2007

Hedonic Damages, Hedonic Adaptation, and Disability

Samuel R. Bagenstos
University of Michigan Law School, sambagen@umich.edu

Margo Schlanger
University of Michigan Law School, mschlan@umich.edu

Recommended Citation
Bagenstos, Samuel R. "Hedonic Damages, Hedonic Adaptation, and Disability." M. Schlanger, co-author. Vand. L. Rev. 60, no. 3 (2007): 745-97. (Later published under the same title in Def. L. J. 58, no. 1 (2009): 91-149.)

VANDERBILT LAW REVIEW

VOLUME 60 APRIL 2007 NUMBER 3

Hedonic Damages, Hedonic Adaptation, and Disability

*Samuel R. Bagenstos and Margo Schlanger**

* Professors of Law, Washington University in St. Louis. We thank Nicolle Neulist for extraordinarily able research assistance and Dorie Bertram, Hyla Bondareff, Kathie Molyneaux, and the document delivery staff in the Washington University Law Library for their incredible work. This Article owes much to the Eleventh Annual Clifford Symposium on Tort Law and Social Policy, at which the idea was seeded, as well as to comments from participants in faculty workshops at the Washington University, UCLA, Brooklyn, University of Nebraska, and Duke Law Schools, participants in the University of Chicago Law and Philosophy Colloquium, and in particular from Susan Appleton, Devon Carbado, Jerry Kang, Andrew Koppelman, Jerry Lopez, Martha Nussbaum, Bob Pollak, Barak Richman, Laura Rosenbury, Jennifer Rothman, Elizabeth Schneider, Tony Sebok, Lynn Stout, David Weisbach, Peter Wiedenbeck, and Steve Willborn. Work on this Article was supported by summer research grants from the Washington University School of Law.

Over the past quarter century, the concept of "adaptive preferences" has played an important role in debates in law, economics, and political philosophy. As Professor Jon Elster has described this psychological phenomenon, "people tend to adjust their aspirations to their possibilities."[1] A number of prominent scholars have argued that the existence of adaptive preferences "raises serious problems for neoclassical economics and for unambivalent enthusiasm for freedom of choice."[2] Because our current preferences are constrained by the opportunities available to us, proponents of adaptive preference theory contend, those preferences may not be the best guide to what is in our interests; we may be unduly content with unfair limitations on our opportunities. In a typical passage, Amartya Sen describes the phenomenon this way:

> The underdog learns to bear the burden so well that he or she overlooks the burden itself. Discontent is replaced by acceptance, hopeless rebellion by conformist quiet, and—most relevantly in the present context—suffering and anger by cheerful endurance. As people learn to adjust to the existing horrors by the sheer necessity of uneventful survival, the horrors look less terrible in the metric of utilities.[3]

Thus, scholars have typically invoked the adaptive preferences phenomenon as an argument that some preferences are not a proper measure of justice and ought not guide policy.[4] Although some have

---

1. JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 109 (3d ed. 1987).

2. Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 426 (2004). For examples of scholars making similar points, see ELSTER, *supra* note 1, at 137; MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 111-66 (2000); AMARTYA SEN, COMMODITIES AND CAPABILITIES 14-15 (Oxford 1999) (1985); David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 375-77 (2002); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1150 (1986).

3. AMARTYA SEN, RESOURCES, VALUES, AND DEVELOPMENT 309 (1984). This general notion clearly is related to the Marxian notion of "false consciousness," but it also draws on a more liberal tradition. NUSSBAUM, *supra* note 2, at 114-15; *see also* JOHN STUART MILL, UTILITARIANISM 10 (George Sher ed., Hackett Publishing 1979) (1861) ("It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.").

4. *See, e.g.*, NUSSBAUM, *supra* note 2, at 144 ("Even if the welfarist can show that people desire liberty and justice, and even if some modification of the welfarist procedure could be devised that reliably generated those goods . . . it would not be clear that this is the right way to

recognized in the abstract that nothing in the theory of adaptive preferences requires preferences to be disregarded uniformly,[5] the concept has nearly always been deployed as part of an argument for disregarding revealed, expressed, or felt preferences.[6]

Critics of adaptive preference theory have argued that the theory lacks "both conceptual coherence and empirical grounding"[7] and that it is "undemocratic"[8] because the true "argument for satisfying preferences is that *they are the individual's, whatever their origin.*"[9] We take a different tack. We agree with the theory's proponents that adaptive preferences exist and that they raise significant normative questions about the unreflective use of preferences as a measure of justice or a basis for policy. But—and this is a point to which proponents of adaptive preference theory have given too little attention—identifying adaptive preferences is only the beginning of the normative inquiry. Although the writings of the theory's proponents sometimes suggest the contrary, we argue that adaptive preferences ought not be automatically rejected (though neither should they be accepted uncritically) as a measure of justice or a basis for policy. Rather, the realization that particular preferences are adaptive should induce a more searching normative inquiry into whether those preferences ought to drive policy in particular contexts. We illustrate this point by exploring one area in which we argue that, far from ignoring adaptive preferences, the law should embrace and

---

justify our social interest in these goods."); SEN, *supra* note 2, at 14-15; SEN, *supra* note 3, at 309. Elster distinguishes adaptive preferences (which result from "habituation and resignation") from preferences developed through learning or conscious character planning. ELSTER, *supra* note 1, at 112-14, 117-19. But other exponents of the adaptive preference theory use the term more broadly. *See, e.g.*, NUSSBAUM, *supra* note 2, at 136-38.

5. *See, e.g.*, NUSSBAUM, *supra* note 2, at 137 (arguing that "it is not at all clear that [Jon Elster] should in such a sweeping way condemn adaptive preferences" because sometimes it makes sense to encourage adaptation).

6. For a rare instance of a law review article (albeit not one by scholars associated with the adaptive preference theory) arguing that it might be inappropriate to disregard adaptive preferences, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 619-20 (2003) (arguing that if preferences adapt to a "postcrisis baseline" that restricts liberty to protect against terror threats, that adaptation will be a good thing "if the precrisis baseline represented a society underprepared for emergencies, in which law and institutions were supplying too much liberty and not enough order").

7. RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 146 (2003).

8. Richard A. Posner, *Pragmatic Liberalism Versus Classical Liberalism*, 71 U. CHI. L. REV. 659, 672 (2004).

9. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 422 n.50 (2002).

promote them. That area is what has been dubbed "the rapidly bubbling cauldron"[10] of hedonic damages in tort.

Hedonic damages compensate for the lost enjoyment of life that results from a tortious injury. Those damages are usually considered to go beyond traditional pain and suffering or mental anguish damages. Pain and suffering damages traditionally compensate "for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself," and mental anguish damages traditionally compensate for "shock, fright, emotional upset, and/or humiliation" caused by the tort.[11] Hedonic damages, by contrast, compensate for limitations "on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations."[12]

A number of states recognize hedonic damages as a separate category of recovery in tort and tort-like actions.[13] Others consider lost enjoyment of life as an aspect of what are sometimes termed "disability" damages—damages for physical or mental impairment.[14] Many other states permit juries to take account of lost enjoyment of life in setting compensation for pain and suffering[15] or other forms of general damages.[16] In all these jurisdictions,[17] disability has loomed

---

10. Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1037-38 (2004). *See generally* Brendan I. Koerner, *What's Your Happiness Worth?*, LEGAL AFF., Jan.-Feb. 2004, at 56 (discussing recent controversy over hedonic damages).

11. Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001).

12. *Id.*

13. *See, e.g.*, Giuliani v. Guiler, 951 S.W.2d 318, 320 (Ky. 1997); Swiler v. Baker's Super Mkt., Inc., 277 N.W.2d 697, 700 (Neb. 1979); McDougald v. Garber, 536 N.E.2d 372, 375-77 (N.Y. 1989); Fantozzi v. Sandusky Cement Prod. Co., 597 N.E.2d 474, 486 (Ohio 1992); *Boan*, 541 S.E.2d at 245.

14. *See, e.g.*, Knight v. Lord, 648 N.E.2d 617, 623 (Ill. App. Ct. 1995) (noting that loss of enjoyment of life is an aspect of disability damages, or damages for "loss of a normal life"); Anderson v. Neb. Dep't of Soc. Servs., 538 N.W. 2d 732, 740 (Neb. 1995) ("[L]oss of enjoyment of life is not a separate category of damages but is an element or component of pain and suffering and of disability."); *Swiler*, 277 N.W.2d at 700 ("Loss of enjoyment of life may, in a particular case, flow from a disability and be simply a part thereof, and where the evidence supports it, may he argued to the jury."); *see* Pamela J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D. L. REV. 561, 577-80 (1987).

15. *See, e.g.*, Canfield v. Sandock, 563 N.E.2d 1279, 1281-83 (Ind. 1990); Estate of Pearson v. Interstate Power & Light Co., 700 N.W.2d 333, 347 (Iowa 2005); Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990); Banks v. Sunrise Hosp., 102 P.3d 52, 64 (Nev. 2004) (noting the court's agreement with "those jurisdictions permitting plaintiffs to seek compensation for hedonic loss as an element of the general award for pain and suffering").

16. *Canfield*, 563 N.E.2d at 1282 (holding loss of enjoyment of life a proper part of general compensation for personal injury).

large. And the (explicit or implicit) view of disability is often one of tragic dependency and helplessness. As we show in Part I below, lawyers seeking hedonic damages emphasize their clients' new status as compromised and damaged persons, and courts frequently uphold jury verdicts awarding hedonic damages to individuals who have experienced disabling injuries based on a view that disability—what some courts refer to as the failure to be a "whole person"[18]—*necessarily* limits one's enjoyment of life. This view is consonant with a general societal understanding of disability as a tragedy and of people with disabilities as natural objects of pity.

In this Article, we challenge that view. A rich psychological literature demonstrates that disability does not inherently limit enjoyment of life to the degree that these courts suggest. Rather, people who experience disabling injuries tend to adapt to their disabilities. To the extent that they experience continuing hedonic loss, it is physical pain and loss of societal opportunities—not anything inherent in the disability—that is the major contributor.

Unfortunately, people *without* disabilities have a difficult time imagining that disability can do anything other than drastically impair the enjoyment of life. Studies have consistently shown that non-disabled people rate the quality of life with a disability as being significantly lower than people with disabilities rate the quality of their own lives. The extensive psychological literature on affective forecasting—recently brought to a mass audience in Daniel Gilbert's book *Stumbling on Happiness*[19]—demonstrates that this phenomenon

---

17. On the division of jurisdictions into these or similar groupings, see Ronald J. Mishkin, Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639, 639 (1969); Hermes, *supra* note 14, at 565; Carleton Robert Cramer, Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 965-66 (1981); Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543, 577 (1990); Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293 (1984). For a general discussion of the case law hoth in states that allow a separate recovery for hedonic damages and in states that allow recovery for hedonic damages as part of a hroader noneconomic damages category, see Susan Poser, Brian H. Bornstein, & E. Kiernan McGorty, *Measuring Damages for Lost Enjoyment of Life: The View From the Bench and the Jury Box*, 27 LAW & HUM. BEHAV. 53, 54-57 (2003).

18. *E.g.*, Flannery v. United States, 297 S.E.2d 433, 436 (W. Va. 1982).

19. DANIEL GILBERT, STUMBLING ON HAPPINESS 17 (2006). For a recent comprehensive effort to assess the implications of the affective forecasting literature for the law, see Jeremy A. Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L.J. 155, 184-85 (2005) (noting, though not developing the point, that the affective forecasting literature might have implications for hedonic damages). For other recent examples of legal applications of the affective forecasting literature, see Chris Guthrie, *Risk Realization, Emotion, and Policy Making*, 69 MO. L. REV. 1039, 1040-44 (2004); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 116-19 (2004). The recent proposals for "asymmetric" or "lihertarian" paternalism also respond to a significant extent to

is no fluke. People simply do a poor job of predicting how they will feel in new life circumstances. People without disabilities may expect that a disabling injury will be tragic, but people who have such injuries tend not to experience them that way.[20]

To be sure, the views of people with disabilities about their own quality of life are classic adaptive preferences. Accordingly, one might suggest that the legal system should disregard those views.[21] But we argue that the legal system goes wrong by so devaluing the experience of people with disabilities. When courts award damages based on the (non-disabled person's) view that disability is tragic, they distract attention from the societal choices and stigmas that attach disadvantage to disability; they also make it harder for people with disabilities to make hedonic adjustments to their conditions. For deterrence and compensation reasons, people who experience disabling injuries should be able to recover for their physical pain; for medical expenses and the cost of assistive technology and personal assistance; and for the varied and costly accommodations that can enable them to participate in our collective social life. But they should not recover for any purported effect of disability on the enjoyment of life.

We thus hope to contribute to the tort-law literature on hedonic damages, as well as the wider literature on adaptive preferences. Our intervention in these debates may also be regarded as an effort at what Jerry Kang has called "behavioral realism," an interdisciplinary collaboration that seeks "to deepen our understanding of human behavior generally and [the mechanics of intergroup inequality]

---

problems of affective forecasting. *See generally* Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211, 1211-12 (2003) ("Recent research in behavioral economics has identified a variety of decision-making errors that may expand the scope of paternalistic regulation."); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1168 (2003) ("[R]esearch by psychologists and economists over the past three decades has raised questions about the rationality of many judgments and decision that individuals make."). Edward McCaffery, Daniel Kahneman, and Matthew Spitzer discuss some of the possible implications of adaptive preferences theory for tort law in a more general way. *See* Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspcctives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1388-1403 (1995).

20. For ease of expression, we speak here in generalities about the basic tendencies of the two groups; the views of individuals within each group are obviously heterogeneous. We discuss that point below. *See infra* Part III.D.-E.

21. *See* JOHN MCKIE, PETER SINGER, HELGA KUHSE & JEFF RICHARDSON, THE ALLOCATION OF HEALTH CARE RESOURCES: AN ETHICAL EVALUATION OF THE 'QALY' APPROACH 34 (1998) (arguing that hedonic adaptation by people with disabilities should not be used in assessing their quality of life).

specifically, with an eye toward practical solutions."[22] Our argument proceeds as follows. In Part I, we show that lawyers presenting hedonic damages cases and courts hearing those cases have treated disability as inherently and tragically limiting the ability to enjoy life. In Part II, we review the extensive evidence, developed by psychologists and rehabilitation professionals, that people with disabilities tend not to believe that their disabilities limit the ability to enjoy life, but that people without disabilities have a much more pessimistic view. Courts that award hedonic damages for disabling injuries thus tend to act based on the views of most people without disabilities, rather than on the views of most people with them. Finally, in Part III, we develop in detail the normative and policy implications, adopting what we believe are the valid insights of the disability rights movement, which has long rejected pity as a basis of public policy and pressed for societal changes rather than individual cure or adaptation. With these as our normative commitments, we argue that courts should not award hedonic damages based on disability.

Our argument might seem, at first blush, to push a tort reform agenda that prefers defendants' balance sheets to plaintiffs' bodies. We do not agree with that prioritization and do not believe our proffered reform serves those ends. Although we would erase one type of damages, we are not interested in decreasing the bottom line of tort awards. The tort system should, we believe, award compensatory damages fully sufficient to enable tort plaintiffs with disabling injuries to fund often costly accommodations to enable their participation in the community. This may well be more rather than less than is typically awarded under current doctrine.

Finally, we should note at the outset the limits of our argument. The hedonic damages in which we are interested constitute compensation for what some call the "shrunken pleasure" of living with a disability, compared to the plaintiff's prior physical or mental state. We are not dealing, at least not here and not directly, with two related but distinct topics: "disability damages" that are not based on the effect of disability on life's enjoyment,[23] and hedonic damages for the *complete* loss of the ability to experience life (because of death or coma, for example).[24] The former class of damages may implicate some

22. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1591-92 (2005).

23. As we have noted, disability damages are sometimes awarded for hedonic harm. *See* cases cited *supra* note 14. Our argument applies in full to that class of disability damages.

24. On hedonic damages in cases arising out of deadly accidents, see, e.g., Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 60 (1990); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U.

of the same normative issues we highlight with regard to hedonic damages, but because it does not implicate the problem of hedonic adaptation we do not discuss that class further. With respect to the latter, hedonic damages in wrongful death cases or cases of coma or vegetative state serve the function of placing a significant value on the deprivation of *all* of life's experiences.[25] Because the plaintiffs or decedents cannot perceive the awards, those cases are more about deterrence than compensation.[26] More important for this project, they do not relate to any adaptive preferences of their victims, who do not have the ability to sustain any preferences at all.

