

Hedonic Adaptation and the Settlement of Civil Lawsuits

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ABSTRACT

This paper examines the burgeoning psychological literature on happiness and hedonic adaptation (a person's capacity to preserve or recapture her level of happiness by adjusting to changed circumstances), bringing this literature to bear on a previously overlooked aspect of the civil litigation process: the probability of pre-trial settlement. The glacial pace of civil litigation is commonly thought of as a regrettable source of costs to the relevant parties. Even relatively straightforward personal injury lawsuits can last for as long as two years, delaying the arrival of necessary redress to the tort victim and forcing the litigants to expend ever greater quantities of resources. Yet these procedural delays are likely to have salutary effects on the litigation system as well. When an individual first suffers a serious injury, she will likely predict that the injury will greatly diminish her future happiness. However, during the time that it takes her case to reach trial the aggrieved plaintiff is likely to adapt hedonically to her injury—even if that injury is *permanent*—and within two years will report levels of happiness very close to her pre-injury state. Consequently, the amount of money that the plaintiff believes will fairly compensate her for her injury—will “make her whole,” in the typical parlance of tort damages—will decrease appreciably. The sum that the plaintiff is willing to accept in settlement will decline accordingly, and the chances of settlement increase—perhaps dramatically. The high costs of prolonged civil litigation are thus likely to be offset substantially by the resources saved as adaptive litigants succeed in settling before trial.

INTRODUCTION

Perhaps the most important recent development in social science research is the emergence of an interdisciplinary group of psychologists, economists, and public policy analysts devoted to the study of happiness, or, as it is known in the literature, *hedonics*.¹ Investigators have begun to ask questions about the kinds of things that make people happy, about people's ability to predict what will make them happy, and about the intensity and duration of changes in

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¹ See WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY (Daniel Kahneman et al. eds., 1999).

happiness.² The answers to these questions have challenged some of the fundamental tenets of psychological and economic theory.³ They also have significant practical implications for medicine, public policy, business, and, of course, the law. The legal implications of the new happiness research are only now being realized, and this Article is the first to apply these findings to the settlement of civil litigation.

Among the most important and robust findings of hedonic psychology is the discovery that many positive and negative life events—including significant changes such as winning the lottery, being denied tenure, and becoming disabled—have little long-term effect on well-being.⁴ Immediately after experiencing these and other events, people show substantial changes in reported happiness, but in the weeks, months, and years that follow, people undergo a process of “hedonic adaptation” that nullifies the effect of the change and returns them to a pre-event level of well-being. This adaptation occurs, in part, because people tend to shift their attention away from the few new things brought about by the change and back towards the mundane features of daily life.⁵ While many changes are subject to adaptation within a couple of years, others, it seems, tend to be unadaptable—particularly those injuries that cause constant or worsening pain.⁶

Concomitantly, although people often experience hedonic adaptation to major life events, researchers have found that people fail to recognize and remember adaptation’s effects.⁷ An overwhelming body of evidence now shows that when people are asked to predict how future changes are likely to affect their well-being, they make significant errors in their estimations of both the intensity of the change and its duration. Thus, healthy people tend to predict that becoming disabled will have a more substantial impact on their well-

² *Id.* at ix.

³ See Isabelle Brocas & Juan D. Carrillo, *Introduction*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS, at xii (Isabelle Brocas & Juan D. Carrillo, eds. 2003).

⁴ Nobel laureate Daniel Kahneman writes, “The fundamental surprise of well-being research is the robust finding that life circumstances make only a small contribution to the variance of happiness” Daniel Kahneman, *Experienced Utility and Objective Happiness*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS, *supra* note 3, at 199.

⁵ On the role of attention in adaptation, see *infra* notes 85-87.

⁶ On the differences between adaptable and unadaptable injuries, see *infra* notes 78-82.

⁷ See Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617 (1998).

being and that the impact will last longer than it actually does. In effect, they ignore the strength and speed of hedonic adaptation.⁸

In this Article, we apply this research on hedonic adaptation to the settlement of civil lawsuits. Specifically, we examine the likely effects of adaptation on a plaintiff seeking the recovery of pain and suffering or punitive damages in a personal injury suit. Following the research on hedonic psychology, we suggest that such a plaintiff, when making her initial settlement demands shortly after her injury, will tend to overestimate both the severity and the duration of her injury. Her attention will be drawn towards the novel and painful features of the injury, and, like most people, she will fail to recognize the extent to which hedonic adaptation will enable her to cope with her new circumstances. During the many months that she will have to wait before trial, she will begin to experience the effects of hedonic adaptation, lifting her perception of her own well-being, and, we suggest, making her more willing to settle for a lower and more accurate sum.

The legal literature is replete with attempts to weigh the benefits of additional trial processes—error reduction, fairness to litigants, improved opportunities to participate—against the administrative costs of delay.⁹ Indeed, modern due process doctrine is largely organized along these lines.¹⁰ Yet while all of these analyses count trial delays as pure economic losses, we propose that, by allowing plaintiffs time to adapt to their injuries, such delays may result in a beneficial increase in settlements. Accordingly, we suggest that current accountings of drawn-out trial processes have understated the benefits that extended procedure can provide.

Part I of this Article sets out the principal law and economics model of civil settlement as well as recent challenges to the model

⁸ This research is further discussed at *infra* notes 88-91.

⁹ For a particularly incisive treatment of these questions, see Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601 (2006).

¹⁰ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (“More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

drawn from psychological research. In Part II, we elaborate on the social scientific research on hedonic adaptation and affective forecasting, and we survey the few legal scholars who have devoted attention to these discoveries. In Part III, we apply the findings of hedonic psychology to the settlement of personal injury lawsuits, and in Part IV, we offer a series of empirically testable predictions about such lawsuits and reflect on potential implications and objections.

I. THE FACTORS THAT DRIVE CASES TOWARD SETTLEMENT

For the past quarter-century, perhaps no topic relating to the American civil justice system has received more scholarly attention than the attempt to understand what distinguishes lawsuits that settle from those that go to trial. Fewer than two percent of federal civil lawsuits go to trial,¹¹ but any case that does so presents a puzzle for law and economics. The value of a lawsuit can be monetized by multiplying the probability of winning by the amount to be won, and then that value can be paid in settlement, avoiding the large transaction costs of litigation. Both parties stand to gain handsomely from such a deal, so why would they ever choose to forgo it in favor of a trial?

Early hypotheses, operating under the assumption that parties rationally pursue the goal of maximizing wealth or utility, pointed to bargaining strategies or informational asymmetries as the reasons for trial. Behavioral law and economics then modified the assumption of rationality by considering factors that undermine rational choice. Ultimately, behavioral psychology has indicated that wealth maximization is not the only goal driving decisions about settlement. Because other goals—principally, a desire for an outcome perceived as fair—influence the decision whether to settle, that decision would be affected in turn by a plaintiff's changing perception over time of the sum that constitutes fair compensation.

This Part briefly sketches the time that elapses during the litigation process. It then surveys the development of the literature on settlement, describing the analytical framework we aim to augment via insights from the new psychological literature on happiness.

¹¹ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 462 Table 1 Civil Trials in U.S. District Courts at Ten-Year Intervals, 1962-2002 (2004).

A. Time in the Litigation Process

Since Charles Dickens wrote about *Jarndyce and Jarndyce* more than 150 years ago,¹² it has been widely understood and bemoaned that litigating a civil case all the way through trial takes a long time. Today, the median interval in federal court between filing and trial adjudication is about two years.¹³ Even that figure does not include the time that elapses before filing, after an injury has occurred, while the harmed party decides whether to hire a lawyer and pursue a legal remedy. When that decision is made and a lawyer is found, the lawyer must investigate whether the issue merits litigation. If so, then a complaint is filed in the appropriate court.¹⁴ The defendant is notified of the suit by service of process,¹⁵ and litigation commences.

First comes the filing of motions, as the defendant's lawyer will submit an answer to the complaint and perhaps a motion to dismiss the lawsuit.¹⁶ The court considers the motion and eventually rules on it, and if the suit is not dismissed, then discovery begins. Each party's lawyers draft lists of questions (interrogatories) that are propounded to the opposing party, whose lawyers then draft answers in consultation with their client.¹⁷

After the interrogatories, the parties request from each other all documents relevant to the case.¹⁸ Finding and producing these documents can be onerous and time-consuming, as can reviewing the documents to find whatever important information might be contained within them.¹⁹ Then there are depositions.²⁰ Each party's lawyers

¹² CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853).

¹³ STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. C-5.

¹⁴ See FED. R. CIV. P. 3.

¹⁵ FED. R. CIV. P. 4.

¹⁶ FED. R. CIV. P. 7, 12.

¹⁷ See FED. R. CIV. P. 33.

¹⁸ See FED. R. CIV. P. 34.

¹⁹ Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 240-41 (2004) ("Many civil litigators spend most or all of their time drafting discovery requests, compiling and reviewing documents and data to respond to discovery requests, drafting discovery responses, filing motions for protective orders regarding discovery or motions to compel discovery, responding to these motions, and otherwise fighting over discovery issues.").

²⁰ *E.g.*, FED. R. CIV. P. 30.

schedule times in which to question witnesses, and then the questioning occurs.

The parties might then file motions for summary judgment.²¹ Because this is such an important part of the litigation,²² it can take considerable time on the part of both lawyers and the court.²³ If the motions are denied, then the next phase is the trial itself. A jury is empanelled (unless the parties have waived their right to jury trial),²⁴ opening statements are made, witnesses are examined and cross-examined, and finally closing arguments occur before the jury deliberates.

Of course, few cases continue through all of these phases. A lawsuit can settle at any time from filing through adjudication, or it can be terminated by a grant of a motion to dismiss or motion for summary judgment.²⁵ The point is simply that when a case does not settle early, the steps it must take to wend its way through the litigation process to judgment take considerable time.

Along the way, there will typically be ongoing settlement negotiations between the lawyers with little or no involvement by the clients, who are not professional negotiators and whose involvement might therefore run contrary to their own interests.²⁶ Even if these negotiations have not borne fruit by the time the pre-trial litigation is nearing completion, a party still has much to gain by settling before trial. The expense of trial itself can be considerable or even, in some cases, vast. Not only must the lawyer be paid for every hour spent

²¹ See FED. R. CIV. P. 56.

²² EDWARD J. BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 1 (West Group 2d ed. 2000); John Bronsteen, *Against Summary Judgment*, 75 GEO WASH. L. REV. 522, 523 (2007).

²³ Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 171 (1988) ("The judge deciding a summary judgment question must along with her law clerks read, research, reflect, hold a hearing, read and research some more, and often must draft, revise, and issue a lengthy written opinion as well. Although presiding over a jury trial takes time, it may not take any more of the judge's time than does consideration of the summary judgment motion."); Morton Denlow, *Summary Judgment: Boon or Burden?*, 37 NO. 3 JUDGES' J. 26, 29 (1998).

²⁴ See U.S. CONST. amend. VII.

²⁵ E.g., Bronsteen, *supra* note 22, at 530.

