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Hedonic Damages, Hedonic Adaptation, and Disability

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

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

¹ JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109 (1983).

² Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 *DUKE L.J.* 385, 426 (2004). For examples of scholars making similar points, see ELSTER, *SOUR GRAPES*, *supra* note 1, at 137; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 111-166 (2000); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 14-15 (1987) (Oxford India Paperback 1999); David Dolinko, *The Perils of Welfare Economics*, 97 *NW. U. L. REV.* 351, 375-377 (2002); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. CHI. L. REV.* 1129, 1150 (1986).

³ AMARTYA SEN, *RESOURCES, VALUES, AND DEVELOPMENT* 309 (1984). This general notion clearly is related to the Marxian notion of “false consciousness,” but it also draws on a more liberal tradition. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 2, at 114-115; see, e.g., JOHN STUART MILL, *UTILITARIANISM* 10 (George Sher, ed., 1979) (1861) (“It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.”).

Thus, scholars have typically invoked the adaptive preferences phenomenon as an argument that some (specified) preferences are not a proper measure of justice and ought not to guide policy.⁴ Although some have recognized in the abstract⁵ that nothing in the theory of adaptive preferences requires preferences to be uniformly disregarded, the concept has nearly always been deployed by the theory's adherents as part of an argument for disregarding revealed, expressed, or felt preferences.⁶

Critics of adaptive preference theory have argued that the theory lacks “both conceptual coherence and empirical grounding,”⁷ and that it is “undemocratic,”⁸ because the true “argument for respecting preferences is that *they are the individual's, whatever their origin.*”⁹ We take a different tack. We agree with the theory's proponents that adaptive preferences exist and that they raise significant normative questions about the unreflective use of preferences as a measure of justice or a basis for policy. But—and this is a point to which proponents of adaptive preference theory have given too little attention—identifying adaptive preferences is only the beginning of the normative inquiry. Although the writings of the theory's proponents suggest

⁴ See, e.g., NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 2, at 144; SEN, COMMODITIES AND CAPABILITIES, *supra* note 2, at 14-15; SEN, RESOURCES, VALUES, AND DEVELOPMENT, *supra* note 3, at 309. Elster distinguishes adaptive preferences (which result from “habituation and resignation”) from preferences developed through learning or conscious character planning. ELSTER, *supra* note 1, at 112-114, 117-119. But other exponents of the adaptive preference theory use the term more broadly. See, e.g., NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 2, at 136-138 (discussing Elster).

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

⁶ For a rare instance of a law review article (albeit not one by scholars associated with the adaptive preference theory) arguing that it might be inappropriate to disregard adaptive preferences, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 619-620 (2003) (arguing that if preferences adapt to a “postcrisis baseline” that restricts liberty to protect against terror threats, that adaptation will be a good thing “if the precrisis baseline represented a society underprepared for emergencies, in which law and institutions were supplying too much liberty and not enough order”).

⁷ RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 143-149 (2003).

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

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

the contrary, we argue that adaptive preferences ought not be automatically rejected (though neither should they be uncritically accepted) as a measure of justice or a basis for policy. Rather, the realization that particular preferences are adaptive should induce a more searching normative inquiry into whether those preferences ought to drive policy in particular contexts. We illustrate this point by exploring one area in which, far from ignoring adaptive preferences, the law should embrace and promote them. That area is what has been dubbed “the rapidly bubbling cauldron”¹⁰ of hedonic damages in tort.

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

A number of states recognize hedonic damages as a separate category of recovery in tort and tort-like actions.¹³ Others consider lost enjoyment of life an aspect of what are sometimes termed “disability” damages—damages for physical or mental impairment.¹⁴ Many other states permit juries to take account of

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

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

¹² *Boan*, 541 S.E.2d at 244.

¹³ See, e.g., *Boan*, 541 S.E.2d at 245; *Adams v. Miller*, 908 S.W.2d 112, 116, (Ky. 1995), *abrogated in part on other grounds*, *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997); *Fantozzi v. Sandusky Cement Prod. Co.*, 597 N.E.2d 474, 486 (Ohio 1992); *McDougald v. Garber*, 536 N.E.2d 372, 375-377 (N.Y. 1989); *Swiler v. Barker’s Super Market, Inc.*, 277 N.W.2d 697, 700 (Neb. 1979).

¹⁴ See, e.g., *Swiler v. Baker’s Super Market, Inc.*, 277 N.W.2d 697, 700 (Neb. 1979) (“Loss of enjoyment of life may, in a particular case, flow from a disability and be simply a part thereof, and where the evidence supports it, may be argued to the jury.”); *Anderson v. Nebraska Dep’t of Social Services*, 538 N.W. 2d 732, 740 (Neb. 1995) (“[L]oss of enjoyment of life is not a separate category of damages but is an element or component of pain and suffering and of disability.”); *Knight v. Lord*, 648 N.E.2d 617, 623 (Ill. App. 1995) (loss of enjoyment of life is an aspect

lost enjoyment of life in setting compensation for pain and suffering¹⁵ or other forms of general damages.¹⁶ In all these jurisdictions,¹⁷ disability has loomed large. And the view of disability is often one of tragic dependency and helplessness. As we show in Part I below, lawyers seeking hedonic damages emphasize their clients' new status as compromised and damaged persons, and courts frequently uphold jury verdicts awarding hedonic damages to individuals who experienced disabling injuries based on a view that disability—what some courts refer to as the failure to be a “whole person”¹⁸—*necessarily* limits one's enjoyment of life. This view is consonant with a general societal understanding of disability as a tragedy and of people with disabilities as natural objects of pity.

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

of disability damages, or damages for “loss of a normal life”). See Pamela J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D. L. REV. 561, 577-80 (1987).

¹⁵ See, e.g., *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005); *Banks v. Sunrise Hosp.*, 102 P.3d 52, 64 (Nev. 2004); *Gregory v. Carey*, 791 P.2d 1329, 1336 (Kan. 1990); *Canfield v. Sandock*, 563 N.E.2d 1279, 1281-1283 (Ind. 1990).

