
THE TROUBLE WITH HAPPINESS

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The empirical study of happiness is all the rage. Scholars across disciplines are measuring, dissecting, and writing about happiness; trying to find the causes, correlates, and conditions of happiness; and trying to explain how people can be happier and sustain happiness. In recent years, legal scholars have relied on these findings to explain or justify changes to legal institutions as diverse as the tax code, the tort system, criminal punishment, and corporate governance.

The trouble is the data on happiness cannot inform public policy generally or transform legal institutions specifically without additional, significant theoretical undergirding. This Article shows that scholars cannot use the happiness data instrumentally without answering two foundational questions. Scholars must first figure out whether and how the data collected relate to more complete definitions of well-being. Second, scholars must determine whether, in light of other normative theories that animate substantive law, the apparent conflict between prediction, experience, and memory matters. These two foundational questions, in turn, raise important concerns about the importance of hedonic adaptation, a finding that a number of scholars have relied upon in recent articles.

In working through these questions, this Article provides an important roadmap for future scholars who wish to use empirical data on happiness to set public policy or transform legal institutions.

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INTRODUCTION

Happiness is all the rage. Empiricists are measuring and dissecting happiness; examining the causes, correlates, and conditions of happiness; and trying to explain how people can be happier and sustain happiness. Based solely on these data, scholars have proposed significant changes to legal institutions such as criminal law,¹ tort law,² civil procedure,³ taxation,⁴ and corporate governance.⁵ Others have proposed new ways

1. See, e.g., Mirko Bagaric & James McConvill, *Giving Content to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offense Seriousness and Penalty Severity*, 69 J. CRIM. L. 50, 52 (2005) (suggesting that the appropriate criteria for matching the seriousness of an offense with the severity of its punishment is the level of unhappiness stemming from each imposition); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1039 (2009) [hereinafter *BBM, Happiness and Punishment*] (using recent psychological findings regarding happiness to more accurately describe the effects of punishment); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUDIES 173, 174 (2004) (analyzing how perceptions and expectations of the costs of incarceration impact the deterrent power of the criminal justice system).

2. See, e.g., Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 747–48 (2007) (examining lost enjoyment of life damages in tort law); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S157 (2008) (discussing the likelihood of juries to overestimate the effect of “injuries of happiness” in tort law); Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn’t Be (Just) About Pain and Suffering*, 37 J. LEGAL STUD. S195, S195 (2008) (challenging the notion that specific damages should be awarded as compensation for feelings of pain and suffering).

3. See generally John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008) [hereinafter *BBM, Adaptation and Settlement*] (applying the research on hedonic adaptation to the settlement of civil lawsuits).

4. See, e.g., Mirko Bagaric & James McConvill, *Stop Taxing Happiness: A New Perspective on Progressive Taxation*, 2 PITT. TAX REV. 65, 91 (2005) (“When the considerations that are relevant to human well-being are applied to tax revenue, it emerges that a revision of our current tax system is required.”); Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1363 (2004) (stating that “happiness research” supports “adopting a progressive tax structure”); Marjorie E. Kornhauser, *Educating Ourselves Towards a Progressive (and Happier) Tax: A Commentary on Griffith’s Progressive Taxation and*

of approaching public policy⁶ and recommended that governments seek ways to identify and create happiness and well-being for their citizenry.⁷ What's more, governments are starting to listen.⁸

Happiness, 45 B.C. L. REV. 1399, 1399–1402 (2004) (building on Griffith's argument regarding happiness and progressive taxation). *But see* Diane M. Ring, *Why Happiness?: A Commentary on Griffith's Progressive Taxation and Happiness*, 45 B.C. L. REV. 1413, 1423 (2004) (recommending a progressive tax policy that considers how hedonic gains from redistribution compare to the efficiency costs of higher taxes); David A. Weisbach, *What Does Happiness Research Tell Us About Taxation?*, 37 J. LEGAL STUD. S293, S294–95 (2008) (arguing that while some research recommends augmenting the tax system due to happiness considerations, happiness research is still limited in empirical support so changes should not yet be made to the tax model on the basis of the happiness literature).

5. *See, e.g.*, JAMES MCCONVILL, SHAREHOLDER PARTICIPATION AND THE CORPORATION: A FRESH INTER-DISCIPLINARY APPROACH IN HAPPINESS 4 (2006) (arguing that the future of corporate governance as a discipline of study could be guided by inquiries into what really makes corporate participants happy); James McConvill, *Executive Compensation and Corporate Governance: Rising Above the "Pay-for-Performance" Principle*, 43 AM. BUS. L.J. 413, 416–17, 421–30 (2006) (arguing that happiness research explains why agency theory and "pay-for-performance" derive from a false understanding of human motivation and behavior); James A. McConvill, *Positive Corporate Governance*, 6 J. BUS. & SEC. L. 51, 57–62 (2006) (arguing that corporate law should recognize and foster potential and strengths of company executives, rather than simply trying to control them by imposing corporate governance requirements); James McConvill, *Shareholder Empowerment as an End in Itself: A New Perspective on Allocation of Power in the Modern Corporation*, 33 OHIO N.U. L. REV. 1013, 1016 (2007) (arguing that shareholder participation can be a vehicle for realizing happiness). *But see* Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomiosis*, 2 BROOK. J. CORP. FIN. & COM. L. 41, 44 (2007) (arguing critically against McConvill's Panglossian proposals for enhanced shareholder participation); Harry G. Hutchison & R. Sean Alley, *The High Costs of Shareholder Participation*, 11 U. PA. J. BUS. L. 941, 947–48 (2009) (same).

6. *See* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Well-Being Analysis v. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1617–18 (2013) (proposing that policymakers should use a well-being analysis tool to measure quality of life more directly than cost-benefit analysis). *But see* Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use*, 62 DUKE L.J. 1509, 1509–10 (2013) (arguing that well-being analysis is poor evidence of preference utility, which measures the quality of one's mental states).

7. *See, e.g.*, DEREK BOK, THE POLITICS OF HAPPINESS 7 (2010) (addressing the impact of human happiness on the goals and priorities of government); Ed Diener et al., *Income's Association with Judgments of Life Versus Feelings*, in INTERNATIONAL DIFFERENCES IN WELL-BEING 3, 3–7 (Ed Diener et al. eds., 2010) (developing a method for assessing and analyzing different forms of well-being); ED DIENER ET AL., WELL-BEING FOR PUBLIC POLICY 3 (2009) [hereinafter DIENER ET AL., WELL-BEING] (asserting that "[s]ocieties need subjective indicators of well-being to aid policy makers and ordinary citizens in making decisions"). Scholars have focused on two different tools to aid governments in formulating policy. First, scholars have proposed adding measures of national happiness to other economic indicators like gross domestic product (GDP). Adler, *supra* note 6, at 1516. Here, individual responses to happiness surveys could be aggregated (as is done in other large national indices) to calculate the "Gross National Happiness" of a country at a given time. *Id.* This number could then be tracked over time to evaluate particular policies. *Id.* Second, governments could determine the costs and benefits of public policy prescriptions by estimating the monetary equivalents to nonmarket goods. *Id.* at 1515–16. This tool has already been used to estimate the costs associated with death of family members, social relationships, unemployment, air quality, airport noise, and exposure to crime or terrorism. *Id.* at 1516.

8. Countries as diverse as China, Bhutan, Australia, and France have adopted or are considering adopting Gross National Happiness measures. BOK, *supra* note 7, at 1, 4. For example, the former President of France, Nicolas Sarkozy, commissioned Nobel laureates Joseph Stiglitz and Amartya Sen to develop alternate economic measures to track national well-being. *See* JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 7 (2009) (defining the limitations of gross domestic product and gross national product as indicators of economic performance and social

The trouble is, to be policy relevant, these data need significant theoretical undergirding. Even if empiricists are measuring something real and the data can be aggregated in a meaningful way, the data cannot be used to set policy or transform legal institutions without answering at least two fundamental questions. Scholars must first determine whether and how the data relate to more complete definitions of well-being. Second, scholars must account for acute differences between what people predict, experience, and remember about their happiness. This Article shows that without answering these foundational questions, scholars cannot use the happiness data instrumentally. These two questions, in turn, shed light on the meaning of hedonic adaptation, an additional finding relied on by other legal scholars. In doing so, the Article offers an important roadmap for future scholars who wish to use the existing happiness data to influence policy discussions or transform legal institutions.

First, and quite simply, without understanding how the data map onto a definition of well-being, the data themselves appear confused or incoherent, pointing in obviously flawed or inconsistent policy directions.⁹ For instance, some data suggest that money is highly correlated with well-being, and others suggest that money is not.¹⁰ Some data suggest particular medical interventions are correlated with well-being, and others do not.¹¹ In part, these inconsistencies arise because the data themselves are not a good enough proxy for well-being. Without determining how the data fit into a definition of well-being, they will suggest inconsistent policy outcomes. For example, one who follows the data that suggest that money is not correlated with well-being might argue that governments need not focus on increasing gross domestic product (GDP). Those who follow the data that claim money is correlated with well-being might suggest opposing policies.

But even if one can resolve this definitional dilemma, there is another problem. The data suggest that there are sharp divergences between what people predict,

progress and providing alternative measurements including measurement of subjective well-being). David Cameron, the Prime Minister of Great Britain, likewise touted a new well-being measure. At the campaign's launch, he stated:

If your goal in politics is to help make a better life for people - which mine is - and if you know, both in your gut and from a huge body of evidence, that prosperity alone can't deliver a better life, then you've got to take practical steps to make sure government is properly focused on our quality of life as well as economic growth, and that is what we are trying to do.

Suzi Dixon, *Wellbeing Index Gets the Go Ahead*, THE TELEGRAPH, <http://www.telegraph.co.uk/expat/expatnews/8661678/Wellbeing-index-gets-the-go-ahead.html> (July 26, 2011, 5:16 PM). In this country, Ben Bernanke, the former Chairman of the Board of Governors of the Federal Reserve, recently argued that economists "should seek better and more-direct measurements of economic well-being, the ultimate objective of our policy decisions." Ben S. Bernanke, Bd. of Governors of the Fed. Reserve Sys., Remarks to the 32nd General Conference of the International Association for Research in Income and Wealth 2 (Aug. 6, 2012).

9. Although most legal scholars have ignored this problem, there are notable exceptions. See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Welfare as Happiness*, 98 GEORGETOWN L.J. 1583, 1585-89 (2010) [hereinafter *BBM*, *Welfare as Happiness*] (arguing that a subjective accounting of welfare is possible and would in fact be preferable to objective data); Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 590 (2011) (emphasizing the importance of subjective experiences to the measurement of well-being).

10. See *infra* Part II.B.1 for a discussion of the correlation between wealth and happiness.

11. See *infra* Part II.B.2 for a discussion of the correlation between health and happiness.

experience, and remember. Scholars have relied on these gaps to suggest that legal institutions should minimize predictive and memory errors. For example, some scholars have argued that jurors cannot reliably award noneconomic tort damages because they will overpredict the amount of harm suffered by tort victims.¹² This claim—like others based on the divergence between prediction, experience, and memory—requires a belief that experience matters more than prediction. This unexamined belief may not be justified in light of normative theories that animate substantive areas of law. For example, it is not at all clear that tort awards based on prediction, even if the award varies with the actual experience of the victim, necessarily undermine economic or corrective-justice theories of tort.¹³

The Article proceeds as follows. In Section I, I describe the primary techniques for gathering data about happiness. I suggest that the data are both reliable and valid, are measuring something real, and say something about the human condition. Despite this conclusion, in Section II, I discuss whether the data collected, even if they are relevant to the human condition, have anything important to say about well-being. I show that the data could be useful in a number of different, plausible accounts of well-being. But without a deeper understanding of which data matter for which account and a belief about which account of well-being matters, it is impossible to use the data to set policy. In Section III, I tackle the problem related to prediction and memory. I suggest that it is not necessarily problematic that prediction and memory are often at variance with experience. Further, I argue that claiming that the legal system ought to correct or otherwise work around the variations between prediction, experience, and memory requires a thicker theoretical account than most have offered. Lastly, in Section IV, I address the question of hedonic adaptation—the notion that long-term individual happiness is not affected deeply by changes in circumstance. Much has been made of adaptation in the legal literature. Properly understood, however, adaptation may only be a species of the definitional or temporal problems laid out in Sections II and III. Working through these earlier questions may limit the usefulness of the finding of adaptation as a justification for changing legal institutions.

I. WHAT IS BEING MEASURED AND HOW

Although there is little consensus on the constitute parts of well-being, social scientists have nonetheless endeavored to measure it in a variety of ways. I will return to the definitional problem more fully in Section II. This Section, as a precursor, briefly reviews some of the methods for, and issues with, these measures of well-being. I conclude that the results of these surveys are valid and reliable and the data say something real about happiness and life satisfaction. But even if the data are saying something real, they may not be saying something deep.

12. See *infra* Part III.A.2 for a discussion of the problematic gap between memory and experience.

13. See *infra* Part III.A.1 for an analysis of how individuals predict and experience the ways that various life events impact their happiness.

A. *Types of Measures*

Researchers have tried to measure well-being in general field surveys and in laboratory settings.¹⁴ Survey questions related to subjective well-being most frequently ask a respondent to provide a global report on his or her life satisfaction or happiness.¹⁵ For example, in the World Values Survey, “respondents in 81 countries are asked, ‘All things considered, how satisfied are you with your life as a whole these days?’”¹⁶ In contrast, “the General Social Survey . . . asks Americans, ‘Taken all together, how would you say things are these days? Would you say that you are very happy, pretty happy, or not too happy?’”¹⁷ Some surveys include a version of both types of questions.¹⁸ Others ask multiple questions on the same theme.¹⁹ But generally the major surveys ask respondents to reflect on their overall happiness or life satisfaction.

These global, retrospective questions present a variety of problems. The most important of which is that the questions require the respondent to reflect on her life as a whole and then provide a single numeric response. The retrospective judgment, however, is often influenced deeply by the respondent’s current mood, the vagaries of memory, and by the immediate context in which the respondent answers the question.²⁰ For that reason, the response to these questions can be unduly influenced by something as inconsequential as the weather, finding a dime on a copier before answering the questions,²¹ or even the order of the questions themselves.²²

Methods that minimize the impact of memory on the judgment of well-being and context can be expensive and difficult to implement. For example, some researchers have employed an Experience Sampling Method, whereby participants are prompted at random times throughout the day to record what they are doing and how they feel.²³

14. See Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 3, 4, 6 (2006) (describing the previous measurement of well-being from surveys and tests conducted across the globe over the past few decades).

15. See *id.* at 3, 6 (noting that most frequently these surveys report on global life satisfaction or happiness by asking respondents to subjectively answer a series of questions about their well-being); Alan B. Krueger & David A. Schkade, *The Reliability of Subjective Well-Being Measures*, 92 J. PUB. ECON. 1833, 1835–36 (2008) (“Subjective well-being is most commonly measured by asking people a single question.”).

16. Kahneman & Krueger, *supra* note 14, at 6.

17. *Id.*

18. See Richard Layard et al., *The Marginal Utility of Income*, 92 J. PUB. ECON. 1846, 1849 (2008) (laying out the precise form of the questions in major global surveys).

19. For example, the Satisfaction with Life Scale asks individuals to rate on a seven-point scale the degree to which they agree or disagree with five related statements: “In most ways my life is close to my ideal”; “[t]he conditions of my life are excellent”; “I am satisfied with my life”; “[s]o far I have gotten the important things I want in life”; and “If I could live my life over, I would change almost nothing.” Ed Diener et al., *The Satisfaction with Life Scale*, 49 J. PERSONALITY ASSESSMENT 71, 72 tbl.1 (1985) [hereinafter Diener et al., *Satisfaction with Life Scale*].