²⁶ See generally Windle Turley, *Creating the Right Settlement Environment*, TRIAL, June, 1994, at 28.

preparing for and performing in court,²⁷ but also expert witnesses may have to be paid,²⁸ and the court itself must expend its limited resources on only this case.²⁹ Much is to be saved, therefore, by avoiding trial even if the parties have failed to avoid the costs of pretrial litigation.

B. The Rational Actor Model of Settlement Decisionmaking

As noted above, a case can settle at any time during the litigation process. A settlement is possible, of course, only if the largest amount of money that a defendant is willing to pay exceeds the smallest amount of money that a plaintiff is willing to accept.³⁰ Early proponents of law and economics created models that explained when that circumstance would arise, operating under the assumption that litigants will act to maximize their wealth.³¹

In the early 1970s, William Landes and Richard Posner began to analyze settlement through the lens of law and economics.³² Building on their work, George Priest and Benjamin Klein later proposed a model of settlement—predicting that when cases fail to settle, they will be adjudicated in favor of the plaintiff 50% of the time—that has permeated the literature ever since.³³ Landes and Posner developed the core insight that the cost of litigating a case opens up a zone of bargaining within which the result for each party

²⁷ D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 903 (2006).

²⁸ Bronsteen, *supra* note 22, at 534-35.

²⁹ *Id.* at 540-41; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 421 (1982) (“If cases are disposed of quickly, the time saved can be used to consider more cases.”). One commentator has estimated that trials cost federal courts about \$4000 per day (not counting the cost to litigants), and although he was discussing criminal cases, the costs (such as judicial salary) apply equally to civil cases. David Wippman, Notes and Comment, *The Costs of International Justice*, 100 AM. J. INT’L L. 861, 868 (2006).

³⁰ Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 111 (1994) (“Lawsuits will settle if the defendant’s maximum offer is higher than the lowest offer the plaintiff will accept.”).

³¹ *See id.* at 108-09.

³² Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); *see also* John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

³³ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

will be better than the party's expected utility from litigating to trial. Specifically, a litigant will calculate the value (or cost, for a defendant) of a lawsuit by multiplying the damages by the probability of winning, then subtracting the cost of litigation.³⁴ If the litigants each come to a similar assessment of the value of the case, then they will settle because doing so saves them the transaction costs of litigation.

For example, suppose that a plaintiff sues for \$100,000 in damages and has a 50% chance of winning at trial. Absent transaction costs, a risk-neutral plaintiff would accept a settlement offer of no less than the expected value of the lawsuit: \$50,000 (i.e., \$100,000 x .5). And a risk-neutral defendant would be willing to make a settlement offer of no more than that same expected value: \$50,000. The bargaining zone would be limited to that specific amount, and a case might well go to trial because settlement would be no better for either party than trial.

The introduction of transaction costs makes all the difference. Assume that litigating the case to adjudication would cost the plaintiff and defendant each \$10,000. That would make the expected value of the litigation \$40,000 for the plaintiff and the expected cost \$60,000 for the defendant. Any settlement between \$40,000 and \$60,000 would be better for both parties than a trial. The bargaining zone would thus be \$40,000 to \$60,000, and we would expect a settlement somewhere within that zone.³⁵ Widening the bargaining zone in this way increases the likelihood of settlement.³⁶ The classic economic model tells us nothing about the dollar value within that zone for which the case would settle, but merely that it would be some point in the range.³⁷ By eliminating the transaction costs of trial, a settlement

³⁴ Richard A. Posner, *supra* note 32, at 418.

³⁵ For a similar explanation and example, see Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 7 (2003).

³⁶ See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 101 (1990) (“[I]t is natural—as well as customary in the legal and economic literature—to assume that the likelihood of settlement is positively related to the width of the settlement zone.”); Rave, *supra* note 27, at 892 (“Generally, the wider the settlement zone, the more likely the case is to settle.”). The existence and size of the bargaining (or “settlement”) zone is, on this account, the primary condition on which settlement depends. See Korobkin, *supra* note 35, at 6.

³⁷ Korobkin, *supra* note 35, at 8-9.

surplus is created—\$20,000 in this example—that will benefit both parties even if it is divided in a way that does not benefit them equally.

It should be noted that even if the parties were wealth-maximizing rational actors who reached the same assessment of the probability of a plaintiff victory, settlement would not be assured. A trial could result from rational but ultimately harmful bargaining behavior.³⁸ Each side might try to capture most of the settlement surplus for itself by hard bargaining—telling the opposing party that the only alternative to such a one-sided deal is a trial (which is an even less appealing option because it eliminates the entire surplus). Both parties might play this game of “chicken” all the way to the mutually unfavorable outcome of an adjudication.³⁹ But this risk might be outweighed under certain circumstances by the potential benefit of capturing most of the settlement surplus, making such bargaining rational.

What emerges from the rational actor model is that two sorts of things—hard bargaining and differing assessments of a trial’s likely outcome—can funnel cases away from settlement and toward adjudication. These factors might, however, be mitigated to some degree by the fact that attorneys are sophisticated repeat-players.⁴⁰

C. Behavioral Modifications of the Rational Actor Model

The classic economic model is based on the assumption that litigants act rationally to try to maximize their wealth. Still working within the framework of wealth maximization as the litigants’ only goal, several scholars have added nuances or modifications to these models by emphasizing the limits of human rationality. And more recently, evidence has emerged that litigants pursue goals other than

³⁸ Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972-73, 975-76 (1979).

³⁹ Mnookin & Kornhauser, *supra* note 38, at 975.

⁴⁰ Cf. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 81 (1997) (“How does the economic model accurately predict the high rate of settlement if disputant behavior systematically departs from the assumptions of the model in ways that suggest lower rates of settlement? One likely answer, we submit, is the role of lawyers in the litigation system.”).

wealth maximization—in particular, that they are far more likely to accept a settlement offer if they perceive it as fair.

1. Obstacles to Wealth Maximization

Even when people aim to maximize wealth, they may fail due to psychological factors that lead them to act irrationally. One such factor, *optimism bias*,⁴¹ causes both plaintiffs and defendants to overestimate their prospects of winning at trial.⁴² This reduces the likelihood of settlement. If the damages sought are \$100,000 and if the plaintiff and defendant each view their own odds of victory as 65%, then the plaintiff will value the case at \$65,000 and the defendant at \$35,000. If settlement would enable each to avoid \$10,000 in costs, that would make the plaintiff willing to accept a minimum of \$55,000 and the defendant willing to offer a maximum of \$45,000. Under these circumstances, no settlement will be reached.

Whereas optimism bias can shrink or even eliminate the bargaining zone, another set of behavioral considerations known as *prospect theory* can shift the zone toward plaintiffs or defendants. Daniel Kahneman and Amos Tversky have famously demonstrated that when people face the prospect of a gain, they are risk averse;

⁴¹ As might be expected, this psychological trait affects many areas of life beyond the realm of litigation. Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 (1998) (“An amazingly robust finding about human actors . . . is that people are often unrealistically optimistic about the probability that bad things will happen to them. A vast number of studies support this conclusion. Almost everyone thinks that his or her chances of having an auto accident, contracting a particular disease, or getting fired from a job are significantly lower than the average person’s chances of suffering these misfortunes; estimates range from twenty to eighty percent below the average person’s probability.”).

⁴² E.g., George Loewenstein et al., *Self-serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 153 (1992). Loewenstein and his co-authors gave undergraduates a set of facts in an auto accident case, then paired them off as plaintiffs and defendants and instructed each pair to negotiate a settlement. Before negotiating, they were asked to guess the judge’s award in the actual case and to decide the award they themselves deemed fair. After negotiating, they were asked to recall the relevant facts of the case. Although all subjects read the same facts, plaintiffs made substantially higher guesses and fairness determinations than did defendants, and each side recalled better the facts supporting its own claims than those that cut in favor of the opposing party. *Id.* at 145-51.

whereas when they face the prospect of a loss, they are risk seeking.⁴³ A settlement is a fixed gain for a plaintiff or loss for a defendant, whereas a trial holds out the prospect of a larger but uncertain gain or loss.⁴⁴ Applying prospect theory to the topic of settlement, Jeffrey Rachlinski has used experiments to illustrate that plaintiffs can be expected generally to be irrationally risk averse whereas defendants can be expected generally to be irrationally risk seeking.⁴⁵ This phenomenon does not reduce settlement rates but does shift the bargaining zone downward, by making plaintiffs willing to settle for less and defendants unwilling to settle for amounts that risk-neutral litigants would find acceptable.

These effects reverse when probabilities are low.⁴⁶ Imagine a nuisance lawsuit wherein the plaintiff has a very low chance of victory (say, 1%) but a very high amount of damages were he to win (say, \$10 million). The bargaining zone would shift upward because people are risk-seeking with respect to gains and risk-averse with respect to losses when probabilities are low (explaining, for example, why they

⁴³ Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 344 (1984); see also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

⁴⁴ One might speculate that, at least under certain circumstances, plaintiffs would not view the money at stake as a gain and defendants would not view it as a loss. If, for example, a defendant had taken money from the plaintiff via the underlying tort or contract violation, then anything less than a full repayment of that baseline sum could be treated by the defendant as an overall gain and by the plaintiff as an overall loss. This possibility is mentioned briefly in Part I.C.2, *infra*. However, Rachlinski's experimental findings suggest otherwise, indicating that plaintiffs view settlements as gains whereas defendants view them as losses.

⁴⁵ Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996). In one experiment, undergraduates were assigned the role of attorney for either a plaintiff or defendant in a property lawsuit. They were told the amount the plaintiff stood to gain at trial and the percentage chance of such a plaintiff victory. Then they were told that the opposing side had offered to settle for an amount that corresponded to the probability times the amount; e.g., if a trial victory would yield \$100,000 and the plaintiff had a 70% chance to win, then the offer was \$70,000. Far more plaintiff-attorney subjects than defendant-attorney subjects accepted the offer rather than take the all-or-nothing risk of a trial. *Id.* at 135-40.

⁴⁶ Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000).

buy lottery tickets).⁴⁷ The lowest payment acceptable to the plaintiff would be a higher number than it would have been if he were risk neutral, whereas the defendant would be willing to pay a correspondingly higher sum.

2. Fairness and Goals Other than Wealth Maximization

The above analyses of settlement all retain at least one basic assumption of the classic economic model: that a litigant's goal is to maximize her wealth.⁴⁸ She might fail due to imperfect information, hard bargaining, or cognitive biases, but her objective is not in question. Important literature in behavioral psychology has suggested, however, the need to change that assumption. There is evidence that litigants are not pure wealth maximizers but rather people who also consider other values like fairness when deciding whether to accept a settlement offer.⁴⁹ This evidence corroborates the emphasis that scholars have long placed on fairness or justice in civil procedure.⁵⁰

⁴⁷ *Id.* at 167 (“When choosing between low-probability gains and losses with equal expected values, Kahneman and Tversky have found that individuals make risk-seeking choices when selecting between gains and risk-averse choices when selecting between losses.”).

⁴⁸ More precisely, his goal is to maximize utility, which is defined as wealth with a built-in accommodation for rational risk-aversion in keeping with the declining marginal value of money.

