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ESSAY

HEDONIC ADAPTATION AND THE SETTLEMENT OF CIVIL LAWSUITS

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This Essay 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 the probability of pretrial settlement in civil litigation. The existing economic and behavioral models of settlement are incomplete because they do not incorporate the effect of adaptation on the sum for which a plaintiff is willing to accept an offer. 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 far closer to her pre-injury state than she had expected. 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. The sum that the plaintiff is willing to accept in settlement will decline accordingly, and the chances of settlement will increase.

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 happiness.² The answers to these questions have challenged some of the fundamental tenets of psychologi-

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1. See Daniel Kahneman et al., Preface to *Well-Being: The Foundations of Hedonic Psychology*, at ix, ix (Daniel Kahneman et al. eds., 1999) [hereinafter *Well-Being*] (defining and exploring hedonic psychology).

2. See *id.* (describing past and future hedonic research).

cal and economic theory.³ They also have significant practical implications for medicine, public policy, business, and the law. The legal implications of the new happiness research are only now being realized, and this Essay 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 experiences—including significant events 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 initially show substantial changes in reported happiness, but in the weeks, months, and years that follow, they undergo a process of “hedonic adaptation” that 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 novel consequences of the event and back toward the mundane features of daily life.⁵ While individuals are able to adapt to many changes within a couple of years, other changes, it seems, tend to resist such adaptation—particularly injuries that cause constant or worsening pain.⁶

Although people often experience hedonic adaptation to major life events, researchers have found that people fail to recognize and remember adaptation’s effects.⁷ This memory failure then leads to an inability to predict the hedonic impact of future experiences. 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.⁸ Thus, healthy people tend to predict that becoming disabled will have a more substantial impact on their well-being and that the impact will last longer than it actually does. In effect, they neglect to account for the strength and speed of hedonic adaptation.

3. See Isabelle Brocas & Juan D. Carrillo, Introduction to *The Psychology of Economic Decisions: Rationality and Well-Being*, at xiii, xiii–xv (Isabelle Brocas & Juan D. Carrillo eds., 2003) [hereinafter *Rationality and Well-Being*] (describing challenges posed by behavioral economics to both psychologists and economists).

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: A Moment-Based Approach*, in *Rationality and Well-Being*, supra note 3, at 187, 199.

5. On the role of attention in adaptation, see *infra* notes 80–84 and accompanying text.

6. On the differences between adaptable and unadaptable injuries, see *infra* notes 72–77 and accompanying text.

7. See Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 *J. Personality & Soc. Psychol.* 617, 634–35 (1998) [hereinafter Gilbert et al., *Immune Neglect*] (discussing reasons why people may not be attuned to their ability to emotionally adapt to undesired outcomes).

8. For a discussion of this research, see *infra* notes Part II.B.

In this Essay, 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 toward the novel and painful features of the injury, and 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 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 an increase in settlements that avoid some of the costs of trial. Accordingly, we suggest that current accountings of drawn out litigation processes have overstated the net costs attributable to extended procedure.

Part I of this Essay sets out the principal law and economics model of civil settlement as well as recent challenges to the model drawn from psychological research. In Part II, we elaborate on the social scientific research on hedonic adaptation and affective forecasting. 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.

9. For a particularly incisive treatment of the relationship between due process requirements and government decisionmaking costs, 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). In that case, the Court wrote:

[D]ue 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 . . . of additional or substitute procedural safeguards; and finally, the Government's interest

Id. at 335.

I. THE FACTORS THAT DRIVE CASES TOWARD SETTLEMENT

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 litigants opt for trial.¹² Behavioral law and economics then modified the assumption of rationality by considering factors that undermine rational choice.¹³ Ultimately, behavioral psychology has indicated that wealth maximization is not the only goal driving decisions about settlement.¹⁴ Because other goals—principally, a desire for an outcome perceived as fair—influence a plaintiff's decision whether to settle, that decision is 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.

A. *The Rational Actor Model of Settlement Decisionmaking*

Since Charles Dickens wrote about *Jarndyce and Jarndyce* more than 150 years ago,¹⁵ many others have bemoaned that litigating a civil case all the way through trial takes a long time.¹⁶ Today, the median interval in federal court between filing and trial adjudication is about two years.¹⁷ That period of time encompasses the filing of preliminary motions,¹⁸ the taking of discovery,¹⁹ the filing and adjudication of summary judgment

11. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 462 tbl.1 (2004) (depicting trial rates declining since 1962 to less than two percent in 2002).

12. See *infra* Part I.A.

13. See *infra* Part I.B.1.

14. See *infra* Part I.B.2.

15. Charles Dickens, *Bleak House* (Norman Page ed., Penguin Books 1971) (1853).

16. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274 (1982) (criticizing "delay" and "time lapse" associated with litigation).

17. James C. Duff, Admin. Office of the U.S. Courts, 2006 Judicial Business of the United States Courts 192 tbl.C-5 (2006), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf> (on file with the *Columbia Law Review*) (depicting "Median Time Intervals From Filing to Disposition of Civil Cases" for U.S. district courts).

18. See Fed. R. Civ. P. 7, 12.

19. See Fed. R. Civ. P. 26, 30, 33, 34; see also Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. Rev. 229, 240–41 (2004).

motions,²⁰ and finally the jury trial itself.²¹ Yet even that figure does not include the time that elapses after an injury has occurred and before filing, while the harmed party decides whether to pursue a legal remedy. When that decision is made and a lawyer is found, the lawyer must investigate whether the issue merits litigation.

Few cases continue through all the phases of litigation. 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.²² 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, lawyers will typically continue to engage in settlement negotiations with little or no involvement by the clients, who are not professional negotiators and whose involvement might therefore run contrary to their own interests.²³ Even if these negotiations have not borne fruit by the time the pretrial 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 preparing for and performing in court,²⁴ but also expert witnesses may have to be paid,²⁵ and the court itself must

("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. See Fed. R. Civ. P. 56. Summary judgment is an important part of litigation. See Edward Brunet & Martin H. Redish, *Summary Judgment: Federal Law and Practice* §1:1, at 1–2 (3d ed. 2006) ("As the primary procedure used to avoid unnecessary civil trials, summary judgment is probably the single most important pretrial device used today."); John Bronsteen, *Against Summary Judgment*, 75 *Geo. Wash. L. Rev.* 522, 523–24 (2007) [hereinafter *Bronsteen, Against Summary Judgment*] (noting summary judgment is a "staple of how today's U.S. civil justice system conducts business"). As a result, it can consume considerable time on the part of both lawyers and the court. See 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."); Morton Denlow, *Summary Judgment: Boon or Burden?*, *Judges' J.*, Summer 1998, at 26, 26 ("[Summary judgment motions] are expensive to prepare and consume substantial lawyer and judicial resources.").

21. See U.S. Const. amend. VII.

22. See *Bronsteen, Against Summary Judgment*, *supra* note 20, at 530 (listing points at which a lawsuit can be terminated).

23. See Windle Turley, *Creating the Right Settlement Environment*, *Trial*, June 1994, at 28, 29 (recognizing clients may lack training and information necessary for successful negotiation).

24. D. Theodore Rave, *Note, Questioning the Efficiency of Summary Judgment*, 81 *N.Y.U. L. Rev.* 875, 903 (2006) (noting bulk of cost to plaintiff is lawyer fees for time spent in preparation for and at trial).

