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# Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process

Jeffrey L. Harrison\*

- I. INTRODUCTION
- II. BEGINNING POINTS
- III. EFFICIENCY AND HAPPINESS
  - A. *A Short History of Economic Efficiency*
  - B. *Actual Happiness and Behavioral Assumptions*
- IV. FROM THE PREDICTIONS OF ACQUISITIVE PEOPLE TO A DIRECT ASSESSMENT OF HAPPINESS
  - A. *Paths to Happiness and Well-Being*
  - B. *Well-Being, Ignorance, and Adaptation*
  - C. *Well-Being: Sensing and Being*
  - D. *The Fleeting Nature of Happiness*
  - E. *Capability Issues and Trusting Happiness*
- V. FROM OUTCOME TO PROCESS
  - A. *The Decision Maker as Producer*
  - B. *Decisional Equity and Its Components*
- VI. SUMMARY

## I. INTRODUCTION

The application of economics to law makes many people uncomfortable. The principal reason is that sooner or later—generally sooner—the discussion must turn to efficiency. Efficiency has a business-industrial-not treating-people-as-human-beings ring to it. This discomfort is well-founded. Efficiency-based legal standards focus on the *expectations* of relatively *acquisitive* people that their choices will make them feel or be “better off.”<sup>1</sup>

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1. This is fundamentally the framework of the “wealth maximization” standard—based on

As it turns out, these decision makers<sup>2</sup> are often “wrong.”<sup>3</sup> An enormous amount of recent research on the determinants of actual happiness,<sup>4</sup> as opposed to expectations, may hold great potential for filling the gap and moving the economic analysis of law to a more useful stage—one in which efficiency is directly connected to how people actually feel.

This Article explores this promising advance. It concludes that direct focus on one concept or another of happiness or “better-off-ness”<sup>5</sup> does not fully address the limitations of law and economics and may raise additional issues. For example, Which is more important, feeling better off or being better off? When does happiness count? Is it at the time of the activity or as one remembers it? The Article explains why outcome-oriented goals like efficiency, happiness, or well-being are ultimately of limited use as goals for law. It then makes the case that law would be more usefully applied to the *process* of decision making. To this end, it examines the extent to which law can be devoted to a decision-making ideal or “decisional equity.”

The discussion has five parts. Part II places happiness research in the context of past efforts to assess efficiency standards. Part III outlines the schism between efficiency and happiness and examines whether they can be

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choices made by people able to express themselves in markets. *See infra* text accompanying notes 34–38.

2. Much of the discussion about how to react to “wrong” choices addresses the possible paternalism of limiting options available as opposed to the mechanics of decision making itself. *See, e.g.,* Colin Camerer et. al, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1231–35 (2003); Cass R. Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

3. Well-being can be assessed both subjectively and objectively. In this Article, well-being will be used to denote an objective assessment.

4. *See generally* ROBERT FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); BRINO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING (2002); DANIEL GILBERT, STUMBLING ON HAPPINESS (2006); JONATHAN HAITT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006); JENNIFER MICHAEL HECHT, THE HAPPINESS MYTH: WHY WHAT WE THINK IS RIGHT IS WRONG (2007); RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005); MATTHIEU RICARD, HAPPINESS: A GUIDE TO DEVELOPING LIFE’S MOST IMPORTANT SKILL (Jesse Browner trans., Little, Brown & Co. 2006); Jeremy A. Blumenthal, *Law and Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155 (2005); Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT’L ACAD. SCI. 11176 (2003) [hereinafter Easterlin, *Explaining Happiness*]; Richard A. Easterlin, *Income and Happiness: Toward a Unified Theory*, 111 ECON. J. 465 (2001) [hereinafter Easterlin, *Income and Happiness*]; Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 J. ECON. BEHAV. & ORG. 35 (1995) [hereinafter Easterlin, *Happiness of All*]; INTERPERSONAL COMPARISONS OF WELL-BEING (Jon Elster & John E. Roemer eds., 1991); Tiffany A. Ito & John T. Cacioppo, *The Psychophysiology of Utility Appraisals*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 470 (Daniel Kahneman et al. eds., 1999); Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERS. & SOC. PSYCH. 527 (2003). For an excellent selection of readings, see WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra*.

5. In this Article, “utility” and “happiness” are used to note the *sense* of being better off. In other words, they are subjective. “Welfare” and “well-being” are used to indicate relatively objective standards like health and nutrition.

reconciled. In addition, problems relative to legal analysis that are shared by both efficiency and happiness standards are explored. Part IV discusses the problems of relying on direct measures of happiness. The concept of decisional equity is described and examined in Part V. It argues that decisional equity means adhering, as much as is practical, to three rules in order to achieve three ideals:

1. The Information Ideal: Individual decision making should take place in the context of the most relevant information that can be practically made available.
2. The Psychic Ideal: Decisions should be relatively unaffected by desire and cognitive biases.
3. The Social Ideal: Decisions should not be influenced by adaptations to perceived injustice.

The potential for law to achieve these ends is discussed. Although the informational ideal is relatively easy to approach, the psychic and social ideals may lie beyond the reach of traditional legal measures.

## II. BEGINNING POINTS

The adverse reaction many people have to the use of economics to guide law stems from a number of factors but ultimately can be distilled to four. First, the link between efficiency itself and any normatively defensible objective is weak. This issue was discussed extensively in the 1980s<sup>6</sup> and will not be considered here except as it pertains to the history of efficiency<sup>7</sup> and to specific issues that separate efficiency and happiness.<sup>8</sup>

Second, conventional economics is based on behavioral assumptions that have over the last twenty-five years come under increasing scrutiny.<sup>9</sup> Principal among these assumptions is that people are rational and motivated by self-interest alone.<sup>10</sup> These assumptions are, as it turns out, difficult to

6. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981). Possibly the most succinct explanation of the separation between wealth maximization and morally defensible outcomes is Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL. STUD. 227 (1980). See *infra* text accompanying notes 44–45.

7. See *infra* Part III.A.

8. See *infra* Part III.B.

9. The law and economics movement began with the publication of Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) and was propelled to the forefront by Richard Posner's casebook, *Economic Analysis of Law*, which was first published in 1973 and is based on behavioral assumptions and efficiency standards. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007).

10. In one early law and economics offering, the author notes that rational self-interest means

square with actual behavior.<sup>11</sup> More importantly, these behavioral assumptions are particularly questionable when specifically applied to the “markets” with which law and economics is concerned. The “goods” bought and sold in the quasi-markets of law and economics—contract breach, levels of care, criminal activity—are profoundly different from, say, buying a ton of soy beans. In these markets, contract rights, carelessness, and criminal behavior are viewed as subject to demand and supply. They are colored by personal preferences and values related to fairness and a sense of obligation. These matters are not a central concern of this Article except to illustrate that a focus on happiness does not mean escaping the problems these assumptions give rise to.

Third, efficiency is predicated on the accuracy of the choices people make.<sup>12</sup> This deals with the narrow process of making choices. Standard economic analysis assumes that preferences and choices match—indeed, that choices reveal preferences. The logic goes that self-interested people reveal their preferences by virtue of the choices they make. The reasoning here is circular, however. Moreover, empirical evidence dealing with behavioral economics from the last twenty-five years demonstrates that the choices often turn out to be “wrong” as a result of various biases. “Bounded rationality”<sup>13</sup> results in default tendencies that are inconsistent with aspirations.<sup>14</sup> These default tendencies are quirks of perceptions and decision making that separate what a person desires from what is selected. In this instance, “wrong” means that what is selected is not consistent with the preference.

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excluding “[s]omeone who acts from duty and obeys the law out of respect.” Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1527 n.9 (1984).

11. A classic article on this is Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 328 (1977). For a strong argument that not enough attention has been afforded the role of emotions in decision making, see Jon Elster, *Emotions and Economic Theory*, 36 J. ECON. LITERATURE 47 (1998). In fact, there is evidence that rationality and emotions are linked in important ways. See ANTONIO DAMASIO, *DECARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

12. To some extent, the rationality assumption may properly be viewed as part of this general area of study.

13. The term originated with Herbert Simon. See Herbert Simon, *Rational Choice and the Structure of the Environment*, in *ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION* (Massimo Egidi & Robin Marris eds., 1992); HERBERT SIMON, *Rationality and Administrative Decision Making*, in *MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETTING* 196, 198–99 (1987). As the term suggests, most decisions are made without complete information and thus the ability to accurately predict outcomes. For a discussion in the context of contract law, see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003).

14. See generally Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

More attention will be afforded behavioral economics and decision biases but only in the sense of how they might be addressed to achieve decisional equity.<sup>15</sup> These are, however, enormously important topics because they address the link between policies, the laws created to advance those policies, and actual individual choice making.<sup>16</sup> No policy (or rules promoting that policy) can be effective without consistent individual choices. Since the 1980s, a huge body of economic research—drawing on psychology<sup>17</sup> and biology<sup>18</sup>—has been devoted to understanding the process of choice making and ways this may affect the law.<sup>19</sup> Thus, the incorporation of behavioral theories began in law and economics. It would be misleading to say that it has had a marked influence on mainstream law and economics thinkers. Still, it is possible that this trend will continue.<sup>20</sup>

15. See *infra* Part V.B.

16. See generally Jeffrey L. Harrison, *Socioeconomics: Choices and Challenges*, 41 SAN DIEGO L. REV. 257, 257–61 (2004); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 412–19; see also Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. 87 (2006).

17. More specifically “hedonic psychology.” See WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra* note 4.

18. See, e.g., Jones & Goldsmith, *supra* note 16.

19. The number of articles in law alone that address the implications of behavioral economics is vast and often repetitive. One of the earliest is Jeffrey L. Harrison, *Egoism, Altruism and Market Illusions*, 33 UCLA L. REV. 1309 (1986). See also Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Blumenthal, *supra* note 4; Jeremy Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007); Grant M. Hayden & Stephen Ellis, *Law and Economics After Behavioral Economics*, 55 KAN. L. REV. 629 (2007); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1656 (1998); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russel B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67 (2002).

Perhaps the most recent publication to generate significant discussion about how law can account for behavioral economics is Sunstein & Thaler, *supra* note 2. See also Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003); Symposium, *Preferences and Rational Choice: New Perspectives and Legal Implications*, 151 U. PA. L. REV. 707 (2003); Symposium, *Homo Economics, Homo Myopicus, and the Law of Economics of Consumer Choice*, 73 U. CHI. L. REV. 1 (2006).

20. This is not to say that those who write about conventional economics have jumped on the behavioral bandwagon. See, e.g., POSNER, *supra* note 6. Judge Posner also addresses the issue in Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998). The reluctance by some to “engage” in behavioral economics is understandable if one considers the division within legal education more generally. There are those who are well-versed in

The fourth aspect of efficiency that needs to be addressed is the disconnect between choices made and how people feel about outcomes. In other words, even if people are not subject to “bounded rationality” and even if they are self-interested and make exactly the “right” choice, that choice often turns out not to “deliver” in terms of happiness.<sup>21</sup> More technically, even if individuals accurately reveal preferences through their choices, they may still not achieve the sought-after outcome in terms of its psychic impact.

The principal focus of this Article is on this newest area of study—happiness research.<sup>22</sup> The question is whether a direct focus on individual or collective happiness can cure the problems of law and economics or even act as a substitute. This is an odd question in some respects because some of the versions of efficiency can be equated with happiness. For example, utility maximization can be said to mean maximizing overall happiness. Still, as will become clear, the focus on happiness has added important elements to the analysis. The principal one is that modern research on happiness focuses on actual or experienced happiness while the economist’s notion of utility involves expected or predicted happiness. In fact, happiness research has progressed sufficiently that some economists are proposing that national well-being accounts are as relevant as gross domestic product as a means of guiding policy.<sup>23</sup> The goal is to assess how people actually feel.<sup>24</sup> The question then becomes whether an approach of this nature can reshape economic analysis as applied to law.<sup>25</sup> Additionally, if happiness research cannot cure the ills of law and economics or act as a replacement, Is there

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economics, but for the most part, these are also people who, like Judge Posner, prefer to put behavioral theories aside for one reason or another. The second group of scholars are those who for one reason or another are not interested in economics in the first place, either because they find the discipline threatening or because they find the free-market brand of economics that has characterized law and economics scholarship politically uncomfortable.

21. For a brief but insightful discussion of problems inherent in decision making, see Jeremy Blumenthal, *supra* note 4, at 157–59.

22. See authorities cited *supra* note 4.

23. See, e.g., Daniel Kahneman et al., *Toward National Well-Being Accounts*, 94 AM. ECON. REV. (PAPERS & PROC.) 429 (2004) (proposing to weigh the time spent in various activities by the satisfaction derived).

24. This approach is largely subjective and close to an assessment of utility. More objective well-being assessments could be undertaken by focusing on health care, education, longevity, etc.

25. Economics as a discipline is somewhat inclusive, and a great deal of the writing about behavior assumptions and happiness is found in economic journals. One might have expected the economics applied to law to have followed these tendencies. That has not, by and large, been the case. Although economics has responded and advanced in response to the four objections to efficiency listed above and is continually reassessing “efficiency,” for reasons about which one can only speculate, those advances have been only partially incorporated into law and economics. Representative of the methodological stickiness of law and economics is the seventh edition of Judge Posner’s treatise. See POSNER, *supra* note 9. It steadfastly adheres to the approach introduced thirty-five years earlier. The principal difference is an effort to specify the rationality assumption. Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 5 (1972), with POSNER, *supra* note 9, at 15–20. This position is further explained in Posner, *supra* note 20.

any other way to assess legal rules with respect to a generally acceptable standard?

The challenge of reconciling economic analysis with happiness research is great. First, in terms of theory generally, most law and economics theory is based on the rejection of the possibility of an interpersonal comparison of utility that would allow observers to know when and if people are actually better off or experience higher utility. Can the economic analysis of law, and especially the concept of efficiency, be reshaped somehow to allow for what we are now learning about actual outcomes and the sources of happiness? Second, What does it mean for law itself? Presumably law exists as a means of altering behavior in a generally beneficial way. "Beneficial" is, however, a slippery term, and happiness research reveals a great deal of complexity. Third, the notion of assessing actual outcomes or true welfare leads back to utilitarianism or the possibility of resource allocations that maximize aggregate *ex post* well-being. Does anything about happiness treat the problems of utilitarianism, including those features that are morally repugnant to many? Fourth, Is it really utility (or happiness) that should be maximized even if it is possible to assess actual as opposed to predicted utility? For example, a strict adherence to utility does not account for the fact that some people learn to be happier with less than other far more affluent people want and, often, frequently acquire. In a sense, the poorer person may *feel* happy, but this may not reflect his *actual* state of well-being. One of the factors that detractors from law and economics find worrisome is its indifference to the question of actual as opposed to subjective well-being. Yet the possibility of recognizing this distinction is discussed with some frequency by economists<sup>26</sup> and sociologists.<sup>27</sup>

### III. EFFICIENCY AND HAPPINESS

As already noted, economics and happiness are intertwined by their joint concerns with utility. This is actually a two-edged similarity. It is possibly beneficial because findings with respect to actual as opposed to expected happiness would appear to overcome the problem of revealed preferences and other objections to economic efficiency as a standard. On the other hand, it seems likely that happiness assessments share some of the ills of

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26. The most important contributor here is Amartya Sen. For a general presentation, see AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

27. Here the most important theories are those relating to relative deprivation. See *infra* notes 233–236; see also *infra* Part V.B.3.



standard utilitarianism. To understand both of these effects, it is useful to begin with a slightly closer look at the evolution of efficiency.

### A. *A Short History of Economic Efficiency*

Efficiency, especially in the context of welfare economics, has always been a problem for economists. Modern considerations of efficiency begin with Jeremy Bentham. The criticisms of utilitarianism, as described by Bentham, are well-known and not reviewed here.<sup>28</sup> For the most part, these criticisms stem from moral questions like whether the goal is to maximize average or total utility; whether animals, other than humans, count; and how to address utility monsters—those who derive great utility from harming others. It is important to note, though, that Bentham's notion of utility was not based on predictions or revealed preferences; instead, “[b]y utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, . . . or . . . to prevent the happening of mischief, pain, evil, or unhappiness.”<sup>29</sup> Utility, under his formulation, was the potential of an “object” to produce happiness or unhappiness.

He did not say, however, that the potential was the same for all possible owners. Thus, the practical question arose of how to determine whether a change in a resource allocation increased actual utility or pleasure. For example, there is no way to know if a wealthy person derives less utility from \$10 spent on a cigar than a poor and hungry person would derive from eating a meal that costs \$10.<sup>30</sup> The absence of a suitable answer on this matter of interpersonal comparisons of utility creates a great deal of uncertainty as far as policy.<sup>31</sup>

The next most fundamental step in the evolution of efficiency, and one that recognized the interpersonal comparison problem, came in the form of Pareto superiority.<sup>32</sup> More specifically, if interpersonal comparisons of utility are impossible, at least *intrapersonal* comparisons are possible. Thus, a change in position by a single person that makes that person better off and no one worse off is superior utility-wise than the *ex ante* position. More importantly, if two people enter into an exchange that leaves them both better off and no one worse off, overall happiness or utility is increased.

