In Praise of Irrational Plaintiffs

Frank B. Cross
IN PRAISE OF IRRATIONAL PLAINTIFFS

Frank B. Cross†

INTRODUCTION .................................................. 2

I. THE CLASSIC ECONOMIC MODEL OF LITIGATION DECISION
   MAKING .......................................................... 3

II. THE SYSTEMATICALLY SKewed CONSEQUENCES OF
   RATIONAL LITIGATION ........................................ 5
   A. Strategic Precedent Manipulation .......................... 6
   B. Limiting Precedent Manipulation ......................... 8
   C. Empirical Evidence of Repeat Player Strategic
      Litigation ......................................................... 9

III. THE CORRECTIVE EFFECTS OF IRRATIONAL LITIGATION ... 15
   A. Behavioral Economics Model ............................... 15
   B. Litigants' Noneconomic Motivations ...................... 19
   C. The Failure of the Classic Model to Account for the
      Irrational Plaintiff ........................................... 23

IV. POLICY IMPLICATIONS OF THE FINDINGS .................. 24

CONCLUSION ....................................................... 32

Classical economic analysis suggests that parties in a lawsuit decide whether to settle or litigate an action based solely upon calculations of costs and potential recovery in the pending action. This analysis suggests that the current policy of encouraging settlement is beneficial. Using statistical analysis and behavioral economics, Professor Cross argues that, in fact, many litigants do not engage in rational decision making and that policies should encourage the “irrational plaintiff.” The classical economic analysis neglects the negative effect of repeat player litigants upon precedent. This Article notes that repeat player litigants, particularly tort and product liability defendants, have a strong economic interest to engage in strategic precedent setting and reduce their potential liability in future cases. These repeat player litigants manipulate precedent by pursuing settlement in cases with unfriendly facts, while tenaciously litigating cases with favorable facts. In contrast, behavioral economic analysis suggests that many plaintiffs have noneconomic motivations to litigate rather than settle, including vengeance, fairness, or vindication. Professor Cross suggests that the irrational plaintiff may counteract the negative effects of strategic settlement by pursuing litigation in spite of large settlement offers. Professor Cross concludes, through an understanding of behavioral economics and classical economic analysis, that settlement can result in significant inefficiencies, and that the irrational plaintiff holds the greatest corrective potential.

† Herbert D. Kelleher Centennial Professor of Business Law, University of Texas at Austin. President, Academy of Legal Studies in Business.
Rational choice theory, characteristic of economic analysis, argues that people are rational maximizers of wealth and typically suggests that this is salutary. In many circumstances, the theory is probably right. This Article argues, however, that many litigants, especially plaintiffs, do not in fact act in the classical "economically rational manner," and that this putative irrationality produces a far better and more economically efficient legal outcome than would litigants acting consistently with the dictates of classical economic rationality. In so doing, this Article employs a combination of classical and behavioral economics. One key implication of this fact is that policies favoring the settlement of litigation may be undesirable. This counterintuitive claim, apparently contrary to traditional economic behavior rationality, is in fact actually rationally grounded. While classical economics understandably prefers voluntary agreements such as litigation settlement, the efficiency and often the fairness of voluntary agreements can collapse in the presence of significant externalities. A fundamental outcome of litigation, and perhaps its greatest benefit to society, is producing precedents that define the law, affect subsequent decisions, and influence private economic behavior. However, such precedents are in many respects externalities or public goods because the litigants themselves cannot capture much of the benefit associated with a precedent that their case creates. Consequently, the voluntary agreements of rational actors, failing to account for the external benefits of precedent, may not yield an efficient outcome.

Moreover, some strategic, rational litigants can use the litigation process to obtain externalities (precedents) that favor their private situation even at the expense of the public good. Not all litigants have the same incentive or ability to use the process so strategically, and therefore only some classes of litigants will be able to manipulatively obtain favorable precedents. Such strategizing allows these litigants to

---

1 For a review of rational choice principles in economics and their extension in political science, see Donald P. Green & Ian Shapiro, Pathologies of Rational Choice Theory 1-12 (1994). The authors proceed to challenge the empirical support for the conclusions of rational choice theory in political science. E.g., id. at 33 (noting that empirical applications tend "to suffer from two classes of methodological infirmities"). For a response and a general defense of rational choice theory, see Dennis Chong, Rational Choice Theory's Mysterious Rivals, 9 Critical Rev. 37 (1995). A critical perspective on applying rational choice theory to the law can be found in Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051 (2000).

2 It is impossible to fairly say that the litigants are behaving irrationally, because it is impossible to know their utility functions. I simply argue that they are not behaving in the fashion projected by economic models assuming that individuals act solely to maximize their economic wealth.
manipulate the government into providing them special favors. This outcome is simply a variety of the rent-seeking thesis commonly recognized in economics. When effective, this practice produces unwise precedents contrary to both justice and economic efficiency. The presence of irrational litigants, typically plaintiffs, can restrain the manipulation and partially counteract this undesirable and inefficient end.

This Article is broken into discrete sections that form a chain to its conclusion. Part I sets forth as background the classic economic model of litigation and settlement. Part II elaborates on the simple classical model and explains how it enables rent-seeking by some parties through selective settlement and litigation. Part III reviews the evidence on how litigants, especially plaintiffs, do not behave as the classic economic model predicts, and explains how apparently irrational litigant behavior serves as at least a partial remedy to the bias created by the classic model. Part IV reviews some policy implications of these findings, such as the undesirability of encouraging settlement of litigation. This Article concludes that the insights of both the classic economic model and behavioral economics reveal the inefficiency of settlement, particularly in the context of repeat-player litigants, and asserts that policies should promote the corrective capacity of the irrational litigant.

I

THE CLASSIC ECONOMIC MODEL OF LITIGATION

DECISION MAKING

The classic economic model of litigation is well ventilated in the literature, and this represents only a brief summary. In the classic model, each of the parties to an action assesses its expected financial value. The expected value is calculated by estimating the probabilities of various litigation outcomes, including a defendant’s victory—meaning zero damages—and a plaintiff’s victory—with the associated range of possible damages, each with its independent probability. The parties then consider the additional out-of-pocket costs associated with trying the case instead of settling. If the parties are relatively close in their assessments of the litigation’s value, settlement will be in the economic self-interest of both parties because they agree on the likely trial outcome and will both save litigation costs by avoiding the
The parties will decline to settle only when the difference in their estimated value of their cases is greater than their combined litigation costs. The model typically assumes risk-neutrality on the part of litigants, although some models assume risk-aversion.

For example, suppose that the plaintiff expected a weighted average recovery value of $55,000 from its litigation, while the defendant valued the plaintiff’s case at $45,000, independent of litigation costs. Each side anticipated their own net litigation costs at $15,000. The plaintiff would perceive a benefit from any settlement above $40,000 ($55,000-$15,000), while the defendant would perceive a benefit from any settlement of less than $60,000 ($45,000-$15,000), leaving a substantial zone of $40,000 to $60,000 in which the parties can reach a mutually beneficial settlement. Both sides would view any settlement in this range as preferable to a trial. If parties could easily calculate the value of cases accurately, one might expect few, if any, trials, because settlement would always appear beneficial. Alas, cases are not so easy to value, and a significant number of cases may arise in which the valuation disparity is so wide that the parties perceive no mutually beneficial settlement zone. The model predicts litigation when the disparity between the parties’ valuation of the claims exceeds the estimated costs of litigation. Consequently, scholars often view trials as “mistakes” associated with disparate valuations to be avoided whenever possible.

George Priest and Benjamin Klein have famously propounded that settlement of litigation fails because of divergent expectations, and that the difficult to value cases are those near the margin of the decision standard employed by courts. The parties readily sort out the obvious cases and reach settlement. The value of close cases is more difficult to predict, and therefore more likely to proceed to trial. This yielded the “fifty percent hypothesis,” which suggested that plaintiff and defendant win rates at trial should generally hover around fifty percent because this reflects the close cases that parties do not settle. Whether or not this tends to produce an efficient legal end product, the litigation process itself appears efficient. Most

---

7 See, e.g., id. at 502 ("[A] settlement will be reached if, and only if, both parties perceive that it would leave them at least as well off as they would expect to be after trial.").
8 For a good general economic review of the model, see Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LITERATURE 1067 (1989).
11 See id. at 16, 17.
12 See id.
13 See id. at 17.
cases were settled because settlement was in the mutual economic interest of both plaintiffs and defendants. The model assumes that the parties to litigation have single-peaked preferences that are limited to their economic interest. The model does not account for other, noneconomic objectives that litigants may have.

The fifty percent hypothesis has been widely accepted, at least as a starting point for additional analysis. While studies have shown that the fifty percent hypothesis often does not accurately describe outcomes, recent research embraces the fundamental claims of the fifty percent hypothesis, and then modifies it to account for additional factors that go beyond Priest and Klein's original model. However, these additional factors remain true to the economic model's assumptions, such as the possibility of asymmetric information. The Priest and Klein model appears widely accepted as an underlying structure for analysis of the selection of cases for litigation. Priest and Klein did, in fact, recognize that actual win rates might diverge from fifty percent, due to factors beyond their simple model.