20. Kahneman & Krueger, *supra* note 14, at 6.

21. *Id.*; Norbert Schwarz & Fritz Strack, *Evaluating One’s Life: A Judgment Model of Subjective Well-Being*, in SUBJECTIVE WELL-BEING: AN INTERDISCIPLINARY PERSPECTIVE 27, 36 (Fritz Strack et al., 1991).

22. See generally Betsy Stevenson & Justin Wolfers, *Happiness Inequality in the United States*, 37 J. LEGAL STUD. S33, S39 (2008) (providing that “happiness questions are remarkably sensitive to small changes in question order”).

23. Kahneman & Krueger, *supra* note 14, at 9.

Others have used the less costly, Day Reconstruction Method, whereby participants summarize a day's worth of events on a number of different scales.²⁴

Unlike the preceding survey methods, laboratory methods can often minimize the variability of the stimuli and the impact of memory.²⁵ For example, in some experiments, researchers ask subjects to provide a continuous, real-time indication of the "hedonic quality" of their experience "by manipulating a lever that controls a marker on a scale, which is usually defined by extreme values such as very pleasant and very unpleasant."²⁶ This technique has been used while watching film clips and public debates, undergoing medical procedures, and undergoing other laboratory experiments.²⁷ Other researchers have attempted to get more objective responses by getting trained, interested or disinterested third parties to code and record a subject's emotional state—measuring facial changes as a reflection of emotion or using modern technology to measure neural activity.²⁸

B. *Validity and Reliability of Subjective Well-Being Measures*

There are two main concerns about the data collected in the ways described above. The first is a question of validity. Are subjects reporting their "true" emotional states and beliefs about their overall well-being? The second question is one of reliability. Will respondents give the same answer to the same stimulus at different points in time, and can a third party replicate the results? In this Part, I briefly address those concerns.

Validity. Validity gauges the accuracy of a reported measure. It gauges the relationship between the *measures* happiness and life satisfaction and *actual* happiness and life satisfaction. In the context of these subjective accounts of well-being, validity takes on a special prominence because the measures "refer to internal psychological states."²⁹ As such, there is a fear that "there is no way to determine whether the reports themselves reflect something real within the person."³⁰ One way to work around this problem is to externally validate the measurement. If the measures of happiness and life satisfaction correlate with expected characteristics, this is evidence that researchers are measuring something close to actual "happiness" and "life satisfaction."³¹

To that end, people who report being more happy than average smile more often;³² have greater left than right superior frontal-brain activation;³³ and are rated as

24. *Id.* at 10.

25. *Id.* at 5.

26. *Id.*

27. *See id.* (describing various stimuli that have been used in laboratory experiments to test the impact of memory).

28. Randy J. Larsen & Barbara L. Fredrickson, *Measurement Issues in Emotion Research*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 40, 49–56 (Daniel Kahneman et al. eds., 1999).

29. DIENER ET AL., WELL-BEING, *supra* note 7, at 67.

30. *Id.*

31. Kahneman & Krueger, *supra* note 14, at 6–7.

32. *See* Paul Ekman, Richard J. Davidson & Wallace V. Friesen, *The Duchenne Smile: Emotional Expression and Brain Physiology II*, 58 J. PERSONALITY & SOC. PSYCHOL. 342, 347 (1990) (demonstrating that self-reports of happiness are correlated with Duchenne smiles); Paul Ekman, Wallace V. Friesen & Maureen O'Sullivan, *Smiles When Lying*, 54 J. PERSONALITY & SOC. PSYCHOL. 414, 414 (1988) (finding that

happier by spouses, other family members, friends, and associates.³⁴ Similarly, life satisfaction is positively correlated with educational attainment and negatively correlated with “recent negative changes of circumstances; chronic pain; and unemployment, especially if only the individual was laid off.”³⁵

These external validations lend some credibility to the claim that the measurements are providing something close to actual happiness or life satisfaction. Nonetheless, there may still be reasons to believe that people are claiming they are happy without feeling happy, that life satisfaction reports are being distorted by temporary mood changes, or many other concerns.³⁶ And, as discussed below, even if the measurements are actually getting at whether the subjects are truly happy or truly satisfied with their lives, these accounts may not be a sufficient proxy for well-being such that the data can be used to set public policy.³⁷

Reliability. Reliability gauges the consistency of a measurement. For example, a household scale is reliable if it reports the same weight for the same person in a short period of time. In the context of subjective well-being, the concern is whether the same individuals will report a similar well-being score over time.³⁸ “Absent dramatic events, overall life satisfaction should not change much from week to week. Likewise, individuals who have similar routines from week to week should experience similar feelings over time.”³⁹ But research has shown that small changes in context can have a profound impact on a self-reported measure of well-being. For example, individuals report higher life satisfaction after finding a dime on a copier⁴⁰ and when the weather is nicer.⁴¹ Given this, it may not be surprising that self-reported life satisfaction and

subtle differences in aspects of facial expression differentiated types of smiling); Kahneman & Krueger, *supra* note 14, at 9 tbl.1 (identifying correlates of happiness, including smiling frequently).

33. See Nathan A. Fox & Richard J. Davidson, *Patterns of Brain Electrical Activity During Facial Signs of Emotion in 10-Month-Old Infants*, 24 DEVELOPMENTAL PSYCHOL. 230, 230 (1988) (finding that ten-month-old infants display greater activation of their left rather than right frontal area of their brains upon seeing videotapes of actresses exhibiting happy facial expressions); Heather L. Urry et al., *Making a Life Worth Living: Neural Correlates of Well-Being*, 15 PSYCHOL. SCI. 367, 367 (2004) (finding that for a sample of eighty-four adults ranging in age from fifty-seven to sixty higher self-reported happiness was correlated with greater left than right superior frontal activation).

34. BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS 33 (2002). Further, they are more easily prepared to initiate social contacts; are more ready to help other people; are less often absent from work; are less involved in quarrels at work; are more optimistic about the future; are more energetic, flexible, and creative; recall more positive than negative life events; have a higher tolerance level of frustration; are less likely to attempt to commit suicide; are more healthy; and need less psychological counseling. *Id.*

35. Kahneman & Krueger, *supra* note 14, at 8 (emphasis omitted).

36. This will be discussed more fully in the Part below. See *infra* notes 39–41 and accompanying text for a brief discussion of how small changes in context can alter self-reported measure of happiness. These changes may call into question both the reliability and validity of the measure. As to the first, it suggests that the measures are not picking up something real about well-being because it is too easy to manipulate the answer with external events. As to the second, it suggests that given the unknown number of variables affecting respondents, the responses cannot be duplicated.

37. See *infra* Section II for an overview of the challenges surrounding the definition of well-being.

38. Krueger & Schkade, *supra* note 15, at 1834.

39. *Id.*

40. Schwarz & Strack, *supra* note 21, at 27.

41. Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being:*

happiness “display a serial correlation of about .60 when assessed two weeks apart.”⁴² In other words, there is significant difference between the answers given two weeks apart to questions about life satisfaction and happiness when the same people are engaged in the same activities. This measure “is lower than the reliability ratios typically found for education, income and many other common microeconomic variables.”⁴³ This suggests that there is a fair amount of random error variance in subjective measures of well-being.

Despite these relatively low reliability scores, empiricists do not think that they are simply measuring “noise.”⁴⁴ Rather, they believe that they have taken sufficient precaution to eliminate some of the randomness of their measurements.⁴⁵ They have done so in two primary ways. First, in small-scale surveys, researchers often include several questions related to well-being.⁴⁶ These multifactor scales “are more reliable than the single items of which they are composed.”⁴⁷ Second, in the large-scale surveys, where adding additional well-being questions is often cost prohibitive, the sheer volume of responses likely compensates for the lack of reliability.⁴⁸ In a larger sample, there are likely just as many people who find a dime on the copier or are answering the survey on a nice day as have just stepped in gum or answer on a gloomy day. Thus, “national indicators based on a single item can still provide valid information for subgroups (e.g., men and women), even if they are too unreliable to measure well-being of a single individual.”⁴⁹

C. Measurement Conclusions

There is obviously much to say about gathering data about a topic as seemingly ephemeral as well-being. For purposes of this Article, however, it is not necessary to either go into all of the issues or resolve any of the debates related to what is being measured and how. Rather, I am willing to stipulate that what is being measured is valid and reliable and that the measurements say something real about the human condition. My fear is that the something being said is rather thin. Even if researchers are getting something real from questions about happiness and life satisfaction, it is not clear that those data are relevant to a discussion of well-being. And, even if self-reported happiness or life satisfaction are sufficient proxies for well-being, there are other questions that have to be answered before the data can be used to shape public policy or remake legal institutions. I will go into further depth on these topics in the

Informative and Directive Functions of Affective States, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 519 (1983).

42. Krueger & Schkade, *supra* note 15, at 1834; *see also* DIENER ET AL., WELL-BEING, *supra* note 7, at 72 (concluding based on multiple studies that “the reliability of a single well-being item is about .6”).

43. Krueger & Schkade, *supra* note 15, at 1834.

44. *Id.*

45. *Id.*

46. *See, e.g.*, Diener et al., *Satisfaction with Life Scale*, *supra* note 19, at 71 (evaluating three separable components of well-being).

47. DIENER ET AL., WELL-BEING, *supra* note 7, at 69.

48. *See id.* at 69–70 (explaining that “the precision of an estimated level of well-being for a perfectly reliable measure in a sample of 100 respondents is the same as the precision of a mean estimate for a measure with a reliability of .5 in a sample of 200 respondents”).

49. *Id.* at 70.

remainder of the Article.

II. THE DEFINITIONAL DILEMMA

Using the methods described above, social scientists have gathered significant data about the causes and correlates to reports of positive feelings, negative feelings, and subjective evaluations of life satisfaction, well-being, and quality of life. There are, of course, several problems with using these data to set public policy.

First, policymakers must settle on a definition of well-being. There are several plausible accounts of well-being that could include one's subjective evaluations as an important element. But even within these accounts, there is wide variation of what matters. Does one's evaluation of happiness and unhappiness matter? Or, instead, does one's evaluation of life satisfaction matter? Moreover, are these subjective measures the sum total of well-being, or do they simply constitute a part of well-being?

Second, the data cannot be used unless the data can be aggregated in a way that gives a clearer picture of overall well-being. That is, can each of the individual survey responses be put together in a rational way that provides useful insights into the well-being of the population surveyed? If not, the data might be useful for each individual, but they cannot be a reliable measure for setting public policy.⁵⁰

Lastly, even if the data accurately and reliably describe individual and aggregate happiness and life satisfaction, and even if policymakers can settle on a definition that uses these data in a plausible way, they must still choose decision procedure. Policymakers must still decide how much well-being matters for determining what policies to set. That is, even if everyone agrees on a common definition of well-being, it is unclear what should be done about it. Is well-being the only criterion that matters in setting policy? Should society endeavor to maximize aggregate well-being? Should it maximize individual well-being? What if aggregate well-being comes at the cost of individual well-being? What if maximization means that some small number of people must suffer greatly?

In this Section, I address only this first problem. I assume the data can be aggregated, and I leave aside the decision-procedure problem. I further assume, as do scholars relying on this data to forge policy, that the data can be a part or all of a reasonable definition of well-being. In doing so, I am ignoring obvious and important concerns. In particular, I am not discussing obvious objections to using the data on well-being in consequential terms without considering the importance of a broader set of considerations such as fairness, equality, or justice. My focus instead is on a particular internal critique of the happiness data. Without choosing among the plausible definitions of well-being and without determining how the data relate to that account, the data appear confused or incoherent about whether someone is living a good life.

I first describe the accounts of well-being that might include a subjective measure of well-being as a part of the definition. I do not attempt to pick a best definition. Rather I aim to show that there are a number of plausible versions of well-being that could include a subjective account. Second, I demonstrate the pitfalls for those attempting to forge policy based on the burgeoning empirical literature on well-being

50. See Adler, *supra* note 6, at 1558–59 (arguing that the data cannot be aggregated).

without choosing among the plausible accounts.⁵¹

A. *Of Philosophers and Social Science*

Well-being is commonly understood to be an inquiry about what is best for someone, what would be in the person's best interest, or what would make her life go as well as possible.⁵² Philosophers generally distinguish three different kinds of theories of well-being—experiential theories, desire theories, and objective-list theories. Data about happiness and life satisfaction may be important to determining whether someone is living a good life under each of these accounts.

Experiential theories posit that what would be best for someone is to maximize positive experiences and minimize negative ones.⁵³ Experiential accounts tend to allow each individual to determine for him or herself which are pleasant experiences and which are not. It may be that different kinds of events cause different reactions and that different people experience the same events differently. Holding a sleeping baby likely feels different than reading a great book or drinking a good beer. Each might be pleasurable in its own way (or not), depending on the individual experiencing the event. But under this narrow construction of experientialism, when an individual subjectively feels pleasure, she is living a good life; when she feels pain, she is not.⁵⁴

Desire theories claim that life is best when individuals best fulfill their desires.⁵⁵ Under the most plausible version of desire theory, one's life goes best when she fulfills the desires she would have had if she were fully informed about all her options and the outcomes of those options. One of the factors that might influence decision making about desires (fully informed or otherwise) could be the experience that the desire leads to or the sense of life satisfaction. In other words, one could desire to feel positive emotions and avoid negative ones.⁵⁶

51. Some policy prescriptions could rest on experiences of pain or pleasure, not on a clear definition of well-being. See, e.g., Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 184 (2009) (arguing that policymakers must take account of the fact that different people experience different punishments differently). But rather than think of these as exceptions to the need for definitional clarity, these arguments prove the point. To make his argument, Kolber chose a relevant definition for the data: one based on experience, not well-being. *Id.*

52. See, e.g., DEREK PARFIT, REASONS AND PERSONS 493 (1984) (discussing prominent theories that attempt to understand well-being based on these considerations).

53. *Id.* Matt Adler offers a similar definition, claiming that an account of well-being is experientialist if an individual's well-being is "wholly dependent upon the quality of her mental states." Adler, *supra* note 6, at 1523.

54. An experientialist need not think only in terms of short-term pleasure or pain. An experientialist could set goals and overcome short-term pain to create a greater sense of pleasure from achieving a long-term goal. For example, imagine a person who wants to run a marathon but hates the daily routine of running. An experientialist could believe that the marathoner has lived a good life if she gains more pleasure from completing the marathon than she loses from training for the marathon. On the other hand, an experientialist cannot explain the rationality of someone doing something painful in the short-term that does not have offsetting long-term gains—for instance, if the marathoner does not derive sufficient pleasure finishing the race. If there were no net gain from running 26.2 miles, the experientialist would say that the marathoner has not lived a good life even if she very much desired to run the marathon *ex ante*.

55. PARFIT, *supra* note 52, at 494.

56. This informed desire theory has a significant experiential constraint—her life cannot go better as a

According to objective-list theory, “certain things are good or bad for people, whether or not these people would want to have the good things, or to avoid the bad things”.⁵⁷ These goods could include “moral goodness, rational activity, the development of one’s abilities, having children and being a good parent, knowledge, and the awareness of true beauty.”⁵⁸ They could also include feeling pleasure, satisfying desires, or believing that one has lived a good life.⁵⁹

Given the diversity of these philosophical accounts, it should be clear that even if one accepts that the data demonstrate something real about happiness or life satisfaction, one need not accept that the data are a sufficient proxy for well-being. Even if the data are a sufficient proxy for an experientialist view of well-being, one would need to choose the data on which to rely: the data related to affect or the data related to life satisfaction. And, for the more complex accounts, the data may be necessary but are certainly not sufficient. Thus, it is ultimately unclear what role the empirical data gathered by social scientists should play in understanding well-being. Interestingly, this confusion is not just of theoretical concern. Without a deeper theoretical account, the data themselves point in confusing and inconsistent directions.

