

REVIEW

Law and Subjective Well-Being

Thomas S. Ulen[†]

Happiness and the Law

John Bronsteen, Christopher Buccafusco, and
Jonathan S. Masur. Chicago, 2014. 280 pages.

Happiness is like a kiss . . . you must share it to enjoy it.

Bernard Meltzer¹

Most people are as happy as they make up their minds to be.

Popularly attributed to Abraham Lincoln²

INTRODUCTION

In 2005, I was invited to give an address to the annual meeting of the European Association of Law and Economics in Ljubljana, Slovenia. At the urging of my friend and colleague, the distinguished psychologist Professor Ed Diener, I had been reading some scholarship on what is sometimes called “positive psychology”³ (that is, “the study of subjective well-being”⁴ or “hedonic

[†] Swanlund Chair Emeritus, University of Illinois at Urbana-Champaign, and Professor Emeritus of Law, University of Illinois College of Law. I thank the editors of *The University of Chicago Law Review* for their help. I should also say that I know John, Chris, and Jonathan and admire them very, very much.

¹ Web Augustine, *\$500,000* Worth of Inspiring Quotations for Our Times* 96 (Zinfandel 2011).

² See Gerald J. Prokopowicz, *Did Lincoln Own Slaves? And Other Frequently Asked Questions about Abraham Lincoln* 90 (Vintage 2008).

³ Shelly L. Gable and Jonathan Haidt, *What (and Why) Is Positive Psychology?*, 9 *Rev Gen Psychology* 103, 103 (2005).

⁴ John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 *Duke L J* 1603, 1621 (2013).

psychology”⁵), to distinguish its focus on what makes people happy from its focus on what the field’s proponents apparently think of as “negative psychology,”⁶ which involves the study of things that give people psychological difficulties or abnormalities. The happiness literature I was reading was not far removed from the behavioral literature with which I have long been familiar. And just as that behavioral literature proposed a profound challenge to my rational-choice-theory roots in economics, the happiness literature hinted at a profound challenge to another touchstone of economics: that well-being or happiness is so deeply subjective that it can be revealed only through observing the choices people actually make, and that it is incommensurable among individuals.

In this 2005 talk, I sought to summarize the happiness literature and share my sense of why it may be very important for economics. Moreover, given the connection between standard economics and law and economics, I sought to explain why the happiness literature has implications for legal scholarship that are just as important as those of behavioral economics.⁷

Apparently, I misjudged my audience. Although they listened politely and attentively, they were not buying what I was selling. The questions that the audience members posed when I concluded speaking were skeptical, almost incredulous, of my claim that the happiness literature might force legal scholars to rethink some of their fundamental claims. And to my chagrin, I was not adept enough to respond to those questions in such a way as to turn the mood from incredulity to acceptance.

I thought of this episode as I was reading Professors John Bronsteen, Christopher Buccafusco, and Jonathan Masur’s marvelous new book, *Happiness and the Law*. Where I failed, they have succeeded wonderfully. This book accomplishes everything that I had hoped to achieve in my 2005 talk and does so persuasively, thoughtfully, and thoroughly. Moreover, it is delightfully written.

In what follows, I summarize the authors’ work with the intention not simply of reproducing it in an abbreviated form but rather of using it to make the case that the happiness literature

⁵ Id at 1608.

⁶ Gable and Haidt, 9 Rev Gen Psychology at 105–07 (cited in note 3).

⁷ For a treatise on the importance of behavioral economics and its impact on the law, see generally Eyal Zamir and Doron Teichman, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford 2014).

is extremely important to academic and policy-oriented analyses of the law. From time to time, I shall add my own views about additional points that I wish the authors had made or examples that they might have added. But my principal goal is to urge a very wide readership for this important and pathbreaking book.

Happiness and the Law is best described as an introduction to a vast literature rather than a comprehensive treatise. The authors have written a book that is valuable to members of the general legal community, including law students, policymakers, and law professors. In particular, I suspect that the authors hope to make an impact on both those who endorse law and economics and those who are deeply skeptical of law and economics. The book exhibits not only a respectful tone toward law and economics—as one would expect from three distinguished practitioners of that field—but also a sense that the theory contains weaknesses, some of which can be addressed by the happiness literature. The authors are enthusiastic proponents of the use of a happiness standard to examine law, and they skillfully advocate for that use.

To these ends, the book reviews the happiness literature but does so in a rigorous scholarly fashion, not in a casual or didactic voice. The authors' enthusiasm, which they have previously expressed in important law review articles,⁸ is based on organized, compelling, and well-presented evidence rather than on a merely theoretical or philosophical basis.

There are only 185 pages of text, only a few tables and figures, and no off-putting technicalities. But for those who want to dig deeper into the various topics raised, the authors have included seventy-four pages of endnotes and a twenty-two-page bibliography. Between these two resources, the authors have included most of the happiness scholarship with which I am familiar and more.

A summary of a vast and expanding literature can always be criticized for not emphasizing some aspect of the scholarship, for

⁸ See generally, for example, Bronsteen, Buccafusco, and Masur, 62 Duke L J 1603 (cited in note 4); John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Welfare as Happiness*, 98 Georgetown L J 1583 (2012); John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 Cal L Rev 1463 (2010); John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness and Punishment*, 76 U Chi L Rev 1037 (2009); John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 Colum L Rev 1516 (2008).

relying on an incomplete selection of articles or books, for misrepresenting some scholarly conclusions, and so on. I detect very few grounds for those criticisms here. This book is the best summary of the literature that exists and is the best book to put in the hands of those who ought to know about the scholarship of happiness.

In this Review, I shall join the authors in advocating for a happiness norm in law. Very rarely, I shall seek to fill in what I think are gaps in their arguments.

I. THE CASE FOR HAPPINESS AS A LEGAL NORM

Even if one pays only cursory attention to what is going on overseas, one is likely to know that happiness has become a focus of some important national and international political efforts. Most famously, the Kingdom of Bhutan has stated that its national policy will be to maximize “gross national happiness.”⁹ The Chinese National People’s Congress announced in February 2011 that increasing happiness in the People’s Republic of China is more important than increasing gross domestic product (GDP).¹⁰ And, as the authors note, David Cameron, the Prime Minister of the United Kingdom, and Nicolas Sarkozy, the former President of France, have created domestic bureaus to periodically survey the subjective well-being of UK and French citizens (pp 28–29).¹¹ The Organization for Economic Cooperation and Development (OECD) has undertaken to measure subjective well-being on the theory that its past focus on macroeconomic indicators as the measure of societal well-being was incomplete.¹² Recently, Charles Kenny, a distinguished researcher of economic growth and development, has noted that happiness is increasing in the developing world even if GDP per capita is not; this puts a much more optimistic face on the development process.¹³ These are all

⁹ Karma Ura, et al, *A Short Guide to Gross National Happiness Index*, *6 (Centre for Bhutan Studies, 2012), archived at <http://perma.cc/2CEK-78RD>; *The Story of GNH* (GNH Centre Bhutan, 2015), archived at <http://perma.cc/4ZSF-FY6B>.

¹⁰ See Damien Ma, *China’s GDP Strategy: Make People Happy* (The Atlantic, Feb 28, 2011), archived at <http://perma.cc/6A9C-8A5R>.