¹⁶ *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990) (holding loss of enjoyment of life a proper part of general compensation for personal injury)

¹⁷ On the division of jurisdictions into these or similar groupings, see Ronald J. Mishkin, Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639 (1969); Carleton Robert Cramer, Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981); Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 577 (1990); Pamela J. Hermes, *Loss of Enjoyment of Life-Duplication of Damages Versus Full Compensation*, 63 N.D. L. REV. 561, 565 (1987); Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293 (1984). For a general discussion of the case law both in states that allow a separate recovery for hedonic damages and in states that allow recovery for hedonic damages as part of a broader noneconomic damages category, see Susan Poser, Brian H. Bornstein, & E. Kiernan McGorty, *Measuring Damages for Lost Enjoyment of Life: The View From the Bench and the Jury Box*, 27 L. & HUM. BEHAVIOR 53, 54-57 (2003).

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

Unfortunately, people *without* disabilities have a difficult time imagining that disability can do anything other than drastically impair the enjoyment of life. Studies have consistently shown that nondisabled people rate the quality of life with a disability as being significantly lower than people with disabilities rate the quality of their own lives. The extensive psychological literature on affective forecasting—recently brought to a mass audience in Daniel Gilbert’s book *Stumbling on Happiness*¹⁹—demonstrates that this phenomenon is no fluke. People simply do a poor job of predicting how they will feel in new life circumstances. People without disabilities may expect that a disabling injury will be tragic, but people who have such injuries tend not to experience them that way.²⁰

To be sure, the views of people with disabilities about their own quality of life are classic adaptive preferences. Accordingly, one might suggest that the legal system should disregard those views.²¹ But we argue that the legal system goes wrong by so devaluing the experience of people with disabilities. When courts award damages based on the (nondisabled person’s) view that

¹⁹ DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006). For a recent comprehensive effort to assess the implications of the affective forecasting literature for the law, see Jeremy A. Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L.J. 155 (2005). (In a paragraph, Blumenthal notes that the affective forecasting literature might have implications for hedonic damages, but he does not develop the point. *See id.* at 184.) For other recent examples of legal applications of the affective forecasting literature, see Chris Guthrie, *Risk Realization, Emotion, and Policy Making*, 69 MO. L. REV. 1039, 1040-1044 (2004); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 116-119 (2004). The recent proposals for “asymmetric” or “libertarian” paternalism also respond to a significant extent to problems of affective forecasting. *See generally* Colin Camerer, *et al.*, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). Edward McCaffery, Daniel Kahneman, and Matthew Spitzer discussed some of the possible implications of adaptive preferences theory for tort law in a more general way in Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1388-1403 (1995).

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

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

disability is tragic, they distract attention from the societal choices and stigmas that attach disadvantage to disability; they also make it harder for people with disabilities to make hedonic adjustments to their conditions. For deterrence and compensation reasons, people who experience disabling injuries should be able to recover for their physical pain; for medical expenses and the cost of assistive technology and personal assistance; for the opportunities society denies people with their conditions; and for the effects of social stigma. But they should not recover for any purported effect of disability on the enjoyment of life.

We thus hope to contribute to the tort-law literature on hedonic damages, as well as the wider literature on adaptive preferences. Our intervention in these debates may also be regarded as an effort at what Jerry Kang has called “behavioral realism,” an interdisciplinary collaboration that seeks “to deepen our understanding of human behavior generally and [the mechanics of intergroup inequality] specifically, with an eye toward practical solutions.”²² Our argument proceeds as follows. In Part I, we show that lawyers presenting hedonic damages cases and courts hearing those cases have treated disability as inherently and tragically limiting the ability to enjoy life. In Part II, we review the extensive evidence, developed by psychologists and rehabilitation professionals, that people with disabilities tend not to believe that their disabilities limit the ability to enjoy life, but that people without disabilities have a much more pessimistic view. Courts that award hedonic damages for disabling injuries thus tend to act based on the views of most people without disabilities, rather than on the views of most people with them. Finally, in Part III, we develop in detail the normative implications. We argue that courts should not award hedonic damages based on disability.

We should note at the outset the limits of our argument. The hedonic damages in which we are interested constitute compensation for what is said to be the shrunken pleasure of living with a disability, compared to the plaintiff’s prior physical or mental state. We are not dealing, at least not here and not directly, with two related but distinct topics: “disability damages” that are not based on the effect of disability on life’s enjoyment,²³

²² Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1591-1592 (2005).

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

and hedonic damages for the *complete* loss of the ability to experience life (because of death or coma, for example).²⁴ The former class of damages may implicate some of the same normative issues we highlight with regard to hedonic damages, but because they do not implicate the problem of hedonic adaptation we do not discuss them further. With respect to the latter, hedonic damages in wrongful death cases or cases of coma or vegetative state serve the function of placing a significant value on the deprivation of *all* of life's experiences. Because the plaintiffs or decedents cannot perceive the awards, those cases are more about deterrence than compensation.²⁵ More important for this project, they do not relate to any adaptive preferences of their victims, who do not have the ability to sustain any preferences at all.

I. DISABILITY AND HEDONIC DAMAGES PRACTICE

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

²⁴ On hedonic damages in cases arising out of deadly accidents, see, e.g., Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 545 (2005) (noting that five states permit recovery for hedonic loss in wrongful death actions); Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57 (1990). On hedonic damages when the plaintiff has been rendered unable to experience anything, see, e.g., McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989) (holding some degree of cognitive awareness as prerequisite to recovery of damages for loss of enjoyment of life); Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super 1991) (allowing recovery for lost enjoyment of life by plaintiff in a vegetative state).

²⁵ We have no quarrel with that function of hedonic damages, although their deterrent effect should not be overstated, see Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 530-531 (2006).