25. *Bronsteen, Against Summary Judgment*, *supra* note 20, at 534–35.

expend its limited resources on only this case.²⁶ Much is to be saved, therefore, by avoiding trial even if the parties have failed to avoid the costs of pretrial litigation.

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.²⁷ In the early 1970s, William Landes and Richard Posner began to analyze settlement through the lens of law and economics.²⁸ 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 will be better than that 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.²⁹ 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.

It is the introduction of transaction costs that makes all the difference. For example, suppose that a plaintiff sues for \$100,000 in damages and has a fifty percent chance of winning at trial. 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 one would expect a settlement somewhere within that zone.³⁰

26. See *id.* at 540–41 (recognizing that until trial ends, the court cannot fully attend to other cases); 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 \$4,000 per day, excluding the cost to litigants. David Wippman, *The Costs of International Justice*, 100 *Am. J. Int’l L.* 861, 868 (2006). Although he was discussing criminal cases, many of the costs (such as judicial salary) apply equally to civil cases.

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

28. William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & Econ.* 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. Legal Stud.* 399 (1973); see also John P. Gould, *The Economics of Legal Conflicts*, 2 *J. Legal Stud.* 279 (1973) (seeking to show why a larger percentage of lawsuits are settled out of court and providing hypothesis about what causes cases to go to trial). 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 fifty percent of the time—that has come to be identified with the assumption of wealth maximizing behavior. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1, 4–5 (1984).

29. Posner, *supra* note 28, at 418.

30. For a similar explanation and example, see Russell Korobkin, *Aspirations and Settlement*, 88 *Cornell L. Rev.* 1, 7 (2002) [hereinafter Korobkin, *Aspirations*].

Importantly, the wider the bargaining zone, the higher the probability of settlement.³¹ Parties are more likely to reach agreement if they have a greater degree of bargaining space—space in which both sides will benefit—with which to work. In addition, this model implies that settlement becomes more likely as the plaintiff's claim shrinks relative to the transaction costs of litigation.³² As this occurs, this available bargaining zone comes to occupy a greater proportion of the valuation space within which the two parties will be negotiating.

B. *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 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 set of behavioral considerations known as *prospect theory* can shift the bargaining 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; but when they face the prospect of a loss, they are risk seeking.³³ 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.³⁴ Applying prospect

31. 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 24, 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, *Aspirations*, *supra* note 30, at 6 (noting disputes will settle in bargaining zone or not at all if zone does not exist).

32. See Posner, *supra* note 28, at 419 ("[A]ny increase in the stakes must increase the likelihood of litigation by making the plaintiff's minimum settlement offer grow faster than the defendant's maximum settlement offer.").

33. Daniel Kahneman & Amos Tversky, Choices, Values, and Frames, 39 Am. Psychologist 341, 344 (1984); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 268–69 (1979); Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Science 453, 453 (1981).

34. 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

theory to the topic of settlement, Jeffrey Rachlinski has used experiments to illustrate that plaintiffs can generally be expected to be irrationally risk averse whereas defendants can generally be expected to be irrationally risk seeking.³⁵ 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.³⁶ Imagine a nuisance lawsuit wherein the plaintiff has a very low chance of victory (say, one percent) but a very high amount of damages were she to win (say, ten million dollars). 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 buy lottery tickets).³⁷ The lowest payment acceptable to the plaintiff would be a higher number than it would have been if she 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 retain at least one basic assumption of the classic economic model: A litigant's goal is to maximize her wealth.³⁸ 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 interested purely in wealth maximization, but also consider other values like fairness when deciding whether to accept a settlement offer.³⁹ This evidence corroborates the

possibility is mentioned briefly *infra* Part I.B.2. However, Rachlinski's experimental findings suggest otherwise, indicating that generally plaintiffs view settlements as gains whereas defendants view them as losses. See *infra* note 35.

35. Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. Cal. L. Rev. 113, 118–19 (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 seventy percent 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.

36. Chris Guthrie, Framing Frivolous Litigation: A Psychological Theory, 67 U. Chi. L. Rev. 163, 168 (2000).

37. See *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.”).

38. More precisely, her 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.

39. Fairness is not the only nonmonetary consideration that can matter to litigants. See Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New

emphasis that scholars have long placed on fairness or justice in civil procedure.⁴⁰

The stage was set for such evidence by the results of a game known as “ultimatum bargaining.”⁴¹ 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.⁴² In fact, offers under twenty percent of the total are regularly rejected.⁴³ 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.⁴⁴ 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 told them that the result of a

Look at the Role of the Lawyer, 76 *Tex. L. Rev.* 77, 79–80 (1997) (“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” (quoting Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 *Law & Soc’y Rev.* 339, 346 (1976)) (footnotes omitted)).

40. See, e.g., George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 *J. Legal Stud.* 135, 139 (1992) [hereinafter Loewenstein et al., *Self-Serving*] (“[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 class action context); Owen M. Fiss, *Justice Chicago Style*, 1987 *U. Chi. Legal F.* 1, 10–11 (arguing that justice is different from efficiency and should be prioritized over it in civil justice system); Resnik, *supra* note 26, at 444–45 (1982) (expressing concern that docket pressures may be causing judges wrongly to value efficiency over justice).

41. See Werner Güth & Reinhard Tietz, *Ultimatum Bargaining Behavior: A Survey and Comparison of Experimental Results*, 11 *J. Econ. Psychol.* 417, 447 (1990) (describing research using ultimatum bargaining games and results); Loewenstein et al., *Self-Serving*, *supra* note 40, at 142–43 (observing that fairness concerns affect bargaining in ultimatum bargaining games).

42. See Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 *Science* 1773, 1773 (2000) (“The irrational human emphasis on fair division suggests that players have preferences which do not depend solely on their own payoff”).

43. Karen M. Page & Martin A. Nowak, *Empathy Leads to Fairness*, 64 *Bull. Mathematical Biology* 1101, 1102 (2002) (“One half of offers of 20% or less are rejected.”).

44. Korobkin & Guthrie, *Psychological Barriers*, *supra* note 27, at 110–11.

trial could go either way, and the defendant offered to settle for \$21,000.⁴⁵

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.⁴⁶

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 rational actor model, both groups should have viewed the offer similarly.

But the groups do diverge. One way to characterize the divergence is as a simple offshoot of the core idea of prospect theory: Group B, unlike Group A, views the \$21,000 settlement offer as a loss rather than a gain because it falls short of the injury Group B has suffered.⁴⁷ Accordingly, Group B would be more likely to gamble on recovering the “full” amount of \$28,000 at trial. 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.

C. 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,⁴⁸

45. Id. at 130–32.

46. Id. at 132–33.

47. See id. at 109 (“People avoid risk when they choose between options they understand as gains, but they prefer risk when they select between choices viewed as losses. . . . [S]ettlement rates will depend on whether the offeree understands a given settlement offer as a gain or loss.”).