¹¹ See also Allegra Stratton, *Happiness Index to Gauge Britain’s National Mood* (The Guardian, Nov 14, 2010), archived at <http://perma.cc/47N3-87WU>.

¹² See *Measuring Well-Being and Progress: Understanding the Issue* (OECD), archived at <http://perma.cc/KA9K-5APB>. See also *Regional Well-Being: A Closer Measure of Life* (OECD), archived at <http://perma.cc/G4DV-S7JV>; *OECD Better Life Index* (OECD), archived at <http://perma.cc/EKY8-HNU8>.

¹³ See Charles Kenny, *Getting Better: Why Global Development Is Succeeding—and How We Can Improve the World Even More* 9 (Basic Books 2011):

examples of grand issues of national or international policy in which the happiness literature has possibly influenced large-scale public policies.

The focus of this book is not on those grand issues of public policy but rather on what happiness means as a legal norm.¹⁴ The connection between happiness and law is rooted in the motivation for—and our understanding of—human behavior. As the authors put it: “[I]f you want to understand the law, you need to understand people,” and if you want to understand people, you need to know “what makes people happy” (p 3). I could not agree more. This is a rallying cry not just for law and economics, law and psychology, or any other interdisciplinary legal field, but rather for the now forty-year-old collective enterprise of bringing the full force of the behavioral and social sciences to bear on the study of law.

Happiness and the Law has a brief introduction and three parts, which roughly correspond to three of the authors’ previous articles on these topics (p v). Part I discusses issues that arise in measuring subjective well-being and compares well-being analysis with cost-benefit analysis. Part II applies well-being analysis to issues of punishment and civil litigation. Part III takes up some philosophical and other criticisms directed at happiness studies. A very brief concluding chapter speculates about future research on happiness and the law.

This broad progress might lie behind one other indicator that seems to be going up across much of the developing world—happiness. The proportion of populations in surveyed countries who say they are happy has been rising over time in economies that have seen rapid growth as well as in economies that haven’t.

¹⁴ For a marvelous study of how public policies premised on increasing happiness might differ from current public policies, see generally Ed Diener and Martin E.P. Seligman, *Beyond Money: Toward an Economy of Well-Being*, 5 Psychological Sci in the Pub Interest 1 (2004). See also Arthur C. Brooks, *Gross National Happiness: Why Happiness Matters for America—and How We Can Get More of It* 193–207 (Basic Books 2008) (discussing how political leaders should align their values to ensure enduring happiness). The United States does not have federal or state governmental surveys of happiness, although Gallup, in partnership with Healthways, periodically publishes a well-being index and the City of Santa Monica, California, has started a well-being program. See *The Wellbeing Project* (City of Santa Monica), archived at <http://perma.cc/9DKS-2QUV>. For a proposal on how to implement a US national survey of well-being, see Daniel Kahneman, et al, *Toward National Well-Being Accounts*, 94 Am Econ Rev 429, 430–33 (2004).

A. The Groundwork

The authors' inquiry begins with a brief introduction to the scholarly literature on happiness. The authors offer some striking examples of familiar legal issues—compensation for tort injuries, criminal punishment, and the selection between regulatory programs—that, when viewed through the lens of happiness studies, appear different from what one might otherwise expect.

Consider first their example of how a happiness-focused analysis of criminal punishment might lead to a different analysis and conclusion from those of conventional law and economics:

Suppose Jack talks Jill into robbing a bank with him. Jack enters with a gun, while Jill waits in the getaway car. They get caught and go to prison for 10 years and 5 years, respectively. The point of these different punishments is, of course, to make the punishments fit the crimes: years 6 through 10, when Jill has been released but Jack stays behind bars, are supposed to be a lot worse for Jack than for Jill. (p 1)

This is a conventional law and economics analysis. The criminal-justice system should design all criminal sanctions so as to deter criminal activity, both specifically for those who have committed crimes and generally for the population as a whole.¹⁵ Additionally, the system should calibrate the sanctions among different crimes so as to signal to potential criminals that the severity of the sanctions demonstrates society's judgment regarding the heinousness of the crimes. In this instance, planning a bank robbery and carrying it out using a gun is a much more serious crime than driving a getaway car—although that, too, is a serious offense.¹⁶

But then the authors take us in a different analytical direction by invoking happiness studies:

¹⁵ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum L Rev 1193, 1193 (1985):

[T]here has been an outpouring of economic work on criminal law, concentrated in the following areas: the optimal tradeoff between certainty and severity of punishment, the comparative economic properties of fines and imprisonment, the economics of law enforcement and criminal procedure, and above all the deterrent and preventive effects of criminal punishment (including capital punishment).

¹⁶ See Steven D. Levitt and Thomas J. Miles, *Empirical Study of Criminal Punishment*, in A. Mitchell Polinsky and Steven Shavell, eds, 1 *Handbook of Law and Economics* 455, 458–59 (Elsevier 2007).

When [Jill] is released, she finds it hard to get and keep a job, much less a desirable one. Her family and friends have distanced themselves from her, and developing new relationships doesn't come easily. Because of her difficulty keeping employment, she is poor, which brings its own set of hardships. And her former prison conditions and current poverty may have caused her to contract a disease that shortens, or at least worsens, her life. (pp 1–2)

While it is true that Jill is in at least one obvious way better off than Jack during this second five-year period (she is, after all, free), the difference between their situations may not be as great as deterrence theory would claim. Although Jack may have his own postincarceration adjustments to look forward to, the second half of his prison term is not nearly as different from Jill's free life as we might imagine. Jack will have adapted to prison life (p 2). Indeed, as we shall see, there is evidence that prisoners return to their preincarceration levels of well-being fairly early in their prison terms (pp 98–99). And again, as we shall see, people systematically misremember experiences in a manner that will blunt the deterrent effect of imprisonment (p 22). In this instance, both Jack and Jill will probably remember prison as “not so bad.” As a result of these various factors—Jill's postincarceration experiences, Jack's adaptation to prison life, and their distorted memories of their prison experiences—longer prison sentences might well not deter behavior in the fashion that the conventional law and economics approach assumes it does.¹⁷

Now consider this example of a happiness-focused regulatory decision:

Suppose the government wants to use some of its tax dollars to start a new program. One proposal is to help people who live in rental apartments become able to afford houses in the suburbs. Another proposal is to start a public health initiative . . . to encourage people to get enough sleep. (p 2)

Conventional justifications for regulation typically focus on the correction of market imperfections (such as external costs and benefits, public goods, market power, and severe informational asymmetries).¹⁸ There is no obvious connection between any of

¹⁷ See Thomas S. Ulen, *Skepticism about Deterrence*, 46 Loyola U Chi L J 381, 396–401 (2014).