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28. See J.J.C. SMART & BERNARD WILLIAMSON, *UTILITARIANISM: FOR AND AGAINST* (1973); R.M. HARE, *FREEDOM AND REASON* 118–34 (1962).

29. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 2 (Dover Publications 2007) (1823).

30. See Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635, 635–41 (1938).

31. For a study suggesting that interpersonal comparisons of utility are possible, see Daniel Kahneman et al., *Back to Bentham: Explorations of Experienced Utility*, 112 *Q. J. ECON.* 375 (1997).

32. This is not to say that Paretian standards replaced utilitarianism. See SEN, *supra* note 26, at 30–32.

These changes are referred to as Pareto superior states. A Pareto optimal state is one in which no reallocation could improve the position of one party without making another party worse off.

This relatively conservative notion of efficiency also left a great deal to be desired. One problem is that Pareto must have been referring to “expected utility” as opposed to actual utility or happiness. Once the exchange takes place, there is no way of knowing whether either party actually experiences a higher level of utility. In addition, there are many—perhaps an infinite number—of Pareto optimal states. Some of these could very well be ones in which people are relatively miserable. Selecting one Pareto superior outcome over another means engaging in something akin to an interpersonal comparison of utility.<sup>33</sup> In effect, Pareto leaves open the possibility that choices may not be consistent with experienced utility and provides no economic guidance for when redistributions would lead to higher levels of utility.<sup>34</sup>

The effort to bring a more practical element to the Paretian notion of efficiency can be traced to the work of Nicholas Kaldor and John Hicks in the first half of the twentieth century. This critical step took place in the context of questioning whether welfare economics or economics generally has anything useful to say *proscriptively*. In other words, if utilities cannot be compared unless one makes the assumption that individuals are uniform in their preferences and the ability to sense happiness, What can economics offer with respect to policies? To this, Kaldor answered:

[W]here a certain policy leads to an increase in physical productivity, and thus of aggregate real income, the economist's case for the policy is quite unaffected by the question of the comparability of individual satisfactions; since in all such cases it is *possible* to make everybody better off than before, or at any rate to make some people better off without making anybody worse off.<sup>35</sup>

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33. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 515–18 (1980).

34. Amartya Sen suggests that two strains of utilitarianism can be described, one dealing with pleasure or happiness and the other focusing on desires. See SEN, *supra* note 26, at 17. These two approaches can, however, be reconciled. See RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 95–98 (1979).

35. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939).

Hicks, writing three months later, applied the same notion to the special case of organizing an industry into fewer firms: "Before recommending in practice a policy of shutting down redundant firms, we ought to be sure that the full condition is satisfied; and we ought to be very sure that the discarded factors will in fact be transferred to more productive uses."<sup>36</sup>

In effect, wealth maximization became the surrogate for utility maximization. Thus, even if some parties were made worse off, a policy could be viewed as efficient as long as those losses were offset by larger gains to others. It is important to note that, in fact, by the late 1930s, two changes to the pure notion of utility maximization had occurred that separated it from actual happiness or utility. One was the shift from utility to wealth as something to be maximized. The other was a shift to *ex ante* assessments. In short, these two steps can be viewed as refinements to the concept of efficiency in an effort to perpetuate a branch of economics called welfare economics.<sup>37</sup> On first impression, direct attention to actual happiness would seem to make these accommodations unnecessary.

### 1. The Shift to Wealth as Opposed to Expected Utility or Actual Happiness

The substitution of *value*—the Kaldor–Hicks standard of efficiency<sup>38</sup>—for utility creates the question of whether value as expressed by willingness to pay is a reliable indicator of the utility derived from a good, service, or rule.<sup>39</sup> In his 1981 book, *The Economics of Justice*,<sup>40</sup> Judge Posner took on the task of defending Kaldor–Hicks efficiency as an "ethically attractive" standard.<sup>41</sup> His argument consisted principally of noting that wealth maximization did not share the unacceptable characteristics of the two other competing efficiency standards—Paretianism and utilitarianism.<sup>42</sup> According

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36. J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 711 (1939).

37. Economics would have remained viable in other areas without this adaptation. It would have remained both important as a source of descriptive information about past economic performance and important for forecasting. In addition, the assessment of costs of production, the impact of interest rates, and forecasting would all have remained relatively intact. Without this adaptation, however, any connection between economics and happiness would have dropped significantly. Ironically, the accommodations necessary to preserve welfare economics have actually increased the distance between efficiency and actual happiness or utility.

38. See Hicks, *supra* note 36; Kaldor, *supra* note 35.

39. While it is traditional to think in terms of the efficient allocation of goods and services, law and economics often addresses the issue of whether specific legal rules are efficient.

40. POSNER, *supra* note 6, at 88–115.

41. For further reading, Posner's defense also appeared in two articles. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 9 *J. LEGAL. STUD.* 103 (1979).

42. POSNER, *supra* note 6, at 88–115.

to Posner, Kaldor–Hicks efficiency is superior to Pareto efficiency because it allows for greater flexibility.<sup>43</sup> Under Paretian standards, redistributions are only permitted when at least one person is made better off and no one is worse off. The Kaldor–Hicks standard avoids the problems of interpersonal comparisons and other well-known hazards of utilitarianism by requiring those with greater desires to back up those needs with spending. For example, the so-called utility monster is less of a threat—those who claim that their utility would be increased when it means disutility for others would have to demonstrate an ability to pay for what is, in effect, the use of others. The fact that the payment *could* be made is all that is necessary for the Kaldor–Hicks standard to be met.

Although wealth maximization remains the baseline concept of efficiency in the economic analysis of law, Judge Posner’s effort to turn it into an ethically acceptable standard has not been successful. The sharpest criticism focuses on the disconnect between Kaldor–Hicks efficiency and the attractive elements of *either* Paretianism or utilitarianism.<sup>44</sup> For example, wealth maximization permits involuntary transfers of wealth, thus violating the strong autonomy-protecting element of Paretianism. Conversely, the connection between wealth—or the willingness to pay—for a good or service is not demonstrably connected to utility. Thus, Kaldor–Hicks efficiency cannot deliver on the one possibly saving grace of utilitarianism: the maximization of total utility or happiness.<sup>45</sup> In effect, while adoption of Kaldor–Hicks efficiency is a convenient substitute for utilitarianism, it possesses no independent core principle that elevates it to a stand-alone moral guideline.

The problems created by a shift from utility to wealth maximization would appear to be solved by a direct focus on happiness. Although people have different capacities to express themselves in the market, the capacity to feel actual joy, happiness, or utility is not tied to an ability to pay. As will be discussed below, however, while it is likely that the capacity to have positive feelings is unrelated to income, this does not answer the question of whether other factors may be controlling and their legal relevance. It also does not help answer the question of what “positive” feelings should mean as a guide for legal rules and institutions. Just as problems arise with the

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43. *Id.* at 91–92.

44. *See, e.g.,* Coleman, *supra* note 33; Kronman, *supra* note 6; *see also* GILBERT, *supra* note 4, at 260–61.

45. Further concerns are expressed in LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 28–32 (2002).

substitution of wealth for happiness, the problems of stressing outcome over process remains.

## 2. Expectations as Opposed to Outcomes

The second step, from actual to expected, means that utility or happiness assessments must be based on present or past choices and experiences, either partially or totally. The theory is that choices reveal preferences that are based on utility or happiness. The idea that choices reveal preferences is an important one because it supposedly removes the problem of assessing utility.<sup>46</sup> There are, however, many reasons why choices may not reveal preferences or actual utility. Most certainly they do not reveal fully informed preferences.<sup>47</sup> There is a large body of literature illustrating that choices may reveal as much about how the choice is framed as they reveal about actual preference.<sup>48</sup> Strategic behavior may also be designed to conceal actual preference.<sup>49</sup> The only thing that can confidently be said is that choices reveal choices.

Recent scholarship in economics and sociology has begun to focus on this problem. For example, psychologist Daniel Gilbert points out that the question is determining how much “goodness” dollars buy.<sup>50</sup> Gilbert and others<sup>51</sup> note that this is not the way economists typically approach the issue. A choice *when made* is viewed as utility-maximizing, and the actual outcome is not something that economists have, until recently, been inclined to explore.<sup>52</sup> Daniel Kahneman, Peter Wakker, and Rahesh Sarin capture this distinction, distinguishing “decision utility” from “experienced utility.”<sup>53</sup> They describe the circularity of conventional economics like this: “In current economics and in decision theory, the utility of outcomes and attributes refers to their weight in decisions: utility is inferred from observed

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46. As Paul Samuelson said, the theory is “freed from any vestigial traces of the utility concept.” P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 *ECONOMICA* 61, 71 (1938).

47. At some point the cost of additional useful information will exceed the expected benefit in terms of outcome from that information.

48. See, e.g., Amos Tversky & Daniel Kahneman, *Framing Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981); see also, Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 *AM. PSYCHOLOGIST* 342 (1984); Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 *SCI. AM.* 160 (1982); Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 *Q. J. ECON.* 507 (1984).

49. See Amartya Sen, *Behavior and the Concept of Preference*, 40 *ECONOMICA* 241, 250 (1973).

50. GILBERT, *supra* 4, at 260.

51. SEN, *supra* note 26, at 9–10.

52. GILBERT, *supra* note 4, at 260. But see Eric Van den Steen, *Rational Overoptimism (And Other Biases)*, 94 *AM. ECON. REV.* 1141 (2004).

53. Kahneman et al., *supra* note 31, at 375.

choices and is in turn used to explain these choices.”<sup>54</sup> A good example is found in *Fairness Versus Welfare* by Louis Kaplow and Steven Shavell.<sup>55</sup> The authors start their defense of welfare as opposed to fairness-seeking policies with, “[W]e observe that we will usually assume that individuals comprehend fully how various situations affect their well-being and there is no basis for anyone to question their conception of what is good for them.”<sup>56</sup> The authors contrast their assumption with “actual” well-being.<sup>57</sup> Of course, there is a difference between thinking one knows what is good for oneself and being right about the matter. Or, put differently, people cannot know what will make them happier until they experience the outcome of the choice.<sup>58</sup>

Here again, a direct focus on actual feelings seems to avoid the problem of revealed preferences. On the other hand, actual outcomes remain the results of choices. Unless there is some method not simply to determine what choices make people better off or feel better off but to link the choices and good outcomes, simply knowing the aftermath of a choice does not represent great progress. Again, a focus solely on outcomes—even happy outcomes—does not resolve the problem of defining proper legal rules and institutions.

### *B. Actual Happiness and Behavioral Assumptions*

Suppose the problems related to the substitution of wealth for feelings and the differences between predicted and actual outcomes did not exist. Does this mean that happiness research and its implementation would or should reassure the detractors of conventional economic analysis? This would depend on whether direct happiness assessments avoid the two most critical behavioral assumptions of law and economics.

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54. *Id.*

55. KAPLOW & SHAVELL, *supra* note 45, at 23.

56. *Id.*

57. *Id.* at 23 n.14; see Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 4 (1997).

58. One should not be too quick to condemn economists on this point of view. First, it is only recently that economists and others have begun to seriously consider the possibility of interpersonal comparisons. Second, economists make no secret of the limitations this placed on their analysis.

## 1. Do People Maximize?

One problem that happiness research and proposals seem unable to avoid is the assumption that people are interested in maximizing anything and, in particular, self-interest. Note that this is different from asking whether they are successful at maximizing anything. Instead, the question is whether they start out with goals that are only self-regarding. From the standpoint of conventional economics, as discussed above,<sup>59</sup> the question of whether all decisions are wholly self-regarding can be short-circuited by claiming that all choices reveal one's preferences. In the words of Amartya Sen: "[N]o matter whether you are a single-minded egoist or a raving altruist or a class conscious militant, you will appear to be maximizing your own utility . . ."<sup>60</sup> Thus, in the terms Amartya Sen has used, Are individuals capable of "counter-preferential choice?"<sup>61</sup> For example, Is it possible to make a choice based on the sense that the outcome is fair or consistent with firmly held principles without feeling personally better off or happier as a result of the choice? If so, the notion that people strive only to increase their income, utility, or well-being is, at best, an unverified assumption.

This problem seems to be resolved by efforts to measure happiness. But consider this assumption in the context of one of the major theories about actual happiness—the set point model.<sup>62</sup> Under this model, parties adapt to new situations and return to the same level of happiness. If something unfortunate happens, there is a drop in happiness followed by an adjustment back to the former level of happiness. The same cycle recurs if there is a temporary increase in happiness. The theory seems quite far from ideas like wealth maximization and revealed preferences. In fact, one implication is that it is not what people have but who they are that counts. The set point model and the idea that what matters most is "who one is" fit nicely with the proposition that happiness is genetically determined.<sup>63</sup> What these theories of happiness suggest is that those interested in maximizing actual well-being would do well to concentrate on minimizing the period of time for an adaptation to negative events and maximizing the period of adaptation to positive events.

It is not clear why the maximization assumption would be less important for a happiness model than it would be for a conventional economic model. Suppose law were designed to maximize actual as opposed to expected happiness or wealth. Further suppose, however, that not every person all the

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59. See *supra* notes 11–14 and accompanying text.

60. Sen, *supra* note 11, at 323.

61. *Id.*

62. Lucas et al., *supra* note 4.

63. See David Lykken & Auke Tellegen, *Happiness Is a Stochastic Phenomenon*, 7 *PSYCHOL. Sci.* 186 (1996).

time is attempting to maximize that happiness. Efforts to assess the effectiveness of those laws that focus on actual happiness would be no more useful than the *ex ante* or predicted wealth maximization effects that are currently considered. In effect, the rules would be comparable to installing a powerful engine into a car owned by people who are not interested in how fast they can go.

## 2. Are Choices or Outcomes Rational?

Closely related to the maximization assumption is the rationality assumption.<sup>64</sup> Even if individuals are wholly self-interested, Do they make decisions in a way that is consistent with achieving that end? The assumption is crucial because the economic analysis of law assumes that individuals respond to costs and benefits in certain ways. For example, the concept of the efficient breach assumes that individuals will breach contracts when the opportunity costs of not doing so is relatively high.<sup>65</sup> Similarly, the notion of efficient levels of crime is based on the idea of a cost-benefit analysis in which expected gains from violating a law are compared with the expected punishment.<sup>66</sup>

Whether talking about efficiency or happiness, the rationality question can be answered in a way that skirts the issue while revealing its complexity and importance. For example, even inconsistent choices may seem to be consistent if one allows for changes in preference. Take the young man who wakes up in the morning and resolves not to eat sweets as a way of losing weight. At lunch he buys a big jelly doughnut and coffee with cream and sugar. One explanation is irrationality: the decision seems inconsistent. On the other hand, the decision may be rational if, by “sweets,” he was thinking of chocolate. It is also rational if he changed his mind at ten and decided not to diet after all. Of course, it could be rational as well if he really does want to lose weight but not at the expense of eating whatever and whenever he chooses.

Even if happiness, as opposed to expected utility, is used as a standard, consistent choice making must still be assumed. The problem is that legal rules cannot help but be formulated in terms of costs, other sanctions, and rewards. More generally, any output-related goal requires an assumption

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64. It is possible to take the view that the idea of maximization means rationality. This simplifies the analysis but at the expense of recognizing the possibility that one may intend to be wholly self-serving but go about it in an inconsistent way.

65. *See, e.g.*, JEFFREY L. HARRISON & JULES THEEUWES, LAW AND ECONOMICS 229–30 (2008).

66. *See id.* at 396–405.



about behavior. The proposition, in a happiness analysis, is that people will make decisions that channel them into happier outcomes. The fact that actual happiness is somehow assessed or measured does not alter this equation and the necessity of some assumption about likely behavior or responses when a legal measure is taken. But that assumption will remain an assumption that a great deal of examination has drawn into question.<sup>67</sup> For example, suppose there are no speed limits. Some people will drive at unsafe speeds. Others may either drive less or enjoy it less for fear of carnage on the highways. Now suppose a speed limit is imposed. After the measure, the people who were afraid are happier and drive more or less stress-free. One might conclude that they have had a rational reaction to greater safety. First, note that the most one can say is that people *seemed* to have a rational response in this particular circumstance. This depends on an assumption of what a rational response should be, which is not the same as whether people actually were rational. In particular, more and happier driving is compared to prior levels of driving and happiness. But the “before” level may itself have been “irrational” in that it was an over-reaction to actual danger. This is not so much a criticism of economic analysis or happiness assessments. It is simply to note that the success of any policy taken is dependent on a belief that people will act rationally.

