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EMOTIONAL ADAPTATION AND LAWSUIT SETTLEMENTS

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In *Hedonic Adaptation and the Settlement of Civil Lawsuits*, Professors John Bronsteen, Christopher Buccafusco, and Jonathan Masur note an unexplored aspect of protracted lawsuits: During prolonged litigation tort victims can adapt emotionally to even permanent injuries, and therefore are more likely to settle—and for less—than if their lawsuits proceeded faster.¹ This Response demonstrates that this is a facile application of hedonic adaptation with the following three points. First, people care about more than happiness: Tort victims may sue to seek justice or revenge; emotions in tort litigation can be cultural evaluations;² and people are often motivated by identity and meaning.³ Also, if plaintiffs fear losing litigation options,⁴ they are less likely to settle—and for more—than if their lawsuits proceeded faster. Second, adaptation can be slow and remain incomplete after many years. Third, fostering emotional adaptation by lengthy tort litigation raises ethical and normative questions.

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1. John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 Colum. L. Rev. 1516, 1536–40 (2008).

2. Peter H. Huang, *Response, Diverse Conceptions of Emotions in Risk Regulation*, 156 U. Pa. L. Rev. PENumbra 435, 447 (2008), at <http://www.pennumbra.com/responses/03-2008/Huang.pdf>.

3. See George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. Pub. Econ. 1795, 1801–04 (2008) (arguing that “experience utility fails to capture a wide range of dimensions of existence that people deeply and legitimately care about”).

4. See Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan. L. Rev. 1267, 1275–80 (2006) (introducing real options model to analyze litigant behavior).

I. HAPPINESS IS NOT EVERYTHING

Naturally, individuals desire happiness; but most people, especially litigation parties, care about emotions other than happiness and care about things other than emotions. Emotions other than unhappiness that drive plaintiffs to file lawsuits include anger, disappointment, outrage, shock, and surprise. The language of tort litigation also involves more than just happiness and unhappiness. Torts entail contested notions of blameworthiness, efficiency, equity, fairness, justice, morality, and responsibility. These value-laden concepts typically move parties emotionally.⁵ Tort victims motivated by these emotions will continue litigation even if they experience complete hedonic adaptation.

Litigation itself also generates usually negative affect.⁶ As with divorce and child custody battles, tort lawsuits can become unpleasant, with each side determined to emotionally harass the other. Parties can end up in a vicious cycle of aggressive litigation behavior: Litigation causes negative affect, leading to more aggressive litigation behavior that causes further negative affect, and so forth. Further, most people seek meaning in their life narratives. Tort victims who do not sue may be viewed as weak by others. Individuals usually care about what others think and do not like to appear weak. Indeed, many also derive pleasure from reliving memories of being courageous.

Perhaps most importantly, people care about features of life other than affect. An empirical survey found that childcare was only marginally more enjoyable than housework, working, and commuting, and less enjoyable than eleven other daily activities.⁷ There are two ways to interpret such data. First, people mistakenly become parents, not realizing that kids reduce average happiness. Second, people become parents to experience meaning and satisfaction from caring for another. Objective “happiness” does not capture such valued experiences.⁸

Finally, lawsuits involve real options:⁹ Plaintiffs have unilateral options to drop lawsuits, and litigants have bilateral options to settle.

5. In the movies *A Civil Action* and *Erin Brockovich*, for example, tort victims care more about receiving apologies than money. *A Civil Action* (Paramount Pictures 1998); *Erin Brockovich* (Universal Pictures 2000).

6. Peter H. Huang & Ho-Mou Wu, Emotional Responses in Litigation, 12 *Int'l Rev. L. & Econ.* 31, 32–33 (1992).

7. Daniel Kahneman et al., A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method, 306 *Science* 1776, 1777 tbl.1 (2004) [hereinafter Kahneman, Survey Method].

8. See Dylan M. Smith et al., Are Subjective Well-Being Measures Any Better Than Decision Utility Measures?, 3 *Health Econ. Pol'y & L.* 85, 89 (2008) [hereinafter Smith et al., Subjective Well-Being Measures].

9. See Grundfest & Huang, *supra* note 4, at 1275–80 (applying real options theory in context of litigation); Peter H. Huang, A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation, 73 *N.Y.U. L. Rev.* 1943, 1952–58 (1998) (same).

Litigation options are like financial options in that an option with more time before its expiration is more valuable than an option with less time.¹⁰ Therefore, fear of losing options motivates people to spend effort and money to preserve options that they may not otherwise value.¹¹ If plaintiffs desire to preserve litigation options, they will be less likely to settle than if their lawsuits proceeded faster. This contradicts the conclusion that the Essay reaches under different assumptions and so highlights the importance of empirically verifying the descriptive accuracy of such assumptions.