In the next Part, I set out several empirical findings that show the dilemma that comes from using subjective accounts as a stand-alone proxy for well-being. I then discuss some of the policy implications that derive from these very different definitions.

B. Empirical Findings and the Problem of Definitional Clarity

The empirical data on happiness and life satisfaction could be a significant aid in evaluating public policy. Changes to the tax rate or efforts to create jobs or reduce commute time could be justified by the impact that these policies have on well-being. The promise of the data, however, is undermined without a clear definition of well-being.

The first example below—the correlation between wealth and money—demonstrates that even if one believes that subjective well-being is a sufficient proxy for actual well-being, policy cannot be set without choosing between a subjective account more closely linked to happiness and one more closely linked to life satisfaction. The latter examples—health and happiness and women and happiness—cast doubt on the premise that a subjective account of well-being standing alone is a sufficient proxy for well-being at all.

result of things she does not actually experience. For instance, imagine someone (A) who desired that her friend (B) live a drug free life. Imagine further that A never saw B again, and A had no knowledge of whether B stayed off drugs. How could B’s status possibly have an impact on the quality of A’s life? See PARFIT, *supra* note 52, at 493 (rejecting the unrestricted desire theory as implausible because an individual’s well-being cannot depend on exogenous, unknown events).

57. See PARFIT, *supra* note 52, at 499.

58. *Id.* This list is simply an exemplar. There could be significant differences among scholars about which goods should be on the list. See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78–80 (2000) (listing core human values).

59. See, e.g., NUSSBAUM, *supra* note 58, at 78–80 (including in a list of “Central Human Functional Capabilities” values such as life, bodily health, and bodily integrity).

1. Wealth and Happiness

Economists and policymakers seem to believe that, “the rising tide lifts all boats”—that growing the entire economy is good for everyone.⁶⁰ As the GDP of a country increases, each individual (or at least the average of all the individuals in the country) will be better off. They will earn more money, have greater purchasing power, and will therefore be happier. This claim is highly controversial for happiness scholars.

Happiness scholars have long believed that although wealth is correlated with individual well-being, it is not relevant for a country’s average well-being.⁶¹ In other words, in any given country, richer people tend to report a higher level of well-being, but raising the average wealth of a country over time does not lead to a concomitant increase in the population’s average well-being.⁶² To say it more starkly, a rising tide raises some boats but sinks others. Further, happiness scholars claimed that richer countries do not, on average, report greater levels of well-being.⁶³ That is, countries with a higher GDP do not report higher levels of average well-being.

Scholars attempting to explain these early findings concluded that people evaluate their own well-being by comparing their station in life to that of others around them. For example, Richard Layard—emeritus professor at the London School of Economics and member of the House of Lords—claimed, “people are concerned about their relative income and not simply about its absolute level. They want to keep up with the Joneses or if possible to outdo them.”⁶⁴ If true, these claims would suggest significant

60. E.g., Matt Bai, *The Poverty Platform*, NEW YORK TIMES MAGAZINE (June 10, 2007), http://www.nytimes.com/2007/06/10/magazine/10edwards-t.html?_r=0&pagewanted=all.

61. The foundation of these claims is attributed to Richard Easterlin and is often referred to as the Easterlin paradox. As Easterlin stated in 1973, “In all societies, more money for the individual typically means more individual happiness. However, raising the incomes of all does not increase the happiness of all.” Richard A. Easterlin, *Does Money Buy Happiness?*, 30 PUB. INTEREST 3, 4 (Winter 1973); see also Richard A. Easterlin, *Diminishing Marginal Utility of Income? Caveat Emptor*, 70 SOC. INDICATORS RES. 243, 243 (2005) [hereinafter Easterlin, *Caveat Emptor*]; Richard A. Easterlin, *Feeding the Illusion of Growth and Happiness: A Reply to Hagerty and Veenhoven*, 74 SOC. INDICATORS RES. 429, 440 (2005) (explaining that the results of studies of European countries and of the United States do not support the claim that happiness levels can be raised by a growth in national income); Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All*, 27 J. ECON. BEHAV. & ORG. 35, 44 (1995) [hereinafter Easterlin, *Will Raising the Incomes of All Increase the Happiness of All*] (arguing that “[r]aising the incomes of all does not increase the happiness of all”).

62. Easterlin, *Caveat Emptor*, *supra* note 61, at 243–44.

63. In a slightly different form of the argument, some scholars claim that wealth has a satiation point. After individuals can obtain their basic needs—like food, clothing, and shelter—additional income does not raise the average well-being of a country. See Richard Layard, *Rethinking Public Economics: The Implications of Rivalry and Habit*, in *ECONOMICS AND HAPPINESS: FRAMING THE ANALYSIS* 147, 149 (Luigino Bruni & Pier Luigi Porta eds., 2005) (“[I]f we compare countries, there is no evidence that richer countries are happier than poorer ones—so long as we confine ourselves to countries with incomes over \$15,000 per head. . . . At income levels below \$15,000 per head things are different, since people are nearer to the absolute breadline.”); Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research*, 40 J. ECON. LITERATURE 402, 416 (2002) (“[I]ncome provides happiness at low levels of development but once a threshold (around \$10,000) is reached, the average income level in a country has little effect on average subjective well-being.”). This means that after a country is sufficiently wealthy, where most people can meet their basic needs, raising the GDP does not create more wealth across the population.

64. RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 45 (2005).

policy changes. If economic growth does not increase the average well-being of the population, then growth should not be the primary goal of public policy. There may be little reason for a national or local government to emphasize or prioritize increasing GDP, increasing average salaries, or creating wealth for its citizenry.

Further, the idea that individuals are more concerned about relative than absolute income suggests that individual labor effort creates an externality on others.⁶⁵ That is, every time someone earns additional money, those around her feel worse about their own lives. One way to correct this externality would be to place higher taxes on consumption and income. This could level the playing field by reducing the variation among citizens and eliminate reference points.⁶⁶

Importantly, the premise upon which these policy prescriptions rests is now highly disputed. Several scholars have, in fact, recently put forth the opposite claim.⁶⁷ They argue “that there has been increasing happiness in many nations, and that it is associated with rising income.”⁶⁸ They believe that the data show that not only are wealthier people happier in a given country, but also (1) wealthier countries report higher well-being, and (2) as a country’s wealth grows over time, so too does its average happiness.⁶⁹ According to these scholars, there is a close relationship between wealth and subjective evaluations of well-being in the intracountry, intercountry, and time-series data.⁷⁰ If this is true, then economic growth is a key policy goal, and the case for progressive taxation is undermined.

Now policymakers have a quandary. The data (or at least the scholars interpreting the data) seem to be pointing in very different directions. Some suggest that growth is unnecessary because economic growth does not correlate with gains in average well-being. Others claim the opposite is true. Rising incomes and growth in GDP are correlated with increased average well-being—societies become happier as they become wealthier.

65. *Id.*; see also Griffith, *supra* note 4, at 1384 (“As a positional good, the additional income earned by one individual reduces the relative position and thus the welfare of others.”).

66. There are significant technical and substantive objections to these policy prescriptions. See, e.g., Michael E. DeBow & Dwight R. Lee, *Happiness and Public Policy: A Partial Dissent (or, Why a Department of Homeland Happiness Would Be a Bad Idea)*, 22 J.L. & POL. 283, 289–90 (2006). These objections and, in fact, the “rightness” of the policy are beyond the scope of this Article.

67. See Michael R. Hagerty & Ruut Veenhoven, *Wealth and Happiness Revisited—Growing National Income Does Go with Greater Happiness*, 64 SOC. INDICATORS RES. 1, 24 (2003) (stating that increasing national income can increase national happiness); Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox 2* (Nat’l Bureau Econ. Research, Working Paper No. 14282, 2008) (explaining that their findings “put to rest the earlier claim that economic development does not raise subjective well-being”); Ruut Veenhoven & Michael Hagerty, *Rising Happiness in Nations 1946–2004: A Reply to Richard Easterlin*, 79 SOC. INDICATORS RES. 421, 421 (2006) (stating that recent data shows a positive correlation between happiness and economic growth).

68. Ed Diener et al., *Income’s Differential Influence on Judgments of Life Versus Affective Well Being*, in ASSESSING WELL-BEING: THE COLLECTED WORKS OF ED DIENER 233, 234 (Alex C. Michalos et al. eds., 2009) [hereinafter Diener et al., *Income’s Differential Influence*].

69. Stevenson & Wolfers, *supra* note 67, at 28–29.

70. See *id.* at 28 (“[T]he relationship between subjective well-being and income within countries (that is, contrasting the happiness of rich and poor members within a country) is similar to that seen between countries, which in turn is similar to the time-series relationship (comparing the happiness of countries at different points in time as they get richer or poorer).”).

Perhaps this controversy is unsurprising. Empiricism is difficult, and it is subject to advancement and refinement.⁷¹ But this is not simply a dispute about the proper empirical methods, better survey techniques, or the benefit of more data. It may be that the data themselves point in different directions. It turns out that some definitions of well-being correlate more closely with wealth than others.

Consider the survey questions that are used as proxies for well-being. At one end of the spectrum, surveys ask respondents to report on the pleasantness or unpleasantness of their lives.⁷² These questions ask the responder to report on her emotional state, her affect. At the other end of the spectrum, questions about subjective well-being ask respondents to reflect more globally about their lives.⁷³ These questions are a retrospective evaluation of life.⁷⁴ These questions require a more cognitive, and less affective, evaluation of well-being. These different aspects of subjective well-being—affect and cognitive evaluations—seem to correlate differently with wealth.⁷⁵ “[M]aterial prosperity is strongly associated with judgments of life but much less correlated with affective well-being.”⁷⁶ This is true across different countries and over

71. If one wanted to be snarky, one would say, as Winston Churchill famously said, “If you put two economists in a room, you get two opinions, unless one of them is Lord Keynes, in which case you get three opinions.” DAVID COLANDER & ROLAND KUPERS, COMPLEXITY AND THE ART OF PUBLIC POLICY 91 (2014).

72. See Diener et al., *Income’s Differential Influence*, *supra* note 68, at 243.

73. *Id.* (stating that questions “vary along a dimension that is anchored by judgments about one’s life at one end and by affect at the other”). On the affect end of the spectrum, questions ask the respondent to assess recent emotional experiences. These questions might ask about how often the respondent has felt positive feelings (like enjoyment or joy) and negative emotions (like sadness, anger, worry, or depression). *Id.* at 236. In contrast, on the judgment end of the spectrum, questions employ a ladder analogy, where each of ten rungs on the ladder represents a better possible life. Cameron N. McIntosh, *Report on the Construct Validity of the Temporal Satisfaction with Life Scale*, 54 SOC. INDICATORS RES. 37, 41 (2001). Respondents are asked to report what rung of the ladder best represents their lives. *Id.* Other judgment-based questions ask respondents to evaluate “how satisfied they were with their lives on a scale ranging from 0 (*Dissatisfied*) to 10 (*Satisfied*).” Diener et al., *Income’s Differential Influence*, *supra* note 68, at 236. Alternatively, another popular instrument asks individuals the degree to which they agree or disagree with five related statements: “In most ways my life is close to my ideal”; “[t]he conditions of my life are excellent”; “I am satisfied with my life”; “[s]o far I have gotten the important things I want in life”; and “[i]f I could live my life over, I would change almost nothing.” Diener et al., *Satisfaction with Life Scale*, *supra* note 19, at 114.

Other questions may fall in between. These questions seem to ask about affect, but given the definitional ambiguity of the word “happiness,” they may capture some aspects of the affective questions and some aspects of the global-judgment questions. For example, some surveys ask, “Taking all things together, would you say that you are: 4—Very happy, 3—Quite happy, 2—Not very happy, 1—not at all happy.” Diener et al., *Income’s Differential Influence*, *supra* note 68, at 237. It is unclear whether a respondent will answer this question based on the positive feeling of joy or jubilation or based on a global assessment of her well-being.

What seems to be clear is that the ladder questions require the most judgment and affect questions the least. Questions about life satisfaction and happiness fall in between. See *id.* at 238 (describing how “Life Satisfaction is more strongly saturated with judgment, but also includes an affective influence, whereas Happiness is more strongly reflective of affect”).

74. See Diener et al., *Income’s Differential Influence*, *supra* note 68, at 234 (“[A]ffect is determined in a less consciously controlled way as people react over time in their natural settings to ongoing events,” whereas global judgments force people to “step back and think of certain factors that they deem to be important and salient at the time of the judgment.”).

75. *Id.* at 243–44.

76. *Id.*

time.⁷⁷ In short, wealth is correlated with a retrospective evaluation of one's life but is not correlated with one's affective or emotional state.

If wealth correlates with some subjective measures of happiness, but not others, are the policy prescriptions listed above undermined? That is, should the government reorient national policy away from economic growth and move to a more progressive taxation system? The answer to these questions depends in no small part on one's preferred definition of well-being. Even if a subjective account of well-being suffices, without a further definitional refinement, one cannot rely on subjective well-being to set policy. If happiness is welfare, if the goal of government is to induce positive affect, then governments should not invest in economic growth and should implement progressive taxes. If, in contrast, one defines well-being in terms of subjective accounts of life satisfaction, then governments have a better argument for focusing on economic growth.

In short, the definition of well-being matters for setting national-level economic policy. The survey questions attempting to measure well-being run a spectrum from asking individuals to reflect on their emotional state on the one end to asking them to evaluate their life satisfaction on the other. The subjective responses to these different types of questions may point policymakers in different directions. Thus, even if the data are providing an accurate description of the causes and correlates of different aspects of well-being, without choosing which aspect matters, it is not possible to use the data to craft economic policy.

2. Health and Happiness

The data on the correlation between wealth and happiness seem to require policymakers to choose among extant types of survey questions to set economic policy. But the data do not necessarily undermine the core belief that a subjective account of happiness or well-being is useful for setting policy. In contrast, the data on the correlation between health and well-being seem to suggest that subjective responses are not a useful proxy for well-being at all.

Information about the correlation between health and happiness could be important in a range of legal and policy domains. For example, doctors and patients could use the information to determine a treatment path, insurers could use the information to determine appropriate medical coverage, and juries could use the information to help determine appropriate tort awards. But this can only work if the data on happiness provide a clear and complete picture of well-being.

First, data about well-being could help doctors and patients determine appropriate medical interventions. Doctors and patients deciding on a course of treatment often consider the welfare effects of different treatment paths. Should a cancer patient undergo surgery, chemotherapy, or a battery of medicines? The answer might depend, in part, on which treatment would provide the best life for the longest? Doctors may explicitly frame decisions for patients in these terms: "If you have surgery, you will be in bed for three weeks, but should be better afterwards. There are, however, some risks

77. *See id.* at 233–34 (analyzing the affect of income on well-being in both the short-term and long-term, using many national samples).

involved. Chemotherapy has a better chance of controlling the disease for longer, but your life will be difficult during the months of treatment.”

A similar inquiry could be helpful to insurers. To determine whether a medical intervention is appropriate, insurers might consider the insured’s post-intervention well-being. If, for instance, chiropractic interventions or acupuncture provide sustained well-being and better health effects, insurers might consider covering those procedures. If these relatively low-cost procedures increase or sustain well-being and thus help avoid more expensive and intensive treatments, an insurer would be more likely to provide coverage.