I. DISABILITY AND HEDONIC DAMAGES PRACTICE

Our goal in this Part is largely descriptive. We show that when lawyers seek, and courts award, hedonic damages, they often treat disability as something that inherently (or nearly so) impairs not only plaintiffs' physical or mental activity, but also their enjoyment of life. In Section A, we examine how plaintiffs' lawyers themselves advise their colleagues to argue for hedonic damages in cases involving disabling injuries. In Section B, we examine the discourse in courts that have upheld hedonic damages awards in such cases. This description sets the stage for our discussion in Part II of the psychological research, which shows that people with disabilities in fact do not tend to believe that their disabilities limit their life's enjoyment in the ways lawyers and courts suggest.

A. The Practices of Plaintiffs' Lawyers

In personal injury cases, hedonic damages can be an important component of plaintiffs' claims. Materials written by and for plaintiffs' lawyers demonstrate that counsel in such cases aim to arouse jurors' pity by emphasizing a great distance between "normal" and disabled life. Lawyers advise their peers to paint a picture of injury as

---

CHI. L. REV. 537, 545 (2005) (noting that five states permit recovery for hedonic loss in wrongful death actions). On hedonic damages when the plaintiff has been rendered unable to experience anything, see, e.g., Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991) (allowing recovery for lost enjoyment of life by plaintiff in a vegetative state); McDougald v. Garher, 536 N.E.2d 372, 373 (N.Y. 1989) (holding some degree of cognitive awareness as prerequisite to recovery of damages for loss of enjoyment of life).

25. It is possible that hedonic damages in such cases are compensatory to the victim's families. But that has been neither the doctrinal justification nor the measure of damages.

26. We have no quarrel with that function of hedonic damages, although their deterrent effect should not be overstated. *See* Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 530-31 (2006).

permanent disability accompanied inevitably by debilitation and dependence (and—over and over again—hygienic difficulties).[27]

A few examples will suffice to give the basic flavor of these materials. The first is a sample closing argument in a case in which the plaintiff with impaired vision in one eye lost the vision in the other eye due to the alleged medical malpractice of the defendant. (The references to a computer are intended to shore up the jury's responsibility for deriving a dollar figure without expert assistance):

> You have to consider past and future loss of life's pleasures. You have to award Paul for that. You heard the testimony. A computer doesn't know what it's like to want to play a game of cards with the guys down the block. A computer doesn't know what it's like to have someone say, "Pop Pop, do you want to catch a ball?" . . . Imagine you need to go for a haircut or to go visit your relatives, and to realize that you are a prisoner. You have to ask your wife "will you drive me down for the haircut, will you wait outside for the haircut, and when I'm done will you take me home" Or consider that this time of year you want to do some Christmas shopping. You can't go to the mall. You can't go out and take a walk around the neighborhood. You can't even buy a gift for someone because you have to ask your wife to take you.
>
> A computer doesn't know what it's like to be a man and you go to a wedding or you go to a first communion or a bar mitzvah, and when you have to go to the bathroom you have to say, "Will you take me, Karen?"[28]

A leading practitioners' treatise similarly advises lawyers seeking hedonic damages for disabling injuries to turn the trial into a maudlin spectacle that aims at demonstrating that the plaintiff's "life has no dignity":

> Have [the plaintiff's husband] describe their family, to which he will readily respond that his spouse was the center of a typical American family. They did all of the normal things that any family would do, together. As a family, they went out to dinner or the movies. They enjoyed planning and taking vacations. His wife always took the photographs and made the family scrapbook. She was an excellent homemaker and cook, but more importantly a wonderful mother. She lived to do things with their daughter. She had always dreamed of having a daughter so that she could do the same things with her daughter that her mother had done with her. She got her wish and her daughter was her joy. The husband explains that his wife and daughter had an excellent relationship. They talked about everything. They were each other's best friend.
>
> You then call the daughter, who, with courage, describes her relationship with her mother. Her testimony, although brief, less than 15 minutes, is poignant. Unsurprisingly, there is no cross-examination. The daughter tells the jury how happy her mother was the week before the injury, that she was on school break and they could decorate her room together. Her mother was a problem solver, willing to help with school issues and willing to step in and intervene or advise on problems with friends. Together they worked on jigsaw puzzles, played cards, made candy, went shopping, enjoyed lunch and through everything, they talked. This was a "girl thing" between a

27. On the disability rights movement's rejection of this portrayal, and its implications for hedonic damages, see *infra* text accompanying notes 148-160.

28. Thomas Duffy, *A Plaintiffs' Attorney's Perspective*, *in* MEDICAL-LEGAL ASPECTS OF PAIN AND SUFFERING 483, 485-96 (Patricia Iyer ed., 2003).

> mother and daughter, two women. They basically did everything together. These are the relationships and activity patterns that the injured mother had established as her normal life prior to injury.
>
> This testimony will stand in marked contrast to the medical care providers who will testify that plaintiff is incapable of doing any of the things her husband and daughter described, and is unable to perform any of the normal, everyday activities of life. She can't comb her hair or bathe herself. She must ring a bell to relieve her bladder. A woman who loved to cook is now fed through a gastrostomy tube. All of the simple mundane aspects of daily life, that we take for granted and that comprise our normal lives, she is no longer capable of performing. Her life has no dignity.[29]

Understandably enough, the entire presentation of evidence—indeed, the entire development of evidence—is aimed at consolidating this image and rejecting any more sanguine assessment of the plaintiff's life prospects. The same treatise suggests, for example:

> If a physician describes a "moderate" loss, have him or her explain it on a scale of mild, moderate, and severe. Stress that the physician is someone who deals with disabled persons every day. It is moderate compared to the few who have severe injuries, but devastating in contrast to the individual who has no disabilities. The individual with a limp may be consoled by the person confined to a wheelchair, but is still frustrated, self-conscious and feels inadequate when observing the overwhelming majority of people who walk without any impediment whatsoever.[30]

Practitioners stress that plaintiffs themselves can often undermine their own cases. One lawyer writes, "Plaintiffs also tend to understate their condition in the [day-in-a-life] diary with notations of 'good' or 'not bad today.' This is somewhat ironic considering that clients are often making these notations while confined to a wheelchair or bed."[31] Likewise, the same treatise chapter quoted above counsels:

> In developing the testimony you will ultimately present on the issue of noneconomic damages, you may find that the plaintiff is not the best, and certainly not the only, witness who should discuss these damages. After all, the plaintiff lives with his or her injuries on a daily basis and has learned to compensate for his or her limitations.[32]

Thus the treatise suggests that lawyers should override their clients' own claims of adjustment, coping, and adaptation.

For this reason and to avoid the plaintiff seeming like a whiner, plaintiffs' lawyers frequently advise that the plaintiff not even attend the trial. Instead, says one experienced trial lawyer, plaintiff's counsel should inform the jury:

---

29. Philip H. Corboy & Susan J. Schwartz, *Pain and Suffering and Non-Economic Damages*, *in* ATLA'S LITIGATING TORT CLAIMS § 24:13 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003).

30. *Id.* § 24.17.

31. Duffy, *supra* note 28, at 487.

32. Corboy & Schwartz, *supra* note 29, § 24.10.

> "With the court's permission and pursuant to the recommendation of the treating physician, John Doe will not be present in the courtroom except when providing testimony, if at all." This lends apparent judicial approval to the plaintiff's absence. It also subtly declares that the plaintiff's injuries are so incapacitating that the rigors of a trial are beyond plaintiff's abilities.[33]

The point is that plaintiffs' counsel litigate personal injury cases to emphasize to both the defendant (for settlement) and the jury that plaintiffs' injuries are permanently disabling and devastating in their effect on plaintiffs' dignity and quality of life. That is, plaintiffs' attorneys attempt to show that plaintiffs' injuries have caused plaintiffs inevitably sharp contraction in their personal agency and activity, and, consequently, in their enjoyment of life.

B. The Judicial Discourse

The same frame characterizes judicial decision-making in these cases. Consider a 1967 California case, in which the plaintiff, a conductor-brakeman for a railroad, had both legs severed. The court sustained a large damages award on two alternative bases. The award, the court said, was fully supportable as economic damages (for lost wages, rehabilitation costs, and the like). But in addition, it was reasonable in light of the plaintiff's hedonic damages:

> At the time of respondent's injury he was 29.7 years of age. The fruitful and productive years of his life were before him. In the accident he lost both legs high above the knees. His right stump is only three and three-quarters inches in length, his left one four inches. There was evidence that he will never be able to use functional artificial legs; that he will be confined to a wheelchair for the remainder of his days; that he will require personal assistance in the routine affairs of living, and will never be able to hold gainful employment of a significant nature. *In sum, so far as the expected pleasures and satisfactions of life are concerned he has become a mere spectator and is no longer a participant.*[34]

In many cases upholding hedonic damages awards, judges seem to have concluded explicitly that the mere fact of disability, without more, necessarily limits life's enjoyment. In one early case, the Maine Supreme Judicial Court upheld a damages award on the ground that "[t]he total loss of the left hand by a boy 10 years of age takes a great deal of usefulness and enjoyment out of his prospective life."[35] Although the court stated that "[t]he loss of earning power is by no means the extent of the injury,"[36] it did not elaborate on how the absence of a left hand deprived the plaintiff's life of "usefulness and

---

33. WILLIAM A. BARTON, RECOVERING FOR PSYCHOLOGICAL INJURIES 176 (2d ed. 1990).

34. Henninger v. S. Pac. Co., 59 Cal. Rptr. 76, 84 (Cal. Ct. App. 1967).

35. Haynes v. Waterville & Oakland St. Ry., 64 A. 614, 615 (Me. 1906).

36. *Id.*

enjoyment."[37] Similarly, in a 1925 case, the Supreme Court of New Jersey affirmed a plaintiff's verdict, explaining without development: "A shriveled hand and wrist is a mortification especially to a young woman, such as Mrs. Haeussler was. She is entitled to compensation for the mortification. Such an injury also deprives one of much of the enjoyment of life."[38] In a far more recent case, in holding that hedonic damages could be recovered as part of an award for permanent impairment, the New Hampshire Supreme Judicial Court concluded that the inability to engage in pleasurable activities "is the natural result of the incapacity that an impairment award is designed to compensate."[39] Hedonic damages thus were part and parcel of the permanent impairment award, which "compensates the victim for the inability to function as a 'whole person.' "[40] Other courts have similarly suggested that individuals with disabilities inevitably experience hedonic loss because they can no longer "function as a whole man."[41]

The language of wholeness, which appears with some regularity in the caselaw,[42] is a classic linguistic devaluation of life with a disability; other similar signals—use of the words "normal" or "crippled"—are common as well. Some cases, for example, characterize hedonic damages as recovery of damages for "loss of a normal life" attendant to disability.[43] Others use the language of normalcy in even a more pointed way. A 1980 Wyoming case, explaining that disability damages and hedonic damages are intertwined doctrinally, stated:

> [W]e [previously] held that loss of mobility may be compensable even if it doesn't result in loss of earnings because mobility "is the right to be a normal human being." This

37. *Cf.* King v. Britt, 148 S.E.2d 594, 598 (N.C. 1966) (ruling that the jury could "infer and find that the permanent scar on appellant's forehead caused her to suffer mental pain" even though the appellant "did not testify that she suffered any mental pain or anguish or embarrassment or humiliation").

38. Haeussler v. Consol. Stone & Sand Co., 127 A. 602, 604 (N.J. 1925).

39. Bennett v. Lembo, 761 A.2d 494, 498 (N.H. 2000).

40. *Id.* (citation omitted).

41. *E.g.*, Canfield v. Sandock, 563 N.E.2d 1279, 1282 (Ind. 1990); Flannery v. United States, 297 S.E.2d 433, 436, 438 (W. Va. 1982).

42. The language is characteristic not only of opinions, but also of lawyers' arguments. *See* Gary Gober, *Closing Argument: The Lawyer's Crowning Achievement*, TRIAL, Apr. 1998, at 70, 75 (quoting the closing argument in a case about neck injury: "A year and a half ago, this man was a whole person. He was 100 percent of a man, and he's lost that."); *supra* notes 39, 41.

43. Smith v. City of Evanston, 631 N.E.2d 1269, 1278 (Ill. App. Ct. 1994); *see* Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 766-67 (Tex. 2003) (treating lost enjoyment of life as equivalent to "the inability to have a normal life"); *see also* Paul E. Marth, Comment, *Loss of Enjoyment of Life—Should It Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459, 459 (1975) ("[T]he right to recover for the diminished capacity to enjoy life ... encompass[es] such ideas as inconvenience, embarrassment, loss of pleasure and enjoyment of life, and inability to engage in normal activities.").

> suggests that appellee's neck injury, which has caused him to curtail some of his physical activities, should be compensable because it has deprived him of ordinary human pleasures.[44]

The word "crippled" also appears occasionally. For example, in a 1967 case a federal district court upheld hedonic damages based on a finding that the plaintiff, who had fractured two heel bones, could no longer engage in "dancing, ice skating, walking through the nearby woods or the Lake Michigan shore, family picnics, mushroom hunting, and shopping."[45] The court added that the plaintiff "will no longer be permitted to enjoy many of the things in life which it may well be said 'make life worth living.' He will always be crippled, and must suffer the inconvenience and humiliation incident to such physical condition."[46]

Not all courts upholding hedonic damages awards have treated disability as something that in and of itself limits the ability to enjoy life. Some have instead identified specific pleasure-creating activities in which the plaintiffs (like others with similar impairments) can no longer engage. In one case, the court awarded hedonic damages to a woman who experienced a severe leg fracture, based on evidence that as a result of her injury she was "unable to leave her home without constant supervision and assistance" and had "difficulty moving around in her own home."[47] Another upheld hedonic damages awarded a plaintiff who had lost some mobility in her arms because she had to rearrange her kitchen "so she could reach items," she "has problems eating, dressing, and brushing her hair," she "sleeps in a recliner," and she "is tired by the evening and does not have the stamina she had before."[48] Numerous other cases have upheld hedonic damages awards based on similar showings.[49]

---

44. Mariner v. Marsden, 610 P.2d 6, 12 (Wyo. 1980) (citing Fox v. Fox, 296 P.2d 252, 262 (Wyo. 1956)).

45. Gowdy v. United States, 271 F. Supp. 733, 750 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525, 535 (6th Cir. 1969) (holding that the defendant was not in fact negligent).

46. *Gowdy*, 271 F. Supp. at 750 (citation omitted).