In sum, happiness and unhappiness do not capture all human motivations. In litigation specifically, there are many practical reasons besides unhappiness for why plaintiffs choose to sue, and for these other motivations, hedonic adaptation is generally irrelevant.

II. SECOND THOUGHTS ABOUT HEDONIC ADAPTATION

A version of the “hedonic treadmill” model first appeared in 1971,¹² but recent empirical data has necessitated important revisions of that original model.¹³ First, people differ in their hedonic adaptation to events. Second, hedonic set points differ across people and depend partly upon individual temperaments.¹⁴ Third, people have slightly positive, as opposed to neutral, hedonic set points. Fourth, one person can have several hedonic set points for different components of well-being that move in different directions. Fifth, minor events can lastingly increase life satisfaction.¹⁵ Sixth, an event can permanently alter hedonic set points.

As to the last point, there is evidence that long-term disability

10. Robert C. Merton, *Theory of Rational Option Pricing*, 4 *Bell J. Econ. & Mgmt. Sci.* 141, 142–43 (1973) (developing financial options theory).

11. See Jiwoong Shin & Dan Ariely, *Keeping Doors Open: The Effect of Unavailability on Incentives to Keep Options Viable*, 50 *Mgmt. Sci.* 575, 584 (2004) (“[T]he experimental evidence presented suggests that individuals value options in a way that is different from expected value of these options, and in particular, that decision makers overvalue their options and are willing to overinvest to keep these options from disappearing.”).

12. See Philip Brickman & Donald T. Campbell, *Hedonic Relativism and Planning the Good Society*, in *Adaptation-Level Theory: A Symposium* 287, 289, 299–300 (M. H. Appley ed., 1971).

13. See Ed Diener et al., *Beyond the Hedonic Treadmill: Revising the Adaptation Theory of Well-Being*, 61 *Am. Psychol.* 305, 312 (2006).

14. A person’s hedonic set point is a stable happiness level that a person tends back towards after temporary experiences of elation or irritation.

15. See Daniel Mochon et al., *Getting off the Hedonic Treadmill, One Step at a Time: The Impact of Regular Religious Practice and Exercise on Well-Being*, 29 *J. Econ. Psychol.* 632, 635 (2008) (suggesting that “cumulative impact of repeating minor but positive life events in the short term . . . may be sufficient to increase well-being in the long-term”).

permanently lowers hedonic set points.¹⁶ In addition, even if adaptation occurs, it can remain incomplete. The Essay argues that a recent longitudinal study¹⁷ provides “substantial evidence that hedonic adaptation to disability is significant.”¹⁸ That study, however, found only “approximately fifty percent adaptation to moderate disability and thirty percent adaptation to severe disability.”¹⁹ While reasonable people can quibble over whether fifty percent adaptation is more like a glass being half full or half empty, thirty percent adaptation is indisputably akin to a glass being seventy percent empty. As a recent book describes, hedonic adaptation has its limits.²⁰

Psychologist and economics Nobel Laureate Daniel Kahneman, who pioneered research to devise a measure of experienced happiness,²¹ recently stated:

Ten years ago the generally accepted position was that there is considerable hedonic adaptation to life conditions. . . . Evidence that people adapt—though not completely—to becoming paraplegic or winning the lottery supported the idea of a “hedonic treadmill” [I]t is rare for a hypothesis to be so thoroughly falsified. . . . [A]lthough I still find the idea of an aspiration treadmill attractive, I had to give it up. . . . We have been wrong and now we know it. I suppose this means that there is a science of well-being, even if we are not doing it very well.²²

Two psychologists recently proposed a model of emotional adaptation summarized by the acronym AREA: People *Attend* to self-relevant unexplained events, *React* emotionally to such events, *Explain* or come to understand them, and thus *Adapt* in the sense that they attend less and experience weaker emotional reactions to those events.²³ If this model is correct, the march of time is not why a tort victim will adapt hedonically to an injury. Instead, this model suggests tort victims will adapt emotionally to injuries after they explain and understand how and

16. See Richard E. Lucas, Long-Term Disability Is Associated with Lasting Changes in Subjective Well-Being: Evidence from Two Nationally Representative Longitudinal Studies, 92 *J. Personality & Soc. Psychol.* 717, 726 (2007).

17. Andrew J. Oswald & Nattavudh Powdthavee, Does Happiness Adapt? A Longitudinal Study of Disability with Implications for Economists and Judges, 92 *J. Pub. Econ.* 1061 (2008).