Likewise, data about health and happiness could help determine appropriate tort awards for noneconomic damages. Juries awarding damages for pain and suffering may be concerned about the welfare effect of a plaintiff’s injuries. In calibrating awards for pain, suffering, or loss of enjoyment of life, a jury might consider the changes in welfare attributable to the plaintiff’s injuries.⁷⁸ If, for example, a plaintiff’s well-being is unchanged after losing a toe, becoming paralyzed, or suffering constant headaches, a juror might conclude that the plaintiff should not be compensated significantly for pain, suffering, emotional distress, or loss of enjoyment of life.

In each of these applications, the fundamental question is, do various life events—medical treatment or injury—have an impact on an individual’s well-being? This question has been the subject of a number of empirical studies.⁷⁹ Early returns suggested that health conditions that remain constant over time do not significantly impact long-term, individual well-being.⁸⁰ For example, people who suffer paralysis,⁸¹ children and adolescents who lose limbs as a result of cancer,⁸² people who are on dialysis⁸³ or have had colostomies,⁸⁴ report significant (if not complete) return of happiness and life satisfaction.⁸⁵

78. See, e.g., Sunstein, *supra* note 2, at S157 (arguing that jury awards for pain and suffering are too high because the plaintiffs’ injuries do not often cause long-lasting hedonic losses, but juries overpredict the amount of the damages). *But see* Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 584 (2010) (arguing, in part, that the data cannot necessarily be used to monetize injuries for purposes of tort lawsuits).

79. One of the earliest studies on the link between health and happiness is Philip Brickman’s oft-cited article, *Lottery Winners and Accident Victims: Is Happiness Relative*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978). That article inspired a new generation of empirical research into the link between well-being and health. See Swedloff & Huang, *supra* note 78, at 564–74 (detailing the history of research about hedonic adaptation).

80. See Swedloff & Huang, *supra* note 78, at 555 (reviewing the early literature stating that lottery winners and people who become disabled “do not note a significant change in happiness over the long term”).

81. Camille B. Wortman & Roxane Cohen Silver, *Coping with Irrevocable Loss*, in CATAclysms, Crises and Catastrophes: Psychology in Action 189 (Gary R. VandenBos & Brenda K. Bryant eds., 1987).

82. Vida L. Tyc, *Psychological Adaptation of Children and Adolescents with Limb Deficiencies: A Review*, 12 CLINICAL PSYCHOL. REV. 275, 280 (1992).

83. Jason Riis et al., *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 8 (2005).

84. Dylan M. Smith et al., *Misremembering Colostomies? Former Patients Give Lower Utility Ratings than Do Current Patients*, 25 HEALTH PSYCHOL. 688, 688–89 (2006).

85. These changes, which are relatively constant and do not get progressively worse over time, stand in contrast to progressive or degenerative disorders, such as rheumatoid arthritis or multiple sclerosis. Individuals

These results have been the basis of significant work by legal scholars.⁸⁶ But it is unclear whether these results tell us anything real about the respondent's actual well-being. Even where people report a return to pre-injury or pre-illness levels of happiness or life satisfaction, they are still willing to give up significant amounts of their remaining life spans to return their lost function.⁸⁷ For example, in one study, researchers asked colostomy patients to imagine that they had ten years left to live and then asked the patients to report how much of their remaining years they would give up to live the rest of their lives with normal bowel function.⁸⁸ Importantly, the current colostomy patients reported similar positive and negative affect and similar life satisfaction as patients who had had the procedure reversed.⁸⁹ Further, the current patients reported a similar quality of life as both former colostomy patients and the community overall.⁹⁰ Thus, the normal conclusion would be that current colostomy patients had nearly complete returns of well-being after their procedures. This conclusion, however, is belied by the fact that the current patients reported that if they only had ten years left to live, they would give up, on average, nineteen months of that life (over fifteen percent of their remaining years) to return to life with normal bowel function.⁹¹ In another, similar study, dialysis patients reported a willingness to give up over half of their remaining years to have normal kidney function.⁹²

What do these studies mean? They indicate, at a minimum, that subjective measures of happiness, life satisfaction, and quality of life are missing something fundamental about the human experience. People care deeply about things that are not captured by the current subjective well-being measures. Questions about happiness and life satisfaction may indeed capture something real about respondents' emotional state or about their perceived quality of life. But even if we assume the responses capture all that and more, the answers to these questions are still missing something

with progressive or degenerative issues often report significant and lasting changes to well-being. See Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra* note 28, at 302, 312 (“[I]n contrast to paralysis victims, whose condition is likely to remain constant over time, sufferers of such debilitating diseases must cope not only with the disabilities resulting from the cumulative deterioration they have thus far suffered but with new impairments as their disease progresses.”); see generally Richard F. Antonak & Hanoeh Livneh, *Psychosocial Adaptation to Disability and Its Investigation Among Persons with Multiple Sclerosis*, 40 SOC. SCI. & MED. 1099 (1995) (reviewing literature about psychosocial adaptation to disability among individuals with multiple sclerosis, identifying research problems, and suggesting future research).

86. See, e.g., BBM, *Adaptation and Settlement*, *supra* note 3, at 1516–18 (discussing the study of hedonic adaptation in the social sciences); Sunstein, *supra* note 2, S157 (referring to studies of how healthy people perceive the welfare of those who are seriously ill).

87. E.g., Smith et al., *supra* note 84, at 693.

88. *Id.* at 691.

89. *Id.* at 692.

90. *Id.*

91. *Id.* at 691; see also George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. PUB. ECON. 1795, 1799 (2008) (“[D]espite experiencing moods similar to people without colostomies, they were willing to give up 15% of their projected life span to rid themselves of a colostomy.”).

92. George W. Torrance, *Toward a Utility Theory Foundation for Health Status Index Models*, 11 HEALTH SERVICES RES. 349, 361 (1976).

fundamental.⁹³ If otherwise happy people, who report high levels of life satisfaction, would rather forgo significant portions of their lives than live with disabilities, the measures must not be a particularly good proxy for well-being.

If these subjective accounts are a bad proxy for well-being, it is unclear how helpful they can be in policy or legal domains. Doctors can, of course, provide some information to their patients: “after the procedure, most people report that their happiness is similar to what it was before the procedure, but these same patients would give up significant chunks of time to not have the procedure done.” Is this useful information? Can doctors or patients really decide what type of medical interventions to use? Can insurers determine which procedures to cover? The survey responses seem to say very little about well-being.

Likewise, it is unclear what information jurors should draw from these studies. If people are just as happy post-injury as before, does that mean that plaintiffs should not get noneconomic damages? Or does it suggest that these data are simply unimportant for monetizing noneconomic damages?⁹⁴

In the end, these studies suggest that current subjective accounts are, at a minimum, missing something fundamental about well-being. People care about things—like health and abilities—that do not seem to be reflected in survey responses about happiness and quality of life. But it may be worse than that. The studies may suggest that, without a better theory of well-being, one cannot use the surveys as a reasonable proxy for well-being at all, or that the responses themselves are flawed.

3. Women and Happiness

The studies linking wealth and happiness seem to require a choice between affective and cognitive subjective accounts of well-being to set policy. The studies about health and happiness call into question whether the subjective accounts of well-being are a useful proxy at all. A recent study on women’s happiness further suggests that using the happiness data to set policy is likewise complicated—if not impossible.⁹⁵

It is relatively uncontroversial to claim that women are objectively better off now than they were in 1970. Currently, women attain more education than they did forty years ago, and in fact, now attain more education than men.⁹⁶ Women have increased labor force opportunities, including increased real wages (for all but the least educated women), increased wages relative to men, and rising labor force participation.⁹⁷ Women also have increased “autonomy over individual and family decision making, including rights over marriage, children born out of wedlock, the use of birth control,

93. See Loewenstein & Ubel, *supra* note 91, at 1802–03 (claiming that happiness measures may not capture things that people desire for true well-being such as nonaffective components of well-being—feeling a range of emotions and having meaning—having capabilities, and altruistic or moral concerns).

94. Swedloff & Huang, *supra* note 78, at 584.

95. Betsey Stevenson & Justin Wolfers, *The Paradox of Declining Female Happiness*, 1 AM. ECON. J. 190, 224 (2009) (stating that “subjective well-being makes understanding what is behind declining female happiness a challenging task”); see also generally David G. Blanchflower & Andrew J. Oswald, *Well-Being Over Time in Britain and the USA*, 88 J. PUB. ECON. 1359 (2004).

96. Stevenson & Wolfers, *supra* note 95, at 190.

97. *Id.*

abortion, and divorce.”⁹⁸ In addition to these objective markers, women generally believe that their lives are better now.⁹⁹ Thus, on a number of objective measures, women have made (and believe they have made) huge strides in the last forty years.

But surprisingly, over this same period, “measures of women’s subjective well-being have fallen both absolutely and relatively to that of men.”¹⁰⁰ In fact, compared to men, the decline is quite striking. “[T]he relative decline in the subjective well-being of US women over the past 35 years is roughly comparable to the effects of an [8.5] percentage point rise in unemployment rates (that is, a rise from, say, 4 percent unemployment to [12.5] percent).”¹⁰¹ Interestingly, this decline is the same whether one asks about happiness or life satisfaction.¹⁰² Moreover, the inclusion of controls for income, children, employment status, and marital status has little effect on the trend of declining female happiness.¹⁰³

One could make a number of reasonable assumptions about why this decline might make sense. For example, one might guess that women who have entered the workforce nonetheless still have real and emotional obligations for household work.¹⁰⁴ Under this hypothesis, women are less happy because they essentially hold two jobs—one outside and one inside the home.¹⁰⁵ One might also guess that the source of women’s declining happiness is the burden of balancing children and a career, which falls disproportionately on women, or one might guess that the decline is related to a corresponding rise in divorce and single parenthood.¹⁰⁶ But the data do not support any of these hypotheses.

If the burdens of work inside and outside the home are contributing to the decline in happiness, one might expect that the decline in happiness would be concentrated among women who are employed. But “employed and nonemployed women have experienced roughly similar declines in subjective well-being.”¹⁰⁷ Likewise, there “are no statistically significant differences in the trends for women with and without children.”¹⁰⁸ Further, there are similar trends among “single parents and married parents, and between employed parents and nonemployed parents . . . casting doubt on the hypothesis that trends in marriage and divorce, single parenthood, or work-family

98. *Id.* at 192.

99. Four out of five respondents to recent polls asking about the changing status of women over the past twenty-five or fifty-years felt that “the overall status of women in the United States has gotten better.” *Id.* at 221. “[T]he remaining respondents break two-for-one toward ‘stayed the same’ over ‘worse.’” *Id.* at 221–22. Another poll found that “72 percent of women believe that ‘women having more choices in society today gives women more opportunities to be happy’ while only 39 percent thought that having more choices ‘makes life more complicated for women.’” *Id.* at 222.

100. *Id.* at 191.

101. *Id.* at 201.

102. *Id.* at 193.

103. *Id.* at 199.

104. See generally ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (1989).

105. *Id.* at 1–2.

106. Stevenson & Wolfers, *supra* note 95, at 209–10.

107. *Id.* at 209.

108. *Id.* at 210.

balance are at the root of the happiness declines among women.”¹⁰⁹

Despite the increased opportunities for women, there are other important social forces that may account for the decline in their happiness, including “decreased social cohesion, increased anxiety and neuroticism, and increased household risk.”¹¹⁰ Alternatively, the social changes may mean that women are aggregating their responses to subjective well-being questions across wider domain sets.¹¹¹ For example, life satisfaction may have previously only meant satisfaction at home, but it now may include satisfaction at home and work.¹¹² But it is also possible that it is precisely the increased opportunities over the past four decades that have contributed to women’s decreased subjective account of well-being.

So now what to do? If this subjective account is a good proxy for well-being—or even if it is only an important aspect of a broader objective list of well-being—it is still unclear what policymakers should do with the data. Certainly, it seems outrageous to claim that we should increase happiness by limiting women’s choice sets. But that is clearly one conclusion someone bent on maximizing well-being might derive if looking only at this data. This study suggests that even if one were to accept that the data provide important and real information about the human condition, the data cannot be used to set policy without thinking more deeply about what else might matter for well-being. Things like equality, capacity,¹¹³ or capabilities¹¹⁴ might be just as important.

C. *Disaggregating the Definitional Dilemma*

The empirical literature on subjective well-being and happiness has provided—and will hopefully continue to provide—useful, descriptive information about the causes, conditions, and correlates of happiness and well-being. But it is unclear what policymakers should do with the information.

First, even if one believes that a subjective account is a reasonable proxy for well-being, one must choose between affective and cognitive subjective measures. It is not enough to say that people should determine for themselves whether they are doing well. Things that cause pleasure and pain may not add to life satisfaction and vice versa. Without a coherent account of what matters, it is impossible to use the data to shape policy.

Second, there is significant evidence that the subjective data about happiness and life satisfaction are not a good enough proxy for well-being either alone or in combination. People who report significant happiness and life satisfaction after changes in their medical status are willing to give up significant portions of their remaining lives to live without disability. This suggests, at a minimum, that subjective measures of happiness and life satisfaction fail to capture something important about the human

109. *Id.*

110. *Id.* at 222 (internal citations omitted).

111. *Id.*

112. *Id.* at 222–23.

113. See AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 9–16 (1985) (discussing the “functionings” of people in relation to what they can do with a given commodity as a benchmark of happiness).

114. See NUSSBAUM, *supra* note 58, at 78–80 (listing the central elements of human functional capabilities).

condition—that well-being is more complex than these subjective measures.

Lastly, even if one believes that the measures are capturing something real and important and wants to use subjective measures to guide public policy, the data may point in directions that are anathema to other social goods—like fostering equality and opportunity.

This is, of course, not to suggest that social scientists should abandon their data collection. Rather, it is a call first for careful scrutiny of the use of the data in policy agendas. Further, it is a call for greater emphasis on the definition of well-being before using the data to set policy.

III. THE TEMPORAL PUZZLE

Even if one were to accept that the data are a sufficient proxy for well-being, there are other questions that must be answered to set legal policy or shape legal institutions. Scholars must further consider the implications that flow from the fact that people do a bad job predicting and remembering how their well-being will change or has changed in response to certain experiences.

Positive law is typically grounded—at least in part—on an individual's experience. Tort victims are compensated based on their actual pain, anxiety, and fear; criminal sentences are partially set by the negative experience of the incarcerated; and administrative agencies may consider the emotional impact, including feelings of loss, in crafting regulations. Descriptive and normative theories of law likewise depend on experience for their explanatory power. Consider tort. Economists believe that tort serves its deterrence function when tortfeasors anticipate internalizing, or are made to internalize, the harms they cause. Likewise, corrective justice theories of tort imagine a victim being compensated for the harms that are felt. The value of the noneconomic portion of those harms, for both economic and corrective justice approaches, is based on the experience of the victim.

Differences between prediction and memory on the one hand and experience on the other are thus considered errors to be corrected. Again consider tort. A plaintiff who remembers her pain as greater than her actual experience may be thought of as overclaiming. A jury that awards damages based on an overprediction of the impact of the injury on the plaintiff's pain and suffering may be thought of as granting too high an award. An economist would claim that as a result a defendant would be forced to overinvest in precaution. A corrective justice scholar might likewise claim that the defendant has given too much to restore justice and the plaintiff has received a windfall.

High awards, however, are only windfalls or cause overinvestment in precaution if one believes that experience is what matters. There may be good reasons to privilege prediction or memory over experience. After all, one spends more time predicting and remembering emotional responses to events than experiencing the events themselves. The experience of many events is relatively short: the pain from stubbing your toe, burning your mouth on hot coffee, or embarrassing yourself at a cocktail party take only an instant to experience. Even events that have long durations—such as recovering from an injury, serving a criminal sentence, or negotiating a settlement—likely only last a portion of the time that one could spend predicting or remembering

the event.