47. Harnesk v. Carnival Cruise Lines, Inc., No. 87-2328-Civ-DAVIS, 1991 WL 329584, at *2 (S.D. Fla. Dec. 27, 1991).

48. Ford v. State *ex rel.* Dep't of Transp. & Dev., 760 So. 2d 478, 488 (La. Ct. App. 2000).

49. *See, e.g.*, Nemmers v. United States, 681 F. Supp. 567, 575-76 (C.D. Ill. 1988) (awarding hedonic damages to a child who, because of the defendant's negligence in prenatal medical treatment, was born with mental retardation and cerebral palsy, and reasoning that the plaintiff "will never be able to do *most* of the normal things of life: the first date, parenting children, reading, debating the politics of the day, etc."; that the plaintiff "can see but not substantially comprehend, and he can hear but not substantially understand"; and that "[t]here may be love and affection in his life, but almost all of the developments to which a normal person is exposed during his or her childhood and adulthood will pass him by"); Yosuf v. United States, 642 F. Supp. 432, 439 (M.D. Pa. 1986) (awarding damages for lost enjoyment of life to plaintiff who, because of an injury to his hand, was "unlikely" to "be able to pursue such things as tennis,

Just as plaintiffs' lawyers maneuver to keep their clients' adaptations from shrinking recovery, there is evidence that juries and courts disregard evidence of hedonic adjustment that is presented. Consider *Schindler Elevator Corp. v. Anderson*,[50] a Texas case in which a four-year-old boy had three toes taken off by a negligently maintained escalator.[51] Included in the jury's $17 million award was $1 million for future pain and mental anguish (remitted by the trial judge to $308,394) and $6 million for past and future physical impairment (remitted by the trial judge to $1.8 million).[52] The court of appeals reinstated the full $1 million in the future mental anguish category, and upheld the $1.8 million for physical impairment.[53] Of course, the procedural question before the court of appeals was the existence of sufficient evidence to uphold the jury verdict—not the court's own view of that evidence. But the discussion demonstrates the ways in which both juries and courts may assess the evidence with

---

weightlifting, basketball, or heavy household chores" in the future); Hendrix v. Stepanek, 771 N.E.2d 559, 568 (Ill. App. Ct. 2002) ("[P]laintiff testified that before the accident she was very active and enjoyed gardening, housework, camping, canoeing, and motorcycle riding but that after the accident either she could not enjoy these activities at all or she was only able to enjoy them much less frequently."); Payton v. City of New Orleans, 679 So. 2d 446, 452 (La. Ct. App. 1996) (upholding a general damages award to a plaintiff with severe leg and back pain as a result of a knee injury: "After the injury, she was unable to pursue her hobbies, to play actively with her children or to continue to work. She testified that emotional and sexual aspects of her marriage likewise deteriorated. She continues to have pain and swelling, and the medical experts testified that her condition is not expected to improve with time or further surgery."); Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 97 (Mo. 1985) (inability to "enjoy a normal sexual life or have children normally" and "destruction of her athletic lifestyle which will prevent her from ever again playing tennis, skiing, running, jogging, playing softball, raquetball [sic], hiking, backpacking and riding horses" relevant to lost enjoyment of life component of pain and suffering); Lowe v. State, 599 N.Y.S.2d 639, 639 (N.Y. App. Div. 1993) (upholding damages award to compensate individual whose left hand and forearm were severed for "inability to perform certain day-to-day activities at all or to perform them as quickly as before, and inability to participate in sports such as basketball, which claimant previously enjoyed"); Young v. Warr, 165 S.E.2d 797, 901 (S.C. 1969) (upholding an award of general damages, which included a component for lost enjoyment of life, based on testimony that the plaintiff had lost control of his bladder and bowel functions and "lost all ability for sexual function"); Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 717 (Tenn. Ct. App. 1999) ("While wearing her eye shield, Ms. Overstreet could not swim or wash her own hair, and she was forced to avoid heavy lifting and driving."); Lawrence v. Town of Brighton, No. 02A01-9801-CV-00020, 1998 WL 749418, at *5-6 (Tenn. Ct. App. Oct. 28, 1998) (upholding award of hedonic damages where plaintiff "could no longer raise or care for his dogs," "was not able to cook or help his mother with normal household chores," "could not play with children as he had in the past," "could no longer engage in exercises such as lifting weights, running, and jumping," "could not help his brother with yard work or drive a car to Memphis when he and his brother went shopping together," and "was forced to sleep in a recliner").

50. Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392 (Tex. App. 2001), *vacated on settlement*, Docket No. 02-0426 (May 22, 2003).

51. *See id.* at 399.

52. *See id.* at 410-15.

53. *See id.* at 412-13.

some skepticism about the ability of a plaintiff to overcome the trauma of a new disability.

In *Schindler* the court of appeals began its discussion of the future pain and mental anguish award by noting that, notwithstanding his injury, the "evidence shows that Scooter is a happy child who, at the time of trial, was active in many sports."[54] Nonetheless, the court said, Scooter did show some "concern[]" about his foot (for example, wearing a sock to avoid seeing it, even when swimming).[55] Even though his psychologist testified that he "will continue to psychologically adjust to the loss of his toes and injury to his foot in the future,"[56] the court (and apparently the jury) gave more weight to the evidence that "his self-esteem is based in large part on his physical ability, and when he cannot compete athletically on the level of his peers in the future, it will be very difficult for him."[57] Moreover, the court reasoned that "by high-school age, the only sport in which Scooter will be able to participate at a competitive level is swimming."[58]

Similarly, in reviewing the jury's award (after remittitur) of $1.5 million for future "physical impairment, sometimes called loss of enjoyment of life," the court quoted Scooter's own testimony that " 'I can do all the things I used to do.' "[59] But again, the court held the jury entitled to give more weight to the concomitant testimony that "running [would] be more difficult" in Scooter's future, "even [his] walking will be affected," "he will have problems with standing for long periods and with climbing," and might (if he eventually had to have the other two toes amputated, as might occur) in the future have to walk with "shortened steps" or suffer an " 'appreciable limp.' "[60] Already, noted the court, he "limps when he is tired."[61] This evidence, the court held, was sufficient to support $1.5 million in hedonic damages,[62] even for a happy, athletic child.

These cases hardly represent the entirety of hedonic damages practice. But they should suffice to show how disability and hedonic damages interact. Lawyers argue that disability saps happiness; juries award hedonic damages to plaintiffs who experience disabling

54. *Id.* at 411.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 411 n.7.
59. *Id.* at 412.
60. *Id.* at 413.
61. *Id.*
62. *Id.*

injuries; and judges uphold those awards. All do so based on a view that disability—either inherently or because it forecloses particular pleasurable activities—limits the ability to enjoy life, by undermining independence, dignity, and overall happiness. As we show in the next Part, those decisions reflect the views of most non-disabled people about the lives of people with disabilities. But they do not track the views of most people with disabilities themselves.

II. DISABILITY AND HEDONIC PSYCHOLOGY

The discussion in the preceding Part should demonstrate that courts have upheld hedonic damages awards based on the view that disability—even in the form of relatively minor physical impairments—necessarily limits the ability to enjoy life. That view, we contend, does not reflect how most people with disabilities themselves feel. As we show in this Part, an extensive body of research demonstrates that people who acquire disabilities tend not to lose much enjoyment of life, at least after an initial transition period. As the psychological literature on hedonic adaptation shows, people have a tendency to maintain their happiness following adverse events through a variety of psychological mechanisms.[63] Moreover, an extensive body of research demonstrates that people without disabilities tend to view the prospect of life with a disability as far less enjoyable than people with disabilities themselves report their lives as being. As the literature on affective forecasting demonstrates, people are poor predictors of how they will feel in new and unfamiliar life circumstances.[64] By requiring non-disabled jurors and judges to decide whether plaintiffs' disabilities limit their ability to enjoy life, hedonic damages practice all but guarantees that a pessimistic view of disability will be translated into litigation practice, verdicts, and doctrine.

This Part proceeds as follows. In Section A, relying on literature from a variety of disciplines, we show that many individuals with disabilities report that their conditions do not limit their ability

63. For a good general overview of the hedonic adaptation literature, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302 (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., 1999).

64. For good general overviews of the affective forecasting literature, see George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, *in* WELL-BEING, *supra* note 63, at 85; Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 345 (2003); *see also* Blumenthal, *supra* note 19, at 165-81. *See generally* Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, *in* FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 178 (Joseph P. Forgas ed., 2000).

to enjoy life, or at least not significantly. In Section B, we show that people without disabilities have a very different, and much more negative, view about the impact of disability on an individual's quality of life, and, importantly, that the litigation process is especially likely to bring out that negative view. The decisions that uphold hedonic damages for disability, though they depart from the views of most people with disabilities, are therefore unsurprising.

A. The Views of People with Disabilities: Of Hedonic Adaptation

In a classic study published in 1978, Professor Philip Brickman and his colleagues interviewed "lottery winners and accident victims" to assess the degree to which major strokes of good or bad fortune change a person's happiness.[65] They interviewed twenty-nine individuals with quadriplegia or paraplegia, twenty-two lottery winners, and twenty-two controls, and they asked the interviewees to rate their general happiness and their current experience of mundane everyday pleasures.[66] Although "lottery winners rated winning the lottery as a highly positive event, and paraplegics rated their accident as a highly negative event,"[67] the lottery winners were nonetheless less happy, and the accident victims happier, than the researchers had anticipated. In particular, lottery winners and controls "were not significantly different" in their self-reported happiness ratings; and although accident victims did report that they "experienc[ed] their present as less happy than controls," their happiness rating was "still above the midpoint of the scale," and they "did not appear nearly as unhappy as might have been expected."[68] In ratings of their experience of mundane, everyday pleasure, there was no meaningful difference between lottery winners, accident victims, and controls.[69]

The Brickman study has become the "most famous article in the psychological literature on well-being."[70] To be sure, it hardly offered definitive proof that disability has no effect on the enjoyment

---

65. *See generally* Philip Brickman, Dan Coates & Ronnie Janoff-Bulman, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978).

66. *Id.* at 918-19.

67. *Id.* at 920.

68. *Id.* at 920-21.

69. *See id.* at 921. For another classic study in the genre, though one that has not become as famous, see Paul Cameron, Donna Gnadinger Titus, John Kostin & Marilyn Kostin, *The Life Satisfaction of Nonnormal Persons*, 41 J. CONSULTING & CLINICAL PSYCHOL. 207, 212 (1973) (finding "no evidence of a difference between the handicapped and normals in self-reported life satisfaction or its linguistic relatives").

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

of life.[71] It involved a small sample; its subjects had only one kind of disability; and the subjects who had disabilities reported lower happiness than did lottery winners and controls. Nonetheless, subsequent research confirms that people have a "psychological immune system that detects and neutralizes events that challenge [their] sense of well-being."[72] Through a variety of defense mechanisms—distraction, rationalization, illusion, and so forth—our minds keep our happiness relatively stable.[73] Such hedonic adaptation may involve changes "in interests, values, goals, attention, or characterization of a situation"; it may involve "consciously directing one's attention away from troubling thoughts"; and it may also involve "cognitive transformations of situations—for example, by interpreting a tragedy as a 'learning experience.' "[74] Indeed, people who experience adversity often find benefit in it, such as the "strengthening of relationships with family and friends," the "development of greater patience, tolerance, empathy, and courage," or a "valued change in

71. *See* Frederick & Loewenstein, *supra* note 63, at 322 n.25 ("[E]vidence of hedonic adaptation in the [Brickman] paper is not overwhelming.").

72. Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 380 (citation omitted); *accord* Daniel T. Gilbert, Elizabeth C. Pinel, Timothy D. Wilson, Stephen J. Blumberg & Thalia P. Wheatley, *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 619 (1998).

73. *See* Gilbert, Pinel, Wilson, Blumberg & Wheatley, *supra* note 72, at 619 ("Ego, defense, rationalization, dissonance reduction, motivated reasoning, positive illusions, self-serving attribution, self-deception, self-enhancement, self-affirmation, and self-justification are just some of the terms that psychologists have used to describe the various strategies, mechanisms, tactics, and maneuvers of the psychological immune system."); Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 371-74 (describing process by which we make sense of unexpected events and then "ordinize" them "in a way that robs them of their emotional power"); *see also* Rebecca L. Collins, Shelley E. Taylor & Laurie A. Skokan, *A Better World or a Shattered Vision? Changes in Life Perspectives Following Victimization*, 8 SOC. COGNITION 263, 279-84 (1990) (discussing coping strategies people employ following adverse life events); Shelley E. Taylor & David A. Armor, *Positive Illusions and Coping with Adversity*, 64 J. PERSONALITY 873 *passim* (1996) (discussing role of positive illusions in coping with adverse life events). For a general discussion of psychological sense-making processes and "emotional evanescence," see Timothy D. Wilson, Daniel T. Gilbert & David B. Centerbar, *Making Sense: The Causes of Emotional Evanescence*, *in* 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS 209 (Isabelle Brocas & Juan D. Carrillo eds., 2003). Wilson and Gilbert have highlighted hindsight bias—"whereby people transform an event psychologically after it occurs to make it seem more predictable than it really was"—as one of the psychological tools that leads to the "evanescence" of negative emotions. Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 374. On hindsight bias generally, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576-86 (1998).

74. Frederick & Loewenstein, *supra* note 63, at 302-03; *see also* Shelley E. Taylor, *Adjustment to Threatening Events: A Theory of Cognitive Adaptation*, 38 AM. PSYCHOLOGIST 1161, 1161 (1983) ("[T]he readjustment process focuses around three themes: a search for meaning in the experience, an attempt to regain mastery over the event in particular and over one's life more generally, and an effort to enhance one's self-esteem—to feel good about oneself again despite the personal setback.").

life's priorities and personal goals."[75] Through such adaptations, most people in virtually all demographic groups—even those who experience economic disadvantage or racial stigma—report positive levels of happiness.[76]

The general phenomenon holds true in the disability area. A massive body of research has demonstrated that people who acquire a range of disabilities typically do not experience much or any permanent reduction in the enjoyment of life.[77] After an "initial adjustment period,"[78] people tend to adapt psychologically to having a disability. Whether because they gain more accurate information on their actual life and activity prospects,[79] or because their new disability "forces reexamination, reconceptualization, and the alternation of values, attitudes, beliefs, and desires,"[80] people with disabilities experience a hedonic transformation.[81] One researcher's description of her own experience with partial paralysis illustrates the point:

> When I did [accept my disability], it wasn't at all like [I had] envisioned; settling for second-rate goals and dreams. It wasn't even defusing the disappointment that I would never again hear whistles when I walked, or dance, or ride in a horse show, or walk alone in the rain, or go to the bathroom by myself. It sure as hell wasn't the much touted process of discovering substitute gratifications for the ones I had lost.

---

75. Glenn Affleck & Howard Tennen, *Construing Benefits From Adversity: Adaptational Significance and Dispositional Underpinnings*, 64 J. PERSONALITY 899, 902 (1996).

76. *See* Ed Diener & Carol Diener, *Most People Are Happy*, 7 PSYCHOL. SCI. 181, 181 (1996).

77. For a general discussion of this research, some of which is discussed in more detail in the remainder of this section, see Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCHOL. PUB. POL'Y & L. 526, 528-29 (2000); *see also* M.G. Eisenberg & C.C. Saltz, *Quality of Life Among Aging Spinal Cord Injured Persons: Long Term Rehabilitation Outcomes*, 29 PARAPLEGIA 514, 517 (1991) (collecting studies finding that "quality of life among those with even severely disabling conditions may be as high as those with no disability"); Thomas Mehnert, Herbert H. Krauss, Rosemary Nadler & Mary Boyd, *Correlates of Life Satisfaction in Those with Disabling Conditions*, 35 REHABILITATION PSYCHOL. 3, 5 (1990) (collecting studies finding that people with a variety of disabilities experience at least as much life satisfaction as nondisabling controls).

78. Carol J. Gill, *Depression in the Context of Disability and the "Right to Die"*, 25 THEORETICAL MED. & BIOETHICS 171, 185 (2004).

79. *See* Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 111-12 (1993) (suggesting the importance of the disability-related information deficit suffered by people without disabilities).

80. *Id.* at 114.

81. *See* Marilynn J. Phillips, *Disability and Ethnicity in Conflict: A Study in Transformation*, *in* WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS 195, 196-200 (Michelle Fine & Adrienne Asch eds., 1988) (discussing various theories of transformation offered by researchers).

> It was more like those things not only didn't matter any more, they wouldn't have mattered even if I could still have done them. I didn't need to be able to do them—or to mourn their loss—in order to maintain some image of myself.[82]

This kind of transformation is far from uncommon. Rather, studies have shown that people with disabilities "ranging from quadriplegia to blindness" tend to "report positive well-being" when asked.[83] Although people with spinal cord injuries report that they are "very unhappy immediately following their trauma," most report that they are happy by the third week after the accident.[84] "[I]ndividuals who use wheelchairs are believed to be happy by their friends and family, can recall more good than bad events in their lives, are rated as happy by an interviewer, and report more positive than negative emotions in daily experience-sampling measures."[85] People "with severe, multiple handicaps" and people "with chronic mental problems" also report high levels of subjective well-being.[86] Similarly, although burn injuries often cause "an initially severe impact" on well-being, the emotional impact "tend[s] to be transitory"; after roughly twelve months, "[t]he majority of burn survivors appear to adjust quite well to their injuries."[87] And "young patients with limb

---

82. Carolyn L. Vash, *The Psychology of Disability*, 22 REHABILITATION PSYCHOL. 145, 152-53 (1975), *excerpted in* CAROLYN L. VASH & NANCY M. CREWE, PSYCHOLOGY OF DISABILITY 160 (2d ed. 2004). This quotation came to our attention because it is featured in Pryor, *supra* note 79, at 115.

83. Diener & Diener, *supra* note 76, at 181.

84. *Id.*; *see* Camille B. Wortman & Roxane Cohen Silver, *Coping with Irrevocable Loss*, *in* CATACLYSMS, CRISES, AND CATASTROPHES: PSYCHOLOGY IN ACTION 189, 198 (Gary R. VandenBos & Brenda K. Bryant eds., 1987); *sec also* C. Lundqvist, A. Siosteen, C. Blomstrand, B. Lind & M. Sullivan, *Spinal Cord Injuries: Clinical, Functional, and Emotional Status*, 16 SPINE 78, 82 (1991) (finding that after four years, subjects with spinal cord injuries reported levels of subjective well-being and quality of life that were similar to those of a non-disabled reference group); G.G. Whiteneck, S.W. Charlifue, H.L. Frankel, M.H. Fraser, B.P. Gardner, K.A. Gerhart, K.R. Krishnan, R.R. Menter, I. Nuseibeh & D.J. Short, *Mortality, Morbidity, and Psychosocial Outcomes of Persons Spinal Cord Injured More Than 20 Years Ago*, 30 PARAPLEGIA 617, 626 (1992) ("Approximately three quarters of the subjects rated their current quality of life as either good or excellent on a 5-point scale.").