II

THE SYSTEMATICALLY SKEWED CONSEQUENCES OF RATIONAL LITIGATION

The fifty percent hypothesis is too facile in its assumption that economic dispute resolution is the only consequence of litigation and settlement. Litigation has another crucial corollary: the creation of a

---

14 Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior, 1999 U. ILL. L. Rev. 43, 45 (observing that both the classical economic and behavioral framing models of litigation "treat litigants solely as calculating creatures" and "allow no role for actual or anticipated emotion in the litigation decision-making process").


18 E.g., Kessler et al., supra note 16, at 242-43.

19 Thomas, supra note 15, at 210 & n.7.

20 E.g., Priest & Klein, supra note 10, at 27 n.9 (acknowledging that their assumptions about parties' behavior avoids the problem of strategic litigant behavior).
precedent. Precedents govern future decisions with similar facts or analogous legal questions. The external value of precedent can substantially alter the economics of parties' litigation decision making. Other external factors similar to precedent can also affect these economics, such as issue preclusion, public relations, and release of information in discovery. The precedent-setting example is easy to understand and analogous to the other externalities, so the remainder of this Article focuses on the influence of precedent-setting's value upon parties' decision making.

A. Strategic Precedent Manipulation

For many litigants, the precedential outcome of a case may have little significance; the victim of an automobile accident, for example, probably does not contemplate a future accident arising from a similar set of facts. For other litigants, though, the precedent may have enormous value. The manufacturer of the automobile sued over this accident has much at stake in the precedent that the court establishes. Suppose a plaintiff alleges that an accident was attributable to the faulty placement of a fuel tank. If the court holds that the vehicle has a design defect resulting in strict liability, the manufacturer is subject to a considerable future stream of liability. The "repeat player"

21 Leandra Lederman, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 NOTRE DAME L. REV. 221, 228 (1999) ("There are two primary factors in the development of precedent: which cases go to trial and therefore result in case precedents, and what the substantive decisions were in prior cases.").

22 See id. at 234-35 (discussing the development of precedent in subsequent cases).

23 See id. at 232-33 (acknowledging that a model that focuses on the value of precedent suggests repeat players are more likely to litigate to create favorable precedent).

24 The availability of nonmutual issue preclusion means that obtaining a favorable outcome in a given case may preclude other parties from relitigating the issue. See, e.g., Richard Hynes, Comment, Inconsistent Verdicts, Issue Preclusion, and Settlement in the Presence of Judicial Bias, 2 U. CHI. L. SCH. ROUNDTABLE 663 (1995). Losing a trial may have a public relations cost to the company, and merely trying an action may risk the exposure of sensitive information in discovery, which adversaries might use in future litigation. For example, in General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. 1994), a former GM safety engineer provided damaging testimony concerning the development of the company's saddle fuel tank for its pickup trucks. Despite the company's best effort to exclude this testimony in Moseley and to limit its future use, future plaintiffs were able to use the testimony against GM in subsequent litigation. E.g., Hannah v. General Motors Corp, 969 F. Supp. 554 (D. Ariz. 1996).


26 In General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. 1994), a single plaintiff brought a liability claim due to the faulty tank placement which eventually sparked a class action lawsuit brought by all buyers over a fifteen-year period. See Pickup Truck Liability Litigation, 55 F.3d at 777.
may find considerable importance in the precedential outcome.\textsuperscript{27} The plaintiff, by contrast, is unlikely to purchase another car with the same fuel tank flaw; and even if she did purchase the same car, she is unlikely to suffer an accident again.

The potential significance of precedent-setting value has indeed been recognized, but not thoroughly explored. An article by Bailey and Rubin sets forth a model of precedential change, and proposes that "litigation will occur only when the party with the larger interest in precedent would gain from upsetting or strengthening the existing precedent."\textsuperscript{28} They note that well-informed, single player parties always have an incentive to settle under the classic economic model.\textsuperscript{29} Repeat players, though, have a very different incentive structure.\textsuperscript{30}

Consider a hypothetical in which both parties to the action give the case an expected economic value of $50,000. Under the classic economic model, they would settle and avoid the costs associated with litigation. Now assume that one party is a repeat player who expects the facts underlying the case to recur ten times in the near future. With the same expected value per case, the cumulative future cost would be $500,000 (omitting discounting). In such a case, the precedent-setting economic implications of the litigation dwarfs the economic implications of the case at hand.\textsuperscript{31} The positions of the plaintiff and defendant are not comparable because the plaintiff’s expected gain is limited to the particular case, while the defendant’s loss is equal to the value associated with a series of related actions.\textsuperscript{32}

How would a rational, repeat player defendant consider the precedent-setting implications of a given case? By the hypothesized nature of the facts, the defendant will confront a number of cases with similar claims. The economically strategic defendant will examine its portfolio of cases, and potential future cases, and identify the one that offers the best prospects for success, thereby strategically setting a favorable precedent. The defendant may base the determination of these prospects on a variety of factors, including the relatively unsympathetic nature of a given plaintiff, facts unique to the complaint, the favorability of a given forum or judge or potential appellate judges,

\begin{itemize}
\item \textsuperscript{27} See Lederman, \textit{supra} note 21, at 226 & n.32 (noting that precedential value of litigation is proportional to the extent that a litigant is a repeat player).
\item \textsuperscript{28} Martin J. Bailey & Paul H. Rubin, \textit{A Positive Theory of Legal Change}, 14 Int’l. Rev. L. & Econ. 467, 472 (1994).
\item \textsuperscript{29} See id. at 469-74.
\item \textsuperscript{30} See id.
\item \textsuperscript{31} This example obviously involves an oversimplification of precedent. A single trial outcome does not dictate results of all future cases. A loss at a jury trial may have relatively little precedential impact. However, an opinion by the district court, such as pretrial summary judgment, a directed verdict, or a judgment notwithstanding the verdict, will have some persuasive precedential impact. A victory on appeal could have a much larger effect.
\item \textsuperscript{32} E.g., \textit{supra} note 26 and accompanying text.
\end{itemize}
and the relative ability of plaintiff's counsel. Once the defendant identifies the case, the defendant will prosecute it, regardless of the settlement interest of the plaintiff. Contrary to the predictions of the classic economic model of litigation, this defendant will make no settlement offer at all. In the early cases with relatively undesirable facts or other circumstances, the defendant will settle in order to avoid an adverse precedent, even if this requires an offer for more than the case is apparently worth. If the defendant calculates accurately, and wins the first case, it will suffer fewer future claims and have a better chance of winning those claims that plaintiffs do bring. The defendant then can afford to try more cases, but would still settle cases with undesirable facts readily distinguished from the initial defendant to avoid an adverse precedent.34

Once a court establishes favorable precedent, it will directly benefit a defendant. Thus, a judicial finding that x product design is not unreasonably dangerous, or that y product does not cause cancer, benefits the producer of those products in future cases. Moreover, given the path-dependence of precedent, the specific precedents will add to the general body of the law and skew precedent generally in favor of these and other defendants for future cases. This fact enables repeat player parties to engineer favorable precedents. Indeed, the manipulation need not even be by a party to a case; a third party interested in the precedent may intervene in the case, formally or informally, and settle unfavorable actions.

B. Limiting Precedent Manipulation

On the plaintiffs' side, the strategic litigation bias for repeat player defendants might be cured by aggregating all current and potential future victims. The law does not provide an opportunity to do so, however, and economic principles would make it unlikely to occur in any event. Class actions are an aggregating tool of sorts, but the law

34 Lederman also explains this theory. Lederman, supra note 21, at 231. Lederman also discusses how the parties' settlement behavior will influence the substantive content of precedent. Id. at 233-34.
35 See id. at 234.
36 See id. at 234-35, 241-46 (discussing the "path-dependent" nature of precedent that allows parties to strategically influence its development).
places various barriers\textsuperscript{38} and costs in the path of bringing such actions.\textsuperscript{39} More inherently, a class action can aggregate only those whom a particular product has already injured, not potential future victims. The central beneficiaries of a pro-plaintiff precedent are the tens of millions of drivers who have not yet suffered injury, but they are generally excluded from a class action.

A theoretically more promising aggregating tool would be through amicus participation, for example, by some drivers' interest group.\textsuperscript{40} Experience shows that this behavior is rare, no doubt because of the difficulties and costs of organizing a group with so many members, and ready free riding by potential members.\textsuperscript{41} If anything, the opportunity for amicus participation would enhance the bias for large repeat players because smaller groups of related potential defendants can better organize for their joint precedent-setting interests.\textsuperscript{42}

The bottom line is that economically rational litigation will result in a set of cases being tried that systematically favors defendant victories. Individual plaintiffs may benefit from defendants' strategies by receiving lucrative settlement offers when their cases are strong and the defendants fear adverse precedents. But the set of remaining tried cases are more likely to result in repeat player wins, generally in favor of the defense in tort litigation. Particularly in product liability actions, such as the hypothesized automobile design defect litigation, the repeat player defendant has much larger stakes in ensuring that it avoids an adverse precedent. Court decisions are not perfectly predictable, and defendants would not win every case, but one would expect them to win a disproportionate number of them.