A. *The Practices of Plaintiffs' Lawyers*

In personal injury cases, hedonic damages can be an important component of plaintiffs' claims. Materials written by and for plaintiffs' lawyers demonstrate that counsel in such cases aim to arouse the pity of jurors by emphasizing a great distance between "normal" and disabled life. Lawyers advise their fellows to paint a picture of injury as permanent disability accompanied inevitably (that is, through no fault of the plaintiff) by debilitation and dependence (and—over and over again—hygienic difficulties).²⁶

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

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

A computer doesn't know what it's like to be a man and you go to a wedding or you go to a first communion or a bar mitzvah, and when you have to

²⁶ On the disability rights movement's rejection of this portrayal, and its implications for hedonic damages, see *infra* text accompanying notes 141-151.

go to the bathroom you have to say, “Will you take me, Karen?”²⁷

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

Have [the plaintiff’s husband] describe their family, to which he will readily respond that his spouse was the center of a typical American family. They did all of the normal things that any family would do, together. As a family, they went out to dinner or the movies. They enjoyed planning and taking vacations. His wife always took the photographs and made the family scrapbook. She was an excellent homemaker and cook, but more importantly a wonderful mother. She lived to do things with their daughter. She had always dreamed of having a daughter so that she could do the same things with her daughter that her mother had done with her. She got her wish and her daughter was her joy. The husband explains that his wife and daughter had an excellent relationship. They talked about everything. They were each other’s best friend.

You then call the daughter, who, with courage, describes her relationship with her mother. Her testimony, although brief, less than 15 minutes, is poignant. Unsurprisingly, there is no cross-examination. The daughter tells the jury how happy her mother was the week before the injury, that she was on school break and they could decorate her room together. Her mother was a problem solver, willing to help with school issues and willing to step in and intervene or advise on problems with friends. Together they worked on jigsaw puzzles, played cards, made candy, went shopping, enjoyed lunch and through everything, they talked. This was a “girl thing” between a mother and daughter, two women. They basically did everything together. These are the relationships and activity patterns

²⁷ Thomas Duffy, *A Plaintiffs’ Attorney’s Perspective*, in *MEDICAL-LEGAL ASPECTS OF PAIN AND SUFFERING* 483, 485-96 (Patricia Iyer, ed. 2003).

that the injured mother had established as her normal life prior to injury.

This testimony will stand in marked contrast to the medical care providers who will testify that plaintiff is incapable of doing any of the things her husband and daughter described, and is unable to perform any of the normal, everyday activities of life. She can't comb her hair or bathe herself. She must ring a bell to relieve her bladder. A woman who loved to cook is now fed through a gastrostomy tube. All of the simple mundane aspects of daily life, that we take for granted and that comprise our normal lives, she is no longer capable of performing. Her life has no dignity.²⁸

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

If a physician describes a “moderate” loss, have him or her explain it on a scale of mild, moderate, and severe. Stress that the physician is someone who deals with disabled persons every day. It is moderate compared to the few who have severe injuries, but devastating in contrast to the individual who has no disabilities. The individual with a limp may be consoled by the person confined to a wheelchair, but is still frustrated, self-conscious and feels inadequate when observing the overwhelming majority of people who walk without any impediment whatsoever.²⁹

Practitioners stress that plaintiffs themselves can often undermine their own cases. One lawyer writes, “Plaintiffs also tend to understate their condition in the [day-in-a-life] diary with notations of ‘good’ or ‘not bad today.’ This is somewhat ironic considering that clients are often making these notations while confined to a wheelchair or bed.”³⁰ And the same treatise chapter

²⁸ Philip H. Corboy & Susan J. Schwartz, *Pain and Suffering and Non-Economic Damages*, in ATLA's LITIGATING TORT CLAIMS § 24:13 (Roxanne Barton Conlin & Gregory S. Cusimano, eds., 2006).

²⁹ *Id.* at § 24.17.

³⁰ Duffy, *supra* note 27, at 487.

quoted above counsels: “In developing the testimony you will ultimately present on the issue of noneconomic damages, you may find that the plaintiff is not the best, and certainly not the only, witness who should discuss these damages. After all, the plaintiff lives with his or her injuries on a daily basis and has learned to compensate for his or her limitations.”³¹ Thus lawyers are advised to override their clients’ own claims of adjustment, coping, and adaptation.

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

‘With the court’s permission and pursuant to the recommendation of the treating physician, John Doe will not be present in the courtroom except when providing testimony, if at all.’ This lends apparent judicial approval to the plaintiff’s absence. It also subtly declares that the plaintiff’s injuries are so incapacitating that the rigors of a trial are beyond plaintiff’s abilities.³²

The point is that plaintiffs’ counsel litigate personal injury cases to emphasize to both the defendant (for settlement) and the jury that plaintiffs’ injuries are permanently disabling and devastating in their effect on plaintiffs’ dignity and quality of life—that their injuries have caused plaintiffs, inevitably and through no fault of their own, sharp contraction in their personal agency and activity, and, consequently, in their enjoyment of life.

B. The Judicial Discourse

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

At the time of respondent’s injury he was 29.7 years of age. The fruitful and productive years of his life

³¹ Corboy & Schwartz, *supra* note 28, at § 24.10

³² WILLIAM A. BARTON, *RECOVERING FOR PSYCHOLOGICAL INJURIES* 176 (2d ed. 1990).

were before him. In the accident he lost both legs high above the knees. His right stump is only three and three-quarters inches in length, his left one four inches. There was evidence that he will never be able to use functional artificial legs; that he will be confined to a wheelchair for the remainder of his days; that he will require personal assistance in the routine affairs of living, and will never be able to hold gainful employment of a significant nature. *In sum, so far as the expected pleasures and satisfactions of life are concerned he has become a mere spectator and is no longer a participant.*³³

In many cases upholding hedonic damages awards judges seem to have concluded, explicitly, that the mere fact of disability, without more, necessarily limits life's enjoyment. In one early case, the Maine Supreme Judicial Court upheld a damages award on the ground that "[t]he total loss of the left hand by a boy 10 years of age takes a great deal of usefulness and enjoyment out of his prospective life."³⁴ Although the court stated that "[t]he loss of earning power is by no means the extent of the injury,"³⁵ it did not elaborate on how the absence of a left hand deprived the plaintiff's life of "usefulness and enjoyment."³⁶ Similarly, in a 1925 case, the Supreme Court of New Jersey affirmed a plaintiff's verdict, explaining without development: "A shriveled hand and wrist is a mortification especially to a young woman, such as Mrs. Haeussler was. She is entitled to compensation for the mortification. Such an injury also deprives one of much of the enjoyment of life."³⁷ In a far more recent case, in holding that hedonic damages could be recovered as part of an award for permanent impairment, the New Hampshire Supreme Judicial Court concluded that the inability to engage in pleasurable activities "is the natural result of the incapacity that an impairment award is designed to compensate."³⁸ Hedonic damages thus were part and parcel of the permanent impairment award, which "compensates the victim for the inability

³³ *Henninger v. Southern Pac. Co.*, 59 Cal.Rptr. 76, 84 (Cal. App. 1967)

³⁴ *Haynes v. Waterville & O. St. Ry.*, 64 A. 614, 615 (Me. 1906).