18. Bronsteen, Buccafusco & Masur, *supra* note 1, at 1529.

19. *Id.*

20. Ed Diener & Robert Biswas-Diener, Happiness: Unlocking the Mysteries of Psychological Wealth 151–61 (2008) (citing studies to illustrate ways in which hedonic adaptation is limited).

21. Kahneman, *Survey Method*, *supra* note 7.

22. Daniel Kahneman, The Sad Tale of the Aspiration Treadmill, *Edge World Question Center* (2008), at http://www.edge.org/q2008/q08_17.html#kahneman (on file with the *Columbia Law Review*).

23. Timothy D. Wilson & Daniel T. Gilbert, Explaining Away: A Model of Affective Adaptation, 3 *Persp. Psychol. Sci.* 370, 370 (2008).

why they were injured.

Another set of problems with hedonic adaptation involve the difficulties in measuring happiness. Happiness involves both experienced feelings and cognitive evaluations. Happiness measures reflect an illusion of numerical objectivity, but in reality happiness involves qualitative and subjective value judgments.²⁴ Therefore, measuring happiness with a number requires collapsing a multi-dimensional rich notion into a necessarily impoverished one-dimensional ranking. Moreover, people interpret the same question about happiness differently depending on their age, culture, ethnicity, gender, geographical region, language, situation, and time. People may also desire to appear happy but not too happy. Research finds that self-reported happiness is affected by framing,²⁵ and people can lie to both others and themselves about happiness.

The hedonic adaptation literature consists of two related but distinct claims. First, people tend to adapt hedonically. This tendency of emotional reactions to diminish over time is highly functional. To ignore current events, by ruminating over ancient misfortune or celebrating past good fortune, is not adaptive. As economics Nobel Laureate Herbert Simon observed, emotions interrupt our attention to focus on real-time priorities that demand our attention.²⁶ If hedonic adaptation is substantial, then any happiness is only temporary. But, then again, so is life! As macroeconomist John Maynard Keynes famously once said, “[T]he *long run* is a misleading guide to current affairs. *In the long run* we are all dead.”²⁷ This quote also highlights that whatever emotional adaptation there ultimately is, it will not be immediate.

Second, while people can forecast accurately the valence of emotions, people routinely and systematically overestimate the duration and intensity of emotions.²⁸ This has been labeled duration bias, focusing illusion, or impact bias. But such inaccurate affective forecasts motivate people to strive to achieve desirable outcomes and to avoid aversive ones. If tort victims forecast complete hedonic adaptation, they would not sue since lawsuits would have no lasting affect.

Emotions are fleeting and should be. But, while feeling emotions,

24. Mariano Torras, Subjectivity Inherent in Objective Measures of Well-Being, 9 J. Happiness Stud. 475, 476 (2008).

25. Rick Swedloff, Accounting for Happiness in Civil Settlements, 108 Colum. L. Rev. Sidebar 39, 43–44 (2008), http://www.columbialawreview.org/Sidebar/volume/108/39_Swedloff.pdf.

26. Herbert A. Simon, Motivational and Emotional Controls of Cognition, 74 Psychol. Rev. 29, 34 (1967).

27. John Maynard Keynes, A Tract on Monetary Reform (1923), reprinted in 4 The Collected Writings of John Maynard Keynes 65 (Royal Econ. Soc’y ed., 1971).

28. Daniel Gilbert, Stumbling on Happiness 107–19, 230–32 (2006); Diener & Biswas-Diener, *supra* note 20, at 165–81.

people can engage in behavior that is costly to reverse or even irreversible. For example, severely depressed people may commit suicide even if they would have adapted to what they were depressed about given enough time. If people believed they would completely hedonically adapt to most events, they would neither do anything desirable nor avoid doing anything undesirable because nothing would have much impact on their long-run happiness.

III. ETHICAL AND NORMATIVE QUESTIONS

If there is hedonic adaptation because of litigation delay, at least five complex ethical questions follow—none of which the Essay fully addresses.²⁹ First, are attorneys breaching ethical or professional responsibility norms if they continually remind plaintiffs of pain and suffering to pursue greater monetary recovery? Second, should plaintiffs' lawyers promote monetary or emotional recovery? Third, if plaintiffs' attorneys come to learn from their past clients that former plaintiffs are not as happy as those plaintiffs had expected after protracted litigation, even if they receive a lot of money, should attorneys disclose this to future clients? Fourth, should defense attorneys make pretrial strategy choices to facilitate plaintiffs' hedonic adaptation to reduce settlement demands? Fifth, should plaintiffs' attorneys engage in trial behavior that exacerbates judges' and juries' overestimation of the duration and intensity of negative affect from severe injuries?