48. See, e.g., Landes, *supra* note 28, at 61 (“The basic assumption of the model is that both the prosecutor and the defendant maximize their utility, appropriately defined, subject to a constraint on their resources.”); Posner, *supra* note 28, at 417–18 (“The plaintiff’s minimum offer is the expected value of the litigation to him plus his settlement costs, the expected value of the litigation being the present value of the judgment if he wins, multiplied by the probability . . . of his winning, minus the present value of his litigation expenses.”); Priest & Klein, *supra* note 28, at 4 (“According to our model, the determinants of settlement and litigation are solely economic The most important

there is now evidence that plaintiffs' lowest acceptable sum is determined in part by reference to the amount they feel would fairly compensate them for the harm they have suffered.⁴⁹

If a plaintiff's perception of what would constitute fair compensation were to decrease as time passed, then that passage of time would accordingly increase the likelihood of settlement. To be sure, many factors could influence a plaintiff's demand, and her current experience of the injury is only one of them. But holding constant all such other factors, one would expect a plaintiff to be more willing to settle if, over time, she came to view a smaller amount as representing a fair payment for her injury.

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 one to ten, 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.⁵⁰ Moreover, psychologists have shown that your failure to anticipate the extent and rapidity of your recovery is not unusual. People consistently overestimate how unhappy a negative

assumption of the model is that potential litigants form rational estimates of the likely decision . . .").

49. Korobkin & Guthrie, *Psychological Barriers*, *supra* note 27, at 144–47.

50. For an excellent summary of the initial research on hedonic adaptation, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, *in* *Well-Being*, *supra* note 1, at 302, 311–18 [hereinafter Frederick & Loewenstein, *Hedonic Adaptation*].

event would make them, in part because they do not appreciate how quickly they would adapt to their new lives.⁵¹

This Part explores recent social scientific research on adaptation to disability⁵² and the inability to predict future states of happiness, known in the literature as “failure of affective forecasting.”⁵³ We describe the evidence of hedonic adaptation as well as its limits, and we consider why people are unable to anticipate how disabilities will influence their well-being.

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.”⁵⁴ 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.”⁵⁵ 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.⁵⁶ Most interestingly for this Essay, psychologists have found that

51. See Gilbert et al., *Immune Neglect*, supra note 7, at 634 (concluding from research results that respondents recover much more quickly from variety of negative events than they predicted).

52. 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.

53. Daniel Kahneman & Robert Sugden, *Experienced Utility as a Standard of Policy Evaluation*, 32 *Env’tl. & Resource Econ.* 161, 169 (2005) [hereinafter Kahneman & Sugden, *Experienced Utility*].

54. Daniel Kahneman et al., *Preface to Well-Being*, supra note 1, at ix, ix.

55. *Id.*

56. 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 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 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.

most life events, including apparently devastating ones such as those that cause permanent 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 individuals with paraplegia or quadriplegia.⁵⁷ 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 midpoint of the scale, indicating that they considered themselves happy.⁵⁸ 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.⁵⁹ Although specific aspects of the treadmill theory have been challenged,⁶⁰ a wealth of recent research has confirmed its general finding for other disabilities. For example, studies have found that children and adolescents with limb deficiencies exhibit remarkably good psychosocial adjustment.⁶¹ People with spinal cord injuries report levels of well-being similar to those of healthy controls,⁶² as do burn victims,⁶³ patients with colostomies,⁶⁴ and those undergoing dialysis for treatment of kidney dis-

Hence, a reallocation of time in favor of family life and health would, on average, increase individual happiness.

Richard A. Easterlin, Explaining Happiness, 100 *Proc. Nat'l Acad. Sci.* 11,176, 11,182 (2003); see also Richard Layard, Happiness: Lessons from a New Science 29–31 (2005) (“When people become richer compared with other people, they become happier. But when whole societies have become richer, they have not become happier—at least in the West.”).

57. Philip Brickman et al., Lottery Winners and Accident Victims: Is Happiness Relative?, 36 *J. Personality & Soc. Psychol.* 917 (1978).

58. *Id.* at 920–21.

59. See *id.* at 918 (describing processes of “Contrast and Habituation” that tend to mitigate effects of extreme good or bad fortune). For a further explanation of the hedonic treadmill theory, see Daniel Kahneman, Objective Happiness, *in* *Well-Being*, *supra* note 1, at 3, 13–15.

60. See Ed Diener et al., Beyond the Hedonic Treadmill: Revising the Adaptation Theory of Well-Being, 61 *Am. Psychologist* 305, 306–11 (2006) (suggesting modifications to treadmill model); Richard E. Lucas, Adaptation and the Set-Point Model of Subjective Well-Being: Does Happiness Change After Major Life Events?, 16 *Current Directions Psychol. Sci.* 75, 76–78 (2007) (arguing that hedonic adaptation is not inevitable and may depend on individual differences).

61. See Vida L. Tyc, Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review, 12 *Clinical Psychol. Rev.* 275, 276–77 (1992) (collecting studies).

62. C. Lundqvist et al., Spinal Cord Injuries: Clinical, Functional, and Emotional Status, 16 *Spine* 78, 80 (1991).

63. David R. Patterson et al., Psychological Effects of Severe Burn Injuries, 113 *Psychol. Bull.* 362, 370 (1993).

64. See Norman F. Boyd et al., Whose Utilities for Decision Analysis?, 10 *Med. Decision Making* 58, 63 (1990) (finding patients with colostomies consistently assign higher utility value to life with colostomy than do healthy patients).

orders.⁶⁵ 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.”⁶⁶

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.⁶⁷ 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.⁶⁸ In these surveys, respondents rated their own level of happiness on a scale of one to seven, 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 min[utes]”) and those who were seriously disabled (“unable to do at least one of the above day-to-day activities”).⁶⁹

Oswald and Powdthavee’s study produced noteworthy results. As a group, people who became disabled reported an average well-being score of 4.8 for the two years preceding disability, an abrupt fall to 3.7 at the onset of disability, and then a subsequent rebound to 4.1 in the next two years despite the fact that the disabilities themselves had not changed.⁷⁰ Separating the moderately and severely disabled groups, the authors find approximately fifty percent adaptation to moderate disability and thirty percent adaptation to severe disability.⁷¹ Thus, there is substantial evidence that hedonic adaptation to disability is significant (if incomplete).

65. Jason Riis et al., *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. Experimental Psychol. 3, 6 (2005).

66. Id. at 7.

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

68. The survey contains over ten thousand adults who were interviewed between September and December each year since 1991. Id. at 1065.

69. Id. There were 675 person-year observations in the “Moderately Disabled” category and 3442 observations in the “Severely Disabled” category. Id.

70. Id. at 1066.

71. Id. at 1070. That is to say, over the course of two years, moderately disabled people recover approximately fifty percent of their “lost” happiness, and even severely disabled people regain more than thirty percent of the happiness they lost due to their injury. Id.

Due to its considerable size and longitudinal nature, Oswald and Powdthavee's recent study provides some of the strongest evidence for adaptation to disability.⁷² That they did not find higher levels of adaptation may be due to their inability to distinguish between disabilities that people can readily adapt to and those that are, in effect, "unadaptable." A number of studies have found that people have difficulty adapting to particular categories of negative events. Low-level, chronic stimuli like noise, dull pain, and headaches have substantial long-term effects on happiness, as do diseases associated with progressive deterioration.⁷³ One study, for example, found that instead of adapting to noise problems, some college students actually became sensitized to it, experiencing higher levels of annoyance as time went on.⁷⁴ Others have shown that people are less likely to adapt to unemployment⁷⁵ and negative changes in marital status such as widowhood.⁷⁶ 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 deteriorating nature of the stimuli associated with such diseases.⁷⁷ It is also worth pointing out that even where hedonic adaptation occurs, it is neither inevitable nor invariable. Although adaptation effects may be

72. 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, 722 (2007) [hereinafter Lucas, Long-Term Disability] (finding no evidence of adaptation from same data set). Oswald and Powdthavee note methodological differences between their paper and Lucas's, but, they write, "[W]e cannot be certain why we find much more adaptation than does Lucas." Oswald & Powdthavee, *supra* note 67, at 1065 n.10.