#### IV. FROM THE PREDICTIONS OF ACQUISITIVE PEOPLE TO A DIRECT ASSESSMENT OF HAPPINESS

If the notion of *ex post* happiness is not useful as a way to mend traditional economics in order to respond to its critics, Could one focus on happiness alone as a goal for legal rules? In this formulation, the goal would be simply to create as much actual happiness as possible. Five complexities come into play. What they suggest is that any outcome-oriented approach to law is likely to be too complex and indeterminate to be a useful guide. First, Does everyone become happy or achieve higher states of utility in the same way? Second, if “ignorance is bliss,” Is it a legitimate form of happiness? Third, How are subjective and objective well-being related? More specifically, Is there a difference between a sense of being better off and actually being better off? Fourth, Does utility have a temporal quality and how? Finally, How does the concept of legal efficiency accommodate what Amartya Sen describes as the “capabilities” problem?<sup>68</sup>

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67. See *supra* text accompanying notes 10–12.

68. SEN, *supra* note 26.

*A. Paths to Happiness and Well-Being*

At the most basic economic level, the view is that people increase utility, even *ex post*, by acquiring needed or wanted goods or services. This is, however, a very narrow approach to happiness,<sup>69</sup> and in reality, happiness can be achieved by at least three paths.<sup>70</sup> The first way of becoming happier is represented by a person who consciously wants something—a new job, a new car, etc.—feels its absence, and acquires whatever that is by virtue of a transaction. The critical feature here is the sense of desire. One can view this as an effort to extinguish disutility. In its extreme form, the longing is so severe that the person simply cannot be happy unless that person obtains a new job or car. The longing is always there and consistently takes the edge off any short-term feelings of well-being.

For a very practical illustration, consider Richard Easterlin's explanation for why rising income over lifetimes does not result in comparable increases in happiness.<sup>71</sup> As income grows it tends to generate higher levels of material aspirations. This results in a disconnect between expectation of utility and experienced utility. The problem is that at one level of income people tend to anticipate being better off with a higher level of income because they envision matching that future income with current aspirations. When that higher level of income is achieved, the matching reference is then-current aspirations, which are higher. In effect, people make assessments and decisions based on a state that changes once the decision is made. This is significant in two ways. Revealed preferences take place in the context of preferences that may change the instant a preference is actually revealed. One solution is to make decisions based on realistic expectations. Another is to limit the seemingly endless increase in material aspirations.

A second way of becoming happier is achieved when the relatively happy person becomes happier. Here there is no sense of loss or disutility leading to an effort to address the suffering of wanting something. If you spoke to this person about his happiness, he might say, "I am perfectly happy, but I would be happier still if I had a Rolex watch." Again, there is

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69. See generally Bernard M.S. van Praag & Paul Frijters, *The Measurement of Welfare and Well-Being: The Leyden Approach*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY*, *supra* note 4, at 413.

70. This puts aside the highly individualized utility-affecting responses to various stimuli. See Ito & Cacioppo, *supra* note 4.

71. See Easterlin, *Happiness of All*, *supra* note 4; Easterlin, *Explaining Happiness*, *supra* note 4; Easterlin, *Income and Happiness*, *supra* note 4.

no sense of longing or disutility. A third person may simply be content or happy enough that she does not fit into either of these categories. This person does not define happiness in terms of what she has or does not have. "Things" are not the source of happiness. Instead, happiness can be said to come from within in perhaps a very literal sense.<sup>72</sup>

If the distance between happiness and unhappiness is seen as a gap associated with the difference between what one has and what one wants, there are two ways to close the gap. One is to acquire the things desired as is the case with the first path. The other is simply to not want in the first place. This eliminates the "suffering" of wanting what one does not have. This is reminiscent of the four basic truths in Buddhism and the theme that suffering can be traced directly to attachment.<sup>73</sup>

It is important to note that this category does not include the person who does not want a Rolex watch because he does not know they exist or the child who does not want cereal with sparkles because he has not seen the ad on television with multi-colored cartoon characters. Rather, this person adopts the Zen-like perspective that all suffering is a result of desire and the elimination of desire in a generalized sense is the path to well-being. Frankly, it is not clear whether this person can be regarded as "happy" or merely "not unhappy."

Although the first and third approaches eliminate unhappiness, they are otherwise worlds apart. The first approach—the one most closely approximating the conventional economic view of the matter—involves a constant process of suffering or wanting, and extinguishing that feeling. In effect, happiness is the reaction to unhappiness. Acquisition, like a painkiller, temporarily masks the disutility. Under the third approach, disutility is dealt with directly.

The recognition that happiness is not just a function of acquiring things to offset a sense of longing has a number of implications. First, it seems clear that the usual view of "economic man" as a rational maximizer of self-interest is inadequate. This version of efficiency is somewhat like the old joke about why someone is pounding her head against a wall. The answer is because it feels so good when she stops. Specifically, unhappiness leads to happiness. A more precise examination of utility or happiness if one takes this route is to examine net utility. Even if people feel better off through acquisition, Would utility be even higher if the sense of missing something had not occurred in the first place?

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72. See Lykken & Tellegen, *supra* note 63.

73. See David Burton, *Knowledge and Liberation: Philosophical Ruminations on a Buddhist Conundrum*, 52 PHIL. E. & W. 326 (2002); see also Christina Feldman, *The Four Noble Truths: Path of Transformation*, in VOICES OF INSIGHT 103 (Sharon Salzberg ed., 1999).

The idea of becoming happier by wanting less is not the usual province of law or economics. It is not, however, a far-fetched idea. Learning to be happy with how things are is probably an important component of virtually everyone's emotional make-up. There are actually practical applications of this idea. For example, restrictions on advertising aimed at children are a good example of increasing happiness by eliminating a sense of longing. In fact, a great deal of modern advertising can be seen as an effort to create desire, disutility, or suffering that is then remedied by acquisition.

Another possible way to categorize this person or path raises the issue of contentment. Perhaps the person who extinguishes desire not through acquiring things but through acting directly on the desire problem is merely "content." One could argue that being content exists apart from the state of being happy or less happy and that it is incorrect to think in terms of maximizing anything. Perhaps the goal should simply be to achieve the highest incidence of people who answer "yes" to the question "Are you content?" On the other hand, if there is a possibility of being more or less content, the logic loops back to the happiness–efficiency discussion. This means considering something like "absolute contentment." Whether this is a meaningful concept, unless one is talking about something like a rock or a spoon full of water, is questionable.

Regardless of how one feels about the path to happiness, one should notice the complexity these possibilities pose for a theory of efficiency based on experienced happiness. If we could all agree that utility is maximized by having a world full of "not unhappy" people, Does that mean massive investment in meditation and Zen lectures for all? On the other hand, if utility maximization means "happy but could be happier still," that seems to call for a policy of raising the fortunes of all people to some minimum level. For the first person—the habitually unhappy person who allows one need to override all other sources of happiness—the utility-maximizing approach may mean an investment in psychotherapy or mood-altering drugs. In fact, from the standpoint of maximizing utility, that may be a terrifically favorable investment. The point is that maximizing utility requires some attention to what it takes for various types of people to be happy. It may also mean not just addressing the sources of happiness but the "happiness producers"—i.e., decision-making processes—themselves to ensure they are as effective as possible at producing happiness.<sup>74</sup>

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74. This is a dangerous path to travel down. If "we" know that a person could be happier after psychotherapy and medication, Does that translate into a right or even an obligation to force the issue? The easy answer, even from a utilitarian perspective, is probably "no" because of the

Finally, as already noted, Is it useful to separate experienced utility or contentment from well-being in a more objective sense? The answer, as is the case with respect to many questions, is “yes” and “no.” As the following section indicates, being happy or content may be a function of a variety of factors that are unrelated to one’s well-being. On the other hand, a feeling of having been treated fairly or an absence of stress may both have an impact as an objective matter on one’s health and cannot be discounted even if it is strictly an emotional state.

### B. *Well-Being, Ignorance, and Adaptation*

“Ignorance is bliss” is more than a trite expression. There seems to be little doubt that it is also true. The matter of ignorance can be viewed in two ways. One is true ignorance in which a person simply does not know information that would result in disutility. The other is a contrived or adaptive ignorance subconsciously designed to avoid dissonance and, therefore, disutility.<sup>75</sup> In the first form a person may not know what is possible or what others have. For example, an employee may be entirely satisfied with a certain salary increase as long as the employee has no inkling that other similar employees are receiving higher increases. Or, the buyer of a car may be satisfied with the price paid but then become upset upon learning that others have paid less. Similarly, not knowing that one is among the highest paid employees or that one has received an especially good price on a car may lead to feeling less happy than the reality warrants. These possibilities create awkward decisions for the person interested in actual well-being. It suggests that the impact of information be considered before it is disseminated.

The implications of simply not knowing as being instrumental in achieving happiness are closely related to the ideas of John Stuart Mill on different qualities of utilities.<sup>76</sup> For example, an evening at the opera may create more utility than watching *Dancing with the Stars* on television. The possibility that there are different grades of utility may seem odd or even objectionable, but the possibility is a core question. Suppose after experiencing both, people consistently choose the opera over *Dancing with the Stars*. Is it possible to then conclude that people who watch *Dancing with the Stars* are deriving less utility than people who attend the opera? In a sense, they settle for a lower form of utility because they do not know of an option. Put in slightly different terms, if everyone who sampled filet mignon after eating hamburger preferred filet mignon, Is it safe to conclude

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disutility of living in a society in which unhappy people are forced to accept treatment.

75. See *infra* text accompanying notes 240–248.

76. See JOHN STUART MILL, UTILITARIANISM 8 (George Sher, ed., Hackett Pub’g Co. 2d ed. 2001) (1861).

that filet mignon is a superior pleasure than hamburger? If so, to maximize happiness, in addition to sheltering people from information that would be disquieting, one would also have to consider assisting people in developing more sophisticated tastes. Of course, this assumes that those tastes can be satisfied. Enlightening someone about the pleasures of opera or filet mignon only to tell them “but not for you” would only serve to decrease overall utility.

Closely related to the idea of ignorance as a critical element in maximizing utility is the concept of “relative deprivation.”<sup>77</sup> In effect, a person assesses his or her position by reference to others in some defined group. The first studies go back to military personnel in the 1940s in which groups with greater benefits were unhappier than groups with less.<sup>78</sup> The key is whether individuals feel relatively deprived with respect to the relevant group for comparison. For example, a person who has little or is deprived in an absolute sense may not feel that something is missing. A common response to those asked about why they do not feel deprived is that they simply do not think in those terms. It would not occur to them to compare what they have with what others have outside their immediate reference group.<sup>79</sup> If people pick the right group, they are less likely to be unhappy than if they select the “wrong” group.

There is a bit of a twist to consider here. One might initially think that the relevant reference group is outside the control of the individual. It is not clear that this is true.<sup>80</sup> Think of the price an individual pays in terms of dissonance, suffering, and even humiliation if that individual attempts to behave and have the expectations of a more affluent group. The disutility in a variety of forms can be quite high. In reality, people adapt to their situations to avoid these sources of unhappiness.<sup>81</sup> One adaptation is to relate to groups that create more “comfort.” Thus, one may achieve greater

77. As discussed below, this concept may also affect decision making in ways that cause it to deviate from decisional equity. See *infra* text accompanying notes 230–235.

78. 1 SAMUEL A. STOUFFER ET. AL., *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* (1949). See also generally, J. Stacy Adams, *Inequity in Social Exchange*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 267, 269 (Leonard Berkowitz ed., 1965); see also Paul D. Sweeney et al., *Using Relative Deprivation Theory to Explain Satisfaction with Income and Pay Level: A Multistudy Examination*, 33 *ACAD. MGMT. J.* 423 (1990).

79. See Joanne Martin, *The Tolerance of Injustice*, in 4 *RELATIVE DEPRIVATION AND SOCIAL COMPARISON: THE ONTARIO SYMPOSIUM* 217 (James M. Olsen et. al. eds., 1986).

80. See *infra* text accompanying notes 233–240.

81. This can be referred to as the “adaptation problem.” See Mozaffar Qizilbash, *Well-Being, Adaptation and Human Limitations*, in *PREFERENCES AND WELL-BEING* 83 (Serena Olsaretti ed., 2006).

happiness by expecting less, and the route to expecting less may be to compare oneself to those similarly situated in society.<sup>82</sup>

Relative deprivation may explain why some groups consistently accept contractual outcomes that other groups regard as unfair and unacceptable.<sup>83</sup> For example, it is possible that racial discrimination in wages or in the price of cars and other products can be traced to an expectation by sellers that members of minority groups are likely to compare their individual outcomes with the outcomes of the group. To the extent they receive lower wages or pay higher prices, a feeling of deprivation may not emerge.

Similarly, the process of revolution or the form it takes may depend on the individual developing a sense of deserving better.<sup>84</sup> In other words, the position to which one is relegated in a social structure must create a sense of dissatisfaction. Those who effectively adapt may not achieve that level of dissatisfaction. This leads to the difficult question of whether a necessary step toward greater utility is the creation, initially, of disutility. But the question is even more complicated. Suppose a person's consciousness is raised with respect to that person's relative deprivation. Through social change or individual efforts, that person may achieve whatever is sought. Still, there is no assurance that a new level of unhappiness will not simply return. In fact, the set point theory of happiness is that people may experience short-term happiness or unhappiness but then adjust and return to their original state.

The implications of this for any form of efficiency—whether wealth-based or ex post utility-based—are profound. If the goal really is to maximize happiness and one can be happy as a result of imperfect information or as a result of not recognizing a different allocation as something one has a claim to, What does that mean? One possibility is to not do anything that will result in disutility. This means perpetuating the ignorance. The other option is to increase disutility by raising the consciousness of people as to other possibilities and assisting them in developing a taste for and a sense of entitlement to those possibilities.<sup>85</sup> Only if that disutility is offset by future happiness would this seem to make

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82. See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 145 (1983); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445 (1994); Cass A. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1152 (1986); SEN, *supra* note 26, at 46–47.

83. For a discussion, see Harrison, *supra* note 82, at 440–45.

84. See generally William H. Panning, *Inequality, Social Comparison, and Relative Deprivation*, 77 AM. POL. SCI. REV. 323 (1983); Faye Crosby, *Relative Deprivation Revisited: A Response to Miller, Bolce, and Halligan*, 73 AM. POL. SCI. REV. 103 (1979); Ted Robert Gurr, *Sources of Rebellion in Western Societies: Some Quantitative Results*, 392 ANNALS OF AM. ACAD. POL. & SOC. SCI. 129 (1970).

85. Cf. Cass R. Sunstein & Richard H. Thaler, *Preferences, Paternalism, and Liberty*, in PREFERENCES AND WELL-BEING, *supra* note 81, at 233.

sense. It is important to note that this is all aside from the issue of whether the individuals involved are in fact better off by any objective standard.

### C. *Well-Being: Sensing and Being*

An additional problem is that having a *sense* of well-being—being happier—is not always the same as experiencing well-being.<sup>86</sup> If the goal is happiness, then if a person who is a smoker, a poorly educated person, or a sickly person feels happy, that is the end of the analysis. Objective well-being is quite different, and this is captured by Thomas Scanlon in his defense of an objective perspective:

I mean a criterion that provides a basis for appraisal of a person's level of well-being which is independent of that person's tastes and interests, thus allowing for the possibility that such an appraisal could be correct even though it conflicted with the preferences of the individual in question, not only as he believes they are but even as they would be if rendered consistent, corrected for factual errors, etc.<sup>87</sup>

In effect, one could assess happiness not as actual happiness but in terms of how happy the person should be if tastes and preferences were “normalized.”

The greater problem is not understanding the distinction but in dealing with the interdependency between the subjective and objective. This interdependency goes both ways. For example, being better off is likely to be accompanied by *feelings* of being better off. A pain-wracked person who undergoes a successful medical procedure to relieve the pain, all other factors being constant, is better off and undoubtedly feels better off. Even if, as set point theory suggests, one's feeling better off is temporary, it is hard not to regard the outcome as successful. Conversely, a sense of being happy, satisfied, or at least having lower levels of stress has been associated with objective measures of well-being.<sup>88</sup> But take the harder case. Suppose two people are exactly the same with respect to any measure of objective

86. See generally FREY & STUTZER, *supra* note 4, at 4–6.

87. Thomas M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 658 (1975).

88. See Nan Lin & Walter M. Ensel, *Life Stress and Health: Stressors and Resources*, 54 AM. SOC. REV. 382 (1989); see also Patrick A. Bovier et al., *Perceived Stress, Internal Resources, and Social Support as Determinants of Mental Health Among Young Adults*, 13 QUALITY LIFE RES. 161 (2004).



well-being. One person is quite happy and the other is unhappy. Even though the difference appears to be subjective only, it would be hard to make the case that the happier person is not also objectively better off. The point for efficiency theory is that neither subjective well-being (utility) nor objective well-being can be considered alone.