C. Empirical Evidence of Repeat Player Strategic Litigation

Commentators have recognized the success of repeat players for a while. They acknowledge that big business interests win an over-

\textsuperscript{38} E.g., Fed. R. Civ. P. 23(a) & (b) (describing the requirement that plaintiffs must satisfy to maintain a class action suit).

\textsuperscript{39} Paul H. Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205, 220 (1982) (noting that the costs and free rider problems of class litigation often preclude its use).

\textsuperscript{40} See, e.g., William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 274 (1979) (suggesting that groups can act as amici to advance their collective interests).

\textsuperscript{41} See Allison Lucas, Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation, 26 Fordham Urb. L.J. 1605, 1613-14 (1999) (discussing how circuit courts are discouraging amici participation).

\textsuperscript{42} In Mancur Olson's now famous explication, "the incentive for group action diminishes as group size increases, so that large groups are less able to act in their common interest than small ones." Mancur Olson, The Rise and Decline of Nations 31 (1982) (emphasis omitted).
whleming proportion of their cases. Marc Galanter published a famous article noting the phenomenon. Galanter also recognized that a reason for this phenomenon was the repeat players' concern for the effects of litigation beyond the immediate case. A study of federal appellate courts found that large enterprises are far more successful than individuals. Other studies particular to specific areas of the law have also noted this tendency. Paul Rubin describes the evolution of nuisance law in the nineteenth century as a study of the law favoring "factories and firms, rather than individuals." A study of product liability claims and settlement offers indicated that firms based litigation decisions partially on their "stake in the court outcome that extends beyond the immediate court award."

The strategic precedent-setting litigation concept is unsurprising because it is merely an example of wise business strategy. Case outcome studies demonstrate the relative significance and success of strategic defense litigation. One might expect a measure of strategic litigation in tort actions generally, but it should be most pronounced in product liability actions. Product liability claims are more likely to have a repeat player defendant than, for example, ordinary negligence claims, and product liability defendants may be particularly sensitive to adverse precedent. Hence, one would expect strategic litigation to yield a higher defendant win rate in product liability actions than in other torts. The following chart depicts win rates from the Administrative Conference of the United States database of all federal district court decisions between 1978 and 1993. The win rates are broken down by case categories in Table 1, with product liability actions separated from other claims in the case category.

44 Id. at 57-103.
48 Infra notes 51-62 and accompanying text and tables.
49 Supra notes 25-37 and accompanying text.
As expected, the plaintiff win rates are lower across the board in product liability actions. The relatively high general tort rates are quite consistent with the predictions of Priest and Klein's fifty percent hypothesis,\textsuperscript{52} although the low product liability plaintiff win rates are suspicious and evidence that strategic litigation may be transpiring.

The relatively low plaintiff win rates in product liability litigation are not conclusive evidence of the effect of strategic litigation. They might be attributable to some other factor, such as asymmetric information.\textsuperscript{53} This is actually an unlikely explanation of the results reported in Table 1 because product liability actions should have less information asymmetry favoring defendants than other tort actions.\textsuperscript{54} Under the asymmetric information theory, plaintiffs should do relatively better in product liability actions.\textsuperscript{55} To truly be sure we are see-

\textsuperscript{52} While the Priest and Klein's hypothesis suggests fifty percent win rates, that assumes that the only dispute was over liability. However, disputes may also arise over the magnitude of damages. Hence, the hypothesis suggests that plaintiffs should win fifty percent of the cases involving only liability, and some unidentified number of additional cases in which the parties may agree that a probability exists that the plaintiff will win but cannot agree to settle because of disagreement about the damages deserved.

\textsuperscript{53} If information about the case is asymmetric and favors defendants, plaintiffs will make unwise judgments in settlement and bring bad cases to trial, thus reducing their win rates. See Lucian Arye Bebchuk, \textit{Litigation and Settlement Under Imperfect Information}, 15 RAND J. ECON. 404, 407-08 (1984); Robert H. Gertner, \textit{Asymmetric Information, Uncertainty, and Selection Bias in Litigation}, 1999 U. Chi. L. SCH. ROUNDTABLE 75, 89-92 (1993); Keith N. Hylton, \textit{Asymmetric Information and the Selection of Disputes for Litigation}, 22 J. LEGAL STUD. 187, 188-99 (1993); Kesler et al., \textit{supra} note 16, at 242-43; see also Thomas J. Miceli, \textit{Settlement Strategies}, 27 J. LEGAL STUD. 473 (1998) (discussing two economic models of settlement involving asymmetrical information that defendants may use to their advantage).


\textsuperscript{55} See Hylton, \textit{supra} note 53, at 199-200 (noting that plaintiffs have a win rate lower than fifty percent for product liability litigation due in part to the outcome's dependence
ing strategic litigation effects in the results, however, we must consider the corpus of settled cases as well.

Some information on settlement and trial does support the strategic litigation theory. For example, research suggests that medical malpractice defendants consider the effects of precedent when making settlement offers, as the probability of going to trial was inversely related to the plaintiff’s probability of success at trial. Evidence on strategic litigation might be found from analyses of individual judges’ trial rates and win rates. In the presence of such litigation decisions, judges appearing to be pro-plaintiff would have fewer trials as defendants settled to avoid adverse precedent.

Information on settlement rates is scarce, but Joel Waldfogel provided data on win and trial rates for twenty-three judges in the Southern District of New York. Waldfogel’s article gives trial rates and plaintiff win rates for all cases and for three larger subdivisions of cases: contract claims, property rights claims, and tort claims. This Article hypothesizes that tort defendants are more likely to be repeat players who see precedential value to litigation, and thus are likely to settle cases before judges that appear to be pro-plaintiff. The inclusion of all tort claims, rather than just product liability actions, might dilute this tendency, but it should still be greater than in property and contract actions, in which both sides could have comparable interest in precedent. Table 2 shows the results of a regression of plaintiff win rates and trial rates by judge for the three types of cases. The first row is a coefficient (with T-terms in parentheses) and the second row is the R² for the simple regression.

<table>
<thead>
<tr>
<th>Tort</th>
<th>Contract</th>
<th>Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>-.626*** (3.678)</td>
<td>-.145 (.673)</td>
<td>-.243 (1.15)</td>
</tr>
</tbody>
</table>


upon the defendant’s level of compliance and informational advantage about its compliance efforts).


57 See infra notes 58-62 and accompanying text.

58 See Waldofgel, supra note 17, at 243 tbl.3.

59 Id.

60 Supra notes 42-43 and accompanying text.

61 See Waldofgel, supra note 17, at 253-55 (discussing the variation of asymmetry in various types of cases); see also Hylton, supra note 53, at 199-200 (making a distinction between various tort disputes and noting low plaintiff win rates in product liability actions due to the defendants’ informational advantage).
For tort cases, judges with a record of high plaintiff win rates in tort actions consistently tend to have lower trial rates, with a high level of statistical significance (less than .01). The R² means that strategic litigation explains over 36% of the variation from a random relationship, and it might have been larger had the study been more focused on product liability or other actions that have more repeat player defendants and associated strategic precedent-setting litigation.

One can also observe the unreality of the classic economic model by examining the offers that are made by defendants. Gross and Syverud have found that in a substantial minority of cases—around 25%—the defendants make no settlement offer, or a zero offer. Under the classic economic model, defendants should always offer at least their litigation costs, even if the plaintiff's case is worthless. The authors suggested that defendants might sometimes make zero offers "in order to bring cases to trial in which they hope to set formal or informal precedents that affect future cases." Other possible explanations may exist for the zero offers, but when combined with the empirical evidence on win rates and trial rates, it appears that some strategic precedent-setting litigation is occurring.

The existence of strategic litigation is most obvious and straightforward in the practice of settlement and vacatur. Some circuits allowed litigants to settle decided actions conditioned upon the vacatur of the opinion. This enabled them to escape the precedential effects of an undesirable opinion by eliminating it. Repeat player major companies and the U.S. government were most interested in using vacatur. While the settlements are typically sealed, evidence shows that the parties might pay substantially for vacatur. The repeat play-

---

62 Waldofgel did not conduct this statistical test but observed that plaintiffs lose a higher than expected number of tort cases and attributed the fact to differential stakes. Waldofgel, supra note 17, at 252-53.

63 Gross & Syverud, supra note 33, at 343.

64 See id. at 342-43 (noting that such offers should be "rare" under the Priest and Klein hypothesis).

65 Id. at 343.


68 See Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. Rev. 1691, 1713 (1995) (reporting that vacatur efforts are primarily made by corporations and the government); Resnik, supra note 66, at 1489 (observing that U.S. government and the Product Liability Advisory Council, whose members include dozens of companies, fought for preserving vacatur rights).

69 E.g., Resnik, supra note 66, at 1490 n.79 (citing one case that was actually settled for an amount greater than the lower court award, presumably in compensation for vacatur of the opinion).
ers made the payments to rig the law for their benefit, and this demonstrates the monetary value of a favorable settlement before the fact.\textsuperscript{70} The general availability of vacatur would eliminate the need for strategic settlement, because defendants could erase their losses, but the Supreme Court disapproved of the practice.\textsuperscript{71} Consequently, strategically selective litigation is now the most effective way for parties to obtain precedential value.