73. Frederick & Loewenstein, Hedonic Adaptation, *supra* note 50, at 311–12.

74. Neil. D. Weinstein, Individual Differences in Reaction to Noise: A Longitudinal Study in a College Dormitory, 63 *J. Applied Psychol.* 458, 460 (1978).

75. Richard E. Lucas et al., Unemployment Alters the Set Point for Life Satisfaction, 15 *Psychol. Sci.* 8, 11 (2004).

76. 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, 535 (2003).

77. See Richard F. Antonak & Hanoch Livneh, Psychosocial Adaptation to Disability and Its Investigation Among Persons with Multiple Sclerosis, 40 *Soc. Sci. & Med.* 1099, 1105 (1995) ("Regressions to earlier phases of the hypothesized adaptation process are predictable from the renewed life crises associated with unexpected exacerbations of physical symptoms and the resultant imposition of disability."); Craig A. Smith & Kenneth A. Wallston, Adaptation in Patients with Chronic Rheumatoid Arthritis: Application of a General Model, 11 *Health Psychol.* 151, 151 (1992) ("[Rheumatoid arthritis] and its associated pain have been linked to poor adjustment, including depressive symptoms and impaired quality of life." (citations omitted)). Frederick and Loewenstein note, however, that the degree of adaptation may be particularly difficult to measure with these progressive diseases. Frederick & Loewenstein, Hedonic Adaptation, *supra* note 50, at 312 ("Even maintaining a constant hedonic state in the face of these deteriorating conditions would be impressive evidence of hedonic adaptation.").

seen in the aggregate, individuals experience a range of responses to adaptable disabilities.⁷⁸

Understanding which disabilities are adaptable and which are not should lead to a better understanding of the mechanisms of adaptation. These mechanisms may range from physiological changes (such as increased upper body strength in paraplegics enabling more effective wheelchair mobility) to conscious and unconscious cognitive changes in disabled people's "interests, values, [and] goals."⁷⁹

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 his colleagues have suggested that people possess a "psychological immune system" that dampens the hedonic effect of disability.⁸⁰ 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.⁸¹ Similarly, Kahneman and Thaler note that attention is normally directed toward novelty, including changes in response to disability.⁸² 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 responses."⁸³ These coping strategies are evolutionarily adaptive, allowing people to recover quickly from considerable misfortune.⁸⁴

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 fore-

78. See Diener et al., *supra* note 60, at 310–11 ("[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.").

79. Frederick & Loewenstein, *Hedonic Adaptation*, *supra* note 50, at 302–03.

80. Gilbert et al., *Immune Neglect*, *supra* note 7, at 619.

81. *Id.*

82. Daniel Kahneman & Richard H. Thaler, *Utility Maximization and Experienced Utility*, *J. Econ. Persp.*, Winter 2006, at 221, 230 [hereinafter Kahneman & Thaler, *Utility Maximization*].

83. *Id.*

84. See Lucas, *Long-Term Disability*, *supra* note 72, at 718 ("[J]ust as homeostatic temperature regulation mechanisms prevent extreme heat or extreme cold from causing physical damage to the body, homeostatic emotion regulation mechanisms may protect the body from dangerous physiological and psychological reactions that occur with prolonged emotional states."); cf. Eugene Kontorovich, *Comment, The Mitigation of Emotional Distress Damages*, 68 *U. Chi. L. Rev.* 491, 491 (2001) (suggesting emotional distress may be mitigated by tort plaintiffs and lack of mitigation standards may lead to moral hazard problems).

casting”—people’s ability to judge how future experiences will make them feel.⁸⁵ Most people, it turns out, do a surprisingly poor job of predicting the intensity and the duration of future feelings.⁸⁶ This inability is particularly important in situations concerning disability and adaptation where it likely affects decisions about treatment.

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”).⁸⁷ 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.⁸⁸

The most compelling explanation for the mispredictions associated with affective forecasting suggests that people suffer from a “focusing illu-

85. See, e.g., Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting: Knowing What to Want*, 14 *Current Directions Psychol. Sci.* 131, 131 (2005) [hereinafter Wilson & Gilbert, *Affective Forecasting*] (“Research on *affective forecasting* has shown that people routinely mispredict how much pleasure or displeasure future events will bring and, as a result, sometimes work to bring about events that do not maximize their happiness.”).

86. For an excellent recent review of research on misprediction of hedonic reactions, see Daniel T. Gilbert & Timothy D. Wilson, *Prospection: Experiencing the Future*, 317 *Science* 1351 (2007) [hereinafter Gilbert & Wilson, *Prospection*].

87. Wilson & Gilbert, *Affective Forecasting*, *supra* note 85, at 131.

88. See Boyd et al., *supra* note 64, at 63 (finding that healthy controls assigned lower utilities to colostomies than did patients who had undergone the procedure); David L. Sackett & George W. Torrance, *The Utility of Different Health States as Perceived by the General Public*, 31 *J. Chronic Diseases* 697, 702 (1978) (finding that patients undergoing dialysis gave higher utilities to that treatment than did healthy controls); 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, 111 (2005) [hereinafter Ubel et al., *Disability and Sunshine*] (“One of the most commonly replicated ‘happiness gaps’ is that observed between the self-rated quality of life of people with health conditions and healthy people’s estimates of what their quality of life would be if they had those conditions . . .” (citation omitted)); 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, 197 (2001) [hereinafter Ubel et al., *Do Nonpatients Underestimate*] (finding that healthy peoples’ underestimates of quality of life for paraplegics could not be altered by defocusing tasks); Peter A. Ubel et al., *Misimagining the Unimaginable: The Disability Paradox and Health Care Decision Making*, 24 *Health Psychol.* S57, S57 (Supp. 2005) [hereinafter Ubel et al., *Misimagining the Unimaginable*] (“Across a wide range of health conditions, patients typically report greater happiness and [quality of life] than do healthy people under similar circumstances . . .”).

sion”⁸⁹ (also called “focalism”⁹⁰) 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.⁹¹ As Wilson and his colleagues 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.”⁹² 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 would create rather than, say, their unaltered ability to enjoy a glass of wine or a conversation with friends.⁹³ By directing their attention to the changes wrought by disability, healthy people underestimate how happy they will remain. Focalism thus 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. Some researchers have referred to this failure to predict adaptation as “immune neglect.”⁹⁴ When asked to predict how long they

89. For an example of a focusing illusion, see David A. Schkade & Daniel Kahneman, Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction, 9 Psychol. Sci. 340, 344–45 (1998) (describing indications of focusing illusion when people asked how happy they are and then asked how happy they would be in another region). Ubel and his colleagues define a “focusing illusion” as “a failure to appreciate that not all life domains or life events will be equally affected by a given change in circumstances.” Ubel et al., Disability and Sunshine, *supra* note 88, at 112.

90. Timothy D. Wilson et al., Focalism: A Source of Durability Bias in Affective Forecasting, 78 J. Personality & Soc. Psychol. 821, 822 (2000) [hereinafter Wilson et al., Focalism].