This Section explores whether a person's predictions, experiences, or memories should be privileged. It first lays out the claim—based on burgeoning empirical literature—that prediction, experience, and memory are often at significant, and predictable, variance. It then considers whether legal institutions should or do consider this variance.

A. *The Three Selves*

What one predicts about her emotional reaction to an event is often different from her experience or memory of the event. One could think of this as a problem of multiple selves stuck in different points of time. The first is the predicting self. This is the self that can only imagine how much her happiness will be changed by a future vacation or medical procedure, by buying a bigger house or nice car, or by moving to new suburb.¹¹⁵ The second is the experiencing self. That self “lives in the present and knows the present, is capable of reliving the past, but basically it has only the present.”¹¹⁶ The experiencing self answers the questions, “Does it hurt now when I touch you here?”¹¹⁷ or “Are you happy right now?” The last self, the remembering self, has a different role. It “keeps score, and maintains the story of our life;” it answers the questions, “How have you been feeling lately?” or “How was your trip to Albania?”¹¹⁸

To be sure, predicting, experiencing, and remembering are related constructs. For example, to properly predict the emotional impact of a future event, one must often properly remember a similar past event. That is, often a prediction is based on a memory. Experiences themselves can be influenced by predictions. For example, people who predict that a movie will be “one of the best they have ever seen might have a different experience than people who see the same movie with no expectations.”¹¹⁹ But while related, the selves are separated in time. As such, they may have significant impacts on behavior. Because these selves often view the same event differently, scholars must, in some sense, choose which self to privilege.

In this Part, I review the literature related to the three selves. I show that each of these selves perceives the impact of the same event differently. The predicting self often overestimates how much a future event will impact the experiencing self. And the remembering self systematically distorts the memories of events that the experiencing self lived through.

115. See Jeremy Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 172–75 (2005) (discussing several examples of individuals predicting emotional responses to different events and the reasons for errors in the predictions).

116. Daniel Kahneman, *The Riddle of Experience vs. Memory*, TED (Mar. 2010), http://www.ted.com/talks/daniel_kahneman_the_riddle_of_experience_vs_memory.html.

117. *Id.*

118. *Id.*

119. Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345, 362 (2003).

1. Predicting vs. Experiencing

Individuals often have a hard time predicting how life events will change their future emotional state. That is, predicting selves have trouble guessing what they will actually experience.¹²⁰ These so-called affective forecasts have at least four components: (1) the valence of an emotional reaction (“I’ll feel good if I get the job”); (2) the specific emotions experienced; (3) “the initial intensity of the reaction” (I’ll experience an enormous amount of joy when the Phillies win); and (4) “the duration of that emotion” (my sadness at the loss of my pet will last for years).¹²¹ Most people can identify whether a particular event will lead to positive or negative emotions and can generally identify the specific emotions they will feel.¹²² In other words, predicting selves can often guess the valence and the mix of emotions caused by a future event. Predicting selves do less well when asked to guess the initial intensity or duration of an emotional reaction to a future event.¹²³ In fact, predictors typically overestimate the impact of future events because they “overestimate how good or bad they will feel, overestimate how quickly those feelings will arise, or underestimate how quickly they will dissipate.”¹²⁴ Studies have shown that these differences occur in both simple and complex situations and across different populations of predictors.¹²⁵

Predicting selves are surprisingly bad at estimating the impact of even simple, direct emotional stimuli. For example, patients at a dentist’s office tend to predict that they will experience far more pain than they actually experience during the visit.¹²⁶ And “physical pain, such as pinpricks, do not produce measurable psychological-stress reactions beyond those produced by the mere anticipation of such conditions.”¹²⁷ Likewise, in simple life settings, predicting selves cannot guess the true impact of life events. For example, college football fans tend to substantially overestimate how happy they will be if their school’s team wins and how unhappy they will be if their team loses.¹²⁸ Similarly, voters overestimate how good they will feel if their gubernatorial or

120. For excellent reviews of the literature on affective forecasting, see generally George Lowenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY*, *supra* note 28, at 85; Blumenthal, *supra* note 115; Wilson & Gilbert, *supra* note 119.

121. Wilson & Gilbert, *supra* note 119, at 349.

122. *See id.* at 347–48 (explaining the ability of people to correctly identify specific emotions they will feel in a given experience). When events are more likely to lead to a complex mix of emotions, people may do less well in predicting their future affective state. *See* Blumenthal, *supra* note 115, at 167 (asserting that complex events or events in the far future produce more incorrect predictions than straightforward experiences).

123. *See* Blumenthal, *supra* note 115, at 167 (stating that while people may tend to accurately predict whether an experience will be positive or negative, “people are surprisingly inaccurate at predicting the intensity and the duration of those emotions”).

124. Wilson & Gilbert, *supra* note 119, at 351.

125. *See* Blumenthal, *supra* note 115, at 170–72 (exploring research and studies of different individuals incorrectly predicting their future emotions in a variety of scenarios).

126. Arndt et al., *Predictions of Dental Pain: The Fear of Any Expected Evil, Is Worse than the Evil Itself*, 28 *BEHAV. RES. & THERAPY* 29, 30 (1990).

127. Andrew Caplin & John Leahy, *Psychological Expected Utility Theory and Anticipatory Feelings*, 116 *Q.J. ECON.* 55, 57 (2001) (citing RICHARD LAZARUS, *PSYCHOLOGICAL STRESS AND THE COPING PROCESS* (1966)).

128. Timothy D. Wilson et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 *J.*

presidential candidate wins and how bad they will feel if their candidate loses.¹²⁹

People also overpredict the amount that moderately complex changes in life circumstances and events will affect their happiness. For example, groups of students at Midwestern universities and schools in California were asked how much happier someone like them would be in California.¹³⁰ The midwesterners consistently overestimated the happiness reported by the Californians, and the Californians generally believed that living in California would make someone happier than the reports indicated.¹³¹ Likewise, people tend to overestimate their enjoyment of vacations.¹³² When asked before various vacations (e.g., European vacations or bicycle trips), people tend to predict far more enjoyment than they actually experience.¹³³

Not surprisingly, this same pattern follows as life events produce a more complex mix of emotional responses. For example, women who were mere minutes from finding out if they were pregnant or not could not predict with any exactitude their emotional response to finding out the results of the test.¹³⁴ These women consistently “overestimated the displeasure of unfavorable outcomes. Women who received bad news from their pregnancy tests actually felt better than they expected.”¹³⁵ And, several empirical findings support the claim that people consistently overestimate the impact that children will have on their lives.¹³⁶ Many people predict that having children will be a great joy. Indeed, there is evidence that in the year before having a child, overall happiness goes up for both men and women.¹³⁷ But compared to those without children, parents often report statistically significant lower levels of happiness,¹³⁸ life satisfaction,¹³⁹ marital satisfaction,¹⁴⁰ and mental well-being.¹⁴¹ As discussed above,

PERSONALITY & SOC. PSYCHOL. 821, 829 (2000).

129. Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 624–26 (1998); Timothy D. Wilson et al., “How Happy Was I Anyway?” *A Retrospective Impact Bias*, 21 SOC. COGNITION 421, 429–31 (2003).

130. David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340, 343 (1998).

131. *Id.*

132. Terence R. Mitchell et al., *Temporal Adjustments in the Evaluation of Events: The “Rosy View,”* 33 J. EXPERIMENTAL SOC. PSYCHOL. 421, 422 (1997).

133. *Id.* at 427–28, 435–42.

134. Barbara A. Mellers & A. Peter McGraw, *Anticipated Emotions as Guides to Choice*, 10 CURRENT DIRECTIONS PSYCHOL. SCI. 210, 211–13 (2001).

135. *Id.* at 213.

136. See DANIEL GILBERT, *STUMBLING ON HAPPINESS* 220–22 (2006) (explaining research that despite predictions, both marital and actual satisfaction decrease when parents have children).

137. Andrew E. Clark et al., *Lags and Leads in Life Satisfaction: A Test of the Baseline Hypothesis*, 118 ECON. J. F222, F236 (2008).

138. Alberto Alesina et al., *Inequality and Happiness: Are Europeans and Americans Different?*, 88 J. PUB. ECON. 2009, 2020 (2004).

139. Rafael Di Tella et al., *The Macroeconomics of Happiness*, 85 REV. ECON. & STAT. 809, 812–13 (2003).

140. Jean M. Twenge et al., *Parenthood and Marital Satisfaction: A Meta-Analytic Review*, 65 J. MARRIAGE & FAM. 574, 580 (2003).

141. Nattavudh Powdthavee, *Think Having Children Will Make You Happier?*, 22 THE PSYCHOLOGIST 308, 309–10 (2009) (citing Andrew E. Clark & Andrew J. Oswald, *Well-Being in Panels* (2002) (unpublished manuscript)).

this may represent a definitional problem in the measurement, but it may also be that people focus on the wrong question when asked about having children. People focus on the good things (a child's first words, first steps, or the feeling of comfort from holding a child), rather than the mundane tasks of child rearing.¹⁴² Regardless of the reason, it appears that predicting selves have a very difficult time guessing what they will feel like throughout the childbearing and child-rearing processes.

Tenure-track professors likewise overestimate the emotional impact of a decision about promotion and tenure.¹⁴³ Those who had not yet received a decision on tenure overestimated the emotional response to both favorable and unfavorable tenure decisions as compared to those who had recently gone through the tenure process. Even dieters, who typically "are quite familiar with attempts to lose weight, and therefore should have experience with their actual reactions to unsuccessful attempts," cannot accurately predict how bad they will feel if they gain or fail to lose weight.¹⁴⁴

There is, thus, a deep body of empirical evidence that predictions about emotional responses do not match the actual experience of that event. In most contexts, the predicting self overestimates the emotional impact of life circumstances and life events on the experiencing self.¹⁴⁵ There are a number of reasons for this so-called *impact bias*. For example, as discussed in the child-rearing example, when asked to predict how an event will impact their happiness, predictors focus on the event to the exclusion of the rest of life's circumstances that may mitigate the impact of the event.¹⁴⁶ Further, predictors may not have familiarity with the event prompting the emotional experience and thus may not be able to predict with any precision how it would really impact someone's life. More importantly, predictors cannot properly draw on past emotional experiences as a guide because they systematically misremember emotional experiences, which ultimately distorts their ability to predict future emotional experiences.¹⁴⁷

2. Experiencing vs. Remembering

A similar body of research demonstrates that there is a gap between what people experience and what they remember in a number of settings.¹⁴⁸ At first blush, this may

142. *Id.* at 309–10 (citations omitted).

143. Gilbert et al., *supra* note 129, at 622–24.

144. Mellers & McGraw, *supra* note 134, at 213.

145. In some contexts, the predicting self may underestimate the impact on future affect. For example, people are likely to underestimate the hedonic effect of depression, chronic pain, and degenerative diseases. In part, people may underestimate the impact of these events because people do not adapt significantly to them. *E.g.*, Frederick & Loewenstein, *supra* note 85, at 312.

146. See Blumenthal, *supra* note 115, at 174 (explaining that individuals' predictions of the impact of an event are too narrow and fail to consider the breadth of its impact and the totality of their own circumstances).

147. *Id.*

148. See Talya Miron-Shatz et al., *Memories of Yesterday's Emotions: Does the Valence of Experience Affect the Memory-Experience Gap?*, 9 *EMOTION* 885, 885 (2009) ("The *memory-experience gap* is defined as a discrepancy between the average of experienced emotions and the overall evaluation of the experience, which is usually more intense than the averaged emotions."). Given that most happiness surveys require a retrospective analysis of well-being, one could claim that this problem alone causes significant problems for the science of happiness. For now, however, the focus will remain on the difference between experiencing and

seem like less than a surprising observation. Human memory is notably imperfect and often fallible. Importantly, though, the gap is more than just a flawed memory. It is a consistent and predictable distinction between the remembering self and experiencing self.

The first predictable pattern is known as the *peak-end rule*. In the context of pain and aversive experiences, people disproportionately remember the most intense (the peak) and the most recent (end) moment of the experience.¹⁴⁹ The duration of the event is mostly ignored.¹⁵⁰ For example, researchers compared two groups of colonoscopy patients. For example, researchers examined the experience of colonoscopy patients.¹⁵¹ Throughout the procedure, patients recorded their level of discomfort every sixty seconds.¹⁵² Later, patients evaluated their experience as a whole and compared it to other unpleasant experiences (such as an average visit to the dentist).¹⁵³ Some patients had a shorter procedure that ended on a more painful note.¹⁵⁴ Other patients experienced all the pain of the first group and then some, but ended on a less painful note.¹⁵⁵ The second group's procedure included all the pain of the first group's procedure but lasted longer.¹⁵⁶ Objectively, the patients in the second group experienced more pain.¹⁵⁷ But when asked to recall the procedure, patients in the second group recalled suffering much less than those in the first.¹⁵⁸ Adding an additional period of discomfort, which ended on a less unpleasant note, improved the memory of the event.¹⁵⁹ The extra period of discomfort was mostly ignored.

This peak-end finding has been replicated in other experiments. In one, participants preferred to have their hands in uncomfortably cold water for a longer period of time if the water temperature increased slightly at the end of the experiment.¹⁶⁰ The remembering self did not consider the duration of the immersion and focused instead on the average of the peak and end experiences.¹⁶¹ This same

remembering.

149. See BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 131 (2008) (stating that the most "memorable moments of an experience . . . disproportionately affect retrospective assessments of feelings. The most intense moment (peak) and the most recent moment (end) of an emotional event tend to count as '[most] memorable'"); Daniel Kahneman et al., *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375, 381 (1997) (explaining that what individuals remember can be accurately predicted by averaging the utility of the most intense moment and the most recent moment).

150. Donald A. Redelmeier & Daniel Kahneman, *Patients' Memories of Painful Medical Treatments: Real-Time and Retrospective Evaluations of Two Minimally Invasive Procedures*, 66 PAIN 3, 4 (1996).

151. *Id.* At the time this research was performed, colonoscopies were relatively unpleasant experiences. Today, however, physicians often use some additional anesthesia to dampen the unpleasantness.

152. *Id.*

153. *Id.*

154. *Id.* at 5.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 5–6.

159. Kahneman et al., *supra* note 149, at 385.

160. Daniel Kahneman et al., *When More Pain Is Preferred to Less: Adding a Better End*, IV PSYCHOLOGICAL SCIENCE 401, 403 (1993).

161. See Kahneman et al., *supra* note 149, at 386–87 (demonstrating that the peak-end rule explains why

finding holds true for those watching aversive and pleasant film clips,¹⁶² receiving gifts of DVDs and candy,¹⁶³ and experiencing lithotripsies.¹⁶⁴

Memories can also be distorted based on the remembering self's current emotional state. Consider the following example:

[W]hen widows and widowers rated the intensity of their grief 6 months and then 5 years following the death of their spouse, they reported much more intense current grief at 6 months than at 5 years. However, when asked after 5 years to recall how they had felt 6 months after the death of their spouse, the intensity of grief participants remembered was more highly correlated with their current level of grief than with the actual grief reported at 6 months.¹⁶⁵

Other times, a person's predictions about (or theories of) the event can have a significant impact on retrospective evaluations. For example, "[m]emory-experience gaps in the context of menstrual symptoms . . . correlate with a woman's beliefs about her typical menstrual distress; those who expect great distress tend to exaggerate symptoms on recall."¹⁶⁶ These predictions can also bring about a rosy view in memories of an experience. As discussed above, people tend to predict that vacations will be more enjoyable than they actually experience. And despite having less fun than predicted, people tend to remember the vacations in a very positive way. The initial rosy predictions tend to influence people's memories of vacations.¹⁶⁷ In one study, cyclists were surveyed before, during, and after a three-week bicycle trip through California.¹⁶⁸ People generally anticipated the trip would be enjoyable.¹⁶⁹ And despite the fact that during the trip participants reported excessive rain, physical exhaustion, and companions who would not "joke around" enough, the cyclists generally "remembered the bike trip as being more enjoyable than they actually experienced it to be."¹⁷⁰ The same pattern has been observed among vacationers to Europe¹⁷¹ and Disneyland,¹⁷² runners in the Chicago Marathon,¹⁷³ and students on spring break

participants would choose more pain over less pain).

