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

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A. 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.”\(^1\) As it turns out, these decision-makers\(^2\) often turn out to be “wrong.”\(^3\) An enormous amount of recent research on the determinants of actual happiness,\(^4\) as

\(^1\) This is fundamentally the framework of the “wealth maximization” standard. It is based on the choices made by people able to express themselves in markets. See infra text at notes, ___-___.


\(^3\) Well-being can be assessed both subjectively and objectively. In this Article it will be used to denote an objective assessment.

\(^4\) See generally Brino S. Frey & Alois Stutzer, Happiness and Economics (2002); Robert Frank, Choosing the Right Pond (1985); Daniel Gilbert, Stumbling on Happiness (2005); Jonathan Haidt, The Happiness Hypothesis (2006); Jennifer Michael Hecht, The Happiness Myth (2007); Richard Layard, Happiness (2005); Matthieu Ricard, Happiness
opposed to expectations, holds 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” 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 B places happiness research in the context of
past efforts to assess efficiency standards. Part C outlines the schism between efficiency

Affective Forecasting,” 80 Ind. L. J. 155 (2005); Daniel Richard Easterlin, “Income and
Happiness: Toward a Unified Theory,” 111 Economic Journal 465 (Jul. 2001); Richard
Easterlin, “Explaining Happiness,” 100 Proceedings of the National Academy of
Sciences of the United States of America 11176 (Sept. 2003); Richard A. Easterlin, “Will
Raising the Incomes of All Increase the Happiness of All,” 27 J. Econ. Behav. & Org. 35
(1995); Interpersonal Comparisons of Well-Being (Eds. Jon Elster & John E. Roemer,
Appraisals,” in Well-Being: The Foundations of Hedonic Psychology (Eds. Daniel
Kahneman, Ed Diener & Norbert Schwartz, 1999); Richard E. Lucas, Andrew E.Clark,
Yannis Georgellis, & Ed Diener, “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

In this Article “utility” and “happiness” will be used to note the sense of being better
off. In other words, they are subjective. “Welfare” and “well-being” will be used to
indicate relatively objective standards like health, nutrition, etc.
and happiness and examines whether they can be reconciled. In addition, problems relative to legal analysis that are shared by both efficiency and happiness standards are explored. Part D discusses the problems of relying on direct measures of happiness. The concept of decisional equity is described and examined in Part E. It argues that decisional equity means adhering, as much as is practical, to three rules in order to achieve three ideals:

1. Individual decision-making should take place in the context of the most relevant information that can be practically made available. (The Information Ideal)

2. Decisions should be relatively unaffected by desire and cognitive biases. (The Psychic Ideal)

3. Decisions should not be influenced by adaptations to perceived injustice. (The Social Ideal)

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.

B. 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 and will not be considered here except as it

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pertains to the history of efficiency and to specific issues that separate efficiency and happiness.

Second, conventional economics is based on behavioral assumptions that have, over the last twenty-five years, come under increasing scrutiny. Principal among these assumptions are that people are rational and motivated by self-interest alone. These assumptions are, as it turns out, difficult to square with actual behavior. 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. These “markets” are colored by personal preferences and values

7 See infra text at notes ______-_______.

8 See infra text at notes ______-_______.

9 When the law and economics movement began with the publication of Ronald Coase’s “The Problem of Social Cost,” 3 J. L. & Econ. 1 (1960) and was propelled to forefront by Richard Posner’s Economic Analysis of Law (The first edition of Judge Posner’s Economic Analysis of Law was published in 1973. The seventh edition appeared in 2007.) it was based on the behavioral assumptions and efficiency standards of the day.

10 In one early law and economics offering the author notes that rational self-interest means excluding “someone 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).

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.\textsuperscript{12} 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”\textsuperscript{13} results in default tendencies that are inconsistent with aspirations.\textsuperscript{14} 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.

\textsuperscript{12} To some extent the rationality assumption may properly be viewed as part of this general area of study.

\textsuperscript{13} The term originated with Herbert Simon, “Rational Choice and the Structure of the Environment,” in Economics, Bounded Rationality and the Cognitive Revolution (Ed, Massimo Egidi & Robin Marris, 1992); Herbert Simon, Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting 198-199 (1957). As the terms suggest 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)

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. 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. 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 and biology -- has been devoted to understanding the process of choice-making and ways this may affect the law. Thus, the incorporation of behavioral theories

15 See infra text at notes ______-______.


18 See, e.g., Owen D. Jones & Timothy H. Goldsmith, supra note 17.

has begun 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 this trend will continue.\(^{20}\)

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 they 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.\(^{21}\) 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.