#### D. *The Fleeting Nature of Happiness*

The process of assessing objective and subjective well-being is daunting and deservedly so. Add to this the possibility that assessing happiness may be a bit like lifting water with a net. As already noted, one theory—set point—is that people tend to be happy, unhappy, or somewhere in between. Events may move them to higher or lower levels of happiness but only temporarily. While set point theory usually deals with good or bad things that happen to people, it has implications as well for decision making. If people tend to adjust, “right” or “wrong” decisions are likely to be relatively unimportant. For example, a diner reveals a preference for steak. It turns out to be tough and unsatisfying. The diner will get over it. In this nihilistic view of utility, not much matters.

That is not to say that researchers have not discovered a great deal about happiness and utility. In some studies employing the “experience sampling” method, subjects note contemporaneously what they are doing and the level of satisfaction or dissatisfaction.<sup>89</sup> It is comparable to a running commentary on their feelings. Daniel Kahneman and his coauthors have utilized a variation of this approach in which subjects are asked to reflect on the previous day and list activities and levels of pleasure.<sup>90</sup> In effect, they reconstruct. In that survey, the highest level of satisfaction is derived from sex and the lowest from commuting to and from work.<sup>91</sup> The difference between experience sampling and day reconstruction is in the time at which feelings are assessed.

In fact, Kahneman notes at least six ways the question of utility can be posed.<sup>92</sup> First is “instant utility”—how one is feeling at the moment.<sup>93</sup> Second is “remembered utility,” which is utility one assigns after the fact.<sup>94</sup> For example, “How *was* the sex, meal, or lecture?” Third are measures based on a more general assessment of specific components of one’s life—

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89. See Kahneman et. al., *supra* note 23, at 430–32.

90. See Kahneman et al., *A Survey Method for Characterizing Daily Life Experiences: The Day Reconstruction Method*, 306 *SCIENCE* 1776 (2004).

91. *Id.* at 1777 tbl. 1.

92. Daniel Kahneman, *Objective Happiness*, in *WELL-BEING: FOUNDATIONS OF HEDONIC PSYCHOLOGY*, *supra* note 4, at 3, 4.

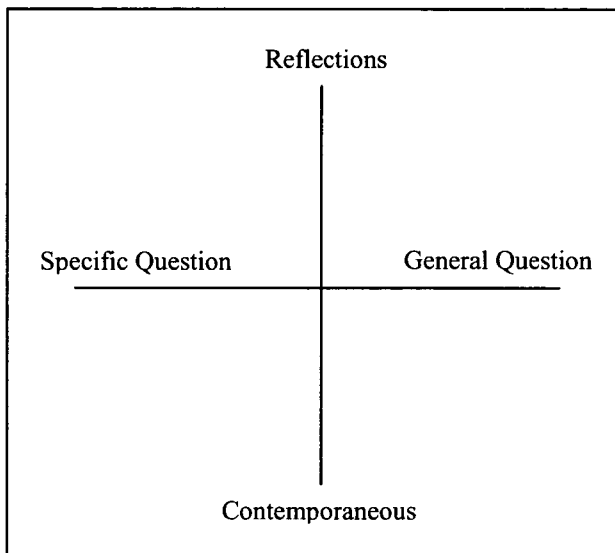
93. *Id.*

94. *Id.*

"How do you feel about your job or your spouse?"<sup>95</sup> Fourth is the more global question, "How happy are you?"<sup>96</sup> Kahneman and his coauthors also identify "decision utility" and "predicted utility."<sup>97</sup> Decision utility is the "weight of an outcome in a decision."<sup>98</sup> Predicted utility is a forecast of the utility to be derived from a choice.<sup>99</sup>

Three points are particularly important with respect to these different approaches. First, the utility question can vary in both scope and timing. On a grid it might look something like Figure 1.

Figure 1



The combination of utility assessment possibilities is endless.<sup>100</sup> Is it more relevant to ask, "How are you enjoying your meal now?" or, two years later, "How did you like the meal you had at that restaurant?" Or even, "Are your memories of the meal pleasant ones?" To understand the importance of

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95. *Id.*

96. *Id.*

97. Kahneman et. al., *supra* note 31.

98. *Id.* at 375.

99. *Id.* at 378.

100. In fact all time periods may interact to create the current sense of happiness. See Wladyslaw Tatkiewicz, *Happiness and Time*, 27 PHIL. & PHENOMENOLOGICAL RES. 1 (1966).

the differences, most readers can relate to the same questioning about a book or a movie. How much they enjoyed either one may depend on when they are asked. Or they may say “I enjoyed it at the time but now I am not so sure.” Similarly, “How happy are you with your job?” may elicit a different response than “Looking back on your career, how satisfying was it to you?”

The grid assists in visualizing the utility problem but, in fact, may actually oversimplify the complexity. In particular, a question about experienced or instant utility will not account for future pleasure derived from recalling the experience. Even an assessment of remembered utility at any particular moment may not account for subsequent recollections. In addition, How does one evaluate an extreme positive or negative experience that is virtually forgotten as compared to a less intense experience that remains vivid and from which one continues to experience utility or disutility?

The second point is how revealed preference, which is based on predicted utility, deviates from any other measure of utility. At one level the distinction is easily understood. There is a difference between *acquiring* something and *having* something.<sup>101</sup> For example, someone may be elated on the day a new car is acquired, but perhaps the more relevant utility is that associated with having and keeping the car.

The third and most startling point is how often people are inaccurate when reporting on the impact an event had on them at the time. For example, in one experiment people were asked to put a hand in very cold water for a short period of time and then for a longer period of time.<sup>102</sup> The temperature of the water was equal, except in the longer experiment it was raised slightly near the end of the time period.<sup>103</sup> The subjects recorded the level of discomfort during the experiment.<sup>104</sup> Later they were asked which of the two variations of the exercise they would be more willing to repeat. A majority chose the longer emersion.<sup>105</sup> In other words, they chose the alternative that was experienced, at the time, as being more unpleasant. There are actually two factors that disconnect experience from what is remembered and then from future actions based on the same experience. The first is “duration neglect” which is the tendency to ignore the duration of the experience.<sup>106</sup> Another is to recall the event with respect to what is called the “peak-end average.” “Peak-end average” is the average of the

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101. See Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 18 (1994).

102. Kahneman, *supra* note 31, at 386.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 381.

intensity of feeling at the peak moment and the intensity at the end.<sup>107</sup> For example, in the longer version of the water experiment, the last period was less uncomfortable than the peak period. The average of these two tended to be more influential than a much shorter period of discomfort that did not have a period of reduced discomfort.

A similar study goes directly to the question, Do people accurately predict at the time of revealing their preferences what will actually make them happier?<sup>108</sup> Here subjects were given a sample of yogurt and asked to predict how much they would like a full serving the next day and for eight consecutive days.<sup>109</sup> In general, they over-predicted how much they would like the first serving and then under-predicted how much they would like the servings on the subsequent days.<sup>110</sup> In short, the initial serving was not as satisfying as predicted, but the ones thereafter were more satisfying. In a similar study involving ice cream, subjects also tended to predict their enjoyment for the ice cream would decline.<sup>111</sup> The actual level of the decline tended to be lower than that predicted.<sup>112</sup> Most surprising is that the ability of subjects to predict their actual enjoyment of the ice cream was no more accurate than those made by a random stranger.<sup>113</sup>

What the studies and possibilities underscore is the limited usefulness of relying on demonstrated preferences as a gauge for utility or happiness. Consider dining out. There may be considerable utility generated simply by looking forward to a pleasant dinner. Eating the meal may also be pleasurable, although almost certainly more so at the outset than later in the meal. At the end of the experience one may look back on the meal. Upon reflection, it may have been better or worse than anticipated. Plus, the very process of recalling may itself be utility-producing. An hour later one may be uncomfortably full. And the next morning, when stepping on the scale, the response may be “never again.” Eventually a decision about dining out will be made again. Of all the utilities—experienced or a variety of recalled—Which governs the decision? And, perhaps as important, Which should govern decision making? If this is not complicated enough, it is useful to recall that set point theory holds that regardless of what happens, people tend

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107. *Id.*

108. Daniel Kahneman & Jackie Snell, *Predicting a Changing Taste: Do People Know What They Will Like?*, 5 J. BEHAV. DECISION MAKING 187, 189 (1992).

109. *Id.* at 194.

110. *Id.* at 195–96.

111. *Id.* at 191–92.

112. *Id.* at 192.

113. *Id.*

to be hardwired to return to a set level of happiness. In effect, some people tend to be happy, others tend to be unhappy, and this is genetically determined.<sup>114</sup>

### *E. Capability Issues and Trusting Happiness*

The distinction between feeling and being better off is at the heart of work done by Amartya Sen with respect to capability.<sup>115</sup> In effect, for want of a better term, there is a “thinness” to feeling happy or better off.<sup>116</sup> As John Lennon once wrote, drugs, religion, and television can produce the same result.<sup>117</sup> Sen’s more scholarly exposition focuses on the link between having possessions and feeling or being better off. For example, thirty different people may own bicycles that are exactly the same. Each bicycle has the potential to be used in different ways—transportation to work or school, touring, exercise, etc. Obviously, simply knowing how many bicycles exist (or the “wealth” of the group) tells us little about the overall happiness.

The problem is that we cannot know much about the utility produced by the bicycles without knowing about the functionings or capabilities of the individuals possessing them. They may be possessed by disabled or able-bodied people. Even among the able-bodied who use the bicycles regularly, some may greatly enjoy the feeling of movement and the wind blowing through their hair. Others may use the bikes only as a means of going to and from work and receive little additional pleasure.

What accounts for these differences? The variation in feelings may be a function of their expectations. The person who loves biking may have only experienced life without a means of transportation while the person who can

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114. See Lykken & Telgen, *supra* note 63. For an expression of this possibility in a context of particular interest to legal scholars, see Letter from Benjamin Cardozo to Elvira Stolis (Feb. 15, 1933) (on file at the Benjamin N. Cardozo School of Law Chutick Law Library), *quoted in* Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 33 (2001).

115. See SEN, *supra* note 26; see also AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 353–69 (1982). The same themes have been advanced by Martha Nussbaum. For a collection of readings edited by and written by Professors Sen and Nussbaum, see THE QUALITY OF LIFE (Martha C. Nussbaum & Amartya Sen eds., 1993). See also David A. Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic*, 20 POL. THEORY 584 (1992); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

116. There is a very moving line in the film *Tender Mercies* in which actor Robert Duvall, as Mac Sledge, says, “I don’t trust happiness. I never did, I never will.” TENDER MERCIES (Universal Pictures 1983). This gives one the sense that happiness can be both temporary and resting on a shaky foundation.

117. For example, “[They] keep you doped with religion and sex and TV.” JOHN LENNON, *Working Class Hero*, on PLASTIC ONO BAND (Apple/EMI 1970).

take it or leave it may have access to an expensive sports car. Sen captures the contingent element in the valuation by noting:

The hopeless beggar, the precarious landless labourer . . . or the over-exhausted coolie may all take pleasures in small mercies, and manage to suppress intense suffering for the necessity of continuing survival, but it would be ethically deeply mistaken to attach correspondingly small value to the loss of their well-being because of this survival strategy.<sup>118</sup>

In effect, commodities and utility are linked by both capability and valuation processes.<sup>119</sup>

This gap between resources and utility is especially important to those who are squeamish about applying law to achieve efficiency. If one takes a wealth maximization approach, it is comparable to adding up the number of bicycles without proper consideration of the actual pleasure delivered by the bicycles. As already noted, this is hardly a measure of utility. Alternatively, if one focuses on utility alone, allocations would be to those who currently possess the greatest capability of generating utility. The implication that should concern even the most ardent utilitarian is that without proper attention to capability and valuation, huge amounts of potential utility are not realized.<sup>120</sup>

## V. FROM OUTCOME TO PROCESS

### A. *The Decision Maker as Producer*

The problems inherent in using revealed preferences as a link to efficiency are obvious. Choices do not indicate outcomes. Unfortunately, as the preceding suggests, focusing on happiness is far from a perfect solution

118. AMARTYA SEN, ON ETHICS & ECONOMICS 45–46 (1987).

119. In some respects, one may argue that a wealth maximization approach remedies the problem because people with low capabilities will attribute low value to items they cannot make use of. There are two problems with this. First, wealth maximization is, as discussed earlier, a very imprecise and misleading measure of utility or even well-being. Second, capability is usually not defined in terms of one specific commodity. Capability is more usefully concerned with broad attributes like health, education, etc.

120. Another implication for those who view rights as having an importance independent of utility is that addressing capability issues broadens freedom whether those freedoms are then employed to maximize personal self-interest. After all, if the only question were to maximize utility, or even wealth, the proper route to take may be to drug some people.

to that disconnect. For example, the way people feel may involve a fair amount of ignorance with respect to actual well-being. At the same time, actual well-being may result in a broad range of senses of subjective well-being—five people who are objectively the same may experience five levels of happiness. Plus, the time at which feelings of happiness are assessed can produce different outcomes. In addition, there are great differences in people's abilities to achieve happiness due to talent limitations, resource limitations, or just psychological factors. Efforts to refine the analysis by focusing on one problem are likely to exacerbate others.

Themes do emerge, however, with respect to factors that define a comprehensive and legally practical notion of efficiency. Principal among these are information problems. For example, in the context of revealed preferences and perhaps as the most extreme example of a transaction cost, today's decision maker is unable to appreciate how a choice will actually turn out. Moreover, there may be no standard measure of what it means to "turn out." Does it mean while experiencing the choice or reflecting on that choice? Information also comes into play when one's sense of well-being is based on ignorance as to the possibilities. Thus, the sense of well-being of those who are relatively deprived and do not realize it may be no more a legally legitimate sense of well-being than that experienced by a drug addict.

The second theme is related to what one might call "producer" problems. Here the producer is the individual, and the output is happiness. Production is limited by capabilities. In effect, resources that people are not capable of using and for whom the use produces little happiness are not, in fact, all that useful. Under this formulation, the focus is not on "production" but on the producer. Amartya Sen and Martha Nussbaum describe it as involving "an account of the many different kinds of activity that actually make up a 'thriving' human life."<sup>121</sup>

Information and capability matters have a common characteristic. They are not end result measures of efficiency. Instead, they are *facilitators* of autonomous decision making. By emphasizing factors that allow freedom in decision making, the focus is taken from "outcome" to "process." This is important. In the context of indeterminate measures of utility, the best one can achieve is a state in which individuals are equipped to make the choices that they—with full awareness—believe will make them better off. Providing for this type of decision making has the potential of narrowing the difference between choice on one hand and both feeling and being better off on the other.

This shift in focus from output to process can be understood by reference to a standard application of economics to law—the "efficient

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121. Martha C. Nussbaum & Amartya Sen, *Introduction* to THE QUALITY OF LIFE, *supra* note 115, at 1, 2.

breach.” Although subject to criticism, the basic idea is that the remedy for breach of contract should be set to protect the expectancy of the non-breaching party. A party will then breach if an opportunity presents itself that permits the breaching party to pay the expectancy of the non-breaching party and still be better off. The ultimate outcome supposedly means no one is worse off and at least one party (and probably two) is better off from a wealth-maximizing perspective.

Aside from the fact that it is doubtful that many decisions to breach are based on this analysis, consider how far it is from any measure of well-being. Nothing about the efficient breach means that those who “gain” or “lose” are better off in either a subjective or objective sense. The income itself is only a means to an end, and the way it is used may be disappointing or highly satisfying. Moreover, “better off” does not mean as well off as possible. The winner in the efficient breach analysis may look back years later and regret how the surplus was spent. Even more pointedly, the person may regret being the type of person who breaks promises for money. These outcomes are difficult to predict such that it may not make sense to study them closely. What is more important and more useful to assess is the process involved in the decision to breach.<sup>122</sup>

More generally, the importance of information and the capability of the producer can be illustrated by reference to money itself. An Economics 101 tenet is that money is strictly a means to an end. It is a medium of exchange and a way to store value. On its own it provides no sustenance. The same is true with respect to goods and services. It is the processing or how they are used that determines their impact. Even food is worthless to the person whose digestive system is unable to effectively process it. At the other end of the spectrum, ownership of a work of art may be without consequence if the owner is unable to appreciate it.

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122. Another law and economics standard is allocation of the risk of a harm to the party best able to avoid the harm. “Best able” in this context means at the lowest cost. Thus, suppose the cost to a small grocery store owner of constant vigilance designed to keep floors completely dry is \$3000 per year. The expected cost of harm from slips caused by slippery floor is \$2000. If the grocery store owner is found not to be negligent when a shopper slips, What does it really mean? The grocery store owner may or may not become subjectively better off or objectively better off due to higher profit resulting from avoiding the \$3000 expense. If the owner expects not to be negligent, then the outcome does not increase anything. It is a loss avoided that the owner never expected to lose. The actual outcome will depend on information and capability. In short, the increase in wealth and its distribution are only relevant with respect to improving conditions of individuals who are capable of making the best use of these resources.