91. Gilbert and Wilson discuss four reasons why affective forecasting errors occur—mental simulations of future events tend to be “unrepresentative” because they are based on faulty memories, “essentialized” because they only include central features, “abbreviated” because they are shorter than the actual event, and “decontextualized” because they do not take place in the same circumstances as the actual event. Gilbert & Wilson, Prospection, *supra* note 86, at 1352–54. 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.* at 1354.

92. Wilson et al., Focalism, *supra* note 90, at 822.

93. Ubel et al., Disability and Sunshine, *supra* note 88, at 113.

94. Gilbert et al., Immune Neglect, *supra* note 7, at 619. Ubel and his coauthors describe a similar phenomenon that they call “failure to consider adaptation.” Ubel et al., Disability and Sunshine, *supra* note 88, at 113. 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.

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.”⁹⁵ The underestimation of hedonic adaptation “is probably the most commonly observed error in research on hedonic prediction.”⁹⁶ 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.⁹⁷

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).⁹⁸ One early study showed that, on a scale of zero (conditions as bad as death) to one (perfect health), the general public estimates that the quality of life for patients receiving home dialysis for life is 0.39, while dialysis patients report their QoL as 0.56.⁹⁹ Similarly, patients with colostomies rate their quality of life at 0.92, while patients without colostomies predict that QoL with a colostomy would be 0.80.¹⁰⁰ In addition, 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.¹⁰¹ As the authors explain, “The less you know about paraplegics, the worse off you think they are.”¹⁰² 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, “[I]f 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.”¹⁰³ As we will later argue, this focus on *becoming* rather than *being* may account for certain aspects of victims’ settlement behavior. Re-

95. Ubel et al., *Disability and Sunshine*, supra note 88, at 113.

96. Gilbert & Wilson, *Prospection*, supra note 86, at 1353.

97. *Id.*

98. 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 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.

99. Sackett & Torrance, supra note 88, at 702 tbl.4.

100. Boyd et al., supra note 64, at 63.

101. Schkade & Kahneman, supra note 89, at 340.

102. *Id.*

103. *Id.* at 345.

cently injured plaintiffs will make the same kinds of errors when estimating the sum that they feel will adequately compensate them for their injuries that healthy people make because their attention will be directed toward the major changes brought about by disability. Thus, they will likely overestimate the long-term hedonic impact of their injuries.¹⁰⁴

* * *

Much of the research on hedonic psychology is specifically targeted toward policymakers 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.¹⁰⁵ That this research also has profound consequences for the law is becoming increasingly clear.¹⁰⁶

104. We use the term "overestimate" with some reservation. Considerable debate exists about the policy implications of hedonic adaptation, particularly regarding the value to be attached to ratings of subjective well-being. See, e.g., Paul Menzel et al., *The Role of Adaptation to Disability and Disease in Health State Valuation: A Preliminary Normative Analysis*, 55 Soc. Sci. & Med. 2149, 2157 (2002) (arguing for "an initial, *prima facie* privilege for the perspective of the actual, typically adapted patient"). Perhaps the most startling evidence for the limitations of subjective well-being as a measure of welfare comes from a recent study by Dylan Smith and colleagues finding that former colostomy patients (those who had had their colostomies reversed) were willing to trade forty-three months out of the next ten years of their lives to have lived without a colostomy. Yet even this finding seems to be the result of a focusing illusion, since current patients were only willing to trade nineteen months while healthy patients would trade forty-four months. Dylan M. Smith et al., *Misremembering Colostomies? Former Patients Give Lower Utility Ratings Than Do Current Patients*, 25 *Health Psychol.* 688, 691 (2006).

105. See Daniel Kahneman & Jackie Snell, *Predicting a Changing Taste: Do People Know What They Will Like?*, 5 *J. Behav. Decision Making* 187, 198 (1992) ("[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."); see also Boyd et al., *supra* note 64, at 63–65 (demonstrating "substantial variation between different groups of individuals in the utilities they attach to life with a colostomy" and finding "choice of treatment was strongly influenced by the utility assigned to life with a colostomy"); Ubel et al., *Do Nonpatients Underestimate*, *supra* note 88, at 190–91 (describing importance of assessing whether people misestimate quality of life associated with health conditions to facilitate good medical decisions by patients); Ubel et al., *Misimagining the Unimaginable*, *supra* note 88, at S62 (noting that "people's tendency to . . . ignore or underestimate the beneficial effects of adaptation contributes to hedonic predictions that are more extreme than warranted" and finding that this "put[s] people at risk for making poor decisions").

106. See, e.g., 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 of 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. *Id.* at 182–223. In this last section, Blumenthal touches on the impact that litigants' mispredictions of future emotional states may have on litigation behavior, *id.* at 204–08, but he does not apply these findings to settlement behavior in the ways suggested by our work, *id.*; see also Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 *Cornell L. Rev.* 1, 19 (2000) (examining behavioral economic implications of plaintiffs motivated by noneconomic goals); Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 *Marq. L. Rev.* 817, 817 (2004) (suggesting that negotiation scholars and

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.¹⁰⁷ 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. The long delays associated with the civil litigation process

practitioners pay attention to hedonic psychology); Peter H. Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 *Syracuse L. Rev.* 335, 339 (2008) (discussing how creation of “authentic happiness and meaning for lawyers in law firm settings may be a way to stem the tide of increased dissatisfaction and negative affect within the legal profession”).

Oswald and Powdthavee, the economists responsible for the study discussed *supra* notes 67–72 and accompanying text, framed their research in terms of its value to judges and lawyers. Their goal is to use regression analysis to generate payment schedules that would compensate victims for reductions in happiness. Oswald & Powdthavee, *supra* note 67, at 1071.

Cass Sunstein, in a recent paper, has suggested that affective forecasting errors by jurors may be responsible for some of the variability in pain and suffering awards. Cass R. Sunstein, *Illusory Losses* 2–3 (Univ. of Chi. John M. Olin Law & Econ., Working Paper No. 340 (2d Series), 2007), available at <http://ssrn.com/abstract=983810> (on file with the *Columbia Law Review*) [hereinafter Sunstein, *Illusory Losses*]. According to Sunstein, because jurors neglect hedonic adaptation, they will tend to overcompensate emotionally salient yet highly adaptable injuries like paraplegia, but undercompensate less salient yet unadaptable injuries such as headaches and migraines. *Id.* at 17–20.

In a recent article on hedonic damages and disability, Samuel Bagenstos and Margo Schlanger also draw attention to the likelihood of jurors’ ignorance of the existence of hedonic adaptation. Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *Vand. L. Rev.* 745, 760 (2008). When awarding compensation for hedonic damages, jurors tend to focus inordinately on the limiting effects of a 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 by 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. *Id.* at 784. Moreover, because the trial process requires that the plaintiff perform her disability in front of the jury, the trial itself is debilitating. *Id.* at 785. 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.” *Id.* Accordingly, they conclude that courts should not award hedonic damages for decreased quality of life arising from disability. *Id.* at 788.

