(MIS)JUDGING INTENT: THE FUNDAMENTAL ATTRIBUTION ERROR IN FEDERAL SECURITIES LAW

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"We need to see that biases and prejudices and conditions of attention affect the judge's reasoning as they do the reasoning of ordinary men. . . . The study of human nature in law . . . may not only deepen our knowledge of legal institutions but open an unworked mine of judicial wisdom. . . . Judges will go far . . . when they begin to procure, and to rely on, carefully prepared factual data as to the social setting of the cases which come before them for decision."

- Jerome Frank, LAW AND THE MODERN MIND, - 146 (1930).

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INTRODUCTION

Growth in the field of social psychology has broadened our understanding of human nature and deepened our appreciation for how people attribute causality, intent, and blame. This scientific progress calls for reexamination of the intuitions behind legal concepts such as intent, mens rea, malice, and *scienter.*

This article focuses on a reexamination of scienter, one of the most consequential elements of a claim of federal securities fraud under Section 10(b) of the Securities Exchange Act of 1934. Scienter is the defendants' intent to deceive, manipulate, or defraud.[1] I examine the interaction between scienter and the Supreme Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[2] from a social-psychological perspective.

Scienter is the subject of robust debate among the Courts of Appeals. In *Tellabs*, the Supreme Court weighed in on this debate and interpreted the requirement under the Private Securities Litigation Reform Act of 1995 ("PSLRA") that complaints must set forth facts giving rise to a "strong inference" of scienter.[3] In so doing, the Supreme Court instructed federal courts to dismiss federal securities complaints, unless a reasonable person would deem the inference of fraudulent intent to be cogent, and at least as compelling as any opposite inference one could draw from factual allegations in the complaint.[4] A central teaching of *Tellabs* is that federal district courts must contrast both culpable and nonculpable inferences of intent at

1. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).
2. 551 U.S. 308 (2007)
3. *Id.* at 322-24.
4. *Id.*

the motion to dismiss stage of litigation. The Courts of Appeals, however, debate whether the *Tellabs* framework applies at summary judgment.[5]

Social science should illuminate and guide the debate.[6] It has been aptly said that we are "in the midst of a flowering of large-scale quantitative studies of fact and outcome," one that has yielded a New Legal Realism—an effort to understand judicial decision-making on the basis of hypotheses tested by data.[7] One aspect of this New Legal Realism is pragmatism rooted in scientific experimentation, a pragmatism that tests the formulation and interpretation of legal rules against the best available evidence of human behavior.[8] This form of pragmatism has been termed "Behavioral Realism" in the law.[9]

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5. *See infra* Section II.C.

6. *See generally* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 73 (Yale Univ. Press 1924) [hereinafter CARDOZO, THE GROWTH OF THE LAW] ("Not logic alone, but logic supplemented by the social sciences becomes the instrument of advance. We may frame our conclusions for convenience as universal propositions. We are to remember that in truth they are working hypotheses.").

7. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008); *see also* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be,"* 2005 WIS. L. REV. 365, 385–87 (2005); Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 (2005) ("[N]ew legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.").

8. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 972-73 (2006); Erlanger, *supra* note 7.

9. The concept of "Behavioral Realism" as used in this article was introduced at a symposium in July 2006 discussing how advances in social and cognitive psychology lend new perspective to jurisprudence under federal antidiscrimination laws and the Equal Protection Clause. After the symposium, jurists and social and cognitive psychologists produced several noteworthy articles: Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063 (2006); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Linda H. Krieger, *Behavioral Realism in Law: Reframing the Discussion About Social Science's Place in Antidiscrimination Law and Policy*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 383 (Eugene Borgida & Susan T. Fiske eds., 2008). *See also* HUNTINGTON CAIRNS, LAW AND THE SOCIAL SCIENCES (1935) ("The development of the synthesis of law and psychology will be a long and perhaps a

When legal doctrines draw implicitly on theories of human nature and conduct, those doctrines should evolve and grow with the advances in relevant fields of scientific inquiry which examine that human conduct.[10]

In this regard, the legal concept of intent draws on a rudimentary theory of human nature. The *sine qua non* of the most severe judicial decrees is a determination that unlawful conduct was intentional. Whether a defendant will be deprived of life, liberty, or property often turns on whether a judge or jury believes that the accused intended wrongful conduct and the consequences of that conduct.[11] Yet our legal intuitions are shaped by the assumption that humans are self-interested beings who behave as free moral agents and who make rational choices.[12] Woven throughout our jurisprudence is the theory

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tedious process; but it is a process, however much patience it may require, which for the law will yield a fruitful harvest.").

10. Improving upon legal doctrine through the social sciences, and in particular, the field of psychology, reflects the program of early Legal Realists. *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, (1979). The resurgence is reflected by jurists and scholars who draw on cognitive and social psychological advances to improve federal antidiscrimination jurisprudence. *See* Jolls & Sunstein, *supra* note 9. The resurgence is reflected also by the work of behavioral economists. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

11. The concepts of culpability and blameworthiness are central to punitive decrees. In *Morissette v. United States*, 342 U.S. 246, 250 (1952), the Supreme Court admonished that "the contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." This admonishment parallels findings of social and cognitive psychologists who have evidenced that humans tend to attribute responsibility and blameworthiness when they perceive conduct to be intentional. *See* KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS (1985).

12. *See, e.g.*, ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 44-45 (1922) ("In the growing law of the seventeenth and eighteenth centuries [natural rights and the ideal form of the law] were but guides to lead growth into definite channels and insure continuity and permanence in the development of rules and doctrines. . . . [T]he point was . . . that he should use his hand freely and skillfully to shape rules and doctrines and institutions that they might be instruments of achieving the ideal of human

that humans are motivated to act out of self-interest and that every individual is rational and selfish. This "rational actor model" has been grafted onto the broad branches of our jurisprudence.[13] In short, judging is shaped by the assumption that self-interest and dispositions are the primary causes of human behavior.[14]

Decades of research in the field of social psychology, however, have shown that forces larger than dispositions and self-interest shape human nature and conduct.[15] Chief among those forces is the power of the social situation and environment.[16] This empirical research has called into question theo-

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existence in a "state of nature." For the state of nature, let us remember, was a state which expressed the ideal of man as a rational creature."). This philosophy underpins much of classical liberal political theory as well. John Locke theorized, for example: "[W]e must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bound of the law of nature; without asking leave, or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 131-32 (C. Baldwin Printer 1824) (1690).

13. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21-22 (4th ed. 1992) (providing a history of the law and economics movement); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics, in* BEHAVIORAL LAW AND ECONOMICS 13, 14 (Cass R. Sunstein ed., 2000).

14. Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 434 ("Law and economics has been one of the most successful innovations in the legal academy in the last century. . . By the early 1990s, economic analysis suffused modern legal education, even one devoid of an explicit course in law and economics.").

15. *See, e.g.*, Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV 1110, 1123 (2006) ("[W]ork in cognitive psychology and economics have catalogued the differences between *homo sapiens* and *homo economicus*. For their part, social psychologists have shown that social influences often amplify cognitive errors. Bounded rationality, interact[s] with social influences . . . ."); RICHARD A. POSNER, HOW JUDGES THINK 68 (Harvard Univ. Press 2010) [hereinafter, POSNER, HOW JUDGES THINK] ("In other words, people (literally and figuratively) see things differently, and the way in which they see things changes in response to changes in the environment. That is true of judges.").

16. *See* Mahzarin R. Banaji, *Ordinary Prejudice*, 14 PSYCHOL. SCI. AGENDA 8, 8 (2001); *see generally* Shelley E. Taylor, *The Social Being in Social Psychology, in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 58, 58 (Daniel T. Gilbert et al. eds., 4th ed. 1998) ("[F]irst . . . individual behavior is strongly influenced by the environment, especially the social environment. The person does not function in an individualistic vacuum, but in a social context that influences

ries that describe human behavior solely in terms of self-interest. Subtle changes to norms and social environments lead to marked and spontaneous changes in human behavior.[17]

Social-psychological research, moreover, has shown that decision-makers systematically misattribute blame and intent: overestimating the role of dispositions (i.e., personality, traits, attitudes, character) and underestimating the role of social influences.[18] Professor Lee Ross termed this systematic bias the *Fundamental Attribution Error.*[19] Social psychologists and cognitive psychologists conducted research on attribution theories in the 1970s and 1980s,[20] involving the study of how decision-makers explain human behavior—their causal attributions. Scientists advanced normative models for how decision-makers ought to make attributions. And by testing these normative models against actual decision-making, researchers identified regular, systematic biases in how humans attribute causality and intent.[21] Of great significance among these biases is the Fundamental Attribution Error.

In light of the Fundamental Attribution Error, what is called for is reconstruction of legal concepts such as intent,

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thought, feeling, and action. . . . [S]econd . . . the individual actively construes social situations. We do not respond to environments as they are but as we interpret them to be."); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 34 (1991) [hereinafter ROSS & NISBETT, THE PERSON AND THE SITUATION]; ELLIOT ARONSON, THE SOCIAL ANIMAL 9 (1995) ("The social psychologist studies social situations that affect people's behavior."); Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 151–52, (Daniel T. Gilbert et al. eds., 4th ed. 1998) [hereinafter Cialdini, *Social Influence*]; Kurt Lewin, *Behavior and Development as a Function of the Total Situation* (1946), *reprinted in* RESOLVING SOCIAL CONFLICTS & FIELD THEORY IN SOCIAL SCIENCE 337–38 (APA 2d ed. 2000).

17. *See* Sunstein, *supra* note 15.

18. *See* discussion *infra* Section III.A.

19. *See* ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 4.

20. *See* Miles Hewstone, *Attribution Theories, in* THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 6671 (Antony S.R. Manstead & Miles Hewstone eds., 1996) (collecting social psychological studies).

21. *See, e.g.*, RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 416 (Prentice Hall 1980) [hereinafter NISBETT, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT].

foreseeability, mens rea, malice, and scienter.[22] These concepts should be recalibrated and operationalized to decrease the likelihood that judicial decision-makers will misattribute intent by increasing the likelihood that they will consider whether social situations, social norms, and subtle changes to environments caused behavior.[23]

This article examines one such concept for recalibration: the intent to deceive and defraud—*scienter*—under Section 10(b) and Rule 10b-5 and the circuit split on whether the *Tellabs* framework should apply at summary judgment.[24] When federal district courts evaluate allegedly intentional wrongful conduct, the *Tellabs* framework broadens the epistemic inquiry at summary judgment. It reduces the likelihood that courts will, after business calamity in hindsight, be subtly influenced by the stereotype that corporate executives are driven by greed and increase the likelihood that judicial decision-makers will compare and contrast dispositional inferences against situational explanations. The *Tellabs* framework allows federal judges to consider the force of social situations and environments on the accused. It therefore mitigates the Fundamental Attribution Error.[25] Further, application of *Tellabs* at summary

22. Scholars have discussed the Fundamental Attribution Error in the context of criminal law, mainly examining the notion that judges and juries tend to under attribute the force of situational factors on the accused. *See, e.g.*, David Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003). The present law review article offers not only a description of the psychology behind judging scienter, but a prescription. To remedy the Fundamental Attribution Error, judges and juries should explicitly consider how social norms, social situations, and environments influenced the conduct of the accused.

23. This is not to say that humans do not act out of self-interest. Behavioral law and economists, however, recognize bounded rationality and the bounded nature of self-interest. *See* Jolls, Sunstein & Thaler, supra note 13, at 14. They recognize that social norms and situations strongly interact with perceptions of self-interest and, most importantly, behavior. The social-psychological program proposed, here, views the connection between subtle changes to situations and human behavior first, without resorting to self-interest *per se*. The field of social psychology has shown that social contexts, situations, and situational norms affect human behavior in significant ways, often unconsciously and spontaneously. This program directly examines how social-psychological research illuminates our jurisprudential thinking and how this research lends itself to the reconstruction of our jurisprudence.

24. *See* discussion *infra* Section II.C.

25. Douglas S. Krull, *Does the Grist Change the Mill? The Effect of the Perceiver's Inferential Goal on the Process of Social Inference*, 340 PERS. SOC. PSYCHOL.

judgment in the federal securities context is consistent with Rule 56 of the Federal Rules of Civil Procedure and modern summary judgment jurisprudence.[26]

The degree to which the Fundamental Attribution Error skews attributions of blame and intent is an empirical question, one that has been examined extensively.[27] Whether the *Tellabs* framework sufficiently rectifies the Fundamental Attribution Error, however, is an empirical question that warrants future social-psychological research.[28] Federal judges serve as gatekeepers in a number of litigation stages, including the motion to dismiss and motion for summary judgment stages. What is called for is empirical research, both qualitative and quantitative, that describes and evaluates judicial decision-making at these various litigation stages, as well as research examining the inferences judges draw, their use of heuristics, and the strategies and potential shortcomings of their social judgment. This empirical research should focus on the gap between "law in books and law in action," between folk theories that describe how judges apply legal precepts in a formalistic, *a priori*, deductive fashion and social-psychological accounts that more accurately describe judicial decision-

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BULL. 345 (1993); Oscar Yabarra & Walter G. Stephan, *Attributional Orientations and the Prediction of Behavior: The Attribution-Prediction Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 718, 718 (1999); Aaron C. Kay, S. Christian Wheeler & Dirk Smeesters, *The Situated Person: Effects of Construct Accessibility on Situation Construals and Interpersonal Perception*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 275, 275 (2008); *see* discussion *infra* Section III.A.