Emphasis on process and the decision point is hardly a new idea. For example, Seneca, writing about a happy life, stresses wisdom and virtue.<sup>123</sup> “Wisdom is the right understanding; a faculty of discerning good from evil; what is to be chosen, and what rejected . . . .”<sup>124</sup> More modern research indicates that an important element in determining happiness is a sense of control.<sup>125</sup> In short, in both cases the emphasis is not on outcome but process. Even Sen’s theory of capability has at its center the idea of control. How can law be fashioned to place an emphasis on process? In particular, How can law be applied to enhance the decision making of individuals?

Before considering this question below, it may be important to address three points. First, Is an approach that puts end results aside and focuses on function an economic approach at all? In the context of this discussion, it will be so labeled although the label itself is irrelevant. It is related to an economic approach much as planners and engineers strive to make the production process of a factory work seamlessly to achieve the best outcomes with limited waste and down time.

Second, it may seem odd to view decisional *equity* as an economic matter. Equity, a normative matter, is usually not the province of economics. Here, however, “equity” refers to the fairness inherent in each person having an opportunity to make the best decisions. Note that this is not equality. Enabling all people to make qualitatively equal decisions is likely to be impossible. The objective is to create the best chance—which will vary from person to person—to make the best possible decisions.

The third question is to what extent the decision-making process of individuals can be the sole focus of law. This depends a bit on what is meant by law. For example, Congress can pass a law that ensures access to health care by all, which almost certainly improves well-being and may make individuals better decision makers. In the context of the proposal presented here, however, law is taken to mean the principles and regulations governing conduct. In the context of this definition, law has many “duties” including avoiding injustice, providing incentives and deterrence, as the case may be, and rationalizing industries. Some but not all of these can be included in a focus on decision making. For example, even criminal law, to the extent that it has the impact of preference-shaping,<sup>126</sup> as opposed to

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123. James J. Walsh, *Buridan and Seneca*, 27 J. HIST. IDEAS 23, 30 (1966). Interestingly, Seneca is also responsible for the following oft-quoted proposition: “If you want to make a [man] rich, do not add to his possessions but subtract from his desire.” Norman W. Dewitt, *Epicurian Doctrine in Horace*, 34 CLASSICAL PHILOLOGY 127, 133 (1939).

124. ROGER L’ESTRANGE, *SENECA’S MORALS BY WAY OF ABSTRACT* 76 (1879).

125. See GILBERT, *supra* note 4, at 21–23; Frey & Stutzer, *supra* note 4, at 51; Dan Ariely, *Controlling the Information Flow: Effects on Consumers’ Decision Making and Preferences*, 27 J. CONSUMER RES. 233 (2000) (discussing the impact of control on information itself).

126. See Kenneth Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 39 DUKE L.J. 1 (1990).

simply punishing, can arguably improve decision making. In contract law, the case has been made that increased use of the unconscionability doctrine can have a therapeutic and empowering impact on those who are taken advantage of.<sup>127</sup> Still, it seems clear that economic considerations cannot be the sole focus of law.

### *B. Decisional Equity and Its Components*

This leads to a more precise description of decisional equity. The standards are by necessity somewhat elastic, but they also have an intuitive appeal. Three rules are the anchors of such an approach:

1. The Informational Ideal: Individual decision making should be made in the context of the most relevant information that can practically be made available. This information should include expected outcomes and opportunity costs.
2. The Physic Ideal: Decisions should be relatively unaffected by desire and cognitive bias.
3. The Social Ideal: Decisions should not be influenced by adaptation to perceived injustice.

The implications of each of these for the effectively processing person are fairly obvious. Together they achieve greater equity in decision making but, it is important to note, not equality of outcomes. This is in part because there is nothing particularly just about equal outcomes. In addition, as the first part of this article indicates, a determination of what it means to have an equal outcome is impossible. Finally, an equality of outcome approach is likely to be excessively intrusive.

The approach here is in the tradition of those who have attempted to express various equalitarian ideals,<sup>128</sup> whether they are in terms of welfare,<sup>129</sup> resources,<sup>130</sup> primary goods,<sup>131</sup> or capability.<sup>132</sup> It is influenced by the writings of Amartya Sen and John Rawls but different in many critical respects. Sen's notion of capability calls for much broader action than law,

127. See Harrison, *supra* note 82.

128. For a good summary, see Norman Daniels, *Equality of What: Welfare, Resources or Capabilities*, 50 PHIL. & PHENOMENOLOGICAL RES. 273 (1990).

129. See, e.g., Richard Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1988).

130. See, e.g., Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

131. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

132. See *supra* text accompanying notes 115–120 (discussing the views of Amartya Sen).

as defined above, can facilitate. For example, capability, in Sen's view, extends to general well-being including matters of physical health and longevity.<sup>133</sup> Indeed, capability issues are akin to macroeconomic adjustments. One might view the capability approach as an effort to define an ideal economic system. Decisional equity on the other hand focuses on just that—fully informed decision making free of the fog of social and psychological influences. To a much greater extent than Sen, however, it leaves people as it finds them. Not that this is necessarily a desired goal in the long run, but Sen's broader goals lie outside the province of law as defined above.<sup>134</sup>

Similarly, the approach here is more modest than that of Rawls.<sup>135</sup> Certainly equity in decision making could be a part of obtaining both liberty principle<sup>136</sup> and difference principle<sup>137</sup> goals, but not necessarily. Nevertheless, decisional equity does not guarantee equal liberty of outcomes that favor those better off only when those worse off are also favored. In fact, to some extent the outcome-oriented approach of the difference principle encounters the same issues as conventional efficiency standards.

The central tenet of decisional equity is to limit the effects of information imbalances, reasoning biases, and social class. In many respects, limiting these influences increases personal autonomy by permitting the expression of true or more accurate preferences. Ironically, the approach allows people to reveal their preferences as conventional economics would have it but only when those preferences are free of the variety of factors that often separate choice from actual welfare, happiness, or desires. More specifically, the approach should appeal even to those who continue to adhere to "revealed preference" as a means of assessing utility-increasing choices.

Since these choices are very often revealed in the context of contract formation, much of the following analysis will be expressed in that context. In reality, choice making far exceeds contract making. For example, the

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133. See SEN, *supra* note 26, at 10, 45.

134. The difficulties of operationalizing Sen's capability approach have been noted. See Antonio D'Agata, *Endogenizing Sen's Capabilities: An Adaptive Dynamic Analysis*, 36 J. SOCIO-ECONOMICS 177 (2007); Simon Barnbeck, *Freedom and Capacity: Implications of Sen's Capability Approach for Berlin's Negative Freedom*, 1 RERUM CAUSAE 10 (2006); Charles Gore, *Irreducibly Social Goods and the Informational Basis of Amartya Sen's Capability Approach*, 9 J. INT'L DEV. 235 (1997); Flavio Comin, *Operationalizing Sen's Capability Approach* (June 2001) (unpublished paper, on file with author).

135. See RAWLS, *supra* note 131.

136. The Liberty Principle states that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." *Id.* at 250.

137. The Difference Principle states that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all." *Id.* at 60.

decision to exercise, drive carefully, have children, or postpone present consumption are all affected by the three rules of decisional equity expressed here.

It would be incorrect to infer that decisional equity requires harnessing an entirely novel set of legal theories and tools. In fact, the field of therapeutic jurisprudence,<sup>138</sup> although not expressly so, is closely related to decisional equity and the discussion that follows. Therapeutic jurisprudence is devoted to the question of how law can have an impact on the “psychological or physical well-being of the people it affects.”<sup>139</sup> On the other hand, it would be idealistic to assume standard legal tools alone can achieve decisional equity. Given the fact that the same tools and the institutions employing them have a variety of other demands, the best that can be achieved might be termed “workable decisional equity.”

### 1. The Information Ideal

The information ideal is a broad concept. It includes ordinary information like product quality but extends to information about the long-term effects of decisions and includes opportunity costs.<sup>140</sup> It can be broken into two subtopics. First, at a very practical level, Are the basic rules of required disclosure consistent with decisional equity? Second, Can an understanding of non-functional factors that influence choices be increased and the impact of those influences reduced where appropriate? In both of these cases, the goal is to match revealed preferences with actual outcomes.

#### *a. Transactional Information: The Issue of Disclosure*

One of the important areas of contract law deals with disclosure and misrepresentation. Its tenets have even broader applications. Perhaps the standard that holds the greatest likelihood of enhancing decisional equity is something akin to a golden rule of information exchange. Under this standard, any party to an exchange would be required to reveal any information that the party would like to know if in the position of the other party. This would cover both instances of unilateral mistake and failure to

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138. See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, xvii–xx (David B. Wexler & Bruce J. Winick eds., 1996).

139. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 138, at 763, 775.

140. An opportunity cost is the value of the next best choice when one makes a decision.

disclose.<sup>141</sup> Obviously this is not the law. Instead, some fairly general rules are well-established. Fraud and material misrepresentation are grounds for one party to avoid a contract or to collect for breach of contract the difference between the value of what was promised and the value of what was received.<sup>142</sup> Moreover, as a general matter, one party is not required to disclose information to another party unless the non-disclosure would be tantamount to a misrepresentation. Under the Restatement (Second) of Contracts,<sup>143</sup> this duty to disclose arises in four cases, the most relevant for the purposes at hand being when the disclosure “would correct a mistake . . . and if non-disclosure . . . amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”<sup>144</sup> In the case of unilateral mistake, the mistaken party is excused when that party did not assume the risk of the mistake and the other party knew or had reason to know of the mistake.

There are, of course, a great number of statutory disclosure requirements, ranging from warning labels on toys and medications to loan terms and the nutritional content of foods. Clearly these requirements assist in creating greater decisional equity. They are required because there is little indication that the market would produce the information otherwise. Either it is not in the interest of suppliers to disclose certain product characteristics or free-riding problems lead to under-production.

The principal argument against “full disclosure” in the context of an individual exchange is that it creates a disincentive to invest in generating or discovering information. Anthony Kronman’s seminal article on the issue notes that the ability to exploit information leads to additional information.<sup>145</sup> Consequently, the rule against automatically requiring disclosure is arguably efficient. According to Professor Kronman, this is consistent with the rule requiring a party to intervene in the case of unilateral mistake because the type of information likely to be involved in those instances is unlikely to be subject to a disincentive.<sup>146</sup> In a sense, the

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141. The Restatement (Second) of Contracts separates these topics. Under section 153, a contract is voidable by a unilaterally mistaken party when he does not assume the risk of the mistake *and* the other party has reason to know of the mistake. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). Under section 161, a failure to disclose information is treated as a misrepresentation under certain conditions. *Id.* at § 161. Aside from the remedial differences, it is not clear that the distinction is otherwise useful.

142. Of course, fraud also gives rise to an action under tort law.

143. RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

144. *Id.* at § 161(b). The other situations involve ones in which 1) the disclosure would correct a prior misleading statement, 2) the mistake goes to the content of a writing, and 3) there exists a relationship between the parties that would lead one to expect disclosure. *See id.* at § 161(a), (c), (d).

145. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

146. Professor Kronman sees these cases as analogous to the tort doctrine of “last clear chance.”

analysis is like that applied in the context of intellectual property: the ability to internalize the benefits of one's inventive or creative efforts means more production. While this analysis probably holds as a general matter with respect to intellectual property and is clearly the underpinning of American intellectual property law, the analysis is not sufficiently nuanced to apply to the ordinary exchange.<sup>147</sup>

To understand the complexity it is useful to think of information as existing along two different continuums. First, as Professor Kronman points out, there is information that is deliberately sought and there is information that is obtained casually.<sup>148</sup> Thus, at one end there might be an art historian who studies for years in order to be able to spot the early and unrecognized works of great artists at auctions. Once found, the works are sold to museums for all to enjoy. This can be contrasted with the person who has no training in art but overhears someone at the same auction say, "That could very well be a Picasso," but pays a price that is not enhanced in any way. In the first case, so the argument goes, disclosure could discourage the search for important but mislaid works of art.

The deliberate-casual distinction is but one part of the analysis. The use of unilaterally held information can have primarily allocative or primarily distributive effects. This too can form a continuum. For example, the art finder's actions, described above, can be seen as having what are ultimately allocative effects—increased pleasure for those seeing the previously lost works of art. On the other hand, consider this example that is based on the personal experience of those who have undergone training as door-to-door encyclopedia peddlers. Part of that training involves knowing just how to hand a sample volume to a prospective customer. The "appropriate" technique is to keep the book just beyond the customer's reach so that the customer can only grasp the edge. What is conveyed by this approach is that the books are heavy, well-made, or substantial. The information about how to hand the book to someone is the result of research, like that of the art finder, designed to increase the wealth or well-being of the researcher. Of course the difference is that the art finder may make others better off too—

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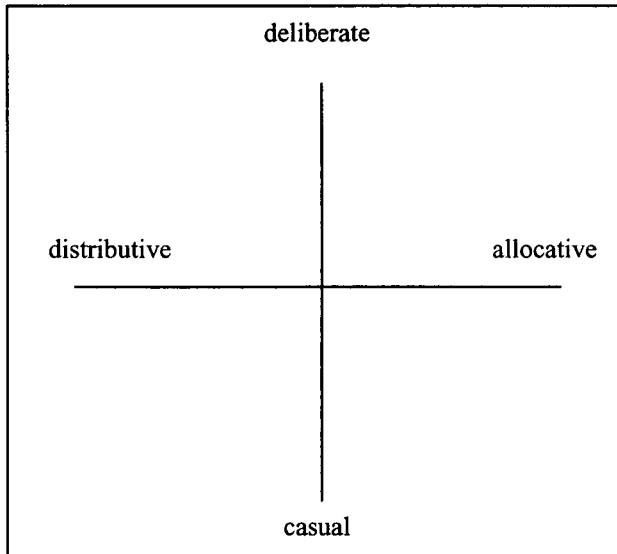
The party seeking to be excused has made a mistake, but there is little or no cost to the mistaken party to correct the mistake. *Id.* at 8.

147. See Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 3–4 (2005).

148. Kronman, *supra* note 145, at 13. According to Professor Kronman, the duty to intervene in the case of unilateral mistake that is absent in the disclosure cases can be reconciled by the fact that the information in the unilateral mistake instance is rarely obtained through a deliberate search. *Id.* at 13–14.

an allocative effect—while the sole goal of the book seller is to sell the encyclopedia at the highest possible price. The objective is purely distributive. Efforts that alter only distributive outcomes are viewed by most economists as economic waste. They do not increase total well-being, they just redistribute it. The analysis can be visualized in Figure 2.

Figure 2



In the context of Professor Kronman's analysis, all information, regardless of the purpose, that is acquired casually should be disclosed. This information will be forthcoming without an incentive. Similarly, all information that is used primarily to facilitate a redistribution from one party should be disclosed. With no reward available to those to study things like how to make a book seem weightier than it is, this type of information is far less likely to be developed. The quadrant of the grid that raises the strongest case for not requiring disclosure is on the upper right, describing deliberately acquired information having an allocative impact.<sup>149</sup>

Even focusing on this best case argument for non-disclosure, the efficiency argument is a very thin one. The first point to be made here is that any efficiency associated with the rule stems from ignorance of the rule or at least of its breadth. To understand this, consider the classic case

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149. Professor Kronman treats both the issues of unilateral mistake and disclosure. He concludes that a rule requiring a party to correct the mistake of another party if the first party knows about the mistake is unlikely to have undesired consequences because the relevant information is unlikely to be the result of a deliberate effort to gather information. *See id.* at 7.

*Laidlaw v. Organ*.<sup>150</sup> Organ purchased tobacco from Laidlaw knowing that the value had suddenly increased because of the end of the War of 1812.<sup>151</sup> Laidlaw did not know the war had ended.<sup>152</sup> The Supreme Court eventually ruled that Organ had no duty to disclose.<sup>153</sup> In the context of the case, it is not clear if the information was deliberately acquired, how much of an investment was made to acquire it, or whether there was any allocative advantage associated with one tobacco dealer enjoying a few hours jump on another.

But, suppose all of these things were true. That is, Organ invested in acquiring the information and, by virtue of the bargain, otherwise delayed information would reach the market and would affect the planting decisions of growers. This would put him squarely in the upper right quadrant. Note that even if that were all true, had Laidlaw asked “Do you know of something that affects the value of the tobacco?” a negative answer would constitute fraud.<sup>154</sup> In other words, the legal right not to disclose seems to hinge on whether one party asks the other party whether such information exists.

To understand the importance of this, go back to the hypothetical art finder, this time making the rounds of yard sales. Suppose one seller asks, “Do you have any knowledge of what this painting may be?” and another does not. In the first case the buyer must disclose and in the second case, under the conventional standard, disclosure is not required. What would account for one party asking and another not asking? There are a couple of possibilities. One possibility is that not asking is a form of competition.<sup>155</sup> That is, bargain hunters may prefer shopping in contexts in which they will not be asked questions about what they know.