107. 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 *supra* Part II. It is also possible that emotional injuries, such as the psychic pain caused when someone is discriminated against on the basis of race or gender, are similarly adaptable, and that plaintiffs will behave in a similar fashion after suffering such injuries. (We thank Chris Guthrie for drawing this point to our attention.) Although the theory behind hedonic adaptation would predict equal (or perhaps even greater) adaptation to emotional trauma, as of this writing the empirical evidence of such adaptation is substantially less robust.

are commonly thought of as a source of costs to the system—costs that 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.¹⁰⁸ 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.¹⁰⁹ For these reasons, the most prominent attempts at civil litigation reform have focused on alternative methods of dispute resolution—in particular, arbitration¹¹⁰—that are designed to curb costs primarily by increasing the speed at which cases are decided and eliminating many of the procedures that typically serve to retard the rapid progression of litigation.¹¹¹

We argue that even procedural delays have the capacity to reduce certain costs to litigation. 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 pretrial procedures—the plaintiff is likely to suffer from a focusing illusion. With her attention focused on her injury, the plaintiff will overestimate its impact on her future happiness: She will anticipate that the injury will prevent her from achieving the same enjoyment of life that she experienced before being hurt.¹¹²

However, during the nearly two years that it takes a typical civil case to reach trial,¹¹³ the plaintiff is likely to adapt hedonically to her injury—even if that injury is permanent—and will report levels of happiness

108. See *supra* Part I.

109. See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (arguing that “termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits” and thus put an end to the litigation itself).

110. See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

111. See, e.g., J. Thomas Corbett, *Mediation, Bankruptcy and the Bankruptcy Administrator*, 65 Ala. Law. 410, 410 (2004) (analyzing use of mediation in bankruptcy proceedings and benefits in speed and cost of resolution); James P. George, *Access to Justice, Costs, and Legal Aid*, in *American Law in the 21st Century: National Reports to the XVIIth International Congress of Comparative Law* 293, 304 (John C. Reitz & David S. Clark eds., 2006) (discussing states’ practice of inserting arbitration provisions into remedial statutes); Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 Harv. Negot. L. Rev. 1, 1–2 (2006) (recommending mediation as starting point in most cases); cf. Samaha, *supra* note 9, at 620–47 (discussing potential constitutional problems raised by provision or requirement of excessive legal process).

112. See Schkade & Kahneman, *supra* note 89, at 340 (observing this effect for paraplegia); Ubel et al., *Disability and Sunshine*, *supra* note 88, at 112 (observing this effect with regard to variety of health conditions and comparing predictions of healthy individuals against reported happiness of unhealthy individuals); Wilson et al., *Focalism*, *supra* note 90, at 822 (describing focalism effects generally).

113. *Supra* note 17 and accompanying text.

closer to her pre-injury levels.¹¹⁴ This adaptation will have two relevant effects. First, the degree to which a plaintiff believes she has been “wronged” will dissipate as her sense of the scale of the indignity that has been perpetrated against her diminishes. Second, the amount of money that the plaintiff believes will fairly compensate her for her injury—the amount that will “make her 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 her for the loss of function she has suffered; two years later, after 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.¹¹⁵

In combination, these two effects will drive down a tort plaintiff’s settlement price over the course of litigation. Consider, for instance, a plaintiff who loses a limb in a traffic accident (through no fault of her own). Imagine that in the months that follow the injury, when the lawsuit is initially filed, the plaintiff views her injury as highly incapacitating and believes (a rough estimate, of course) that she will need \$280,000 to compensate for her pain and suffering. Over the course of the two years between filing and trial, the plaintiff adapts to her injury and comes to believe that only \$140,000 is necessary to fairly compensate her for the harm she has suffered.¹¹⁶ Irrespective of the fact that the expected jury award

114. See generally *supra* Part II.

115. See *supra* Part I.C. 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 Sunstein, *Illusory Losses*, *supra* note 106, at 3–4 & nn.4–11. For specific examples of hedonic damage awards, see *Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1297–98 (10th Cir. 2001) (upholding jury instructions entitling plaintiff to damages for loss of ability to ride horses); *Day v. Ouachita Parish Sch. Bd.*, 823 So. 2d 1039, 1044 (La. Ct. App. 2002) (affirming damage award for 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 W. Kip Viscusi, *Reforming Products Liability* 102–07 (1991) (finding that pain and suffering damages account for “30 to 57 percent of all awards in which bodily injury payment has been received,” and well over fifty percent of all awards in which there is a nonzero pain and suffering award); Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 *DePaul L. Rev.* 265, 296 (1998) (“[I]t seems reasonable to conclude that the general damages portion of jury awards in malpractice cases is, on average, between 50 and 60%.”), and so adaptation that reduces pain and suffering damages could have a substantial effect on the overall valuation of a personal injury case.

116. This is a reasonable approximation of a typical plaintiff’s ability to adapt. As we noted previously, moderately disabled plaintiffs recover fifty percent of their “lost

will not have changed, the plaintiff will likely see a lower settlement amount as appropriate given the apparent amelioration of her injury.¹¹⁷ As the plaintiff's settlement price declines commensurate with the significant degree of hedonic adaptation that humans typically experience,¹¹⁸ the chance of settlement increases—perhaps even substantially.¹¹⁹ Civil settlements reduce costs,¹²⁰ and many of the principal rules of civil litigation are designed with the goal of encouraging settlement.¹²¹ Hedonic adaptation operates as a significant background complement to these rules.

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, for example, allows parties to eliminate the uncertainties that surround each side's analysis of the case and thereby narrows 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 overestimation of litigation costs.¹²² By drawing upon and facilitating hedonic adaptation, the civil trial process

happiness" through adaptation over a period of two years. See *supra* note 71 and accompanying text.

117. See Korobkin & Guthrie, *Psychological Barriers*, *supra* note 27, at 130–33 (detailing results of experiment where acceptance of settlement offer differed based on amount already recovered).

118. *Supra* notes 67–78 and accompanying text.

119. *Supra* Part I.C.

120. See, e.g., *Bement v. Nat'l Harrow Co.*, 186 U.S. 70, 93 (1902) (expressing view that settlement is "a legitimate and desirable result in itself"); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1574 (2006) ("[S]ettlements are in certain respects desirable, because they conserve litigation expense and benefit parties who are in the best position to arrange their own affairs."). But cf. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984) (arguing that plaintiffs will effectively bear costs of litigation even if they settle before trial as defendants reduce settlement offers to reflect litigation expenses which were not incurred).

121. 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."); Fed. Dist. Court for the N. Dist. of Cal., *Alternative Dispute Resolution Local Rules*, California Rules of Court 489–505 (Thompson-West Federal ed. 2008) (setting forth extensive local rules intended to facilitate settlement); *In re Young*, 253 F.3d 926, 927 (7th Cir. 2001) (Posner, J.) (noting that settlements may typically be kept confidential).

122. See *supra* notes 107–111 and accompanying text.

manages to recoup for litigants some of the costs that the extensive prelitigation procedures would appear to impose upon them.¹²³

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.¹²⁴ These two cases, if brought in the same jurisdic-

123. We note in passing that 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. See Susan Bandes, Victims, “Closure,” and the Sociology of Emotion, 71 *Law & Contemp. Probs.* (forthcoming 2009) (manuscript at 3, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=1112140> (“Closure has also come to stand for the constellation of feelings—peace, relief, a sense of justice, the ability to move on—that come with finality.”); Elizabeth Beck et al., Seeking Sanctuary: Interviews with Family Members of Capital Defendants, 88 *Cornell L. Rev.* 382, 387–90 (2003) (describing victims’ rights movement); cf. Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, 88 *Cornell L. Rev.* 282, 288–89 (2003) (describing possible reasons for victims’ interest in sentencing of defendants). 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.