26. *See infra* Section IV.

27. *See infra* Section III.

28. A fruitful area for subsequent study lies in the gap between the folk narrative on how legal precepts are ostensibly applied by federal district courts in formalistic, *a priori*, and deductive fashion and how social-psychological research suggests that judicial-decision makers actually decide cases. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) ("[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one."); Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COL. L. REV. 431, 450 (1930) ("One seeks the real practice on the subject . . . One seeks an understanding of actual judicial behavior . . . .").

making.[29] As described below, to date, sufficient social-psychological research has been amassed to propose that *Tellabs* should be incorporated at the summary judgment stage.

I.
SECTION 10(B), SCIENTER, AND THE PSLRA

A. *Brief Background on Section 10(b) and Rule 10b-5*

After the stock market crash of 1929 and the Great Depression, Congress enacted the Securities Exchange Act of 1934. Congress aimed to advance a philosophy of full disclosure in public offerings, to protect investors against fraud and to promote ethical standards of honesty and fair dealing in the national securities markets.[30] Congress created the Securities and Exchange Commission ("SEC") to enforce the Exchange Act. The Exchange Act grants the SEC broad regulatory power, including the power to enact regulations banning manipulation or deception in connection with the purchase or sale of securities.[31]

Section 10(b) of the Exchange Act makes unlawful the use or employment of "any manipulative or deceptive device or contrivance" in contravention of the SEC's rules. Congress intended that the SEC robustly enforce the Exchange Act and use Section 10(b) as a catch-all to thwart new and cunning fraudulent schemes.[32]

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29. Several scholars and jurists have begun fruitful research on this question. *See infra* note 121.

30. *See generally* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963).

31. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10, 48 Stat. 881 [hereinafter Exchange Act] (codified as amended at 15 U.S.C. §§ 78a-78kk (1982 & Supp. V 1987)); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 766 (1975) (Blackmun, J., dissenting); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 391 (1990); 1 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG AND LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 2:15 (2d ed. 2005).

32. One of the drafters of the Exchange Act described the SEC's broad authority under Section 10(b):

> Subsection (c) says, 'Thou shalt not devise any other cunning devices.' * * * Of course subsection (c) is a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices.

Shortly after the passage of the Exchange Act, the SEC exercised its regulatory power by enacting Rule 10b-5.[33] Rule 10b-5 defines the manipulative and deceptive devices actionable under Section 10(b). Rule 10b-5 implements Section 10(b) by making it unlawful, in connection with the purchase or sale of securities, to employ any device, scheme, or artifice to defraud; to make material misstatements or conceal material information; or to engage in any act, practice, or course of business that operates as fraud.[34]

Federal courts forged an implied private cause of action under Rule 10b-5.[35] This private cause of action is now well established.[36] In recent years, however, Congress and the Supreme Court have retrenched the private cause of action and placed greater emphasis on SEC enforcement of Rule 10b-5.[37]

Stock Exchange Regulation: Hearing on H.R 7852 and H.R. 8720 Before the H. Comm. on Interstate & Foreign Commerce, 73d Cong. 115 (1934), *reprinted in* 7 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY, Item 23 (1973).

33. Exchange Act Release No. 3230, 7 Fed. Reg. 3804 (May 21, 1942); 17 C.F.R. 240.10b-5 (2008).

34. 17 C.F.R. § 240.10b-5; *see generally* Douglas M. Branson, *Prescience and Vindication: Federal Courts, SEC Rule 10b-5, and the Work of David S. Ruder*, 85 NW. U. L. REV. 613 (1991).

35. The first reported civil action based upon Rule 10b-5 was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (motion to dismiss). *See generally* Milton Freeman, Remarks at Conference on Codification of the Federal Securities Laws (Nov. 18, 1966), *in* 22 BUS. LAW. 793, 922 (1967); *Blue Chip Stamps*, 421 U.S. at 729 ("[T]he history of this provision [does not] provide any indication that Congress considered the problem of private suits under it at the time of its passage.").

36. *See* Herman & Maclean v. Huddleston, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy is simply beyond peradventure.").

37. Some have asserted that the implied remedy under Rule 10b-5 is consistent with the private attorney general model. The private attorney general model stands for the proposition that private enforcement under Rule 10b-5 serves as a necessary supplement to the SEC's efforts in deterring fraud. The private attorney general model holds that the implied action efficiently permits class action attorneys to sue defendants on behalf of a class of investors who either cannot afford the costs of litigation or whose stake is so small that litigation would not be cost effective. *See* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997). Others, however, have asserted that the effect of private enforcement under Rule 10b-5 is a misalignment of incentives between class members and class counsel. They have recommended a consolidated approach with enforcement authority placed exclusively in a federal agency such as the SEC. *See generally* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010) [hereinafter, Rose, *The Multienforcer Ap-*

B. *Scienter and the Private Securities Litigation Reform Act of 1995*

In *Ernst & Ernst v. Hochfelder*,[38] the Supreme Court concluded that to prevail under Section 10(b) and Rule 10b-5 plaintiffs must prove scienter. Up until that point, jurists had differed on whether scienter was a necessary element and on whether negligence alone was sufficient for civil liability under Section 10(b) and Rule 10b-5.[39] The Supreme Court reviewed the text and legislative history of Section 10(b) and found that the language of Section 10(b) strongly suggests that Congress intended to prohibit *only* knowing or intentional misconduct. The Supreme Court found that the term "manipulative," in Section 10(b), connotes intentional or willful conduct—conduct designed to deceive or defraud investors.[40] The Supreme Court aimed to avoid civil liability in situations where an accused acted in good faith but harmed investors—situations that appear unreasonable only in hindsight.[41] The Supreme Court concluded that civil liability under Section 10(b) required proof of "*scienter*," and that *scienter* is a mental state embracing intent to deceive, manipulate, or defraud.[42]

After *Hochfelder*, federal courts held that Rule 9(b) of the Federal Rules of Civil Procedure governed whether a plaintiff had sufficiently pleaded federal securities fraud.[43] The Courts

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proach]; Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1312-18 (2008) [hereinafter, Rose, *Reforming Securities Litigation Reform*]; John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Carl W. Hittinger & Jarod M. Bona, *The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court*, 4 J. BUS. & TECH. L. 167, 172 (2009).

38. 425 U.S. 185 (1973).

39. *See Hochfelder*, 425 U.S. at 193–94 n.12, 197 n.17 (1976) (citing conflicting case law and authorities).

40. *See id.* at 197-205.

41. *See id.* at 198.

42. *See id.* at 193 n.12.

43. *See, e.g.*, Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994). Rule 9(b) reads:

> Fraud, Mistake; Condition of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

of Appeals, however, diverged when applying Rule 9(b). The Ninth Circuit allowed plaintiffs to plead simply that defendants had acted with scienter, but required plaintiffs to set forth the circumstances constituting fraud (i.e., the time, place, and nature of the alleged fraudulent activities).[44] In contrast, the Second Circuit concluded that plaintiffs were required to plead the defendants' state of mind with particularity and to plead facts giving rise to a "strong inference of fraudulent intent."[45]

These divergent standards led to divergent outcomes across federal jurisdictions. Generally, unless a federal district court dismisses a frivolous private securities action or grants summary judgment, settlement is the result.[46] It was, therefore, substantially more likely in the Ninth Circuit than in the Second that defendants would be forced to settle an unmeritorious lawsuit.

Consequently, in 1995, Congress recast the landscape of securities fraud litigation by enacting the Private Securities Litigation Reform Act ("PSLRA").[47] Congress determined that frivolous strike suits had increased the costs of raising capital and chilled corporate disclosures.[48] It aimed to curb abuse of

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FED. R. CIV. P. 9(b).

44. *See, e.g.*, Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995); *In re* GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).

45. *See Shields*, 25 F.3d at 1128; Chill v. Gen. Elec. Co., 101 F.3d 263, 267 (2d Cir. 1996) (quoting *Shields'* two pronged strong inference test of pleading test to show either motive and opportunity or circumstantial evidence of misbehavior or recklessness).

46. *See infra* Section II.D.

47. Pub L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

48. *See* H.R. CONF. REP. NO. 104-369, 43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 742 ("Shareholders are also damaged due to the chilling effect of the current system on the robustness and candor of disclosure."); S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683 ("The Committee heard substantial testimony that today certain lawyers file frivolous 'strike' suits alleging violations of the Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation. These suits, which unnecessarily increase the cost of raising capital and chill corporate disclosure, are often based on nothing more than a company's announcement of bad news, not evidence of fraud.")

For additional analysis of the Reform Act's legislative history, *see* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 347-53 (1996);

the private cause of action under Section 10(b) and to discourage the filing of securities class actions of dubious merit designed to exact large settlement recoveries.[49] Moreover, Congress recognized that the Courts of Appeals had fashioned divergent standards when assessing the sufficiency of federal securities complaints and aimed to establish uniform and more stringent pleading requirements for private securities litigation.[50]

The PSLRA contains several provisions intended to reduce vexatious lawsuits. For present purposes, the most relevant is Section 21D(b)(2) of the PSLRA:

> (2) Required State of Mind – In any private action arising under [the Securities Exchange Act of 1934] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate [the 1934 Act], *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*[51]

In enacting the PSLRA, Congress rejected the Ninth Circuit's lenient pleading standard and instead drew from the Second Circuit, adopting its "strong inference" standard.[52] The "strong inference" requirement fashioned a stricter nationwide pleading standard for pleading scienter.[53] Congress

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Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 288-98 (1998); Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996).

49. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007); H.R. REP. NO. 104-369, at 31 ("Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets."); S. REP. NO. 104-98, at 15.

50. *See Tellabs*, 551 U.S. at 320; H.R. REP. NO. 104-369, at 41.

51. 15 U.S.C. § 78u-4(b)(2) (1998) (emphasis added). The PSLRA further provides that a "court shall, on the motion of any defendant, dismiss the complaint if the requirements of [§ 21D(b)(2)] are not met." *Id.* at § 78u-4(b)(3)(a).

52. *See* H.R. REP. NO. 104-369, at 41 ("Regarded as the most stringent pleading standard, the Second Circuit requirement is that the plaintiff state facts with particularity, and that these facts, in turn, must give rise to a 'strong inference' of the defendant's fraudulent intent.").

53. *See Tellabs*, 551 U.S. at 322 (citing H.R. REP. NO. 104-369, at 41).

did not aim to eliminate private federal securities class actions, but rather to require federal courts to screen out less meritorious lawsuits. Before allowing plaintiffs to fully impose the costs of defending a securities class action and thereby granting plaintiffs the strike value of federal securities lawsuits, federal district courts must evaluate whether plaintiffs have, in fact, made a heightened showing of intentional misconduct.[54]

Congress also elevated the motion to dismiss stage to a crucial adjudication point in private federal securities litigation.[55] Section 21D(b)(3)(A) of the PSLRA states that, "the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met." Congress contemplated that federal courts would use the strong inference standard as a means to filter out unmeritorious federal securities lawsuits.[56] The locus of decision-making shifted to federal judges. Judges now serve as gatekeepers who screen out complaints, thereby minimizing the strike value of unfounded allegations and preserving the court's time and limited resources. Several empirical studies suggest that the PSLRA's heightened pleading standards have increased the dismissal of unmeritorious suits.[57]

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54. *See* Carl W. Hittinger & Jarod M. Bona, supra note 37, at 182. Professor Mukesh Bajaj has shown that the PSLRA decreased the number of cases that defendants settle to avoid the costs of discovery and the reputational harms associated with litigation. *See* Mukesh Bajij, Sumon Mazumdar, Atulya Sarin, *Empirical Analysis: Securities Class Action Settlements*, 43 SANTA CLARA L. REV. 1001, 1032-33 (2003).

55. *See generally* A.C. Pritchard & Hillary A. Sale, *What Counts as Fraud? An Empirical Study of Motions To Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEGAL STUD., 125, 128 (2005) [hereinafter, Pritchard, *Motions to Dismiss*] (explaining that the motion to dismiss affects discovery and settlement).

56. *See Tellabs*, 551 U.S. at 324.

57. *Compare* David M. Levin & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1, 40 (1998) (citing *Securities Litigation Reform: Hearings Before the Subcomm. on Telecomm. & Fin. of the H. Comm. on Energy and Commerce*, 103d Cong. (1994) (testimony of Professor Joel Seligman, University of Michigan Law School)), *with* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 691 (2002). *See generally* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 923-29 (2003) (asking whether Congress has achieved the primary goals of the PSLRA); Stephen J. Choi, Karen K. Nelson & Adam C. Pritchard, The Screening Effect of the Private Securities Litigation Reform Act (Univ. of

II.
VYING APPROACHES AND VEXING CIRCUIT SPLITS

A. *Pre-Tellabs Circuit Split at the Motion To Dismiss Stage*

When enacting the PSLRA, Congress left the key phrase "strong inference" undefined. As a result, Courts of Appeals diverged on the meaning of the phrase and on whether it permitted federal courts to contrast competing inferences of intent. This divide originated from the tension between how federal courts had customarily adjudicated motions to dismiss under Rule 12(b)(6) and the dictates of the PSLRA. Under Rule 12(b)(6), federal district courts had afforded plaintiffs wide latitude when adjudicating motions to dismiss. Until quite recently, federal courts drew all reasonable inferences in favor of plaintiffs, without contrasting inferences drawn from allegations.[58] The split, therefore, centered on whether federal courts were permitted to contrast attributions of intent drawn from factual allegations. Some Courts of Appeals allowed federal district courts to evaluate *only* whether an attribution of culpable intent *could be* drawn from the factual allegations, while others required federal district courts to compare and contrast both culpable and nonculpable attributions of intent. As will be discussed shortly, the first approach would likely result in the Fundamental Attribution Error, while the latter would reduce its effect.