The more likely reason is that the second seller does not think to ask. The assumption would follow from a belief that the buyer is not required to give a truthful answer. In this case, disclosure or non-disclosure has nothing to do with exclusive information but a likely misunderstanding of legal obligations.<sup>156</sup> Needless to say, an argument that a specific legal rule is

150. 15 U.S. (2 Wheat.) 178 (1817).

151. *Id.* at 183.

152. *Id.* Evidently the question was asked but it is not clear what the answer was. *Id.*

153. *Id.*

154. See Kronman, *supra* note 145, at 10 n.27.

155. Presumably non-askers would adjust their asking or offering prices accordingly.

156. Professor Kronman suggests that even silence after such a question may be fraudulent. See Kronman, *supra* note 145, at 10 n.27. It seems likely that the buyer who silently walks away has not committed a fraud. It is not clear why a seller would accept silence after such a critical question.



efficient only because it is ultimately misunderstood is hardly compelling. The weakness of the idea that non-disclosure is a “right” in the case of unilaterally held information can be understood by comparing it to other rights.<sup>157</sup> Certainly the “owner” of land or any other property who must relinquish it when asked for it would not regard herself as the owner of much at all. In effect, this is the reality with information held by one party whether casually or deliberately acquired.

A second point with respect to the thinness of the rule allowing non-disclosure requires understanding that the decision to allow a party to internalize the gains from deliberately obtained allocatively beneficial information does not necessarily mean that all of the gains need to be internalized for the information to be discovered or developed. Again, returning to the case of the art finder, the proper question is—What is the minimum level of internalization that would give rise to the allocative benefits? For example, the art expert finds a misplaced Picasso worth \$5,000,000 for sale at a yard sale for \$15 and buys the painting for that amount. It is not at all clear that art finders who do not disclose are entitled to the entire profit associated with their research.<sup>158</sup>

Those with an interest in intellectual property will recognize these issues as similar to the ones raised in that context. Patents and copyrights are for limited times. Since American copyright and patent law exists for the benefit of the public with the creative people as a means to an end,<sup>159</sup> the question is how much incentive is necessary to draw forth the efforts of inventors and artists. By limiting the duration of intellectual property rights and the scope of protection, the theory is that not all of the benefits associated with these efforts must be internalized for the efforts to be made.

Both because the property right to unilaterally held information is thin, if close to nonexistent, and because full internalization of the full benefits is very likely not necessary, the cost of decisional equity is actually quite low.<sup>160</sup> In theory and perhaps no more than in theory, decisional equity requires a series of decisions. First, Was the information deliberately or casually obtained? Second, Was the information used by the possessor of the information primarily for distributive or allocative purposes? Finally, if the information was deliberately sought and was allocatively valuable, Is it necessary for the possessor to internalize all the benefits in order for the information to be used effectively?

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157. *Id.* at 15.

158. The analysis changes if the art expert is speculating and buys art on the chance that it may turn out to be valuable.

159. One of the broadest statements of this is found in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

160. It is useful to note that the argument against a “golden rule” of information hinges on efficiency—a concept that, as explained in the early part of this article, is very inexact.

Intellectual property law resolves these issues with largely politically determined standards<sup>161</sup> that seem to have little connection with encouraging the most desired levels of innovation and creativity.<sup>162</sup> Still, at least there are relatively bright lines on which one can rely. In the context of unilaterally held information, the analysis is not so simple. From a practical perspective, a limited right not to disclose means determining how much information the knowledgeable party must disclose. Even an imperfect bright line test like that found in the context of intellectual property is difficult to design.<sup>163</sup> The argument may be made that the administrative costs of making such a fine distinction outweigh any benefits.<sup>164</sup> This point does not, however, lead to one rule or the other—it is just as applicable to an argument for full disclosure as it is to an argument for no disclosure.

The reality is that the costs of fine-tuning are likely too high and that the better per se rule is the (golden) rule of full disclosure. The full disclosure rule covers all contexts including those of casually obtained information plus those of information used for distributive purposes only. If it is over-inclusive, it is because it picks up some instances in which non-disclosure discourages some useful research. Still, even here, the right it protects is one that exists because of the ignorance of parties that, if they ask for the information, it must be disclosed. Moreover, a rule of non-disclosure is also over-inclusive. It may protect some research that leads to allocative gains but only at the cost of unproductive redistributive efforts and the protection of information that was casually gained.<sup>165</sup>

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161. For example, in 1998 the copyright term was extended from life plus fifty years to life plus seventy years not just for post-1998 work but for works already in existence. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The extension has been referred to as the “Mickey Mouse Act” because the effect was to prevent some Disney characters from falling into the public domain.

162. See Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 HOFSTRA L. REV. 853 (2004).

163. There are two issues that would have to be addressed. One is to separate the cost of deliberately acquired allocatively beneficial information from all other cases. This determination leads to the second problem. Should the knowledgeable party be permitted to retain all of the gain from the exchange? This gets particularly sticky. For example, in the case of the art hunter who finds the \$5,000,000 Picasso marked \$15 at a yard sale it seems impractical for the buyer to offer, say, \$500,000. This requires the buyer to indirectly disclose and may mean the seller simply shops for the highest bidder and removes virtually all gain to the buyer. Any offer above the asking price will in many instances have the same effect.

164. Kronman, *supra* note 145, at 17–18.

165. It is important to note in this context that research designed to facilitate only redistributions are, to economists, misallocations. In other words, they are an allocative loss to be compared with whatever allocative gains result from information in the upper right quadrant.

b. *The Challenge of Non-Functional and Created Expectations*

One of the more puzzling problems in the context of an analysis of decisional equity is what to make of and how to treat non-functional appeals. “Non-functional” denotes information that appeals to emotion, whim, vanity, status, or anything else unrelated to what the product or service actually does.<sup>166</sup> Non-functional information is treated here as something different from information or the presentation of information, the success of which depends on decision-making biases that have been discussed over the last twenty-five years by behavioral economists and others studying cognitive biases.<sup>167</sup>

Obviously, the potential for this use of information depends on the product. Not many screwdrivers are promoted as making the buyer younger or more attractive. On the other hand, many automobile advertisements clearly appeal to the type of image the driver would like to project. Two problems emerge. First, What if the information itself, albeit non-functional in some sense, actually leads to greater subjective well-being? Second, To what extent are people to be excused from their own unwillingness to examine the assertions of others more closely?

The complexity of the issue for a theory of decisional equity can be understood by reference to a recent experiment. Subjects were served wines that they were told were very different in terms of price.<sup>168</sup> In fact the wines were the same.<sup>169</sup> Not only did the subjects claim to prefer the higher priced wine, brain scans suggested that they actually experienced greater satisfaction from that wine.<sup>170</sup> It seems unlikely that such results are isolated to wine. For example, beer commercials may actually increase a person’s sense of social happiness the next time that person consumes the beer. An automobile commercial showing an attractive person asserting independence while driving a convertible may make the positive feelings more pronounced when the buyer drives the car.

There are a couple of reactions to this. The first might be to ban non-functional advertising. Not only would this lead to serious First Amendment issues, but it too quickly classifies the non-functional as something to be avoided.<sup>171</sup> Is there a principled distinction between owning and using a

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166. A product could, however, have an aesthetic appeal.

167. See *infra* Part V.B.2.b.

168. See Hilke Plassmann et al., *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*, 105 PROC. NAT’L. ACAD. SCI. 1050, 1050 (2008).

169. *Id.*

170. *Id.* at 1050–51.

171. On the other hand, there seems to be little reason for public subsidization of arguably non-functional qualities. This is, however, the direction trademark law has taken. As one court has put it: “[A] loss occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the *status* of owning the

stapler and feeling pleasure each time it reliably operates and driving a convertible that creates pleasant associations with being young, attractive, and free? More importantly, By what standard would the “worth” of one type of pleasure be ranked ahead of another? The fact is that the information itself may give rise to the pleasure.

The important step in the context of decisional equity is to avoid this debate. The temptation to be pulled into it is captured nicely by the authors of the wine study when they write:

[O]ur results have implications for economics. [Experienced pleasantness] is an important component of experienced utility, which is the economist’s term for subjective well being. We show that, contrary to the standard economic view, [experienced pleasantness] depends on nonintrinsic properties, such as the price at which they are sold. It then follows that marketing manipulations might affect subjective perceptions of well being. This raises several difficult questions for the field. Should the effect of prices on experienced utility be counted as real economic well being or as a mistake made by individuals?<sup>172</sup>

Note that the authors’ statement of the problem follows the traditional path. The question is, in essence, Should this be counted as an output? This just leads to a string of imponderables. Does Prozac increase well-being or just a sense of well-being by changing the way various brain functions operate? Are people actually better off when they do not know of an impending illness? The point is, as illustrated throughout this Article, that the output assessment is a trap of circular reasoning, arguments and counterarguments, and indeterminacy.

In fact, non-functional information is only a problem if it clouds the decision-making process itself by generating false expectations. In the context of the wine example, the problem is not that a person enjoys the \$100 wine more than the identical \$20 wine but that the pricing may create false expectations about future purchases. In short, the focus of decisional equity is not on what *should* be counted as utility or happiness but on whether the information has the potential to mislead or to convince a buyer

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genuine article at a knockoff price.” *Hermès Int’l. v. Lederer De Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000) (emphasis added). See also generally Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195 (2007); Richard S. Higgins & Paul H. Rubin, *Counterfeit Goods*, 29 J.L. & ECON. 211 (1986).

172. See Plassmann et al., *supra* note 168, at 1052.

that certain results will or will not occur when the seller has no good faith belief that those results actually will occur.

The second problem concerns personal autonomy and ensuring that decisional equity does not intrude on that autonomy. Decisional equity means that a person with unrealistic expectations should not be permitted to recover. A case that illustrates the difficulty of this distinction is the famous dance lesson case, *Vokes v. Arthur Murray, Inc.*,<sup>173</sup> in which a fifty-two-year-old widow, Mrs. Vokes, ends up buying a total of 2,300 hours of dance lessons at a cost of \$31,000.<sup>174</sup> She was evidently motivated by repeated assurances that she had “grace and poise” and great potential.<sup>175</sup> In fact, she did not progress, had little dance aptitude, and even had difficulty “hearing the musical beat.”<sup>176</sup>

What makes the case difficult are a series of questions. Did Vokes really believe she would become an accomplished dancer if, in fact, she knew she could not hear the beat of the music? Was she actually and knowingly paying for companionship, or should she have known she was? Or, on the other hand, Was she unable to think clearly given the barrage of misleading information that she encountered? Decisional equity does not assist the person who is willfully ignorant.

One important distinction *Vokes* suggests is between instances of changing one’s mind and those in which legitimate expectations are not met. For example, Vokes may have, at some point, just wished she had not spent so much money on dance lessons. Or, it may be that she realized the expectations created by the cajoling of the instructors were not likely to be met. In some sense, the critical concept is whether those expectations were actually *created* by others.

Precisely what decisional equity calls for in the context of non-functional information is difficult to describe. Ideally, people would become more sophisticated in their evaluation of information. In fact, to some extent this end has been achieved—it would be surprising if many people took the suggestions found in television and print advertisements seriously. Still, a case can be made that greater awareness of these vulnerabilities has a public-good-like character and that this public effort in raising awareness is warranted.

The basis for reacting to non-functional information as described here follows from the general rule that a person who creates a misimpression must correct it or be viewed as having engaged in a misrepresentation. In fact, when any product or service is put onto the market and portrayed

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173. 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

174. *Id.* at 908.

175. *Id.* at 907.

176. *Id.* at 908.

*exclusively* in a positive light, the logic of the misrepresentation rule calls for a fuller disclosure.<sup>177</sup> These disclosures already exist in many areas related to nutritional information and consumer safety.<sup>178</sup> Plus there is a significant private market for information pertaining to product quality and durability. Broader efforts to correct misimpressions in broadcast and print media could be furthered by requiring that objective consumer product information be attached to all such ads.<sup>179</sup> For example, in the case of automobile ads, like the side effect warnings for prescription drugs, information could be included about average repair costs, repeat buyers, and average trade-in values. Airline ads could be accompanied by statistics indicating percentage of on-time arrivals, average age of fleet, and pilots' years of experience.<sup>180</sup> In fact, the vast amount of information that could be useful to buyers is either already available to them but involves high transaction costs or is kept secret by producers. Moreover, non-disclosure of this information is generally to achieve distributive ends,<sup>181</sup> the fear being that the information would render the market more competitive or diminish the value of the product.

The argument is more compelling when one considers why broader disclosure is not already the norm. It cannot be that consumers have no right to the information. After all, the logic of misrepresentation by silence seems to extend equally to non-functional information. Otherwise one is in the awkward position of arguing, for example, that airline passengers have no right to know the age of a particular aircraft even though airlines routinely stress safety, albeit in somewhat subtle ways. The lack of greater disclosure seems to be a function of market power. Sellers reveal as little as possible about the downside of a purchase because buyers are unable to locate suppliers who are more forthcoming. Thus, permitting non-disclosure in

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177. This seems a logical extension of section 161 of the Restatement (Second) of Contracts.

178. As has been pointed out, the way the information is presented can be as important as its disclosure. See Jolls & Sunstein, *supra* note 14. For example, a generalized statement that something may be harmful is less effective at overcoming the inherent optimism bias than a warning that includes an example. *Id.* at 209–17.

179. For a spirited discussion of whether current disclosure requirements are sufficient as a response to persistent consumer error, compare Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008), with Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008).

180. See United States Bureau of Transportation Services, United States Department of Transportation, <http://www.bts.gov> (providing statistical information regarding airlines) (last visited Apr. 9, 2009).

181. See Bar-Gill, *supra* note 179, at 780 (making the point that redistributions associated with non-disclosures may be regressive).

many instances is not only inconsistent with the requirement that parties correct misimpressions they have created but arises, in part, as a result of market imperfections that permit the most efficient producers of the information to conceal it.

## 2. The Psychic Ideal

### a. *The Dynamics of Desire*

One of the underrepresented elements in any decision making is not just that individuals become locked into efforts to achieve specific outcomes but that they do not consider the prospects of not having the desire in the first place. There is an important distinction here. Presumably when deciding whether to buy something individuals, perhaps only in a cursory sense, compare how they will feel with and without, for example, the new car or vacation. Some informal cost-benefit analysis would seem to be the ideal if only for its consistency with rationality. One can picture the decision maker making a list of pros and cons.

Beyond most people's consciousness, there is a third possibility, perhaps more critical to the information ideal than any other—How would it feel not to have the desire at all? On a practical level we know it is possible to get there. People frequently are faced with pressing decisions that months later they can see from a different perspective that enables them to realize how little what seemed like a critical decision actually meant. Often times, hearing about the misfortune of someone else is said to “put things in perspective.” The event allows people to recognize how inconsequential their own decisions are. In a sense, they see decisions in a broader context and realize that “in the scheme of things it did not matter at all.”

At those moments, individuals are able to separate needs from desires.<sup>182</sup> In a general sense, needs are those things one cannot do without. Desires, on the other hand, may create a tremendous sense of longing, but this discomfort can be extinguished not only by acquiring or achieving the subject of that “want” but also by ridding oneself of the desire.<sup>183</sup> There is obviously a close connection with this view of desire and the Four Noble Truths of Buddhist thought:<sup>184</sup>

#### 1. Life means suffering.

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182. See Harry G. Frankfurt, *Necessity and Desire*, 45 PHIL. & PHENOMENOLOGICAL RES. 1 (1984).

183. These may also be viewed as “natural” or “empty” desires. Empty desires are “infected with the falsity of the evaluative beliefs that ground them; and also because they tend to be vain or self-defeating, reaching out for a ‘boundless’ object that can yield no stable satisfaction.” MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE* 112 (1994).

184. See Feldman, *supra* note 73, at 103.

2. The origin of suffering is attachment.
3. The cessation of suffering is attainable.
4. There is an eight-fold path to the cessation of suffering.

Critical in this analysis is the notion of attachment and suffering. Attachment in this context means desiring or being “fixed” on things, ideas, and even self. The connection is fairly obvious. Wanting creates a sense of not being fulfilled, i.e., suffering. In all likelihood, especially when it comes to material things, obtaining whatever is giving rise to that suffering provides only temporary relief. New needs emerge. One can understand how this happens. The standard example is one in which having bought a new coat, it becomes evident that one’s other clothing is in need of updating.<sup>185</sup> Or, under set point theory,<sup>186</sup> regardless of the happiness or unhappiness experienced, the person returns to a steady level of contentment or discontent. What all of this suggests, as noted earlier, is that acquisition is not the key to happiness. Buddhists have a prescription for relieving the suffering by eliminating desire.<sup>187</sup> Without attempting to detail it here or to describe one particular formula, the key idea is that decisional equity would include information or knowledge of the possibility of eliminating unhappiness by diminishing desire.