The evidence for hedonic adaptation provides 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 her condition. On this account, realizing closure from a lawsuit is a means of facilitating the process of hedonic adaptation. The more quickly and completely a plaintiff can put matters concerning an accident behind her and “move on,” the sooner her psychological immune system can bury thoughts of her injury and adapt the plaintiff hedonically to her new circumstances. Litigants 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.

124. This dichotomy is discussed in Sunstein, *Illusory Losses*, supra note 106, at 19. For examples of cases involving enduring, nonadaptable injuries, see *Sarchet v. Chater*, 78 F.3d 305 (7th Cir. 1996) (fibromyalgia); *Westphal v. Wal-Mart Stores*, 81 Cal. Rptr. 2d 46

tion, will involve symmetric pretrial 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 nearly return to pre-injury levels of happiness.¹²⁵ By contrast, recurrent conditions such as headaches and ringing in the ears present among the worst cases for adaptation.¹²⁶ By the time that several years of pretrial machinations have run their course, the workplace injury plaintiff is likely to perceive herself 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 nonadaptable injuries.*
2. *Consequently, personal injury cases involving adaptable injuries will settle at higher rates than personal injury cases involving nonadaptable 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 pretrial 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 pretrial settlement more

(Ct. App. 1998) (chronic pain); Hatcher v. Ramada Plaza Hotel & Conf. Ctr., No. CV010807378S, 2003 Conn. Super. LEXIS 255 (Super. Ct. Jan. 29, 2003) (persistent joint pain); Bayer Corp. v. Lassiter, 638 S.E.2d 812 (Ga. Ct. App. 2006) (tinnitus); City of Cedar Rapids v. Mun. Fire & Police Ret. Sys., 526 N.W.2d 284 (Iowa 1995) (chronic pain syndrome); Levy v. Bayou Indus. Maint. Servs., 855 So. 2d 968 (La. Ct. App. 2003) (postconcussion syndrome, including headaches, dizziness, and vertigo); Strawderman v. Creative Label Co., 508 S.E.2d 365 (W. Va. 1998) (migraine headaches).

125. See, e.g., Lundqvist et al., *supra* note 62, at 80–81 (demonstrating that subjects who have incurred spinal injuries are nearly as happy as the general population four years after their injuries).

126. See *supra* notes 73–77 and accompanying text.

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.¹²⁷ Consider, then, a set of accelerated pretrial procedures that provide the same informational gains to the parties as standard litigation practices and generate the same level of costs. (An accelerated litigation calendar—for instance, the Eastern District of Virginia's famous "rocket docket"¹²⁸—would possess this feature.) We predict 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 Essay. Nonetheless, the necessary data, particularly concerning hypotheses two and three, should be relatively easy to obtain. Empirical analysis of hedonic adaptation has matured into a vigorous science;¹²⁹ we hope that empirical research into adaptation's effects on the trial process will soon follow suit.

B. *Principal Objections*

The reader by now undoubtedly has in mind a number of objections to the model we describe and the conclusions we set forth in the preceding Parts. In the sections that follow, we address some of the most prominent of these objections.

1. *Litigation Behavior and Agency Relationships.* — The model of civil litigation we employ is, of course, overly simplified in perhaps two important respects. First, and most importantly, 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.¹³⁰ Much has been made in recent years of the growth of an attorney-centered litigation model, in which the attorney—the sophisticated repeat player—drives the litigation and makes the preponderance of important decisions.¹³¹ Certainly, if the plaintiff exerts no control over a lawsuit, her adaptation is irrelevant.¹³² But that is a caricature of the attorney-client

127. See Posner, *supra* note 28, at 422–26 (discussing this function performed by pretrial procedure).

128. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 829 & n.34 (2006) (describing Eastern District of Virginia's reputation for rapid resolution of litigation).

129. See generally *supra* Part II. The foremost example is probably Oswald and Powdthavee's longitudinal study of thousands of British citizens. Oswald & Powdthavee, *supra* note 67.

130. See *infra* note 153 and accompanying text.

131. This trend, which is generally viewed unfavorably, is closely related to the less pejorative theory of "directive lawyering," in which lawyers make "moral" decisions irrespective of the bad intentions of their clients. Robert F. Cochran, Jr. et al., *Symposium: Client Counseling and Moral Responsibility*, 30 *Pepp. L. Rev.* 591, 594–96 (2003).

132. Similarly, if the plaintiff has already recovered from her insurer, and the insurance company is the true plaintiff at suit, see June F. Entman, *More Reasons for*

relationship; more likely, each party will have some say over the most important litigation choices, particularly the question of when and whether to settle.¹³³

If this is the case, attorney-client agency costs should not 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.¹³⁴ Contingent fee attorneys will tend to prefer early settlement over protracted litigation because they bear all of the costs and risks of protracted court battles.¹³⁵ Thus it is the rare contingent fee attorney who will stand in the way of an adapted plaintiff's desire to settle; far more frequently, cases that do not settle when the attorney wishes fail to do so because an unsatisfied client preferred to continue to trial. Adaptation will mitigate this effect.

Second, delays and time lags in litigation are often caused by hard bargaining and acrimony between the parties. As much as the adaptation that follows from delay might increase the rate of settlement, the rancor that accompanies it might act in the opposite direction. We wish to stress that we make no claims on the ultimate frequency of settlement in protracted or expeditious cases (or the relative rates of settlement in each case). We mean only to say that *all things being equal*, delay will drive settlement through hedonic adaptation. As we note above, lengthy cases may generate greater information or drive up costs,¹³⁶ making settlement more likely; these effects are ancillary to our general theory, much like the acrimonious nature of long cases. When litigation is delayed by exogenous factors beyond the parties' control—a court's docket schedule, for instance—the effects of adaptation should be most evident.

Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation, 68 N.C. L. Rev. 893, 908–11 (1990) (describing subrogation of claims by insurance companies), the plaintiff's adaptation will not affect the lawsuit. Of course, even insured tort victims are typically uninsured as to pain and suffering and are never insured for anything resembling a punitive damages claims. See Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U. L. Rev. 908, 932 n.125 (1989) ("No health coverage, public or private, explicitly pays for noneconomic damages . . ."); Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 N.Y.U. L. Rev. 391, 401 (2005) ("[E]vidence confirms that patients do not purchase coverage for noneconomic damages as part of first-party health care insurance.").

133. See Model Code of Prof'l Responsibility EC 7-7 (2001) ("[I]t is for the client to decide whether he will accept a settlement offer . . .").

134. 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).

135. See John Bronsteen, Class Action Settlements: An Opt-In Proposal, 2005 U. Ill. L. Rev. 903, 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) (suggesting that economic factors make plaintiffs' attorneys predisposed to settle).

136. See *supra* Part IV.A.

The same analysis would apply if defendants began to understand the processes of hedonic adaptation and refused to begin settlement negotiations until later in the case, after the plaintiff had an opportunity to adapt. It is entirely possible that the result of defendants' strategic behavior would be to curb the rate of settlement, or at least the rate of early settlement. We make no claims to the contrary. Even under such circumstances, plaintiffs' settlement price would diminish, *ceteris paribus*, as time passed, and settlement would become more likely as litigation dragged on.¹³⁷

2. *Focalism in Settlement Negotiations.* — While the evidence supporting theories of hedonic adaptation has by this point become quite robust,¹³⁸ 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,¹³⁹ standards,¹⁴⁰ and interpretations of the negative event's meaning.¹⁴¹ 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.¹⁴² For instance, an individual who becomes paralyzed below the waist and must use 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 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."¹⁴³ This "focalism"¹⁴⁴ 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 of the plaintiff's lawsuit might remind the plain-

137. This type of strategic behavior might eventually result in a type of cycling equilibrium, in which defendants first refused to settle early, followed by plaintiffs' credible threats to refuse settlement late in the litigation, followed by defendants loosening their strategic stance and returning to early settlements, and so forth.