\(^{20}\) This is not to say that those who write about conventional economics have jumped on the behavioral bandwagon. See, e.g., Richard A. Posner, \textit{supra} note 9. Judge Posner 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” behavioral economics is understandable if one considers the division within legal education more generally. There are those who are well-versed in economics but for the most part these are also people whose preferences, like those of Judge Posner, are 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 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, \textit{supra} note 4.
The principal focus of this Article is on this newest area of study – happiness research. 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 (NWBA) are as relevant as gross domestic product (GDP) as a means of guiding policy. The goal is to assess how people actually feel. The question then becomes whether an approach of this nature can reshape economic analysis as applied to law. Additionally, if happiness

22 See materials cited in supra note 4.


24 The approach is largely subjective and is 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 in large, been the case. For reasons about which one can only speculate, although economics has responded and advanced in response to the four objections to efficiency listed above and is continually reassessing “efficiency,” 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. It
research cannot cure the ills of law and economics or act as a replacement, is there 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 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 steadfastly adheres to the approach introduced 35 years earlier. The principal difference is an effort to specify the rationality assumption. Compare Richard A. Posner, Economic Analysis of Law 5 (1972) and Richard A. Posner, Economic Analysis of Law 15-20 (7th ed. 2007). Judge Posner explains his position at Richard A. Posner, “Rational Choice, Behavioral Economics, and the Law,” 50 Stanford L. Rev. 1551 (1998).
question of actual as opposed to subjective well-being. Yet the possibility of recognizing this distinction is discussed with some frequency by economists and sociologists.

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

1. 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. 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

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 text at notes _______ - _______.

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 . . .”29 Utility, under his formulation, was a matter of 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 $10.30 The absence of a suitable answer on this matter of interpersonal comparisons of utility creates a great deal of uncertainty as far as policy.31

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.32 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


31 For a study suggesting that interpersonal comparisons of utility are possible, See Daniel Kahneman, Peter P. Walker & Rakesh Sarin, “Back to Bentham: Explorations of Experienced Utility,” 112 Q. J. Econ. 375 (May, 1997).

32 This is not to say that Paretian standards replaced utilitarianism. See Amartya Sen, supra note 26 at 30-32.
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. 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. But selecting one Pareto superior outcome over another means engaging in something akin to an interpersonal comparison of utility.33 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.34

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


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 Amartya Sen, supra note 26 at 17. These two approaches can, however, be reconciled. See Richard B. Brandt, The Theory of the Good and Right 95-98 (1979).
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 comparability of individual
satisfactions; since in all such cases it is possible to make everyone better
off than before, or at any rate to makes some people better off without
making anyone worse off.35

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 very sure that the full condition is satisfied; and we
ought to be sure that the discarded factors will be transferred to more
productive uses.36

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

35 Nicholas Kaldor, “Welfare Propositions of Economics and Interpersonal Comparisons
of Utility,” 49 Econ. J. 549, 550 (Sept. 1939) (emphasis in original).

1939).
to wealth as something to be maximized. The other was a shift to \textit{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.\textsuperscript{37} On first impression, direct attention to actually happiness would seem to make these accommodations unnecessary.

\textbf{a. The Shift to Wealth as Opposed to Expected Utility or Actual Happiness}

The substitution of \textit{value} – the Kador-Hicks standard of efficiency \textsuperscript{38} -- 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.\textsuperscript{39} In his 1981 book, The Economics of Justice,\textsuperscript{40} Judge Posner took on the task of defending Kaldor-Hicks efficiency as an “ethically attractive” standard.\textsuperscript{41} His argument consisted principally of noting that wealth maximization did not share the unacceptable characteristics of the two

\textsuperscript{37} Economics would have remained viable in other areas without this adaptation. It would have remained both an important 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 actually happiness or utility.

\textsuperscript{38} J. R. Hicks, supra note 36; Nicholas Kaldor, supra note 35.

\textsuperscript{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.


other competing efficiency standards – Paretianism and utilitarianism. According to Posner, Kaldor-Hicks efficiency is superior to Pareto efficiency because it allows for greater flexibility. 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 those needs up 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 base-line 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.\(^\text{42}\) 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.\(^\text{43}\) 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 substitution of wealth for happiness, the problems of stressing outcome over process remains.

b. 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. There are, however, many reasons why choices may not reveal preferences or actual utility. Most certainly they do


44 As Paul Samuelson has said, the theory is “free from any vestigial traces of the utility concept.” Paul S. Samuelson, “A Note on the Pure Theory of Consumer’s Behavior,” 5 Economica 61 (n.s., Feb. 1938).
not reveal fully informed preferences. 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. Strategic behavior may also be designed to conceal actual preference. 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. Gilbert and others note that this is not the way economists typically approach the issue. A choice \textit{when made} is viewed as utility-maximizing and the actual outcome is not something that economists have, until recently, been apt to explore. Daniel Kahneman, Peter Wakker, and Rahesh Sarin capture this distinction, distinguishing “decision utility” from “experienced utility.”

They describe the circularity of conventional economics like this: “In current economics and decision theory, the utility of outcomes and attributes refers to their weight in

\begin{quote}
At some point the cost of additional useful information will exceed the expected benefit in terms of outcome from that information.
\end{quote}


Daniel Gilbert, supra 4 at 260.

Amartya Sen, supra note 26 at 9-10.