85. Diener & Diener, *supra* note 76, at 184 (citation omitted).

86. *Id.* at 181; *see also* Richard Stensman, *Severely Mobility-Disabled People Assess the Quality of Their Lives*, 17 SCANDINAVIAN J. REHABILITATION MED. 87, 89-91 (1985) (finding no statistically significant difference in self-reported quality of life between subjects with severe mobility impairments and non-disabled controls). Liz Emens argues that psychiatric disabilities, at least, are "defined by . . . hedonic costs." Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 423-28 (2006). Our discussion focuses on injuries that cause physical or intellectual disabilities.

87. David R. Patterson, John J. Everett, Charles H. Bombardier, Kent A. Questad, Victoria K. Lee & Janet A. Marvin, *Psychological Effects of Severe Burn Injuries*, 113 PSYCHOL. BULL. 362, 362, 370 (1993).

deficiencies, as a group, appear to be relatively resilient to maladjustment."[88]

In a recent study, Jason Riis and his colleagues used the technique of "ecological momentary assessment" ("EMA") to measure the reported well-being of individuals who were undergoing kidney dialysis.[89] They found virtually no significant differences between those individuals and a control group of individuals without major health conditions. In particular, there was no statistically significant difference between the two groups in reports of overall mood (a five-point scale from "very pleasant to very unpleasant") or in reports of the extent to which they were experiencing nine specific emotions ("happy, joyful, pleased, enjoyment/fun, depressed/blue, unhappy, frustrated, angry/hostile, worried/anxious").[90] Nor were there statistically significant differences in reports about pain, tiredness, or overall life satisfaction.[91] The authors concluded "that hemodialysis patients do, largely at least, adapt to their condition. Although they 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."[92]

A recent longitudinal study conducted by two British economists reported similar, though less pronounced, results.[93] Using data from the British Household Panel Survey to "track[] individuals' levels of reported life-satisfaction in the years leading up to, and after, disability," they found "a striking degree of recovery in human wellbeing" among those who have less severe disabilities.[94] But though

---

88. Vida L. Tyc, *Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review*, 12 CLINICAL PSYCHOL. REV. 275, 286 (1992).

89. *See* Jason Riis, George Loewenstein, Jonathan Baron, Christopher Jepson, Angela Fagerlin & Peter A. Ubel, *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCHOL. 3 (2005). As the authors describe the EMA method:

> In EMA, subjects are given personal digital assistants (PDAs; e.g., Palm Pilots) to carry with them wherever they go for a period of several days or more. The metbod is designed to minimize the influence of biased recall. The PDA prompts the subject to answer questions at random times tbroughout the day. In studies of well-being, subjects are asked bow they feel at that very moment.

Id. at 4. *See generally* Arthur A. Stone, Saul S. Shiffman & Marten W. DeVries, *Ecological Momentary Assessment*, *in* WELL-BEING, *supra* note 63, at 26-28 (discussing the EMA technique).

90. Riis, Loewenstein, Baron, Jepson, Fagerlin & Ubel, *supra* note 89, at 5-6.

91. *Id.* at 6.

92. *Id.* at 7.

93. Andrew J. Oswald & Nattavudh Powdthavee, Does Happiness Adapt? A Longitudinal Study of Disability with Implications for Economists and Judges 14 (Nov. 1, 2005) (unpublished manuscript, on file with authors).

94. *Id.* at 21.

they found that "a person's emotional damage from disability reduces through the years," they did not find "a complete return to the old happiness level."[95] For people with severe disabilities, the authors found (based on a relatively small sample) that well-being recovers to a similar degree, but more slowly.[96]

Even in those instances where disability does durably reduce subjective well-being, there is good reason to think that it is social factors, and not anything intrinsic in the disability, that cause the reduction. A meta-analysis of twenty-nine studies of self-reported quality of life of individuals with spinal cord injuries found that those individuals report a lower quality of life than do their non-disabled peers.[97] But the degree of an individual's impairment had only "a very

---

95. *Id.* at 21; *see also* Adrienne Asch, *Distracted by Disability*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 77, 80-81 (1998) (noting that "[n]ot everyone who has a disability is satisfied with life" but that "overall disabled people believe that they can achieve enough of their goals to make life worthwhile"); M. Kannisto & H. Sintonen, *Later Health-Related Quality of Life in Adults Who Have Sustained Spinal Cord Injury in Childhood*, 35 SPINAL CORD 747, 750 (1997) (finding that adults who experienced spinal cord injuries in childhood reported a slightly, but only slightly, lower health-related quality of life than did non-disabled controls); R. Stensman, *Adjustment to Traumatic Spinal Cord Injury: A Longitudinal Study of Self-Reported Quality of Life*, 32 PARAPLEGIA 416 (1994) (evaluating similar findings with individuals who experienced their injuries in adulthood).

96. *See* Oswald & Powdthavee, *supra* note 93, at 10.

97. *See* Marcel Dijkers, *Quality of Life After Spinal Cord Injury: A Meta Analysis of the Effects of Disablement Components*, 35 SPINAL CORD 829, 835 (1997); *see also* Marcus J. Fuhrer, Diana H. Rintala & Karen A. Hart, *Relationship of Life Satisfaction to Impairment, Disability, and Handicap Among Persons with Spinal Cord Injury Living in the Community*, 73 ARCHIVES PHYSICAL MED. & REHABILATION 552, 554 (1992) ("[O]n average, people with SCI who are living in the community report a lower level of satisfaction with life than do people in the general population."); Mehnert, Krauss, Nadler & Boyd, *supra* note 77, at 12 (finding that people with a range of disabilities experience less life satisfaction than people without them, but that "[e]ven among those who consider themselves severely disabled, and those who report themselves unable to work or keep house, the majority indicate that they are at least somewhat satisfied with their lives."); Richard Schulz & Susan Decker, *Long-Term Adjustment to Physical Disability: The Role of Social Support, Perceived Control, and Self-Blame*, 48 J. PERSONALITY & SOC. PSYCHOL. 1162, 1170 (1985) (reporting, in study of individuals with spinal cord injuries, that "the subjects in this study reported a mean degree of well-being that was only slightly lower than that of other non-disabled adult populations."). *But see* Kathleen Chwalisz, Ed Diener & Dennis Gallagher, *Autonomic Arousal Feedback and Emotional Experience: Evidence From the Spinal Cord Injured*, 54 J. PERSONALITY & SOC. PSYCHOL. 820, 823 (1988) (finding no statistically significant differences between subjects with spinal cord injuries and non-disabled controls on most measures of subjective well-being); L.A. Cushman & J. Hassett, *Spinal Cord Injury: 10 and 15 Years After*, 30 PARAPLEGIA 690, 694 (1992) (reporting that subjects with spinal cord injuries "who were surveyed 10 and 15 years post injury rated their perceived quality of life as equal to or somewhat better than that of their peers, on average"). Professors Ville and Ravaud note that the studies finding a lower quality of life for people with spinal cord injuries often use measures that beg the question by assuming that functional limitations necessarily limit well-being. *See* I. Ville & J.F. Ravaud, *Subjective Well-Being and Severe Motor Impairments: The Tetrafigap Survey on the Long-Term Outcome of Tetraplegic Spinal Cord Injured Persons*, 52 SOC. SCI. & MED. 369, 370 (2001). *See generally* Tracey C. Lintern, J. Graham Beaumont, Pamela M. Kenealy & Rachel C. Murrell, *Quality of Life (QoL) in Severely Disabled Multiple Sclerosis*

minor effect" on reported quality of life.[98] Instead, the crucial determinants were family involvement, work opportunities, mobility, and social integration.[99] (Presumably, these factors contribute as well to the expressed willingness of some persons with disabilities to pay for a "cure" for their disabilities.[100]) Disability does not inherently limit an individual's opportunities along these dimensions; rather, such limitations often "stem from the frustration of social rejection, of physically inaccessible movies and restaurants, of inadequate social gatherings, or of discrimination in the workplace."[101]

The doctrine allowing hedonic damages for disabling injuries fails to take account of the degree to which people with disabilities adapt to their conditions. Contrary to the view of many of the courts whose decisions we cited in Part I,[102] people with disabilities do not, by

---

Patients: Comparison of Three QoL Measures Using Multidimensional Scaling, 10 QUALITY LIFE RES. 371, 372 (2001) ("Most currently available forms of QoL assessment employ external value systems; thus specific goals or activities important to the individual patient may not be included in the measurement scale.")

98. Dijkers, *supra* note 97, at 833. *But cf.* Mehnert, Krauss, Nadler & Boyd, *supra* note 77, at 10-12 (finding that degree of functional limitation was directly associated with reduced life satisfaction, but that "social interactional variables" were important as well).

99. *See* Dijkers, *supra* note 97, at 835; *see also* Brent W. Chase, Thomas A. Cornille & R. William English, *Life Satisfaction Among Persons with Spinal Cord Injuries*, J. REHABILITATION, July-Sept. 2000, at 14, 18-19 (finding that marital status and "perceived control"—the ability to make decisions about one's life—were the most significant predictors of positive life satisfaction among people with spinal cord injuries, and that the opportunity to direct personal assistants and the availability of at least part-time work were highly correlated with positive perceptions of control); Ashley R. Craig, Karen M. Hancock & Hugh G. Dickson, *Spinal Cord Injury: A Search for Determinants of Depression Two Years After the Event*, 33 BRIT. J. CLINICAL PSYCHOL. 221, 227 (1994) (finding that physical pain and perceived loss of control of one's life were the major determinants of depression in people with spinal cord injuries, and that "medical characteristics such as level of lesion and completeness of lesion" were not associated with depression); Fuhrer, Rintala & Hart, *supra* note 97, at 555-56 (finding that the social factors of disablement, and not the degree of medical impairment, were the determinants of lower life satisfaction among people with spinal cord injuries); Schulz & Decker, *supra* note 97, at 1170 ("Persons [with spinal cord injuries] who had high levels of social support, were satisfied with their social contacts, and felt that they had high levels of control reported high levels of well-being."); Vappu Viemero & Christina Krause, *Quality of Life in Individuals with Physical Disabilities*, 67 PSYCHOTHERAPY & PSYCHOSOMATICS 317, 321 (1998) (finding that social factors, and not the degree of medical impairment, were key determinants of life satisfaction in individuals with disabilities); Ville & Ravaud, *supra* note 97, at 370, 377-79 (noting that self-reported well-being measures in individuals with spinal cord injuries "increase with increased quality and richness of social contacts" and with "indicators of social status such as income and level of education" as well as occupational level, and reporting results of study showing that similar "sociological variables" play a major role in perceived well-being).

100. *See infra* notes 145-147.

101. Asch, *supra* note 95, at 80; *see also* Nancy Weinberg, *Physically Disabled People Assess the Quality of Their Lives*, 45 REHABILITATION LITERATURE 12, 14 (1984) (finding that "adjustment to societal attitudes was the most difficult" for interview subjects with disabilities). *See infra* text accompanying notes 148-160 (providing analysis development on this point).

102. *See supra* text accompanying notes 34-62.

and large, experience disability as inherently and sharply limiting their enjoyment of life. And even those courts that identify particular pleasure-creating activities that people with disabilities can no longer perform are missing two significant points. First, the degree to which disability actually limits those activities is often overstated.[103] Although courts frequently suggest that a disabling injury makes an individual unable to have sex, participate in athletics, and otherwise lead an active life,[104] that is not generally true. People with disabilities can still have sex,[105] work,[106] compete athletically and go to ballgames,[107] and participate in other activities in the community.[108] Second, and more fundamental, hedonic adaptation often works by transforming what one values and enjoys. Even if a disability prevents an individual from performing a task that she previously enjoyed, she will not necessarily experience that as an hedonic loss. People who acquire spinal cord injuries, for example, come to believe that "mental functioning, communication, social participation, and seeing"—all things they can still do—are more important to their enjoyment of life than mobility.[109]

More generally, they begin to think of autonomy as consisting in being "in charge of how, when, by whom, and in what ways certain tasks are performed" rather than in personally performing those tasks.[110] By this process, the inability to move around without a

---

103. *See infra* note 155 and accompanying text.

104. *See supra* notes 47-62 and accompanying text.

105. *See, e.g.*, Colette Ray & Julia West, *Social, Sexual, and Personal Implications of Paraplegia*, 22 PARAPLEGIA 75, 75-76, 81-83 (1984) (describing ability of people with spinal cord injuries to have sex, despite obstacles). For extensive discussions of sex and disability, from very different perspectives, see TOM SHAKESPEARE, KATH GILLESPIE-SELLS & DOMINIC DAVIES, THE SEXUAL POLITICS OF DISABILITY: UNTOLD DESIRES (1996); THE PSYCHOLOGICAL AND SOCIAL IMPACT OF PHYSICAL DISABILITY 207-55 (Robert P. Marinelli & Arthur E. Dell Orto eds., 1977).

106. The employment rate for people with disabilities does lag well behind that of people without disabilities, but that is to a large extent the result of discrimination and the lack of social services for which courts could compensate directly. *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 19-54 (2004).

107. *See, e.g.*, Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997) (requiring sports arena to provide wheelchair users seating areas with a line of sight over standing spectators); Disabled Sports USA, http://www.dsusa.org.

108. *See, e.g.*, Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1132-33 (9th Cir. 2003) (requiring movie theaters to be accessible to people who use wheelchairs).

109. Kannisto & Sintonen, *supra* note 95, at 747; *see also* Schulz & Decker, *supra* note 97, at 1171 (noting that individuals with spinal cord injuries "saw themselves as better off than most non-disabled persons," and that they did so "partly by selectively focusing on attributes that made them appear advantaged (e.g., brain is more important than brawn)"); Weinberg, *supra* note 101, at 14 (making similar observations, but noting that the process of adjustment "was not always easy").

110. Asch, *supra* note 95, at 79; *see also id.* ("The father or mother who accompanies a child to a sporting event supervises the child even if they are both driven by an assistant because the

wheelchair, or to dress and bathe oneself, is not perceived as an hedonic loss. Indeed, people who acquire disabilities often come to find that "[t]hey have incorporated the disabilities into their identities, into their very selves. And they see their experiences as yielding much that is positive in their personal growth."[111] And many people with disabilities state that they would refuse, if offered, a risk-free surgery that would completely cure their disabilities, because they "fear that they would no longer be the same person."[112]

B. The Views of People Without Disabilities: Of Affective Forecasting

The discussion in the previous Section should demonstrate that people who acquire disabilities do not find that their enjoyment of life is impaired—perhaps not at all, and at least not substantially. But people without disabilities think differently. They tend to believe that disability inevitably has a very negative effect on the enjoyment and quality of one's life.[113] This is true of the general public,[114] and it is true even of professionals who spend a great deal of time interacting with people with disabilities. Reviewing over a dozen studies, Carol Gill found it "consistent and stunning" that "health professionals significantly underestimate the quality of life of persons with disabilities compared with the actual assessments made by persons with disabilities themselves."[115]

---

child is too young to drive and the parent's seizure disorder makes driving unsafe. The woman with a mobility impairment whose personal assistant shops for food she selects is no less in charge of her life than the woman who trades shopping for babysitting so that she and her friend can both maintain homes and work lives.").

111. PAUL K. LONGMORE, *Medical Decision Making and People with Disabilities: A Clash of Cultures*, *in* WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 204, 209 (2003).

112. Weinberg, *supra* note 101, at 13.

113. *See* NATIONAL COUNCIL ON DISABILITY, ASSISTED SUICIDE: A POSITION PAPER 22-25 (1997), *available at* http://www.ncd.gov/newsroom/publications/1997/suicide.htm (last visited Feb. 15, 2007).

114. *See* Loewenstein & Schkade, *supra* note 64, at 92 (discussing "very substantial evidence" that healthy people underestimate the quality of life of sick people"); George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209, 1212 (2003) ("[C]ross-sectional studies have consistently found that nonpatients' predictions of the quality of life associated with serious medical conditions are lower than actual patients' self-reported quality of life."); *see also* Asch, *supra* note 95, at 82 (discussing how the Oregon health rationing plan incorporated biases toward disability through the use of a public quality-of-life survey); Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1508 & n.12 (2001) (same).