138. See generally *supra* Part II.

139. See Easterlin, *supra* note 56, at 11,180, 11,182 (suggesting that people's aspirations change commensurately with changes in life circumstances).

140. See Menzel et al., *supra* note 104, at 2151–52 (noting "people who have what is commonly thought of as a 'disability' or 'disease' may be stimulated to adopt a radically different and, in their eyes, a more insightful definition of their health").

141. See Wilson & Gilbert, *Affective Forecasting*, *supra* note 85, at 133 ("People are motivated to recover from negative emotional events, and the kind of sense making they engage in often involves coping, psychological defenses, and rationalization.").

142. See Kahneman & Sugden, *Experienced Utility*, *supra* note 53, at 168 ("[I]f some factor continues to operate over time, the corresponding experience of happiness or unhappiness becomes less intense."); Sunstein, *Illusory Losses*, *supra* note 106, at 14–15 (explaining transition in focus over time to "central features of [injured people's] hours and days" after significant loss); *supra* Part II.B.

143. Kahneman & Thaler, *Utility Maximization*, *supra* note 82, at 229 (citing Schkade & Kahneman, *supra* note 89).

144. See *supra* notes 89–92 and accompanying text.

tiff of the severity (or existence) of her condition, subvert the process of hedonic adjustment, and return the plaintiff, at least momentarily, to her diminished post-injury state of happiness. Settlement-induced “hedonic relapse” could re-inflate the plaintiff’s perception of the severity of her injury and its worth.

Although this counterproductive 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 her 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 herself may not know or understand the long-term lifestyle effects of her condition. Throughout this early stage, the plaintiff’s attorney will attempt to emphasize or even exaggerate the severity of the plaintiff’s injury in an attempt to increase the value of the litigation.¹⁴⁵ These types of interactions cannot help but retard the process of hedonic adaptation.

As scholars have noted, the trial itself is also likely to create negative focalism effects.¹⁴⁶ 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 her health and disability. And she will likely be called upon to testify about her accident and continuing health. Even if the plaintiff has succeeded in adapting hedonically by the time that her case reaches trial, the trial itself is likely to undo those gains.

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. We argue that 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

145. See Bagenstos & Schlanger, *supra* note 106, at 753 (“A leading practitioners’ treatise . . . advises lawyers seeking hedonic damages for disabling injuries to turn the trial into a maudlin spectacle . . .”).

146. See, e.g., *id.* at 785 (pointing out that plaintiffs with disabilities will delay their adaptation if forced to testify about their disabilities at trial).

trial.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ These communications do not involve rehashing the facts of the case or reexamining the plaintiff's injuries; to the extent that this sort of hard bargaining takes place, it will occur almost entirely between the attorneys.¹⁵⁰ Later period settlement negotiations thus will not function as indelible reminders of the plaintiff's condition in the same fashion that a full trial on the merits—complete with extensive testimony by the plaintiff—might. As such, they are likely to produce only minimal focalism.¹⁵¹

Much has been made of the attorney-client relationship as a classic principal-agent problem.¹⁵² According to the standard model of attor-

147. See *supra* note 145 and accompanying text.

148. See Austin Sarat & William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* 59 (1995) (describing lawyers' insistence on negotiating attorney-to-attorney); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 *Ohio St. L.J.* 1315, 1362 (2003) ("In many traditional cases, represented clients do not personally participate in negotiation.").

149. See *supra* note 23 and accompanying text.

150. Cf. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 *Md. L. Rev.* 1, 84–85 (1992) (describing settlement negotiations between opposing attorneys as "stylized" and "slightly exaggerated, somewhat predictable, and essentially impersonal").

151. It is worth noting that there is good reason to believe that active engagement in the settlement process may in fact promote hedonic adaptation in injured plaintiffs. Among the best predictors of individual adaptation is a person's perceived level of self-control. See Glenn Affleck et al., *Appraisals of Control and Predictability in Adapting to a Chronic Disease*, 53 *J. Personality & Soc. Psychol.* 273, 278 (1987) (finding "patients who reported greater personal control over their medical care and treatment expressed more positive mood"). Thus, getting to make decisions about the course of litigation may enhance a person's sense of control and at least moderate any negative effects brought about by refocusing on the injury. On the psychological benefits of client-controlled litigation, see Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 *Cal. W. L. Rev.* 105, 112–13 (2000) ("Negotiation can itself be a healing process, bringing together disputants to discuss and iron out their differences, and helping them to resolve their conflicts and to achieve reconciliation Exercising a degree of control and self-determination in significant aspects of one's life may be an important ingredient of psychological wellbeing.").

152. See, e.g., 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."); Jonathan R. Macey & Geoffrey P. Miller, *The*

ney-client relations, the attorney manages the litigation and structures the investigation, analysis, and discussion of the relevant issues in order to impel the client toward 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 the potential misalignment of incentives.¹⁵³ 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.

3. *Civil Damages As an 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.¹⁵⁴ 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 understanding of human behavior. The most plausible explanation posits that studies purporting to find hedonic adaptation in fact succeed only in capturing precisely the changes in circumstance that economists predict would

Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 3–5 (1991) (describing continuing problems posed by attorney-client agency costs deriving from attorneys' control over litigation and suggesting reforms to mitigate these costs).

153. See, e.g., Frank A. Sloan et al., *Suing for Medical Malpractice* 77–78 (1993) (noting even greater attorney-client agency costs when injured plaintiff seeks to fulfill noneconomic goals, including disclosure of information, revenge, and specific deterrence, which are unavailing to her attorney); 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, 140–41 (1997) ("Significant agency costs may be imposed on the clients because the attorney . . . may seek to promote her best interests ahead of one or both groups of clients. Indeed . . . if the attorney makes the decisions for both parties, then those parties should in reality be considered a single player.").

154. See Cass R. Sunstein, *Irreversible and Catastrophic*, 91 Cornell L. Rev. 841, 855–69 (2006) (discussing loss of option value in context of environmental litigation and injunctive relief).

raise happiness levels in the wake of serious injury or disability.¹⁵⁵ 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 hedonic restoration 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 would 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.¹⁵⁶ 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. Although family size and marital status—along with income—have statistically meaningful effects on the rate and extent of post-injury adaptation,¹⁵⁷ these effects do not account for the entirety of adaptation. Most adaptation appears to occur for reasons having nothing to do with family size or structure.¹⁵⁸ The conclusion we draw from these studies is that although wealth and a supportive family may aid the process of hedonic adaptation, the normal functioning of the psychological immune system alone would 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, and 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,

155. We thank Thomas Miles for drawing our attention to this possibility.

156. See Oswald & Powdthavee, *supra* note 67, at 1068 tbl.1.

157. See *id.*

158. 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. *Id.*

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 recaptured much of the happiness she 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 considered a pure source of costs to litigants—thus function simultaneously to increase the probability that plaintiffs and defendants in personal injury cases will be able to avoid the cost of trial.