Daniel Kaheman, Peter P. Wakker & Rakest Sarin, supra note 31.
decisions: utility is inferred from observed choices and is in turn used to explain these choices.” 52 A good example is found in Fairness Versus Welfare by Louis Kaplow and Steven Kaplow. The authors start their defense of welfare as opposed to fairness-seeking policies with “we 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.” 53 The authors contrast their assumption with “actual” well-being. 54 Of course, there is a difference between thinking one knows what is good for himself or herself and being right about the matter. Or, put differently, a person cannot know what will make him or her happier until he or she experiences the outcome of the choice. 55

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.

52 Id. at 375.

53 Louis Kaplow & Steven Shavell, supra note 42 at 23.


55 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 made no secret of the limitations this placed on their analysis.
2. Actual Happiness and Behavioral Assumptions

Suppose the problems related to the substitution of wealth for feelings and the predicted for the actual 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.

a. 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 and as discussed above, the question of whether all decisions are wholly self-regarding can be short-circuited by claiming that all choices reveal one’s preferences and, in the words of Amartya Sen, “no matter whether you are a single-minded egoist or a raving altruist or a class conscious militant, you appear to maximizing your own utility. . . .” Thus, in the terms Amartya Sen has used, are individuals capable of “counter-preferential choice?”

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

56 See supra text at notes _____-______.. 
57 Amartya Sen, supra note 16 at 328 (1977). 
58 Id. at 328.
result of the choice? If so, the notion that a person strives only to increase his or her 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. 59 Under this model parties adapt to new situations and return to the same level of well-being. 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. 60 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 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

59 Richard E. Lucas, Andrew E. Clark, Yannis Georgellis & Ed Diener, supra note 4.

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.

**b. Are Choices or Outcomes Rational?**

Closely related to the maximization assumption is the rationality assumption. 61 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. 62 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. 63

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 preferences. 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

61 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.


63 Id. at 396-405.
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 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 only an assumption that a great deal of
examination has drawn into question.64 For example, suppose there are no speed limits.
Some people will drive at unsafe speeds and 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. This
is not the same as whether people actually were rational. In particular in this case, 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

64 See infra text at notes _______ - _______.

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simply to note that the success of any policy taken is dependent on a belief that people will act rationally.

D. From the Predictions of Acquisitive People to a Direct Assessment of Happiness

If the notion of ex-post happiness is not useful as 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?65

1. 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 happiness66 and, in reality, happiness can be achieved by way of at least three paths.67 The first way of becoming happier is represented by a person who

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65 See Amartya Sen, supra note 26.

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 she 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. 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 endlessly 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 or her

67 This puts aside the highly individualized utility-affecting responses to various stimuli. See Tiffany A. Ito & John T. Cacioppo, supra note 4.

68 See writings by Richard A. Easterlin, supra note 4.
happiness, he or she might say, “I am perfectly happy but I would be happier still if I had a Rolex watch.” Again, there is no sense of longing or disutility. A third person may simply be content or happy enough that he or 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.69

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.70

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.”

69 See David Lykken & Auke Tellegen, supra note 60.

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 of that feeling. In effect, happiness is the reaction to unhappiness. Acquisition, like a pain-killer, 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 his head against a wall. The answer is because it feels so good when he 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?

The idea of becoming happier by wanting less is not the usual province of law or economics. It is not, however, some 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 been 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, 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.\textsuperscript{71}

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.

2. 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.\textsuperscript{72} 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 he or she 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

\textsuperscript{71} 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 disutility of living in a society in which unhappy people are forced to accept treatment.

\textsuperscript{72} See infra text at notes ______-______.
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 is closely related to the ideas of John Stuart Mill on different qualities of utilities. 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 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.” 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. The key is whether individuals feel relatively deprived with respect to the relevant group for comparison. For example, a person who may have little or be 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 was 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. 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. Think of the price a person pays in terms of dissonance, suffering, and even humiliation if he or she 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

74 As discussed below, this concept may also affect decision-making in ways that cause it to deviate from decisional equity. See infra text at notes ______-_______.


77 See infra text at note ______-_______.

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to avoid these sources of unhappiness. One adaptation is to relate to groups that create more “comfort.” Thus, one may achieve greater happiness by expecting less, and the route to expecting less may be to compare oneself to those similarly situated in society.

Relative deprivation may explain why some groups consistently accept contractual outcomes that other groups regard as unfair and unacceptable. 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’s developing a sense of deserving better. 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,

78 This can be referred to as the “adaptation problem.” See Mozaffar Qizilbash, “Well-Being, Adaptation, and Human Limitations,” in Preferences and Well-Being 233 (Ed. Serena Olsaretti, 2006).


80 For a discussion see Jeffrey Harrison, supra note 77 at _________.

initially, of disutility. But the question is even more complicated. Suppose someone’s consciousness is raised with respect to his or her relative deprivation. Through social change or individual efforts, he or she 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 possibility is to increase disutility by raising the consciousness of people as to other possibilities and assist them in developing a taste for those possibilities and a sense of entitlement to those possibilities. Only if that disutility is offset by future happiness would this seem to make 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.