¹⁸ See Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 48–55 (Harvard 1990).

these imperfections and the seemingly paternalistic concern for citizens getting more sleep. As a result, policymakers are unlikely to support the sleep-promotion policies. However, well-being studies suggest that the sleep-promotion proposal would be preferable:

When people get enough sleep, they live longer and are healthier and more productive. They also feel better and enjoy their lives more, and they contribute more to others' enjoyment of life. More Americans die each year from drowsy driving than from drunk driving, and spectacular disasters such as the *Exxon Valdez* oil spill and the *Challenger* space shuttle explosion resulted from errors caused in part by sleep deprivation. (pp 2–3)

In Chapter One, the authors address the difficulty of measuring happiness. They ably summarize the various means of measurement, but for my money, they pass through the strengths and weaknesses of those means a little too quickly. I say this not because they make any errors—indeed, everything is correct—but because my experience in talking with academic and judicial audiences about happiness studies is that it is precisely these issues of measurement that cause the most skepticism for the uninitiated. As a result, I have found that it pays to spend more time and lavish more transparency on measurement issues so as to anticipate and answer an audience's many questions. Of course, not everyone will be persuaded on first hearing that the measurements are valid;¹⁹ but I think that the authors would have had a better chance of persuading skeptics if they had spent more time developing these questions of measurement.

The authors begin at the beginning. Psychologists have been surveying randomly selected people in many countries, asking them some variant of: "All things considered, how satisfied with your life are you these days?" (p 12). The respondents are often invited to answer using what is called a "Likert scale," a ranking running from one to, say, five with one indicating "very unhappy" or "very unsatisfied" and ranging through "somewhat unhappy,"

¹⁹ I once tried to explain this literature to a visiting philosopher, beside whom I happened to be seated at a conference dinner. She scornfully dismissed the idea that there is any reason whatsoever to pay attention to individuals' own assessments of their happiness. She argued instead that only philosophers are in a position to define happiness. We moved on to a discussion of the weather.

“neutral as between happy and unhappy,” and so on up to five as “very happy” (p 12).²⁰

Set aside for the moment the fact that economists do not seem to like surveys of this sort,²¹ while most other social scientists do.²² Regardless of what other academics think about surveys, any newcomer to the subject is bound to have questions about the value of survey responses to the question “How happy are you?” For instance, the responses might not be consistent over time. It might matter whether the respondent has just had an argument with a coworker or eaten a particularly good meal, or whether the weather has been especially grim or beautifully sunny and warm. The time of day at which the questioner asks the respondent may matter in some systematic way. And something that the authors do not, in my view, pay enough attention to is the fact that what counts as a satisfactory life may differ significantly from culture to culture and across national boundaries. To be happy or satisfied with one’s life in Bhutan may mean something very different from being happy or satisfied with one’s life in France, in which case cross border comparisons are problematic.²³

B. Measuring Happiness

It should come as no surprise to learn that these and other questions about the validity of the happiness surveys have not only occurred to but also been addressed by those in the field of happiness studies (pp 12–15). For example, to see if there is an ephemeral aspect to the survey results, the researchers have engaged in what is called test-retest practice—asking the same questions of the same respondent, but on another day at a different time and in a different place (p 14).²⁴

²⁰ See also, for example, Peter Hills and Michael Argyle, *The Oxford Happiness Questionnaire: A Compact Scale for the Measurement of Psychological Well-Being*, 33 *Personality & Individual Differences* 1073, 1074 (2002) (describing a different happiness questionnaire that used a six-point Likert scale).

²¹ See Marianne Bertrand and Sendhil Mullainathan, *Do People Mean What They Say? Implications for Subjective Survey Data*, 91 *Am Econ Rev* 67, 67 (2001).

²² There is a great deal of literature about how to best conduct surveys. For a summary, see Robert M. Lawless, Jennifer K. Robbennolt, and Thomas S. Ulen, *Empirical Methods in Law* 55–57 (Aspen 2010).

²³ For a discussion of these cultural differences, see Ed Diener and Marissa Diener, *Cross-Cultural Correlates of Life Satisfaction and Self-Esteem*, 68 *J Personality & Soc Psychology* 653, 660–62 (1995). For international data on happiness, see *Data & Documentation* (World Values Survey), archived at <http://perma.cc/WD52-KKAG>.

²⁴ See also, for example, Daniel Kahneman and Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 *J Econ Persp* 3, 7 (2006).

Results show that there is a remarkably high correlation between the initial and subsequent tests for a given individual, indicating that the circumstances surrounding the questions are probably not distracting, and that the answers given are invariant to time, place, weather, and circumstance (p 14).²⁵

Researchers have also asked family, friends, coworkers, and others who know the initial respondent to make estimates on the same Likert scale regarding the respondent's happiness or life satisfaction. There is a very high correlation between the respondent's answers and those of his family, friends, coworkers, and others (p 14).²⁶ This is perhaps because our affect reveals a great deal about our outlook and happiness and because we are all such social animals that correctly reading others' affects is a tremendously important part of our day-to-day lives.²⁷

Finally, as the authors indicate, there are objective measures of affect, such as smiling and electrical activity in the brain associated with pleasure and pain (p 14). These objective factors are highly correlated with the subjective responses to the survey questions (p 14).

In order to address still-lingering questions about survey responses, researchers have also developed additional means of measuring happiness. Two of the most prominent are the experience-sampling method (ESM) and the day-reconstruction method (DRM). Due to the fallibility of memory (discussed later²⁸), researchers using the ESM have asked some respondents to answer a series of questions (periodically sent to respondents on handheld devices) about what they are doing and how they are feeling.²⁹ Researchers using the DRM prepare a daily report of what the respondents did and how those activities affected their happiness (p 11).

²⁵ There is also a strong correlation between respondents' answers and their behavior. For example, those who report themselves as "very unhappy" are much more likely to commit suicide, and those who report themselves as "happy" are much less likely to commit suicide (p 14).

²⁶ See also Heidi S. Lepper, *Use of Other-Reports to Validate Subjective Well-Being Measures*, 44 Soc Indicators Rsrch 367, 370-74 (1998).

²⁷ See Richard A. Posner, *Behavioral Finance before Kahneman*, 44 Loyola U Chi L J 1341, 1344 (2013).

²⁸ See text accompanying notes 33-36.

²⁹ If you would like to participate in such a survey and receive reports about your own happiness, go to <http://www.trackyourhappiness.org> and sign up. I have participated in several twenty-five-sample surveys and have been intrigued by some of the reports I have received on what makes me happy and not so happy.

These surveys have produced many important findings. For example, we know that while having more income makes people happier, additional income contributes to happiness at a much lower rate for those with an annual income of approximately \$75,000 or more (p 16). That is, marginal happiness from additional income diminishes sharply above \$75,000 per year.

The authors focus on two findings in the happiness literature as the most striking. The first of these is “hedonic adaptation”: “Without question, the most surprising findings from hedonic psychology have to do with humans’ ability to adapt rapidly to changes in their lives” (p 15). I agree with the authors that this is a remarkable finding. Most people, I strongly suspect, greatly underestimate their and others’ abilities to adjust to most changes—even big changes—in their lives. Many people believe, for example, that winning the lottery will make them or others much happier than they now are and that this increase in happiness will last for a very long time. Similarly, they believe that a dire occurrence—such as the loss of a limb, the loss of one’s eyesight, or an unsuccessful try for partner or tenure in a university department—will greatly reduce their well-being, and that this reduction will last for a very long time.