162. Barbara L. Fredrickson & Daniel Kahneman, *Duration Neglect in Retrospective Evaluations of Affective Episodes*, 65 J. PERSONALITY & SOC. PSYCHOL. 45, 54 (1993).

163. Amy M. Do et al., *Evaluations of Pleasurable Experiences: The Peak-End Rule*, 15 PSYCHONOMIC BULL. & REV. 96, 98 (2008).

164. Redelmeier & Kahneman, *supra* note 150, at 7.

165. Linda J. Levine & Martin A. Safer, *Sources of Bias in Memory for Emotions*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 169, 170 (2002).

166. Miron-Shatz et al., *supra* note 148, at 886 (citing Cathy McFarland et al., *Women's Theories of Menstruation and Biases in Recall of Menstrual Symptoms*, 57 J. PERSONALITY & SOCIAL PSYCHOL. 522 (1987)).

167. Mitchell et al., *supra* note 132, at 422.

168. *Id.* at 435.

169. *Id.* at 436.

170. *Id.* at 438, 442.

171. *Id.* at 428.

172. Robert I. Sutton, *Feelings About a Disneyland Visit: Photographs and Reconstruction of Bygone Emotions*, 1 J. MGMT. INQUIRY 278, 284 (1992).

173. Derrick Wirtz et al., *What To Do on Spring Break?: The Role of Predicted, On-Line, and Remembered Experience in Future Choice*, 14 PSYCHOL. SCI. 520, 520 (2003).

trips.¹⁷⁴

It is possible that this too can be described as some form of duration neglect, where remembering selves focus on the significant emotional events of a trip. Alternatively, this may be described as some form of focusing illusion, where remembering selves focus only on positive affect snapshots and minimize the less enjoyable aspects. As with the distortions between the predicting and remembering selves, the reasons are less important than the fact that memories are predictably different from the experiences themselves.

In sum, there is a predictable gap between experience and memory. Remembering selves tend to ignore the duration of an event, and remember instead only the peak and end of the event itself. Further, memory can be influenced by both predictions of the event and the current emotional state when remembering the event.

B. *Legal Institutions and the Temporal Problem*

The previous section laid out a number of studies that suggest that what people predict about the emotional impact of an event and what they remember about the event will differ (sometimes significantly) from what they actually experience. Some of the studies could be criticized methodologically, and certainly some of the studies could be criticized as studying reactions to trivial or mundane events.¹⁷⁵ But taken together, this body of research shows that there is a difference between the predicting self, the experiencing self, and the remembering self. The question is: which of these selves should be privileged in policy making.

Consider first the simple example of vacationers. Vacationers often predict that vacations will be fun and remember that they had more fun than they actually experience.¹⁷⁶ Does this mean that policymakers should discourage vacations because an individual's experience does not live up to expectations or memories? Obviously not! And that is not just because it would be contrary to shared notions of liberty to discourage individual choices about vacations. One could reasonably argue that the fact that the vacationer remembers having a good time is more important than the actual experience. After all, the vacationer usually spends far more time remembering an event than she does experiencing it.

In the context of painful medical procedures, there appears to be a good reason to extend the length of the procedure and end it on a less painful note.¹⁷⁷ The length of the procedure does not correlate with the memory of the procedure. Individuals ignore the duration and, instead, remember the peak and end emotional experiences. Better memories of medical procedures might lower barriers to important preventative medicine. But, creating a longer and objectively worse procedure for the experiencing self in service to the remembering self raises important ethical issues that physicians

174. *Id.* at 521.

175. Blumenthal, *supra* note 115, at 172.

176. See *supra* notes 132–33 and accompanying text for a discussion of individual predictions of vacations and notes 167–74 and accompanying text for a discussion of individual memories of vacation.

177. See *supra* notes 151–59 and accompanying text for a discussion of patients' recollections of painful medical procedures.

must answer.¹⁷⁸

Similarly, one could reasonably argue that the government should eliminate tax deductions for having children, create tax incentives for couples to remain childless, or educate the population about the negative impact of children. After all, there is significant evidence that people overpredict how much happiness they will gain from having children.¹⁷⁹ But these too would seem like odd policies. Again, this is not just because of a shared societal belief in the importance of children. It is in part because people predict that they will like child rearing and remember enjoying their children's childhood, even if their actual experience is different. To the extent that prediction or memory matter more than experience, these policies would be silly.

Nonetheless, legal scholars have tended to privilege the experiencing self without consideration of the impact to (and to the expense of) the predicting and remembering selves.¹⁸⁰ In fact, these scholars often consider predictions or memories that diverge from a person's experience of an event as mistakes or errors. Privileging the experiencing self, however, requires a normative account that is not often present in the legal scholarship.

In this Part, I offer two simple examples of the problem of multiple selves in the legal domain.

1. Tort Law

Consider first tort law. Full compensation of tort victims is a common feature of every practical and theoretical account of tort law. This full compensation must include awards for both economic and noneconomic damages.¹⁸¹ To determine the amount of noneconomic damages, factfinders will necessarily have to assess the affective impact of the injury. This, in turn, will likely call into question the problem of the multiple selves because compensation depends on the injury to one's physical, emotional, and reputational self.

The default position of the tort system seems to be that the experiencing self is what matters. The *Restatement (Second) of Torts* directs the factfinder to consider the "intensity of the pain or humiliation, its actual or probable duration and the expectable consequences."¹⁸² Under this approach, the factfinder must explicitly determine how

178. See, e.g., Redelmeier & Kahneman, *supra* note 150, at 7 ("Our findings also raise a complex ethical issue for clinicians who perform painful medical procedures on awake patients. . . . For procedures where some pain is unavoidable, clinicians may need to decide whether it is more important to optimize patients' experiences or memories.").

179. See *supra* notes 136–42 and accompanying text for a discussion of how people overestimate the amount of happiness having children will bring them.

180. Peter Huang is one of the few scholars to discuss this problem explicitly. See generally Peter H. Huang, *Torn Between Two Selves: Should Law Care More About Experiencing Selves or Remembering Selves?*, 17 SMU SCI. & TECH. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743025.

181. What constitutes *full* compensation is somewhat more controversial as there are differences of opinion about the propriety of, or amount granted for, different kinds of loss. For example, some have argued that damages are inappropriate for wrongful death. Those kinds of arguments are beyond the scope of this Article.

182. RESTATEMENT (SECOND) OF TORTS § 912 cmt. b (1977).

much and how long the plaintiff experienced pain, suffering, or emotional distress.¹⁸³ That determination requires, in turn, a complex interaction between the predicting, experiencing, and remembering selves. To estimate the emotional impact of an injury, the judge or jury likely relies on both an internal sense of how much harm such an injury would cause and the testimony provided about the specific injury to that specific plaintiff. In other words, the judge or jury relies on his or her own *predictions* about the consequences of the injury and the *memories* of the plaintiff as a witness in the trial.

To the extent that jurors rely on their own predictions of the affective impact of the injury, those predictions may vary from the actual experience of the plaintiff. Consider first a plaintiff who suffers a serious injury—loss of a limb, loss of mental capacity, or paralysis. The predictor might describe the injury as catastrophic and thus require significant compensation. The experiencer, in contrast, might believe that life is fine, and report significant happiness and life satisfaction. Alternatively, consider a plaintiff who suffers an injury that leads to chronic pain—such as headaches or backaches—or a possibly degenerative disorder. Here, the predictor may underestimate the impact that the injury will play on the experiencer.

The testimony from the plaintiff is likewise suspect because the plaintiff's memory of the injury or life pre-injury is likely to be at variance with his or her own experience of life with the injury.¹⁸⁴ When asked to remember what life was like pre-injury, the testifying plaintiff will likely focus on the things that are different, rather than the same, about life. This may lead to a problematic gap between memory and experience. If experience is what matters, any variation between the predicting and remembering selves on the one hand and the experiencing self on the other are errors that could corrupt tort awards.¹⁸⁵

But it is not at all clear that a juror's prediction of the impact of an injury and a plaintiff's memory of the injury on the witness stand are errors in need of correcting. Whether differences between prediction and memory on the one hand and experience

183. To award damages for bodily pain, suffering, and mental distress, a factfinder must respectively estimate the amount of damage caused by physical pain felt as the result of an injury; the emotional or affective response to that pain, possibly felt in the form of anxiety, fear, hurt, and anger; and the negative emotional responses to an injury unrelated to physical pain. *E.g.*, Swedloff & Huang, *supra* note 78, at 578–79. Emotional responses to defamation or to watching a loved one get harmed are representative of emotional-distress injuries. *Id.*

184. In this context, the experiencing self and the remembering self merge and diverge. On the one hand, these injuries are permanent or chronic, so there is no point at which there is a pure remembering self who is no longer experiencing the injury. On the other hand, as time goes on, the remembering self is further removed from the onset of the injury.

185. This is precisely the argument marshaled by Cass Sunstein. He expresses concern that judges and juries cannot accurately predict how much a victim will actually suffer from an injury. He argues “[i]f ordinary people make mistakes in forecasting the effects of adverse events in their own lives, there is every reason to think that juries (and judges) will make similar mistakes in assessing the effects of those events on plaintiffs, especially but not only when they are projecting future losses.” Sunstein, *supra* note 2, at S168–69. But Sunstein's argument is not simply that there are random predictive errors. He is specifically concerned that judges and juries are more likely to exaggerate awards because they overpredict the impact of an injury on a victim. As he states: “Juries and others are likely to make hedonic judgment errors, often exaggerating the hedonic effects of losses.” *Id.* at S173. *But see* Swedloff & Huang, *supra* note 78, at 584 (arguing that “hedonic adaptation is not nearly as ubiquitous or strong as once believed, and it is certainly not powerful enough to justify the conclusion that noneconomic awards are illusory”).

on the other constitute errors, and whether these purported errors are worth correcting depends on what one believes motivates tort. The claim that experience should be privileged over predictions or memory must be evaluated in light of what one believes tort law does.

This Part briefly lays out two important approaches to tort law, discussing how each relies on compensation. I then discuss the impact of the difference between prediction, experience, and memory on each of the approaches to tort. This Part is not intended to be an encyclopedic recitation of every theory of tort, nor does it purport to plumb the depths of each of the theories articulated or the criticisms thereof. Rather, this Part aims to show that tort theories need not necessarily privilege experience over prediction or memory. To do so requires a more complete theoretical account.

a. Economic Approach

The economic approach to tort assumes that self-interested individuals will decide whether to engage in a risky activity by considering the costs and benefits of that activity. A manufacturer will produce more cement if the benefits of production (e.g., profits) are higher than the costs; a homeowner will sweep her front walk if the benefits (social or otherwise) outweigh the costs of time and effort of doing so; and a driver will drive more quickly if reduced driving time is more valuable than expected costs (in terms of fines or potential injury). However, not all costs of activity are considered. Self-interested actors only consider the costs they incur.¹⁸⁶ All other costs are ignored. Thus, unless the law intercedes, the cement plant will not consider the costs of the pollution it spews into the sky, the homeowner will not consider the expected loss caused if a neighbor slips on his icy walk, and the driver will not consider the expected loss caused by injuries inflicted as a result of her reckless driving. Those costs are borne by others—the cement plant's neighbors, the unsuspecting slip-and-fall victim, and other drivers or pedestrians on the road. The costs are, in economic parlance, negative externalities—negative effects felt by third parties unrelated to the actors and actions causing the harms. According to this economic account, tort law forces actors to consider these costs and internalize the externalities by imposing damage awards on wrongdoers. Once the actor considers the costs, she can choose whether to invest in preventing the injury—e.g., installing pollution scrubbers, shoveling the walk, or driving more carefully—or not.¹⁸⁷

Notably, the economic account does not place moral blame on actors for accidents. Rather, under the economic account, tort aims to create incentives for efficient investment in precaution. The assumption is that actors will invest in precautions that cost less than the expected injuries. If a tortfeasor could have cost effectively prevented an injury, he would do so. On the other hand, if the tortfeasor cannot prevent the accident cost effectively, he would not attempt to do so. That is, the potential tortfeasor must weigh the costs of marginal precaution against the expected accident costs. This, then, minimizes both the cost of injuries and the cost of accident

186. See Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 170 *PHILOSOPHY & PUBLIC AFFAIRS* 170, 172–73 (2000) (describing the economic model of a rational individual who works only in his self interest).

187. See generally ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (6th ed. 2012).

prevention to reach a socially efficient outcome.¹⁸⁸

To do its economic work, tort law must take account of *all* of the losses felt by the tort victim, including noneconomic injuries (the focus of this Part). Judges and juries cannot award too much or too little. If victims receive too much compensation, potential tortfeasors will overinvest in precaution. If victims receive too little, potential tortfeasors will underinvest.

But how is the system to determine the proper amount of noneconomic compensation given that noneconomic injuries are susceptible to the problem of multiple selves? As described above, prediction and memory may differ from experience of noneconomic losses. For certain injuries, the predicting and remembering selves may overestimate the experiencing self's injury. Before the loss of a limb, loss of mental capacity, or paralysis, potential victims (and thus potential jurors) likely believe the injury would be worse than they described it after experiencing the injury. Moreover, when testifying, the plaintiff might remember life as significantly better before the injury and ask for significantly more compensation than his self-reported change in happiness or life satisfaction might otherwise suggest. As such, an economist might fear that if asked to monetize the injury, the plaintiff will ask for and the jury might award too much in damages. The defendant would thus overcompensate the victim and overinvest in preventing the same injury in the future.¹⁸⁹

But why should this be considered overcompensation? Is the economic account undermined if damages are awarded based on prediction? One could take the position that experience is not the proper frame for calibrating tort damages. One could argue that a community's prediction about an injury is as valid as the plaintiff's experience of the injury. If the jury awards damages greater than the amount of injury experienced by the victim, this could represent an *ex ante* desire to avoid a certain type of injury. That is, one could argue that the predictive view leads to the appropriate amount of deterrence from the *ex ante* perspective. It is the amount of deterrence that the community (as a group of predictors) actually wants. Alternatively, one could argue that the victim's memory of the injury is more important than his real-time experience of the injury. After all, the victim spends far more time remembering the injury than he does experiencing it.

Unlike static injuries, predictors likely underestimate the impact of chronic pain and degenerative disorders on the experiencing self. This too is not necessarily problematic. After all, if it is acceptable to claim that society wants a greater investment to prevent some types of injuries, it could equally want less investment for other types. What may be more difficult is that, given the type of injury, there is no remembering self, and the recurrent nature of the injury extends its experience. This, again, requires additional thought or justification.

But the fact that predicting and remembering selves may provide more (or less) compensation does not necessarily mean that potential tortfeasors will overinvest (or underinvest) in precaution. Because the damages might reflect *ex ante* and *ex post*

188. See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 26–29 (1970) (explaining the goals and economics of accident law).