In interpreting the "strong inference" language, the Ninth Circuit rejected the notion that federal district courts were permitted to consider *only* inferences of culpability drawn from plaintiffs' allegations—that is, *only* inferences favorable

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Mich. John M. Olin Ctr. for Law & Econ., Working Paper No. 07-008, Feb. 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975301 (examining the affects of the PSLRA on filing and settling of securities litigation claims).

58. The U.S. Supreme Court has since altered federal pleading practice greatly. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007) ("[*Conley's* 'no set of facts'] is best forgotten as an incomplete, negative gloss on an accepted pleading standard . . . ."). *See generally* Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 1-17 (Oct. 2010).

to the plaintiffs' position.[59] It concluded that such a standard would eviscerate the PSLRA's strong inference requirement by allowing plaintiffs to plead in a vacuum.[60] Federal district courts, therefore, were to consider *all* reasonable inferences drawn from plaintiffs' allegations—both culpable and nonculpable inferences. Moreover, federal district courts were to consider all allegations in their entirety, together with any reasonable inferences that could be drawn therefrom, including whether, on balance, plaintiffs' complaint gives rise to the requisite inference of scienter.[61] The Sixth Circuit went further, requiring federal district courts to grant dismissal unless the inference of culpability was *the most* plausible of competing inferences.[62]

Unlike the Ninth and the Sixth Circuits, the Tenth Circuit required federal district courts to consider both culpable and nonculpable inferences of intent, but to refrain from weighing them.[63] It concluded that federal district courts must consider the culpable inference suggested by plaintiffs, while acknowledging a possible nonculpable inference, and then consider whether the culpable inference is strong in light of the overall context.[64]

The Seventh Circuit also fashioned a standard that barred federal district courts from weighing culpable and nonculpable inferences of intent.[65] When *Tellabs* was first decided by the Seventh Circuit, the Seventh Circuit required federal district courts to deny defendants' motion to dismiss where plaintiffs alleged facts from which a reasonable person could infer that the defendants acted with the required intent.[66] It permitted federal district courts to grant dismissal only where a reasonable person could not draw a culpable inference from the alleged facts. Like the Tenth Circuit, the

59. *See* Gompper v. VISX, Inc., 298 F.3d 893, 896-97 (9th Cir. 2002).

60. *Id.*

61. *Id.*

62. *See* Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001).

63. *See* Pirraglia v. Novell, Inc., 339 F.3d 1182, 1188 (10th Cir. 2003).

64. *Id.*

65. *See* Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588, 601-03 (7th Cir. 2006), *vacated*, 551 U.S. 308 (2007).

66. *Id.* at 602.

Seventh Circuit aimed to avoid intrusion on the role of the jury as finder of fact.[67]

B. *Tellabs at the Motion To Dismiss Stage*

In *Tellabs*, shareholders filed a private securities action under Section 10(b) and Rule 10b-5, alleging securities fraud.[68] They alleged that Tellabs and its president, Richard Notebaert, made false statements about revenue and demand for Tellabs' popular product. The shareholders claimed that they had relied on those statements and were harmed when share prices dropped following public disclosure of the inaccuracy of Tellabs' reports and projections. The federal district court granted defendants' motion to dismiss, holding that although plaintiffs had pleaded that defendants' statements were misleading, they failed to plead facts from which a strong inference could be drawn that alleged misstatements were made with fraudulent intent. The Seventh Circuit reversed, holding that the shareholders had alleged facts from which a reasonable person could infer that the defendants acted with scienter.[69]

The Supreme Court granted *certiorari* to resolve the Circuit split on whether, and to what extent, a federal district court can and must consider competing inferences of intent when adjudicating whether the allegations of fraud in a private federal securities complaint give rise to a "strong inference" of scienter.[70]

Justice Ginsburg described the Court's task as fashioning a workable construction of the "strong inference" standard that would meet the PSLRA's twin goals: curbing frivolous, lawyer-driven litigation while preserving investors' ability to recover on meritorious claims.[71] The strength of an inference cannot be decided in a vacuum; it is inherently comparative, reasoned the Court.[72] The evaluation turns on how likely it is that one conclusion, as compared to others, follows from the underlying facts. Therefore, federal courts must consider

67. *Id.*
68. Tellabs Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308 (2007).
69. *Id.* at 317.
70. *Id.* at 317-18.
71. *Id.* at 322.
72. *Id.* at 322-23.

plausible, nonculpable explanations for the defendants' conduct, as well as inferences favoring the plaintiffs when evaluating whether factual allegations give rise to the requisite strong inference of fraudulent intent.[73]

The Supreme Court described the test as follows: when evaluating federal securities complaints for a strong inference of scienter, *federal district courts must evaluate whether the inference is cogent and compelling, and thus strong in light of other explanations.* The Court instructed federal district courts to dismiss federal securities complaints unless a reasonable person would deem the attribution of fraudulent intent *cogent and at least as compelling as any opposite attribution one could draw from the facts alleged.*[74]

The Supreme Court, moreover, rejected the Seventh Circuit's formulation, which had barred a comparative inquiry. It concluded that the Seventh Circuit's concern about usurping the jury's role was undue.[75] The Seventh Amendment is not violated by requiring federal district judges to engage in a comparative assessment of plausible inferences, while constantly assuming plaintiffs' factual allegations to be true. This comparative assessment does not force plaintiffs to plead more than they would be required to prove at trial. At trial, plaintiffs would be required to demonstrate that it is more likely than not that the defendants had acted with scienter.[76] The Court explained, moreover, that in numerous contexts federal judges serve as gatekeepers who prevent submission of claims to a jury without running afoul of the Seventh Amendment (*e.g.* Federal Rule of Evidence 601, judgment as a matter of law, and summary judgment).[77]

Justices Scalia and Alito filed concurring opinions proposing a more rigorous standard.[78] They would have required federal district courts to dismiss federal securities complaints, unless the culpable inference was *more plausible* than the nonculpable inference.

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73. *Id.* at 323-24.

74. *Id.* at 324.

75. *Id.* at 326-7.

76. *Id.* at 328-29.

77. *Id.* at 327 n.8.

78. *Id.* at 329 (Scalia, J., concurring), 333-34 (Alito, J., concurring).

C. *Post-Tellabs Circuit Split at Summary Judgment*

While *Tellabs* resolved the split at the motion to dismiss stage, the First Circuit and the Ninth Circuit disagree on the appropriate standard for assessing scienter when evaluating a motion for summary judgment, and specifically, whether the PSLRA's heightened pleading standard applies at summary judgment. There is also a gap between how federal courts say they evaluate scienter and how courts, in fact, assess scienter at summary judgment.

The First Circuit has concluded that the PSLRA's heightened standard applies at summary judgment.[79] In *Geffon v. Micrion Corp.*, plaintiffs alleged that the defendants had violated Section 10(b), Rule 10b-5, and Section 20(a) of the Exchange Act by making fraudulent statements or omissions in failing to disclose the details of a large order and how it affected the defendants' backlog. Plaintiffs relied heavily on the defendant's testimony that the company had interpreted the term 'book an order' differently for internal purposes than how it used the term publicly. The district court granted summary judgment, concluding that there was no genuine issue of material fact as to whether the statements in question were misleading or fraudulent. On the issue of scienter, the First Circuit determined that the "judicial reasoning applicable to imposing heightened pleading requirements is at least as forceful, if not more so, with regard to proof requirements that a trial court must consider in deciding whether to allow a motion for summary judgment."[80]

Federal district courts in the First Circuit, therefore, draw on the strong inference standard and apply the *Tellabs* framework at summary judgment.[81] Courts have explained that a strong inference of scienter must be more than merely plausible or reasonable at summary judgment—it must be cogent

79. *See* Geffon v. Micrion Corp., 249 F.3d 29, 36 (1st Cir. 2001).

80. *Id.*

81. *See* SEC v. Goldsworthy, No. 06-10012-JGD, 2007 WL 4730345, at *14 (D. Mass. Dec. 4, 2007) (holding that summary judgment should be denied as to two defendants, but granted as to a third defendant); KA Invs. LDC v. No. Nine Visual Tech. Corp., No. 00-10966-DPW, 2002 WL 31194865, at *13 (D. Mass. Aug. 26, 2002) (denying summary judgment).

and at least as compelling as any opposing inference of non-fraudulent intent.[82]

Like the First Circuit, other federal courts have held that, although the PSLRA and *Tellabs* dealt with pleading, the underlying rationale of the PSLRA and *Tellabs* is applicable at summary judgment.[83] For example, in *Pennmont Securities*, the court determined that *Tellabs* was "at least instructive in the summary judgment context" and granted summary judgment.[84] There, the court held that there must be a strong inference of scienter drawn from all the facts, and additionally, that the court must take into account plausible competing inferences. The court stated that, under *Tellabs*, the inference of scienter must be at least as compelling as any opposing inference on could draw from the facts.[85]

In marked contrast, the Ninth Circuit has determined that the heightened standard for evaluating scienter does not apply at the summary judgment stage.[86] In *Howard v. Everex Systems*, plaintiffs filed a federal securities class action under Section 10(b) and 20(a) of the Exchange Act, alleging that the defendants had fraudulently inflated the price of the company's stock by falsely representing that the company had achieved profitability and consecutive profit increases. During trial, the district court granted judgment as a matter of law ("JMOL") in favor of the defendants on the grounds that the plaintiffs had not stated a claim within the meaning of Section 10(b) and that the defendants had not acted with the requisite level of scienter.[87] The Ninth Circuit reversed, holding that the PLSRA "did not alter the substantive requirements for scienter under Section 10(b)," and "the standard on summary judgment or JMOL remains unaltered. . . ."

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82. *See Goldsworthy*, 2007 WL 4730345, at *14 (quoting *Tellabs*, 551 U.S. at 309); *KA Invs.*, 2002 WL 31194865, at *11.

83. *See* Nolfi v. Ohio Ky. Oil Corp., 562 F. Supp. 2d 904, 910 (N.D. Ohio 2008) ("The Court notes [in denying summary judgment] that the above cases deal with the pleading standard requirement for these claims, but finds that the underlying rationale is applicable to the summary judgment setting as well.").

84. Pennmont Sec. v. Wallace, No. 06-1646, 2008 WL 834379, at *6 (E.D. Pa. Mar. 26, 2008).

85. *Id.* at *6-7.

86. *See* Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000).

87. *Id.* at 1060.

Other federal courts have reached a similar result. In *In re Bristol-Myers Squibb Securities Litigation*, the court drew on the procedural distinction between the pleading stage and the summary judgment stage to reject a heightened standard at summary judgment. There the court held that the heightened standard imposed by the PLSRA does not apply to the substantive burdens at summary judgment. The court explained that the substantive standard in the Third Circuit calls not for a "strong inference," but rather for the plaintiff to supply a basis from which to draw a reasonable inference that defendants acted with the requisite fraudulent intent. The court found that, at summary judgment, the need to check strike suits is not as significant as that need at the motion to dismiss stage. The court ultimately granted in part and denied in part defendants' motion for summary judgment.[88]

The Second Circuit articulated what is, on its face, the most lenient and least discerning of the standards applied at summary judgment in *Press v. Chemical Inv. Serv. Corp.*[89] There, the Second Circuit explained that it "has been lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences."[90] The Second Circuit explained that it was lenient because whether specific intent existed is generally a question of fact appropriate for resolution by the "trier of fact," i.e., the jury. In Press, the Second Circuit articulated this rule in the context of a motion to dismiss. The Second Circuit rejected the district court's decision on scienter but ultimately affirmed dismissal on other grounds. Nevertheless, Second Circuit district courts have drawn on *Press* when denying summary judgment.[91]

But Second Circuit district courts have not applied *Press* uniformly. In numerous PSLRA cases in which its federal courts grant summary judgment, they do not mention *Press* at

88. *In re* Bristol-Myers Squibb Sec. Litig., No. 00-1990(SRC), 2005 WL 2007004, at *13-14 (D.N.J. Aug. 17, 2005).

89. *See* Press v. Chem. Inv. Servs. Corp., 166 F.3d 529, 538 (2d Cir. 1999).

90. *Id.* (emphasis added).