The implications of strategic litigation are that the law would be inexorably driven in a path favorable to repeat player litigants. This equity bias would simultaneously produce economic inefficiency as well.\textsuperscript{72} Authors have claimed that the common law tends toward efficient results, because inefficient decisions will be relitigated until the court reaches an efficient result.\textsuperscript{73} Because the theory assumes reciprocal stakes in legal rule, repeat player strategic litigation will produce a pattern of litigation that favors the repeat player even when a different rule would be the more efficient one. This result occurs even if judges are affirmatively seeking efficient rules.\textsuperscript{74} This rational business behavior of strategic litigation distorts the law in an undesirable and inefficient way. Moreover, it is extremely difficult to counteract through policy means because it is the product of thousands of separate negotiated settlements that parties have an indisputable legal right to reach.

The evidence of strategic litigation and precedent-setting is clear, but not overwhelming. While defendants win most product liability actions, plaintiffs win a respectable minority of cases.\textsuperscript{75} While defendants often settle cases before unfavorable judges, those judges continue to hear some tort actions.\textsuperscript{76} While the path of precedent often

\textsuperscript{70} See Horton, supra note 68, at 1712 n.116.

\textsuperscript{71} See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994). In addition, vacatur sometimes proved ineffective in expunging the precedent. See Resnik, supra note 66, at 1473-74 (noting that judges may sometimes rely on vacated precedents of which they are aware, and others would refuse to vacate their opinions).

\textsuperscript{72} See Rubin, supra note 39, at 211-14 (discussing how precedent-setting litigation would drive the law away from the most efficient substantive outcome).

\textsuperscript{73} The efficient rule would impose liability upon the least cost avoider. George L. Priest, The Common Law Process and Selection of Efficient Rules, 6 J. LEGAL STUD. 65, 67 (1977); Rubin, supra note 47, at 54. When a legal rule violates this principle, there is a deadweight loss, so the overall stakes of the case would be greater. Priest, supra, at 67; Rubin, supra note 47, at 54. The higher stakes make litigation more likely and thus increase the likelihood that the inefficient rule will be overturned. Priest, supra, at 67; Rubin, supra note 47, at 54. Contra John C. Goodman, An Economic Theory of the Evolution of Common Law, 7 J. LEGAL STUD. 393 (1978).

\textsuperscript{74} See Gertner, supra note 53, at 77-78 (observing that a "judge may adopt a rule or standard that is 'optimal,' for the types of cases that are litigated, but that is not the same rule the judge would adopt if fully-informed about the set of disputes that are affected by the rule").

\textsuperscript{75} Supra Table 1.

\textsuperscript{76} Supra Table 2.
favors defendants, even a casual observer is aware of some significant plaintiff wins. The reason for these outcomes may be that some defendants are not acting strategically, or that they are ineptly strategizing. But a more important factor weighing against strategic litigation arises once we abandon the classic economic model's assumption of rational behavior. The following section discusses this factor.

III
THE CORRECTIVE EFFECTS OF IRRATIONAL LITIGATION

The unfortunate consequences of strategic litigation are inexorable under the classic economic model of litigant decision making. The classic model of litigation assumes that all parties are economically rational, in the sense that they seek to maximize only their economic wealth. However, evidence indicates that litigants, perhaps especially plaintiffs, do not act in the manner prescribed by the classic economic model.

A. Behavioral Economics Model

Behavioral economists have criticized the classic model as an inaccurate description of human reality. Much of behavioral research has focused on decision-making heuristics that are inconsistent with rational choice economics. For example, the research has shown that people are poor estimators of probability and employ logical fallacies in decision making. Insofar as these claims are true, they would not fundamentally alter the manipulation of precedent, but they would add random noise to rational choice models of settlement, which could have some countering effect.

Another aspect of behavioral economics considers the noneconomic aims of individuals, and this effect could systematically counteract the efforts of repeat players to manipulate precedents and thereby yield a more efficient, and therefore just, state of the law.

---

77 See John C. Harsanyi, Rational-Choice Models of Political Behavior vs. Functionalist and Conformist Theories, 21 World Pol. 513, 518 (1969) (discussing the "extreme simplicity" of the classic economic model's assumptions, "which make economic self-interest virtually the only motivating force of human behavior, at least in economic activities").

78 See infra notes 108-25 and accompanying text.


81 See Korobkin & Guthrie, supra note 9, at 146-47.
For example, plaintiffs may litigate for reasons other than purely financial ones and may not be willing to settle for even a lucrative offer from the defendant that exceeds their likely award at trial.\textsuperscript{82} If so, defendants who make large settlement offers to sympathetic plaintiffs may not succeed in avoiding a precedent because these plaintiffs may refuse even highly lucrative offers.\textsuperscript{83} These plaintiffs may have objectives other than economic recovery behind their lawsuits.\textsuperscript{84}

The theory that people have motivations and goals that are not purely economic is not exceptional. The reduction of all human goals to a common monetary currency has more to do with the convenience of economic modelers than the reality of human experience.\textsuperscript{85} Cass Sunstein has recently reviewed the literature and noted that at least some of the time people care about fairness, and "they will sacrifice their material self-interest in order to promote those goals."\textsuperscript{86} A study of the wage negotiating process confirmed that people may "reject economically dominant offers because of social concerns."\textsuperscript{87} The presumption that people make mathematically rational decisions aimed only at maximizing their economic well-being is not an accurate portrayal of real life decision making.\textsuperscript{88} It is a "clearly established empirical fact that many important aspects of everyday economic and political behavior cannot be explained in terms of this over-simple theory of human motivation."\textsuperscript{89}

Models that reduce behavior to wealth maximization have at least three particular shortcomings. The first shortcoming is their failure to consider "expressive preferences." Expressive action is "performed for its own sake, with no apparent rational consideration of material consequences for the actor."\textsuperscript{90} This expressive action may pursue any

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{See infra} notes 86-92 and accompanying text.
\item \textsuperscript{85} \textit{See, e.g.}, Korobkin \& Ulen, \textit{supra} note 1, at 1054 (suggesting that in law and economics, "[m]athematical elegance often becomes the primary goal, with usefulness in the realm of law, which combines logic with human experience, a mere afterthought").
\item \textsuperscript{87} Victoria Husted Medvec et al., Concession Aversion: A Story of Loss and Betrayal (Aug. 4, 1999) (unpublished manuscript at 4, on file with author).
\item \textsuperscript{88} Barbara A. Mellers et al., \textit{Decision Affect Theory: Emotional Reactions to the Outcomes of Risky Options}, \textit{8 PSYCHOL. Sci.} 423, 423 (1997). The authors state that:
\begin{quote}
Most theories of decision making treat choice behavior as a cognitive process; people assess their values, define their goals, and take actions to achieve those goals. But anyone who has ever made an important decision knows that what really happens is not that simple. People often base decisions on emotions.
\end{quote}
\item \textsuperscript{89} Harsanyi, \textit{supra} note 77, at 519.
\item \textsuperscript{90} Robert P. Abelson, \textit{The Secret Existence of Expressive Behavior}, \textit{9 CRITICAL REV.} 25, 27 (1995); \textit{see also} Richard H. Pildes, \textit{Why Rights Are Not Trumps: Social Meanings, Expressive}}
\end{itemize}
\end{footnotesize}
number of ends, from the artistic to the ideological. One might suspect that people become professors of law and write law review articles largely for such expressive reasons. Psychological research shows that "instrumental pursuit of self-interest is a sometime state of mind," and that individuals in various circumstances prefer other objectives. Expressive behavior provides "psychological satisfaction," if not financial return.

These models' second deficiency is the failure to account for a plurality of values. Some contend that humans have a plurality of values, both monetary and expressive, and that reducing all these values to a single metric is foolish. They contend that these values may be incommensurable—that people reject tradeoffs among their different qualitative values. The commensurability of values, such as economic and noneconomic, implies the existence of a cardinal scale, such as dollars, by which one may trade them off. Requiring people to make such tradeoffs among incommensurable values compels the "commodification" of noneconomic ends. The existence of a variety of human objectives suggests that utility acts "primarily as a vector (with several distinct components), and only secondarily as some homogenous magnitude." The ends cannot necessarily be reduced to a single metric; qualitatively different ends are arguably incommensurable. The debate between economists and philosophers over matters of incommensurability and commodification is unsettled. Although the notion of incommensurability supports the position that the classic economic model does not describe litigant decision making, this position is not dependent on that notion. Even if the finan-

---

Harms, and Constitutionalism, 27 J. LEGAL STUD. 725, 755 (1998) (noting that an "expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about").

91 Abelson, supra note 90, at 34.
92 Harasanyi, supra note 77, at 525.
95 See Warner, supra note 94, at 1717.
96 E.g., William H. Hubbard, Civil Settlement During Rape Prosecutions, 66 U. CHI. L. REV. 1231, 1241-42 (1999) (discussing concerns that rape settlements will commodify the right to rape).
98 See Martha C. Nussbaum, Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics, 64 U. CHI. L. REV. 1197, 1199-1203 (1997). The author's review of philosophical literatures concludes that "there is no good reason to suppose that commensurability is a prerequisite of rational choice in the normative sense." Id. at 1202.
cial and emotional ends of litigation were indeed commensurable, the noneconomic ends could predominate and overcome the predictions of the classic model of settlement.