³⁵ *Id.*

³⁶ *Cf. King v. Britt*, 148 S.E.2d 594, 598 (N.C. 1966) (ruling that the jury could "infer and find that the permanent scar on appellant's forehead caused her to suffer mental pain" even though the appellant "did not testify that she suffered any mental pain or anguish or embarrassment or humiliation").

³⁷ *Haeussler v. Consolidated Stone & Sand Co.*, 127 A. 602, 604 (N.J. 1925).

³⁸ *Bennett v. Lembo*, 761 A.2d 494, 498 (N.H. 2000).

to function as a ‘whole person.’”³⁹ Other courts have similarly suggested that individuals with disabilities inevitably experience hedonic loss because they can no longer “function as a whole man.”⁴⁰

The language of wholeness, which appears with some regularity in the caselaw,⁴¹ is a classic linguistic devaluation of life with a disability; other similar signals—use of the words “normal” or “crippled”—are common as well. Some cases, for example, characterize hedonic damages as recovery of damages for “loss of a normal life” attendant to disability.⁴² Others use the language of normalcy in even a more pointed way. A 1980 Wyoming case, explaining that disability damages and hedonic damages are doctrinally intertwined, stated:

[W]e [previously] held that loss of mobility may be compensable even if it doesn’t result in loss of earnings because mobility ‘is the right to be a normal human being.’ This suggests that appellee’s neck injury, which has caused him to curtail some of his physical activities, should be compensable because it has deprived him of ordinary human pleasures.⁴³

The word crippled appears less often, but still sometimes. For example, in a 1967 case a federal district court upheld hedonic damages based on a finding that the plaintiff, who had fractured two heel bones, could no longer engage in “dancing, ice skating, walking through the nearby woods or the Lake Michigan shore,

³⁹ *Bennett*, 761 A.2d at 498 (citation omitted).

⁴⁰ *E.g.*, *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990); *Flannery v. United States*, 297 S.E.2d 433, 436, 438 (W.Va. 1982).

⁴¹ In addition to the cases cited in notes 38 and 40, see Gary Gober, *Closing Argument: The Lawyer’s Crowning Achievement*, TRIAL, April 1998 at 70, 75 (closing argument in a case about neck injury: “A year and a half ago, this man was a whole person. He was 100 percent of a man, and he’s lost that.”)

⁴² *Smith v. City of Evanston*, 631 N.E. 2d 1269, 1278 (Ill. Ct. App. 1994); see *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W. 2d 757, 766-767 (Tex. 2003) (treating lost enjoyment of life as equivalent to “the inability to have a normal life”); see also Paul E. Marth, Note, *Loss of Enjoyment of Life—Should It be a Compensable Element of Personal Injury Damages*, 11 WAKE FOREST L. REV. 459, 459 (1975) (“the right to recover for the diminished capacity to enjoy life” . . . “encompass[es] such ideas as inconvenience, embarrassment, loss of pleasure and enjoyment of life, and inability to engage in normal activities”).

⁴³ *Mariner v. Marsden*, 610 P.2d 6, 12(Wyo. 1980).

family picnics, mushroom hunting, and shopping.”⁴⁴ The court added that the plaintiff “will no longer be permitted to enjoy many of the things in life which it may well be said ‘make life worth living.’ He will always be crippled, and must suffer the inconvenience and humiliation incident to such physical condition.”⁴⁵

Not all courts upholding hedonic damages awards have treated disability as something that in and of itself limits the ability to enjoy life. Some have instead identified specific pleasure-creating activities in which the plaintiffs (like others with like impairments) can no longer engage. In one case, the court awarded hedonic damages to a woman who experienced a severe leg fracture based on evidence that as a result of her injury she was “unable to leave her home without constant supervision and assistance” and had “difficulty moving around in her own home.”⁴⁶ Another upheld hedonic damages to a plaintiff who had lost some mobility in her arms because she had to rearrange her kitchen “so she could reach items,” she “has problems eating, dressing, and brushing her hair,” she “sleeps in a recliner,” and she “is tired by the evening and does not have the stamina she had before.”⁴⁷ Numerous other cases have upheld hedonic damages awards based on similar showings.⁴⁸

⁴⁴ *Gowdy v. United States*, 271 F. Supp. 733, 750 (D. Mich. 1967). The district court’s decision was reversed on the separate ground that the defendant was not in fact negligent. *See Gowdy v. United States*, 412 U.S. 525 (6th Cir. 1969).

⁴⁵ *See id.* (internal quotation marks and citation omitted).

⁴⁶ *Harnesk v. Carnival Cruise Lines, Inc.*, 1991 WL 329584 at *2 (S.D. Fla., Dec. 27, 1991).

⁴⁷ *Ford v. State ex rel. DOTD*, 760 So.2d 478, 488 (La. Ct. App. 2000).