115. Gill, *supra* note 77, at 530; *see also* John R. Bach & Denise I. Campagnolo, *Psychosocial Adjustment of Post-poliomyelitis Ventilator Assisted Individuals*, 73 ARCHIVES PHYSICAL MED. & REHABILITATION 934, 934 (1992) ("Muscular Dystrophy Association clinic directors significantly underestimated life satisfaction reported by Duchenne muscular dystrophy ventilator users."); John R. Bach & Margaret C. Tilton, *Life Satisfaction and Well-Being Measures in Ventilator*

That finding should not be stunning, however. When attempting to assess how people in unfamiliar situations feel, we often do so by seeking to predict how we ourselves would feel in those circumstances.[116] And a large body of evidence demonstrates that we tend to do a very poor job of predicting our own future happiness.[117] In particular, there is a great deal of evidence that we "overestimate the enduring impact that future events will have on our emotional reactions"[118] and thus underestimate our ability to adapt to adverse life events.[119]

Assisted Individuals with Traumatic Tetraplegia, 75 ARCHIVES PHYSICAL MED. & REHABILITATION 626, 630 (1994) (finding that non-disabled health care professionals significantly underestimated the life satisfaction expressed by individuals with spinal cord injuries); Eugenia Bodenhamer, Jeanne Achterberg-Lawlis, George Kevorkia, Anne Belanus & Jeanne Cofer, *Staff and Patient Perceptions of the Psychosocial Concerns of Spinal Cord Injured Persons*, 62 AM. J. PHYSICAL MED. 182, 182 (1983) (citing studies that "revealed significant discrepancies between the way professional staff view spinal cord injured patients' psychological reactions and the responses the patients actually report"); Laura A. Cushman & Marcel P. Dijkers, *Depressed Mood in Spinal Cord Injured Patients: Staff Perceptions and Patient Realities*, 71 ARCHIVES PHYSICAL MED. & REHABILITATION 191, 195 (1990) (finding "a consistent bias on the part of [rehabilitation facility] staff to overestimate depressed mood, relative to the report of patients themselves"); Frederick A. Ernst, *Contrasting Perccptions of Distress by Research Personnel and Their Spinal Cord Injured Subjects*, 66 AM. J. PHYSICAL MED. 12, 13-14 (1987) (reporting results similar to the Bodenhamer study).

116. *See* Leaf Van Boven & George Loewenstein, *Social Projection of Transient Drive States*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1159, 1162, 1165 (2003).

117. *See* Blumenthal, *supra* note 19, at 162 ("[S]ubstantial empirical evidence demonstrates that people are in fact unable to accurately predict their own or others' emotional states."). *See generally* Loewenstein & Schkade, *supra* note 64, at 88-94 (reviewing the literature).

118. Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 351.

119. *See* Gilbert, Pinel, Wilson, Blumberg & Wheatley, *supra* note 72, at 633 (reporting results of studies in which subjects "overestimated the duration of their affective reactions to romantic disappointments, career difficulties, political defeats, distressing news, clinical devaluations, and personal rejections"); Loewenstein, O'Donoghue & Rabin, *supra* note 114, at 1213 (discussing research suggesting "underappreciation of adaptation"); George Loewenstein & Shane Frederick, *Predicting Reactions to Environmental Change*, *in* ENVIRONMENT, ETHICS, AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION 52, 66 (Max H. Bazerman, David M. Messick, Ann E. Tenbrunsel & Kimberly A. Wade-Benzoni eds., 1997) (reporting results of a study of predicted reactions to environmental change in which the subjects "seem[ed] to expect changes in their circumstances to affect their quality of life in the future more than equivalent things have affected their quality of life in the past"); Riis, Loewenstein, Baron, Jepson, Fagerlin & Ubel, *supra* note 89, at 3 ("Research in diverse domains has documented a general tendency for people to underestimate their own and others' speed of adaptation to negative as well as positive outcomes."); Timothy D. Wilson, Thalia Wheatley, Jonathan M. Meyers, Daniel T. Gilbert & Danny Axsom, *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 J. PERSONALITY & SOC. PSYCHOL. 821, 829 (2000) (finding that "[c]ollege football fans overestimated the extent to which the outcome of a football game would influence their overall happiness"); Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 353 ("The impact bias has been found in a variety of populations (e.g., college students, professors, sports fans, dieters, vacationers, snake phobics, people taking medical tests), with a wide range of emotional events (e.g., romantic breakups, personal insults, sports victories, electoral defeats,

In the context of disability, this failure of affective forecasting interacts with and feeds the general societal view that disability is a tragedy and that the non-disabled should pity people with disabilities.[120] There is no doubt that disability is a condition that is subject to a great deal of social stigma.[121] As a result, "[m]any able-bodied persons are tremendously fearful about becoming disabled,"[122] and they believe that disabilities are far more limiting than they actually are.[123] That fear may stem from " 'existential anxiety' "—the fear that one will eventually become disabled oneself.[124] Or it may simply reflect the well-documented psychological "tendency to automatically associate positive characteristics with [one's] ingroups more easily than outgroups" and "to associate negative characteristics with outgroups more easily than ingroups."[125] As members of a

---

parachute jumps, failures to lose weight, reading tragic stories, and learning the results of pregnancy and HIV tests.").

120. *See infra* note 155 and accompanying text; *see also* Beatrice A. Wright, *Attitudes and the Fundamental Negative Bias: Conditions and Corrections*, *in* ATTITUDES TOWARD PERSONS WITH DISABILITIES 3, 8 (Harold E. Yuker ed., 1988) (collecting studies showing "the ease with which devalued groups are regarded as unfortunate, despite the fact that members of those groups do not view themselves as unfortunate").

121. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 436-45 (2000).

122. Paul Steven Miller, *The Impact of Assisted Suicide on Persons with Disabilities—Is It a Right Without Freedom?*, 9 ISSUES L. & MED. 47, 49 (1993).

123. *See* Bagenstos, *supra* note 121, at 423-24.

124. Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 26, 34 (Linda Hamilton Krieger ed., 2003); Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISS. 39, 42-45 (1988); *see also* Miller, *supra* note 122, at 53 ("The root of prejudice against people with disabilities comes from several sources. Foremost is that of fear: fear of the loss of autonomy and the 'there but for the grace of God go I' realization that disability can 'afflict' any person. Such fears are, of course, based on the prejudicial assumptions about life with a disability that society itself creates. Able-bodied people see 'confinement' to a wheelchair, or reliance upon attendant care, or a lack of hearing or vision, as losses of independence, which, in this society, is often regarded as worse than death itself. Furthermore, nothing in our society is despised like difference. Because our society assumes difference is the equivalent of inferiority and treats people with visible differences accordingly, people have grave fears about being viewed as deviating from accepted societal norms."). *See generally* R. William English, *Correlates of Stigma Toward Physically Disabled Persons*, *in* THE PSYCHOLOGICAL AND SOCIAL IMPACT OF PHYSICAL DISABILITY, *supra* note 105, at 162.

125. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). For discussions in the legal literature of this general phenomenon, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 6-7 (2006); Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 383-409 (2000). For a good overview of theories and research on the attitudes of people without disabilities toward people with disabilities, see generally ATTITUDES TOWARD PERSONS WITH DISABILITIES, *supra* note 120.

socially stigmatized class, people with disabilities are a classic outgroup.

It is true, of course, that under what is (unintuitively) called the "Golden Rule," jurors are not supposed to figure damages by asking how much money they themselves would want in exchange for experiencing the injury in question.[126] Nonetheless, jurors must calculate damages using some sense of the value of a loss—and their own perspective is unavoidable when they assign that value. Thus when judges and jurors make decisions about what damages properly compensate for disabling injuries, they are likely to hold and use the non-disabled public's pessimistic views of disabled quality of life. Very few judges have disabilities.[127] And individuals with disabilities are often excluded from juries.[128] As Wendy Hensel has written in the context of "wrongful birth" actions, jurors tend to have a "distance from the disabled perspective" that leaves them "subject to bias and prejudice."[129] The *Schindler* case we discussed in Part I.B. above, in which judges and jurors disregarded extensive evidence that the six-year-old plaintiff with three amputated toes had in fact adapted hedonically, is hardly a surprise in this context.[130]

Indeed, the litigation process itself is structured in a manner that is likely to trigger the very cognitive shortcuts that make affective forecasting so flawed. Daniel Gilbert and his colleagues have found that our tendency to be unaware of our own "psychological immune systems"—they term this tendency "immune neglect"—is a substantial contributor to our inability to predict adaptation to

---

126. *See* McCaffery, Kahneman & Spitzer, *supra* note 19, at 1383-87 (discussing this "golden rule" and lawyers' ways around it). *See generally* L.R. James, Annotation, *Instructions in a Personal Injury Action Which, in Effect, Tell Jurors That in Assessing Damages They Should Put Themselves in Injured Person's Place*, 96 A.L.R.2d 760 (1964).

127. *See Brown Will Present at ABA Conference*, THIRD BRANCH, Spring 2006, at 12, *available at* http://www.wicourts.gov/news/thirdbranch/docs/spring06.pdf (last visited Feb. 15, 2007) ("While statistics on lawyers and judges with disabilities nationwide have not been reliably gathered, [Wisconsin Court of Appeals Judge Richard] Brown said he knows of two blind judges and that he currently is the nation's only deaf judge.") Given the age of the members of the judiciary, it stands to reason that there are some with mobility impairments, and others presumably have less visible disabilities.

128. In the past, that exclusion took the form of categorical statutory prohibitions, some of which remain on the statute books. *See* Tennessee v. Lane, 541 U.S. 509, 524 n.9 (2004) (citing statutes from Tennessee and Michigan). Today, it more often occurs through the use of peremptory challenges. *See generally* Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1 (1997).

129. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 185 (2005).

130. *See supra* text accompanying notes 50-62.

adverse events.[131] Because the presentation of evidence in litigation emphasizes the pain and unhappiness plaintiffs have felt due to their injuries, it further directs jurors' attention away from the likelihood of hedonic adaptation.

Even more, the litigation process encourages "focalism," another key contributor to the inability to predict adaptation. "Focalism" is a phenomenon under which people who are asked to predict an event's effects on happiness "focus too much on the occurrence in question" and "fail to consider the consequences of other events that are likely to occur": "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."[132] A trial, of course, focuses attention on the particular injury,[133] and "when attention is drawn to the possibility of a change in any significant aspect of life, the perceived effect of this change on well-being is likely to be exaggerated."[134] Such focalism is likely to be particularly strong in cases where non-disabled jurors must assess the prospects of happiness with a disability. As Paul Longmore has written, " 'outsiders,' non-disabled people, latch onto a single trait (for example, paraplegia or arthritic pain), while 'insiders,' people with disabilities, take into account the full range of their experience."135

It is only to be expected, then, that judicial decisions on hedonic damages understate the experienced happiness of people with disabilities. Both the general inability to predict that happiness will adapt following adverse events and the social stigma toward disability are intensified for participants in legal processes. In the next Part, we discuss the normative and policy implications of these observations.

III. NORMATIVE AND POLICY IMPLICATIONS

In the previous Part, we showed that people with disabilities tend to have strikingly different views than non-disabled people

131. Gilbert, Pinel, Wilson, Blumberg & Wheatley, *supra* note 72, at 619, 633; *see also* Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 369 ("A major source of the impact bias, we suggest, is that people fail to anticipate the extent to which they will transform events psychologically in ways that ameliorate their impact.").

132. Wilson, Wheatley, Meyers, Gilbert & Axsom, *supra* note 119, at 822; *see also* Wilson & Gilbert, *Affective Forecasting*, *supra* note 64, at 366 ("By neglecting to consider how much these other events will capture their attention and influence their emotions, people overestimate the impact of the focal event.").

133. *See* Schkade & Kahneman, *supra* note 70, at 340 ("[A] judge who tries to imagine the life of a paraplegic or of a lottery winner will naturally focus attention on the special circumstances of these cases.").

134. *Id.*

135. LONGMORE, *supra* note 111, at 209.

regarding the effect a disability has on the enjoyment of life. In particular, people with disabilities tend to adapt to their conditions, to the extent that they experience as much (or nearly as much) enjoyment of life as do non-disabled people. People without disabilities, by contrast, tend to believe that disability inevitably makes life substantially less enjoyable. Where non-disabled jurors and judges decide how much to compensate for the hedonic costs of disabling injuries, then, they are likely to operate on the basis of a view that is not the view of many or most people with disabilities.

But that is merely a descriptive point. As a normative and policy matter, the question remains: How should the law of hedonic damages respond to disabling injuries? The mere fact that people with and without disabilities have different views regarding the hedonic effects of disability does not determine whose views should control. Moreover, as the psychological evidence discussed in the previous Part makes clear, people with disabilities themselves have an array of views regarding the effects of disability on the enjoyment of life. Where individual plaintiffs with disabling injuries convince juries that they have experienced a loss of life's pleasures, should their views be irrelevant simply because they may reflect a minority position among people with disabilities?

In this Part, we address the normative question that the discussion in the previous Part leaves open: How should the law of hedonic damages respond to the tendency of non-disabled people to believe that disabling injuries limit life's enjoyment far more than people with disabilities tend to experience? We believe that the law should not award any damages for loss of enjoyment of life based on disability. When courts uphold hedonic damages awards based on the view that disabling injuries limit life's enjoyment and keep plaintiffs from being a "whole person," they entrench the societal view that disability is inherently tragic, and encourage people with disabilities to see their lives as tragedies. The view of disability as tragedy, for which the proper response is pity, charity, or compensation, has been one of the major targets of disability rights activists (and we endorse their campaign).[136] But we also argue that it is important to disaggregate the various ways in which disability can limit life's pleasures. The law can compensate for some of the negative results of disablement without sending the message that disability is a tragedy; others are at least in part the result of a society and a legal regime that consistently send the message that disability is tragic. In

136. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 24 (1993); Bagenstos, *supra* note 121, at 427-28.

particular, we contend that while tort law should compensate for the physical pain and societal exclusion resulting from disabling injuries, as well as for the cost of medical care, assistive technology, and personal assistance, there should be no recovery for hedonic losses believed to attend disability.

Our argument in this Part proceeds as follows. In Section A, we confront a prominent argument against using the views of people without disabilities to measure the degree to which disability limits the enjoyment of life—the argument that adaptive preferences, including the views of people with disabilities, may be psychologically healthy but ought not to guide policy. As the preceding Sections demonstrate, we agree that the views of people with disabilities reflect adaptive preferences, but we argue that this recognition should start, not end, the discussion. Whether the law should use as a standard the (adaptive) preferences of people with disabilities, or instead the (in some ways equally adaptive) preferences of people without disabilities, depends on a normative inquiry into whether it is better to incorporate one or the other set of preferences into policy.

In the succeeding Sections, we identify two bad consequences of incorporating into tort damages the non-disabled perspective that disability inevitably limits enjoyment of life. In Section B, we contend that a legal doctrine founded on a view that disability inevitably limits life's enjoyment encourages paternalism and pity and distracts political attention from efforts to change the social, attitudinal, and physical barriers that make impairments disabling. In Section C, we argue that such a doctrine also is likely in many cases to harm affected individuals with disabilities by augmenting the negative consequences of their injury.

We then turn to other important normative considerations. In Section D, we respond to a series of possible objections to our argument—that it counsels psychologically unhealthy denial of the effects of trauma, that it underdeters, and that it undercompensates. Finally, in Section E, we consider the complex relationship between our argument and the antipaternalist position of most disability rights activists.

A. Taking Adaptive Preferences Seriously

When people with disabilities experience their lives as just as happy as those of people without disabilities, that experience often results from hedonic adaptation. That is the import of the studies discussed in Part II.A. Should we, then, disregard those experiences? Professors John McKie, Peter Singer, Helga Kuhse, and Jeff

Richardson have argued, indeed, that public policy should disregard the views individuals with disabilities hold about the quality of their lives, if those views are the result of the individuals' having "adjust[ed] psychologically to their condition."[137] But they offer no reason to use the experiences of non-disabled people as the starting point for analysis. The assumed neutral baseline of non-disability is not, in fact, neutral; the preferences and experiences of people without disabilities are just as conditioned by their situations as are those of people with disabilities.[138] Neither people with nor those without disabilities have epistemic access to the "true" enjoyment of life with a disability.[139]

This point stands in tension with one of the most prominent discussions of adaptive preferences. Amartya Sen has argued that a "blind or disabled" person should not be denied redistribution simply because his "cheerful and resilient temperament" keeps him from experiencing less happiness.[140] Such a person, Sen argued, "is *really* much more deprived [than others] in terms of what he can do" and should not, because of his "buoyancy," be forced to "forgo the help that he could otherwise claim from the society."[141] Sen is, of course, correct that disability limits available modes of activity: By definition, mobility impairments impede walking; visual impairments impede

137. MCKIE, SINGER, KUHSE & RICHARDSON, *supra* note 21, at 34.

138. *Cf.* Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, *in* WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 91 (Martha C. Nussbaum & Jonathan Glover eds., 1995) (describing men's preferences to remain in a privileged position as being just as conditioned as women's preferences for their subordinated position). Richard Abel comes close to arguing that there is simply no way to compare and assess the views of people with disabilities against the views of people without them about disabled persons' quality of life. *See* Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 277 (2006) ("Profound injury, like serious illness, transforms lives. But though no one would choose to suffer the transformation, those different lives are just that—different, neither better nor worse—incommensurable with each other and incapable of being given a financial equivalent.").