The adaptation finding, however, suggests that changes in one’s circumstances—both positive and negative—typically cause a predictable rise or fall in one’s happiness but that such changes are short lived and often dissipate within a year or less.³⁰ The hypothesis is that each of us has a “set point” of happiness that operates, with respect to our well-being, in the same way that a thermostat operates for heat (p 15). That is, just as deviations from a temperature programmed into a thermostat cause variations in heating and cooling that return the ambient air to the programmed temperature, changes in our well-being set in motion by changes in circumstances (for good or ill) in turn set in motion forces that return us to our original set point of well-being. There is some question about where our set points originate—from genes, culture, environment and circumstances, experience, or some combination of all these—but an important point of the

³⁰ See pp 16–20, citing, among other scholarship, the famous study by Philip Brickman, Dan Coates, and Ronnie Janoff-Bulman, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J Personality & Soc Psychology 917, 920 (1978).

literature on this matter is that it is difficult, although not impossible, to change an individual's set point.³¹ Without some lasting change to the set point—for example, a change brought about by the death of one's spouse or a spell of involuntary unemployment—we are apparently fated to return to more or less the same level of subjective well-being throughout life (pp 18–19). A crude method seen in everyday behavior is seeking to increase happiness by getting on the “hedonic treadmill” (p 17), running faster and faster, as it were, by having new pleasurable experiences as frequently as possible—new cars, new trips, larger accommodations, new things, and other new experiences—so as to stave off the return to one's set point.³²

The second finding that the authors focus on is related to the first: We are very poor at predicting what things and situations will make us happy or unhappy (this behavior is called “affective forecasting”³³) (p 20). And we distort our memories of the pleasure and pain of past events in predictable ways:

Most people, it turns out, do a surprisingly poor job of predicting the intensity and duration of future feelings. . . . When asked to predict how they will feel on the occurrence of some future hedonic event—eating a bowl of ice cream every day for a week, having their favorite candidate win an election, being denied tenure, or suffering an injury—people are able to estimate whether that event will make them feel good or bad (“valence”) and which emotions they will feel. They are not very good, however, at predicting how strongly they will feel (“intensity”) or how long the feeling will last (“duration”). For both positive and negative events, people predict that they will feel more strongly than they actually do, and they

³¹ For a discussion of how one might change an individual's set point, see generally Martin E.P. Seligman, et al, *Positive Psychology Progress: Empirical Validation of Interventions*, 60 *Am Psychology* 410 (2005); Martin E.P. Seligman, *Can Happiness Be Taught?*, 113 *Daedalus* 80 (2004). For particularly accessible guides to making oneself happier, see generally Elizabeth Dunn and Michael Norton, *Happy Money: The New Science of Smarter Spending* (Simon & Schuster 2013); Elizabeth W. Dunn, Daniel T. Gilbert, and Timothy D. Wilson, *If Money Doesn't Make You Happy, Then You Probably Aren't Spending It Right*, 21 *J Consumer Psychology* 115 (2011).

³² See Daniel Kahneman, *Objective Happiness*, in Daniel Kahneman, Ed Diener, and Norbert Schwarz, eds, *Well-Being: The Foundations of Hedonic Psychology* 1, 14 (Russell Sage 1999) (“[I]mproved circumstances could cause people to require ever more frequent and more intense pleasures to maintain the same level of satisfaction with their hedonic life.”).

³³ See generally Timothy D. Wilson and Daniel T. Gilbert, *Affective Forecasting*, in Mark P. Zanna, ed, 35 *Advances in Experimental Social Psychology* 345 (Academic 2003).

predict that the feeling will last longer than it actually does.
(pp 20–21)

For example, we exaggerate the pain that we anticipate from some disability, such as losing our eyesight, and the enjoyment we expect from some pleasure, such as a month-long vacation to Australia. An important part of these exaggerations is that we consistently, even with experience, fail to anticipate our ability to adapt to changed circumstances (pp 20–21). This is sometimes a useful human quality, to the extent that ignorance of our adaptability induces us to take socially desirable actions—for example, to take precautions (perhaps excessively) against injury or to refrain from criminal activity. But our inability to anticipate our adaptability can also have personal and social costs. We might repeatedly make costly mistakes. For instance, we might avoid taking risks that could otherwise have a substantial payoff both for us individually and for society overall because we are fearful of the loss of well-being we expect to suffer if bad outcomes eventuate; or we may spend lavishly in foolish anticipation of significant pleasure.³⁴ Related to this point about distorting our memories is the fact that we misremember events in a predictable way: “[Professor Daniel] Kahneman has shown that people tend to evaluate the quality of an experience not by thinking about the aggregate quality of the moments of the experience but by averaging their feelings from the time when the experience was at its most extreme and when it ended” (p 22).

I once heard Kahneman give the following example during a lecture: You go on a vacation to a lovely Caribbean island. The temperatures are delightful; the meals are sumptuous and delicious; the people whom you meet are kind and interesting; the sea is warm and inviting; and the shopping is exciting, inexpensive, and charming. You buy lots of presents for your family and friends. But on your way home, the airline loses the luggage containing your gifts.³⁵ What is your memory of that trip? In theory, you ought to remember and count as positive each moment of each

³⁴ A marvelous example of this is the belief that relocating to California will truly increase happiness or that moving from California to Ohio will be calamitous for well-being. See David A. Schkade and Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 *Psychological Science* 340, 341, 345 (1998).

³⁵ See Daniel Kahneman, *Thinking, Fast and Slow* 388–89 (Farrar, Straus and Giroux 2011). See also Thomas S. Ulen, *Remarks on the Lewis & Clark Law School Business Law Forum: Behavioral Analysis of Corporate Law; Instruction or Distraction?*, 10 *Lewis & Clark L Rev* 177, 183 (2006).

day on the island. Presumably these positive moments will add up considerably. Against those positive memories, you must then subtract the displeasure of losing all the gifts that you bought. The net pleasure will probably be strongly positive so that you will recall the trip as a happy one. However, Kahneman suggested that we tend to ignore how long an event lasts (“duration neglect”) and to instead put excessive weight on what happened at the end of the experience (“peak-end averaging”), so that the missing presents loom very large in your remembrance of the event.³⁶ As a result, you might be inclined to remember the trip as just OK.

There are other findings from the happiness literature that are extremely important—perhaps most important to other policy concerns beyond those addressed by law. For example, studies suggest that there are four factors associated with those who report themselves most happy (they are married, they have a job, they have friends, and they have some spiritual component to their lives);³⁷ that only a small number of people report themselves to be “very happy”;³⁸ that in most countries most people are happy (even street dwellers in Calcutta),³⁹ and that in only a few countries (mostly in the transition economies) are most people unhappy;⁴⁰ that there is a pattern to happiness over one’s lifetime

³⁶ See Kahneman, *Thinking, Fast and Slow* at 378–81 (cited in note 35); David A. Redelmeier and Daniel Kahneman, *Patients’ Memories of Painful Medical Treatments: Real-Time and Retrospective Evaluations of Two Minimally Invasive Procedures*, 66 *Pain* 3, 3–4 (1996). Research on peak-end averaging has even led to changes in medical procedures. Patients tend to misremember the discomfort of a colonoscopy, so that their retrospective assessment of the pain of the procedure is greater than the pain they report in real time. See Redelmeier and Kahneman, 66 *Pain* at 7 (cited in note 36). For some time now, doctors have administered a drug called Versed or midazolam to patients having a colonoscopy. That drug not only induces relaxation and sleepiness but also causes amnesia so that patients will not remember what happened during the procedure, although they can feel pain and so indicate to the physician. See Kahneman, *Thinking, Fast and Slow* at 379 (cited in note 35).