Finally, these models fail to recognize the assertions that we perceive separate spheres in life, and that people maximize their income in the economic sphere, but act for other ends in other spheres, such as the political sphere. People may have different preferences, and priorities among preferences, when acting in their "citizen" role than they do in their "consumer" role. In the consumer role, people may strive to maximize their economic welfare, while in the public citizen role people may place a higher value on noneconomic values. An individual's priorities with respect to private goods are not necessarily identical to goals with respect to public goods.

While some evidence supports the distinction between citizen and consumer roles, proving the irrationality of plaintiff behavior need not even turn on whether people act differently in different contexts. Ample evidence shows that people may not act to maximize their wealth even in the economic sphere. Daniel Kahneman's classic article, which examined the significance of fairness in economic markets, found that members of the community had standards for decid-

---

99 See, e.g., GEOFFREY BRENNAN & LOREN LOMASK, DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE 19-52 (1993) (arguing that individuals seek monetary returns in the market context but have more expressive objectives in the political context); Jeffrey Friedman, Economic Approaches to Politics, 9 CRITICAL REV. 1, 4 (1995) (observing that the "economic realm could be defined as the arena in which selfishness is considered legitimate," so "[i]t is only to be expected then, that—to some extent—people will internalize and be guided by unselshif norms in noneconomic realms").

100 Daphna Lewinsohn-Zamir, Consumer Preferences, Citizen Preferences, and the Provision of Public Goods, 108 YALE L.J. 377, 378 (1998) (discussing the distinction, and indicating that the consumer role, "evoked in market settings, reflects people's self-regarding wants and interests, the [citizen role], aroused in political settings, reflects their opinions, values, and beliefs regarding the good of society as a whole"); see also Amitai Etzioni, The Case for a Multiple-Utility Conception, 2 ECON. & PHIL. 159, 171 (1986) (discussing the contrast between various understandings of people's utility preferences when voting); Amartya K. Sen, RATIONAL FOOLS: A CRITIQUE OF THE BEHAVIORAL FOUNDATIONS OF ECONOMIC THEORY, 6 PHIL. & PUB. AFF. 317, 329-33 (1977) (discussing people's various preferences within the public and private spheres); Cass R. Sunstein, Endogenous Preferences, Environmental Law, 22 J. LEGAL STUD. 217, 221-35 (1993) (emphasizing that preferences must be understood within a contextual sphere rather than as "acontextual" preferences); Cass R. Sunstein, SOCIAL NORMS AND SOCIAL ROLES, 96 COLUM. L. REV. 903, 923-25 (1996) (discussing the different goals of people acting in their citizen and consumer roles).

101 See Lewinsohn-Zamir, supra note 100, at 381-82 (noting that individuals who disregard the environment and the poor in their private transactions may vote for or otherwise support government policies to protect the environment and help the poor).

102 See generally Carol M. Rose, Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference, 87 MICH. L. REV. 1631, 1635-39 (1989) (arguing that the distinction between citizen and consumer realms is unfounded, but that noneconomic preferences play a material role in the consumer realm as well).
ing whether companies set fair prices and wages. For example, people considered it unfair for a hardware store to raise snow shovel prices in the wake of a local snowstorm. More significantly for present purposes, individuals will act to punish companies that behave unfairly, even at some cost to themselves. Within the economic marketplace, "many aspects of people's behavior cannot be explained without recognizing that many individuals are motivated partly by noneconomic and/or nonegoistic motives."  

B. Litigants' Noneconomic Motivations

This general evidence on motivation and shortcomings of the rational behavior model surely extends to litigants. In fact, specific evidence indicates that plaintiffs have litigation objectives other than economic ones. Still others simply want a day in court, regardless of the outcome of the trial. Of course, many litigants are primarily interested in economic ends, but the presence of a substantial number with noneconomic ends will alter others' ability to manipulate the path of precedent. Robert Solomon emphasizes that the law is "infused with and motivated by emotion," such that "any conception of law in purely dispassionate terms threatens to be inhuman." The clearest evidence of the importance of emotions such as vengeance comes from defamation actions. One study found that the primary motivating factors for defamation litigation "are restoring reputation, correcting what plaintiffs view as falsity, and vengeance." Litigants, like others, may "sacrifice their own economic interest in order to impose punishment" on others. A plaintiff "will be more likely to re-

---

103 Daniel Kahneman et al., Fairness as a Constraint on Profit Seeking: Entitlements in the Market, 76 AM. ECON. REV. 728, 728-29 (1986).
104 Id. at 729.
105 See generally id. at 734-36 (describing experimental research).
106 Harsanyi, supra note 77, at 519.
107 E.g., Deborah R. Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1999 U. ILL. L. REV. 89, 99 (observing that the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story'"); Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 63 (1985) (observing that a plaintiff "may want to complete the process of litigation in order to feel that she has had her day in court," even when a "settlement would be more favorable than the outcome at trial").
110 Sunstein, supra note 86, at 122; see also Sally Engle Merry & Susan S. Silbey, What Do Plaintiffs Want? Reexamining the Concept of Dispute, 9 JUST. SWS. J. 151, 153 (1984) (suggesting that the plaintiff wants "vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong"); David A. Rammelt, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?, 65 IND. L.J. 965, 1001 (1990) (reporting that "there are some disputes in which the litigants' primary motivation for filing suit
ject a settlement offer if they view the offeror as morally blameworthy or as disrespectful of their claim." Indeed, the very fact that the offer comes from the defendant may be viewed as a reason to reject it, regardless of amount.

The noneconomic goals of plaintiffs are not limited to defamation actions. In fact, these goals may be common among tort plaintiffs who seek vengeance or vindication that results from winning a decision. Plaintiffs in sexual harassment actions "seek a vindication of their right to be treated with dignity fully as much as they are seeking monetary damages." The traditional tort doctrine of nominal damages recognizes the fact that non-monetary motives drive some plaintiffs. Motives such as vengeance may be closely related to the justice system. Adam Smith wrote that the "violation of justice is injury . . . [and] it is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment." A casual observation of litigation suggests "the presence of anger, resentment and vindictiveness is the motivating force behind the persistence, the obstinacy, the economic irrationality, and the ruinousness of a great many lawsuits." The American Law Institute has considered "social grievance redress" to be among the central purposes of tort law.

The parties may gain value from the "act of litigating" itself. For example, "highly emotional issues" characterize malpractice actions, does not involve monetary compensation or redress, but rather involves an overwhelming element of personal vindication.

---

111 Korobkin & Guthrie, supra note 9, at 109-10.
112 This has been called a "reason-excluding commitment": a commitment "not to consider or entertain a gain with respect to some normative criterion." Matthew Adler, Law and Incommensurability: Introduction, 146 U. PA. L. Rev. 1169, 1182 (1998). It would be analogous to a revolutionary refusing to betray a revolution for any amount of monetary gain. Id.
113 Solomon, supra note 108, at 134 (suggesting that the "purpose of liability and tort law may be to compensate the victims and to encourage responsible behavior, but it is also to punish those who are responsible for the victims' plight").
117 Solomon, supra note 108, at 135. He suggests that "[o]ne does not have to look and listen very hard to the plaintiffs in a great many liability suits to be convinced of the vindictiveness of their legal actions. ('Those bastards are going to pay!')." 118 1 Am. Law Inst., Reporters' Study, Enterprise Responsibility for Personal Injury 26-27 (1991).
and both plaintiffs and defendants in these actions may be pursuing noneconomic objectives.\textsuperscript{120}

An experimental study by Korobkin and Guthrie considered the effects of noneconomic values, called "equity seeking," on the settlement decision.\textsuperscript{121} They hypothesized a landlord-tenant dispute, and structured it so that they could modify the blameworthiness of the landlord's behavior, without altering the value of the litigation.\textsuperscript{122} They found that subjects had a substantially lower probability of accepting a given settlement offer when the landlord had been intentionally unresponsive to problems the tenant faced.\textsuperscript{123} The authors concluded that "[w]hen litigants feel they have been treated badly by the other side, the chances of settlement decrease because litigants are more likely to seek retaliation or vindication of their moral position in addition to monetary damages."\textsuperscript{124} Even the presence of an apology by the landlord did not eliminate the noneconomic, vindictive objective of plaintiffs.\textsuperscript{125}

Moreover, direct survey evidence of the litigation process shows that the decision to settle or litigate is not a purely economic one. One study surveyed trial lawyers to discern why a set of twenty-two cases failed to settle.\textsuperscript{126} Of this sample, only six failed to settle exclusively for the valuation disparity reasons which the classic economic model suggests.\textsuperscript{127} Noneconomic factors predominated among explanations of failure to settle.\textsuperscript{128} The authors explained:

That a verdict is rendered determining the merits of the dispute is also of importance to many litigants. One side is declared a winner and the other a loser; one is right and the other wrong; one is vindicated and the other defeated. Many parties, both plaintiffs and defendants, perceive this as the greatest benefit of proceeding to trial and obtaining a verdict. The reverse of this is equally true; settlement avoids a determination that one of the parties may find undesirable.