91. *See, e.g., In re* WorldCom, Inc. Sec. Litig., 352 F. Supp. 2d 472, 500-01 (S.D.N.Y. 2005) (denying summary judgment); RMED Int'l., Inc. v. Sloan's Supermarkets, Inc., 185 F. Supp. 2d 389, 403 (S.D.N.Y. 2002) (denying summary judgment); Buxbaum v. Deutsche Bank AG, 196 F. Supp. 2d 367, 375-76 (S.D.N.Y. 2002) (denying summary judgment).

all.[92] Second Circuit courts have held on a number of occasions, on particular facts, that no reasonable jury could find scienter and have granted summary judgment.[93]

Nor have other federal courts applied the restrictive standard set forth in *Press*. Indeed, many federal courts recite the general rule that summary judgment is appropriate where there is no *genuine* issue of material fact, while ultimately concluding that summary judgment was appropriate because the nonmoving party rested on conclusory allegations, improbable inferences, or unsupported speculation.[94]

D. *Why the Seemingly Intractable Problem Must Be Solved*

First, federal courts are the *de facto* triers of fact—that is, federal district judges screen frivolous pleadings at the motion to dismiss stage, and summary judgment is the point at which evidence could, in fact, be reviewed holistically because trials are so rare. If plaintiffs plead facts creating a strong inference of fraudulent intent, plaintiffs survive a motion to dismiss. But if they later fail to set forth evidence of fraudulent intent, and instead rely only on tenuous circumstantial evidence, the Ninth and Second Circuits would demand denial of summary judgment, prompting the next phase of litigation, i.e., trial.[95]

As an empirical matter, however, denial of summary judgment results not in trial, but settlement whether or not defendants are culpable. Trials are exceedingly infrequent.[96]

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92. *See In re* Corning Inc. Sec. Litig., 349 F. Supp. 2d 698 (S.D.N.Y. 2004); Freedman v. Value Health Inc., 135 F. Supp. 2d 317 (D. Conn 2001); *In re* N. Telecom Ltd. Sec. Litig., 116 F. Supp. 2d 446 (S.D.N.Y. 2000).

93. *See Freedman*, 135 F. Supp. 2d at 342; *In re N. Telecom*, 116 F. Supp. 2d at 465.

94. SEC v. Ficken, 546 F.3d 45, 51-53 (1st Cir. 2008) (affirming grant of summary judgment where no genuine issue of material fact existed); *In re* Acceptance Cos. Ins. Sec. Litig., 423 F.3d 899, 905 (8th Cir. 2005) (affirming grant of summary judgment where no genuine issue of material fact existed); *In re* Ikon Office Solutions, Inc., 277 F.3d 658, 666 (3d Cir. 2002) (affirming grant of summary judgment where no genuine issue of material fact existed).

95. *See Press*, 166 F.3d at 538; *Howard*, 228 F.3d at 1064.

96. *See* Choi et al, supra note 57 (noting that the vast number of securities class actions have either been dismissed or settled); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) ("The shrinking number of trials is particularly striking because virtually everything else in the legal world is growing—the population of law-

For example, the Stanford Law School Securities Class Action Clearinghouse reported that approximately 3,052 federal securities class actions were filed between January 1, 1996 and December 21, 2009.[97] During that time only fifteen (15) federal securities class action cases were tried to verdict—one half of one percent of total cases filed.[98] Settlement results from intense structural incentives. On the defendants' side, risk-averse corporate executives settle before trial to preserve coverage under their directors' and officers' liability ("D&O") insurance policies.[99] D&O policies, however, contain exclusions for active and deliberate dishonesty and improper personal benefit.[100] Deliberate dishonesty is tantamount to scienter under Section 10(b). If a jury returns a verdict of liability under Section 10(b), that verdict may well trigger an exclusion from coverage and personal liability. Risk-averse defendants, therefore, avoid trial to ensure that insurers will fund their defense. On the plaintiffs' side, the "lodestar method" for calculating fees also results in risk aversion. The method offers plaintiffs' attorneys little incentive to wager on a favorable verdict, risking the entire fee award they could earn by simply

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yers, the number of cases, expenditures on law, the amount of regulation, the volume of authoritative legal material, and not least the place of law, lawyers, and courts in public consciousness.")

97. *See* Cornerstone Research, *Cornerstone Research: Securities Class Action Filings 2009: A Year in Review* at 1, *available at* http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_YIR.pdf (last visited Apr. 29, 2010).

98. *See* Risk Metrics Group, *Risk Metrics Group: Securities Class Action Services, Securities Class Action Trials in the Post-PSLRA Era*, Jan. 2010, *available at* http://blog.riskmetrics.com/slw/SCAS%20Trials.pdf (last visited Apr. 29, 2010); *cf.* Pritchard, *Motions To Dismiss*, *supra* note 55, at 128 (claiming that securities fraud class actions rarely go to a jury).

99. *See* Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers Insurance in Securities Settlement*, 157 U. PA. L. REV. 755, 796-819 (2009); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1469 (2004); Bernard S. Black, Brian R. Cheffins & Michael Klausner, Outside Director Liability 18-19 (Stanford Law Sch. John M. Olin Program in Law & Econ. Working Paper No. 250, 2003), *available at* http://papers.ssrn.com/abstract=382422.

100. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 550-53 (1991) [hereinafter, Alexander, *Do the Merits Matter?*]; Roberta Romano, *The Shareholder Suit: Litigation Without Foundation*, 7 J.L. ECON. & ORG. 55, 57 (1991).

settling on the eve of trial.[101] Plaintiffs' attorneys, therefore, often perceive little benefit to proceeding to trial where a jury could return an unfavorable verdict and where they could lose their entire fee and out of pocket expenses as well.

In lieu of trial, settlement will result, but settlements after summary judgment are linked to a torrent of financial harm to public companies. Studies suggest that after settlements in Section 10(b) actions, firms experience liquidity problems, worsening financial health, and an increased likelihood of bankruptcy.[102] Given these consequences, an over-deterrence problem looms large.[103] Unless federal courts contrast culpable and nonculpable inferences of intent, Rule 10b-5 is in effect converted into a strict liability regime for conduct that appears unreasonable only in hindsight.[104]

And *second*, there is a gulf between the language describing how federal courts adjudicate scienter at summary judgment—*Press*—and how federal courts, in fact, adjudicate motions for summary judgment. This gulf is particularly striking when the SEC affirmatively moves for summary judgment. Second Circuit courts granted summary judgment in approximately 46 percent of cases where defendants moved for summary judgment in private securities actions.[105] In marked con-

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101. Unlike a contingent or proportional fee arrangement, the lodestar method is derived primarily from the number of hours worked, not on the ultimate recovery. The lodestar method calculates the fee by multiplying the number of hours worked by a customary hourly rate. Plaintiffs' attorneys expend the vast majority of billable hours pre-trial. They, therefore, have little incentive to bill the additional hours spent in trial, especially given that proceeding to trial may well result in an adverse verdict that would wipe out their entire attorneys' fee award. *See* Alexander, *Do the Merits Matter, supra* note 100 at 541.

102. *See* Lynn Bai, James D. Cox & Randall S. Thomas, *Lying and Getting Caught: An Empirical Study of the Effects of Securities Class Action Settlements on Targeted Firms*, 158 U. PA. L. REV. 1877, 1912-13 (2010).

103. *See* Rose, *The Multienforcer Approach, supra* note 37, at 2184 ("[O]verdeterrence remains a concern to the extent that regulated parties fear inaccurate prosecution and legal error . . . . [O]verdeterrence produces some of the very same social costs as securities fraud itself: it can increase the cost of capital (e.g., if fear of liability causes companies to overinvest in precautionary measures or causes financial intermediaries to charge more for their services) and upset the allocative efficiency of the economy . . . .").

104. *See infra* Section III.B.

105. The sample consists of decisions in the Second Circuit ruling on defendants' motions for summary judgment in private securities fraud class ac-

trast, Second Circuit courts granted summary judgment in approximately 75 percent of the cases where the SEC moved affirmatively for summary judgment.[106] If *Press* is to be applied

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tions, in which scienter was adjudicated. Using exhaustive searches on Westlaw, I collected what I believe is virtually every available published and unpublished decision by district courts at the summary judgment stage beginning in 1996 through the end of 2009. My search yielded fifteen decisions. I identified seven cases granting summary judgment, six cases denying summary judgment, and two cases granting *in part* and denying *in part*. *See* Pension Comm. of the Univ. of Montreal v. Banc of America Sec., LLC, 592 F. Supp. 2d 608 (S.D.N.Y. 2009) (granting and denying summary judgment in part); *In re* Worldcom Inc. Sec. Litig., 352 F. Supp. 2d 472 (S.D.N.Y. 2005) (denying summary judgment); Louros v. Kreicas, 367 F. Supp. 2d 572 (S.D.N.Y. 2005) (granting and denying in part); *In re* Corning, Inc. Sec. Litig., 349 F. Supp. 2d 698 (S.D.N.Y. 2004) (granting summary judgment); Buxbaum v. Deutsche Bank AG, 196 F. Supp. 2d 367 (S.D.N.Y. 2002) (denying summary judgment); RMED Int'l., Inc. v. Sloan's Supermarkets, Inc., 185 F. Supp. 2d 389 (S.D.N.Y. 2002) (denying summary judgment); Sedaghatpour v. Doubleclick, Inc., 213 F. Supp. 2d 367 (S.D.N.Y. 2002) (granting summary judgment); *In re* Motel 6 Litig., 161 F. Supp. 2d 227 (S.D.N.Y. 2001) (denying summary judgment); Freedman v. Value Health, Inc., 135 F. Supp. 2d 317 (D. Conn. 2001) (granting summary judgment); Gerber v. Computer Assoc., 2000 WL 307379 (E.D.N.Y. Mar. 14, 2000) (denying summary judgment); *In re* N. Telecom Ltd. Sec. Litig., 116 F. Supp. 2d 446 (S.D.N.Y. 2000) (granting summary judgment); *In re* Kidder Peabody Sec. Litig., 10 F. Supp. 2d 398 (S.D.N.Y. 1998) (denying summary judgment); *In re* Symbol Techs. Class Action, 950 F. Supp. 1237 (E.D.N.Y. 1997) (granting summary judgment); *In re* Canadiaigua Sec. Litig., 944 F. Supp. 1202 (S.D.N.Y. 1996) (granting summary judgment); Phillips v. Kidder, Peabody & Co., 933 F. Supp. 303 (S.D.N.Y. 1996) (granting summary judgment).

106. The sample consists of decisions in the Second Circuit ruling on motions for summary judgment under Section 10(b) where the SEC moved affirmatively for summary judgment and where scienter was adjudicated. Using exhaustive searches on Westlaw, I collected what I believe is every available published and unpublished decision by district courts beginning in 1996 through the end of 2009. I then excluded summary dispositions where the Commission relied on plea agreements or prior findings from criminal judgments. My search yielded twenty decisions. I identified fifteen cases granting summary judgment for the Commission, three cases denying summary judgment for the Commission, and two cases granting *in part* and denying *in part*. *Compare* SEC v. Aragon Capital Management, LLC, 672 F. Supp. 2d 421, 421 (S.D.N.Y. 2009) (granting summary judgment); SEC v. Rabinovich & Assocs., LP, No. 07 Civ. 10547(GEL), 2008 WL 4937360 (S.D.N.Y. Nov. 18, 2008) (granting summary judgment); SEC v. Pittsford Capital Income Partners, No. 06 Civ 6353 T(P), 2007 WL 2455124, at *2 (W.D.N.Y. Aug. 23, 2007) (granting summary judgment); SEC v. Grotto, No. 05 Civ. 5880(GEL), 2006 WL 3025878, at *1 (S.D.N.Y. Oct. 24, 2006) (granting summary judg-

even-handedly in both private and public enforcement cases and, hence, summary judgment is denied when a "fairly tenuous inference" of culpability exists, this would retrench robust public enforcement of the Exchange Act. The *Press* standard would raise the standard for the SEC's affirmative use of summary judgment. This would unnecessarily force the SEC to shift litigation resources to discovery and trial in a number of public enforcement cases that should be decided at summary judgment where defendants offer only weak explanations for their conduct. The consequence would be under-enforcement of Rule 10b-5 by the SEC. That result is plainly inconsistent with the modern shift toward public enforcement of the Exchange Act.[107] Federal courts must broaden the tools used by the SEC to combat securities fraud, not blunt them.

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ment); SEC v. Save the World Air, Inc., No. 01 Civ. 11586(GBD)FM, 2005 WL 3077514, at *1 (S.D.N.Y. Nov. 15, 2005) (granting summary judgment); SEC v. Mandaci, No. 00 Civ. 6635 LTS FM, 2004 WL 2153879, at *1 (S.D.N.Y. Sept. 27, 2004) (granting summary judgment); SEC v. Roor, No. 99 Civ. 3372(HB), 2004 WL 1933578, at *1 (S.D.N.Y. Aug. 30, 2004) (granting summary judgment); SEC v. Global Telecom Servs., L.L.C., 325 F. Supp. 2d 94, 94 (D. Conn. 2004) (granting summary judgment); SEC v. Batterman, No. 00 Civ. 4835(LAP), 2002 WL 31190171, at *1 (S.D.N.Y. Sept. 30, 2002) (granting summary judgment); SEC v. Credit Bancorp, Ltd., 195 F. Supp. 2d 475, 475 (S.D.N.Y. 2002) (granting summary judgment); SEC v. Coates, 137 F. Supp. 2d 413, 424 (S.D.N.Y. 2001) (granting summary judgment); SEC v. Milan Capital Group, Inc., No. 00 Civ. 108(DLC), 2000 WL 1682761, at *1 (S.D.N.Y. Nov. 9, 2000) (granting summary judgment); SEC v. Todt, No. 98 Civ. 3980(JGK), 2000 WL 223836, at *11 (S.D.N.Y. Feb. 25, 2000) (granting summary judgment); SEC v. Softpoint, Inc., 958 F. Supp. 846, 846 (S.D.N.Y. 1997) (granting summary judgment), *with* SEC v. Lyon, 605 F. Supp. 2d 531, 531 (S.D.N.Y. 2009) (denying summary judgment); SEC v. Treadway, 430 F. Supp. 2d 293, 293 (S.D.N.Y. 2006) (denying summary judgment); SEC v. Meltzer, 440 F. Supp. 2d 179, 179 (E.D.N.Y. 2006) (denying summary judgment); SEC v. Thrasher, 152 F. Supp. 2d 291, 292 (S.D.N.Y. 2001) (denying summary judgment), *and* SEC v. Universal Express, Inc., 475 F. Supp. 2d 412, 412 (S.D.N.Y. 2007) (granting in part and denying in part); SEC v. Falbo, 14 F. Supp. 2d 508, 509 (S.D.N.Y. 1998) (granting in part and denying in part).