³⁷ See David G. Myers and Ed Diener, *Who Is Happy?*, 6 *Psychological Sci* 10, 17 (1995).

³⁸ See Robert Biswas-Diener, Joar Vittersø, and Ed Diener, *Most People Are Pretty Happy, but There Is Cultural Variation: The Inughuit, the Amish, and the Maasai*, 6 *J Happiness Stud* 205, 218 (2005) (“[M]ost people are mildly happy and satisfied, and only rare individuals approach the tops of the scales.”).

³⁹ See Martin E.P. Seligman, *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment* 54–55 (Free Press 2002).

⁴⁰ See generally Biswas-Diener, Vittersø, and Diener, 6 *J Happiness Stud* 205 (cited in note 38). See also Ed Diener, Carol Diener, and Marissa Diener, *Factors Predicting the Subjective Well-Being of Nations*, in Ed Diener, ed, *Culture and Well-Being: The Collected Works of Ed Diener* 43 (Springer 2009); Orsolya Lelkes, *Tasting Freedom: Happiness, Religion, and Economic Transition*, 59 *J Econ Behav & Org* 173, 176 (2006) (noting that the “relative unhappiness” in Eastern Europe is likely related to economic transition). Based

(that it is high in childhood, falls during middle age, and then rises again in late age);⁴¹ that until women's social and employment roles began to match those of men, women were generally happier than men, but that women's happiness levels have since fallen and are now about equal to men's happiness levels;⁴² that African Americans are generally less happy than whites, but that because of a rise in the subjective well-being of blacks, the gap between those groups has been narrowing over the last thirty-five years;⁴³ and that to increase people's well-being we should interrupt positive experiences but not interrupt negative experiences (so, interrupt a long movie but do not send troops in a war zone on rest-and-relaxation leave).⁴⁴ Clearly, there is a lot to cover in this literature.

C. Well-Being Analysis versus Cost-Benefit Analysis

Chapters Two and Three make a case for using well-being analysis (WBA) instead of the "fundamentally flawed" (p 28) cost-benefit analysis (CBA) in making regulatory policy. Chapter Two distinguishes these two methods of measuring the costs and benefits of regulatory action and considers an example. Chapter Three explains in more detail how WBA overcomes CBA's shortcomings. The case is strong, and the authors' argument in favor of WBA is very nearly persuasive, although I still have some lingering questions about the proposal's feasibility.

on national surveys, Denmark ranks highest among all nations in terms of average happiness. The United States is comfortably within the top ten. See Diener, Diener, and Diener, *Factors Predicting* at 52, 54 (cited in note 40).

⁴¹ See David G. Blanchflower and Andrew J. Oswald, *Is Well-Being U-Shaped over the Life Cycle?*, 66 Soc Sci & Med 1733, 1745–46 (2008) (concluding from a survey of 500,000 randomly sampled individuals across 72 countries that the probability of depression follows a U-shaped pattern). For a more qualitative study of happiness over a lifetime, see generally George E. Vaillant, *Triumphs of Experience: The Men of the Harvard Grant Study* (Belknap 2012).

⁴² See Betsey Stevenson and Justin Wolfers, *The Paradox of Declining Female Happiness*, 1 Am Econ J Econ Pol 190, 222–24 (2009) (speculating, based on self-reported subjective well-being, that "the changes brought about through the women's movement may have decreased women's happiness").

⁴³ See Betsey Stevenson and Justin Wolfers, *Happiness Inequality in the United States*, 37 J Legal Stud S33, S56 (2008).

⁴⁴ See Dunn, Gilbert, and Wilson, *If Money Doesn't Make You Happy* at 118 (cited in note 31).

The strengths and weaknesses of CBA have been the subject of extensive scholarly commentary for decades, including recently.⁴⁵ Even though there is probably a scholarly consensus that CBA has significant flaws, there is also a consensus that CBA is the best available methodology and that public policy decisionmakers need CBA in order to make sensible choices.⁴⁶ For that reason, every president since Ronald Reagan has issued an executive order requiring federal agencies to use CBA (or cost-effectiveness analysis) in making policy decisions (p 27).

The authors propose WBA as an alternative. The central idea of WBA is that it measures the costs and benefits of a regulatory policy by comparing what that policy would do to the subjective well-being of those affected. That is, as with CBA, the WBA inquiry focuses on determining the net benefits of a policy—but in the cases in which CBA makes that determination by monetizing the good and bad effects of a policy, WBA compares the increase and decrease in happiness.⁴⁷ The essence of the authors' case for WBA over CBA is that the problems of measuring happiness or subjective well-being are fewer than those of monetizing and measuring costs and benefits (through either revealed preferences or contingent valuation) (pp 32–36).

The authors consider a case in which the Environmental Protection Agency (EPA) used CBA to regulate toxic effluents into watercourses from pulp and paper production. The authors redo that case using WBA to demonstrate both the analysis's feasibility and its superiority to CBA (pp 36–44). To cut through the interesting complexities of the EPA's CBA analysis, it is enough to note that none of the three options that the agency considered,

⁴⁵ See generally, for example, Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 NYU L Rev 1983 (2013); Don Bradford Hardin Jr, Comment, *Why Cost-Benefit Analysis? A Question (and Some Answers) about the Legal Academy*, 59 Ala L Rev 1135 (2008); Matthew D. Adler and Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (Harvard 2006); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan L Rev 247 (1996); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan L Rev 387 (1981); Edward D. Burmeister Jr, Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 Stan L Rev 1092 (1972).

⁴⁶ Better put, without the constraints imposed by CBA, regulators or legislators might make decisions on even shakier grounds. See, for example, Adler and Posner, *New Foundations of Cost-Benefit Analysis* at 109–11 (cited in note 45) (describing how alternative policymaking approaches permit undesirable strategic behavior by legislators).

⁴⁷ Later, the authors refer to "CBA's need to monetize costs and benefits and WBA's corresponding efforts to hedonize them" (p 60).

which are differentiated by the increasing stringency of their regulation, resulted in a net benefit (pp 38–39). That is, for all three cost-benefit calculations, the value of the cancer deaths avoided by requiring paper producers to use safer chemicals was smaller than the increased production costs of using safer chemicals. Nonetheless, the EPA imposed the least costly of the options on the pulp and paper producers (pp 38–39).

Ideally, the costs and benefits of regulations could be converted directly into well-being units (WBUs) (p 40). This conversion is possible only when hedonic data about the regulated activity are available (pp 40–41). When those data are unavailable, the conversion from CBA to WBA involves two steps (p 41). First, the regulatory effects are converted into gained and lost income (p 41). Then, those income changes are converted into WBUs using results from the happiness literature about the relationship between income changes and happiness changes (p 41). Under WBA, the first of the EPA's three regulatory options has a net benefit (p 43). Neither of the other two options has a net benefit using WBA, but the net costs are much less than they were under CBA.

Why does WBA reach this dramatically different conclusion? The authors explain the difference as follows:

[T]he monetary costs of the regulation, which dominated the CBA, are nearly irrelevant here. Instead, the benefits of saving lives and the costs of unemployment produce the dominant welfare effects. This may appear surprising to scholars steeped in cost-benefit analysis, but it is entirely consistent with reams of evidence demonstrating that changes in wealth and income have extremely small impacts on individual well-being.