Closely related to vindication are feelings of anger toward the opponent and a desire to inflict punishment. Trial is an expensive and emotionally debilitating experience for both sides, but often

\textsuperscript{120} Thomas B. Metzloff, Resolving Malpractice Disputes: Imaging the Jury's Shadow, Law & Contemp. Probs., Winter & Spring 1991, at 43, 76-80. The author notes that "[m]alpractice plaintiffs may well view trial as the culmination of their efforts to hold a physician accountable." \textit{Id.} at 79.

\textsuperscript{121} Korobkin & Guthrie, supra note 9, at 144-47.

\textsuperscript{122} \textit{Id.} at 144.

\textsuperscript{123} \textit{Id.} at 146.

\textsuperscript{124} \textit{Id.} at 147.

\textsuperscript{125} \textit{Id.} at 147-50.


\textsuperscript{127} \textit{Id.} at 29.

\textsuperscript{128} \textit{Id.} at 36-38.
one side’s anger towards the other is so great that a trial is forced in order to impose costs on the opponent, even though the other side will also incur costs.\textsuperscript{129} These noneconomic considerations were a factor in a majority of the cases litigated, and were the only factors precluding settlement in eight (36\%) of the cases.\textsuperscript{130} The author emphasized that “litigation is not a purely economic process.”\textsuperscript{131}

A study of appellate litigation found somewhat different noneconomic motivations at this later stage of the litigation process.\textsuperscript{132} After losing at trial, many appellants did not really expect to win on appeal.\textsuperscript{133} Nevertheless, they continued to litigate, in pursuit of process. The survey found that parties “viewed the appellate process itself as able to demonstrate to opposing parties the inappropriateness of their behavior,” and the “fact that the appellate court would treat their claims seriously seemed to vindicate the appellants’ perceptions of the appropriateness of their claims.”\textsuperscript{134} Economic factors were secondary to the decision to appeal.\textsuperscript{135} Appellants sought a fair process, or the retribution that would result from forcing the appellee to participate in additional proceedings, regardless of the outcome.\textsuperscript{136}

Moreover, while typical tort plaintiffs are not repeat players who would derive economic benefit from a favorable precedent, they may have the sociotropic goal of setting a precedent that would assist others who may be similarly situated future plaintiffs. A sense of altruism may motivate peoples’ decisions. Such altruism may be “affective,” in which a person gains utility from the happiness of others, or nonaffective, in which the utility takes the form of a pure internal concern for others.\textsuperscript{137} In either event, the results are similar and contrary to the expectations of the classic economic model.

Considerable evidence indicates that altruism may play a major role in peoples’ decisions. Examples include “voluntary reductions of water-use during droughts, conservation of energy to help solve the energy crisis . . . , donations to public television stations, and many

\textsuperscript{129} Id. at 36 (footnotes omitted).
\textsuperscript{130} Id. at 36-37.
\textsuperscript{131} Id. at 28.
\textsuperscript{133} See id. at 88-89.
\textsuperscript{134} Id. at 89.
\textsuperscript{135} Id. at 91 (reporting that appellants did not base appeals on economic factors or a cost-benefit analysis of the prospects of appeal). Others, including Richard Posner, have observed a similar practice at the trial level. Id. at 90.
\textsuperscript{136} Id. at 90.
\textsuperscript{137} See generally Jane Allyn Piliavin & Hong-Wen Charng, Altruism: A Review of Recent Theory and Research, 16 Ann. Rev. Soc. 27 (1990) (discussing the sources of altruism and whether it is motivated by personal utility or concern for others).
forms of voluntary labor.” According to one estimate, the value of voluntary labor is $74 billion annually. Ample research demonstrates that human behavior is not explained simply by maximization of economic self-interest.

C. The Failure of the Classical Model to Account for the Irrational Plaintiff

The classic economic model’s focus on income maximization is not required by the principles of economics. In fact, it is contrary to those principles. Economists coined the mythical currency of the “utile” in recognition of the fact that people have ends other than monetary ones. In his Nobel lecture, Gary Becker declared:

Unlike Marxian analysis, the economic approach I refer to does not assume that individuals are motivated solely by selfishness or material gain. It is a method of analysis, not an assumption about particular motivations. Along with others, I have tried to pry economists away from narrow assumptions about self-interest. Behavior is driven by a much richer set of values and preferences.

The analysis assumes that individuals maximize welfare as they conceive it, whether they be selfish, altruistic, loyal, spiteful, or masochistic. Judge Posner has declared that economists “long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man.” Perhaps this is true in the abstract, but classic economic models, such as that of litigation, commonly imply the model of the hyperrational actor. Economists have used the in-

---

139 Id. (citing Burton A. Weissbrod, The Nonprofit Economy (1988)).
140 In addition to the sources above, see Amitai Etzioni, The Moral Dimension: Toward a New Economics 51-66 (1988) (discussing how human behavior is not compatible with income maximizing); Norman Frohlich & Joe Oppenheimer, Beyond Economic Man: Altruism, Egalitarianism, and Difference Maximizing, 28 J. Conflict Resol. 3, 21 (1984) (arguing that altruism and egalitarianism play an important role in choice).
141 Economics assumes that people act to maximize their utility but does not necessarily assume that the utility is monetary. See D. Bruce Johnsen, Wealth Is Value, 15 J. Legis. Stud. 263, 268-69 (1986) (defining an economic good as “anything of which more is preferred to less”).
145 E.g., Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: The Limits of Laws and Economics, 33 UCLA L. Rev. 1309, 1320 (1986) (suggesting that “narrow self-interest” is “the behavioral assumption most commonly employed by those applying economic analysis to law”).
come-based assumption for convenience in modeling, but it does not accurately describe reality. The jump from the thin rational theory that individuals pursue their preferences to the thick rational position that all actions aim to maximize individual economic wealth is unjustified.

This richer theory of litigant motivation alters the classic economic model and reduces the opportunities for strategic manipulation of precedent by repeat player defendants. When plaintiffs are not responsive to lucrative settlement offers and insist on litigation, more cases will go to trial and those cases will include more plaintiff wins. Plaintiffs with stronger, winning cases likely have stronger desire for vengeance against defendants and greater emotional commitment to prevailing in court. Such vengeance surely obstructs settlement negotiations and causes rejection of even lucrative offers from defendants. The noneconomic motivations many plaintiffs feel will thus counteract the strategic manipulation of precedent, at least to some degree.

IV
POLICY IMPLICATIONS OF THE FINDINGS

This Article’s argument centers on the descriptive claim that economically irrational decision making by litigants has a positive effect on justness and efficiency in the law. This finding also has policy im-

146 Because a theoretical model by its very nature simplifies reality, simply calling a model reductionist is not much of a criticism. However, the model must capture much of reality in order to be useful. See Douglas G. Baird, The Future of Law and Economics: Looking Forward, 64 U. Chi. L. Rev. 1129, 1131 (1997) (reporting that “[e]conomists aim to capture as much of the dynamics of behavior as they can with the fewest possible assumptions,” so “the question is not whether economists’ assumptions are unrealistic, but whether they capture enough of what is at work to allow us to see basic forces operating in an otherwise impenetrable maze”); see also Lewinsohn-Zamir, supra note 100, at 384-85 (noting that nothing in economic theory denies the existence of noneconomic values such as altruism and that economists acknowledge this fact, but in practice economists “usually prefer to explain behavior using narrowly defined self-interest”).

147 See, e.g., Harsanyi, supra note 77, at 515 (noting that “[o]nce we adopt this broader concept of rationality, we are no longer restricted to the analysis of human behavior in pursuing some fixed goals, but can extend our analysis to changes in people’s goals”). For a discussion of the distinctions between thick and thin visions of rational choice, see Korobkin & Guthrie, supra note 9, at 164-65.

148 See Peter H. Huang & Ho-Mou Wu, Emotional Responses in Litigation, 12 Int’l Rev. L. & Econ. 31, 36-40 (1992) (describing how litigant motivations such as anger, pride, or vengeance can reduce settlements). Although vengeance itself may not be an emotion but an outcome, it is usually associated with emotions such as vindictiveness.

149 Solomon, supra note 108, at 137 (noting that the “desire for vengeance blocks any sincere negotiation”).

150 The data presented in Part II suggest that defendants still win a preponderance of product liability and other cases. See supra note 51 and accompanying text. However, the counteracting effect of plaintiffs’ noneconomic motivations may reduce the magnitude of this effect.
plications and lends weight to arguments for an alteration of the currently prevailing litigation policies. The central implication is that we should not encourage the settlement of litigation.

Owen Fiss made the classic case against settlement; he complained that settlement was a “capitulation” to be “neither encouraged nor praised.”151 While he expressed some concern about the practical biases of the settlement process,152 his case was essentially a philosophical one. Fiss questioned the authenticity of the consent expressed in a settlement.153 He seemed most focused on public law litigation, such as civil rights actions.154 Fiss fundamentally recognized, though, that interests in settlement and in forming precedent conflict. The roots of this Article’s arguments may be found in Fiss, but this Article seeks to make the economic argument much more explicitly than he did.