3. 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. If the goal is happiness, then if a person – a smoker, a poorly educated person, a sickly person – feels happy, that is the end of the analysis. Objective well-being is quite different, and this is captured by Thomas

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83 See generally Bruno Frey & Alois Stutzer, supra note 4 at 4-6.
Scanlon in his defense of an objective perspective: “I mean a criterion that provides a basis for appraisal of a person’s 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.”

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, the feeling better off is temporary, it is hard not to regard the outcome as successful. Conversely, a sense of being happy or satisfied or at least having lower levels of stress has been associated with objective measures of well-being.

But take the harder case. Suppose two people are exactly the same as far as any measure of objective 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.

4. 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 or unhappy or somewhere in between. Events may move them to higher or lower levels of happiness but only temporarily. While set point 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.\(^\text{86}\) 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.\(^\text{87}\) In effect, they reconstruct. In that survey the highest level of satisfaction is derived from sex

\(^{86}\) See Kahneman, et. al. supra note 23 at 430- 432.

and the lowest from commuting to and from work. 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. First is “instant utility”—how one is feeling at the moment. Second is recalled utility. This is utility one assigns after the fact. For example “How was the sex, meal, lecture, etc?” Third are measures based on a more general assessment of specific components of one’s life – “How do you feel about your job, your spouse, etc.” Fourth is the more global question of “How happy are you?” Kahneman and his coauthors also identify “decision utility” and “predictive utility.”

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.

89 Kahneman et. al. supra note 23. See supra text at notes ______-_______.
90 Id. at 375.
91 Id. at 378.
The combination of utility assessment possibilities is endless.\(^9\) 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

\(^9\) In fact all time periods may interact to create the current sense of happiness. See Władysław Tatarkiewicz, “Happiness and Time,” 27 Philosophy and Phenomenology Res. 1 (Sept. 1966).
ones?” To understand the importance of 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. 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. The temperature of the water was equal except in the longer

experiment it was raised slightly near the end of the time period. The subjects recorded the level of discomfort during the experiment. 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. 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. Another is to recall the event with respect to what is call the “peak-end average.” “Peak-end average” is the average of the intensity of feeling at the peak moment and the intensity at the end. 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? 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. 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. In short, the initial serving was not as

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94 D. Kahneman, P. Wakker, R. Sarin, supra note 31 at 386.

95 Id. at 381.

96 Id.

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. The actual level of the decline tended to be lower than that predicted. 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.98

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 the sense of 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 recall – 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 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.99

5. Capability Issues and Trusting Happiness

98 Id. at 192.

The distinction between feeling and being better off is at the heart of work done by Amartya Sen with respect to capability. In effect, for want of a better term, there is a “thinness” to feeling happy or better off. As John Lennon wrote, drugs, religion, and television can produce the same result. Sen’s more scholarly exposition focuses on the link between having possessions and feeling or being better off. For example, 30 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.


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

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 take it or leave may have access to an expensive sports car. Sen captures the contingent element in 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.”103 In effect, commodities and utility are linked by both capability and valuation processes.104

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.105

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103 Amartya Sen, supra note 32 at 45.

104 One may argue that a wealth maximization approach remedies the problem in some respects 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.
E. From Outcome to Process

1. 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 to that disconnect. For example, the way a person senses how he or she feels 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

105 Another implication for those who view rights as having an importance independent of utility is that addressing capability issues broadens freedom whether or not 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.
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. Amarya Sen and Martha Nussbaum
describe it as involving “an account of many different kinds of activity that make up a
‘thriving’ human life.”

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 focusing on 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 breach.” Although subject to
criticism, the basic idea is that the remedy for breach of contract should be set to protect

106 Martha Nussbaum & Amarya Sen, “Introduction,” in the Quality of Life 1, 2 (eds.,
Martha Nussbaum & Amartya Sen, 1993).
the expectancy of the non-breaching party. A party will then breach if an opportunity presents itself that permits that 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, he or she may regret being the type of person who breaks promises for money. These outcomes are difficult to predict so much so 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.\footnote{\textsuperscript{107}}

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

\footnote{\textsuperscript{107} 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 he or she expects not to be negligent then the outcome does not increase anything. It’s 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.}
own it provides no sustenance. The same is true with respect 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.

Emphasis on process and the decision point is hardly a new idea. For example, Seneca, writing about a happy life, stresses wisdom and virtue. 108 Wisdom is “the right understanding, a faculty of discerning good from evil; what is to be chosen, and what rejected. . . .”109 More modern research indicates that an important element in determining happiness is a sense of control.110 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, or normative questions, is usually not the province of economics. Here, however, “equity” refers to the fairness inherent in each person having an opportunity to make his or her 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 and that 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, etc. 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 as opposed to simply punishing, can arguably improve decision-making. In contract law, the case has been made that increased use of unconscionability

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can have a therapeutic and empowering impact on those who are taken advantage of.\textsuperscript{112}

Still, it seems clear that economic considerations cannot be the sole focus of law.

2. 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. Individual decision-making should be made in the context of the most relevant information that can be practically made available. This information should include expected outcomes and opportunity costs. This is the “Information Ideal.”