Other ways to decrease desire involve alterations in perspective. One is to recognize that all desires beyond the natural are socially determined. They are, thus, largely fortuitous and random. At their heart is a loss of personal control. This idea has an important cognitive element because it requires seeing oneself in a position of control. The different context strategy also has a temporal element. It is possible to compare current longings with ones as strongly felt in the past and explore whether acquisition or non-acquisition made a significant long-term difference. For example, a person might have a powerful desire for a new car and decide against buying one. Years later, that person may reflect and decide things turned out better or that it was silly to have made such a big deal at the time. Another “perspective” moment can occur when one is face-to-face with those who have much less or can recall being happier with less.<sup>188</sup> Similarly,

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185. One possibility is the “Diderot effect,” which means that acquisition of one new thing actually increases desire as it becomes evident that one’s other possessions are not as new or as fashionable. See JULIET B. SCHOR, *THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON’T NEED* 145–47 (1998).

186. See *supra* notes 62–63 and accompanying text.

187. See, e.g., THICH NHAT HANH, *THE HEART OF BUDDHA’S TEACHING* 24–40 (1998).

188. According to one author, people tend to be in a form of denial at the time of a purchase and then later see themselves as having been foolish. See SCHOR, *supra* note 185, at 74–84.



if a serious misfortune befalls the person or someone close to that person, the “little things” seem far less important.

Law for the most part has no way to assist people in achieving an understanding of the potential of becoming happier by extinguishing desire in the Buddhist tradition. Perspective-changing, however, as discussed further below, can be addressed with greater availability of cooling-off periods.<sup>189</sup> In effect, the difficulty of gaining a fresh perspective is tantamount to a transaction cost.

### *b. Decision-Making Biases*

Aside from addressing information imbalances and problems of disclosure, decisional equity requires a response to common decision-making errors.<sup>190</sup> These persistent quirks in reasoning have been explored in a number of scholarly works<sup>191</sup> and more recently in writings with broader appeal.<sup>192</sup> All of these quirks, biases, and tendencies, have in common the fact that they prevent expectations, or at least aspirations, at the time of decision making from lining up with outcomes. At a very simple level, the principal reason for this disconnect is that individuals are unable to experience the outcome until they have made<sup>193</sup> an often irrevocable choice. In other instances, they may have experienced the outcome at a prior time but misremembered it for one reason or another.<sup>194</sup>

These biases can be seen as analogous to the kinds of imperfections that give rise in a conventional analysis to transaction costs.<sup>195</sup> Here the term is

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189. See generally ALLAN FARNSWORTH, ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS (2004); Louis E Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797 (1988).

190. See *infra* notes 195–199 and accompanying text. The most direct effort to address the issue of applying law to avoid mistakes before they happen as opposed to responding to poor decisions by some form of regulation or liability assignment is Jolls & Sunstein, *supra* note 14. For a broad examination of judgment “errors,” see Jeffrey M. Lipshaw, *Law’s Illusion: Scientific Jurisprudence and the Struggle with Judgment* (Suffolk Univ. Law Sch. Research, Working Paper No. 08-20, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1163256](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1163256).

191. See *supra* text accompanying notes 113–119; see also JEFFREY L. HARRISON, LAW AND ECONOMICS: POSITIVE, NORMATIVE AND BEHAVIORAL PERSPECTIVES 63–140 (2d ed. 2007); Jolls & Sunstein, *supra* note 14. A concise recent effort is Blumenthal, *supra* note 4, at 167–82.

192. An early attempt was RICHARD H. THALER, THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992). More recently, economists have hit the jackpot with layperson explanations of well-known economic phenomena and released three books in the space of a few months. See DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); TIM HARFORD, THE LOGIC OF LIFE: THE RATIONAL ECONOMICS OF AN IRRATIONAL WORLD (2008); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISION MAKING FOR HEALTH, WEALTH AND HAPPINESS (2008).

193. Conversely, repeated opportunities to make a decision are likely to be informative, leading to more satisfactory outcomes. See Sunstein & Thaler, *supra* note 2, at 1163.

194. See *supra* notes 100–106 and accompanying text.

195. Jeffrey J. Rachlinski also uses the term “transaction costs” in the context of legal responses to

used to mean any factor that separates expectations from what is experienced.<sup>196</sup> In some respects, it may seem awkward to think of transaction costs in this context,<sup>197</sup> but most if not all of the factors separating reality from the informational ideal could be overcome by lowering costs of one kind or another. These costs are ultimately “psychic” in that they are barriers to more effective reasoning. In fact, the transaction cost *idea* can be connected directly to the idea of decisional equity as an end in itself in a significant way.<sup>198</sup> It is important to note what “overcome” means in this context. It is not a matter of channeling individuals into one outcome or another. For example, understanding the fundamentals of desire of Buddhist philosophy does not mean a predetermination of what the person ought to do. Nor does an understanding of framing effects<sup>199</sup> mean that a

decision-making biases. Rachlinski, *supra* note 19, at 1168. His meaning appears to be different, and I would suggest not entirely consistent with the ordinary usage. *Id.* He writes:

To be sure, learning to restructure a decision so as to avoid reliance on a misleading heuristic is costly. In effect, cognitive psychology suggests that this cost is related to the cognitive difficulty of restructuring the decision making task. This cognitive cost, like a transaction cost, might support adopting a particular legal rule constraining individual choice if the cost is high enough or an inexpensive reform reduces the cognitive cost in some way.

*Id.* This passage seems to equate transaction costs with the cost of remedying the decision-making bias. In fact, transaction costs are typically the information and search costs that individual entities must overcome to achieve optimal outcomes. It is this latter meaning of the term that is employed here.

196. One component of transaction costs is search costs. For example, an individual shopping for a new car may travel from dealer to dealer searching for the best price. In fact, the individual may test drive the car, rent it before committing as a way of experiencing, as accurately as possible, what it will feel like to own the car. The idea is that, at some point, the transaction costs are high enough that any advantage found by way of a lower price do not offset those costs.

197. Transaction costs are generally viewed as responsible for blocking the efficient allocation of resources, and part of the thesis of this article is that the notion of efficiency is not a measure of actual subjective or objective well-being and that direct measures of happiness are suspect. Moreover, transaction costs are typically viewed as actual out-of-pocket expenditures.

198. In this sense, what follows can be distinguished from others who have written about decision-making biases as preventing efficient outcomes. See Jolls, Sunstein, & Thaler, *supra* note 19, at 1487.

199. Preference reversals occur when questions are framed differently. A classic example is the Tversky and Kahneman experiment in which people are asked what is objectively the same question in two different forms. See Amos Tversky & Daniel Kahneman, *Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981). People are asked to imagine an epidemic in which 600 people are expected to die. They are then given two choices. Under Program A, 200 people will be saved. Under Program B, there is a one-third probability that 600 people will be saved and a two-thirds probability that no people will be saved. Subjects preferred Program A by almost a three-to-one margin. They were also given these two choices: (1) If Program C is adopted, 400 people will die; (2) If Program D is adopted, there is a one-third probability that nobody will die and a two-thirds probability that 600 people will die. Framed this way, subjects preferred Program D by more than a three-to-one margin. Although the questions are objectively the same, stating the choice in

specific outcome is achieved. In fact, that possibility is inconsistent with decisional equity. Instead, the goal is to equip each person with the most relevant information. The information is designed to provide a clearer picture of the issue faced as a means of allowing the decision maker to peer into the future.

In a sense, the cost is the infinitely high cost of a time machine or, less fancifully, the cost of searching for what the future will be like. Sometimes, however, the costs can be lowered. For example, a person who has had an experience will have some advantage over someone who has not. The student reading about preference reversals,<sup>200</sup> endowment effects,<sup>201</sup> and optimism biases<sup>202</sup> will be more sensitive to these matters than the student who has not. And, to go back to the question of desire, the individual who has read about the topic will be more likely to apply some introspection in an effort to discover why certain wants develop.

As noted earlier, law is fairly well-equipped to deal with what have been labeled transaction information imbalances. It is not nearly as well-equipped to deal with desire and decision-making biases.<sup>203</sup> The ideal of actually “trying on” the future is, of course, impossible to achieve. This does not mean, however, that contract law does not have a variety of tools that permit these visits. Certainly, a possibly strained notion of misrepresentation can address these matters.<sup>204</sup> Contract doctrines addressing capacity<sup>205</sup> and unconscionability<sup>206</sup> also indirectly address these problems. In reality, all of these doctrines address the overriding transaction cost—the general inability

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different terms alters the perception of the issue and may mean different responses. For a more recent discussion, see Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AMER. PSYCHOLOGIST 697 (2003) [hereinafter Kahneman, *Mapping Bounded Rationality*].

200. See description *supra* note 199.

201. Endowment effects occur when people value the same thing differently depending on whether they currently possess it. For example, someone might be willing to pay only \$20 for a book in a bookstore, but if that individual currently owns the book, the lowest price taken to sell it might be \$25. See Knetsch & Sinden, *supra* note 48.

202. Social scientists have discovered that individuals tend to underestimate the possibility of a negative outcome. See generally W. KIP VISCUSI ET AL., LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSE TO HAZARD INFORMATION 93–96 (1987); Van den Steen, *supra* note 52. For a discussion in the context of the enforcement of liquidated damages clauses, compare Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000), with Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633 (2001).

203. The most ambitious effort to date to address how law may be applied to offset some of these biases is Jolls & Sunstein, *supra* note 14.

204. See *supra* text accompanying notes 141–165; see also RESTATEMENT (SECOND) OF CONTRACTS §§ 174–77 (1981) (explaining similar notions such as duress and undue influence).

205. More specifically, doctrines dealing with age, cognitive and volitional impairment, and intoxication come into play here. See RESTATEMENT (SECOND) OF CONTRACTS §§ 12–16 (1981).

206. *Id.* at § 208.

to experience or at least comprehend an outcome before actually committing to it. They do this by looking into the decision-making process and essentially labeling some types of influence as permissible and some as not. For the most part the types of influences that are impermissible are those that make it more difficult—in effect, raise the transaction costs—for one of the parties to fully understand what it will feel like in the future.

Perhaps the most direct way in which contract law permits one to examine the future is through the use of cooling-off periods.<sup>207</sup> A cooling-off period allows a person to do two things. First, it provides an opportunity to “try on” the future to see how it feels. For example, Does it really feel better to “own” the new car or does ownership produce a sense of regret? If owning the new car causes regret, the implication is that what was valued was successful completion of the transaction as opposed to the object of the transaction itself. Unlike an empirical study, however, one cannot “hold constant” for one factor until the other is isolated. Second, it allows time for a different perspective to develop with respect to what factors are involved in the decision.<sup>208</sup> For example, a reassessment of the transaction may assist the individual in responding, perhaps more reasonably, to tactics that a salesperson used to take advantage of typical biases.<sup>209</sup>

The cooling-off period option fits nicely with the general belief among social scientists that individuals possess two cognitive systems—one intuitive and the other rational.<sup>210</sup> The intuitive is fast, emotional, and automatic. Reasoning is slower and takes effort.<sup>211</sup> Here again the analogy to conventional transaction costs is apt. In that context, it is not simply the

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207. See Camerer et al., *supra* note 2, at 1238–42; Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 582; Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 486 (2008); Erin O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1932–35 (2005); Rachlinski, *supra* note 19, at 1222; Sunstein & Thaler, *supra* note 2, at 1188; Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797, 802 (1988). Possibly the best known cooling-off period is that applied by the Federal Trade Commission to door-to-door sales. It allows consumers to change their minds within three days. See 16 C.F.R. § 429.1(a) (2008); see also E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 24 (1998).

208. Rachlinski, *supra* note 19, at 1224.

209. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 450–52 (2002).

210. See generally Kahneman, *Mapping Bounded Rationality*, *supra* note 199, at 698–701; Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAV. & BRAIN SCI. 645 (2000).

211. Kahneman, *Mapping Bounded Rationality*, *supra* note 199, at 698. There is a similarity here as well to the distinction between “controlled” and “automatic” responses. See HAITT, *supra* note 4, at 13–17.

existence of transaction costs that can limit exchange but that a decision must be made in a timely fashion, thus increasing search and other forms of transaction costs. In the context of decision errors, the ability to make an informed choice that is relatively unaffected by decision biases increases with the time allowed. Cass Sunstein and Richard Thaler rightfully point out that cooling-off periods are more appropriate when individuals are making decisions with which they have little experience and which are characterized by high emotions.<sup>212</sup> Both of these factors raise the cost of matching expectations with outcomes.

Thus far the methods discussed all involve ways in which parties are permitted to feel the outcome of a decision before fully committing to it. Sunstein, writing with different coauthors, has proposed two other approaches to the problem. Along with Thaler, Sunstein has proposed default options.<sup>213</sup> This approach would entail the use of automatic adoption of outcomes that are consistent with what bias-free reasoning would choose.<sup>214</sup> Decision makers could opt out of these choices, but the inherent stickiness of decision making might mean that they choose not to opt out.

More recently, Sunstein and Christine Jolls have described an approach designed to affect the problem at the core.<sup>215</sup> Instead of shielding people from the outcomes of decisions, they propose the creation of legal rules that are directed to debiasing the decisions themselves.<sup>216</sup> In effect, they describe a variety of ways to lower the costs of connecting to the future. For example, in response to the tendency of people to discount the possibility of negative outcomes, they propose the use of specific examples to make those outcomes more vivid.<sup>217</sup> They also propose the reframing of dangers in negative terms in order to offset the optimism bias.<sup>218</sup> These examples are, in many respects, ways to encourage individuals at the decision-making stage to actually “experience” the future not simply by supplying more information but by the careful presentation of particularly relevant information in a form that is more conducive to avoiding common errors in selected situations.<sup>219</sup>

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212. Sunstein & Thaler, *supra* note 2, at 1188.

213. *Id.*

214. *Id.*

215. Jolls & Sunstein, *supra* note 14.

216. *Id.* at 199–202.

217. *Id.* at 209–15. This proposal is supported by studies indicating that people are more likely to make accurate estimates when given concrete examples to which they can relate the general question. *Id.*

218. For example, warnings related to risks of usage would be framed in terms of likelihood of harm as opposed to the likelihood of safe use. *Id.* at 206, 216.

219. Jolls and Sunstein view this approach as less paternalistic than approaches that take supposedly irrational options away from decision makers. It not clear that choosing the information and the form in which it is to be delivered can fully escape having a strongly paternalistic influence.

As such, there is an array of ways to approach decision biases. None is completely satisfactory, and the ideal of eliminating all decision bias is likely impossible to achieve. Many operate more or less covertly under traditional contract doctrines. Their impact with respect to decision biases is somewhat minimal in that each doctrine—misrepresentation, duress, undue influence, capacity—requires triggering by identifiable factors.<sup>220</sup> These triggering events do not necessarily coincide with instances of decision bias. Of these, however, an expansion of misrepresentation is the most promising.<sup>221</sup> For example, a seller who frames a warning or even general information in a way to take advantage of known decision biases is a little different from a merchant telling half-truths.<sup>222</sup> In both instances there is an element of predation in the sense that one party raises what might be called the psychic transaction costs of another. The purpose is to conceal information by raising the cost of effective reasoning.

Perhaps the most neutral possibility is the expansion of cooling-off periods.<sup>223</sup> In these instances there is no decision about what information is most important or how it should be presented. Nor are possibly more paternalistic measures involved.<sup>224</sup> As already noted, a more broadly applied cooling-off period works on the decision bias or psychic transaction cost problem by allowing individuals to experience the change in position, albeit lightly, and extend the time for less impulsive thought processes to engage.

Both the traditional contract doctrines and an expansion of those transactions to which cooling-off periods apply have limits. For example, the traditional contract doctrines only come into play when one party has increased the psychic transaction costs above what they otherwise would be. Both traditional contract doctrines and cooling-off periods seem to apply

*See generally* Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J. L. & LIBERTY 411 (2007); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005). Jolls and Sunstein also describe debiasing techniques that respond to the endowment effect. *See* Jolls & Sunstein, *supra* note 14, at 219–25.

220. Most are obvious, but in the case of duress, the event is an improper threat. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 (1981).

221. For a discussion of Federal Trade Commission regulations that have the same goal, *see* Jolls & Sunstein, *supra* note 14, at 215–17.

222. For evidence that marketers are fully aware of decision biases, *see* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 637 (1999), and Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1425–27 (1999).

223. The neutrality suggested here goes to the content of the final decision. Colin Camerer and his coauthors rightfully point out that the general policy is paternalistic and not cost-free. *See* Camerer et al., *supra* note 2, at 1239–40.

224. One possibility—mandatory cooling-off periods—would have a more paternalistic flavor.

most easily to agreements and to decisions that can be easily “undone.” Even if “agreement” can be applied very broadly,<sup>225</sup> many critical life decisions—families, school choice, medical care, etc.—do not fall into the “undoable” category.