The preference for settlement ignores the external precedent-setting benefits of litigation to judgment.155 Fiss hinted at this point when he observed that adjudication consumes public resources, which are provided so that litigation can “interpret [public] values and to bring reality into accord with them.”156 He emphasized that even the “civil lawsuit” should be conceived “in public terms.”157 While Fiss seemed focused on the justice of the outcome of the particular dispute, his claim is even stronger when one considers precedent. Producing a precedent does not merely bring “reality” into accord with public values in an individual dispute, it pronounces those public values as guidance for private actors and promises replication of those values in ensuing analogous disputes.158

The classic public goods case against settlement suggests that lack of litigation will yield an absolute lack of public goods, that is, precedents. Landes and Posner explained how our court system produces rules that are valuable to nonparties in their future planning.159 The “[r]ules and precedents” that result from private litigation have “obvious importance for guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux and

---

152 Id. at 1076. Fiss suggested that poorer litigants would have less ability to predict the outcome of litigation and therefore settle improvidently, be sufficiently desperate for income to accept a low settlement, or lack the resources necessary to finance the full pursuit of their litigation. Id.
153 Id. at 1078-82.
154 E.g., id. at 1087 (using desegregation litigation as his example and perhaps conceding that his claim applies to only a limited number of cases).
155 Supra notes 21-24 and accompanying text.
156 Fiss, supra note 151, at 1085.
157 Id. at 1089.
158 Supra notes 21-24 and accompanying text.
159 See Landes & Posner, supra note 40, at 236.
chaos."160 The precedents "benefit not only the parties to a lawsuit, but third parties as well."161 While precedents are the most obvious public good associated with litigation, prosecuting a case may have other public benefits as well.162 Because litigation and precedent-setting entail external benefits, they will not be produced at optimal levels.163 Individuals have no incentive to maximize such external benefits, for which they must bear the entire cost in litigation expenses. The broad public, which has an interest in optimizing the external benefits, will be unable to organize for this end,164 or in the case of litigation, may be barred by procedural doctrines.165 Ordinarily, "an important role of government is to use its coercive powers to guarantee the production of public goods."166 In this context, government uses its coercive powers to encourage settlement to avoid the production of public goods! The position seems prima facie irrational. Yet, at this point in the argument, it is possible to defend a policy encouraging settlement. Even with various encouragements to settle, litigants produce a lot of precedents. Maybe courts should produce more decisions and opinions, but it is hard to argue that a shortage of precedents is a central problem in America today.

The public goods case is a different and stronger one: the problem is not so much the absolute shortage of precedent as a skewing of precedent. Precedents are not only a public good, they also may be private goods, produced by interest groups to benefit themselves.167 The analogy to legislation is instructive. Legislation is typically seen as creating a public good. Yet it is widely recognized that rent-seeking lobbying may employ legislation to create private goods at the expense of the commonweal.168 Litigation presents the same risk, as ex-

162 Luban, supra note 160, at 2625 (explaining that "the discovery and publicizing of facts, which may subsequently be used by political actors, ordinary citizens, or other agents in the legal system (litigants as well as lawyers), is a public good created by adjudication").
163 See, e.g., Coleman & Silver, supra note 161, at 115 (noting that "settlements reduce the number and variety of legal opinions").
164 Mancur Olson provided the classic exposition of why large groups of individuals, such as the general public, cannot effectively organize. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).
165 For example, standing doctrine restricts the ability of a party to represent the general public in litigation. Frank B. Cross, The Judiciary and Public Choice, 50 Hastings L.J. 355, 363-66 (1999).
166 Korobkin & Ulen, supra note 1, at 1139.
167 Cross, supra note 165, at 366.
168 William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 334 (1990) (describing statutes as a "deal between rent-seeking groups and reelection-minded legislators").
Legislating for private interests should be frustrated just as we should put barriers in the path of rent-seeking litigation.

Part III suggests that litigants, especially tort plaintiffs, behave in an economically irrational fashion, rejecting settlements that appear efficient and beneficial for all parties to a lawsuit, thereby preventing some rent-seeking manipulation of precedent. But this evidence does not mean that such litigants remain wholly oblivious to economic consequences. The threat of a substantial penalty for failure to settle may well overcome such litigants' noneconomic moral resistance to settlement. Hence, public policies favoring settlement may perversely enhance the rent-seeking opportunities of litigation.

Courts and legislatures create various policies designed to encourage the settlement of litigation. These policies aim to reduce the transaction costs of litigation to courts and parties and also to encourage win/win agreements for the parties to litigation. Various informal judicial practices serve the preference for settlement. Many judges cajole, pressure or manipulate litigants to settle. This informal preference for settlement is acknowledged in formal legal rules.

Rule 68 of the Federal Rules of Civil Procedure provides an example of a rule that punishes a party's refusal to settle. The rule dates back to the origin of all the rules of civil procedure in 1938. Rule 68 requires plaintiffs who reject settlement offers greater than the amount eventually won at trial to pay the defendant's costs of trial.

For a general discussion of how interest groups can use the courts for rent-seeking, see Cross, supra note 165, at 356-57. Infra notes 175-86 and accompanying text.

Id. at 222 (noting that "courts, commentators, and federal policy seem to favor settlement, while little attention is given to precedent that may be lost in the process"). Coleman & Silver, supra note 161, at 105-06 (describing how judges encourage settlement by "playing on counsels' hopes and fears . . . by suggesting that close calls may be decided for or against a particular party, by praising the quality of counsels' efforts, and by emphasizing the common interest the judge and counsel have in settling the case and moving on to other matters"); Korobkin & Guthrie, supra note 9, at 108 n.5 (discussing how "[c]ourts have devised a number of procedures aimed at promoting settlement"); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 376-77 (1982) (discussing how judges aggressively encourage settlement of litigation).

More precisely, the rule is potentially invoked by a defendant who makes a settlement offer after a lawsuit is filed but more than ten days prior to a trial. Id. The plaintiff has ten days in which to accept or reject that offer. Id. Suppose that the plaintiff rejects the offer, and the trial yields a judgment for the plaintiff with damages less than those offered in settlement. In this circumstance, Rule 68 directs that the plaintiff must pay the litigation costs incurred by the defendant after the offer was made. Id. For a
Historically, courts have not extended Rule 68 to the defendants’ attorneys fees, so the punishment for refusal to settle is limited to public fees and therefore not too severe. However, courts have interpreted Rule 68 to encompass post-offer attorneys fees in cases in which the law gives a prevailing plaintiff the right to recover attorneys fees. This interpretation is especially ironic, because those are the cases in which Congress has found a public interest in encouraging litigation by a grant of attorneys fees. One district court has unilaterally expanded the application of the rule to include recovery of attorneys fees. In addition, scholars have proposed extending Rule 68 to provide for attorneys fees in all actions. Given the potential magnitude of such fees, Rule 68 now may impose quite an onerous financial burden on plaintiffs who reject settlement offers.

Various states have passed laws or adopted rules that roughly trace the provisions of Rule 68 of the Federal Rules of Civil Procedure but provide even more settlement pressure on plaintiffs. California, for example, has a rule that enables plaintiffs or defendants to make offers of judgment and provides for the shifting of fees when a trial outcome is inferior to the settlement offer. The California law goes even further by requiring a plaintiff to remit some of the damages recovered at trial if the judgment does not exceed the offer. Colorado’s law provides for recovery of attorneys fees when an outcome is inferior to a rejected settlement offer. Wisconsin’s statute actually requires the party that rejected the offer to pay twelve percent interest per year on the amount recovered, dating from the time of the offer.

good summary of the rule’s operation, see generally Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant,* 65 Geo. Wash. L. Rev. 379 (1997).

178 See Jenny R. Rubin, *Rule 68: A Red Herring in Environmental Citizen Suits,* 12 Geo. J. LEGAL ETHICS 849, 853 (1999) (noting that if the “costs include only court and other litigation fees, the risk of such an assessment plays only a minimal role in a plaintiff’s determination of whether to accept an offer of judgment or proceed to trial”).

179 *E.g.*, Marek v. Chesney, 473 U.S. 1, 9-11 (1985); see also Rubin, *supra* note 178, at 853 (noting that “most environmental statutes include attorneys’ fees in their definition of costs” which could make a plaintiff liable for the defendants attorneys’ fees under Rule 68).


183 *Id.* § 998(e).

In Florida, litigants who decline to settle may also be liable for the defendant's attorneys fees. Rule 68 and the parallel state laws are theoretically dubious. Functionally, they delegitimize all noneconomic motives associated with litigation. Suppose that a defendant in a fraud action offers $100,000, the plaintiff rejects the offer, and the trial yields an award of $80,000 for the plaintiff. Such a plaintiff might not be at all disappointed in having taken the case to trial. The outcome of trial, conceived as both the $80,000 monetary award and the noneconomic benefits of vindication, exposure of wrongdoing, and the like might well exceed the value of the $100,000 settlement offer in such a plaintiff's mind. Yet Rule 68 almost conclusively says that this cannot be so. The rule declares that the settlement offer was preferable and punishes the plaintiff for failing to accept it. Hence, it punishes plaintiffs for pursuing noneconomic motives in litigation. It is quite a theoretical irony to find a rule that punishes parties for seeking abstract justice and declares that the courts should be open only to utterly materialistic ends. The existence of the rule even tells plaintiffs that the judicial system considers their noneconomic ends illegitimate and may cause them to question their commitments.