⁴⁹ Fairness is not the only non-monetary consideration that can matter to litigants. Korobkin & Guthrie, *Psychology, Economics, and Settlement*, *supra* note 40, at 79-80 (“The list of reasons litigants might not behave in accordance with the [classic economic] model’s predictions is impressively long: Litigants litigate not just for money, but to attain vindication; to establish precedent; ‘to express their feelings’; to obtain a hearing; and to satisfy a sense of entitlement regarding use of the courts . . .”).

⁵⁰ *E.g.*, Loewenstein, *supra* note 42, at 139 (“[S]ubject disputants seemed more concerned with achieving what they considered to be a fair settlement of the case than maximizing their own expected value.”); *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1448-49 (2003) (distinguishing between actual justice and adequate settlements in the class action context); Owen Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1 (arguing that justice is different from efficiency and should be prioritized over it in the civil justice system); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 444-45 (1982) (expressing the concern that docket pressures may be causing judges wrongly to value efficiency over justice).

The stage was set for such evidence by the results of a game known as ultimatum bargaining.⁵¹ In a classic version of such a game, two people are given a sum of money (say \$20) and told that one of them (the Proposer) will choose how to divide it between them. If the other (the Acceptor) accepts the proposed division, then that division will be final, but if he rejects it, then neither of the two participants will receive anything. A rational Proposer would allot \$19 (or \$19.99, if the division were not limited to whole numbers) to himself and \$1 to the Acceptor, and a rational Acceptor would accept the division in order to receive \$1 rather than nothing. But people routinely turn down such divisions, contrary to economic self-interest. In fact, offers under 20% of the total are regularly rejected.⁵² Such behavior suggests that people care about other values—in particular, their perceptions of fairness.

Russell Korobkin and Chris Guthrie have conducted experiments regarding settlement that appear to support this view.⁵³ In one such experiment, subjects were asked to decide whether to accept a settlement offer in a hypothetical personal injury case. All subjects were told that they had been hurt in a car accident through no fault of their own and that they were suing an insurance company. If they won at trial, they would receive \$28,000 whereas if they lost, they would receive \$10,000 (the amount undisputed by the insurer). Their lawyer tells them that the result of a trial could go either way, and the defendant offers to settle for \$21,000.⁵⁴

There were two groups of subjects. Those in Group A were told that they had owned a car worth \$14,000 that was destroyed in the accident, and those in Group B were told the same thing except that their car had been worth \$28,000. Members of Group B were far less likely to accept the settlement offer than were members of Group A.⁵⁵

⁵¹ Werner Güth and Reinhard Tietz, *Ultimatum Bargaining Behavior: A Survey and Comparison of Experimental Results*, 11 J. ECON. PSYCHOL. 417 (1990); see also Loewenstein, *supra* note 42, at 142-43.

⁵² Martin A. Nowak et al., *Fairness versus Reason in the Ultimatum Game*, 289 SCIENCE 1773 (2000); Karen M. Page & Martin A. Nowak, *Empathy Leads to Fairness*, 64 BULL. OF MATHEMATICAL BIOLOGY 1101 (2002). Nowak and colleagues write, “The irrational human emphasis on fair division suggests that players have preferences which do not depend solely on their own payoff...” Nowak et al., *supra* note 52, at 1773.

⁵³ Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, *supra* note 30.

⁵⁴ *Id.* at 130-33.

⁵⁵ *Id.*

This experiment is particularly revealing. The odds of winning at trial, the damages sought, and the settlement offer were held constant for both groups. According to the assumptions of the Priest-Klein model, both groups should have viewed the offer similarly. Because the defendant's bargaining behavior was the same in regard to both groups, the bargaining literature of Cooter and others would conclude that they should have acted similarly. And because both groups were faced with prospective gains of the same size, the behavioral insights of Kahneman and Tversky (applied to settlement by Rachlinski and Guthrie) do not create a reason for the groups' results to diverge.

But they do diverge. One way to characterize the divergence is as a simple offshoot of the core idea of prospect theory: Group A views the offer as a gain, and Group B views the offer as a loss.⁵⁶ Another characterization would be that the subject plaintiffs cared about values other than maximizing wealth—in particular, that they cared about achieving a result they viewed as fair compensation for their loss. Either way, we are left with the conclusion that *plaintiffs compare settlement offers to the amount they have been harmed and are far more likely to accept offers exceeding that amount.*

Such a conclusion has important implications in light of hedonic adaptation to injury or adversity, as we will see. Due to such adaptation, a plaintiff's assessment of how severely she has been harmed will often change over time. This change, in turn, can be expected to affect the range of offers that she will be willing to accept in order to settle.

D. Putting It All Together

Among the many points that appear in the literature surveyed in this Part, one simple idea stands out in importance. All commentators agree that the less money a plaintiff is willing to accept in order to settle, the more likely settlement will be. Contrary to some early assumptions, there is now convincing evidence that plaintiffs may choose their lowest acceptable sum by identifying the amount they feel would fairly compensate them for the harm they have suffered.

If a plaintiff's perception of what would constitute fair compensation were to decrease as time passed, then that passage of

⁵⁶ See *id.* at 109.

time would accordingly increase the likelihood of settlement. The delays associated with litigation could thus have the effect of saving parties and courts the costs of trial.

II. ADAPTATION TO DISABILITY AND THE FAILURE OF AFFECTIVE FORECASTING

When estimating the level of fair compensation for their injuries, plaintiffs must make predictions about the impact those injuries will have on their future lives. Perhaps unsurprisingly, there is a dearth of legal scholarship addressing how plaintiffs make such predictions and how accurate their predictions are. Recent social science research on well-being and prediction now provides clues to understanding plaintiffs' settlement behavior.

Consider this situation. On a scale of 1 to 10, how would you rate your current happiness? Now suppose that on the way home from work you are struck by a drunk driver and paralyzed from the waist down. What do you predict would happen to your happiness immediately following the accident? How about a year or two years later? If you are like most people, you would expect that after the accident your happiness would plummet and that it would remain low for a long time. You would probably predict that you would never be as happy as you were during that pleasant afternoon spent in your office reading an article on the hedonic psychology of legal settlement. According to a considerable body of recent psychological research, however, you would likely be wrong. Although your subjectively reported happiness level would decline immediately following the accident, social scientists studying people affected by a host of disabilities—quadriplegia, kidney failure, lost limbs—have found that the disabled return to pre-disability states of happiness surprisingly quickly, often within two years.⁵⁷ Moreover, psychologists have shown that your failure to anticipate the extent and rapidity of your recovery isn't unusual. Healthy people consistently overestimate how unhappy a disability would make them, in part because they don't appreciate how quickly they will adapt to their new lives.⁵⁸

⁵⁷ For an excellent summary of the initial research on hedonic adaptation, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* (Daniel Kahneman et al. eds., 1999).

⁵⁸ See Gilbert et al., *supra* note 7.

This Part explores recent social scientific research on adaptation to disability⁵⁹ and the inability to predict future states of happiness, known in the literature as *the failure of affective forecasting*. We describe the evidence for adaptation as well as adaptation's limits, and we consider how and why people are unable to anticipate how disabilities will influence their well-being. Although much of this research is quite new, its implications for the law have already attracted the notice of psychologists, economists, and legal scholars. In the final section of this Part, we discuss their proposals.

A. Hedonic Adaptation

In 1999, Daniel Kahneman, Ed Diener, and Norbert Schwarz “announce[d] the existence of a new field of psychology”—hedonic psychology—that would study “what makes experiences and life pleasant and unpleasant.”⁶⁰ Although some psychologists had been doing research on hedonics for decades, the new hedonic psychology promised to bring together an interdisciplinary group of social scientists to “analyze the full range of evaluative experience, from sensory pleasure to creative ecstasy, from fleeting anxiety to long-term depression, from misery to joy.”⁶¹ Using analytic tools that range from traditional self-evaluation surveys to beeper-activated mood assessments and longitudinal surveys of national populations, hedonic psychology is quantifying individual and collective happiness, and it is measuring the impact that positive and negative life events have on subjective assessments of well-being. Very often, the results are surprising. Increased income, for example, does not make people much happier, but spending more time with family and friends does.⁶²

⁵⁹ Unless otherwise noted, when we refer to “disability,” we are not using the term to refer to any specific legally or medically defined injury but rather as a catch-all category covering a wide range of injuries, illnesses, and debilities that potentially affect one’s health and happiness.

⁶⁰ Daniel Kahneman et al., *Preface* to WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, at ix (Daniel Kahneman et al. eds., 1999).

⁶¹ *Id.*

⁶² See, e.g., RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005). The economist Richard Easterlin compares how quickly people adapt to increases in income due to concomitant changes in aspirations and how slowly they adapt to nonpecuniary benefits like family life. He writes:

In particular, people make decisions assuming that more income, comfort, and positional goods will make them happier, failing to recognize that hedonic adaptation and social comparison will come

Most interestingly for this Article, psychologists have found that most life events, including apparently devastating ones such as those that cause disability, actually have little prolonged effect on well-being. People, it turns out, adapt amazingly quickly to change.

The effects of this *hedonic adaptation*, understood as any action, process, or mechanism that reduces the affective (emotional) consequences of an otherwise stable circumstance, were first detected in a canonical study on lottery winners and quadri/paraplegics. Asked to rate their general happiness and current experience of mundane pleasures, lottery winners were not significantly happier than controls, and accident victims were not as unhappy as had been expected and above the mid-point of the scale.⁶³ These data suggested that people experience life as if on a “hedonic treadmill” such that good and bad events cause brief changes in well-being with rapid returns to an established set point.⁶⁴ Although specific aspects of the treadmill theory have been challenged,⁶⁵ a wealth of recent research has confirmed this general finding for other disabilities. For example, studies have found that children and adolescents with limb deficiencies exhibit remarkably good psychosocial adjustment.⁶⁶ People with spinal cord injuries report levels of well-being similar to those of healthy controls,⁶⁷ as do burn victims,⁶⁸ patients with

into play, raise their aspirations to about the same extent as their actual gains, and leave them feeling no happier than before. As a result, most individuals spend a disproportionate amount of their lives working in order to make money, and sacrifice family life and health, domains in which aspirations remain fairly constant as actual circumstances change, and where the attainment of one’s goals has a more lasting impact on happiness. Hence, a reallocation of time in favor of family life and health would, on average, increase individual happiness.

Richard Easterlin, *Explaining Happiness*, 100 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 11,176, 11,178 (2003).

⁶³ Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917, 920-21 (1978).

⁶⁴ *Id.*

⁶⁵ See Diener et al., *Beyond the Hedonic Treadmill: Revising the Adaptation Theory of Well-Being*, 61 AM. PSYCHOL. 305 (2006) (hereinafter *BHT*); Richard E. Lucas, *Adaptation and the Set-Point Model of Subjective Well-Being: Does Happiness Change After Major Life Events?*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 75 (2007).

⁶⁶ Vida L. Tyc, *Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review*, 12 CLINICAL PSYCHOL. REV. 275 (1992).