2. Decisions should be relatively unaffected by desire and cognitive bias. This is the “Physic Ideal.”

3. Decisions should not be influenced by adaptation to perceived injustice. This is the “Social Ideal.”

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\textsuperscript{113} whether they are in terms of welfare,\textsuperscript{114} resources,\textsuperscript{115}

\textsuperscript{112} See J. Harrison, supra note 77.
primary goods,\textsuperscript{116} or capability.\textsuperscript{117} 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, as defined above, can facilitate. For example, capability, in Sen’s view, extends to general well-being including matters of physical health and longevity.\textsuperscript{118} 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.\textsuperscript{119}

\textsuperscript{113} For a good summary, see Normal Daniels, “Equality of What : Welfare, Resources or Capabilities,” 50 Philosophy and Phenomenological Research 273 (1990 Supp.).


\textsuperscript{116} John Rawls, A Theory of Justice (1971).

\textsuperscript{117} See discussion of Sen at supra text at notes ______-______.

\textsuperscript{118} Amartya Sen, Commodities and Capabilities, supra note 26 at 10, 45.

Similarly, the approach here is more modest than that of Rawls.\textsuperscript{120} Certainly equity in decision-making could be a part of obtaining both liberty principle\textsuperscript{121} and difference principle\textsuperscript{122} 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 affects 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 decision to exercise, drive

\textsuperscript{120} John Rawls, A Theory of Justice (1971).

\textsuperscript{121} The Liberty Principle is “Each 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.

\textsuperscript{122} The “Difference Principle” is “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.
carefully, have children, or postpone present consumption are all effected 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 (TJ), although not expressly so, is closely related to decisional equity and the discussion that follows. TJ is devoted to the question of how law can have an impact on the “psychological or physical well-being of the people it effects.” 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.”

(a) The Information Ideal

The information ideal is a broad concept. It includes ordinary information like product qualities but extends to information about the long-term effects of decisions and includes opportunity costs. 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.

(1) Transactional Information: The Issue of Disclosure

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125 An opportunity cost is the value of the next best choice when one makes a decision.
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 he or she would like to know if in the position of the other party. This would cover both instances of “unilateral mistake” and failure to disclose.\textsuperscript{126} 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.\textsuperscript{127} 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,\textsuperscript{128} 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 non disclosure . . . amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”\textsuperscript{129} In the case of unilateral mistake, the mistaken party is excused when he or

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\textsuperscript{126} The Restatement (Second) of Contracts separates these topics. Under §153 a contract is voidable by a unilaterally mistaken party when he does not assume the risk of the mistake and other party has reason to know of the mistake. Under §161 a failure to disclose information is treated as a misrepresentation under certain conditions. American Law Institute, Restatement (Second) of Contracts (1981). Aside from the remedial differences, it is not clear that the distinction is otherwise useful.
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\textsuperscript{127} Of course, fraud also gives rise to an action under tort law.
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\textsuperscript{128} American Law Institute, Restatement of the Law (Second) Contracts, §161 (1981).
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she 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 principle 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. 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. In a sense, the 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

129 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.


131 Professor Kronman sees these cases as analogous to “last clear chance.” 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.
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.\textsuperscript{132}

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.\textsuperscript{133} 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 which is based on the personal experience of those who have undergone training as door-


\textsuperscript{133} A. Kronman, supra note 127 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.
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 he or she 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 – 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. These efforts to affect only distributive outcomes are viewed by most economists as economic waste. They do not increase total well-being, they just redistribute it.

**Figure 2**

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  deliberate
     |
  ———|
  casual
     |
  ———|
  allocative
   distributive
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The analysis can be visualized in the Figure 2 grid. In the context of Professor Kronman’s analysis all information, regardless of the purpose, which 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.134

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 Laidlaw v. Organ.135 Organ purchased tobacco from Laidlaw knowing that the value had suddenly increased because of the end of the War of 1812. Laidlaw did not know the war had ended. The Supreme Court eventually ruled that Organ had no duty to disclose.136 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

134 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 supra note 127 at 7.


136 Id.
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. 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. 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

137 A. Kronman, supra note 127 at 10, n.27.

138 Presumably non-askers would adjust their asking or offering prices accordingly.
information but a likely misunderstanding of legal obligations. Needless to say, an argument that a specific legal rule is 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. Certainly the “owner” of land or any other property who must relinquish it when asked for it would not regard himself or 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.

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

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139 Professor Kronman suggests that even silence after such a question may be fraudulent. Id. 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.

140 Id. at 15.

141 The analysis changes if the art expert is speculating and buys art on the chance that it may turn out to be valuable.
creative people as a means to an end, 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. 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?

Intellectual property law resolves these issues with largely politically determined standards that seem to have little connection with encouraging the most desired levels of innovation and creativity. Still, at least there are relatively bright lines on which one

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

143 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.

144 For example, in 1998 the copyright term was extended from life plus 50 years to life plus 70 years not just for post-1998 work but for works already in existence. See Eldred v. Ashcroft, 537 U.S. 186 (2006). 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.
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. The argument may be made that the administrative costs of making such a fine distinction outweigh any benefits. 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, 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

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146 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.