139. *Cf.* McCaffery, Kahneman & Spitzer, *supra* note 19, at 1389 (arguing, for similar reasons, that neither an *ex ante* nor an *ex post* perspective on non-pecuniary damages "is more 'accurate' than the other"). This issue has some parallels in the debate regarding whether puhlic or expert assessments of risk are correct. Those who favor the experts' assessments believe that the general public's risk perceptions are biased in a variety of ways; those who favor the public's assessment believe that nonexperts are not biased but simply have a richer theory of risk than do the experts. For a discussion of this debate, see Bagenstos, *supra* note 114, at 1485-86; *see also* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006) (arguing that disputes like these are not empirical but instead reflect "cultural commitments [that] are prior to factual beliefs on highly charged political issues").

140. SEN, *supra* note 3, at 318.

141. *Id.* (emphasis added); *see also* Nusshaum, *supra* note 138, at 91 (arguing we should not "rely on utility [measured by preference-satisfaction] as our measure of life quality," because of the phenomenon of adaptive preferences).

seeing; and so on. Still, the language of "deprivation" is, to our minds, uncomfortably geared towards a non-disabled baseline. Mobility via a wheelchair, for example, can be much faster than walking;[142] and blind people who know Braille can read in the dark. More important, calling the effect of disability a "real[]" deprivation does not change the point, which we discuss below (and which has its own large literature), that it is not physical impairments that limit activity but societal choices that exclude people with impairments.[143] A mobility impairment need not impede getting to work, for example, if transportation and buildings are wheelchair accessible. And of course Sen, who was not focusing on the question we are considering, did not contend that there is such a thing as ontologically "real" happiness.

Accordingly, the choice of frame for assessment of hedonic damages cannot rest on the unexamined use of the word "real." Rather, it requires a normative determination of which views would be best to credit.[144] And that determination, we suggest, requires an assessment of outcomes: Which views, when incorporated in policy, would lead to better consequences? Awarding hedonic damages based

142. In marathons, for example, wheelchair racers routinely beat runners by over a half hour. *See, e.g.*, Frank Litsky, *Boston, Again, Belongs to Kenyans, But This Time Americans Serve Notice*, N.Y. TIMES, Apr. 18, 2006, at D5 (describing men's running victor with course record time of 2 hours 7 minutes, and wheelchair victor with time of 1 hour 25 minutes).

143. *See infra* text accompanying notes 148-160.

144. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1542 (1998) (stating that whether "a person's measure of welfare after (for example) becoming ill [is] the appropriate measure of value" raises "a complex normative question"); Paul Menzel, Paul Dolan, Jeff Richardson & Jan Abel Olsen, *The Role of Adaptation to Disability and Disease in Health State Valuation: A Preliminary Normative Analysis*, 55 SOC. SCI. & MED. 2149, 2150 (2002) (stating that the question whether policy should incorporate the adaptive views of people with disabilities and diseases regarding their quality of life "is fundamentally normative"). This is a major point of Mark Kelman's recent work on the implications of hedonic psychology for welfarism. *See* Mark Kelman, *Hedonic Psychology and the Ambiguities of "Welfare"*, 33 PHIL. & PUB. AFF. 391, 410 (2005). Kelman's work elaborates on themes he has been exploring since 1979. *See generally* Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; *cf.* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-21 (1981) (arguing that the notion of efficiency itself provides no basis to decide whether to use offer or asking prices in cost-benefit analysis and that therefore "the analyst will have to make a choice" based on some extrinsic principle). The idea underlies Ellen Smith Pryor's work, as well. In an argument against what she terms the "insurance theory" of tort damages, Pryor has argued that even if people with disabilities believe that the marginal utility of money is higher pre-injury than post-injury (for example, if a "disabled person . . . conclude[s] that money has been less valuable after injury, at least in part because she has faced social and attitudinal barriers that have diminished the uses of her money and the satisfaction she can garner from those uses), those views cannot be a proper foundation for reduced compensation." Pryor, *supra* note 79, at 119. Normatively, Pryor argues, beliefs that are "the product of a social order that is unjustifiably hostile and nonaccommodating to the disabled" should not be instantiated by the legal system to diminish opportunities for people with disabilities further. *Id.* at 120, 145.

on the view that disability inevitably limits life's enjoyment, we seek to show in the next two sections, has bad consequences.

To be clear, we do not deny that disability causes harm, even in the view of people with disabilities. What we deny is that disability itself necessarily limits happiness. It should be clear that disabling injuries typically require the injured person to pay substantial out-of-pocket costs—for medical care, rehabilitation services, assistive technologies, and personal assistance.[145] Disabling injuries often also cause physical pain.[146] Because of hostile attitudes and our inaccessible environment, disability also often leads to loss of opportunities to work and participate in society.[147] The studies discussed in Part II.A suggest that it is these social factors, and not anything inherent in disability, that makes some people with disabilities less happy. Courts can, therefore, award damages for those disability-related injuries without endorsing the view that disability inherently limits happiness—and we would urge them to do so, in appropriate cases. But damages for lost enjoyment of life are different, because of the negative consequences we detail below.

B. Encouraging Pity and Distracting Attention from Societal Choices that Create Disability

As Part I demonstrated, hedonic damages cases are filled with reasoning, arguments, and findings that endorse and instantiate a view of disability as personal tragedy. That view is very prevalent in our society. The standard narrative of disability is one of "some terrible chance event which occurs at random to unfortunate individuals."[148] In that narrative, disability is a problem that resides in the individual with a disability.[149] It is a medical characteristic that should be fixed through health care and rehabilitation if possible, and that should be compensated with charity or public assistance if not.[150]

But disability rights activists have mounted a persuasive challenge to that individualistic view. In their view (and ours), disability is not "an inherent personal characteristic that should ideally be fixed" but is instead "a characteristic that draws its

145. *See* Pryor, *supra* note 79, at 117 (discussing "the centrality of money to a disabled lifestyle"); *see also* Bagenstos, *supra* note 106, at 25-26 (discussing the importance of, *inter alia*, assistive technology and personal assistance to people with disabilities).

146. For a good discussion of pain, see Ellen Smith Pryor, *Compensation and the Ineradicable Problems of Pain*, 59 GEO. WASH. L. REV. 239, 245-57 (1991).

147. *See* Bagenstos, *supra* note 121, at 419-25.

148. MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 27 (1996).

149. Bagenstos, *supra* note 121, at 427.

150. For elaboration of this and some of the other ideas in this section, see *id.* at 427-32.

meaning from social context."[151] In particular, disability is what occurs when a physical or mental condition interacts with social structures and attitudes to create disadvantage. A person who uses a wheelchair, in this view, is disabled only because so many buildings, sidewalks, and modes of transportation are inaccessible, and because so many people have negative attitudes toward people who use wheelchairs.[152] Although impairments plainly impose limits, it is not the impairment alone that has disabled her, but "the set of social choices that has created a built environment that confines wheelchair users to their homes."[153]

Disability rights activists have supported this "social model" of disability in part because it seems to capture the true nature of disability. As a "natural" matter, abilities lie on a spectrum; it is social choices that make some limitations on some abilities "disabling" and others not.[154] And examples of social choices that deprive people with certain impairments of opportunities are everywhere you look: inaccessible buildings; work schedules that are designed without taking account of the needs of some people (e.g., people with diabetes) to take frequent short breaks; and the "spread effect" in which people assume that an impairment limits more functions, and more severely, than it actually does.[155]

But disability rights activists also support the social model for more consequentialist reasons. When society sees disability as an individual tragedy, the policy response is an individualized one that focuses on the person with a disability. She must attempt to get cured or rehabilitated—a process that may consume an enormous amount of time and effort without ultimately achieving much functional gain.[156]

---

151. *Id.* at 427.

152. Adrian Furnham & Rebecca Thompson, *Actual and Perceived Attitudes of Wheelchair Users*, 7 COUNSELING PSYCHOL. Q. 35 (1994); William Drew Gouvier, Robert C. Coon, Mark E. Todd & Kristi Hulce Fuller, *Verbal Interactions with Individuals Presenting With and Without Physical Disability*, 39 REHABILITATION PSYCHOL. 263 (1994); Michael J. Millington, Douglas C. Strohmer, Chris A. Reid & Paul M. Spengler, *A Preliminary Investigation of the Role of Differential Complexity and Response Style in Measuring Attitudes Towards People with Disabilities*, 41 REHABILITATION PSYCHOL. 243, 250 (1996); Sam B. Morgan & Dale W. Wisely, *Children's Attitudes and Behavioral Intentions Toward a Peer Presented as Physically Handicapped: A More Positive View*, 8 J. DEVELOPMENTAL & PHYSICAL DISABILITIES 29 (1996) ("The general conclusion to be drawn from most of the literature on children's attitudes towards persons with physically [sic] handicaps is that these attitudes are negative.").

153. Bagenstos, *supra* note 121, at 429.

154. *See* U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 87-91 (1983).

155. On the spread effect, see, e.g., BEATRICE A. WRIGHT, PHYSICAL DISABILITY—A PSYCHOSOCIAL APPROACH 32-39 (2d ed. 1983); Bagenstos, *supra* note 121, at 423-24.

156. *See* OLIVER, *supra* note 148, at 31-37.

If that fails, she must accept the charity or welfare that goes with being a member of the "deserving poor"—acceptance that stigmatizes her as less than a full citizen.[157] And in all events she is subject to the paternalistic control of bureaucrats and professionals: doctors, rehabilitation professionals, welfare caseworkers, and so forth.[158] The individualistic approach thus removes very little of the disadvantage attached to disability, and it in fact exacerbates that disadvantage in a number of ways.

The social model, by contrast, directs attention not at the individual with a disability but at the array of social choices that create most of the disadvantage attached to disability: "Once one thinks of disability as arising primarily from the human environment, rather than from anything inherent in an individual's physical or mental condition, it 'becomes a problem of social choice and meaning, a problem for which all onlookers are responsible.' "[159] The social model's policy implications primarily focus not on rehabilitation or charity but on eliminating the physical, social, and attitudinal barriers that make some physical and mental impairments disabling. The Americans with Disabilities Act, with its broad requirements of physical accessibility, reasonable accommodation, and antidiscrimination, is a paradigmatic social-model policy response to disability.[160]

Hedonic damages doctrine that allows recovery on the basis of the supposed intrinsic effect disability has on the enjoyment of life implements and reinforces the individualistic theory that disability rights advocates have persuasively argued against. The juridical discourse in these cases treats disability as something located in the individual rather than in society, something that in and of itself has negative, often tragic, effects, and something that appropriately triggers a form of charitable largesse. Although the psychological evidence suggests that social factors are key contributors when people with disabilities experience enduring hedonic harms,[161] the current doctrine preempts interest in those social factors. To the contrary, the

---

157. *See* Bagenstos, *supra* note 106, at 16-17.

158. *Id.* at 13-14; Bagenstos, *supra* note 121, at 427.

159. Bagenstos, *supra* note 121, at 430 (quoting MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 119 (1990)).

160. *See id.* at 433-36. This is not to say that the ADA entirely reflects the social model; in its definition of disability in particular, it retains substantial aspects of the individualized medical model. *See* Samuel R. Bagenstos, *Comparative Disability Employment Law from an American Perspective*, 24 COMP. LAB. L. & POL'Y J. 649, 657-59 (2003).

161. *See supra* text accompanying notes 98-101.

lawyers' advice and cases discussed in Part I treat it as inevitable that a disability makes it harder to enjoy life.

To illustrate the point, consider *Nemmers v. United States*,[162] one of the cases we cited in Part I. *Nemmers* was a federal case about a boy who had been born with mental retardation and cerebral palsy as a result of the defendants' negligent obstetric care; he was twelve years old at the time of trial.[163] The district judge, Judge Michael Mihm, found the defendant liable, but he summarily refused to award "quality of life" damages.[164] The Seventh Circuit, in an opinion by Judge Frank Easterbrook, vacated that ruling and remanded.[165] Judge Easterbrook analyzed the claim for "quality of life" damages by focusing his attention on the plaintiff's introspective deficits.[166] In a striking example of the natural tendency to focus on one's own perspective, Judge Easterbrook wrote that a "reduction in the ability to appreciate one's own life, and to experience the lives of others through books, is a real loss just as surely as pain and suffering is a real loss. Eric does not suffer pain, but he will never live greatly."[167]

On remand, Judge Mihm developed at some length all of "the normal things of life" that the plaintiff's evidence suggested he could not do.[168] He noted that Eric could not speak well, "climb[] stairs or walk[] on rough terrain," "hop or skip," "feed[] himself, car[e] for his own personal hygiene, or dress[]."[169] Moreover, the plaintiff was "antisocial and . . . prone to throwing fits both in private and in public," although he "like[d] to swim and bowl, and he enjoys riding a

---

162. Nemmers v. United States, 612 F. Supp. 928 (C.D. Ill. 1985) (hereinafter *Nemmers I*), *vacated*, 795 F.2d 628 (7th Cir. 1986) (hereinafter *Nemmers II*), *on remand*, 681 F. Supp. 567 (C.D. Ill. 1988) (hereinafter *Nemmers III*), *aff'd*, 870 F.2d 426 (7th Cir. 1989).

163. *Nemmers I*, 612 F. Supp. at 932.

164. *See id.* at 935.

165. *See Nemmers II*, 795 F.2d at 634.

166. *Id.*

167. *Id.* Judge Easterbrook's use of the phrase "live greatly" is a reference to a famous speech by Justice Holmes, in which Holmes suggested that lawyers could live a life of the mind:

> The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is no less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear out his heart after the unattainable.

OLIVER WENDELL HOLMES, *The Profession of the Law* (1886), *in* COLLECTED LEGAL PAPERS 29-30 (1921). *See generally* Francis A. Allen, *Mr. Justice Holmes and "The Life of the Mind"*, 52 B.U. L. REV. 229 (1972). Of course, Judge Easterbrook's statement also echoes Mill's comparison of a satisfied pig and an unsatisfied person. *See* MILL, *supra* note 3, at 10.

168. *Nemmers III*, 681 F. Supp. at 575.

169. *Id.* at 572-73.

bicycle."[170] The result, Judge Mihm found, was that the plaintiff "will never have the sense of satisfaction, accomplishment, and enjoyment that comes from reading a good book or walking alone in the woods," and "likewise will never experience the joy of marriage and creating a family of his own."[171] Indeed, the judge said, "Eric will never be able to do *most* of the normal things of life: the first date, parenting children, reading, debating the politics of the day, etc."[172]

Accordingly, Judge Mihm found an award of hedonic damages to be appropriate.[173] He concluded that damages would benefit the plaintiff, since he was "mentally conscious ('aware' to the extent that a person with an I.Q. of 45 can be aware), and [was] capable of some narrow capacity to enjoy life."[174] In particular, an award of $400,000 "could provide him consolation and ease the burden of his condition by making available to him 'things' that would occupy his attention and make his life pass more easily."[175] Some of those "things," the judge suggested, might include "a big screen television, or a special stereo system, or a razzle dazzle birthday party (with a real magician pulling rabbits out of a hat)."[176]

Nemmers is a perfect illustration of the medical/charitable attitude that disability rights activists have mobilized against. We have no doubt that Judge Mihm sincerely thought he was "doing the right thing" by an unfortunate plaintiff. His motives were no doubt those of humanity and decency. But his vision of disability was as a trait that is located in and inherently limits the individual with a disability. Although he discussed at length the activities the plaintiff supposedly could not perform because of his disability, Judge Mihm seems to have both underestimated the capacities of people with mental retardation and treated those limitations as flowing naturally from the disability, rather than contingently from social choices. We don't know what Eric Nemmers has, in the nearly twenty years since the final opinion in the case, proved capable of.[177] What we do know is

170. *Id.* at 573.