⁶⁷ C. Lundqvist et al., *Spinal Cord Injuries: Clinical, Functional, and Emotional Status*, 16 SPINE 78 (1991).

colostomies⁶⁹ and those undergoing dialysis for treatment of kidney disorders.⁷⁰ As the authors of this last study note, “Although [hemodialysis patients] report their health as being much worse than that of healthy controls, they do not appear to be much, if at all, less happy than people who do not have kidney disease or any other serious health condition.”⁷¹

The aforementioned studies all applied a cross-sectional methodology that compares the reported well-being of disabled people with that of people who were not disabled. In a compelling new study by economists Andrew Oswald and Nattavudh Powdthavee, the authors track changes in subjective well-being longitudinally by comparing happiness ratings of individuals before their disability with assessments reported yearly following the disability.⁷² Since 1996, the British Household Panel Survey has reported information on respondents’ psychological well-being and whether and to what extent they suffer from a disability.⁷³ In these surveys, respondents rated their own level of happiness on a scale of 1 to 7, with larger numbers indicating greater life satisfaction. Oswald and Powdthavee analyzed the responses from people who originally reported no disability but who subsequently became disabled during the course of the survey. They divided these people into those who were moderately disabled (“disabled but able to do day-to-day activities including housework, climbing stairs, dressing oneself, and walking for at least 10 minutes”) and those who were seriously disabled (“unable to do at least one of the above day-to-day activities”).⁷⁴

Oswald and Powdthavee’s study produced noteworthy results. As a group, people who become disabled report an average well-being score of 4.8 for the two years preceding disability, an abrupt fall to 3.7

⁶⁸ David R. Patterson et al., *Psychological Effects of Severe Burn Injuries*, 113 PSYCHOL. BULL. 362 (1993).

⁶⁹ Norman F. Boyd et al., *Whose Utilities for Decision Analysis?*, 10 MED. DECISION MAKING 58 (1990).

⁷⁰ Jason Riis et al., *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCHOL. 3 (2005).

⁷¹ *Id.* at 7.

⁷² Andrew J. Oswald & Nattavudh Powdthavee, *Does Happiness Adapt? A Longitudinal Study of Disability With Implications for Economists and Judges*, J. PUB. ECON. (forthcoming 2008) available at <http://ssrn.com/abstract=921040>.

⁷³ The survey contain over 10,000 adults who were interviewed between September and December each year since 1991. *Id.* at 7.

⁷⁴ *Id.* at 8. There were 675 person-year observations in the Moderately Disabled category and 3,442 observations in the Severely Disabled category. *Id.*

at the onset of disability, and then a subsequent rebound to 4.1 in the two years that follow despite the fact that the disabilities themselves have not changed.⁷⁵ Separating the two groups, the authors find approximately 50% adaptation to moderate disability and 30% adaptation to severe disability.⁷⁶ Thus, there is substantial evidence that hedonic adaptation to disability is significant (if incomplete).

Due to its considerable size and longitudinal nature, Oswald and Powdthavee's recent study provides some of the strongest evidence for adaptation to disability.⁷⁷ It must be noted, however, that the study also suggests that certain negative events appear to be more difficult to adapt to. Low-level, chronic stimuli like noise, dull pain, and headaches have substantial long-term effects on happiness, as do diseases associated with progressive deterioration.⁷⁸ One study, for example, found that instead of adapting to noise problems, college students actually became sensitized to it, experiencing higher levels of annoyance as time went on.⁷⁹ Others have shown that people are less likely to adapt to unemployment⁸⁰ and negative changes in marital status such as divorce and separation.⁸¹ Most significantly for our purposes, chronic or progressive disorders such as rheumatoid arthritis and multiple sclerosis appear to be resistant to adaptation in part due to the cumulatively deteriorating stimuli associated with such

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 13–14. That is to say, over the course of two years moderately disabled people recover approximately 50% of their “lost” happiness, and even severely disabled people regain more than 30% of the happiness they enjoyed before becoming injured.

⁷⁷ But see Richard E. Lucas, *Long-term Disability is associated with lasting changes in Subjective Well-Being: Evidence from Two Nationally Representative Longitudinal Studies*, 92 J. PERSONALITY & SOC. PSYCHOL. 717, 718 (2007) (finding no evidence of adaptation from the same data set). Oswald and Powdthavee note methodological differences between their paper and Lucas's, but, they write, “we cannot be certain why we find much more adaptation than does Lucas.” Oswald & Powdthavee, *supra* note 72, at fn. 8.

⁷⁸ See Frederick & Loewenstein, *supra* note 57, at 311-12.

⁷⁹ Neil. D. Weinstein, *Community Noise Problems: Evidence Against Adaptation*, 2 J. ENVIR. PSYCHOL. 87 (1992).

⁸⁰ Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 PSYCHOL. SCI. 8 (2004).

⁸¹ Richard. E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERSONALITY & SOC. PSYCHOL. 527 (2003).

diseases.⁸² It is also worth pointing out that even where hedonic adaptation occurs, it is neither inevitable nor invariable. Although adaptation effects may be seen cumulatively, individuals experience a range of responses to adaptable disabilities.⁸³

Understanding which disabilities are adaptable and which are not should lead to a better understanding of the mechanisms of adaptation. We use the plural because it seems likely that hedonic adaptation is not a single process but rather an assortment of psychological processes. Adaptation may result from physiological changes (such as increased upper body strength in paraplegics enabling more effective wheelchair mobility) or from conscious and unconscious cognitive changes in disabled people's interests, values, and goals.⁸⁴

Most recently, psychologists and economists have focused on the role *attention* plays in moderating the effects of negative events. Drawing an analogy between the psychological response to negative events and the body's response to disease, Daniel Gilbert and colleagues have suggested that people possess a "psychological immune system" that dampens the hedonic effect of disability.⁸⁵ Defense mechanisms such as rationalization, dissonance reduction, and positive illusions diminish the intensity of the emotional response to disability by directing attention away from the disability and toward new skills and new sources of pleasure. Similarly, Kahneman and Thaler note that attention is normally directed towards novelty, including changes in response to disability. Therefore, "as the new state loses its novelty it ceases to be the exclusive focus of attention, and other aspects of life again evoke their varying hedonic

⁸² See C.A. Smith & K.A. Wallston, *Adaptation in Patients with Chronic Rheumatoid Arthritis: Application of a General Model*, 11 HEALTH PSYCHOL. 151 (1992); R.F. Antonak & H. Livneh, *Psychosocial Adaption to Disability and Its Investigation Among Persons with Multiple Schlerosis*, 40 SOC. SCI. & MED. 1099 (1995). Frederick and Loewenstein note, however, that the degree of adaptation may be particularly difficult to measure with these progressive diseases. They write, "Even maintaining a constant hedonic state in the face of these deteriorating conditions would be impressive evidence of hedonic adaptation." Frederick & Loewenstein, *supra* note 57, at 312.

⁸³ See Diener et al., *BHT*, *supra* note 65, at 310-311. The authors note, "[W]e have found individual differences in the rate and extent of adaptation that occurs even to the same event. In our longitudinal studies, the size and even the direction of the change in life satisfaction varied considerably across individuals." *Id.* at 310.

⁸⁴ See Frederick & Loewenstein, *supra* note 57, at 302-03.

⁸⁵ Gilbert et al., *supra* note 7.

responses.”⁸⁶ These coping strategies are evolutionarily adaptive, allowing people to recover quickly from considerable misfortune.⁸⁷

B. The Failure of Affective Forecasting—Focalism and Immune Neglect

Although people are capable of hedonically adapting to a variety of positive and negative life events, recent social scientific research suggests that they consistently fail to anticipate such adaptation. Over the past decade, psychologists and economists have begun to study *affective forecasting*—people’s ability to judge how future experiences will make them feel.⁸⁸ Most people, it turns out, do a surprisingly poor job of predicting the intensity and the duration of future feelings.⁸⁹ This inability is particularly important in situations concerning disability and adaptation.

When asked to predict how they will feel upon the occurrence of some future hedonic event—eating a bowl of ice cream every day for a week, having their favorite candidate win an election, being denied tenure, or suffering an injury—people are able to estimate whether that event will make them feel good or bad (*valence*) and which emotions they will feel. They are not very good, however, at predicting how strongly they will feel (*intensity*) or how long the feeling will last (*duration*).⁹⁰ For both positive and negative events, people predict that they will feel more strongly than they actually do, and they predict that the feeling will last longer than it actually does. Accordingly, a growing number of studies have shown that, in the case of physical disabilities, healthy people regularly predict that disabled people will experience greater unhappiness for a longer period of time than they actually do.⁹¹

⁸⁶ Daniel Kahneman & Richard Thaler, *Utility Maximization and Experienced Utility*, 20 J. ECON. PERSPECTIVES 221, 230 (2006).

⁸⁷ See Lucas, *supra* note 77, at 718.

⁸⁸ Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting: Knowing What to Want*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 131 (2005) (hereinafter *AF*).

⁸⁹ For an excellent recent review, see Daniel T. Gilbert & Timothy D. Wilson, *Prospection: Experiencing the Future*, 317 SCIENCE 1351 (2007).

⁹⁰ Wilson & Gilbert, *AF*, *supra* note 88.

⁹¹ See Peter A. Ubel et al., *Disability and Sunshine: Can Hedonic Predictions Be Improved by Drawing Attention to Focusing Illusions or Emotional Adaptation?*, 11 J. EXPERIMENTAL PSYCHOL.: APPLIED 111, 112 (2005) (hereinafter *D&S*); D.L. Sackett & G.W. Torrance, *The Utility of Different Health States as Perceived by the*

The most compelling explanation for the mispredictions associated with affective forecasting suggests that people suffer from a *focusing illusion*⁹² (also called *focalism*⁹³) that causes them to pay too much attention to the narrow aspects of life that will be affected by a change while ignoring the much broader ways in which life will remain the same.⁹⁴ As Wilson et al. note, “People think about the focal event in a vacuum without reminding themselves that their lives will not occur in a vacuum but will be filled with many other events.”⁹⁵ For example, when people are asked to think about the effect paraplegia would have on their lives, they tend to focus on the limitations it will create rather than their unaltered ability to enjoy a glass of wine or a conversation with friends.⁹⁶ By directing their attention to the changes wrought by disability, healthy people underestimate how happy they will remain. This accounts for a substantial amount of their mispredictions about affective intensity.

Faulty predictions about the *duration* of feelings associated with negative events are often caused by a failure to anticipate how rapidly the psychological immune system enables people to adapt to unpleasant emotions. Gilbert et al. refer to this failure to predict

General Public, 32 J. CHRONIC DISEASES 697 (1978); Peter A. Ubel et al., *Misimagining the Unimaginable: The Disability Paradox and Health Care Decision Making*, 24 (No. 4 Suppl.) HEALTH PSYCHOL. S57 (2005); Peter A. Ubel et al., *Do Nonpatients Underestimate the Quality of Life Associated with Chronic Health Conditions Because of a Focusing Illusion*, 21 MED. DECISION MAKING 190 (2007); Boyd et al., *supra* note 69.

⁹² David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340 (1998). Ubel et al. define a *focusing illusion* as “a failure to appreciate that not all life domains or events will be equally affected by a given change in circumstances.” Ubel et al., *D&S*, *supra* note 91, at 112.