In the actual CBA for this regulation, compliance costs were deemed twenty-five times more important than cancer deaths. In the WBA for this regulation, cancer deaths are deemed vastly more important than compliance costs. The only thing other than life-saving that this WBA weights heavily is unemployment, because of the evidence that losing one's job worsens one's life so much. (pp 43–44) (emphasis omitted)

I am intrigued and almost persuaded that WBA is superior to CBA. Let me say first that I take very seriously the authors' contention, which they elaborate on in Chapter Three, that

WBA's flaws—and they concede that there are some—are significantly fewer than those of CBA. On the grounds that we should allow the better to defeat the not-so-good and not let the perfect be the enemy of the better, their case for WBA is very strong.

Nonetheless, two matters trouble me. First, we know the flaws of CBA in part because it has been around for so long and used so extensively that it has confronted a wide variety of regulatory and other situations that have exposed its weaknesses.⁴⁸ WBA is so new that it has not yet been widely used. As a result, we may be focusing on its strengths over CBA while remaining unaware of its weaknesses. This is not an argument against using WBA; rather, it is an argument for instituting a trial period for using WBA alongside CBA to allow for a better assessment of WBA's strengths and weaknesses in practice.

Second, the political objections to WBA are likely to be deafening. The very fact—however well grounded in empirical observation—that WBA weights unemployment heavily while giving little weight to income and wealth losses through regulatory cost increases will excite vigorous scrutiny and fierce opposition. I concede that this is not a strong argument against wider adoption of WBA, particularly if it proves, on wider application, to be superior to CBA. But it is worth considering whether one's limited political capital is better spent on fighting for WBA over CBA, or instead on advocating for some other sensible innovative policy measure in a different area.⁴⁹

D. Punishment and Civil Litigation

Chapters Four and Five will be, for most readers, the most important. In the first of those chapters, the authors apply WBA to issues of crime and punishment. In the second, they apply WBA to issues of tort law. The results are striking, even revolutionary.

To see why their analysis is revolutionary, let me briefly remind you whence we have come in the law and economics of crime and punishment. The beginning is the famous insight of Professor

⁴⁸ For a discussion of CBA's weaknesses, see Richard O. Zerbo Jr., *The Legal Foundation of Cost-Benefit Analysis*, 2 *Charleston L Rev* 93, 112–14 (2007). For an example of scholarship arguing that CBA has a flawed application in certain regulatory settings, see generally Ahdieh, 88 *NYU L Rev* 1983 (cited in note 45).

⁴⁹ Chapter Three, which contains the best succinct criticisms of CBA that I have ever read, elaborates on the theoretical differences between CBA and WBA and attempts to show how WBA overcomes each point of criticism that has been made of CBA. Despite these arguments, it will likely be difficult to undo the use of CBA.

Gary Becker that criminals make the same rational decisions as the rest of society.⁵⁰ In essence, potential criminals compute the costs and benefits of committing a crime and might commit a crime if the expected costs exceed the benefits and might refrain if the reverse is the case.⁵¹ Accordingly, crime can be deterred by implementing policies that raise the expected costs of crime.⁵² This stark account of crime as an economic choice has many important details, but I shall mention only one. Namely, there are two elements of the expected costs of crime: first, the probabilities of detection, arrest, and conviction; and second, the cost of the sanction imposed. Affecting the first element—the probabilities—requires expending significant resources, while increasing the sanction typically does not. Therefore, increasing the sanction for any given crime (and keeping the relative sanctions among different crimes roughly constant) is the most efficient policy for deterring crime.⁵³

This hypothesis about the rational criminal's decision to commit crime has had a great impact on criminal-justice-system policy over the past forty years.⁵⁴ Indeed, it is difficult to think of another scholarly insight, at least in law and economics, that has had a greater impact. To cite one familiar example, indeterminate criminal sentencing has largely given way to determinate sentencing with relatively little flexibility.⁵⁵ One result was a ballooning of our prison and jail populations from about 500,000 in 1980 to roughly 2 million in 2005.⁵⁶ And insofar as the amount of both violent and nonviolent crime has fallen precipitously since the

⁵⁰ See Gary S. Becker, *Crime and Punishment: An Economic Analysis*, 76 J Pol Econ 169, 176 (1968).

⁵¹ See id. For a review of the literature since 1968, see Robert Cooter and Thomas Ulen, *Law and Economics* 454–532 (Pearson 6th ed 2012).

⁵² See Becker, 76 J Pol Econ at 204–05 (cited in note 50).

⁵³ See id at 180–84.

⁵⁴ See Richard Moran, Book Review, *Bringing Rational Choice Theory Back to Reality*, 86 J Crim L & Crimin 1147, 1148–49 (1996).

⁵⁵ See Melissa S. Kearney, et al, *Ten Economic Facts about Crime and Incarceration in the United States* *9 (Hamilton Project, May 2014), archived at <http://perma.cc/R94Q-78U9>.

⁵⁶ See Franklin E. Zimring, *The Great American Crime Decline* 47 (Oxford 2007). See also Kearney, et al, *Ten Economic Facts* at *9 (cited in note 55). Relatedly, our incarceration rate rose from 220 per 100,000 people in 1980 (a rate that was significantly higher than that in most other developed countries at that time) to 756 per 100,000 people in 2008. That latter rate is much higher than the global average of 130 per 100,000 people and six times higher than the average rate among all OECD countries. The countries with the next three highest rates are Chile (266), Estonia (238), and Israel (223). Id at *9–10.

early 1990s,⁵⁷ it is easy, although probably inaccurate, to attribute that decline to the increased rate of incarceration.⁵⁸

Nonetheless, modern scholarship has sounded a note of skepticism about the deterrence hypothesis.⁵⁹ On the one hand, behavioral evidence indicates that criminals do not make decisions about crime's expected costs and benefits in the fashion imagined by rational-choice theory.⁶⁰ On the other hand, there is accumulating empirical evidence that calls into question the efficiency of incarceration as a deterrence policy, largely by showing econometrically that releasing certain kinds of prisoners leads to very little increase in crime.⁶¹

The evidence from the happiness literature on the ineffectiveness of fines and incarceration in deterring crime is clear. "Recent social scientific studies support the notion that criminals adapt to [both fines and imprisonment] in a way that reduces the hedonic difference between a larger fine and a smaller one, as well as the difference between a longer prison term and a shorter one" (p 97). For instance, Kahneman's finding of "duration neglect" in remembered experiences strongly suggests that the length of imprisonment might not have the effect that the traditional deterrence hypothesis predicts.⁶²

⁵⁷ See Levitt and Miles, *Empirical Study of Criminal Punishment* at 471–74 (cited in note 16); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J Econ Persp 163, 177–79 (2004) (listing the rising prison population as one factor that could explain the declining crime rate).

⁵⁸ See, for example, Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, *What Caused the Crime Decline?* *19–26 (Brennan Center, Feb 15, 2015), archived at <http://perma.cc/S4JN-CRY8> (reviewing research that suggests diminishing returns to incarceration); Thomas S. Ulen, *Skepticism about Deterrence*, 46 Loyola U Chi L J 381, 392–96 (2014) (citing California deincarceration efforts as evidence that the connection between crime rates and incarceration is tenuous); Zimring, *The Great American Crime Decline* at 49 (cited in note 56) (noting that increased incarceration in the 1970s and 1980s had "no consistent and visible impact on crime").