171. *Id.*

172. *Id.* at 576.

173. *Id.* at 575 (internal quotation marks omitted).

174. *Id.* at 576.

175. *Id.* (citation omitted).

176. *Id.*

177. The underestimation of the potential of individuals with mental retardation is widespread. Consider Nicholas Romeo, the plaintiff in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Romeo had what the Court characterized as "profound[]" mental retardation, "with an I.Q. between 8 and 10." *Id.* at 309. His own counsel had conceded, "in light of the severe character of his retardation," that Romeo could never live outside of an institution. *Id.* at 317-18. Yet "ten months after the Court's decision, Nicholas Romeo moved to a community residence in

that the judge's description seems extreme. An I.Q. of 45 is usually described as "moderate" retardation.[178] Of course, people in this category are limited in their cognitive abilities in a number of ways. But characteristically, they nevertheless can "learn self-care, social, and vocational skills. Their language is functional and they can achieve at least partial independence."[179] They frequently can learn to read. People with mental retardation and cerebral palsy—including people in the relevant I.Q. range—certainly can date, and marry.[180] And the substantial self-advocacy movement among institutionalized and formerly institutionalized people with mental retardation—who have joined together in a national network of "People First" organizations—shows that developmental disabilities hardly prevent one from "debating the politics of the day."[181] The ability of people with mental retardation to be good parents has also been significantly underestimated.[182] But far from addressing the social choices and stereotypes that were likely to turn the plaintiff's cognitive impairment into profound limitations, the district court uncritically endorsed those stereotypes and offered only an infantilizing form of charity. Instead of substitute pleasures like "razzle dazzle birthday parties," the ruling might have geared compensation towards assistance with literacy, vocational training, independent living, and parenting support. That, we contend, is the correct posture for courts to take in the disability rights era.

Philadelphia." Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 443 (1991). Eight years later, Cook observed that "[s]ince April 1983, Romeo has been living, receiving services, and working part-time in his neighborhood." *Id.* Nicholas Romeo's experience was typical of those released from Pennhurst, the institution where he had been confined. *See* JAMES W. CONROY & VALERIE J. BRADLEY, THE PENNHURST LONGITUDINAL STUDY: COMBINED REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS 84, 118, 142 (1985) (discussing three separate case studies of Pennhurst residents and their improvements in quality of life and ability after moving into community living arrangements after Pennhurst's closing).

178. *See* MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 32-33 (1999).

179. *Id.* at 32 (quoting ARC, PREVALENCE OF MENTAL RETARDATION (1982)).

180. *See, e.g.*, Amy Dockser Marcus, *Next Chapter: A Young Woman with Disabilities Plans Her Wedding*, WALL ST. J., Oct. 11, 2005, at A1 (discussing the story of Ms. Bergeron and her engagement to another individual with Down syndrome).

181. *See* SHAPIRO, *supra* note 136, at 184-210.

182. *See generally* FIELD & SANCHEZ, *supra* note 178. Field and Sanchez cite numerous studies on the subject, many of which included people in the same I.Q. range as Eric Nemmers. *Id.* at 248-58.

When lawyers ask for and courts make decisions like *Nemmers*, they encourage feelings of pity toward people with disabilities.[183] They also divert attention from society's contribution to the barriers that deny opportunities to people with disabilities. Wendy Hensel has argued that the acceptance of wrongful birth and wrongful life actions (in which children with disabilities and their parents sue for the harm of being born) reinforces the message that disability is "a status inherent in the individual" and that the worth of a person with a disability is "limited to the capability of current medical techniques to identify and correct impairments."[184] At least for the participants, and for whatever observers there are of the cases and the doctrine, a very similar effect is likely here.

Awarding damages for the out-of-pocket costs of medical care, rehabilitation, assistive technology, and personal assistance does not send such a negative message, however. Those damages merely recognize concrete obstacles to physical health and participation in the community that money can overcome. Indeed, their very purpose is to enable the disabled plaintiff to participate fully in the community. An award of damages to compensate for the denial of opportunities would also avoid the negative message of current damages practice. Damages cannot directly dispel stigma or end discrimination, but can fund accommodations as well as represent an acknowledgement that the limitations people with disabilities face are not inherent in the disability but rather are the consequence of society's reactions to particular impairments. Awarding damages for the supposed hedonic loss inherent in disability sends the opposite message, that disability, in and of itself, makes one's life less happy, and that there is nothing society can do but take pity on those who are disabled and throw some charity their way.

---

183. Another example is Kansas City S. Ry. Co. v. Johnson, 798 So.2d 374 (Miss. 2001). There, the court stated that the plaintiff's closed-head injury "left him little more than a child," *id.* at 377, and upheld an award for hedonic damages in a discussion that was dripping with pity:

> Perhaps most telling about the effects of the accident on Johnson's life is this testimony from Johnson's daughter, Angela: "I watched an active man sit in a wheelchair all day. I watched an articulate man who took pride in his vocabulary struggle to get one word out. And I have watched a person that was always happy look sullen and sad, stare out into space."
>
> It is apparent that Johnson is no longer the person he was prior to the accident. We hold today that these restrictions are significant enough to warrant compensation as a separate and distinct element of damages.

Id. at 381 (paragraph numbering omitted).

184. Hensel, *supra* note 129, at 181.

C. Debilitation

There is an additional reason to worry that awarding hedonic damages for disability will actually harm the interests of people with disabilities. A plaintiff may feel that standing up to the party who wronged her, and recovering damages for that wrong, is empowering. But the process of obtaining *hedonic* damages can undercut that sense of empowerment.

To recover hedonic damages in a personal injury suit, a plaintiff will often be called upon to testify that the injury has made her life less enjoyable.[185] But that very testimony is itself likely to be debilitating. Such testimony, often derived from the initial adjustment period during which disability typically does affect happiness, may well reflect the plaintiff's true feelings about her life at the time of the trial. But by focusing on the negative feelings that occur during that period, plaintiffs with disabilities may delay or derail their ultimate ability to adapt to their new condition; their testimony itself may disrupt the hedonic adaptation process that ensures that most people's happiness rebounds after a negative event.[186]

If nothing else, the drive to avoid cognitive dissonance can lead a person who repeatedly testifies (even insincerely) about her lost enjoyment of life to come to believe that testimony.[187] The view that disability inherently limits enjoyment of life may therefore become a self-fulfilling prophesy: The fact that non-disabled jurors predictably fail to appreciate hedonic adaptation encourages injured plaintiffs

185. Plaintiffs' counsel may seek to minimize the importance of the plaintiff's testimony, *see* BARTON, *supra* note 33 and accompanying text, but the cases cited in Part I.B. show that that testimony remains important in practice.

186. Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff's Lawyer*, 55 DEPAUL L. REV. 563, 596 (2006) (citing studies showing that writing or talking about a traumatic event may sometimes reduce experienced suffering and grief, but that other times it will exacerbate the problem—particularly "when 'the rehearsals about an emotional experience extend over a long period of time'" (quoting Bernard Rimé, *Mental Rumination, Social Sharing, and the Recovery from Emotional Exposure*, *in* EMOTION, DISCLOSURE & HEALTH 280-81 (James W. Pennebaker ed., 1995))); *cf.* Roger K. Pitman, Landy F. Sparr, Linda S. Saunders & Alexander C. McFarlane, *Legal Issues in Posttraumatic Stress Disorder*, *in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 378, 382 (Bessell A. van der Kolk, Alexander C. McFarlane & Lars Weisaeth eds., 1996) ("Requiring the PTSD patient to confront his or her traumatic history during interviews with attorneys and consultants, depositions, and courtroom testimony thwarts characteristic efforts at avoidance and predictably results in the resurgence of intrusive ideation and increased arousal.").

187. *See* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 302-04 ("Repeatedly describing oneself as a victim may cause one to come to believe that she *is* a victim."); *see also* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1429 (1993) ("Victim talk can have a kind of self-fulfilling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter.").

(guided by their counsel) to present evidence that disability has limited their ability to enjoy life.[188] "Remedies inevitably shape wants,"[189] and "the legal process itself inevitably will be an influence on the plaintiff's 'noneconomic' losses."[190]

Students of the Social Security Disability Insurance ("SSDI") system have reported a parallel phenomenon. To receive benefits, SSDI claimants must prove that their disabilities make them unable to perform any "substantial gainful activity."[191] The very effort to prove that inability, however, gives SSDI applicants a powerful psychic investment in the proposition that they cannot work.[192] One commentator has accordingly concluded that "[t]he very process by which disabled applicants become eligible for benefits leads to learned states of helplessness."[193] And that is one of the key reasons why virtually no one leaves the SSDI rolls—people convince themselves that they cannot work, and their testimony in their benefits applications becomes a self-fulfilling prophesy.[194] So too in the hedonic damages context, a newly disabled person's extensive efforts to prove that she can no longer enjoy life may give her a powerful psychic investment in that proposition.

The phenomenon also finds parallels in wrongful birth and wrongful life actions. Because such actions grant compensation "only to those [people with disabilities] willing to openly disavow their self-worth and dignity," Hensel has argued that even individuals with disabilities who succeed in their suits "are likely to feel abused and

---

188. Some of the testimony these plaintiffs have offered about their expectations of life seems strikingly bleak given the limited extent of their disabilities. *See, e.g.*, Varnell v. La. Tech. Univ., 709 So. 2d 890, 896 (La. Ct. App. 1998) (discussing a plaintiff who had knee injury that required two surgeries and who "testified that with her physical limitations and poor prognosis, she does not see that she has 'much of a future' "); Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 717 (Tenn. Ct. App. 1999) (discussing a plaintiff whose left eye was injured, resulting in disfigurement and loss of vision; she testified that "she will not risk going rafting, canoeing, or playing tennis," and her husband testified that she "no longer wants to go out," that, "she bumps into people because she doesn't see them coming on her left side," and that "she hates going to work because she cannot tolerate the stress").

189. Abel, *supra* note 138, at 259.

190. Pryor, *supra* note 186, at 564.

191. 42 U.S.C. § 423(d)(1)(A) (2007).

192. *See* Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 85, 85 (Carolyn L. Weaver ed., 1991).

193. Cheryl Rogers, *The Employment Dilemma for Disabled Persons*, *in* IMAGES OF THE DISABLED, DISABLING IMAGES 117, 122 (Alan Gartner & Tom Joe eds., 1987); *see also* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 555 (1987-1988) ("The [Social Security Act's] definition of disability is in many ways a negation of self-empowerment.").

194. *See* Bagenstos, *supra* note 106, at 32, 64.

diminished rather than empowered and vindicated."[195] And it is not just the plaintiffs and their children who get the message that life with a disability is not worth living. Other people with disabilities hear the same message as well.[196]

When courts declare that disability inherently limits the ability to enjoy life, and thereby encourage plaintiffs with disabilities to testify to that effect, they send a message that is difficult for people with disabilities to ignore. True, people with disabilities who are not plaintiffs may not come to believe the courts' view that disability does in fact reduce the quality of their lives, and even plaintiffs whose testimony seeking hedonic damages delays their adaptation may ultimately make the adjustment. But judicial decisions affirming hedonic damages for disability powerfully reinforce the notion that society treats people with disabilities as inherently having lives of lower quality (and perhaps importance) than others.[197]

Damages that compensate for the out-of-pocket costs of rehabilitation, assistive technology, or personal assistance would not cause these disempowering effects; they are in fact means to empowerment. And damages that compensate for contraction of opportunities are also empowering, because they represent an official recognition that it is societal choices that exclude people with disabilities, and that those choices are a wrong that the government will address.[198] But hedonic damages for disability are as likely to cause as to compensate for hedonic harm.

---

195. Hensel, *supra* note 129, at 171-72.

196. *See id.* at 174 ("Wrongful birth and life actions transmit a potentially powerful message to all people with disabilities: as a matter of law, your impairment, standing alone, is a sufficient basis upon wbich to evaluate the quality of your life."); *see also* Lori B. Andrews & Michelle Hibbert, *Courts and Wrongful Birth: Can Disability Itself Be Viewed as a Legal Wrong?*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 318, 325 (Leslie Pickering Francis & Anita Silvers eds., 2000); Adrienne Asch, *Reproductive Technology and Disability*, *in* REPRODUCTIVE LAWS FOR THE 1990S 69, 94 (Sherrill Cohen & Nadine Taub eds., 1989) ("There is reason for us to fear wrongful birth suits and to oppose suits for wrongful life: it is the message they send to the children themselves, disabled people, and society about the worth of lives with impairments.").

197. *See* Adam A. Milani, *Better off Dead Than Disabled? Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149, 217-20 (1997) (arguing that "wrongful living" actions have this impact for similar reasons).

198. *Cf.* Bagenstos, *supra* note 121, at 472-73 (advocating, for similar reasons, an approach to reading the ADA's "disability" definition that focuses on society's perceptions of disability rather than anything "inherent[]" in disability itself).

D. Three Objections

To this point, we have argued that courts should not award damages for the limitations disability supposedly imposes on the ability to enjoy life. Such damages awards improperly individualize the problems of disability. They focus attention on the person with a disability and away from the social choices that attach disadvantage to particular impairments. They may also demoralize people with disabilities—both those individuals who must testify as plaintiffs that disability does inherently limit their ability to enjoy life, and other people with disabilities in the broader community who get the message sent by these cases. Here we consider some possible objections to our argument.

1. The Quiescence/Denial Objection

One might respond to our argument by accusing us of being too supportive of adaptation. Denial, we all understand in our post-Freudian world, is not psychologically healthy, and hedonic adaptation makes people too accepting of the unjust actions and conditions that have harmed them. Why, then should we encourage adaptation? Shouldn't we, instead, encourage people to be angry at the injustices that have been done to them?

There is, we think, a meaningful line between adaptation and denial. The psychological evidence we discuss in Part II shows that people adapt to disabling injuries and end up about as happy as they were before they had those injuries.[199] They do so not by denying the limitations their disabilities impose but by refusing to allow those limitations to interfere with their happiness.[200] Nothing we say in this Article is meant to suggest that people should engage in denial regarding the limitations that disabilities impose. All we mean to say is that those limitations are often far less significant than people think, and that they need have no ultimate effect on happiness.

Nor do we think our proposal will lead to quiescence among people who experience disabling injuries. We propose only to eliminate a single category of damages for those injuries—not to get rid of tort actions for those injuries entirely. To the extent that tort actions provide a vehicle for righteous anger against corporate irresponsibility, they will still do so under our proposal. Indeed, because we would permit damages awards for denial of opportunities,

199. *See supra* notes 65-111 and accompanying text.

200. *See* Vash, *supra* note 82, at 152-53.

our proposal would help direct the plaintiff's anger to the social structures that are both the most significant contributors to the unhappiness that people with disabilities feel and the major element of the disadvantage that attaches to disability.[201] Our proposal would, if anything, help to foster in people with disabilities "a taste for not being discriminated against."[202]

2. The Underdeterrence Objection (Of Ex Ante and Ex Post)

Those who believe tort law should provide appropriate incentives to refrain from risky activities might raise a separate objection. From such a deterrence perspective, one might wonder why the legal system should take the adaptive preferences of people with disabilities seriously at all: Even if every person with a disability adapted to his or her condition hedonically, surely that does not mean that, ex ante, potential defendants should be indifferent about whether they cause disabling injuries. Awarding hedonic damages based on a view that disability inherently limits life's enjoyment might be thought to provide the necessary deterrent signal to discourage acts that cause disabling injuries.[203] Deterrence is an ex ante concept, so it may seem strange to use ex post valuations (those of most people with disabilities) to measure damages in a system that aims at deterrence.[204]

It should not seem so strange, however. Among economic analysts of tort law, who have developed the theory of deterrence most extensively, it is a completely standard point that optimal ex ante deterrence is best served by requiring injurers who are held liable to pay the *actual* costs they have imposed—not the costs that might have been expected ex ante.[205] The economics behind the point are simple: "if a liable party must pay for the actual harm he causes, whatever the

201. *See supra* notes 99-101 and accompanying text.

202. *Cf.* Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN. L. REV. 2273, 2273-80 (2003) (stating individuals with "a strong taste for not being discriminated against" will alter their behavior, sometimes to their detriment).