⁹³ Timothy D. Wilson et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 J. PERSONALITY & SOC. PSYCHOL. 821 (2000).

⁹⁴ Gilbert and Wilson discuss four reasons why affective forecasting errors occur—mental simulations of future events tend to be unrepresentative, essentialized, abbreviated, and decontextualized. Gilbert & Wilson, *supra* note 89, at ___. Summarizing the research, they write, “[The mind’s] simulations are deficient because they are based on a small number of memories, they omit large numbers of features, they do not sustain themselves over time, and they lack context. Compared to sensory perceptions, mental simulations are mere cardboard cut-outs of reality.” *Id.*

⁹⁵ Wilson et al., *supra* note 93, at 822.

⁹⁶ Ubel et al., *D&S*, *supra* note 91, at 113.

adaptation as *immune neglect*.⁹⁷ When asked to predict how long they are likely to feel bad following a negative event, subjects ignore the “set of dynamic psychological processes . . . that produce a change in the relationship between what happens and how one feels.”⁹⁸ In a separate paper, they note that the underestimation of hedonic adaptation “is probably the most commonly observed error in research on hedonic prediction.”⁹⁹ When making predictions about future changes, people tend to focus principally on the early stages of those changes, when hedonic reactions are most intense. Adaptation, as noted above, takes time, but the mental simulations people use to predict later emotional states are tightly condensed. Ex ante predictions thus tend to overvalue the intensely emotional change and undervalue the long period of recovery and adaptation.¹⁰⁰

Perhaps the most significant research on focusing illusions and immune neglect is the increasing body of evidence indicating that healthy people fail to predict the limited impact of disabilities on their quality of life (QoL).¹⁰¹ One early study showed that, on a scale of 0 (conditions as bad as death) to 1 (perfect health), the general public estimates that the quality of life for patients receiving dialysis is 0.39, while dialysis patients report their QoL as 0.56.¹⁰² Similarly, patients with colostomies rate their quality of life at 0.92, while patients without colostomies predict that QoL with a colostomy would be

⁹⁷ Ubel et al. describe a similar phenomenon that they call *failure to consider adaptation*. They describe this failure as a distinct type of focusing illusion, noting, “People who have read a description of paraplegia should recognize that paraplegia does not affect the person’s ability to enjoy a good TV show. However, they may fail to consider that the grief they will feel upon finding out that they have paraplegia will subside over time and that the sense of loss that they feel because they have to abandon favorite pastimes will be replaced by the joy they derive from other pastimes.” *Id.*

⁹⁸ *Id.*

⁹⁹ Gilbert & Wilson, *supra* note 89, at 1353.

¹⁰⁰ *Id.*

¹⁰¹ As noted, the research compares the predictions of healthy people to the actual ratings of disabled people. This research does not exactly match the situation that we are concerned with in settlement negotiations, where the person making the prediction is actually a recently injured victim. There is every reason to believe, however, that the same biases affecting healthy people will also affect the recently injured. The latter are just as likely (if not more likely) to suffer from abbreviated, decontextualized, and essentialized simulations of future states because they will be currently experiencing the intense hedonic effects that tend to improperly color predictions.

¹⁰² Sackett & Torrance, *supra* note 91.

0.80.¹⁰³ And Schkade and Kahneman have found that people who have known a paraplegic estimate that paraplegics spend considerably more time in a good mood, while people who have not known a paraplegic estimate that paraplegics spend more time in a bad mood.¹⁰⁴ As the authors explain, “The less you know about paraplegics, the worse off you think they are.”¹⁰⁵ Part of the problem, they suggest, is that when people are asked to make these predictions, they evaluate the various outcomes as changes rather than states. Schkade and Kahneman write, “Common sense suggests that recent lottery winners or the newly paraplegic will spend more of their time responding to their special circumstances in the first few weeks than they will later. Thus, if people judge what it is like to *be* a paraplegic by imagining what it is like to *become* a paraplegic, they will exaggerate the long-term impact of this tragic event on life satisfaction.”¹⁰⁶ As we will later argue, this focus on *becoming* rather than *being* may account for certain aspects of victims’ settlement behavior. When estimating the sum that they feel will adequately compensate them for their injuries, it is likely that recently injured plaintiffs will make the same kinds of forecasting errors that healthy people make because their attention will be directed towards the major changes brought about by disability. Thus, they will likely overestimate the long-term hedonic impact of their injuries.

C. Hedonic Adaptation and the Law

The practical implications of this wave of hedonic psychology research have not escaped the notice of legal scholars. Much of the research is specifically targeted toward policy-makers in the health professions where new ideas about adaptation and focalism are likely to challenge received wisdom about informed consent and end-of-life decisions.¹⁰⁷ That this research will also have profound consequences

¹⁰³ Boyd et al., *supra* note 69, at 60.

¹⁰⁴ Schkade & Kahneman, *supra* note 92.

¹⁰⁵ *Id.* at 340.

¹⁰⁶ *Id.* at 345.

¹⁰⁷ See, e.g., Daniel Kahneman & Jackie Snell, *Predicting a Changing Taste: Do People Know What They Will Like?*, 5 J. BEHAV. DECISION MAKING 187, 198 (1992). The authors note, “[T]he value that is attached to ‘informed consent’ to surgery is surely limited if patients are incapable of assessing the quality of their post-surgical lives.” *Id.*; see also Ubel et al., *Misimagining the Unimaginable*, *supra*

for the law is becoming increasingly clear. Jeremy Blumenthal, for example, has published an extensive evaluation of the implications of affective forecasting failures for legal analysis.¹⁰⁸ His work examines subjects ranging from civil damages and capital punishment to euthanasia and informed consent. Other scholars have focused primarily on hedonic adaptation and tort law, and it will be useful to describe some of their work in order to place our conclusions in context.¹⁰⁹

Oswald and Powdthavee, the economists who produced the longitudinal study of British survey data discussed above, framed their research in terms of its value for judges and juries awarding damages in torts cases. The authors note the lack of rigor associated with the assignment of pain and suffering awards based on “conceptual foundations that are, at best, *ad hoc*.”¹¹⁰ Such damage awards are

note 91; Ubel et al., *Do Non-Patients Underestimate*, *supra* note 91; Boyd et al., *supra* note 69.

¹⁰⁸ Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005). Blumenthal discusses the implications of affective forecasting research for a range legal issues including civil damage awards, victim impact statements, the “death row phenomenon,” sexual harassment, surrogate mothering, euthanasia, advance directives, informed consent, and litigants’ emotional expectations. In this last section, Blumenthal touches on the impact litigants’ miscalculations of future emotional states may have on litigation behavior, *id.* at 204-208, but he does not apply these findings to settlement behavior in the ways suggested by our work. *See also* Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999); Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT’L. REV. L. & ECON. 31 (1992); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL. L. REV. 1 (2000).

¹⁰⁹ Blumenthal cites much of the relevant law-related scholarship available. More recent research includes papers presented at the University of Chicago School of Law’s 2007 conference on the Legal Implications of the New Happiness Research, including Jonathan Haidt, *Hive Psychology, Group Selection and Happiness*; Christopher Hsee, *Money, Consumption and Happiness*; Paul Dolan, *Measuring Well-Being for Public Policy: Preferences or Experiences*; Matthew Adler & Eric Posner, *Money, Happiness and Well-Being: Does Happiness Research Undermine Cost-Benefit Analysis?*; Martha Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*; David Weisbach, *What Does Happiness Research Tell Us about Tax Policy?*; Justin Wolfers & Betsey Stevenson, *Happiness and Family Policy*; Andrew J. Oswald & Nattavudh Powdthavee, *Death and the Calculation of Hedonic Damages*; Peter A. Ubel & George Loewenstein, *Pain and Suffering: It’s Not (Just) about Pain and Suffering*. All papers are available at <http://www.law.uchicago.edu/Lawecon/events/happy.html>.

¹¹⁰ Oswald & Powdthavee, *supra* note 72, at 14.

unlikely to account for the substantial hedonic adaptation that occurs following an injury, and the authors propose to calculate an appropriate schedule of payments that would compensate the victim for changing levels of decreased quality of life. With sufficiently accurate data regarding the increase in QoL associated with income gains, they hope to be able to estimate the amount of money that corresponds to the diminution in QoL in the years following an accident.¹¹¹

In a recent paper, Cass Sunstein also describes problems in the way compensation for injuries is meted out by the legal system. He notes that awards of hedonic damages are “notoriously variable,” and that they often appear irrational and incoherent.¹¹² The literature on hedonic adaptation, however, suggests an explanation for such awards. Just as healthy people suffer from focusing illusions and immune neglect that cause them to underestimate the extent to which disabled people adapt to injuries, jurors are likely to ignore or misunderstand adaptation to injuries when deciding on awards of hedonic damages. The trial is basically a factory for the production of focusing illusions: “The basic problem is that when asked to award damages for a certain loss, the attention of the jury (and the judge) is fixated on the loss in question. . . . Deliberately focused on a particular injury, juries are unlikely to see that most of the time, the plaintiff may not be much focused on the particular injury. The very circumstances of trial create the focusing illusion.”¹¹³ This focusing illusion—and the jury’s failure to consider the plaintiff’s likely adaptation—will often result in overcompensation for injuries with little lasting hedonic effect, the “illusory losses” of Sunstein’s title.¹¹⁴ Yet just as the social scientific literature indicates why some plaintiffs are overcompensated, Sunstein sees that it also suggests why other plaintiffs are likely to be undercompensated. As noted above, some injuries, such as persistent low-level pain, actually have long-lasting hedonic effects; they are, in a sense, unadaptable. Juries are unlikely to recognize such

¹¹¹ *Id.* at 15. In an earlier draft of the paper, the authors attempted to calculate specific sums that would be required to compensate victims for lost quality of life. In the most recent draft, they have removed specific figures and are content with suggesting the possibility of calculating approximate damage awards.

¹¹² Cass R. Sunstein, *Illusory Losses*, 3 (2007) available at <http://ssrn.com/abstract=983810>.

¹¹³ *Id.*, at 11.

¹¹⁴ Blumenthal makes a similar point in his article. See Blumenthal, *supra* note 108, at 184.

distinctions, and the seemingly insignificant nature of the injury will often occasion a small hedonic damage award.

In a recent article on hedonic damages and disability, Samuel Bagenstos and Margo Schlanger also draw attention to the likelihood of jurors misunderstanding the nature of hedonic adaptation. When awarding compensation for hedonic damages, jurors tend to focus inordinately on the limiting effects of disability and, as ostensibly healthy people, fail to recognize how well most disabled people adapt. Drawing on disability rights literature, Bagenstos and Schlanger suggest that in having healthy jurors pass judgment on the quality of life of disabled people, the legal system devalues the experiences of people with disabilities and encourages the perception of disability as a tragedy in need of pity and governmental support.¹¹⁵ Moreover, the trial process, by making the plaintiff perform her disability in front of the jury, itself becomes debilitating. The authors suggest that “by focusing on the negative feelings that occur during [the initial adjustment period], plaintiffs with disabilities may delay or derail their ultimate ability to adapt to their new condition.”¹¹⁶ Accordingly, they reach the conclusion that courts should not award hedonic damages for lost quality of life arising from disability.¹¹⁷

As described above, the evidence for hedonic adaptation is more complex than Bagenstos and Schlanger suggest. Recall that while some disabilities seem to be highly adaptable, others, such as those resulting in continuous or worsening pain, tend to be

¹¹⁵ Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, ___ (2008). They write:

When courts uphold hedonic damages awards based on the view that disabling injuries limit life’s enjoyment and keep plaintiffs from being a ‘whole person,’ they entrench the societal view that disability is inherently tragic, and encourage people with disabilities to see their lives as tragedies. The view of disability as tragedy, for which the proper response is pity, charity, or compensation, has been one of the major targets of disability rights activists (and we endorse their campaign).