The implications of proposals that address the choices available or the form in which information is supplied through direct regulation are more nuanced and perhaps hold greater promise than traditional methods, but they too have limitations. For example, not all people experience the same biases to the same degree.<sup>226</sup> Nor are they present at the same level in all transactions. Thus, a regulatory approach runs the risk of excessive complication and paternalistic tendencies. As an example of this, consider the possibility of a warning label designed to overcome an optimism bias. One warning on a package of cigarettes may read “Cigarette smoking may be hazardous to your health.” If the optimism bias is in play, the reader is inclined to assume that if anyone’s health is affected it will be someone else’s. Or the warning label may read “Cigarette smoking causes cancer” and include a photo of a decaying lung.<sup>227</sup> The effect may be to make the decision to smoke or not to smoke more “rational” by decreasing the likelihood that the optimism bias will influence the decision. The information, however, is unlikely to affect only the decision. As such, like the impossibility of “unringing the bell,” the person who chooses to smoke, unfettered by a decision bias, may turn out to enjoy it less because of the images found on the package. It may be impossible in many instances to untangle the benefits of addressing decision biases from the costs imposed on those who then rationally choose to pursue the activity.<sup>228</sup> Nevertheless, in the interests of decisional equity, there may be many relatively inexpensive measures that do not involve a refined analysis.

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225. See Camerer et al., *supra* note 2, at 1240 (noting that decisions like marriage and divorce could be susceptible to treatment by cooling-off periods).

226. See generally Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006); Mitchell, *supra* note 19, at 69. One risk, as noted by Jolls and Sunstein, is the possibility that individuals who are already sensitive to risks will overreact. Jolls & Sunstein, *supra* note 14, at 230.

227. Jolls & Sunstein, *supra* note 14, at 214–15.

228. Colin Camerer and his coauthors propose asymmetric paternalism as a response to decision bias. See Camerer et al., *supra* note 2, at 1219. Under this approach, techniques to respond to biases would be implemented as long as the benefits to “boundedly rational” decision makers offset the costs to rational decision makers. *Id.* The approach recognizes that individuals may be affected in different degrees by cognitive biases. Whether the consumption effect identified here is anticipated by their analysis is not clear.

### 3. The Social Ideal

In addition to the biases discussed above, information and how it is processed can be a function of perceptions of fairness and adaptations to unfairness that may be status-based. To illustrate how this works, consider this example of actual behavior. Two professors are hired to teach at a law school. At the time of accepting the position, neither thinks to negotiate about moving expenses. Both are destined to incur the same relocation expenses. Late in the summer before beginning their new duties, each receives a letter from the Dean indicating that the school will pay moving expenses up to \$4,000. One faculty member from a relatively privileged background is incensed and writes to complain that \$4,000 is not enough. The second faculty member, from a working-class background, is simply happy to hear the unexpected good news.<sup>229</sup>

In this instance, the faculty member from the relatively privileged background feels deprived. More specifically, he feels deprived relative to a reference group. The other faculty member has no complaints. Her social context does not include family members who have reached a professional status that is consistent with having moving expenses paid for. This is, in fact, what relative deprivation theory<sup>230</sup> suggests: individuals assess fairness by comparing their outcomes to the outcomes for other members of a specific reference group. In the example, one law professor did not feel “deprived” because moving expenses are for “other people.” Individuals who experience a sense of relative deprivation<sup>231</sup> believe they are entitled to more.<sup>232</sup> Those who lack it are likely to be satisfied with less.<sup>233</sup> At the most basic level the actors are responding to different information in the form of socialization about their status, whether legitimate or not. It is hard to square a class-based influence with decisional equity.

229. See, e.g., Martin, *supra* note 79, at 217; Sara J. Solnick & David Hemenway, *Is More Always Better?: A Survey on Positional Concerns*, 37 J. ECON. BEHAV. & ORG. 373 (1998).

230. The term “relative deprivation” is used in a number of interrelated ways. First it may simply refer to the fact that some citizens have less than others mainly with respect to public services or necessities. They are, in effect, “relatively deprived.” From a more sociological perspective, the term is used to describe situations in which there is a sense of being relatively deprived. Here, it means that people believe they deserve better. Lacking a sense of relative deprivation suggests people are satisfied with their status at work or in life generally. Finally, one may be sensitive to relative deprivation but not have a sense of relative deprivation.

231. In other words, the person feels relatively deprived in a subjective sense.

232. See J. Stacy Adams & Sara Freeman, *Equity Theory Revisited: Comments and an Annotated Bibliography*, in 9 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 43 (Leonard Berkowitz & Elaine Walster eds., 1976).

233. See generally Harrison, *supra* note 82, at 478.



In many respects, the socialization bias may be more important than the decision-making biases discussed above. The effects may be to retard upward mobility, perpetuate class stratification, and generate social and individual unrest.<sup>234</sup> Interestingly, with very small exception,<sup>235</sup> the scholars who have plowed the field of cognitive distortions and biases over the past thirty years have paid little attention to the impact of relative deprivation. Part of the reason may be that a great deal of those commenting on the former field ultimately seem concerned with efficiency goals. The economic importance of relative deprivation and related ideas like equity theory<sup>236</sup> is seen as limited to distributive outcomes. In fact, this is not the case. To the extent a sense of relative deprivation is consistent with disutility, even the most efficiency-minded economist should regard it as something to address for efficiency purposes.<sup>237</sup>

Relative deprivation as a source of disutility leaves the efficiency-conscious person with two questions: What is the least expensive way to extinguish the disutility? Is the cost greater or less than the benefit? For example, it might be efficient to decrease the sense of relative deprivation by reinforcing adaptive tendencies that remove the psychic discomfort. Thus, individuals may begin to accept personal responsibility for things over which they have no control, give in to the feeling that whatever class stratification exists is, in fact, justified, or find other ways to adapt in order to avoid the discomfort or dissonance of feeling deprived.<sup>238</sup> Most important is the tendency for people to pick as a reference group those who are similar and then conclude that they are not deprived relative to that group.<sup>239</sup> Finally, they may create an imaginary reality in which their position is

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234. There is a distinction between egoistic relative deprivation and fraternal deprivations. As the labels suggest, in the former case a person may examine the group he views himself as part of and feel deprived relative to that group. In the case of fraternal deprivation, the view is that the group is not properly placed. See W.G. RUNCIMAN, *RELATIVE DEPRIVATION AND SOCIAL JUSTICE: A STUDY OF ATTITUDES TO SOCIAL INEQUALITY IN TWENTIETH-CENTURY ENGLAND* 31–35 (1966); Francine Tougas & Ann M. Beaton, *Personal and Group Relative Deprivation*, in *RELATIVE DEPRIVATION: SPECIFICATION, DEVELOPMENT, AND INTEGRATION* 119 (Iain Walker & Heather J. Smith eds., 2002).

235. See Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323 (2001).

236. See Adams & Freeman, *supra* note 232, at 43.

237. See Robert H. Frank, *The Frame of Reference as a Public Good*, 107 ECON. J. 1832 (1997).

238. See ELSTER, *supra* note 82, at 109–33. George C. Homans puts it this way: “[W]hat people say ought to be is determined in the long run . . . by what they find in fact to be the case.” GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* 250 (rev. ed. 1974).

239. See Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1254–55 (2000) (discussing how this frame of reference may evolve); see also Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a ‘Race Making Situation,’* 35 U. MICH. J.L. REFORM 749, 793–800 (2002).

similar to others.<sup>240</sup> In effect, from a purely economic perspective, it may be efficient to devote public resources to legitimizing the status quo, whatever that happens to be.<sup>241</sup>

Such an approach is not consistent with decisional equity. Decisional equity, at the most basic level, calls for accurate perception of information of all kinds, including one's own value relative to all others. The adaptations people make to what would be perceived as inequities filter this information. The question for decisional equity is how to react to these filters. One approach is to decrease the need for the filters. Another is to decrease their effectiveness.

*a. Decreasing the Need for Filters*

In order to understand how these two approaches work, think of a small town in which there is one employer—a textile factory. The workers earn an average of \$7.00 per hour and live on one side of town. Generally their jobs are the same ones their parents held. Management makes significantly more and lives on the other side of town. There is little upward mobility, and if asked, the workers might indicate that it is a matter of supply and demand<sup>242</sup> and the fact that they have only limited skills. They may feel little resentment because they have adapted in order to avoid the dissonance associated with feeling unfairly paid. Needless to say, the adaptation would be unnecessary if the disparity between rich and poor in the town were less.<sup>243</sup> By removing the need for the adaptations that filter out the feelings of injustice, decisions are less likely to be influenced by these factors. More directly, people are more likely to stop accepting what is and think in terms of what can be if they view the range of realistic expectations as being broader.

The idea of creating a context in which perceptions of injustice would be less is a broad one and not original. Economist Robert H. Frank, starting from the proposition that subjective well-being is largely a relative matter,

240. This follows from the tendency to overestimate the extent to which their views are similar to those of others in order to feel good about those views. For a more complete discussion and case studies, see George R. Goethals, *Fabricating and Ignoring Social Reality: Self-Serving Estimates of Consensus*, in 4 RELATIVE DEPRIVATION AND SOCIAL COMPARISON: THE ONTARIO SYMPOSIUM, *supra* note 79, at 135.

241. It seems clear that the status quo does have value. See John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSY. 881 (2004).

242. See Martin, *supra* note 79.

243. See generally William H. Panning, *supra* note 84.

has proposed taxing consumption.<sup>244</sup> Frank's proposal is based on the utility-increasing impact of lower levels of disparity.<sup>245</sup> In the context of decisional equity the reasoning is different. The goal is to reduce the need for adaptation that skews the perceptions of justice.

*b. Decreasing the Effectiveness of Filters*

If psychological filters are adapted to protect individuals from experiencing a sense of relative deprivation, it may seem counterproductive to propose decreasing their effectiveness. The problem is that the filters avoid the disutility by distorting reality. Removing them is likely to make people feel worse off and agitated in the short run and even in the long run if the factors creating the sense of deprivation are permanent.<sup>246</sup> Too much concern about this, however, means falling into the trap of putting imprecise outcome goals ahead of process. Removing the filters is comparable to providing accurate information that creates the sense of deprivation. An important distinction is, however, warranted here. When an individual instinctively responds only to bare outside data, it is probably more accurate to say that the individual is already *sensitive* to relative deprivation but has not *sensed* relative deprivation until hearing the news. Thus, a worker may become unhappy upon hearing another worker doing the same job is paid more or that someone paid a lower price for the same car. This dissatisfaction may then lead to action. More difficult is the case of an individual who has adapted to such an extent that the individual is not sensitive to relative deprivation. In this case, the different wage or price paid for the car is attributed to factors that make them seem fair.

In the first case, the problem is relatively simple. The information itself creates the decisional equity. In the second case, something more is required. For example, in the instance of the textile workers described above, to be effective the information needs a contextual element. The news may come in the form of finding out that unionized workers doing the same work elsewhere are paid significantly more. Thus, even if they have chosen only workers with the same level of skill as the relevant reference group, it will be hard to filter out completely the question of why they should earn any less. In days when organized labor was more active, this news might

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244. See FRANK, *supra* note 4, at 246–50. Frank views the disutility from economic disparities as a type of externality. *Id.* at 122–23. In a sense, what has been described here are filters designed to decrease the impact of the externality. See also Michael J. Boskin & Eytan Sheshinski, *Optimal Redistributive Taxation When Individual Welfare Depends Upon Relative Income*, 92 Q. J. ECON. 589 (1978).

245. See FRANK, *supra* note 4, at 248–50.

246. A sense of relative deprivation has been associated with higher levels of crime. See, e.g., Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 122 (1982).

come from a union organizer. The information must make prior adaptations relatively ineffective in order to create the sense of relative deprivation that leads to decisions made with clarity.

To be sure, the information is double-edged. Efforts may both elevate individuals' sense of worth and create dissonance because they feel deserving of more than they have. This dissonance may result in more adaptive behavior or action to either correct or protest against the injustice.<sup>247</sup> Most important for decisional equity, the perception of injustice may mean that the decision that follows is made with greater information than existed when the subject had effective filters.

In the harder case of the person who is insensitive to relative deprivation, there may be a need for some kind of catalyst. In these cases, the most likely source of enlightenment and action is through *fraternal* relative deprivation.<sup>248</sup> This means essentially raising the consciousness of an entire class of people to the possibility of a shared unfairness. In effect, each person remains the same within the relevant group, but the group itself develops norms that are adopted by all.<sup>249</sup> Possibly the best examples of this are the American experience with respect to race<sup>250</sup> and other social movements.

Of the three ideals incorporated into decisional equity, the possibility of the disadvantaged achieving the ability to make decisions beyond the cloud of class-based preferences seems the most remote with respect to changes law can bring about. Reducing differences with a policy of taxing consumption as proposed by Professor Frank seems unrealistic. Similarly, courts seem generally unresponsive to social class-based claims that might

247. See Robert MacCulloch, *Income Inequality and the Taste for Revolution*, 48 J.L. & ECON. 93 (2005); Steven Stack, *Income Inequality and Property Crime: A Cross-National Analysis of Relative Deprivation Theory*, 22 CRIMINOLOGY 229 (1984); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 789 (1994).

248. See *supra* note 234.

249. See generally Joanne Martin & Alan Murray, *Catalysts for Collective Violence: The Importance of a Psychological Approach*, in *THE SENSE OF INJUSTICE* 95 (Robert Folger ed., 1984); Stephen C. Wright & Linda R. Tropp, *Collective Action in Response to Disadvantage: Intergroup Perceptions, Social Identification, and Social Change*, in *RELATIVE DEPRIVATION: SPECIFICATION, DEVELOPMENT, AND INTEGRATION*, *supra* note 234, at 200.

250. See Lise Dupé & Serge Guimond, *Relative Deprivation and Social Protest: The Personal-Group Issue*, in 4 *RELATIVE DEPRIVATION AND SOCIAL COMPARISON: THE ONTARIO SYMPOSIUM*, *supra* note 79, at 210. It seems clear that the church has played an important role in this development. See Rosemary D'Apolito, *The Activist Role of the Black Church*, 31 J. BLACK STUD. 96 (2000). Recent news events involving Reverend Dr. Jeremiah A. Wright, Jr. also provide insight into the role of some Black churches. See, e.g., Jeff Zeleny & Adam Nagourney, *An Angry Obama Renounces Ties to His Ex-Pastor*, N.Y. TIMES, April 30, 2008, at A1.

have the impact of affirming a sense of relative deprivation.<sup>251</sup> Individuals may change from time to time and develop a legitimate sense of relative deprivation, but as already noted, it is doubtful that anything less than a class-wide phenomenon would make a substantial difference.

Perhaps the most difficult problem is deciding which groups are entitled to feel relatively deprived. Clearly middle-class people and the wealthy could reach a conclusion through the development of a sense of relative deprivation that they are entitled to more. In the example set out at the beginning of this section, the upper-class law professor complained of the moving expense allocation because he felt deprived relative to the group of which he was a part. In addition, some may feel relatively deprived by looking at those who have less and concluding that the difference should be greater. The problem is identifying and isolating those groups who make decisions on the basis of lowered expectations that are adaptations to class. Whether there is any legal mechanism for achieving this is doubtful.

## VI. SUMMARY

The connection between efficiency and well-being has been undergoing scrutiny for a number of years. Recent emphasis on direct measures of happiness is an improvement but also imperfect. Questions arise with respect to whether well-being is a subjective or objective notion and, if subjective, When does the feeling of happiness count? Given the indeterminacy of all outcome measures, this Article suggests changing the emphasis to process—specifically to the decision-making process.

The ideal of decisional equity requires addressing three areas—information imbalances, psychic biases, and adaptations to social conditions. All of these affect the decision-making process to one degree or another creating a separation between what might be called true preferences and expected outcomes. The capacity of legal institutions to respond to these three areas in hopes of achieving ideal conditions is likely to be greatest in the case of information problems and very limited in the case of social adaptations. A fourth area of concern has not been addressed—differences in native intellect. To be sure, these differences also have an impact on decision making. Whether there should be a legal response to these differences is another question deserving of close examination.<sup>252</sup>

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251. To some extent contract has the tools to make individualized changes. See Harrison, *supra* note 82, at 489–500. Note that class plays a role in judicial decision making. See Miriam A. Cherry, *Exploring (Social) Class in the Classroom: The Case of Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 235, 237–39 (2008).

252. This is not to suggest the issue has not been addressed. See, e.g., Erik J.S. Plug et al., *If We Knew Ability, How Would We Tax Individuals?*, 72 J. PUB. ECON. 183 (1999); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145 (2000). The Genetic Information Nondiscrimination Act,

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which recently became law, prohibits discrimination by health insurers on the basis of genetic information. *See* Pub. L. No. 110-233, §§ 101–06, 122 Stat 881 (2008). The outcome is a required cross-subsidization of high-risk insureds by low-risk insureds. This concept is difficult to distinguish from a policy of what might be called genetic equity in decision making.