189. Cf. Sunstein, *supra* note 2, at S173–80 (discussing how a judge or jury may overcompensate a plaintiff by making a mistake as to that person's welfare).

community condemnation and evaluation of specific types of injury, a different level of award may lead to the appropriate amount of precaution.

b. Corrective-Justice Approach

In contrast to the economic approach, corrective-justice scholars do not view compensation as important for reasons of deterrence.¹⁹⁰ Rather, under this account, tort law's aim is to redress the imbalance created when a tortfeasor harms another. For corrective-justice scholars, when a party is injured, her ledger is at a deficit.¹⁹¹ She has suffered harms. When another person has a sufficient normative nexus to the victim's injury, that person has a duty to correct the injured party's deficit. Tort law serves to identify the other person and determine whether she has the responsibility to balance the injured party's books. In other words, tort law requires the wrongful actor to transfer the deficit from the injured party's ledger to her own.¹⁹² Tort law corrects "private injustices by transferring wrongful losses to the wrongdoer who caused them."¹⁹³ It does so by "ordering that the *full value* of the loss be transferred to the responsible party via a damage payment equal to the value of the loss."¹⁹⁴

This account may have more difficulty with the problem of multiple selves. Again, the question turns on how to evaluate the "full value" of the loss. Should loss be evaluated based on how much one predicts the injury will impact or remembers the injury impacting their well-being? Or should the loss be measured by actual experience?

On the one hand, it is not clear that the full value of the loss has to be measured based solely on the experience of the injury. It is not necessarily incoherent to use either prediction or memory as the mechanism for correcting the imbalances created by the wrongful conduct. As with the economic approach, the prediction of loss might represent the community's belief about the change in the injured party's ledger. The memory of loss might represent the injured party's belief about how much the injury actually changed well-being. On the other hand, unlike the economic account, the corrective-justice account appears focused quite clearly on the loss itself. It is the experience of the harm that triggers the duty to recompense the injured party. The

190. See John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 571 (2003) ("[C]orrective justice theory is mainly devoted to demonstrating—*contra* the other major tort theories—that the basic features of tort law are not a mere historical byproduct, nor a convenient means of achieving deterrence or compensation . . .").

191. See Goldberg, *supra* note 190, at 570 (noting that the corrective justice theory of tort law "is understood as aiming to restore an equilibrium that has been disturbed by the tortfeasor's conduct").

192. There are, of course, disputes within the corrective justice camp. For example, there is some dispute about whether tort responds to "wrongful conduct" or "wrongful loss." Compare JULES L. COLEMAN, RISKS AND WRONGS 326 (1992) (arguing that even if an individual has done nothing morally wrong, the wrongdoer must be held responsible if there is a loss), with Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445, 446–48 (1992) (arguing that only wrongdoers who are wrongful, and not innocent injurers, should be held accountable by corrective justice theory). But these differences are not important for the purposes of this argument. As an explanatory theory, all agree that the "make whole" compensatory payment is an essential feature of tort. Goldberg, *supra* note 190, at 572–73.

193. Goldberg, *supra* note 190, at 571.

194. *Id.* at 570 (emphasis added).

change in the ledger is triggered by the experience of loss; it cannot be triggered merely by a prediction of harm. This might require reconciling the differences between prediction, experience, and memory.

2. Crime and Punishment

Similar problems may exist in the context of crime and punishment. There is some evidence that the various stakeholders in the criminal justice system—legislatures, courts, prosecutors, criminal defendants, potential criminals, and victims—do not properly predict the consequence of punishment on well-being.¹⁹⁵ Whether, and how much, these variations matter depends in part on the underlying justification for punishment and the relative privilege one gives to prediction, experience, and memory.

Most punishment theories implicitly assume that the longer the sentence, the greater the negative impact on well-being. The simplest assumption is that there is a linear relationship between the length of sentence and the diminution of well-being. “So, for instance, a ten year sentence produces twice the punishment bite as does a five year sentence. Assuming a constant intensity of 1, which continues at the same level for, say 100 days, the total amount of punishment—the total punitive ‘bite’—is 100 punishment units.”¹⁹⁶ In that vein, the classic “prisonization” theory predicted a steady decline in physical and psychological health throughout the period of incarceration.¹⁹⁷

Current research has undermined this classic assumption. Rather than a steady decline in well-being, incarceration appears to follow a different, but still predictable, pattern for those in prison.¹⁹⁸ Prisoners initially experience a significant drop in well-being, marked by increased psychological distress, depression, and anxiety.¹⁹⁹ Over time, however, that anxiety dissipates, and prisoners seem to adapt to their surroundings.²⁰⁰ In one longitudinal study, researchers followed a group of prisoners

195. See Robinson & Darley, *supra* note 1, at 183–87 (discussing the difficulty of predicting how the severity of punishment affects one’s experience with the criminal justice system).

196. See *id.* at 187 (demonstrating a simple assumption for the justification to use different sentences lengths for different punishment).

197. See DONALD CLEMMER, *THE PRISON COMMUNITY* 299–300 (1940) (introducing the prisonization theory).

198. See Frederick & Loewenstein, *supra* note 85, at 311 (“Although incarceration is *designed* to be unpleasant, most of the research on adjustment to prison life points to considerable adaptation following a difficult initial adjustment period.”).

199. See, e.g., Doris Layton MacKenzie & Lynne Goodstein, *Long-Term Incarceration Impacts and Characteristics of Long-Term Offenders: An Empirical Analysis*, 12 CRIM. JUST. & BEHAV. 395, 409 (1985) (asserting that, among prisoners serving long sentences, those three years into their sentences reported higher levels of anxiety, depression, and psychosomatic illness compared to those six years into their sentences). As MacKenzie and Goodstein note, “[T]he early period of incarceration is particularly stressful for long-term offenders as they make the transition from the outside world to institutional life.” *Id.*

200. See EDWARD ZAMBLE & FRANK PORPORINO, *COPING, BEHAVIOR, AND ADAPTATION IN PRISON INMATES* 150 (1988) (discussing how prisoners found it easier to serve time as time passed); Edward Zamble, *Behavior and Adaptation in Long-Term Prison Inmates: Descriptive Longitudinal Results*, 19 CRIM. JUST. & BEHAV. 409, 416 (1992) (stating that study results indicated a significant decrease in prisoners’ anxiety over time, which supports the study’s overall finding that prisoners adapted to the prison environment); Edward Zamble & Frank Porporino, *Coping, Imprisonment, and Rehabilitation: Some Data and Their Implications*, 17 CRIM. JUST. & BEHAV. 53, 64 (1990) [hereinafter Zamble & Porporino, *Some Data*] (explaining that, among prisoners, study results indicated that the level of dysphoric states, including anxiety, dropped significantly

for seven years. In the first couple of weeks, the new prisoners reported extremely high levels of negative affect.²⁰¹ Within a couple of months, however, reports of depression and anxiety dropped by nearly one-third.²⁰² Fifteen months after incarceration, levels of dysphoria dropped again by one-third.²⁰³ By the time offenders had been in prison for seven years, the mean level of depression “fell within the range considered normal.”²⁰⁴

Admittedly, the science on this point is not as clear as one might like, but one might assume that like other aversive events, this adaptive pattern will lead to a wedge between experience, on the one hand, and prediction and memory on the other.²⁰⁵ There may be a number of reasons why predictors fail to guess the affective impact of experiences: predictors may suffer from a focusing illusion, may not have familiarity with the event, or may not be able to properly draw on past emotional experiences as a guide because they systematically misremember emotional experiences.²⁰⁶ Each of these issues may create significant differences between what a potential offender predicts prison will be like and how a prisoner actually experiences prison.

Consider first a potential offender who has never been incarcerated. This inexperienced predictor might overestimate the impact of imprisonment on well-being. He would likely focus inappropriately on the negative portions of imprisonment rather than recognizing that life continues with emotional highs and lows even after incarceration.²⁰⁷ Just like the early prisonization theorists, the inexperienced offender might predict that each day in prison life gets a little worse. He would thus ignore his capacity to adapt to life in prison, and the normalcy of day-to-day routines in or out of prison. Like inexperienced offenders, policymakers—those who set the rate of punishment—may not be able to predict the amount of suffering a prisoner will experience. Legislators and judges alike may focus inappropriately on the suffering caused by the deprivation of liberty. They may not account for the fact that those who are incarcerated learn to deal with the loss of liberty over time, and their suffering thus decreases.

In contrast, consider the repeat offender.²⁰⁸ Here, one might expect that this experienced predictor should know how much incarceration impacts his well-being. The repeat offender should remember adaptation to prison experience, remember the highs and lows of prison life, and remember that prison life is not as bad as he

over the period of just a few months).

201. See Zamble & Porporino, *Some Data*, *supra* note 200, at 64 (finding “high levels of emotional distress in many subjects” near “the beginning of the prison term”).

202. *Id.*

203. See *id.* (stating that, after a year had passed following the initial three month interviews, the total number of individuals who reported as being depressed or anxious dropped by about one-third—from 37% to 21%).

204. Zamble, *supra* note 200, at 416.

205. Most of the research in this area has focused on adaptation rather than affective forecasting.

206. See *supra* notes 146–47 and accompanying text for a discussion of individuals’ diminished ability to accurately remember emotional experiences.

207. See Blumenthal, *supra* note 115, at 174 (noting the focusing illusion phenomenon, whereby one tends to focus on the immediate event to the exclusion of the other circumstances).

208. This may make sense given the rate of recidivism in this country. In 2006, 43% of all felony defendants in the nation’s largest counties had a prior felony conviction. THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 2 (2010).

anticipated before incarceration. But here, too, there are significant wedges between prediction, experience, and memory. The remembering recidivist likely cannot recall his time in prison with any specificity. Importantly, the recidivist is likely to neglect the duration of incarceration and focus instead on the peak aversive experience (likely the first couple of days in prison) and the end of his time in prison.²⁰⁹ This is not to say that recidivists will not want to avoid longer sentences, just that those who have suffered short sentences may, in fact, remember them as worse than those who suffered longer sentences.²¹⁰

Adding further complexity to this problem is new research that suggests that ex-inmates are far more likely to be associated with negative employment prospects, health outcomes, and family associations.²¹¹ This is true regardless of how long the ex-convict was in prison.²¹² Other research has shown that unemployment; degenerative diseases, such as HIV and hepatitis; and divorce are associated with significant and lasting decreases in overall well-being.²¹³ Thus, those who serve only several months in prison are equally at risk of significant and somewhat permanent reduction in well-being as those who are imprisoned for much longer.²¹⁴

What is important about these post-incarceration changes is that they are not necessarily a part of the common description of the experience of imprisonment. That is, if one were to describe the suffering associated with imprisonment, the description would certainly include the pain associated with deprivations of liberty, may include the pain associated with prison violence (including sexual assault), and could possibly include the stigma associated with being a former convict. These descriptions likely would not include decreased employment opportunities, broken relationships, and poor health.²¹⁵ Thus, it is unlikely that legislators, courts, or potential inexperienced offenders consider these negative experiences at all when setting punishment levels or deciding to offend.

In short, all sorts of stakeholders in the criminal justice system—including those who create sentences and those who commit crimes—likely predict a different level of

209. See *supra* notes 149–64 and accompanying text for a discussion of the peak-end rule.

210. This is likely true for two reasons. First, the length of the sentence adds little to the memory of the experience. Robinson & Darley, *supra* note 1, at 190. Second, the short sentence will be remembered as worse because prisoners at the end of a short prison sentence are likely to report far more negative affect than those at the end of a long sentence because they have not adjusted fully to their new environment. See *id.* (“[L]engthening sentences may actually reduce their recalled negative character if the end experiences are relatively less aversive!”). There is also some evidence that prisoners who are about to be released from prison experience a dip in well-being. Lee H. Bukstel & Peter R. Kilmann, *Psychological Effects of Imprisonment on Confined Individuals*, 88 PSYCHOL. BULL. 469, 488 (1980) (“The typical pattern among these individuals might involve an initial adjustment reaction to incarceration, followed by a period of successful adjustment with another mild psychological reaction (e.g., ‘short-timer’s syndrome’) occurring just prior to release.”). But it is unclear whether this dip in well-being will be better or worse for those who have spent a longer time in prison.

211. BBM, *Happiness and Punishment*, *supra* note 1, at 1049.

212. *Id.* at 1040–41.

213. *Id.* at 1052.

214. *Id.* at 1071–72.

215. See *id.* at 1038 (observing that the results of empirical studies differ from “the assumptions that generally underlie penal policy” with regard to the suffering associated with imprisonment).

suffering than is experienced by incarcerated offenders. Whether this matters depends on one's normative view of criminal punishment. What follows is a brief description of how the problem of multiple selves plays out for the two primary normative criminal theories: retribution and deterrence.

a. Punishing for Retribution

Retributivists justify criminal punishment because those who transgress society's rules, those who have done wrong, deserve punishment. Importantly, the amount of punishment deserved should be proportionate to the wrong or harm committed.²¹⁶ Offenders who commit more severe crimes must suffer harsher sentences.²¹⁷ But how should a retributivist judge the harshness of the sentences? Should a retributivist base punishment on a prediction of suffering, the actual amount the offender suffers, or the amount the offender remembers suffering?²¹⁸

It makes some intuitive sense that retributivists should be concerned, at least in part, about the actual experience of offenders. After all, punishment is not an expressive act for retributivists.²¹⁹ Society is not voicing its displeasure at the offender's bad acts or sending messages to other potential offenders. Society is punishing an individual for his transgressions. If an individual deserves a certain amount of suffering because of his bad acts, his experience of suffering might be relevant to determining how much punishment is appropriate.²²⁰

But retributivists might have difficulty taking that intuition too far. Consider how difficult it would be to actually try to calibrate punishment for each individual offender. What if an offender actually prefers prison? Should he be released to increase his suffering? What if one person suffers significantly more than others as a result of incarceration because he is claustrophobic, singled out for harassment, etc.? Should he be released earlier to balance his suffering with the suffering of those who commit similar crimes?²²¹ These are simple examples, but they suggest that individuating punishment to suit the experience of the individual being punished might be difficult.

216. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.03, at 52 (6th ed. 2012).

217. *Id.* § 6.03, at 53.

218. There is a spate of recent scholarship on similar issues. *See generally* BBM, *Happiness and Punishment*, *supra* note 1; John Bronsteen, Christopher Buccafusco, & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010); Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605 (2011). This scholarship has, however, focused on whether retributivists should account for hedonic adaptation. The goal here is not to resolve that dispute, but to highlight that, in part, this is a problem of multiple selves. Those who claim that community norms set retributivist policy believe that prediction matters more than experience. Those on the other side argue that experience matters more.

219. *See* DRESSLER, *supra* note 216, § 2.03, at 18 (distinguishing the expressive theory of punishment from retributivism).

220. *See generally* Kolber, *supra* note 51 (arguing that policymakers must grapple with the normative implications of grounding punishment theory on experience).

221. *See id.* at 190–91 (providing numerous examples of the ways in which different individuals could experience the same punishment differently).

To escape this problem, one could argue instead that retributivists should not care about individual suffering but instead should focus on the expectation of suffering that is generally anticipated in the community. This predictive account could eliminate the need to radically individuate but allow for some individuation at sentencing. Thus, first time offenders might get a lower sentence because the initial suffering upon entering prison might be worse.

Obviously, these are not the only possible choices for retributivists, but the examples suggest that, at a minimum, retributivists must think seriously about whether prediction (i.e., community expectations) or offender experience should be privileged in the calculation of punishment. If one privileges experience, then she might eliminate sentencing guidelines, which do not seem to give enough flexibility to individuate sentences. If, on the other hand, she privileges prediction, small tweaks to the current system might fix some of the problems.