⁵⁹ See, for example, Paul H. Robinson and John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 Oxford J Legal Stud 173, 173–75 (2004).

⁶⁰ See, for example, Richard H. McAdams and Thomas S. Ulen, *Behavioral Criminal Law and Economics*, in Nuno Garoupa, ed, *Criminal Law and Economics* 403, 413–26 (Edward Elgar 2009); Robinson and Darley, 24 Oxford J Legal Stud at 178–82 (cited in note 59).

⁶¹ See, for example, Steven Raphael and Michael A. Stoll, *A New Approach to Reducing Incarceration while Maintaining Low Rates of Crime* *9–14 (Hamilton Project, May 2014), archived at <http://perma.cc/L7R9-H4EW>; Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?* 201–36 (Russell Sage 2013); Francesco Drago, Roberto Galbiati, and Pietro Vertova, *The Deterrent Effects of Prison: Evidence from a Natural Experiment*, 117 J Pol Econ 257, 278–79 (2009).

⁶² See Kahneman, *Thinking, Fast and Slow* at 378–81 (cited in note 36). I once facetiously suggested that duration neglect and the peak-end rule suggested collapsing all or

Even if it does not deter crime, imprisonment does have long-term adverse consequences for prisoners. The authors cite evidence showing that incarceration is associated with high levels of stress, anxiety, depression, and psychosomatic illness in former prisoners, both immediately after completion of their sentences and over longer time periods (pp 98–99). Additionally, incarceration has adverse effects on ex-prisoners' social and familial lives (pp 101–03).

The authors survey how these insights from the happiness literature fit (or, more accurately, do not fit) with the popular utilitarian (largely espoused by law and economics scholars) and retributivist (a favorite among many moral philosophers, such as my distinguished colleague, Professor Michael Moore⁶³) theories of criminal punishment (pp 95–115). At the conclusion of Chapter Four, the authors note that they do not have any concrete proposals—with one important exception—for how to alter our criminal-justice system in light of the happiness literature beyond pointing out that the utilitarian and retributivist bases of current policy can be shown to be either mistaken or inadequate (pp 116–17).

The one important exception is their sensible and caring suggestion that the happiness literature's finding of long-term adverse consequences of imprisonment for prisoners' mental, employment, social, and familial health should alter how we treat ex-prisoners. Specifically, the authors suggest that we ought to help ex-prisoners to better reintegrate into society upon the completion of their sentences and that we ought to find forms of punishment that are less easy to adapt to (pp 116–17). While the authors' first suggestion is obviously correct, I am much less sanguine about our ability to find less-adaptable punishments that would survive a confrontation with widespread notions of morality. The authors seem skeptical as well. They make it clear that they are merely pointing out the implications of hedonic theory, not supporting the use of inhumane, less-adaptable punishments such as sleep deprivation and solitary confinement (p 116).

most prison sentences into the same length—say, one year—but distinguishing the seriousness of the crime by the number and strength of the lashings that a prisoner received in the final days of his or her incarceration. Ulen, 10 *Lewis & Clark L Rev* at 183 (cited in note 35).

⁶³ See Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* 20–33 (Oxford 2009).

There is one final point, to which I alluded earlier, that I have been unable to find in the authors' discussion of the deterrent effect of criminal punishment. That is the fact that, while prisoners might not be much deterred from committing future crimes by periods of incarceration (or by "three strikes" laws), the majority of citizens have never been imprisoned and are therefore likely to find the threat of incarceration highly deterring.⁶⁴ It is true that many might be deterred from crime by strong moral or religious beliefs or by a belief that their current lives are so good that there is nothing at all to be gained from crime. But those who are open to the temptation of crime may be significantly deterred as a result of their inability to accurately predict that they will adapt to being in prison and their mistaken beliefs about the displeasures of imprisonment.

These facts raise a number of troubling issues. First, in addition to designing punishments that are not easy to adapt to, policymakers must still try to make beneficial use of mistaken beliefs about adaptability and the inaccuracies of affective forecasting in the vast majority of the population. I doubt that we can have a fruitful and happy public discussion about the social utility of the fact that most people are mistaken about how distasteful it is to be incarcerated. Second, I do not think that a punitive sanction to which adaptation is difficult is one that most citizens are likely to favor. I say that without being aware of an example of such a sanction. But given the pervasive adaptability of human beings, it seems that whatever this sanction is, it likely will not be straightforward, simple, and widely acceptable. If it were, we would already be doing it. So this raises the possibility that a difficult-to-adapt-to sanction is something high-tech or mind-probing or in some other way unusual and scarifying. And that raises a third set of worries: How would we determine that this sanction would be difficult to adapt to? Would we experiment through, say, randomized controlled trials on prisoners—some randomly assigned to a conventional sanction like imprisonment, others to the novel, difficult-to-adapt-to sanction—and then measure the deterrent and other differences, if any, between the two groups? I almost always favor transparent, democratic discussions of public policy options. But I confess to being squeamish about the good that can come of this particular discussion.

⁶⁴ See David S. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 Iowa L Rev 905, 920–29 (2013).

Chapter Five then explores the impact of happiness studies on settlements in civil litigation. There is extensive law and economics literature on this issue,⁶⁵ and the authors note that, as has been the case with their consideration of punishment, some of the settled conclusions of that literature are open to revision once the findings of hedonic psychology are taken into account. For instance, the authors note that because a plaintiff is more likely to settle if the value of her harm is small, and because her perceived harm is likely to diminish over time as she adapts to her injuries, she is more likely to settle as time passes (pp 125–26). This is an important suggestion and one that plaintiffs’ attorneys can heed by pushing for settlement early in the postaccident timeframe, before adaptation has occurred.⁶⁶

As was the case with the authors’ study of punishment, I was struck by the fact that their discussion of accidental harm and litigation versus settlement did not raise the potential implications that happiness studies have on the precautionary effect of exposure to tort liability. I understand that this is not their topic; nonetheless, one of the great central contentions of the law and economics analysis of tort liability is the precatory effect of tort law—that is, its ability to induce cost-minimizing precaution so as to make accidents less likely (and less harmful if they do occur).⁶⁷ Just as I was concerned by the authors’ discussion of criminal deterrence and its implications for playing on the perceptions of those who have never been incarcerated, I am also concerned that readier settlements at lower amounts might diminish potential tort defendants’ incentives to take adequate care. But that, perhaps, is a topic for another study.

II. CRITICISMS OF HAPPINESS STUDIES

The final Part of *Happiness and the Law* is a careful and extensive consideration of the criticisms of taking happiness seriously.⁶⁸ The authors raise some of these points briefly at the end

⁶⁵ For a summary of this literature, see Cooter and Ulen, *Law and Economics* at 382–453 (cited in note 51).

⁶⁶ There is every reason to believe that plaintiffs’ attorneys already do this. See John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U Ill L Rev 903, 911–12 (“The lawyer could settle many cases in the time it takes to litigate one, so it is rational for her to settle quickly even if doing so reduces her profit in the individual case.”).