147 A. Kronman, supra note 127 at 17-18.
of unproductive redistributive efforts and the protection of information that was casually gained.\textsuperscript{148}

\textit{(2) 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.\textsuperscript{149} 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.\textsuperscript{150}

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?

\textsuperscript{148} 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.

\textsuperscript{149} A product could, however, have an aesthetic appeal.

\textsuperscript{150} These issues are discussed in section b, \textit{infra}. 
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.\textsuperscript{151} In fact the “wines” were the same. Not only did the subjects claim to prefer the wine with the higher price, brain scans suggested that they actually experienced greater satisfaction from that wine. 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 he or she consumes the beer. An auto commercial showing an attractive person asserting his or her 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.\textsuperscript{152} Is there a principled distinction between owning and using a 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


\textsuperscript{152} 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 same \textit{status} of owning the genuine article at a knockoff price.”\textsuperscript{153} Hermes Int’l. v. Kederer De Paris Fifth Avenue, Inc. 219 F.3d 104 (2d Cir. 2000). See generally, See Jeffrey L. Harrison, “Trademark Law and Status Signaling: Tattoos for the Privileged.,” 59 Fl. L. Rev. 195; Richard S. Higgins & Paul H. Rubin, “Counterfeit Goods,” 29 J.L. & Econ. 211 (1986).
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. EP [experienced pleasantness] is an important component of experienced utility which is the economists’ term for subjective well being. We show that, contrary to the standard economic view, EP depends on nonintrinsic properties. It then follows that market manipulations might affect subjective perceptions of well being. This raises several difficult questions. Should the effect of prices on experienced utility be counted toward real economic well being or as a mistake made by individuals?"^{153}

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? Is someone actually better off when he or she does 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.

^{153} Id. at 1052.
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 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.*154 in which a 52-year-old widow ends up buying a total of 2300 hours of dance lessons at a cost of $31,000. She was evidently motivated by repeated assurances that she had “grace and poise”155 and great potential. In fact, she did not progress, had little dance aptitude, and even had difficulty “hearing that musical beat.”156

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

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155 Id. at 907.
156 Id. at 908.
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 in which a person changes his or her 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 exclusively in a positive light, the logic of the misrepresentation rule calls for a fuller
disclosure. These disclosures already exist in many areas related to nutritional information and consumer safety. 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. 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 years of experience of pilots. 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, the fear being that the information would render the market more competitive or the value of the product less.

As has been pointed out, the way the information is presented can be as important as its disclosure. See Chirstine Jolls & Cass R. 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 209-217.


This information is available from the Bureau of Transportation Statistics, U.S. Department of Transportation.

Oren Bar-Gill makes the point that redistributions associated with non-disclosures may be regressive. See O. Bar-Gill, supra note 155, at 780.
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 is 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. Non-disclosure is not only contrary to the logic of misrepresentation law but arises, in part, as a result of market imperfections that permit the most efficient producers of the information to conceal it.

(b) The Psychic Ideal

(1) 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 which months later they can see from a different perspective that enables them to realize how little what seemed like a critical decision actually meant. Oft-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. 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. There is obviously a close connection with this view of desire and the Four Noble Truths of Buddhist thought:

1. Life means suffering.
2. The origin of suffering is attachment.
3. The cessation of suffering is attainable.


163 These may also be viewed as “natural” or “empty” desires. Empty desires are “infected with 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).

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 -- 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. Or, under set point theory, 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. 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

\footnote{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 145-147 (1998).}

\footnote{See supra text accompanying notes ______.-_______.}

\footnote{See, e.g., Thich Nhat Hanh, The Heart of Buddha’s Teaching 24-40 (1998).}
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 he or she 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 themselves when they had less and were actually happier.\(^{168}\) Similarly, if a serious misfortune befalls the person or someone close to him or her, 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.\(^{169}\) In effect, the difficulty of gaining a fresh perspective is tantamount to a transaction cost.

(2) Decision-Making Biases

Aside from addressing information imbalances and problems of disclosure, decisional equity requires a response to common decision-making errors.\(^{170}\) These

\(^{168}\) 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 J.B. Schor, \textit{supra} note 161 at 74-84.


\(^{170}\) See citations and examples at infra notes 175-179. 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 C. Jolls & C. Sunstein, \textit{supra} note 14. For a broad examination of judgment “errors” see Jeffrey Lipshaw, \textit{Law’s Illusion: Scientific Jurisprudence and the Struggle with Judgment},
persistent quirks in reasoning have been explored in a number of scholarly works\textsuperscript{171} and more recently in writings with broader appeal.\textsuperscript{172} All of these quirks, biases, tendencies, etc., 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\textsuperscript{173} 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.\textsuperscript{174}

These biases can be seen as analogous to the kinds of imperfections that give rise in a conventional analysis to transaction costs.\textsuperscript{175} Here the term is used to mean any

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\textsuperscript{171}See also supra text at notes ___-___; Jeffrey L. Harrison, Law and Economics: Positive, Normative and Behavioral Perspectives 63-140 (2d. 2007); C. Jolls. & C. Sunstein, supra note 14. A concise recent effort is J. Blumenthal, supra note 4, at 167-182.