Id. at 130.

¹¹⁶ *Id.* at 141.

¹¹⁷ *Id.* at 130. They write:

For deterrence and compensation reasons, people who experience disabling injuries should be able to recover for their physical pain; for medical expenses and the cost of assistive technology and personal assistance; and for the varied and costly accommodations that can enable them to participate in our collective social life. But they should not recover for any purported effect of disability on the enjoyment of life.

Id. at 106.

unadaptable. The psychological literature indicates that responses to disability may be conditioned by a number of factors, including the nature of the disability.¹¹⁸ Moreover, even when adaptation does occur, in most cases it is incomplete. People do not tend to recover fully; there is often some lasting, if surprisingly small, hedonic effect.¹¹⁹ Although hedonic adaptation may be variable and incomplete, its implications for the law are no less significant. Our account of these implications turns, for the first time, to the role adaptation and focalism may play in the settlement of legal disputes.

III. HEDONIC ADAPTATION AND IMPROVED SETTLEMENT OPPORTUNITIES

Consider the class of injuries that involve ongoing disabilities or losses of function, but not continuous pain—in other words, those to which humans are capable of adapting hedonically.¹²⁰ Where these types of injuries give rise to lawsuits for personal injury, hedonic adaptation will likely instigate a greater number of settlements than standard models would predict. Hedonic adaptation's effect on the settlement process is twofold. First, by the time a trial is set to occur, many personal injury plaintiffs will have adjusted to their injuries and concomitantly reduced their settlement demands. Second, plaintiffs will understand—consciously or unconsciously—that settlement (or “closure” by some other means) is essential to the process of hedonic adaptation and opt to end litigation more expeditiously as a result.

A. *Adaptation as Inducement to Settle*

The long delays associated with the civil litigation process are commonly thought of as a source of costs to the system, costs that

¹¹⁸ See Marcel Dijkers, *Quality of Life After Spinal Cord Injury: A Meta Analysis of the Effects of Disablement Components*, 35 SPINAL CORD 829 (1997). Dijkers points to the effects of occupation, family life, mobility, and social integration play in individual responses to disability. *Id.* at 836-37.

¹¹⁹ See Oswald & Powdthavee, *supra* note 72; Lucas, *supra* note 77.

¹²⁰ Injuries or conditions that fall into this category include loss of limb, partial paralysis, loss of sexual function, blindness or deafness, and a variety of other disabilities that will eventually heal to the point that the subject is no longer in pain, but not to the point that the subject regains the lost functionality. For a more complete description, see Part II, *supra*.

should be avoided whenever possible. On their own, of course, drawn-out litigation procedures raise the costs of litigating to both sides (and to the public at large), as all parties are forced to devote more time and resources to the litigation. Lengthy litigation periods also delay the arrival of redress to the tort victim.¹²¹ In so doing, they may make potential plaintiffs less likely to litigate in the first instance, or less likely to follow through with already commenced litigation, as the means of support that might allow the victim to pursue litigation disappear.¹²² For these reasons, the most prominent attempts at civil litigation reform have focused on alternative methods of dispute resolution—in particular, arbitration¹²³—that are designed to curb costs primarily by increasing the speed at which cases are handled and decided and eliminating many of the procedures that typically serve to retard the rapid progression of litigation matters.

At the same time, these procedural delays are likely to have salutary effects on the litigation system as well. The explanation rests with the psychological healing that the injury victim will undergo during the period before trial. During the first few months that follow a severe injury—a period of time that includes the filing of litigation and the initial pre-trial procedures—the plaintiff is likely to suffer from a focusing illusion. With his attention focused on his injury, the plaintiff will overestimate its impact on his future happiness: he will anticipate that the injury will prevent him from achieving the same enjoyment of life that he experienced before being hurt.¹²⁴

However, during the nearly two years that it takes a typical civil case to reach trial, the plaintiff is likely to adapt hedonically to his injury—even if that injury is permanent—and will report levels of happiness very close to his pre-injury levels.¹²⁵ Two years after a plaintiff has suffered an injury, the plaintiff will likely view that injury as far less severe, far less debilitating, and generally far less important than he did in the months following the accident.¹²⁶ This adaptation will have two relevant effects. First, the degree to which a plaintiff believes he has been “wronged” will dissipate. His sense of the scale

¹²¹ See Part I, *supra*.

¹²² See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

¹²³ See Federal Arbitration Act, *codified at* 9 U.S.C. § 1 et seq. (2007); See Part I, *supra*.

¹²⁴ See Schkade & Kahneman, *supra* note 92; Ubel et al., *D&S*, *supra* note 91, at 112; Wilson et al., *supra* note 93, at 822.

¹²⁵ See generally Part II, *supra*.

¹²⁶ See Oswald & Powdthavee, *supra* note 72, at 15.

of the indignity that has been perpetrated against him will diminish. Second, the amount of money that the plaintiff believes will fairly compensate him for his injury—will “make him whole,” in the typical parlance of tort damages—will decrease. Immediately after a serious injury, a plaintiff is likely to feel that only a sizeable amount of money will adequately compensate him for the loss of function that he has suffered; two years later, when the plaintiff has had the opportunity to hedonically adapt and the injury seems less debilitating, what the plaintiff perceives as appropriate compensation will decline as well.¹²⁷

In combination, these two effects will drive down a tort plaintiff’s settlement price. Consider, for instance, a plaintiff who loses a limb in a traffic accident (through no fault of his own). Imagine that in the months that follow the injury, when the lawsuit is initially filed, the plaintiff views his injury as highly incapacitating and believes (a rough estimate, of course) that he will need \$280,000 to make him whole.¹²⁸ Over the course of the two years between filing and trial, the plaintiff adapts to his injury and comes to believe that only \$140,000 is necessary to fairly compensate him for the harm he

¹²⁷ See Part I.C., *supra*. We certainly do not mean to suggest that all types of tort damages are susceptible to adaptation. Tort damages typically comprise a variety of linked payments designed to compensate the plaintiff for various aspects of his injury. Plaintiffs can recover damages for medical expenses and economic costs (typically lost wages due to disability) incurred as a result of the injury. These expenses are not “adaptable” in the sense we describe here; a plaintiff’s view of these costs is unlikely to change. But plaintiffs may also recover damages for present and future pain and suffering, and in many jurisdictions they are permitted to recoup so-called “hedonic” damages to compensate for lost enjoyment of their lives. See generally, Sunstein, *supra* note 112, at 3-4 & nn. 4-11; Edward P. Berla et al., *Hedonic Damages and Personal Injury: A Conceptual Approach*, J. FORENSIC ECONOMICS (1990). For specific examples of hedonic damage awards, see, e.g., *Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1297 (10th Cir. 2001) (loss of ability to ride horses); *Day v. Ouachita Parish School Bd.*, 823 So.2d 1039, 1044 (La. Ct. App. 2002) (loss of ability to play high school sports). Plaintiffs will adjust to the losses for which these latter types of damages are meant to compensate. Pain and suffering awards constitute approximately fifty percent of the total value of monetary damages in personal injury cases, see Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 296 (1998); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT’L REV. L. & ECON. 203 (1988), and so adaptation that reduces pain-and-suffering damages could have a substantial effect on the overall valuation of a personal injury case.

¹²⁸ These numbers have obviously been chosen to correspond to the hypothetical presented in Part I.C., *supra*.

has suffered.¹²⁹ Irrespective of the fact that the expected jury award will not have changed, the plaintiff will likely see a lower settlement amount as appropriate given the apparent amelioration of his injury.¹³⁰ As the plaintiff's settlement price declines, the chances of settlement increase¹³¹—perhaps even substantially, commensurate with the significant degree of hedonic adaptation that humans typically experience.¹³² Civil settlements are valuable cost-saving mechanisms,¹³³ and many of the principal rules of civil litigation are designed with the goal of encouraging settlement in mind.¹³⁴ Hedonic adaptation operates as a significant background complement to these rules.¹³⁵

¹²⁹ This is a reasonable approximation of a typical plaintiff's ability to adapt. As we noted previously, moderately disabled plaintiffs recover 50% of their "lost happiness" through adaptation over a period of two years. See Oswald & Powdthavee, *supra* note 72, at 15; *supra* notes 63–83 and accompanying text.

¹³⁰ See Korobkin & Guthrie, *supra* note 30, at 130–33.

¹³¹ See *id.*; Part I.C, *supra*.

¹³² *Supra* notes 63–83 and accompanying text.

¹³³ E.g., C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1574 (2006); Bement v. Nat'l Harrow Co., 186 U.S. 70, 93 (1902) (expressing the view that settlement is "a legitimate and desirable result in itself"). But see Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

¹³⁴ See, e.g., Fed. R. App. P. 33 ("The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement."); *In re Young*, 253 F.3d 926 (7th Cir. 2001) (Posner, J.) (noting that settlements may typically be kept confidential); Federal District Court for the Northern District of California, *Alternative Dispute Resolution Local Rules*, *available at* [http://www.cand.uscourts.gov/cand/LocalRul.nsf/fec20e529a5572f0882569b6006607e0/8ff98f4dddff8f7f882568cf00561683/\\$FILE/ADR12-05.pdf](http://www.cand.uscourts.gov/cand/LocalRul.nsf/fec20e529a5572f0882569b6006607e0/8ff98f4dddff8f7f882568cf00561683/$FILE/ADR12-05.pdf) (extensive local rules intended to facilitate settlement).

¹³⁵ The model of civil litigation we employ is, of course, overly simplified in one important respect. It does not take into account the potential for attorney-client agency costs to interfere with the smooth translation of client preferences into litigation decisions. See *infra* note 161. However, to the extent that they affect the behavior of actors within our model, agency costs are in fact likely to augment—rather than diminish—the effects of adaptation that we describe. Ninety-five percent of personal injury plaintiffs are represented by attorneys working on a contingent-fee basis. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 626 n.3 (1995). Contingent-fee attorneys will tend to prefer early settlement over protracted litigation because they bear all of the costs and risk of protracted court battles. John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903,

This is not to say, of course, that drawn-out litigation procedures are effective at driving parties toward settlement only insofar as they permit the psychological immune system to operate. Discovery allows parties to eliminate the uncertainties that surround each side's analysis of the case and thereby narrow the gap between their respective valuations.