⁶⁷ See Shawn J. Bayern, *The Limits of Formal Economics in Tort Law: The Puzzle of Negligence*, 75 Brooklyn L Rev 707, 712–16 (2010).

⁶⁸ Part III covers fifty pages and is, therefore, almost 30 percent of the total text.

of Chapter Two. Here they engage in more protracted and vigorous wrestling with the counterarguments. For those who care deeply about philosophical arguments, this part of the book might well be their favorite. Even for those who, like economists, typically believe that less philosophy is more, these chapters might be interesting but easy to dismiss. But to do so would be a mistake. These chapters are an accessible and compelling survey of the literature about what makes life worth living.

In particular, I commend the discussion of two issues in Chapter Eight. The first is a discussion of whether happiness or “feeling good” is a worthy goal for one’s life and the consideration of some particularly hard situations (pp 164–66). The answer to the question raised by the first issue is a resounding yes, drawing on empirical evidence presented throughout the book (and particularly in Chapter Seven) that pleasure and pain are real categories (pp 164–65).

The second issue concerns the criticism that “happiness theory . . . cannot account for the intuition that one’s welfare is diminished by things outside of one’s experience or knowledge” (p 166). To illustrate this point, the authors consider the following example, which they admit is of the type that they “find most difficult for hedonic theory to explain” (pp 166–67):

Jack is very happy in his marriage to Jill, and he fully believes she is faithful to him. In one possible state of affairs, Jill is actually faithful; whereas in an alternative state of affairs, she is cheating on Jack without his knowledge. We are asked to suppose that these two states of affairs are identical but for the cheating, as far as Jack’s experience of life is concerned. To wit: Jill treats Jack *identically* whether she is cheating on him or not; everyone else treats Jack identically whether Jill is cheating on Jack or not; Jack never learns that Jill is cheating on him; and Jack’s experience of life is never affected by the cheating in any way.⁶⁹ (p 167)

According to the authors, critics of happiness theory say that “people overwhelmingly believe that Jack is better off if Jill is faithful than if she is cheating” (p 167).⁷⁰ The authors doubt that

⁶⁹ This example apparently comes from Matthew Adler and Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J Legal Stud S253, S257–59 (2008). The authors also consider some interesting variants of this basic scenario.

⁷⁰ Although the authors do not say so, it appears that the assertion that “people overwhelmingly believe that Jack is better off if Jill is faithful” is not the result of actual survey

this is, in fact, how people would really react to this scenario. And, indeed, the whole thrust of the criticism is that happiness theory is at odds with people's intuitions (p 167). Whether it is at odds cannot be decided in the absence of carefully collected evidence, which has not, apparently, been put in play by the critics. It is idle to speculate on these matters without evidence before us.⁷¹

Chapter Eight concludes with two wonderful discussions: first, of Professor Robert Nozick's famous "experience machine" scenario and what it might mean for happiness studies (pp 172–76); and second, whether artificial happiness induced by drugs should count as real happiness (pp 176–80).

Any criticisms I have about this section have nothing to do with the substance of what the authors have written. Rather, my main criticism is that the authors have not given enough of an account of how the happiness literature has deeply shaken economists' theories of preference satisfaction.⁷² The story, in brief, would be as follows: For economists, the hope in the late nineteenth century was that the pleasure that individuals derived from different things and experiences would one day be measurable, perhaps through a machine that some called a "hedonometer" or "hedonimeter."⁷³ If that machine could reliably measure objective units of happiness (typically called "utils"), it would change everything. We could, for example, take (perhaps with compensation) from *A* an item that gives him 25 utils of pleasure and give it to *B*, who gets 30 utils of pleasure, and thereby generate a net increase of 5 utils. Interpersonal comparisons of happiness would

work but is rather an intuition widely held among the philosophers who have speculated on this matter.

⁷¹ For what it is worth, I have from time to time (but not obsessively) wondered how I would feel if I were to discover that the dear mother and father who raised me were not my biological parents. I do not know what intuition I have about that matter. It is an extremely complex issue that, happily, I have never had to face. I would like to think that whether or not they were my biological parents (and, to be honest, I have no doubts, and a lot of objective evidence, that they were) would neither diminish my love nor cause me to wonder whether they truly loved me. I would certainly be puzzled as to why they did not tell me earlier, but I hope that I would forgive them and come to have some understanding of why they withheld the information.

⁷² The authors' discussion of preference theories is at pp 137–41.

⁷³ David Colander, *Retrospectives: Edgeworth's Hedonimeter and the Quest to Measure Utility*, 21 J Econ Persp 215, 216–19 (2007). See also Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 Ind L J 499, 509 ("[British economists from the nineteenth century] doubted their ability to make interpersonal comparisons of subjective preference, but had greater confidence about interpersonal comparisons of [] objective criteria of welfare.").

be possible, and the issue of allocating society's scarce resources would be much more easily resolvable.

There were hints around the turn of the twentieth century that the objective measure of utility might not eventuate. In the early 1900s, the Swiss economist Vilfredo Pareto demonstrated—through his famous Pareto criterion—that a world in which utility was a purely subjective experience incapable of objective measurement was one in which involuntary reallocation was constrained. Only reallocations that made no one worse off (in his own estimation) and at least one person better off (again, in his own estimation) could be welfare enhancing.⁷⁴ Professor Sir John Hicks signaled the end of the waiting for a hedonimeter when, in *Value and Capital*, he reworked all of consumer theory on the presumption that utility was ordinal, not cardinal, and subjective.⁷⁵ The point is that economists adopted ordinal, subjective utility as the basis for their consumer theory because they felt that intellectual honesty compelled them to do so in the absence of an objective means of measuring utility.⁷⁶

Against that background, the remarkable possibility raised by happiness studies is the partial objectification of utility or happiness or subjective well-being. While it would be a stretch to say that happiness can now be measured cardinally, we can—thanks to the happiness literature—objectively measure the things and experiences that, on average, contribute to and detract from happiness. Not only does this conclusion admit of the possibility of interpersonal comparisons of happiness (at least across average persons), but it also raises the possibility of comparing different strategies for making someone happy. Would the average person become happier by receiving an additional income of \$10,000 per year or by getting married? These possibilities have perhaps not yet been fully realized, but they are close. And they promise dramatic changes in public policy not unlike the revolutionary changes in law that the authors have shown us.

⁷⁴ See Joseph A. Schumpeter, *Vilfredo Pareto (1848-1923)*, 63 Q J Econ 147, 163–64 (1949).

⁷⁵ See generally J.R. Hicks, *Value and Capital: An Inquiry into Some Fundamental Principles of Economic Theory* (Oxford 1939).

⁷⁶ See Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 Geo Mason L Rev 971, 982–83 (1998).

CONCLUSION

Professors Bronsteen, Buccafusco, and Masur have written a marvelous book—important, lucid, exciting, and delightful to read. It is a pleasure and an honor to be part of a profession that fosters scholarship of this remarkably high caliber.

As their conclusion suggests, there is much, much more work to be done in measuring and explaining happiness, discovering the nuances of adaptation, exploring how to adjust set points of well-being effectively, and more. But once acquainted with the field of happiness studies through *Happiness and the Law*, no one could doubt that such further work is not only worth pursuing but also vitally important.