\textsuperscript{173} Conversely, repeated opportunities to make a decision are likely to be informative leading to more satisfactory outcomes. See C. Sunstein & R. Thaler, supra note 2 at 1163.

\textsuperscript{174} See discussion at supra notes 92-95.

\textsuperscript{175} Jeffrey J. Rachlinski also uses the term transaction costs in the context of legal responses to decision-making biases. His meaning appears to be different, and I would suggest not entirely consistent with the ordinary usage. 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
factor that separates expectations from what is experienced. In some respects it may seem awkward to think of transaction costs in this context, 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. 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 mean that a specific outcome is 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.” J. Rachlinski, supra note 19 at 1168. 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.

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, he or she may test-drive the car or rent it or even rent a second home on the beach before committing as a way of experiencing, as accurately as possible, what it will feel like to own the car or house. 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.

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.

In this sense, what follows can be distinguished from others who have written about decision-making biases as preventing efficient outcomes. See C. Jolls, C. Sunstein & R. Thaler, supra note 11 at 1487.
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,\textsuperscript{180}
endowment effects,\textsuperscript{181} and optimism biases\textsuperscript{182} will be more sensitive to these matters

\textsuperscript{179} Preference reversals occur when questions are framed differently. A classic example
offered by A. Tversky and D. Kahneman, Tversky & Kahneman, “Framing of Decisions
and the Psychology of Choice,” 211 Science 453 (1981) involves the following
experiment in which people are asked what is objectively the same question in two
different forms. They are asked to imagine an epidemic in which 600 people are expected
to die.

1. If Program A is adopted, 200 people will be saved.
2. If Program B is adopted, 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, preferred Program D by more than a three-to-one margin.
Although the questions are objectively the same, stating the choice in 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 679 (Sept 2003).

\textsuperscript{180} See description in note 180, infra.

\textsuperscript{181} Endowment effects occur when a person values the same thing differently depending
on whether he or she currently possesses it. For example, someone might be willing to
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.\textsuperscript{183} 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.\textsuperscript{184} Contract doctrines addressing capacity\textsuperscript{185} and unconscionability\textsuperscript{186} also indirectly address these problems. In reality all of these doctrines address the overriding transaction cost – the general inability to experience or at

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\textsuperscript{183} The most ambitious effort to date to address how law may be applied to offset some of these biases is Christine Jolls & Cass R. Sunstein, “Debiasing Through Law,” supra note 14.

\textsuperscript{184} See infra text at notes \textbf{-} - \textbf{-}. See also similar notions such as duress and undue influence. American Law Institute, Restatement (Second) of Contracts, §§ 174-177 (1981).

\textsuperscript{185} More specifically, doctrines dealing with age, cognitive and volitional impairment and intoxication come into play here. See Id. at §§ 12-16 (1981).

\textsuperscript{186} Id. at § 208.
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.¹⁸⁷ 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.¹⁸⁸ For example, a


Possibly the best known cooling-off period is that applied by the Federal Trade Commission to door-to-door sales. It allows the consumers to change their minds within three days. 16 CFR § 429.1(a). See also E. Allan Farnsworth, Changing Your Mind: The Law Of Regretted Decisions 24 (1998).

¹⁸⁸ J. Rachlinski, supra note 19 at 1224.
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.\textsuperscript{189}

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.\textsuperscript{190} The intuitive is fast, emotional, and automatic. Reasoning is slower and takes effort.\textsuperscript{191} Here again the analogy to conventional transaction costs is apt. In that context it is not simply the 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 about which they have little experience and which are characterized by high emotions.\textsuperscript{192} 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. Cass Sunstein, writing with different coauthors, has proposed two other approaches to the problem. Along with

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\item \textsuperscript{191} Id. at 698. There is a similarity here as well to the distinction between “controlled” and “automatic” responses. Jonathan Haidt, supra note 4 at 13-17.
\item \textsuperscript{192} C. Sunstein & R. Thaler, supra note 2 at 1188.
\end{itemize}
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Richard Thaler, Sunstein has proposed default options. This approach would entail the use of automatic adoption of outcomes that are consistent with what bias-free reasoning would choose. 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. Instead of shielding people from the outcomes of decisions they propose the creation of legal rules that are directed to debiasing the decisions themselves. 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. They also propose the reframing of dangers in negative terms in order to offset the optimism bias. Jolls’ and Sunstein’s 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.

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193 Id.


195 C. Jolls & C. Sunstein, supra note 14 at 209-215. 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.

196 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.

197 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
In effect, 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.\(^\text{198}\) These triggering events do not necessarily coincide with instances of decision bias. Of these, however, an expansion of misrepresentation is the most promising.\(^\text{199}\) For example, a seller who frames a warning or even general information in a way to take advantage of known decision biases is little different from a merchant telling half-truths.\(^\text{200}\) 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.