⁴⁸ *See, e.g., Hendrix v. Stepanek*, 771 N.E.2d, 559, 568 (Ill. Ct. App. 2002) (“[P]laintiff testified that before the accident she was very active and enjoyed gardening, housework, camping, canoeing, and motorcycle riding but that after the accident either she could not enjoy these activities at all or she was only able to enjoy them much less frequently.”); *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 717 (Tenn. Ct. App. 1999) (“While wearing her eye shield, Ms. Overstreet could not swim or wash her own hair, and she was forced to avoid heavy lifting and driving.”); *Lawrence v. Town of Brighton*, 1998 WL 749418 at *5-*6 (Tenn. Ct. App., Oct. 28, 1998) (upholding award of hedonic damages where plaintiff “could no longer raise or care for his dogs,” “was not able to cook or help his mother with normal household chores,” “could not play with children as he had in the past,” “could no longer engage in exercises such as lifting weights, running, and jumping,” “could not help his brother with yard work or drive a car to Memphis when he and his brother went shopping together,” and “was forced to sleep in a recliner”); *Payton v. City of New Orleans*, 679 So.2d 446, 452 (La. Ct. App. 1996) (upholding general damages award to plaintiff with severe leg and back pain as a

Just as plaintiffs’ lawyers maneuver to keep their clients’ adaptations from shrinking recovery, there is evidence that juries and courts disregard evidence of hedonic adjustment that is presented. Consider *Schindler Elevator Corp. v. Anderson*,⁴⁹ a Texas case in which a four-year-old boy had three toes taken off by a negligently maintained escalator.⁵⁰ Included in the jury’s \$17 million award was \$1 million for future pain and mental anguish (remitted by the trial judge to \$308,394) and \$6 million for past and future physical impairment (remitted by the trial judge to \$1.8 million).⁵¹ The court of appeals reinstated the full \$1 million in the future mental anguish category, and upheld the \$1.8 million for physical impairment.⁵² Of course, the procedural question before the court of appeals was the existence of sufficient evidence to uphold the jury verdict—not the court’s own view of that evidence.

result of a knee injury: “After the injury, she was unable to pursue her hobbies, to play actively with her children or to continue to work. She testified that emotional and sexual aspects of her marriage likewise deteriorated. She continues to have pain and swelling, and the medical experts testified that her condition is not expected to improve with time or further surgery.”); *Lowe v. State*, 194 A.D.2d 898, 901 (N.Y. App. Div. 1993) (upholding damages award to compensate individual whose left hand and forearm were severed for “inability to perform certain day-to-day activities at all or to perform them as quickly as before, and inability to participate in sports such as basketball, which claimant previously enjoyed”); *Nemmers v. United States*, 681 F. Supp. 567, 575-576 (N.D. Ill. 1988) (awarding hedonic damages to a child who, because of the defendant’s negligence in prenatal medical treatment, was born with mental retardation and cerebral palsy, and reasoning that the plaintiff “will never be able to do *most* of the normal things of life: the first date, parenting children, reading, debating the politics of the day, etc.”; that the plaintiff “can see but not substantially comprehend, and he can hear but not substantially understand”; and that “[t]here may be love and affection in his life, but almost all of the developments to which a normal person is exposed during his or her childhood and adulthood will pass him by”); *Yousuf v. United States*, 642 F. Supp. 432, 439 (M.D. Pa. 1986) (awarding damages for lost enjoyment of life to plaintiff who, because of an injury to his hand, was “unlikely” to “be able to pursue such things as tennis, weightlifting, basketball, or heavy household chores” in the future); *Kenton v. Hyatt Hotels*, 693 S.W.2d 83, 97 (Mo. 1985) (inability to “enjoy a normal sexual life or have children normally” and “destruction of her athletic lifestyle which will prevent her from ever again playing tennis, skiing, running, jogging, playing softball, raquetball [*sic*], hiking, backpacking and riding horses” relevant to lost enjoyment of life component of pain and suffering); *Young v. Warr*, 165 S.E.2d 797, 901 (S.C. 1969) (upholding an award of general damages, which included a component for lost enjoyment of life, based on testimony that the plaintiff had lost control of his bladder and bowel functions and “lost all ability for sexual function”).

⁴⁹ 78 S.W.3d 392 (Tex. Ct. App. 2001), *rvw. granted, jgt. vacated on settlement* (May 22, 2003), Docket No. 02-0426.

⁵⁰ *See id.* at 399.

⁵¹ *See id.* at 410-414.

⁵² *See id.* at 412-413.

But the discussion demonstrates the ways in which both juries and courts may assess the evidence with some skepticism about the ability of a plaintiff to overcome the trauma of a new disability.

In *Schindler* the court of appeals began its discussion of the future pain and mental anguish award by noting that the “evidence shows that Scooter is a happy child who, at the time of trial, was active in many sports.” Nonetheless, the court said, Scooter did show some “concern[]” about his foot (for example, wearing a sock to avoid seeing it, even when swimming).⁵³ Even though his psychologist testified that he “will continue to psychologically adjust to the loss of his toes and injury to his foot in the future,”⁵⁴ the court (and apparently the jury) gave more weight to the evidence that “his self-esteem is based in large part on his physical ability, and when he cannot compete athletically on the level of his peers in the future, it will be very difficult for him,”⁵⁵ and that “by high-school age, the only sport in which Scooter will be able to participate at a competitive level is swimming.”⁵⁶

Similarly, in reviewing the jury’s award (after remittitur) of \$1.5 million for future “physical impairment, sometimes called loss of enjoyment of life,” the court quoted Scooter’s own testimony that “I can do all the things I used to do.”⁵⁷ But again, the court held the jury entitled to give more weight to the concomitant testimony that “running [would] be more difficult” in Scooter’s future, “even [his] walking will be affected,” “he will have problems with standing for long periods and with climbing,” and might (if he eventually had to have the other two toes amputated, as might occur) in the future have to walk with “shortened steps” or suffer an “‘appreciable limp.’” Already, noted the court, he “limps when he is tired.” This evidence, the court held, was sufficient to support \$1.5 million in hedonic damages,⁵⁸ even for a happy, athletic child.

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

⁵³ *Id.* at 411.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 411 n.7.

⁵⁷ *Id.* at 412.

⁵⁸ *Id.*

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

II. DISABILITY AND HEDONIC PSYCHOLOGY

The discussion in the last Part should demonstrate that courts have upheld hedonic damages awards on the basis of the view that disability—even in the form of relatively minor physical impairments—necessarily limits the ability to enjoy life. That view, we contend, does not reflect how people with disabilities themselves feel. As we show in this Part, an extensive body of research demonstrates that people who acquire disabilities tend not to lose much enjoyment of life, at least after an initial transition period. As the literature on hedonic adaptation shows, people have a tendency to maintain their happiness following adverse events through a variety of psychological mechanisms.⁵⁹ And an extensive body of research also demonstrates that people without disabilities view the prospect of life with a disability as being far less enjoyable than people with disabilities themselves report. As the literature on affective forecasting demonstrates, people are poor predictors of how they will feel in new and unfamiliar life circumstances.⁶⁰ By placing nondisabled jurors and judges in the position to decide whether plaintiffs' disabilities limit their ability to enjoy life, hedonic damages practice all but guarantees that a pessimistic view of disability will be translated into litigation practice, verdicts, and doctrine.