203. McCaffrey, Kahneman & Spitzer, *supra* note 19, at 1397 ("Even if we believed that the lower, ex post making whole value adequately compensated an injured plaintiff once an injury had occurred, it does not follow that the damages faced by putative defendants, for purposes of calibrating their ex ante incentives and expressing society's values, should also be set at this making whole level.").

204. *See, e.g.*, Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 622 (1985) ("[J]udges should be aware that their decisions create incentives influencing conduct ex ante, and that attempts to divide the stakes fairly ex post will alter or reverse the signals that are desirable from an ex ante perspective.").

205. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 236-37 (2004).

level of harm happens to be, his expected damage payments will equal the expected harm he causes."[206]

In the case of hedonic damages for disabling injuries, the real question is how to determine what is the "actual harm" caused by the injury. Should the "actual harm" be measured by what the plaintiff would have demanded as compensation for hedonic loss prior to the injury (a large valuation, because most people expect that disabling injuries will make them lose much enjoyment of life)? Or should it be measured by what the plaintiff, after the injury, would pay to be "made whole" for hedonic loss (a smaller valuation, because most people do not find that disabilities cause them to lose much enjoyment of life)? As McCaffery, Kahneman, and Spitzer have persuasively shown, *either* the selling-price *or* the making-whole perspective could plausibly be understood as describing the "actual harm" caused by an injury; which perspective to incorporate is essentially a policy question that might have different answers for different activities, torts, and damages.[207]

The argument for using the (ex ante) selling-price perspective to describe the hedonic harm of a disabling injury would rest on non-disabled people's dread of experiencing such an injury, and the degree to which disability limits choices among activities, even if it does not limit felt happiness. But tort law can account for much of the dread (and perhaps choice-limitation) attendant to disability without awarding *hedonic* damages. Under our proposal, courts would award damages for medical expenses, lost opportunities, and physical pain, among other things, and those damages would likely capture much of what non-disabled people fear about disability.

We do not, however, believe there is any independent value in the law protecting and endorsing non-disabled people's dread of disability. As a normative matter, disability is best understood as a trauma, not a tragedy. Damages awards should reflect that understanding.[208]

206. *Id.* at 236.

207. McCaffery, Kahneman & Spitzer, *supra* note 19, at 1397-1403.

208. In any event, it is doubtful that tort liability could meaningfully reduce non-disabled people's dread of becoming disabled. So long as a few salient examples of disabling injuries remain, the fears will remain as well. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 711-15 (1998) (discussing tbe importance of the availability heuristic in public perceptions of risk).

3. The Undercompensation Objection

One might also respond that our proposal will lead to undercompensation. Even if many people with disabilities find that their disabilities do not limit their ability to enjoy life, not all do. For those who do authentically experience a loss of enjoyment of life, our proposal appears to deny full compensation.

Imagine, in this regard, an exceptionally talented amateur pianist. If an accident severs her hands, she will no longer be able to engage in an activity—producing beautiful music—that brought her transcendent joy. Even if she finds substitute pleasures, most people with exceptional talents in one area are not equally talented in others. It seems intuitively obvious that by losing her hands, the pianist has lost something uniquely pleasurable, yet our proposal would deny her compensation for that lost pleasure.[209] One might therefore argue that our proposal is too blunt: People who do not experience hedonic harm from their disabilities should not recover hedonic damages, but people who do experience such harm should. Why shouldn't appropriate jury instructions and adversary presentation of evidence solve the problems we have identified above?

We can offer a couple of responses to the undercompensation objection. It bears emphasis again that we do *not* propose to leave disabling injuries uncompensated. To the contrary, under our proposal courts would award damages for medical expenses, rehabilitation counseling, assistive technology, and personal assistance, as well as for the economic costs of society's restriction of opportunities to people with disabilities. (It is worth recalling that social factors like those for which our proposal would compensate are the most important contributors to the hedonic loss experienced by those people with disabilities who experience hedonic loss.[210]) Under current law, courts do not typically award some of these forms of damages for disabling injuries. Our argument therefore is not that courts currently award too much in damages for disabling injuries (indeed, they may award too little) but that they award the *wrong* damages. Under our proposal, total compensation for disabling injuries—and thus the

209. Beyond examples like this, a person whose hands are cut off may simply be restricted in her choice of pleasure-creating activities, even if she ultimately enjoys life to the same extent that she did before. That type of loss might be dealt with under the rubric of disability or permanent impairment damages rather than hedonic damages. To the extent that our argument applies to those damages, *see supra* note 23 and accompanying text, one might make a similar undercompensation challenge to it.

210. *See supra* text accompanying notes 98-101.

aggregate deterrent signal against actions that cause disabling injuries—might be as large as or even larger than under current law

It is certainly true that our proposal would deny compensation for hedonic harm even to those plaintiffs who phenomenologically experience that harm. But a more narrowly tailored proposal that relied on jury instructions and adversarial presentation of testimony to sort out the cases in which the plaintiff "truly" experienced hedonic harm would not, we believe, solve the problems we have identified. In part, this is due to the problem of cognitive bias. When people hear information that is inconsistent with their preexisting biases, they often do not reconsider; instead, they process the apparently inconsistent information in a way that confirms those biases.[211]

The *Schindler* case, in which an escalator amputated the plaintiff's toes,[212] is a perfect example of the phenomenon. The jurors and appellate judges believed so strongly that even a minor disability just *had to* lead to unhappiness that they disregarded all of the evidence that the plaintiff was happy. Sure, he thinks he's happy now, they apparently felt, but we know he'll be unhappy when he gets older and can't play varsity football. The *Schindler* case, viewed against the backdrop of general psychological findings regarding cognitive bias, suggests that so long as courts award hedonic damages for disabling injuries, lawyers, judges, and jurors will apply a view of disability as tragedy—even in the face of testimony that the plaintiff does not see her disability that way.[213]

Nor is it readily possible to award hedonic damages for "unique" or "transcendent" losses (like that experienced by a talented amateur pianist) while denying those damages for the loss of more "mundane" activities (like gardening). Prior to adaptation, one's pleasures may be bound up in any sort of activity—"unique" or "mundane"—and happiness can equally adopt to the loss of any sort of activity. There is therefore no basis in principle for distinguishing among lost activities in this way, and there will be great difficulty doing so in practice. If our concerns are correct, the proper response

---

211. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1208 (1995) (explaining, in the context of stereotyping, that individuals group others into categories that fit their pre-defined expectancies, and "once a target individual has been perceived as a member of a particular category, people are more likely to remember the target as exhibiting attributes and behaviors commonly associated with that category.").

212. *See supra* text accompanying notes 50-62.

213. Should a "debiasing" approach, which would seek to eliminate the biases we discuss here, emerge in this context, it would certainly warrant consideration as a way of avoiding the bluntness of our proposal. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200-01 (2006).

appears to be the categorical one of eliminating hedonic damages for disabling injuries entirely.

To be sure, this means that some people who experience hedonic loss will not receive compensation *for that loss* (though they will for other aspects of their injuries). But modern tort law includes many doctrines rendering real harms non-compensable. For starters, in some (though by no means all) situations in which a victim is no longer able to receive compensation, modern tort doctrine sacrifices deterrent goals. Thus wrongful death statutes offer only very limited damages;[214] pain and suffering damages in some jurisdictions do not survive the death of the plaintiff;[215] and many jurisdictions do not allow any recovery for lost enjoyment of life in either wrongful death actions or where the plaintiff is unconscious of the loss.[216] As Rick Abel has argued, "If tort law excludes significant damages because victims cannot be compensated, then arguments for general damages grounded in corrective or distributive justice lose some of their force."[217]

Even where injured persons can receive compensation, it is simply not the case that the law generally awards or should award damages for all injuries caused by a wrongful injury. To the contrary, as Robert Rabin has persuasively argued, "fidelity to the goals of tort law, and more particularly to the compensation objectives of accident law, does not require efforts to engage in precisely contoured case-by-case implementation of a make-whole principle."[218] One familiar example, made prominent by Judge Cardozo in *Palsgraf v. Long*

---

214. For a list of wrongful death statutes for all fifty states, see Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 23–26 nn.129–31 (2005). The statutes allow only limited liability; at common law, the rule was against any liability at all. *Id.* at 18-20; *see also* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067-76 (1965).

215. *See, e.g.*, CAL. CIV. PROC. CODE § 377.34 (West 2007) ("In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.").

216. *See* Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 931 n.6 (Miss. 2000) (en banc) (Cobb, J., dissenting) (citing cases from twenty states); MISS. CODE ANN. § 11-1-69 (West 2003) (overruling *Choctaw Maid Farm*).

217. Abel, *supra* note 138, at 270.

218. Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 375 (2006); *see also* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 466-67 (2006) (arguing for a theory of "fair" rather than "full" compensation, under which "a fact-finder might be entitled to award less-than-fully compensatory damages, even to a not-at-fault tort plaintiff").

Island R.R.,[219] is often labeled the "duty" rule; it holds that no damages are available for physical injuries caused by the defendant's negligence, if the defendant's conduct was foreseeably risky, ex ante, only with respect to someone other than the plaintiff.[220]

Another limited liability doctrine perhaps more closely related to the topic of this article governs negligent infliction of emotional distress. Common law courts generally do not award damages for emotional distress incurred when the plaintiff witnesses someone else's physical injury or narrowly avoids such injury herself, unless the plaintiff herself was in the "zone of danger" in which she was at risk of sustaining such an injury.[221] Other similar policy judgments abound: While damages are available for the emotional toll wrought by the wrongful death of a spouse or minor child, in many states there is no authorized emotional distress recovery for wrongful death of an adult son or daughter, or of the parent of an adult plaintiff, or of a sibling or dear friend.[222] These rules do not reflect a belief that people who are outside of the zone of danger or whose adult children are wrongfully killed never in fact experience emotional distress; nor do they reflect a belief that such emotional distress is not in fact an injury. Instead, they rest on a policy judgment that awarding emotional distress damages in the specified circumstances would create uncertain, and potentially limitless, liability, and, perhaps, that it would unhelpfully encourage would-be claimants to dwell on their traumas.[223]

Our argument, too, rests on a policy judgment, though one of a different and perhaps even more defensible kind. Even if some individuals who experience disabling injuries honestly find that their conditions inherently limit their enjoyment of life, we believe that awarding damages on that basis is on balance harmful to people with

---

219. Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).

220. *See, e.g.*, Bryant v. Glastetter, 38 Cal. Rptr. 2d 291, 292 (Cal. Ct. App. 1995) (denying recovery to plaintiff tow truck operator killed after being summoned by police to haul away defendant drunk driver's car, notwithstanding the defendant's negligence witb respect to earlier users of the road).

221. *See* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963) (applying the "zone of danger" rule). *Compare* Dillon v. Legg, 441 P.2d 912, 924-25 (Cal. 1968) (overruling *Amaya* and allowing recovery for emotional trauma caused when mother witnessed the death of her child as a result of defendant motorist's negligence) *with* Tobin v. Grossman, 249 N.E.2d 419, 423 (N.Y. 1969) (refusing to allow recovery in similar circumstances).

222. *See, e.g.*, Stewart v. Price, 718 So. 2d 205, 209-10 (Fla. Dist. Ct. App. 1998) (discussing evolution of Florida statutory law on this point); Weimer v. Wolf, 641 So. 2d 480, 480-81 (Fla. Dist. Ct. App. 1994) (same).

223. *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1679-82 (2002) (stating that courts may limit emotional distress liability to force a plaintiff to get on with his or her life).

disabilities—even those people with disabilities who phenomenologically experience hedonic loss. If, for example, damages for negligent infliction of emotional distress can be limited out of a concern for fairness to people who negligently cause harm, surely damages for disabling injuries can be limited out of concern for people with disabilities themselves.

E. Of Paternalism

At this point, it is worthwhile to consider the relationship between our argument and the anti-paternalist position articulated by most disability rights activists. As we suggested above,[224] paternalism has historically been one of the most significant contributors to the disadvantage people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities.[225] In so doing, they have deprived people with disabilities of opportunities to work and participate in the community.[226] They have denied people with disabilities the autonomy that consists in making one's own choices. And they have denied people with disabilities the "dignity of risk"—"the opportunity to develop their skills, test them in the world, and succeed or fail according to their talents."[227] Anti-paternalism thus has become one of the core tenets on which most disability rights advocates agree.[228]

Our argument in this paper certainly draws on the disability rights critique of paternalism. Against the historical backdrop of paternalistic control over people with disabilities, the judicial practice of awarding damages based on the hedonic harms supposedly inherent in disability appears as yet another instance of people without disabilities telling people with disabilities how they should feel. Most people with disabilities do not feel that their conditions limit their ability to enjoy life. But people without disabilities tend not to see it

---

224. *See supra* note 158 and accompanying text.

225. For a discussion of the role of paternalism in disability oppression, see JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 52-55 (1998).

226. For an example, see Chevron U.S.A., Inc. v. Ecbazabal, 536 U.S. 73, 76-77 (2002). For criticism of the Court's decision in *Echazabal*, see Samuel R. Bagenstos, *The Supreme Court, The Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 930-34 (2004).

227. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 997 (2003).

228. *See id.* at 1010-12 (discussing how individuals with disabilities were moved to action by their desire to "escape the control of professionals who thought they knew what was best [for the disabled individuals]"); Bagenstos, *supra* note 226, at 932 n.70.

that way. To embrace the view that disability *really* lessens the enjoyment of life seems once again to substitute the non-disabled public's view of disability for that of most people with disabilities.

Yet the matter is complicated, in a way that underscores the analytical and normative limitations of a purely anti-paternalist position. At least some people with disabilities—including, presumably, many plaintiffs who are prepared to testify about their unhappiness—hold what we have been calling the "non-disabled view"—that disability does limit their ability to enjoy life. Under our proposal, those individuals would not be able to recover damages for their sincerely felt hedonic losses. To that extent, as the discussion in the previous section highlights, our position itself could reasonably be described as paternalist. We can at least partially defend ourselves on the ground that when people with disabilities believe they are less able to enjoy life, those beliefs are artifacts of the adjustment period or are endogenous to a society that believes disability inherently limits life's enjoyment and a legal system that encourages people with disabilities to testify that it does.[229] But then we must confess to making a move that resembles the very conduct and attitudes we criticize, that writes off the positive hedonic experiences of most people with disabilities. Our proposal is therefore paternalistic in many individual cases.[230]

Still, the kind of paternalism to which we have confessed is categorically different from the kind of paternalism criticized by the disability rights movement. When disability rights activists object to paternalism, they are not simply challenging decisions to override the choices of particular individuals with disabilities. They are more importantly challenging a system in which the views of most people with disabilities—that disability is a trauma, not a tragedy, and that its disadvantages are largely socially created—are written off as irrational and illegitimate.[231] In that respect, our position is very much in line with the "anti-paternalist" view espoused by disability rights activists. In the end, our argument must rest on the consequences of using the adaptive preferences of most people with disabilities as the basis for damages law: Using those preferences avoids demoralization and puts the focus where it should be—on integrating people with disabilities into society, rather than pitying them for being outside of it.

---

229. *See supra* text accompanying notes 185-98.

230. *See* Sunstein & Thaler, *supra* note 19, at 1171-90 (discussing the inevitability of paternalism and noting that "the anti-paternalist position is incoherent, simply because there is no way to avoid effects on behavior and choices.").

231. *See, e.g.*, SHAPIRO, *supra* note 136, at 12-40.

CONCLUSION

We have argued that courts should not award hedonic damages for disabling injuries. Most people with disabilities find that their conditions do not limit their ability to enjoy life, though most people without disabilities do not believe them. Incorporating the views of people without disabilities in the law distracts attention from the social choices that attach disadvantage to disability, and it may itself inflict hedonic harm on people with disabilities.

Our discussion has implications that extend well beyond the disability or hedonic damages contexts, however. For one thing, our discussion illustrates that tort remedies must be judged not just on how much they give victorious plaintiffs but on whether the procedures by which they are awarded are empowering or disempowering. Hedonic damages may increase plaintiffs' recovery for disabling injuries (though our proposed system might well award as much or more), but they have negative effects on the class of people with disabilities that must be taken into account as well. The same may well be true of other tort remedies.

We have also highlighted an underappreciated complexity in the theory of adaptive preferences. Adherents to that theory often write as if identifying a preference as adaptive is dispositive of the question whether that preference is a proper measure of justice or guide to policy. As we have shown, matters are more complicated than that. Identifying a preference as adaptive should be the beginning, not the end, of the normative inquiry. Often, it will make sense to disregard adaptive preferences. But the example of hedonic damages and disability shows that, at least sometimes, it is more just, and makes better policy, to take adaptive preferences seriously.