairly resolved.¹⁵⁹

(describing trial as an anomaly and a deadweight loss).

155. See Bronsteen, *supra* note 120, at 102 (discussing Fiss's work).

156. Fiss, *supra* note 153, at 1076–78, 1085–87.

157. Bronsteen, *supra* note 120, at 108.

158. *Id.* at 104.

159. We are still discovering the jury trial's many functions and uses. For example, Professor Cass Sunstein contends that the Seventh Amendment right to trial by jury ensures citizenship by preserving an active role for citizens in the administration of both civil and criminal justice. CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS* 113 (2004). Similarly, Professor Ellen Sward notes that the civil jury actually serves four functions: First, the jury has a dispute-settling role, acting as an equalizer among citizens and leveling inappropriate influence. Second, the jury has a law-making role, in which it can achieve an indirect regulatory effect through jury nullification. Third, the jury has a political role, as it protects the person from the tyranny of the government. Fourth, the jury has a socializing role, in that it encourages diverse involvement. ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 23–65 (2001). In his compelling book, Professor Robert Burns argues that the civil jury trial combines political purpose, legal structure, and moral sensibility under “the discipline of the evidence” and hence is “the central institution of law as we know it.” See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009) (discussing the history of trials in America and how they are dying out).

VI. CONCLUSION

The Supreme Court's opinion in *Zenith* has empowered federal judges to prejudge factual issues by presuming that human beings engage in rational wealth-maximizing behavior. That presumption, which has become pervasive throughout the pre-trial adjudication process, is inconsistent with the overwhelming weight of social science research and empirical evidence amassed since *Zenith*. Nonetheless, the profound and problematic judicial-certainty bias in favor of rationality has led courts to grant summary judgment in situations where the plaintiffs can present only circumstantial evidence of conduct, which those courts presume to be irrational. Courts thus refuse to allow the fact-finder to infer that a defendant engaged in irrational behavior from circumstantial evidence. In other words, judges refuse to construe the evidence presented on summary judgment in the light most favorable to the nonmoving plaintiff, and they refuse to resolve inferences from that evidence in favor of the nonmoving plaintiff.

As such, the remedy for this deeply flawed judicial predetermination of factual questions is quite simple. Even as it altered the landscape of summary judgment, the Supreme Court in its trilogy made absolutely clear that federal judges must construe all the evidence presented on summary judgment in favor of the nonmoving party and must resolve inferences from that evidence in favor of the nonmoving party.¹⁶⁰ Moreover, in *Anderson*, the Court went out of its way to remind federal judges not to use summary judgment in a way that would take from the jury its quintessential function of resolving credibility issues, weighing competing evidence, and drawing legitimate inferences.¹⁶¹ When federal courts conclude that irrational conduct cannot be inferred from circumstantial evidence, they fly in the face of the Court's own admonitions. They do not, as they must, view the evidence in the light most favorable to the plaintiffs. They do not, as they must, resolve inferences from the evidence in favor of the plaintiff. They do not, as they must, confine fundamental issues of human behavior and credibility to the jury.

By simply taking the Supreme Court's own cautionary language seriously, the federal courts would be precluded from granting summary judgment when the plaintiff presents circumstantial evidence of an illicit motive. In doing so, the courts would free themselves from the

160. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986) (Brennan, J., dissenting); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253–54 (1986); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

161. *Anderson*, 477 U.S. at 253–54.

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temptation to pre-judge cases based on the profound, pervasive, and problematic presumption that humans invariably engage in rational, wealth-maximizing behaviors. They would thereby also be freed from the temptation to treat human beings as abstractions.