There is an even more serious instrumental problem with Rule 68. Rule 68 and its policies appear perverse and unwise. Although the rule seeks to encourage settlement for economic efficiency reasons, the policies facilitate strategic settlement and precedent manipulation by repeat players with noneconomic motives to deter litigation. This instrumental criticism is bolstered by the direct and facial import of settlement-encouraging rules such as Rule 68. While the rules permit precedent manipulation by repeat-players, the rules functionally establish a government policy against one-shot litigants' vindication of

---

187 See supra Part III.B.
188 This sentence is slightly exaggerated. Courts have recognized, for example, that nonmonetary injunctive relief won at trial may be considered in valuing the trial outcome. E.g., Lish v. Harper's Magazine Found., 148 F.R.D. 516, 520 (S.D.N.Y. 1993) (holding that equitable relief in defamation action was more favorable than monetary value of settlement offer). The exaggeration is only slight, however. This author has found only one case in which the courts have even considered noneconomic values other than equitable relief in valuing the trial outcome. Rogers v. City of Va. Beach, No. 98-2253, 1999 WL 498707, at *3 (4th Cir. July 15, 1999) (refusing to apply Rule 68 because the plaintiff's Fair Labor Standards Act victory had external benefits to all city employees). Moreover, a plaintiff surely has considerable uncertainty over how a court would value noneconomic ends. See, e.g., Bonney et al., supra note 177, at 414 (noting that "[d]etermining the weight to give to any injunctive or other equitable relief is, at best, a guessing game for the court and, at worst, a vehicle by which a result-oriented court can achieve an outcome at odds with the purpose of the rule").
189 In addition to Rule 68, see supra notes 170-74 and accompanying text.
their noneconomic motives through litigation.\textsuperscript{190} That policy is not frankly defended, though, and it would be particularly difficult to defend in a nation in which a primary, if not paramount, goal of courts is to do justice. The best defense for such a policy would be one of economic efficiency, yet the policy is in fact contrary to such efficiency, because it enables greater manipulation and skewing of precedent.

The more that refusal to settle is economically punished, the more difficult it will be for plaintiffs to resist settlement in favor of noneconomic aims. Noneconomic motives are significant to human decision making in general and to litigation in particular. The fact that money is not everything, however, does not mean that it is nothing. The evidence of noneconomic motives should not cause one to ignore the simultaneous relevance of economic motives. The relevance of both motives is best illustrated in a classic story about George Bernard Shaw.\textsuperscript{191} At a dinner party, he purportedly asked a woman if she would spend the night with him for a million pounds and, though taken aback, she agreed. Then he asked if she would do so for five pounds. Her response was “What kind of a woman do you think I am?” Shaw replied that they had already established that and now merely were haggling over the price. The story may be apocryphal, but it establishes a truth that at some financial level our self-interest may override our emotions or principles. Seldom if ever are values or goals lexically ordered: a relationship that implies that even the smallest amount of goal $X$ is always preferable to goal $Y$.\textsuperscript{192} Instead, it is common that a party may prefer some amount of noneconomic $X$ to economic $Y$, but as the story of the socialite suggests, a sufficient economic consideration may drive the party to subordinate his or her concerns for the noneconomic $X$.\textsuperscript{193}

The principle is even more true when the trade off involves a prospective financial loss rather than a gain. Behavioral research shows that parties tend to be risk-averse and fear the loss of a given amount of money more than they value the gain of that same amount.\textsuperscript{194} Rule 68 clearly imposes a loss on an onsetling party, so its

\textsuperscript{190} See supra Part III.B.
\textsuperscript{191} The Sayings of Bernard Shaw 64 (Joseph Spence ed., 1993).
\textsuperscript{193} One might expect the Sierra Club to be especially devoted to noncpecific environmental objectives and relatively less responsive to economic concerns. But the Sierra Club recently suggested that if federal law were interpreted to require it to pay attorneys’ fees in cases in which it does not prevail, it would “stop bringing cases.” Marcia Coyle, Should Defendants Win Fees?, Nat’l L.J., Dec. 20, 1999, at B1.
\textsuperscript{194} Behavioral economics has conclusively established that people do not weigh losses and gains equally; rather, individuals are particularly averse to out-of-pocket losses. E.g., Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47
application is regarded especially seriously. The imposition of defendants' litigation costs on plaintiffs may even amount to coercion.\textsuperscript{195} Hence, punishing a refusal to settle may substantially encourage settlement, even at the expense of noneconomic concerns.\textsuperscript{196}

The reason for encouraging settlement may be for the precise purpose of discouraging litigation from vindictive motives. The intrinsic deontological value of such motives may be debated.\textsuperscript{197} However, the rules encouraging settlement ignore the substantial instrumental virtue of such motives in pursuing litigation and creating public goods, while minimizing the amount of strategic manipulation of precedent. Nothing about the law necessarily rules out the legitimacy of noneconomic motives. To the contrary, doctrines of nominal damages and other nonmonetary relief demonstrate that substantive law recognizes noneconomic motives.\textsuperscript{198} Hence, there is no intrinsic legal reason to aggressively encourage settlement at the expense of plaintiffs' noneconomic ends. Of course, settlement of a large percentage of cases is pragmatically vital, given limited judicial resources. But noneconomic objectives are not so pervasive as to pre-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{195} E.g., Bonney et al., supra note 177, at 417 n.266 (noting that the “importance and appeal of current Rule 68 rests in the rule’s ability to coerce parties into settlement.”).
\item\textsuperscript{196} The trial lawyer survey discussed above to demonstrate the significance of noneconomic motives suggested that those motives declined in significance as the economic stakes grew larger. Hoffman, supra note 126, at 37 (noting that “economics did . . . place a limitation on the exercise” of noneconomic motives and that settlement was more likely when more was at stake economically). The survey of appellants similarly led to an “impression that cost could accumulate to a level for the losing litigants where it would have precluded their appeal.” Barclay, supra note 132, at 93. For empirical evidence on how economic factors in fact influence settlement, see Gary M. Fournier & Thomas W. Zuehlke, Litigation and Settlement: An Empirical Approach, 71 Rev. Econ. Stat. 189 (1989).
\item\textsuperscript{197} E.g., Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1499 & n.70 (1998) (noting that prominent philosophers argue that motives such as spite are not worthy of consideration).
\item\textsuperscript{198} Regarding relief, see supra notes 113-20 and accompanying text. Noneconomic values are recognized in other legal doctrines. Standing, for example, may be predicated on noneconomic injuries. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970). Wrongful death doctrines have recognized the need to compensate the noneconomic value of children. Steven P. Croley & Jon D. Hansen, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 Harv. L. Rev. 1785, 1908 (1995). Even in intellectual property actions noneconomic values have been recognized. E.g., Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., 296 S.E.2d 697, 706 (Ga. 1982) (holding that King's estate had sufficient noneconomic interest in precluding marketing of his bust). The same is true of telecommunications law. MCI Telecomms. Corp. v. FCC, 675 F.2d 408, 415-416 (D.C. Cir. 1982) (recognizing cost allocation in telecommunications as based in part on fairness and other economic values). Many forms of equitable relief reflect plaintiffs' monetary objectives. However, injunctive relief in defense of constitutional rights, for example, reflects a nonmonetary end. Free speech, procedural due process, and other similar rights are protected regardless of economic losses.
\end{enumerate}
\end{footnotesize}
clude settlement altogether.\textsuperscript{199} The question is whether decisions to eschew settlement and proceed with litigation are desirable at the margin. This Article urges that they are.

\section*{Conclusion}

Behavioral economics criticizes classical economics for failing to describe the reality of human behavior, which arguably leads to undesirable policy prescriptions. Yet one can criticize much behavioral economics for failing to make accurate descriptive predictions or to produce policy prescriptions that are demonstrably superior to those of classical economics. This Article demonstrates how behavioral alterations of the classic economic model can produce more accurate descriptions of human actions and how these descriptions lead to certain policy conclusions. Richard Thaler, perhaps the most prominent behavioral economist, asks all to agree that the following propositions are false: "(1) Rational models are useless. (2) All behavior is rational."\textsuperscript{200} The goal should be synthesizing economically rational objectives and other factors.

The prevailing battle between law and economics and behavioral economics is thus misguided. The conventional rational decision-making presumptions of classic law and economics are amply demonstrated to a degree, but the theory does not explain all behavior completely. Behavioralism is not so much an alternative to law and economics as it is a complement. It supplements the classic model and explains why deviations may occur from the model, but it does not supplant that model. Both models are valuable only insofar as they explain actual behavior, and their descriptive validity can be tested empirically, yielding the knowledge necessary for policy.

Legal analysis should employ both theories, according to their predictive abilities. This analysis can obviously inform legal decision making. Settlement of litigation traditionally has appeared desirable to both lawyers and economists, for obvious reasons. Settlement in many cases is a desirable end. When considering the economic consequences of strategic settlement, though, settlement may be unfortunate and inefficient. Economically irrational litigation decisions help counteract the resulting bias and should be applauded rather than discouraged.

\textsuperscript{199} It is well known that the vast majority of cases over many years have settled. \textit{See} Korobkin & Guthrie, supra note 9, at 107 n.1.