There may also be second-order problems related to the wedges among prediction, experience, and memory. Retributivists who privilege experience and memory may have a difficult time with proportionality. Offenders will likely remember longer sentences as somewhat better experiences than shorter sentences. As described above, remembering offenders likely ignore the length of the sentence when thinking about the suffering they have endured. Instead, offenders likely remember an average of the worst experience (their initial time in prison) and the end of their incarceration.²²² For those serving longer sentences, the end period is likely to be less bad than for those serving short sentences because long-term prisoners have adapted to the circumstances. Thus, short timers may remember imprisonment as worse than long-term prisoners. This anomaly, of course, creates difficulty for adhering to proportionality between minor and serious offences.

b. Punishing for Deterrence

In contrast to retributivists, utilitarians justify punishment as a means of reducing offensive, well-being-reducing, criminal conduct.²²³ According to this theory, punishing a bad actor sends a signal to the general community to forgo future criminal conduct.²²⁴ This punishment also deters the bad actor from future offensive conduct “by inflicting pain and suffering upon him for his criminal actions.”²²⁵ This punishment, however, comes at a cost. Each unit of punishment could reduce aggregate or overall well-being because the person being punished is suffering.²²⁶

Deterrence theory is thus to be judged on its ability to reduce crime at the least cost to overall well-being. There are two sides to this equation. First, punishment must actually deter. This is a results-oriented question, and the differences between prediction, experience, and memory loom large. For deterrence to work, potential offenders must actually perceive that punishment will be more costly than the benefits

222. See *supra* notes 149–64 and accompanying text for a discussion of the peak-end rule.

223. See DRESSLER, *supra* note 216, § 2.03, at 14 (stating that, according to utilitarianism, the purpose of the legal system is to maximize the net happiness of society).

224. *Id.* § 2.03, at 15.

225. *Id.*

226. See *id.* (noting that punishing one person reduces aggregate well-being).

that will accrue with successful completion of the crime.²²⁷ As discussed above, it is unlikely that anyone can predict with any real accuracy how much she will suffer from being incarcerated.²²⁸ Experienced predictors—those who have already been in prison—are likely to underestimate the costs of being incarcerated because they cannot remember past experiences accurately.²²⁹ As Paul Robinson and John Darley argue, the standard view of recidivism is that ex-convicts reoffend because the prior sentence was not harsh enough.²³⁰ But it may be that rememberers view prison as not “so bad after all and risking it is not an important consideration in one’s thinking in deciding whether to offend.”²³¹ Inexperienced potential offenders likely have no frame of reference for their possible incarceration and are therefore unlikely to make accurate predictions. They may overpredict potential suffering because they focus inappropriately on the deprivation of liberty, without realizing that life continues for convicts over time. On the other hand, these inexperienced predictors may radically underpredict post-incarceration suffering.²³² These concerns go to the core of the deterrence theory. And, as others have noted, the difficulties that humans have predicting and remembering suffering suggest that society cannot hope to create optimal deterrence through punishment.²³³

These concerns, however, are separate and apart from a concern about how to minimize the loss of well-being. For purposes of this Article, the question is: what should count as diminishment of well-being? Should utilitarians consider the

227. Economists claim “that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.” Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 278 (8th ed. 2011) (stating that a person commits a crime because the expected benefits are greater than the expected costs). The costs of crime include the costs of the instruments of crime (weapons, burglar tools, etc.), the opportunity cost of the criminal’s time, and the expected costs of criminal sanction. POSNER, *supra*, at 278. The benefits include tangible property or monetary gains and intangible gains like reputation. *Id.*

228. See *supra* Part III.A.1 for a discussion of the research indicating that individuals are poor predictors of how life events will affect their future emotional state. Paul Robinson and John Darley advance three arguments about why current behavioral data undermine this theory. Robinson & Darley, *supra* note 1, at 174. They argue that potential offenders (1) do not know the implications of their bad acts; (2) do not perceive costs of their crime as significant either because the perceived likelihood of punishment is so small, or because punishment is distant; and (3) are incapable of bringing this information to bear on their conduct choices at the moment they make their choices even if they know the rules and believe that they should not commit the crime. *Id.* This Article is concerned only about the perception of the amount of punishment.

229. See *supra* Part III.A.2 for a discussion of the disparities between the experiencing and the remembering selves. The mistakes made by these experienced predictors are particularly concerning given the rate of recidivism in this country. See Robinson & Darley, *supra* note 1, at 191 (stating that many current offenders are recidivists).

230. Robinson & Darley, *supra* note 1, at 191.

231. *Id.* (internal quotation mark omitted).

232. If utilitarians are concerned about total suffering, post-incarceration suffering should be part of the calculation. Retributivists, on the other hand, may reasonably disagree about whether post-incarceration suffering is the concern of the state doling out punishment. *E.g.*, VICTOR TADROS, *THE ENDS OF HARM* (2011). The full extent of these arguments is well beyond the scope of this Article.

233. See BBM, *Happiness and Punishment*, *supra* note 1, at 1059 (asserting that criminals will predict the effect of punishment on their well-being as worse and longer than it actually is); Robinson & Darley, *supra* note 1, at 173–75 (discussing reasons for “skepticism of criminal law’s deterrent effect”).

predictive, experiencing, or remembering frame?

The cornerstone of utilitarian thought seems to be about the actual experience of individuals. Jeremy Bentham, the founder of modern utilitarianism, considered experience the *sine qua non* of utility.²³⁴ Bentham argued in *An Introduction to the Principles of Morals and Legislation* that utility is anything that tends to “produce benefit, advantage, pleasure, good, or happiness, . . . or . . . to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered.”²³⁵ This viewpoint has found similar support in more recent economic thought. For example, Daniel Kahneman, Peter Wakker, and Rakesh Sarin advocated measuring utility based on a summation of individual and temporally specific experiences.²³⁶ This makes some intuitive sense. If the concern is about aggregate well-being, the proper metric might be the amount of suffering that an offender actually experiences. This intuition, however, is difficult to square with the utilitarian justification for punishment. Utilitarians justify punishment because the expectation of suffering deters generally and the memory of suffering deters specifically.²³⁷ The former necessarily implicates an *ex ante* predictive frame, the latter an *ex post* remembering frame. Should predictions or memories of suffering count as suffering?

Imagine that a utilitarian magician could implant predictions about horrible suffering as a result of incarceration into the minds of everyone in society and memories of suffering during incarceration into the minds of criminal offenders.²³⁸ The magician would, of course, be able to implant these predictions and memories without actually sending anyone to prison or causing any actual suffering. If experience is all that matters for maximizing well-being, this sorcery would be a utilitarian dream. Society could achieve deterrence because society—including recidivists—would predict significant suffering from imprisonment. Since no one actually would experience suffering in prison, overall well-being would not be diminished through punishment.²³⁹ If, on the other hand, a utilitarian wants to take account of memories in a calculation of well-being, this hypothetical is less clear. Those who have offended will have significant memories of suffering. Those memories may reflect a diminution in well-being.²⁴⁰

234. See Richard M. Ryan & Edward L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, 52 ANN. REV. PSYCHOL. 141, 143–44 (2001) (arguing that Bentham equated the well-being of society with a hedonic view of pleasure).

235. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (1789); see also Ryan & Deci, *supra* note 234, at 144 (“Utilitarian philosophers such as Bentham argued that it is through individuals’ attempting to maximize pleasure and self-interest that the good society is built.”).

236. See Kahneman et al., *supra* note 149, at 377 (describing a system of real-time, intermittent measurement); see also BBM, *Welfare as Happiness*, *supra* note 9, at 1586 (arguing that the measure of one’s welfare “is the aggregate of a person’s moment-by-moment experiences”).

237. DRESSLER, *supra* note 216, § 2.03, at 15.

238. Many thanks to Kimberly Kessler Ferzan for this hypothetical.

239. While utilitarians should not be concerned about overdetering, they may be worried that they will create too much punishment for a given crime and thus decrease overall well-being by more than necessary. That is, they must be concerned that the costs of incarceration, including the decrease in well-being suffered by the offender, is more than the decrease in well-being caused by the criminal offense. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (3d ed. 2003).

240. This is true not just because the contemporary experience of negative memories may diminish well-

The intent here is not to unravel the seeming knot that utilitarians have created about the relative importance of prediction, experience, and memory. Rather the goal is simply to highlight the multiple selves problem inherent in a theory that places importance on prediction and memory, but evaluates well-being from an experiencing frame.

IV. A BRIEF QUESTION ABOUT ADAPTATION

An early—and oft-cited—finding of the research into happiness is that external life events typically do not impact long-term happiness.²⁴¹ People who win the lottery or become disabled do not report big changes in happiness over the long term.²⁴² Someone who wins the lottery may report an initial spike in happiness, and someone who becomes disabled may report an initial drop, but, in the long run, these same individuals report that their happiness returns to its pre-injury level. A number of legal scholars have grounded normative and descriptive theories on this finding.²⁴³ Reports of adaptation, however, raise species of both the definitional dilemma and the temporal puzzle.²⁴⁴

First, with respect to the definitional dilemma, the question is whether reports of return to pre-injury levels of happiness actually reflect changes in well-being. Consider the time-trade-off studies described above.²⁴⁵ In those studies, researchers found that even when dialysis and colostomy patients reported that they had returned to levels of

being in the moment. It may also be true because the memories themselves are of being punished.

241. See Swedloff & Huang, *supra* note 78, at 555 (reviewing the literature that shows that events such as winning the lottery do not significantly impact happiness in the long run). Likewise, one's life circumstances do not affect long-term happiness. *Id.* Thus, prettier and wealthier people are not necessarily happier. *Id.*; see also Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 PSYCHOL. SCI. 8, 8 (2004) (stating that life circumstances like health, income, and physical attractiveness “often account for a very small percentage of variance in [subjective well-being]”); Eunkook Suh et al., *Events and Subjective Well-Being: Only Recent Events Matter*, 70 J. PERSONALITY & SOC. PSYCHOL. 1091, 1091 (1996) (citing other studies suggesting that external life circumstances do not affect happiness).

242. See, e.g., Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917, 920–21 (1978) (finding that lottery winners and controls did not significantly differ in their ratings of happiness).

243. See, e.g., Bagenstos & Schlanger, *supra* note 2, at 774 (claiming that in light of adaptation, damage awards for loss of enjoyment of life should be eliminated because “they entrench the societal view that disability is inherently tragic, and encourage people with disabilities to see their lives as tragedies”); BBM, *Adaptation and Settlement*, *supra* note 3, at 1536–40 (describing the effect of adaptation on civil settlements); BBM, *Happiness and Punishment*, *supra* note 1, at 1068–80 (describing the impact of adaptation on theories of punishment); Robinson & Darley, *supra* note 1, at 187 (claiming that adaptation, in part, undermines deterrence rationales for punishment); Sunstein, *supra* note 2, at S157–58 (claiming that because tort victims adapt to their injuries, their noneconomic losses are, in most senses, illusory).

244. I have written elsewhere about my concerns with the ubiquity, strength, and importance of adaptation. See Swedloff & Huang, *supra* note 78, at 564–75 (raising concerns about the meaning of hedonic adaptation generally and raising specific concerns about applying that finding in the context of pricing tort damages); Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 COLUM. L. REV. SIDEBAR 39 (2008) (raising concerns about the descriptive power and normative import of hedonic adaptation in the context of settlement).

245. See *supra* notes 88–92 and accompanying text for a discussion of studies finding that current patients were willing to return to pre-injury states in exchange for having fewer years to live.

happiness consistent with those who did not have a colostomy or receive dialysis, the patients were willing to give up significant portions of their life to live without injury.²⁴⁶ With this in mind, it is possible that the adaptation findings, even if they are reflective of subjective reports of happiness and life satisfaction, are not reflective of well-being.

If the findings are not reflective of well-being, they cannot be used to suggest changes to legal institutions. For example, Cass Sunstein has argued that because individual happiness adapts post injury, noneconomic losses such as pain and suffering and loss of enjoyment of life are fleeting and illusory.²⁴⁷ Further, Sunstein claims that juries are likely to overcompensate these injuries because they do not understand or anticipate adaptation.²⁴⁸ But if studies about happiness and injuries are not reflective of actual well-being, they are not powerful evidence about how to monetize tort injuries. Thus, a return in self-reported happiness cannot be used as evidence that juries in tort trials are overestimating noneconomic injuries.²⁴⁹ All of this turns on whether the subjective reports of happiness and life satisfaction are a sufficient proxy for actual well-being. That question is part and parcel of the definitional dilemma.²⁵⁰

The adaptation findings likewise raise questions about the temporal puzzle.²⁵¹ Even if injured parties report similar happiness and life satisfaction as they did before the injury *and* those reports are reflective of actual well-being, it is unclear what to make of that finding. People still predict that they will be happier without the injury. Moreover, even after reporting adaptation to injury, individuals still claim that they were happier pre-injury.²⁵² The finding of adaptation does not specify whether to privilege the experience of adaptation over the prediction of the cost of injury or the memory of a better life without injury.

246. See *supra* notes 91–92 and accompanying text for a discussion of studies finding colostomy and dialysis patients preferred to lose years of their lives to return to their prior states.

247. See Sunstein, *supra* note 2, at S157–58 (arguing that injured persons do not anticipate their ability to adapt, thus rendering their hedonic damages illusory or exaggerated).

248. *Id.*

249. See Swedloff & Huang, *supra* note 78, at 593–95 (arguing that the research on hedonic adaptation does not support a theory that juries are overestimating hedonic damages).

250. For a descriptive, rather than normative example, consider the argument put forth by John Bronsteen, Christopher Buccafusco, and Jonathan Masur. They claim that hedonic adaptation can explain why delays in civil trials create greater economic opportunities for settlement. BBM, *Adaptation and Settlement*, *supra* note 3, at 1518. According to their argument, over time the injured plaintiff will feel less injured and will thus accept less money to make her whole. *Id.* at 1538–39. But again, if reports about happiness post-injury are not descriptive of well-being, these studies are not powerful evidence of why civil litigants are more likely to settle after lengthy delays in trial. See Peter H. Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 COLUM. L. REV. SIDEBAR 50, 50 (2008) (arguing that hedonic adaptation does not explain settlement decisions because individuals may be motivated to sue for nonmonetary reasons); Swedloff, *supra* note 244, at 48–49 (arguing that the research on hedonic adaptation is not sufficiently developed such that one could conclude that it impacts settlement decisions).

251. Indeed, a failure to anticipate adaptation may be part of the cause for the difference between prediction and experience. See Blumenthal, *supra* note 115, at 174 (noting the focusing illusion phenomenon, whereby one tends to focus on the immediate event to the exclusion of the other circumstances).

252. See Smith et al., *supra* note 84, at 693 (discussing results of a test that showed that current colostomy patients “recall being more happy 5 years ago than they are now,” despite the fact that they reported very similar happiness, life satisfaction, and quality of life to former colostomy patients).

Thus, to use the adaptation findings in either a normative or descriptive manner, scholars must first address the definitional dilemma and the temporal puzzle.

CONCLUSION

The literature on happiness and life satisfaction can be profoundly interesting from a descriptive standpoint. This research has provided and will continue to provide insights about the causes, correlates, and conditions of happiness and life satisfaction. But, without more, the data cannot inform public policy generally or transform legal institutions. As laid out above, there are two fundamental questions scholars must address.

First, the data can point in conflicting and incoherent directions. It is thus not possible to use these data as a proxy for well-being. To use the data in instrumental ways, policymakers must first think about how the data fit into a more complete definition of well-being.

But even if the data were a reasonable proxy for well-being, scholars still have to think carefully about the divergences between prediction, experience, and memory. Scholars should think carefully about simply claiming that these differences are errors in need of correction. Whether the legal system should take account of or try to correct these differences may depend on the theoretical construct for the system. Thus, scholars must take into account not just the findings but also the goals of the system itself.