This Part proceeds as follows. In Section A, relying on literature from a variety of disciplines, we show that many

⁵⁹ For a good general overview of the hedonic adaptation literature, see Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 302 (Daniel Kahneman, *et al.*, eds., 1999).

⁶⁰ For good general overviews of the affective forecasting literature, see Timothy D. Wilson & Daniel Gilbert, *Affective Forecasting*, 35 *ADVANCES IN EXPER. SOCIAL PSYCHOL.* 345 (2003); George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in *WELL-BEING*, *supra* note 59, at 85; *see also* Blumenthal, *supra* note 19, at 165-181; Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, in *FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION* 178 (Joseph P. Forgas, ed., 2000).

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

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

In a classic study published in 1978, Professor Philip Brickman and his colleagues interviewed “lottery winners and accident victims” to assess the degree to which major strokes of good or bad fortune change a person's happiness.⁶¹ They interviewed 29 individuals with quadriplegia or paraplegia, 22 lottery winners, and 22 controls, and they asked the interviewees to rate their general happiness and their current experience of mundane everyday pleasures. Although “lottery winners rated winning the lottery as a highly positive event, and paraplegics rated their accident as a highly negative event,”⁶² the lottery winners were nonetheless less happy, and the accident victims happier, than the researchers had anticipated. In particular, lottery winners and controls “were not significantly different” in their self-reported happiness ratings; and although accident victims did report that they “experie[n]c[ed] their present as less happy than controls,” their happiness rating was “still above the midpoint of the scale,” and they “did not appear nearly as unhappy as might have been expected.”⁶³ In ratings of their experience of mundane everyday pleasure, there was no meaningful difference between lottery winners, accident victims, and controls.⁶⁴

⁶¹ See Philip Brickman, Dan Coates & Ronnie Janoff-Bulman, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOCIAL PSYCHOL. 917 (1978).

⁶² *Id.* at 920.

⁶³ *Id.* at 920-921.

⁶⁴ See *id.* at 921. For another classic study in the genre, though one that has not become as famous, see Paul Cameron, *et al.*, *The Life Satisfaction of Nonnormal Persons*, 41 J. CONSULTING & CLIN. PSYCHOL. 207, 212 (1973) (finding “no evidence of a difference between the handicapped and normals in self-reported life satisfaction or its linguistic equivalents”).

The Brickman study was hardly definitive proof that disability has no effect on the enjoyment of life.⁶⁵ It involved a small sample; its subjects had only one kind of disability; and the subjects who had disabilities reported lower happiness than did lottery winners and controls. Nonetheless, it has become the “most famous article in the psychological literature on well-being.”⁶⁶ Subsequent research confirms that people have a “psychological immune system that detects and neutralizes events that challenge [their] sense of well-being.”⁶⁷ Through a variety of defense mechanisms—distraction, rationalization, illusion, and so forth—our minds keep our happiness relatively stable.⁶⁸ Such hedonic adaptation may involve changes “in interests, values, goals, attention, or characterization of a situation,” it may involve “consciously directing one’s attention away from troubling thoughts,” and it may also involve “cognitive transformations of situations—for example, by interpreting a tragedy as a ‘learning

⁶⁵ See Frederick & Loewenstein, *supra* note 59, at 322 n.25 (noting that the “evidence of hedonic adaptation in the [Brickman] paper is not overwhelming”).

⁶⁶ David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 *PSYCHOL. SCI.* 340, 340 (1998).

⁶⁷ Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 380; accord Daniel T. Gilbert, *et al.*, *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 *J. PERSONALITY & SOCIAL PSYCHOL.* 617, 619 (1998).

⁶⁸ See Gilbert, *et al.*, *Immune Neglect*, *supra* note 67, at 619 (“Ego, defense, rationalization, dissonance reduction, motivated reasoning, positive illusions, self-serving attribution, self-deception, self-enhancement, self-affirmation, and self-justification are just some of the terms that psychologists have used to describe the various strategies, mechanisms, tactics, and maneuvers of the psychological immune system.”); Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 371-374 (describing process by which we make sense of unexpected events and then “ordinize” them “in a way that robs them of their emotional power”); see also Rebecca L. Collins, *et al.*, *A Better World or a Shattered Vision? Changes in Life Perspectives Following Victimization*, 8 *SOCIAL COGNITION* 263, 279-284 (1990) (discussing coping strategies people employ following adverse life events); Shelley E. Taylor & David A. Armor, *Positive Illusions and Coping with Adversity*, 64 *J. PERSONALITY* 873, *passim* (1996) (discussing role of positive illusions in coping with adverse life events). For a general discussion of psychological sense-making processes and “emotional evanescence,” see Timothy D. Wilson, *et al.*, *Making Sense: The Causes of Emotional Evanescence*, in *THE PSYCHOLOGY OF ECONOMIC DECISIONS, VOL. I: RATIONALITY AND WELL-BEING* 209 (Isabelle Brocas & Juan D. Carrillo, eds., 2003). Wilson and Gilbert have highlighted hindsight bias—“whereby people transform an event psychologically after it occurs to make it seem more predictable than it really was”—as one of the psychological tools that leads to the “evanescence” of negative emotions. Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 374. On hindsight bias generally, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571, 576-586 (1998).

experience.”⁶⁹ Indeed, people who experience adversity often find benefit in it, such as the “strengthening of relationships with family and friends,” the “development of greater patience, tolerance, empathy, and courage,” or a “valued change in life’s priorities and personal goals.”⁷⁰ Through such adaptations, most people in virtually all demographic groups—even those who experience economic disadvantage or racial stigma—report positive levels of happiness.⁷¹

The general phenomenon holds true in the disability area. A massive body of research has demonstrated that people who acquire a range of disabilities typically do not experience any (or do not experience much) permanent reduction in the enjoyment of life.⁷² After an “initial adjustment period,”⁷³ people tend to adapt psychologically to having a disability. Whether because they gain more accurate information on their actual life and activity prospects,⁷⁴ or because their new disability “forces reexamination, reconceptualization, and the alternation of values, attitudes,

⁶⁹ Frederick & Loewenstein, *supra* note 59, at 302-303; *see also* Shelley E. Taylor, *Adjustment to Threatening Events: A Theory of Cognitive Adaptation*, 38 AMER. PSYCHOLOGIST 1161, 1161 (1983) (arguing that “the readjustment process focuses around three themes: a search for meaning in the experience, an attempt to regain mastery over the event in particular and over one’s life more generally, and an effort to enhance one’s self-esteem—to feel good about oneself again despite the personal setback”).