107. *See generally* Hittinger & Bona, *supra* note 37 (examining the Supreme Court's encouragement of government enforcers for securities law); Rose, *The Multienforcer Approach*, *supra* note 37; Rose, *Reforming Securities Litigation Reform*, *supra* note 37 (analyzing various enforcement methods).

III.
THE FUNDAMENTAL ATTRIBUTION ERROR: OVERESTIMATING DISPOSITIONS AND UNDERESTIMATING SITUATIONS

Social psychologists and cognitive psychologists have examined how decision-makers attribute causality, blame, and intent.[108] They have shown that attribution is marked by distortions of perception and persistent, if unintentional, errors and biases.[109] They have also shown that human behavior results from a combination of personal characteristics and situational influences, such as social norms and situational constraints. People make *dispositional attributions* when they assign causality to a person's attitudes, characteristics, or personality traits.[110] People make *situational attributions* when they assign causality to the force of a person's circumstances, social situation, or social environment.[111] Despite the power that situations have in shaping behavior, observers systematically fail to perceive the force that situations bear on behavior.[112] This persistent bias—the bias of attributing people's behaviors to dispositions,

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108. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 23 (2d ed. 1991) [hereinafter FISKE, SOCIAL COGNITION] ("Attribution theory deals with how the social perceiver uses information to arrive at causal explanations for events."); ELLIOT ARONSON, TIMOTHY D. WILSON & ROBIN M. AKERT, SOCIAL PSYCHOLOGY 95 (7th ed. 2010) [hereinafter ARONSON, SOCIAL PSYCHOLOGY].

109. *See generally* FISKE, SOCIAL COGNITION, *supra* note 108, at 66; ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 98.

110. Attributions that assign the cause of behavior dispositions, personality, attitudes, or character are also referred to as "internal attributions." *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 95.

111. Situational attributions are also referred to as "external attributions." *See id.* at 95.

112. *See* ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 125-134; Yaacov Trope & Ruth Gaunt, *Processing Alternative Explanations of Behavior: Correction or Integration?*, J. PERSONALITY & SOC. PSYCHOL. 344 (2000); FISKE, SOCIAL COGNITION, *supra* note 108, at 67; Daniel T. Gilbert & Edward Jones, *Perceiver-Induced Constraint: Interpretations of Self-Generated Reality*, J. PERSONALITY & SOC. PSYCHOL., 269 (1986); GUSTAV ICHHEISER, APPEARANCES AND REALITIES: MISUNDERSTANDINGS IN HUMAN RELATIONS 83-84 (1970) ("We all have in everyday life the tendency to interpret and to evaluate the behavior of other people in terms of specific personality characteristics rather than in terms of specific social situations in which those people are placed. More than that—the whole system of our sociomoral concepts such as merit and guilt, success and failure, responsibility and the like, as accepted and applied in everyday life, is based on the assumption of a personal rather than situational causation of human behavior.").

rather than to situational influences—is known as the Correspondent Bias[113] and is so pervasive and systemic that Professor Lee Ross named the bias the Fundamental Attribution Error.[114]

A. *The Fundamental Attribution Error*

When observers draw inferences on the causes of another's behavior, they systematically fail to take into account situational factors.[115] Even where situational factors fully account for another's behavior, people tend to infer that attitudes, personality traits, and enduring dispositions were the causes for that behavior.[116] Researchers have found this persistent bias more dominant in Western cultures than in non-Western cultures.[117]

Professor George Quattrone developed a descriptive model of the mental processes behind the Fundamental Attribution Error.[118] He found that observers spontaneously attribute a connection between another's dispositions and behavior, and then adjust that attribution only if further deliberation warrants that they do so. Dispositional attributions are fairly spontaneous, whereas the use of situational information to discount the role of dispositions requires effortful deliberation.

Refining Quattrone's descriptive model, Professor Daniel Gilbert and his colleagues found that the process of attribution comprises three sequential operations: a behavioral iden-

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113. *See* FISKE, SOCIAL COGNITION, *supra* note 108, at 67; Gilbert & Jones, *supra* note 112.

114. *See* ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 125-34; FISKE, SOCIAL COGNITION, *supra* note 108, at 67.

115. *See* ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 125-34; FISKE, SOCIAL COGNITION, *supra* note 108, at 67.

116. *See* FISKE, SOCIAL COGNITION, *supra* note 108, at 67; Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485 (1977).

117. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 103-05; Ara Norenzayan & Richard E. Nisbett, *Culture and Causal Cognition*, 9 CURRENT DIRECTION PSYCHOL. SCI. 132 (2000).

118. *See generally* Daniel T. Gilbert, *Ordinary Personology*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 89, 113 (Daniel T. Gilbert et al. eds., 4th ed. 1998) [hereinafter, Gilbert, *Ordinary Personology*]; George A. Quattrone, *Overattribution and Unit Formation: When Behavior Engulfs the Person*, 42 J. PERSONALITY & SOC. PSYCHOL. 593 (1982).

tification stage ("categorization"), a dispositional inference stage ("characterization"), and a situational adjustment stage ("correction").[119] The first two stages are relatively spontaneous, while the last stage requires conscious, controlled, effortful deliberation. When people have an interest in understanding other people's behavior, they consider the influence of situational factors on behavior, but only after they have first spontaneously characterized behavior in dispositional terms. This research demonstrates that categorization and characterization are more automatic than correction. People who are denied the opportunity to think deeply about behavior tend to draw dispositional inferences, even after they are informed that the behavior is linked to situational factors.[120]

The Fundamental Attribution Error is explained by a number of heuristics, which Professors Daniel Kahneman and Amos Tversky introduced in several seminal publications.[121] Heuristics are mental shortcuts—rules of thumb—that reduce complex and time-consuming tasks to more simple and efficient strategies for making judgments about uncertain events.[122]

The Fundamental Attribution Error is explained, for example, by the *representativeness heuristic* and the *anchoring and adjustment heuristic.* The representativeness heuristic applies to categorization judgments.[123] People often decide spontaneously whether an observed instance belongs to a particular category based on a crude assessment of similarity between that instance and their expectations, schemas, or prototypical rep-

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119. *See generally* Gilbert, *Ordinary Personology*, *supra* note 118, at 112; Daniel T. Gilbert, Brett W. Pelham, & Douglass S. Krull, *On Cognitive Busyness: When Person Perceivers Meet Persons Perceived*, 54 J. PERSONALITY & SOC. PSYCHOL. 940 (1988); Daniel T. Gilbert et al., *Of Thoughts Unspoken: Social Inference and the Self-Regulation of Behavior*, 55 J. PERSONALITY & SOC. PSYCHOL. 685 (1988).

120. *See generally* Gilbert, *Ordinary Personology*, *supra* note 118, at 112.

121. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129 (Daniel Kahneman et al. eds., 1982) [hereinafter KAHNEMAN, HEURISTICS AND BIASES].

122. *See* NISBETT, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT, *supra* note 21, at 7.

123. *See* FISKE, SOCIAL COGNITION, *supra* note 108, at 382-83.

resentations of that category, rather than on the basis of a more rational comparison of the instance with all the defining features of that category.[124] Our prevailing expectancies or schemas about human behavior are that others do what they do because they are who they are, not because of situational influences.[125] Given these expectancies and schemas, people spontaneously infer that another's behavior results from their personality. Because spontaneous attributions are strongly anchored to dispositional attributions, people insufficiently adjust for situational influences.

The Fundamental Attribution Error is also explained, in part, by the *availability heuristic* and *salience heuristic.* Actors in the foreground are more salient than the environment in the background.[126] People focus on actors, not environments, and people overestimate the causal significance of actors. Problems arise when observers draw highly vivid causes from memory, rather than concealed causes occurring in the background—such as the influence of environments on behavior. Further, situational factors, social context, social roles, and situational pressures are often invisible, unlike the more dynamic and vivid behavior of actors. Because the actor dominates an observer's thinking, dispositional aspects are overrated as causally important.

Social psychologists have studied how to counteract the Fundamental Attribution Error as well. Professor Douglas Krull and his colleagues have evidenced that observers may attribute behavior spontaneously and effortlessly to either dispositional attributions or situational attributions. Krull found that an observer's epistemic goals determine which of these spontaneous attributions the observation will first evoke.[127] Gilbert and his colleagues had suggested that when observers are interested in understanding an actor, observers always first spontaneously categorize the actor's behavior, attributing be-

124. *See infra* note 146 and accompanying text.

125. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 101; Gilbert, *Ordinary Personology, supra* note 118, at 132.

126. *See generally* Gilbert, *Ordinary Personology, supra* note 118, at 132 ("Behavior in particular has such salient properties it tends to engulf the total field" of correspondence bias.).

127. *See, e.g.*, Krull, *supra* note 25, at 345.

havior in dispositional terms.[128] Krull, however, evidenced that when observers are interested in understanding the force of an environment and situational influences on an actor, observers characterize the situational influence first and then, through effortful deliberation, correct the situational attribution with information about an actor's dispositions. Krull found that observers first attribute behavior as a manifestation of the phenomenon that they most want to evaluate and then consider the role that the other phenomena may have had in causing behavior.[129] That is, social psychologists have shown that the spontaneous inference process can be reversed if the epistemic goal of the observer is to understand how situations shape behavior.

B. *When Situational Influences Shape Business Conduct, the Fundamental Attribution Error Leads to Anomalous Results.*

Whether a federal court will grant or deny a dispositive motion often turns on whether the court perceives that the defendants acted with scienter. Judicial decision-making on the element of scienter, however, is affected by the persistent bias of attributing the defendants' behavior to dispositional factors and self-interest, rather than to situational influences.[130]

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128. *See id.*; *see also* Gilbert, *Ordinary Personology*, *supra* note 118, at 132 (stating that "when observers are interested in diagnosing an actor's dispositions, they draw dispositional inferences with relative ease and then correct those inference with relative effort.").

129. *See* Krull, *supra* note 25; *see also* Aaron C. Kay, S. Christian Wheeler & Dirk Smeesters, *The Situated Person: Effects of Construct Accessibility on Situational Construals and Interpersonal Perception*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 275 (2008). *See generally* Gilbert, *Ordinary Personology*, *supra* note 118, at 132 (discussing Krull's sequential operations model).

130. A number of studies have examined the Fundamental Attribution Error in the context of jury decision-making. *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions, a Review of the Literature and Issues*, 5 PSYCH. SCIENCE IN THE PUBLIC INTEREST, no. 2 33-67 (Nov. 2004); Jeffrey S. Neuschatz et. al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. HUMAN BEHAV. 137-49 (2008); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221-233 (1997). The author, however, is aware of no empirical study that specifically examined the degree to which federal judges display the Fundamental Attribution Error when adjudicating cases. Researchers, however, have recently begun to conduct studies on how heuristics and the basic cognitive illusions that undergird the Fundamental Attribution Error affect federal judges. *See, e.g.*, Cass

By way of a hypothetical, consider the following situation: Federal securities lawsuits often stem from a sudden decline in value of the publicly-traded stock of a corporation ("Acme Corp.") after business problems are reported by the media or management. As a result, shareholders ("Plaintiffs") allege that the directors and officers of Acme Corp. ("Defendants") should have disclosed additional information about a business condition earlier. Plaintiffs claim that Acme Corp.'s stock price was artificially inflated because the Defendants had intentionally or recklessly misstated or omitted adverse information about Acme Corp.'s business condition in public filings. Plaintiffs allege that, when they purchased shares of Acme Corp., they relied on the presumption that Acme Corp.'s stock value incorporated all material information about Acme Corp. Plaintiffs, in turn, claim that, because the Defendants misstated adverse information, the value of Plaintiffs' investments were artificially inflated and then declined once the falsity of the misrepresentations were revealed.

Sunstein, *Illusory Losses, in* LAW & HAPPINESS (2010) ("The implication of the legal system is clear. If ordinary people make mistakes in forecasting the effects of adverse events in their own lives, there is every reasons [sic] to think that juries (and judges) will make similar mistakes . . . ."); John C. Anderson, D. Jordan Lowe & Philip M.J. Reckers, *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 725-27 (1993) (reporting a study of judges that tested for hindsight bias); Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982-89 (1994) (reporting the results of a study of the incidence of egocentric bias among bankruptcy judges and lawyers); Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) [hereinafter Guthrie, *Inside the Judicial Mind*] ("[W]e found that each of the five illusions we tested had a significant impact on judicial decision making. Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment."); Stephen Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Juries in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (reporting results of experiment suggesting that judges and jurors may be similarly influenced by exposure to potentially biasing information); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999) (reporting results of a study of judges' biases); Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 776, 786 (1999) (studying the factors that contribute to judges' assessments of the severity of injuries and judges' awards for damages).