Societies must also answer the normative question of whether a greater probability of settlements versus trials is socially desirable. Trials provide several public goods, including precedent and public judgment amounts. Even if society decides that settlements are more desirable than trials, relying on extended litigation to encourage settlements generates emotional costs. Negative affect generated by extended litigation is not only limited to parties, their attorneys, judges, and juries, but likely spills over to families and friends.

Finally, society must answer two unresolved empirical questions. First, does a higher likelihood of settlement justify such emotional costs? Reasonable people may differ over the answer. Moreover, emotional costs of protracted litigation are imposed unequally on different subgroups in society. So not only the size, but also the distribution, of emotional costs across people matter.

Second, can an increased probability of settlement be realized at lower emotional costs? That depends on why tort victims file lawsuits. If tort victims desire vengeance, self-punishments by defendants produce settlements. If tort victims want information about what happened, providing that produces settlements. If tort victims crave justice, sincere

29. Bronsteen, Buccafusco & Masur, *supra* note 1, at 1536–40.

apologies by defendants produce settlements.

IV. CONCLUSIONS

A desire to apply rapidly developing happiness research to analyze law is laudable,³⁰ but applications must acknowledge current lively debates over the foundations of happiness research³¹ and the perspectives of eudaimonia versus hedonics.³² Data reveal that those with chronic health conditions exhibit what one law professor terms a reverse endowment effect,³³ in the sense that colostomy and kidney dialysis patients report willingness to pay a lot of money or give up much of a healthy life span to no longer suffer from undesirable medical conditions.³⁴ So in spite of the happiness that patients with chronic health conditions report, those patients reveal a willingness to forgo much time or money to be healthy again. Inconsistencies between revealed preferences versus experienced happiness raise questions about which to rely upon. There is certain to be refinement in our measurement and understanding of happiness.³⁵

Even were protracted lawsuits to allow some tort victims opportunities to adapt somewhat emotionally to serious injuries, there are better ways than prolonged litigation to foster hedonic adaptation. Happiness research provides empirical data supporting a dozen activities that raise happiness.³⁶ Further, even were there indisputable data that

30. See, e.g., Scott A. Moss & Peter H. Huang, Replacing Too Narrow “Rationality” Premises in Employment Law: How Behavioral & Happiness Research Actually Can Be Useful (Nov. 27, 2008) (unpublished manuscript, on file with the *Columbia Law Review*); Rick Swedloff & Peter H. Huang, Happiness, Tort Damages, and Juries (Nov. 28, 2008) (unpublished manuscript, on file with the *Columbia Law Review*).

31. See, e.g., Paul Dolan, Developing Methods That Really Do Value the ‘Q’ in the QALY, 3 *Health Econ. Pol’y & L.* 69, 74–75 (2008) (discussing problems with subjective well-being ratings); Smith et al., Subjective Well-Being Measures, *supra* note 8, at 87–88 (discussing value of subjective well-being measures in relation to decision-based utility measures).

32. See Alan S. Waterman, Reconsidering Happiness: A Eudaimonist’s Perspective, 3 *J. Positive Psychol.* 234, 234 (2008) (analyzing hedonia and eudaimonia as related but distinct conceptions of happiness, and suggesting how empirical research can be strengthened in light of multiple conceptualizations about happiness).

33. Telephone Interview with Leo Katz, Frank Carano Professor of Law, Univ. Pa. Law Sch. (Sept. 18, 2008).

34. Dylan M. Smith et al., Misremembering Colostomies? Former Patients Give Lower Utility Ratings Than Do Current Patients, 25 *Health Psychol.* 688, 691 (2006); George W. Torrance, Toward a Utility Theory Framework for Health Status Index Models, 11 *Health Services Res.* 349, 355–364 (1976).

35. See Yew-Kwang Ng, Happiness Studies: Ways to Improve Comparability and Some Public Policy Implications, 84 *Econ. Rec.* 253, 261–262 (2008) (advocating increased public spending and brain stimulation to increase overall happiness).

36. See generally Sonja Lyubomirsky, *The How of Happiness: A Scientific Approach to Getting the Life You Want* (2007) (analyzing different activities that people can engage in to become lastingly happier).

substantial hedonic adaptation to physical injuries causes more settlements, we should not evaluate civil procedure based solely upon such data. It would run counter to most public values to avoid engaging in tort reform on the grounds that drawn-out lawsuits permit emotional adaptation to severe injuries.

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