⁷⁰ Glenn Affleck & Howard Tennen, *Construing Benefits From Adversity: Adaptational Significance and Dispositional Underpinnings*, 64 J. PERSONALITY 899, 902 (1996).

⁷¹ *See* Ed Diener & Carol Diener, *Most People are Happy*, 7 PSYCHOL. SCI. 181, 181 (1996).

⁷² For a general discussion of this research, some of which is discussed in more detail in the remainder of this section, *see* Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and a Reply to Batavia*, 6 PSYCHOL. PUB. POL’Y & L. 526, 528-529 (2000); *see also* M.G. Eisenberg & C.C. Saltz, *Quality of Life Among Aging Spinal Cord Injured Persons: Long Term Rehabilitation Outcomes*, 29 PARAPLEGIA 514, 517 (1991) (collecting studies finding that “quality of life among those with even severely disabling conditions may be as high as those with no disability”); Thomas Mehnert, *et al.*, *Correlates of Life Satisfaction in Those With Disabling Conditions*, 35 REHAB. PSYCHOL. 3, 5 (1990) (collecting studies finding that people with a variety of disabilities experience at least as much life satisfaction as nondisabling controls).

⁷³ Carol J. Gill, *Depression in the Context of Disability and the “Right to Die,”* 25 THEOR. MED. 171, 185 (2004).

⁷⁴ *See* Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 111-112 (1993) (suggesting the importance of the disability-related information deficit suffered by people without disabilities).

beliefs, and desires,”⁷⁵ people with disabilities experience a hedonic transformation.⁷⁶ One researcher’s description of her own experience with partial paralysis illustrates the point:

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

It was more like those things not only didn’t matter any more, they wouldn’t have mattered even if I could still have done them. I didn’t need to be able to do them—or to mourn their loss—in order to maintain some image of myself.⁷⁷

This kind of transformation is far from uncommon. Rather, studies have shown that people with disabilities “ranging from quadriplegia to blindness” tend to “report positive well-being” when asked.⁷⁸ Although people with spinal cord injuries report that they are “very unhappy immediately following their trauma,” most report that they are happy by the third week after the accident.⁷⁹ “[I]ndividuals who use wheelchairs are believed to be

⁷⁵ *Id.* at 114.

⁷⁶ See Marilynn J. Phillips, *Disability and Ethnicity in Conflict: A Study in Transformation*, in *WOMEN WITH DISABILITIES* 195, 196-200 (Michelle Fine & Adrienne Asch eds., 1988) (discussing various theories of transformation offered by researchers).

⁷⁷ Carolyn L. Vash, *The Psychology of Disability*, 22 *REHABILITATION PSYCHOLOGY* 145, 152-153 (1975), excerpted in *CAROLYN L. VASH & NANCY M. CREWE, PSYCHOLOGY OF DISABILITY* 160 (2d ed. 2004). This quotation came to our attention because it is featured in Pryor, *supra* note 74, at 115.

⁷⁸ Diener & Diener, *supra* note 71, at 181.

⁷⁹ Diener & Diener, *supra* note 71, at 181; see Camille B. Wortman & Roxane Cohen Silver, *Coping with Irrevocable Loss*, in *CATAclysms, Crises, and Catastrophes: Psychology in Action* 189, 198 (Gary R. VandenBos & Brenda K. Bryant, eds., 1987); see also C. Lundqvist, et al., *Spinal Cord Injuries: Clinical, Functional, and Emotional Status*, 16 *SPINE* 78, 82 (1991) (finding that after 4 years, subjects with spinal cord injuries reported levels of subjective well-being and quality of life that were similar to those of a nondisabled reference group); G.G. Whiteneck, et al., *Mortality, Morbidity, and Psychosocial Outcomes of Persons Spinal Cord Injured More Than 20 Years Ago*, 30 *PARAPLEGIA* 617, 626 (1992) (“Approximately three quarters of the subjects rated their current quality of life as either good or excellent on a 5-point scale.”).

happy by their friends and family, can recall more good than bad events in their lives, are rated as happy by an interviewer, and report more positive than negative emotions in daily experience-sampling measures.”⁸⁰ People “with severe, multiple handicaps” and people “with chronic mental problems” also report high levels of subjective well-being.⁸¹ Similarly, although burn injuries often cause “an initially severe impact” on well-being, the emotional impact “tend[s] to be transitory”; after roughly twelve months, “[t]he majority of burn survivors appear to adjust quite well to their injuries.”⁸² And “young patients with limb deficiencies, as a group, appear to be relatively resilient to maladjustment.”⁸³

In a recent study, Jason Riis and his colleagues used the technique of “ecological momentary assessment” (EMA) to measure the reported well-being of individuals who were undergoing kidney dialysis.⁸⁴ They found virtually no significant differences between those individuals and a control group of individuals without major health conditions. In particular, there was no statistically significant difference between the two groups in reports of overall mood (a five-point scale from “very pleasant to very unpleasant”) or in reports of the extent to which they were experiencing nine specific emotions (“happy, joyful, pleased, enjoyment/fun, depressed/blue, unhappy, frustrated, angry/hostile, worried/anxious”).⁸⁵ Nor were there statistically significant

⁸⁰ Diener & Diener, *supra* note 71, at 184.

⁸¹ Diener & Diener, *supra* note 71 at 181; *see also* Richard Stensman, *Severely Mobility-Disabled People Assess the Quality of Their Lives*, 17 SCAND. J. REHAB. MED. 87, 90-91 (1985) (finding no statistically significant difference in self-reported quality of life between subjects with severe mobility impairments and nondisabled controls).