Understanding how the Fundamental Attribution Error affects judicial decision-making in this hypothetical first requires discussion of the Hindsight Bias.[131] The hindsight bias refers to the tendency to believe that one would have predicted an adverse result after learning of the eventual outcome. After the fact, outcomes appear obvious, predictable, even inevitable. That is, people tend to exaggerate what could have been predicted beforehand. Twenty-twenty hindsight is robust.[132] Because judges evaluate conduct after the fact, judges are particularly vulnerable to the hindsight bias when making determinations about whether conduct was reasonable and whether the defendants knew or should have known about the likelihood of an adverse result.[133] This bias affects liability and negligence judgments.[134] Legal scholars have dis-

131. The Hindsight Bias has been demonstrated in a legion of empirical studies. *See, e.g.*, Baruch Fischhoff, *Hindsight ≠ Foresight: The Effects of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975); Baruch Fischhoff & Ruth Beyth, *"I Knew It Would Happen"—Remembered Probabilities of Once-Future Things*, 13 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 1 (1975); Paul Slovic & Baruch Fischhoff, *On the Psychology of Experimental Surprises*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 544 (1977). All confirm that events seem far less obvious and predictable beforehand than in hindsight. This point may seem obvious to the reader as well.

132. *See* Guthrie, Rachlinski & Wistrich, *supra* note 130, at 799-805 ("People tend to overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible.").

133. *See* Guthrie, *Inside the Judicial Mind*, *supra* note 130, at 799-805 ("Because courts usually evaluate events after the fact, they are vulnerable to the hindsight bias."); *see also* Jeffrey J. Rachlinksi, *A Positive Psychological Theory of Judging in Hindsight*, *in* BEHAVIORAL LAW & ECONOMICS, *supra* note 13, at 98.

134. *See* Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 L. & HUM. BEHAV. 597, 609 (1999) ("Every measure of the probability of an accident, responsibility for the accident, and liability was sensitive to the manipulation of temporal perspective. . . . We also found that the hindsight effect was dispersed across several other inferences that are important in the context of the punitive damages liability decision."); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89, 99 (1995); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 L. & HUM. BEHAV. 501, 510-12 (1996); Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 L. & HUM. BEHAV. 671, 680-81 (1998).

cussed the hindsight bias in the context of federal securities litigation.[135]

Differing from the hindsight bias, the Fundamental Attribution Error is a distinct phenomenon. The hindsight bias offers an incomplete account of the cognitive biases afoot when courts adjudicate scienter. The hindsight bias suggests that judges and juries will perceive events as more objectively predictable than they actually were, i.e., the way events unfolded was obvious and predictable. However, the hindsight bias does not further predict that judges and juries will infer subjective intent from that belief.[136] In contrast, the Fundamental Attribution Error signifies that, when judges and juries believe an event was obvious and predictable, they will attribute subjective intent to the failure to remedy or report that event. After the trier of fact perceives events as obvious in hindsight, judges and juries are prone to spontaneously attribute fraudulent intent, rather than to seek out situational explanations. These two cognitive biases, therefore, interact. But unlike the hindsight bias, social-psychological research shows that the Fundamental Attribution Error is remedied by examining first situational and then dispositional inferences.[137] This remedy, therefore, reduces misattributions of intent and improves the accuracy of judicial decision-making.

Returning to the hypothetical, with the benefit of hindsight, Plaintiffs characterize Acme Corp.'s business condition as problematic, and obviously so. Plaintiffs claim that the De-

135. *See* Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud By Hindsight*, 98 Nw. U. L. Rev. 773 (2004) (discussing the concern of courts regarding "fraud by hindsight" in cases of securities fraud).

136. *See id.* at 789 n.71 ("The evidence that the hindsight bias has this effect, however, is scant. Virtually all of the data on the hindsight bias speak only to the objective judgment.").

137. *See* William James, *What Pragmatism Means*, *in* Pragmatism 20 (Barnes & Noble Books 2003) (1907) ("The pragmatic method . . . is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?"); Abraham Kaplan, The Conduct of Inquiry: Methodology for Behavioral Science 46 (Chandler Pub. Co. 1964) ("The position just sketched, especially with reference to Dewey's elaboration of it, has come to be known as *instrumentalism*. It identifies the procedures of analyzing concepts by an attempt to get at the use that is made of them. The instrumentalist looks at the problems the concept is used to deal with, and at the ways in which it contributes to the solution of those problems.").

fendants either knew or should have known of the inevitable result. Due to the Fundamental Attribution Error, the Plaintiffs then attribute dispositional factors to the decline in value of Acme Corp.'s stock (dishonesty, gross incompetence, greed, etc.) and to the failure to report problems sooner. The inference to be drawn from Defendants' failure to disclose problems sooner is intentional wrongdoing, fraud.[138]

When behavior is ambiguous, judicial decision-makers commit the Fundamental Attribution Error. That is, judicial decision-makers spontaneously draw dispositional inferences from ambiguous circumstances.[139] This is problematic because after a business calamity, the stereotype that corporate executives are greedy, self-serving, dishonest, and amoral would be particularly salient.[140] Complicating the matter, once a judicial decision-maker arrives at the theory or expectation that dispositional factors caused Defendants' conduct, the judicial decision-maker would more readily identify evidence that confirms, rather than disconfirms, that expectation.[141]

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138. Two classic cases that discuss the hindsight bias are *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.) and *Dileo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir. 1990) (Easterbrook, J.).

139. *See supra* Section III.A.

140. *See* POSNER, HOW JUDGES THINK, *supra* note 15, at 95 ("A judge's professional experiences before he became a judge may have convinced him that . . . a significant fraction of corporate executives are greedy, mendacious, and shortsighted. Such interpreted experiences could congeal into (though could also be formed by) a general . . . antibusiness ideology that would influence the judge's vote in close cases involving . . . corporate executives accused of fraud."); *see* Tom Soter, *Looking for Mr. Good Guy*, 32 AM. MGMT. ASS'N 33-36 (Aug. 1996); R.F. O'Neil, *The Artist's Perception of the Typical Businessman: Selfish, Greedy, Conniving and Thoroughly Amoral*, 8 INT'L J. OF SOC. ECON., iss. 4, at 31 (1981). Negative cultural stereotypes affect legal decisions in decision-making in subtle, but significant ways. *See* Galen v. Bodenhausen, *Stereotypic Biases in Social Decision Making And Memory: Testing Process Models of Stereotype Use*, J. PERSONALITY AND SOC. PSYCHOL., no. 5, at 726-77 (1988).

141. This initial theory or expectation would operate much like a *schema*. *See generally* FISKE, Social Cognition, *supra* note 108, at 96-141 (describing biases that occur when using the attribution process). A schema is a cognitive structure that represents a decision-maker's prior knowledge or expectancy about stimuli, e.g., objects, persons, or situations. Schemas guide processing of new information. Schemas create expectations about the kind of information that will follow and help fill in missing information. Once activated, a schema can change people's encoding of schema-related events, so that what is noticed, remembered, and assumed is consistent with that

A first hypothetical scenario in which the Fundamental Attribution Error leads to anomalous results is the scenario where Acme Corp. adopts a generally accepted business practice yielding a substantial source of revenue, but where that business practice is later curtailed by regulators. For sake of illustration, assume that Acme Corp. adopts the industry practice of exporting widgets to China. If China and/or U.S. Federal or State regulators later curtail that practice, Acme Corp. would lose a substantial source of revenue. Regardless of whether Acme Corp. disclosed that practice and related regulatory risks in periodic filings, the value of Acme Corp.'s publicly-traded stock would decline sharply after the media reports these changes in the regulatory environment. In this scenario, with the benefit of hindsight, Plaintiffs would claim that the likelihood that Chinese and/or U.S. Federal or State regulators would curb Acme Corp.'s business practice was obvious and that Acme Corp. could have and should have done more to disclose that risk in public securities filings, such as its annual reports and 10-Ks.[142]

The problem, however, is that generally accepted business practices operate as social norms, especially when businesses are forced to make decisions in ambiguous situations.[143] De-

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schema. *See id.* Schemas are particularly likely to guide the collection of data if the theory is held with great confidence, if it is very salient in the theory holder's mind, and if the available data are sufficiently ambiguous that they do not, in themselves, suggest an alternative theory. *See id.* at 350. *See generally* Susan T. Fiske & Beth A. Morling, *Schemas/Schemata, in* THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 489, 489-94 (Antony S.R. Manstead et al. eds., 1996) (explaining different aspects of schema, including schema development, and schema stability versus change). Though he called the concept "prior probabilities," Judge Posner articulated how schemas influence judicial decision-making and drew on Bayseian decision theory to show that prior probabilities influence judges' "posterior probabilities" and ultimate judgments. *See* POSNER, HOW JUDGES THINK, *supra* note 15, at 65-70.

142. *Cf.* Cosmas v. Hassett, 886 F.2d 8 (2d Cir. 1989) (China imposed import restrictions, thereby restricting sales to customers in China, which impaired company's stock value and precipitated securities lawsuit).

143. Legal scholars have employed the term "social norm" in a variety of senses, broadly and narrowly. *See* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 549 (1998). *Compare* Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 914 (1996) ("If a definition is thought necessary, we might, very roughly, understand 'norms' to be social attitudes of approval and disapproval, specifying what ought to

scriptive social norms are inferred from what others do in novel or ambiguous situations.[144] People are motivated to make accurate decisions. They observe how others behave because that behavior guides their impressions of the effectiveness of their own conduct. In ambiguous situations, people rely on the "social reality" as displayed by peers. Peer behavior provides consensus information: the greater the number of peers who respond to the same situation in the same way, the more adaptive and reasonable one perceives that behavior to be. Researchers have shown people use evidence of how peers behave to decide on the most effective course of action in novel, ambiguous, or uncertain situations.[145] As an adaptive technique, people model their conduct on the behavior of peers especially when those peers are perceived as exemplars and successful.[146] Significantly, researchers have shown that people draw on the existence of descriptive social norms as cues—not simply for what is reasonable or correct in a given context—but as cues for what is lawful. That is, descriptive social norms subtly influence how people perceive what is proper and lawful in a given context; this is a form of social learning affected by environmental cues.[147]

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be done and what ought not to be done."), *with* Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) ("A norm can be understood as a result that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior."). For present purposes, I refer to the construct both in the injunctive sense described above, and in the sense employed by social psychologists to describe the informational social influence of descriptive social norms. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 214; ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 98-140, 155 (4th ed. 2001) [hereinafter CIALDINI, INFLUENCE]; Cialdini, *Social Influence*, supra note 16, at 155.

144. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 214; CIALDINI, INFLUENCE, *supra* note 143, at 98-137; ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 44; Cialdini, *Social Inflence*, *supra* note 16, at 155.

145. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 214; CIALDINI, Influence, *supra* note 143, at 98-137; Cialdini, *Social Influence*, supra note 16, at 155; ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 44.

146. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 214; CIALDINI, INFLUENCE, *supra* note 143, at 98-137; ROSS & NISBETT, THE PERSON AND THE SITUATION, *supra* note 16, at 44; Cialdini, *Social Influence*, *supra* note 16, at 155.

147. *See, e.g.*, Ralph Hertwig, *Do Legal Rules Rule Behavior?*, *in* HEURISTICS AND THE LAW, 391, 391-410 (Gerd Gigerenzer & Christopher Engel eds.,

When generally accepted business practices operate as social norms, these business practices have a normative and informational influence on conduct.[148] When industry peers adopt a business practice, that behavior has an informational influence on rivals, subtly shaping their perceptions of whether to adopt the same business practice.[149] This suggests that peer behavior can influence not only the decision to adopt a business practice *per se*, but also whether and how to disclose the risks associated with that practice. That is, if most successful peers do not dwell on the associated risks in, say, industry trade shows, earnings conference calls, and public securities filings, their behavior would influence the risk perceptions and estimations of others and how others disclose the same risks in their own public securities filings.[150]

In this first scenario, Acme Corp. adopted the industry norm of exporting widgets to China and disclosed only certain risks associated with that practice, like its peers. These decisions flow not from greed, dishonesty, or other dispositions, but from the normative and informational influence of Acme Corp.'s business environment. Its business environment resulted in imitation and conformity. Doubtless, generally accepted business practices can be wrongheaded in hindsight. But federal securities laws compensate shareholders for fraud, not when a company conforms to industry norms thought foolish in hindsight.

A second hypothetical scenario where the Fundamental Attribution Error leads to anomalous results is where success-

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2006); Robert B. Cialdini, *Descriptive Social Norms As Underappreciated Sources of Social Control*, 72 PSYCHOMETRIKA 263 (2007).

148. *See* ARONSON, SOCIAL PSYCHOLOGY, *supra* note 108, at 214; CIALDINI, INFLUENCE, *supra* note 143, at 98-140; Cialdini, *Social Influence*, *supra* note 16, at 155.