Nor do we mean to claim that hedonic adaptation—and the increased prospects for settlement that it carries—necessarily justifies each and every procedural piece of the civil litigation puzzle from a cost-benefit perspective. The marginal adaptation generated by a particular procedural rule may be very slight, despite the fact that it imposes severe costs upon the parties (and offers little else of value). Rather, we mean only to argue that the current cost-benefit accounting of the civil trial process is incorrect, and biased toward over-estimation of litigation costs.¹³⁶ By drawing upon and facilitating hedonic adaptation, the civil trial process manages to recoup for litigants some of the costs that the extensive pre-litigation procedures would appear to impose upon them.

B. Settlement as Adaptive Mechanism

The concept of “closure” as an end goal for crime and tort victims has gained tremendous currency in recent years. According to conventional psychological wisdom, a victim gains something of value from achieving a sense of finality regarding the crime or tort committed against him.¹³⁷ Within the criminal law, courts and legislatures have attempted to facilitate the search for closure both by affording victims the opportunity to participate more directly in the final stages of a trial¹³⁸ or by foreshortening the process of trial and

911–12 (“The lawyer could settle many cases in the time it takes to litigate one, so it is rational for her to settle quickly even if doing so reduces her profit in the individual case.”); Charles Silver, *Class Actions—Representative Proceedings*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 194, 213 (B. Bouckaert & G. De Geest eds., 2000). Thus, it is the rare contingent-fee attorney who will stand in the way of an adapted plaintiff's desire to settle.

¹³⁶ See Part I, *supra*.

¹³⁷ See generally Susan Bandes, *Victims, “Closure,” and the Sociology of Emotion* (unpublished manuscript; draft on file with author).

¹³⁸ Douglas E. Beloof et al, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003); Elizabeth Beck et al, *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 387-90 (2003) (describing the victims' rights movement). The Supreme

appeal in the interests of bringing proceedings to a close more expeditiously.¹³⁹ This emphasis on closure does not fall neatly into classical economic models or categories of preferences. Under standard economic assumptions, the most that might be said is that individuals derive utility by achieving finality—by being able to put one matter aside as successfully completed in order to focus on others. Here, “closure” is an end in itself, and one of dubious pedigree at that.

Studies of hedonic adaptation provide an alternative, deeper explanation. For a tort plaintiff, “closure” means the definitive end to legal proceedings and the end of one setting in which the plaintiff might be reminded of his condition. On this account, realizing closure from a lawsuit is a means of facilitating the process of hedonic adaptation. Humans are thus conditioned to seek closure and finality—particularly with respect to painful episodes in the past—in order to abet their psychological immune systems. The more quickly and completely a plaintiff can put matters concerning an accident behind him and “move on,” the sooner his psychological immune system can bury thoughts of his injury and adapt the plaintiff hedonically to his new circumstances. Relatedly, a number of studies

Court has appeared to endorse the search for closure as one of the principal rationales supporting the constitutionality of victim impact statements. *See Payne v. Tennessee*, 501 U.S. 808, 832 (O’Connor, J., concurring) (“Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.”); Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 550 (2003) (referring to Justice O’Connor’s concurrence and explaining that “the argument is styled in terms of returning something to the murder victims themselves, but obviously that action is symbolic. Its impact is for the benefit of the victims’ families and friends . . .”).

¹³⁹ *See e.g.* *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006) (explaining that the government’s interests in precluding post-conviction access to evidence included “guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors”) (emphasis added); *Skaggs v. Commonwealth*, 2005 WL 2314073, at 5 (2005) (“Surely the family and friends of the two victims are entitled to some consideration as to the closure of these grisly and senseless murders—24 years have passed. The legal process afforded the convicted killer has been much more than due.”); *State v. Korsen*, 111 P.3d 130 (Idaho 2005) (“With the enactment of I.C. § 19-5304(2), there is a strong public policy ground for not abating a criminal conviction. If the conviction is abated, it may abate the restitution order because, under the statute, a conviction or finding of guilt is necessary for an order of restitution. Further, abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.”).

have demonstrated a strong correlation between an injury victim's level of control or agency over his life and his success at hedonic adaptation.¹⁴⁰ A plaintiff's ability to settle his own personal injury lawsuit may itself contribute to his psychological recovery.

Humans may understand these processes at a conscious level—the search for closure may be deliberate and knowing—or only at an unconscious one—and thus seek closure for reasons not entirely known or understood. On either account, people will act to their own hedonic advantage by seeking closure on matters that have the potential to reinvigorate painful memories.

Plaintiffs are thus likely to view settlement as the most ready means by which to gain closure and smooth the progress of psychological repair. Though discussion of settlement may itself invoke painful memories,¹⁴¹ plaintiffs will understand that their long-term happiness rests on their capacity to end a lawsuit that would otherwise retard hedonic adaptation. Accordingly, when evaluating a lawsuit's prospects of settlement, the possibility of achieving closure is not merely an independent, unquantifiable variable in the plaintiff's welfare function.¹⁴² In the context of many types of personal injury lawsuits, closure is shorthand for the hedonic advantage that a plaintiff can realize from settling the case before trial. In cases involving injuries that permit significant hedonic adaptation,¹⁴³ plaintiffs will seek out settlement for exactly that reason.¹⁴⁴

¹⁴⁰ Magnus L. Elfstrom et al., *Relations Between Coping Strategies and Health-Related Quality of Life in Patients with Spinal Cord Lesion*, 37 J. REHABIL. MED. 9 (2005); I. Ville et al., *Subjective Well-Being and Severe Motor Impairments: The Tetrafigap Survey on the Long-Term Outcome of Tetraplegic Spinal Cord Injured Persons*, 52 SOC. SCI & MED. 369 (2001); Richard Schulz & Susan Decker, *Long-term Adjustment to Physical Disability: The Role of Social Support, Perceived Control, and Self-Blame*, 48 J. PERSONALITY & SOC. PSYCH 1162 (1985).

¹⁴¹ See Part IV.C., *infra*.

¹⁴² Cf. Bandes, *supra* note 137 (criticizing the offhanded use of “closure” as a catch-all goal in criminal prosecutions in death penalty cases in the absence of a sophisticated account of its meaning and operation in the relevant context).

¹⁴³ For a list of such injuries, see Part II, *supra*.

¹⁴⁴ Accordingly, it should not come as a surprise that empirical studies regarding participation by victims and their families in the sentencing phase of criminal trials—participation that is driven by a desire to achieve closure—reveal mixed or non-existent effects. See Bandes, *supra* note 137, at 25-35. If “closure” serves primarily as a means of furthering hedonic adaptation, a process of seeking closure will confer few benefits upon participants if it requires continued rehashing of the events that brought about the hedonic downturn in the first instance.

IV. EXTENSIONS AND OBJECTIONS

The foregoing Parts set forth our case for adaptation's power as an inducement to settlement. In the sections that follow, we outline a number of ways in which we might test these theories empirically, and we confront several of the most significant potential objections to our behavioral framework.

A. Testable Predictions

One of the strengths of our approach is that it generates testable hypotheses regarding settlement rates for particular types of civil cases. Consider two hypothetical personal injury lawsuits, one in which the plaintiff has lost some mobility in an auto accident, and one in which the plaintiff—as the result of a workplace injury—now suffers from recurring migraine headaches.¹⁴⁵ These two cases, if brought in the same jurisdiction, will involve symmetric pre-trial procedures: discovery, mediation, motions to dismiss and for summary judgment, and so forth. A priori, there is every reason to expect that any divergences between the plaintiff and defendant in each case—informational asymmetries, discrepancies in litigation valuation, etc.—will themselves be symmetric across cases. Imagine further that the two cases have approximately equivalent expected values when litigated before a jury. Based on these considerations alone, the auto accident plaintiff and the workplace accident plaintiff should be equally likely to settle before trial.

The lone difference between these cases, as conceived here, is that the auto injury plaintiff will likely be able to adapt to his loss of function while the workplace injury plaintiff will not. The loss of mobility is a paradigm case for the power of hedonic adaptation; studies have shown that even people who lose the power to walk return to nearly pre-injury levels of happiness.¹⁴⁶ By contrast,

¹⁴⁵ Sunstein discusses this dichotomy in Sunstein, *supra* note 112, at 19. For examples of cases involving enduring, non-adaptable injuries, see *Creative Label Co., Inc.*, 203 W.Va. 428 (1998); *Chambers v. Advanced Processing Systems*, 853 So. 2d 984 (Ala. Civ. App. 2004); *Levy v. Bayou Indus. Maint Serv.*, 855 So 2d 968, 980 (La. Ct. App. 2003); *Hunt v. Mercy Medical Center*, 710 A.2d 362 (Md. App. 1998); *Hatcher v. Ramada Plaza Hotel & Conf. Ctr.*, 2003 Conn. Super. LEXIS 255 (Conn. Super. Ct. 2003).

¹⁴⁶ See, e.g., Oswald and Powdthavee, *supra* note 72, at 15; Lundqvist, *supra* note 67.

recurrent conditions such as headaches and ringing in the ears present (as described above) among the worst cases for adaptation.¹⁴⁷ By the time that the several years of pre-trial machinations have run their course, the workplace injury plaintiff is likely to perceive himself as still suffering in a way that the auto accident plaintiff genuinely does not. The auto injury plaintiff will be willing to settle for a range of values that the workplace injury plaintiff would still consider inadequate. Our theory thus generates three predictions:

1. During the time between filing and trial, settlement demands from plaintiffs with adaptable injuries will decrease in value by greater margins than settlement demands from plaintiffs with non-adaptable injuries.

2. Consequently, personal injury cases involving adaptable injuries will settle at higher rates than personal injury cases involving non-adaptable injuries, ceteris paribus.

3. Independent of the effects of costs and informational advantages, hedonic adaptation will cause settlement rates for adaptable personal injury to increase as the time between filing and trial increases.

This last hypothesis warrants further explanation. Lengthy pre-trial procedures have the capacity to induce settlement in two ways that are orthogonal to our analysis here. First, they may increase the costs of proceeding along the path to trial, thus rendering pre-trial settlement more attractive. Second, they frequently (though not always) serve to provide the parties with greater information regarding the respective strengths of their cases, information that narrows the gap between the parties' subjective valuations and facilitates accord.¹⁴⁸ Consider, then, a set of accelerated pre-trial procedures that provide the same informational gains to the parties as standard litigation practices and generate the same level of costs. A simply accelerated litigation calendar—for instance, the Eastern District of Virginia's famous "rocket docket"¹⁴⁹—would possess this feature. We predict

¹⁴⁷ Frederick & Loewenstein, *supra* note 57.

¹⁴⁸ See Posner, *supra* note 32; Landes, *supra* note 32; see also Gould, *supra* note 32.

¹⁴⁹ Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 829 & n. 34 (2006).

that cases litigated on such an accelerated schedule will settle at a lower rate than cases litigated at a more deliberate speed.

Empirical tests of these hypotheses are beyond the scope of this article. Nonetheless, the necessary data, particularly concerning hypotheses #2 and #3, should be relatively easy to obtain. Empirical analysis of the hedonic adaptation has matured into a vigorous science;¹⁵⁰ we hope that empirical research into adaptation's effects on the trial process will soon follow suit.