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\(^\text{198}\) Most are obvious, but in the case of duress the event is an improper threat. See Id. at §176.

\(^\text{199}\) For a discussion of Federal Trade Commission regulations that have the same goal see C. Jolls & C. Sunstein, supra note 14 at 215-217.

Perhaps the most neutral possibility is the expansion of cooling-off periods.\textsuperscript{201} 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.\textsuperscript{202} 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 most easily to agreements and to decisions that can be easily “undone.” Even if “agreement” can be applied very broadly,\textsuperscript{203} 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

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\textsuperscript{201} 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 C. Camerer, et. al. supra note 2 at 1239-1240.

\textsuperscript{202} One possibility – mandatory cooling-off periods – would have a more paternalistic flavor.

\textsuperscript{203} C. Camerer, et al note that decisions like marriage and divorce could be susceptible to treatment by cooling-off periods. See supra note 2 at 1240.
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example, not all people experience the same biases to the same degree. 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. 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. In effect, 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. Nevertheless, in the interests of decisional


205 This example is based on Id. at 214-215.

206 Colin Camerer and his coauthors propose asymmetric paternalism as a response to decision bias. See C. Camerer, 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 offsets the costs to rational decision-makers. 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.
equity, there may be many relatively inexpensive measures that do not involve a refined analysis.

(c) 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 $4000. 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.207

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 the professional status that is consistent with having moving expenses paid for. This is, in fact, what relative deprivation theory208 suggests; assessments of fairness are the result of

comparisons with the group one views himself or herself as part of. 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 believe they are entitled to more. Those who lack it are likely to be satisfied with less. 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.

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. Interestingly, with very small exception, the scholars who have

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209 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 what it means is that people believe they deserve better. A lack of 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.


211 See generally, Jeffrey L. Harrison, supra note 79.

212 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 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). [hereinafter Relative Deprivation.]
plowed the field of cognitive distortions and biases over the past 30 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\(^\text{214}\) 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.\(^\text{215}\)

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.\(^\text{216}\) 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. Finally, they may create an imaginary reality in
which their position is similar to others. 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.

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.

(1) Decreasing the Need for Filters

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C. Homans puts it this way, “. . . what 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

217 For a discussion of how this frame of reference may evolve 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, 1254-1255 (2000). See also Mary Jo
Wiggins, “Race, Class, and Suburbia: The Modern Black Suburb as a ‘Race Making

218 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 “Fabricating and Ignoring Social Reality: Self-Serving
Estimates of Consensus,” in Id. at 135.

219 It seems clear that the status quo does have value. See John T. Jost, Mahzarin R.
Banaji & Brian Nosek, “A Decade of System Justification Theory: Accumulated
(2004).
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 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. 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, has proposed taxing consumption. Frank’s proposal is based on the utility-increasing impact

\footnote{220}{This example is based on those presented by Joanne Martin, supra note 203.}


\footnote{222}{Frank views the disutility from economic disparities as a type of externality. In a sense, what has been described here are filters designed to decrease the impact of the externality. See generally Robert H. Frank, Choosing the Right Pond (1985). See also
of lower levels of disparity. 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.

(2) 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. 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 just to bare outside data it is probably more accurate to say that he or she 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


223 A sense of relative deprivation has been associated with higher levels of crime. See, e.g., Judith R. Blau and Peter M. Blau, “The Cost of Inequality: Metropolitan Structure and Violent Crime,” 47 American Sociological Review, 114, 122 (Feb., 1982).
an extent that he or she is not sensitive to relative deprivation. In this case the
different wage or price paid of 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 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. 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.

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).
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.\(^{225}\) 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.\(^{226}\) Possibly the best examples of this are the American experience with respect to race\(^ {227}\) and other social movements.

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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 have the impact of affirming a sense of relative deprivation.\(^ {228}\)

\[^{225}\] See supra text at notes ______-_______.


\[^{227}\] See Lise Dupe & Serge Guimond, “Deprivation and Social Protest: The Personal-Group Issue,” in Social Comparisons, supra note 189 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 (Sept. 2000.) Recent news events involving Rev. Dr. Jeremiah A. Wright, Jr. also provide insight into the role of some Black churches.

\[^{228}\] To some extent contract has the tools to make individualized changes. See Jeffrey L. Harrison, supra note 77 at 489-500. Note that class plays a role in judicial decision-
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.

F. 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 making. See Miriam A. Cherry, “Exploring (Social) Class in the Classroom: The case of Lucy, Lady Duff-Gordon,” 28 Pace L. Rev. 235 (2008).
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.\textsuperscript{229}

\textsuperscript{229} This is not to suggest the issue has not been addressed. See, e.g., Erik J.S. Plug,
Bernard M.S. van Praag & Joop Hartog, “If We Knew Ability, How would we Tax
Individuals?” 72 J. Pub. Econ. 183 (1999); Lawrence Zelenak, “Taking Endowment,” 55
Duke L. J. 1145 (2000). The Genetic Information Nondiscrimination Act, which recently
became law, prohibits discrimination by health insurers on the basis of genetic
information. 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.