149. *See* Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591, 606-613 (2004); Noah J. Goldstein, Robert B. Cialdini & Vladas Griskevicious, *A Room with a Viewpoint: Using Social Norms To Motivate Environmental Conservation in Hotels*, 35 J. CONSUMER RES. 472, 479 (2008); Vladas Griskevicius, Robert B. Cialdini & Noah J. Goldstein, *Applying (and Resisting) Peer Influence*, 49 MITSLOAN MGMT. REV. 84, 87 (2008) ("[M]anagers need to recognize the stealthy impact that other's [sic] decisions can have on their own choices . . . .").

150. *See* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* KAHNEMAN, HEURISTICS AND BIASES, *supra* note 121, at 465 (discussing how the availability heuristic leads to misperceptions of risk).

ful peers make long-term decisions to invest in capital improvements abroad. Those decisions would likely shape Acme Corp.'s predictions about the vitality of the business environment. Acme Corp.'s predictions would then, in turn, influence its business objectives, goals, and its decision to invest in long-term capital improvements as well.

In this regard, Acme Corp. faces strong informational influence when successful peers invest in capital improvements. In making an accurate prediction about the future of its business environment, Acme Corp. would be influenced by the decisions of peers because those decisions strongly signal vitality in the industry. In this scenario, conformity is the likely result for several reasons. When making predictions, organizations commonly display a bias toward overly optimistic forecasts.[151] This is especially so where the market rewards optimistic actions, for example, with inexpensive capital. When this occurs, Acme Corp. would face normative influence by shareholders and other stakeholders to conform as well. Considerable social psychological research has been conducted on a phenomenon that Professor John Bargh and his colleagues have described as *goal contagion*.[152] Goal contagion describes the automatic adoption and pursuit of goals that one sees others strive for. Researchers have shown when people perceive that others' behavior signals pursuit of a particular goal representing a positive and desired state for the perceiver, people then tend to imitate others in pursuing that goal.[153] This is especially so when others are significant to them, such as friends, parents, spouses, and presumably, successful peers.[154] It is likely, therefore, that where successful peers invest in long-term capital improvements with the aim of competing in a for-

151. *See* Roger Buehler et al., *Inside the Planning Fallacy: The Causes and Consequences of Optimistic Time Predictions, in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 250, 250 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); Paul Slovic, *Facts Versus Fears: Understanding Perceived Risk, in* KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 121, at 472.

152. *See* Ap Dijksterhuis et al., *Effects of Priming and Perception on Social Behavior and Goal Pursuit, in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 51, 100-07 (John A. Bargh ed., 2007); Henk Aarts, *Goal Contagion: Perceiving Is for Pursuing*, 87 J. PERSONALITY & SOC. PSYCHOL. 23, 24-25 (2004).

153. *See* Aarts, *supra* note 152, at 24-25.

154. *See id.*

eign market, those decisions would have a strong normative and informational influence on Acme Corp.'s own decisions to invest abroad for better or worse.

This second hypothetical scenario again illustrates that Acme Corp.'s business decisions may not flow from intentional wrongdoing, but primarily from a reading of the social environment and the informational influence of peer behavior.

These two scenarios highlight norms external to a firm, such as industry norms, that have profound normative and informational effects. In these scenarios, conformity stems from social influence, not fraud. This is not to say that self-interest does not motivate financial fraud,[155] but rather that because of the Fundamental Attribution Error, judges and juries would likely misattribute fraud to innocent conduct in hindsight that results from situational influences.

Situational influences, moreover, may arise internal to the firm. For example, employees may conform to an organizational climate and culture. In this regard, Professor Donald Langevoort has drawn on research on social cognition and norm structures to describe how corporate cultural biases, including cognitive conservatism, over-optimism, over-commitment effects, and self-serving beliefs can lead managers to make overly optimistic forward-looking disclosures and to fail to sufficiently disclose problems relating to novel products.[156]

Organizational cultures and situational influences within firms shape behavior significantly. Social-psychological research could provide a method to develop nuanced rules to more effectively regulate business environments and, therefore, to reshape and control behavior that might otherwise result in fraud.[157] One significant social-psychological finding is

155. *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992) (explaining that significant portion of market frauds is driven by managers attempting to save their own jobs).

156. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 13, at 144; Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004).

157. *See* Robert B. Cialdini, Renee J. Bator & Rossana E. Guadagno, *Normative Influences in Organizations*, *in* SHARED COGNITION IN ORGANIZATIONS: THE

that executives and managers shape situational norms, corporate cultures, and organization climates (whether intending to or not) and have the ability to change the cultures that permeate organizations.[158] Ordinary humans placed into environments with deplorable norms behave in deplorable ways.[159] When executives and managers fail to consider that a dishonest "tone on the top" shapes unethical behavior in their organizations, their reckless conduct may result in social harm and financial-accounting fraud.[160] When dishonesty becomes an accepted organizational norm—thereby becoming part of an organizational culture and climate—a host of consequences follow.[161] While a dishonest business culture may lead to increased profits in the short term, long-term consequences include damage to an organization's reputation, loss of business or clients, turnover by honest employees, theft, and importantly for present purposes, financial-reporting fraud.[162]

A situational approach to the federal securities laws, therefore, would examine both situational influences *external* to the firm (such as generally accepted business conduct that appears fraudulent only in hindsight) and situational influences *internal* to the firm (such as financial-reporting fraud stemming from a corrupt corporate culture). That is, the situational approach could be used both as a shield by defendants and as a sword by plaintiffs who seek to hold defendants liable when they create corporate and industry-wide cultures that cause financial-reporting fraud. The situational perspective

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MANAGEMENT OF KNOWLEDGE 195, 196 (Leigh L. Thompson et al. eds., 1999) [hereinafter Cialdini, *Normative Influences in Organizations*]; Goldstein, Cialdini & Griskevicious, *supra* note 149, at 479; Janneke F. Joly, Diederik A. Stapel & Siegwart M. Lindenberg, *Silence and Table Manners: When Environments Activate Norms*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1047 (2008); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

158. *See* Robert B. Cialdini, Petia K. Petrova & Noah J. Goldstein, *The Hidden Costs of Organizational Dishonesty*, 45 MITSLOAN MGMT. REV. 67 (2004); Harry Levinson, *Why the Behemoths Fell, Psychological Roots of Corporate Failure*, 49 AM. PSYCH., no. 5, at 428-36 (May 1994); Sunstein, *supra* note 157, at 903.

159. *See generally* PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963).

160. *See* Milgram, *supra* note 159, at 371.

161. *See* Cialdini, *Normative Influences in Organizations*, *supra* note 157, at 203.

162. *See id.*; Cialdini, Petrova & Goldstein, *supra* note 158, at 67.

could be used to make internal controls and legal rules more nuanced, precise, and determinate.[163] By focusing on situational influences in business environments, the situational perspective would more effectively deter financial fraud in these environments. It would target the antecedents of financial fraud—organizational norms and dishonest corporate cultures.[164]

IV.
THE *TELLABS* FRAMEWORK AT SUMMARY JUDGMENT

This article shows that the *Tellabs* framework shifts the epistemic inquiry at summary judgment and leads to more accurate judicial decision-making.[165] The next issue is whether the *Tellabs* framework could be woven into summary judgment in federal securities cases, and if so, how? In short, one method that would maintain reasonable regularity in the law stems from the Supreme Court's recent jurisprudence under Rule 56 of the Federal Rules of Civil Procedure.

Growth of jurisprudence is a craft that must be consistent with reasonable regularity in the law and the leeway afforded within precedent, particular doctrine, and patterns of cases.[166] That is, for Behavioral Realism to grow into the broad branches of our jurisprudence, legal scholars must identify leeway in the law sufficient for social-psychological findings to take root. Where social-psychological science shows that juris-

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163. This situational perspective is not novel and, in fact, has been incorporated into the federal sentencing guidelines manual for corporate organizations. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2008) ("[A]n organization shall . . . (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."). *See generally* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

164. The implications of this situational approach will be explored on another day in the author's future scholarship.

165. *See* CARDOZO, *supra* note 6, at 73.

166. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH 70-71 (Oxford Univ. Press 2008) (1930); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 213-35 (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS]; POSNER, HOW JUDGES THINK, *supra* note 15, at 230-65.

prudence is based upon spurious presuppositions of human nature that lead to unforeseen consequences, federal courts may adapt that jurisprudence while maintaining reasonable regularity in the law.[167]

The text of the PSLRA cannot serve as the source of authority for applying *Tellabs* at summary judgment. As discussed, the First and the Ninth Circuits diverge on whether the PSLRA's heightened pleading standard applies at summary judgment.[168] The First Circuit in *Geffon v. Micrion Corp.*, found the reasons for applying the PSLRA at the motion to dismiss stage to be at least as forceful, if not more so, at summary judgment.[169] First Circuit courts, therefore, employ the PSLRA's "strong inference" language when adjudicating summary judgment.[170] In contrast, in *Howard v. Everex Systems*, the Ninth Circuit applied the text of the PSLRA and determined that the heightened standard is a pleading requirement, one that does not change the substantive requirement for proving scienter at summary judgment.[171] A sharp critique of the First Circuit's approach was leveled by Judge Chesler in *In re Bristol-Myers Squibb Securities Litigation.*[172] There, the court applied the text of the PSLRA to conclude that the PSLRA imposed a pleading

167. Karl Llewellyn referred to this manner of technique as the Grand Tradition or the Manner of Reason. KARL N. LLEWELLYN, JURISPRUDENCE 217 (1962) ("The essence is, I think, that every current decision is to be tested against life-wisdom, and that the phrasing of the authorities which build our guiding structure of rules is to be tested and is at need to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a cleaner and more usable structure of doctrine. In any event, and as overt marks of the Grand Style: "precedent" is carefully regarded, but if it does not make sense it is ordinarily re-explored; "policy" is explicitly inquired into; alleged "principle" must make for wisdom as well as for order if it is to qualify as such, but when so qualified it acquires peculiar status."); *see also* Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 457-60 (1930). *See generally* LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, *supra* note 166, at 213-35; POSNER, HOW JUDGES THINK, *supra* note 15, at 231 ("[T]he pragmatic vein in American judging is wide and deep.").

168. *See supra* discussion and notes at Section II.C.

169. *See* Geffon v. Micrion Corp., 249 F.3d 29, 36 (1st Cir. 2001).

170. *See supra* discussion and notes at Section II.C.

171. *See id.*

172. *In re* Bristol-Myers Squibb Sec. Litig., No. Civ. A. 00-1990 (SRC), 2005 WL 2007004, at *1, *15 (D.N.J. Aug. 17, 2005); *see infra* discussion and notes at Section V.

requirement, not a substantive requirement.[173] The "plain meaning rule" of statutory interpretation carries great weight among jurists and is an oft-used heuristic for resolving disputes about statutory interpretation.[174] This suggests that, outside the First Circuit, most jurists would not find sufficient leeway to incorporate *Tellabs* at summary judgment under the PSLRA as a source of authority *per se.*

The *Tellabs* framework, however, could derive from Rule 56 and the requirement that plaintiffs must establish a *genuine* issue of material fact as to scienter at summary judgment. Under Rule 56, the chief inquiry at summary judgment is whether plaintiffs have set forth sufficient evidence to establish a *genuine* issue of material fact.[175]

This standard is best understood in light of the evolution of federal jurisprudence at summary judgment. Jurists once greeted motions for summary judgment with antipathy, and summary judgment was once encumbered with ambiguity.[176]

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173. *In re Bristol-Myers Squibb Sec. Litig.*, 2005 WL 2007004, at *15; 15 U.S.C. § 78u-4(b)(3)(A) (1998) ("Dismissal for failure to meet pleading requirements"); *see supra* discussion and notes at Section I.B.

174. *See, e.g., In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 975-76 (9th Cir. 1999) ("To determine the proper pleading standard under the PSLRA, we turn first to the text of the statute. If the language is plain and its meaning clear, that is the end of our inquiry."). Justice Scalia is the flag bearer of a strict textualist approach: "[W]e do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147 (1994). "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

175. *See* FED. R. CIV. P. 56(c)(2) ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no *genuine* issue as to any material fact and that the movant is entitled to judgment as a matter of law.") (emphasis added). Effective December 1, 2010, the text of Rule 56(a) will provide, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* The change in wording from "issue" to "dispute" does not alter analysis. *See* FED. R. CIV. P. 56 advisory committee's note (2010).

176. William W. Schwarzer, Alan Hirsch, David J. Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 446 (1992); DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, MOTION PRACTICE at 16.01[A] (4th ed. 2005) [hereinafter, HERR, MOTION PRACTICE].

In 1975, for example, the Second Circuit characterized summary judgment as "a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury."[177] Another illustration is the 1962 case of *Poller v. Columbia Broadcasting System,* where the Supreme Court advised "summary procedures should be used sparingly in complex antitrust litigation."[178]

Judicial intuitions, however, changed when jurists began to perceive escalating costs in complex commercial matters and the related need for case-management devices.[179] In 1986, the Supreme Court decided a trilogy of summary judgment cases: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In this trilogy, the Supreme Court built legitimacy into Rule 56 and a path toward effective use of Rule 56 in complex litigation matters.[180] In *Celotex Corp.*, the Supreme Court re-characterized summary judgment not as "a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[181] "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual bases."[182] Changing course in the context of complex antitrust litigation, the Supreme Court explained "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come for-

177. *See* Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975).

178. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962).

179. *See, e.g.*, Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986); William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984) [hereinafter Schwarzer, *Summary Judgment Under the Federal Rules*].

180. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986).

181. *Celotex Corp.*, 477 U.S. at 327 (citing FED. R. CIV. P. 1).

182. *Id.*

ward with more persuasive evidence to support their claim than would otherwise be necessary."[183] In short, summary judgment practice evolved after the Supreme Court created a new decision-making schema in which federal courts now perceive summary judgment not only as a procedure for avoiding unnecessary trials on insufficient claims, but also as an effective case management device for identifying and narrowing issues.[184]

Matsushita provides leeway to develop this framework under Rule 56. In *Matsushita*, the Supreme Court adjudicated Rule 56 in light of antitrust law, but similar policy concerns apply under the federal securities laws. *Matsushita*, therefore, supports the view that "no *genuine* dispute as to any material fact" means that a reasonable trier of fact could not return a verdict for the non-moving party where the non-movant sets forth insubstantial evidence of scienter.[185]

In *Matsushita*, the Supreme Court discussed the requirement that non-moving parties may not rest upon the mere allegations in their pleading, but rather must set forth specific facts showing there is a *genuine* issue for trial.[186] There, plaintiffs, a group of American manufacturers of electronic consumer products charged that Japanese manufacturers had conspired to fix and maintain predatory low prices on their products sold in the United States by, at the same time, maintaining artificially high prices for their products sold in Japan. The American manufacturers alleged the predatory pricing conspiracy had harmed them. But the American manufacturers offered only circumstantial evidence of a predatory pricing conspiracy, not direct evidence.[187]

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183. *Matsushita*, 475 U.S. at 587.

184. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002); Crawford-El v. Britton, 523 U.S. 574, 592-93, 600 (1998); DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 11.34 (4th ed. 2005); Miller, *From* Conley *to* Twombly *to* Iqbal, *supra* note 58, at 51 (Recently, "the Supreme Court has transferred the primary gatekeeping function performed by summary judgment motions even earlier in the action to motions to dismiss.")

185. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) (holding a plaintiff survives motion for summary judgment if "evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity."); *see also Matsushita*, 475 U.S. at 263.

186. *Matsushita*, 475 U.S. at 586-87.

187. *Id.* at 583-84.

The *Matsushita* Court explained that in the absence of direct evidence of a predatory pricing conspiracy if the factual context renders plaintiffs' claim economically implausible, plaintiffs must come forward with persuasive evidence to support their claim.[188] On a motion for summary judgment all inferences must be viewed in the light most favorable to the opposing party. Antitrust law, however, limits the range of inferences that may be drawn from ambiguous evidence. Antitrust economic theory suggests predatory pricing conspiracies are by nature speculative and not likely to occur. Therefore, to survive summary judgment, the non-moving party must do more than show there are two inferences that might be drawn from the circumstantial evidence.[189] Rather, the non-moving party must show *the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed the plaintiffs.* The Supreme Court emphasized courts should not permit factfinders to infer conspiracies when inferences are implausible, because the consequence would be to deter pro-competitive conduct, chilling the very conduct the antitrust laws are designed to protect.[190]

While *Matsushita* stems from substantive antitrust law, the same rationale extends by analogy in the federal securities context where drawing an adverse inference from ambiguous circumstances chills economic activity and results in undesirable social and economic consequences.[191] All else being equal, conformity to situational factors and social norms—including generally accepted business practices—is desirable conduct, not fraudulent.[192] Accepted business practices signal the boundaries of permissible conduct and operate like heuristics. Holding liable those who conform to prevailing norms would thwart an important and efficient business heuristic. Here, the significance of *Matsushita* is especially relevant where plaintiffs offer no direct evidence of fraud, but rather

188. *Id.* at 587-88.

189. *Id.* at 586-88.

190. *Id.* at 594.

191. *See* Schwarzer, *The Analysis and Decision of Summary Judgment Motions*, *supra* note 180, at 492. Drawing on *Matsushita* at the summary judgment stage would retain the close parallel between complex antitrust litigation and federal securities litigation at both the motion to dismiss and the motion for summary judgment stages.

192. *See* text and notes, *supra*, at Section VI.B.

only circumstantial evidence of a fraudulent scheme. And the analogy is especially strong where plaintiffs offer only weak circumstantial evidence, failing to show that the defendants received any "concrete benefits" from the alleged fraud.[193] The non-moving party must do more than show a culpable inference could be drawn from conduct that is consistent with nonculpable situational influences. The non-moving party must show that the culpable inference is plausible and reasonable in light of the competing inference that the defendants conduct resulted from nonculpable situational influences.

In *Tellabs*, the Supreme Court held that the strength of an inference as inherently comparative.[194] Whether an inference of scienter is sufficiently *genuine* is also inherently comparative. To establish a *genuine* dispute of material fact as to scienter, plaintiffs must set forth facts giving rise to a cogent inference that the defendants acted with scienter. Federal courts cannot evaluate the genuineness of a dispute of material fact on scienter in a vacuum. The inquiry is comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? Where a defendant advances its own cogent nonculpable explanations for defendant's conduct, then a federal district court should contrast that cogent inference against the inference favoring the plaintiff. To establish a *genuine* dispute of material fact on scienter, plaintiffs must set forth facts from which an inference of scienter may be drawn that is more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.[195]

The statutory language of Section 10(b) and its legislative history support this jurisprudential approach. Section 10(b) prohibits only intentional harm, not unintentional (negligent) harm.[196] In *Ernst & Ernst*, the Supreme Court concluded that the words "manipulative or deceptive" used in conjunction

193. *See* Ind. Elec. Workers' Pension Trust Fund v. Shaw Group, Inc., 537 F.3d 527, 543 (5th Cir. 2008) ("To demonstrate motive, plaintiffs must show concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.") (internal quotation marks omitted).

194. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007).

195. *See* Geffon v. Micrion Corp., 249 F.3d 29, 36 (1st Cir. 2001); *cf. Tellabs, Inc.*, 551 U.S. at 323.

196. 15 U.S.C. § 78j (2006).

with "device or contrivance" strongly suggest that Congress intended Section 10(b) to reach knowing or intentional misconduct only.[197] The Supreme Court expressly held that, unlike the express civil remedies in the 1933 Act, Section 10(b) does not embrace negligence as a standard of liability.[198] Turning to the legislative history, there is no indication in the legislative history that Section 10(b) was intended to reach unintentional conduct.[199] Given that the Fundamental Attribution Error leads to spurious attributions of intentionality where conduct appears unreasonable in hindsight (that is, appears negligent in hindsight), the *Tellabs* framework ensures that Section 10(b) reaches only the harm Congress sought to address.

With this background in place, the Second Circuit's standard in *Press v. Chemical Inv. Serv. Corp.* must be revisited.[200] There, the Second Circuit explained that questions of intent are generally questions of fact appropriate for resolution at trial and that the Second Circuit "has been lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences."[201] Whether a defendant acted with scienter is an issue of fact,[202] but to proceed to trial the factual issue must be *genuine.* The Second Circuit's statement that scienter issues regularly proceed to trial on fairly tenuous inferences is inconsistent with its jurisprudence and a large body of federal jurisprudence. As previously discussed, in many cases in which Second Circuit courts adjudicate defendants' motions for summary judgment, and in virtually all cases in which they adjudicate the SEC's affirmative motions for summary judgment, Second Circuit courts do not mention *Press* and, in fact, grant summary judgment on the issue of scienter.[203] The *Press* stan-

197. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

198. *Id.* at 207-210.

199. *Id.* at 203.

200. *See* Press v. Chemical Inv. Serv. Corp., 166 F.3d 529, 538 (2d Cir. 1999); *see also* text and notes, *supra* at Section II.C.

201. *See Press,* 166 F.3d at 538; *see also* text and notes, *supra* at Section II.C.

202. *See* Merck & Co., Inc. v. Reynolds, 130 S. Ct. 1784, 1788 (2010) ("Scienter is assuredly a 'fact.'"); *see also* text and notes, *supra* at Section V.

203. *See* text and notes, *supra,* at Section II.C.; *see, e.g.,* Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1220 (9th Cir. 1980) ("Cases where intent is a primary issue generally are inappropriate for summary judgment . . . [yet] the plaintiff [the non-movant] must present significant probative evidence relevant to the issue of intent, e.g., the time, place or nature of the alleged fraudulent

dard represents the judicial experience reflected in *Poller*, a decision-making schema that has since been largely displaced by the Supreme Court's summary judgment trilogy and *Matsushita*.

The final issue is whether federal courts could apply the *Tellabs* framework at summary judgment in light of the Seventh Amendment. Here too there is sufficient leeway. Because *Tellabs* does not require federal courts to resolve factual issues, but merely determine whether there exists a genuine dispute of material fact, the framework does not violate the Seventh Amendment.[204] The Supreme Court's summary judgment trilogy suggests that when the claimant raises a dispute but does not produce supporting evidence sufficient to withstand a motion for a directed verdict, the court may grant summary judgment on the ground that the claimant has not set forth a *genuine* dispute.[205]

In this regard, the *Tellabs* Court concluded that comparing plausible inferences of intent, while constantly assuming the plaintiff's allegations to be true, does not impinge upon the Seventh Amendment.[206] *Tellabs* requires plaintiffs to prove facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. This does not force plaintiffs to prove more than they would be required to prove at trial. At trial, plaintiffs would be required to prove that it is *more likely* than not that the defendants acted with scienter.[207] Hence, applying the *Tellabs* framework at summary judgment is consistent with modern experience in which the Supreme Court has

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activities; mere conclusory allegations are insufficient to require that the motion for summary judgment be denied."); SEC v. Ficken, 546 F.3d 45, 51 (1st Cir. 2008) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.").

204. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2714 (3d ed. 1998, Supp. 2000); *see also* United States v. Burket, 402 F.2d 426 (5th Cir. 1968) ("It is not the purpose of Rule 56 to deny litigants the right of a trial if they really have issues to try.").

205. *See* Allen R. Kamp, *Federal Adjudication of Facts: The New Regime*, 12 AM. J. TRIAL ADVOC. 437, 451 (1989); Schwarzer, *The Analysis and Decision of Summary Judgment Motions*, *supra* note 176, at 487-92.

206. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 328 (2007).

207. *Id.* at 328-29.

entrusted federal district courts as gatekeepers who perform a limited judicial assessment of the plausibility of claims.[208] To be sure, there are valid concerns about the prudence of gatekeeping in other contexts (such as in civil rights and discrimination cases).[209] But federal district judges are the *de facto* triers of fact of federal securities disputes. The question is whether their decisions will be based upon sound practical experience informed by advances in the social sciences.[210]

CONCLUSION

This article focuses chiefly on the systemic bias and misattribution known as the Fundamental Attribution Error, and *Tellabs*'s effect in rectifying it. When viewed from a social-psychological perspective, *Tellabs* promotes effective judicial-decision making. *Tellabs* broadens the epistemic goal of decision-making by requiring federal courts to compare and contrast culpable and non-culpable explanations for behavior. This decision-making approach increases the likelihood that federal courts will consider situational and environmental causes for conduct. Jurists would tend to avoid the Fundamental Attribu-

208. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

209. Given the dearth of trials in the federal securities context and the countervailing concern that such lawsuits will chill lawful economic conduct, these arguments carry less weight here. *See* Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010) (claiming the *Iqbal* framework will undermine civil rights litigation); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (arguing heightened pleading standards will have a chilling effect on civil rights cases). A future direction of the author's research is the question of whether gatekeeping at the pleading stage should be made less exacting in federal civil rights cases given the effect of subtle stereotypes and cognitive biases. *See* Susan T. Fiske, *Social Cognition and the Normality of Prejudgment*, *in* ON THE NATURE OF PREJUDICE, FIFTY YEARS AFTER ALLPORT 36, 38-40 (John F. Dovidio et al. eds., 2005) (explaining how everyday decision-making leads to cognitive biases).

210. CARDOZO, *supra* note 6, at 59. ("There have been two paths, each open, though leading to different goals. The fork in the road has not been neutralized for the traveler by a barrier across one of the prongs with the label of "no thoroughfare." He must gather his wits, pluck up his courage, go forward one way or the other, and pray that he may be walking, not into an ambush, morass, and darkness, but into safety, the open spaces, and the light.").

tion Error and make more accurate decisions. *Tellabs*, therefore, offsets the tendency to over-attribute fraudulent intent to conduct that appears unreasonable only in hindsight. Whether *Tellabs* is sufficient to rectify this well-documented social-psychological phenomenon is an empirical question requiring future research.

Advancing a perspective rooted in Behavioral Realism, I have proposed reconstruction of the inquiry at summary judgment in the federal securities context. This reconstruction derives from Rule 56 of the Federal Rules of Civil Procedure and is consistent with a constellation of recent summary judgment jurisprudence, including the Supreme Court's decision in *Matsushita*. The *Tellabs* framework, therefore, could be operationalized at summary judgment under Rule 56, while maintaining reasonable regularity in the law.

A situational approach, moreover, should be employed to address more effectively the environmental antecedents of fraud: organizational norms, dishonest corporate cultures, and those who shape organizational cultures. A growing body of social-psychological research demonstrates that organizational cultures and business environments affirmatively shape behavior within those environments for better (and worse). When corporate executives create organizational cultures and social environments that lead to fraud, it may be, for example, that a firm has breached its duty under the federal securities laws to implement effective internal controls.