B. Principal Objections

1. Focalism in Settlement Negotiations

While the evidence supporting theories of hedonic adaptation has by this point become quite robust,¹⁵¹ psychologists and economists remain divided and uncertain as to the methods and mechanisms by which it operates. Candidate theories focus on changes in the victim's aspirations,¹⁵² memories,¹⁵³ and interpretations of the negative event's meaning.¹⁵⁴ Nonetheless, the leading hypothesis is the notion that humans are simply capable of blocking out or ignoring losses and limitations, even when they affect matters of daily life.¹⁵⁵ For instance, an individual who becomes paralyzed below the waist and relegated to a wheelchair may occasionally be reminded of the fact that she is in a wheelchair and is therefore incapable of many typical activities. But for the most part her injury is low-wattage background noise; she neither thinks about it nor perceives the ways in which it limits her. As Daniel Kahneman, the pioneer of this theory, has explained in particularly pithy form: "Nothing in life matters quite as much as you think it does while you are thinking about it."¹⁵⁶

¹⁵⁰ See generally Part II, *supra*. The foremost example is probably Oswald and Powdthavee's longitudinal study of thousands of British citizens. See generally Oswald & Powdthavee, *supra* note 72.

¹⁵¹ See generally Part II, *supra*.

¹⁵² See Easterlin, *supra* note 62.

¹⁵³ See Wilson & Gilbert, *AF*, *supra* note 88, at 374.

¹⁵⁴ See Timothy D. Wilson, Daniel T. Gilbert, David B. Centerbar, *Making Sense: The Causes of Emotional Evanescence*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS, *supra* note 3, at 209.

¹⁵⁵ See Part II.B; Sunstein, *supra* note 112, at 14-15; Daniel Kahneman & Robert Sugden, *Experienced Utility As A Standard of Policy Evaluation*, 32 ENVIRONMENTAL AND RESEARCH ECONOMICS 161 (2005).

¹⁵⁶ Kahneman & Thaler, *supra* note 86, at 229.

This “focalism”¹⁵⁷ raises the possibility that settlement negotiations, which we posit here as a beneficial side effect of hedonic adaptation, may be self-defeating. The very fact of negotiating a settlement to the plaintiff’s lawsuit might remind the plaintiff of the severity (or existence) of his condition, subvert the process of hedonic adjustment, and return the plaintiff, at least momentarily, to his diminished post-injury state of happiness. Settlement-induced “hedonic relapse” could re-inflate the plaintiff’s perception of the severity of his injury and its worth.

Though this counter-productive effect may occur in many settings, we do not believe it poses a serious threat to the settlement-forcing adaptation that we’ve detailed here. Typical settlement negotiations do not involve the type of discussions that are most likely to trigger hedonic relapse. Late-period settlement negotiations are most likely to revolve around dollar figures, and nothing more.

At the inception of litigation, before the parties have conducted discovery and fully defined the scope of claims, any negotiations between the plaintiff and defendant—indeed, any conversations between the plaintiff and his attorney—are likely to revolve around the scope of the plaintiff’s injury. The plaintiff’s (or defendant’s) attorney may intend for the plaintiff to visit an additional set of doctors; the parties may be uncertain as to the extent of the plaintiff’s injury; and the plaintiff himself may not know or understand the long-term lifestyle effects of his condition. These types of interactions cannot help but retard the process of hedonic adaptation.

As other scholars have noted, the trial itself is also likely to create negative focalism effects.¹⁵⁸ The plaintiff will be seated in court every day as the parties rehash the plaintiff’s injury and debate the continuing effects of that injury upon the plaintiff’s life. The plaintiff will hear expert testimony from both sides regarding his health and disability. And he will likely be called upon to testify about his accident and his continuing health. Even if the plaintiff has succeeded in adapting hedonically by the time that his case reaches trial, the trial itself is likely to undo those gains.

¹⁵⁷ Wilson et al., *supra* note 93.

¹⁵⁸ As we note above, Cass Sunstein and others have pointed to the distortions in damage amounts that the jury’s focalism may engender. *See* Sunstein, *supra* note 112, at 17; Bagenstos & Schlanger, *supra* note 115. As far as we are aware, however, no one has paid significant attention to the effects of focalism on the plaintiff at trial.

Yet between the initial stages of the litigation and the trial, the plaintiff's health holds very little day-to-day importance. Once the plaintiff's condition has become a known quantity, there is no further need for the sides to discuss it.¹⁵⁹ It is during this period that the plaintiff's adaptive response begins to operate, as the injury and the medically intensive inception of litigation both begin to fade into the background.

If the case does not settle shortly after it is filed, this fallow period may be punctuated by settlement offers and negotiations by both sides. These interactions, however, bear little resemblance in form or substance to the type of emotional presentations that characterize a personal injury trial. By this point, settlement offers are likely to take the form of suggested dollar figures, and little else. By the time that the parties reach the negotiating table, the attorneys will have latched onto approximate case valuations and acceptable settlement ranges, and reaching agreement on a particular number will be the sole priority.

Importantly, plaintiffs are most often bystanders to these negotiations. Any conversation between the plaintiff and his attorney will almost certainly concern only whether the plaintiff wishes to accept a proffered settlement offer or hold out for more money.¹⁶⁰ Much has been made of the attorney-client relationship as a classic principal-agent problem.¹⁶¹ According to the standard model of attorney-client relations, the attorney manages the litigation and structures the investigation, analysis, and discussion of the relevant issues in order to impel the client towards her (the attorney's) preferred outcomes. This litigation structure is commonly thought of as imposing costs upon plaintiffs—and upon third parties who may depend on litigation to provide remuneration and deterrence—through

¹⁵⁹ See Part I, *supra*.

¹⁶⁰ See *id.*

¹⁶¹ See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (describing the continuing problems posed by attorney-client agency costs deriving from attorneys' control over litigation and suggesting reforms to mitigate these costs); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 726 (1986) (“[T]he basic goal of reform should be to reduce the agency costs incident to this attorney-client relationship. While various means to this end are possible . . . all should be understood as responses to this agency cost problem and debated in that light.”).

the potential misalignment of incentives.¹⁶² Yet in personal injury cases, the attorney's function as an emotional screen may help facilitate hedonic adaptation and confer genuine benefits on litigants from both sides.

2. Civil Damages as Adaptive Mechanism?

Modern research on happiness and hedonic adaptation quite obviously poses a number of challenges to classical economic models. Standard rational-choice economics would predict that a loss of function or capability would have substantial long-term effects on a person's happiness. Deprivation of the option value of a set of previously held capabilities—and thus of a variety of forms of activity and entertainment—would cause the disabled person to be less happy in the long run, assuming that perfect substitutes for those activities are unavailable.¹⁶³ Moreover, standard economic models would predict that a person's happiness level should not change without a material change in that person's circumstances or an exogenously forced change in preferences. The very existence of hedonic adaptation belies these predictions.

In response to the burgeoning literature on happiness, economists have proposed a number of explanations that would account for evidence of adaptation within the confines of classical rational-choice understandings of human behavior. The most

¹⁶² See, e.g., Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1244 (2006) ("The presence of a lawyer as agent of a client-principal introduces costs that unrepresented litigants do not face, because, if lawyers are rational actors, they may tend to maximize interests that differ from those of their clients."); Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997) ("Significant agency costs may be imposed on the clients because the attorney, as the strategic decisionmaker, may seek to promote her best interests ahead of one or both groups of clients. Indeed, in game theoretic terms, if the attorney makes the decisions for both parties, then those parties should in reality be considered a single player."); Ellen Wright Clayton & David F. Partlett, *Lawyer-Client Relationships*, in FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 72, 77-78 (1993) (noting that agency costs continue to rise as incentives between attorneys and clients become even more misaligned).

¹⁶³ See Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 855-68 (2006) ("When regulators are dealing with an irreversible loss, and when they are uncertain about the timing and likelihood of that loss, they should be willing to pay a sum—the option value—to maintain flexibility for the future.").

plausible explanation posits that studies that purport to find hedonic adaptation are in fact succeeding only in capturing precisely the changes in circumstance that economists predict would raise happiness levels in the wake of serious injury or disability.¹⁶⁴ In other words, tort victims are increasingly happy over time not because their psychological immune systems have successfully adapted them to their injuries, but because insurance payments, tort settlements, or even increased attention from family and friends have kicked in and restored them to their prior hedonic level. Economists view this as an indication that insurance and tort settlements are achieving the proper effect, genuinely functioning as “make whole” remedies for accident victims.

Were this the case, it would pose a significant challenge to the theory we advance here. If what appears to be “hedonic adaptation” is only a product of the successful resolution of lawsuits and insurance claims, then our causal arrow points in precisely the wrong direction.

Yet the data do not appear to support this view. If cash payments via insurance or tort lawsuits were driving hedonic improvements, personal income should serve as the best indicator for when hedonic adaptation will occur, and when income is held constant researchers should find no evidence of adaptation. However, studies of people with moderate and severe disabilities produce evidence of hedonic adaptation even after controlling for household income.¹⁶⁵ Likewise, if injury victims were adapting because of increased involvement by their family and friends, we would expect that differences in family structure or marital status would largely explain observed hedonic adaptation. Again, this has not proven to be the case. Family size and marital status—along with income—have statistically meaningful effects on the rate and extent of post-injury adaptation.¹⁶⁶ But not only do those effects not account for the entirety of adaptation, they are dwarfed by the adaptation that appears to occur for reasons having nothing to do with family size or structure.¹⁶⁷ The conclusion we draw from these studies is that while wealth and a supportive family may aid the process of hedonic

¹⁶⁴ We thank Thomas Miles for drawing our attention to this theory.

¹⁶⁵ See Oswald & Powdthavee, *supra* note 72, at 24.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* Oswald and Powdthavee’s regressions demonstrate that the effects of time—which they interpret as the workings of the psychological immune system—are at minimum between five and ten times larger than the effects generated by marriage, family size, income, or any other potential confounding factor.

adaptation, the normal functioning of the psychological immune system alone will be enough to drive adaptation, and thus spur settlement.

CONCLUSION

In the wake of a devastating or crippling injury, it is only natural for most people to believe that their future lives will be significantly impacted, their future happiness severely diminished. In keeping with these dire predictions, it is not surprising that victims who bring suit against their injurers will initially demand large compensating awards, certain that those payments will be necessary if they are to have any hope of returning to their pre-injury quality of life. In reality, however, we now know that humans can adapt readily to even debilitating injuries. A scant two years after losing a limb or the ability to walk, an accident victim often will have returned almost completely to the level of happiness he experienced prior to the injury. This human capacity for hedonic adaptation is likely to have profound consequences on the tort suits that personal injury victims bring against their tortfeasors. The typical personal injury lawsuit drags on for almost two years from the date it is filed until the day that it reaches trial. In the course of these two years, adaptation will drive down the settlement prices for many personal injury plaintiffs, enlarging the available window for negotiation between plaintiffs and defendants and increasing the rate of settlement. The passage of some appreciable span of time is essential to the process; were civil litigation not prone to such stagnation, the psychological immune system would have no time within which to operate. Procedural delays—long derided as unnecessary sources of costs and delay to litigants—thus function simultaneously as the means by which plaintiffs and defendants in personal injury cases are able to sidestep lengthy and expensive trials.