⁸² David R. Patterson, *et al.*, *Psychological Effects of Severe Burn Injuries*, 113 PSYCHOL. BULL. 362 (1993).

⁸³ Vida L. Tyc, *Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review*, 12 CLIN. PSYCHOL. REV. 275, 286 (1992).

⁸⁴ *See* Jason Riis, *et al.*, *Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment*, 134 J. EXPERIMENTAL PSYCHOL.: GEN. 3 (2005). As the authors describe the EMA method:

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

Id. at 4; *see generally* Arthur A. Stone, *et al.*, *Ecological Momentary Assessment*, in WELL-BEING, *supra* note 59, at 26 (discussing the EMA technique).

⁸⁵ Riis, *et al.*, *supra* note 84, at 5-6

differences in reports about pain, tiredness, or overall life satisfaction.⁸⁶ The authors concluded “that hemodialysis patients do, largely at least, adapt to their condition. Although they report their health as being much worse than that of healthy controls, they do not appear to be much, if at all, less happy than people who do not have kidney disease or any other serious health condition.”⁸⁷

A recent longitudinal study conducted by two British economists reported similar, though less pronounced, results.⁸⁸ Using data from the British Household Panel Survey to “track[] individuals’ levels of reported life-satisfaction in the years leading up to, and after, disability,” they found “a striking degree of recovery in human wellbeing” among those who have less severe disabilities.⁸⁹ But though they found that “a person’s emotional damage from disability reduces through the years,” they did not find “a complete return to the old happiness level.”⁹⁰ For people with severe disabilities, the authors found (based on a relatively small sample) that well-being recovers to a similar degree, but more slowly.⁹¹

Even in those instances where disability does durably reduce subjective well-being, there is good reason to think that it is broader social factors, and not anything intrinsic in the disability, that cause the reduction. A meta-analysis of 29 studies of self-reported quality of life of individuals with spinal cord injuries found that those individuals report a lower quality of life than do

⁸⁶ See Riis, *et al.*, *supra* note 84, at 6.

⁸⁷ Riis, *et al.*, *supra* note 84, at 7.

⁸⁸ See ANDREW J. OSWALD & NATTAVUDH POWDTHAVEE, DOES HAPPINESS ADAPT? A LONGITUDINAL STUDY OF DISABILITY WITH IMPLICATIONS FOR ECONOMISTS AND JUDGES (Nov. 1, 2005) (unpublished manuscript, on file with authors).

⁸⁹ OSWALD & POWDTHAVEE, *supra* note 88, at 21.

⁹⁰ OSWALD & POWDTHAVEE, *supra* note 88, at 21; *see also* M. Kannisto & H. Sintonen, *Later Health-Related Quality of Life in Adults Who Have Sustained Spinal Cord Injury in Childhood*, 35 SPINAL CORD 747, 750 (1997) (finding that adults who experienced spinal cord injuries in childhood reported a slightly, but only slightly, lower health-related quality of life than did nondisabled controls); R. Stensman, *Adjustment to Traumatic Spinal Cord Injury: A Longitudinal Study of Self-Reported Quality of Life*, 32 PARAPLEGIA 416 (1994) (similar findings with individuals who experienced their injuries in adulthood); Adrienne Asch, *Distracted by Disability*, 7 CAMBR. Q. HEALTHCARE ETHICS 77, 80-81 (1998) (noting that “[n]ot everyone who has a disability is satisfied with life” but that “overall disabled people believe that they can achieve enough of their goals to make life worthwhile”).

⁹¹ See OSWALD & POWDTHAVEE, *supra* note 88, at 10.

their nondisabled peers.⁹² But the degree of an individual's impairment had only "a very minor effect" on reported quality of life.⁹³ Instead, the crucial determinants were family involvement, work opportunities, mobility, and social integration.⁹⁴ Disability

⁹² See Marcel Dijkers, *Quality of Life After Spinal Cord Injury: A Meta Analysis of the Effects of Disablement Components*, 35 SPINAL CORD 829, 833 (1997); see also Marcus J. Fuhrer, et al., *Relationship of Life Satisfaction to Impairment, Disability, and Handicap Among Persons with Spinal Cord Injury Living in the Community*, 73 ARCH. PHYS. MED. & REHABIL. 552, 554 (1992) (finding that "on average, people with SCI who are living in the community report a lower level of satisfaction with life than do people in the general population"); Mehnert, et al., *supra* note 72, at 12 (finding that people with a range of disabilities experience less life satisfaction than people without them, but that "[e]ven among those who consider themselves severely disabled, and those who report themselves unable to work or keep house, the majority indicate that they are at least somewhat satisfied with their lives"); Richard Schulz & Susan Decker, *Long-Term Adjustment to Physical Disability: The Role of Social Support, Perceived Control, and Self-Blame*, 48 J. PERSONALITY & SOCIAL PSYCHOL. 1162, 1170 (1985) (reporting, in study of individuals with spinal cord injuries, that "the subjects in this study reported a mean degree of well-being that was only slightly lower than that of other nondisabled adult populations"); but see Kathleen Chwalisz, et al., *Autonomic Arousal Feedback and Emotional Experience: Evidence From the Spinal Cord Injured*, 54 J. PERSONALITY & SOCIAL PSYCHOL. 820, 823 (1988) (finding no statistically significant differences between subjects with spinal cord injuries and nondisabled controls on most measures of subjective well-being); L.A. Cushman & J. Hassett, *Spinal Cord Injury: 10 and 15 Years After*, 30 PARAPLEGIA 690, 694 (1992) (reporting that subjects with spinal cord injuries "who were surveyed 10 and 15 years post injury rated their perceived quality of life as equal to or somewhat better than that of their peers, on average"). Professors Ville and Ravaud note that the studies finding a lower quality of life for people with spinal cord injuries often use measures that beg the question by assuming that functional limitations necessarily limit well-being. See I. Ville & J.F. Ravaud, *Subjective Well-Being and Severe Motor Impairments: The Tetrafigap Survey on the Long-Term Outcome of Tetraplegic Spinal Cord Injured Persons*, 52 SOCIAL SCI. & MED. 369, 370 (2001); see generally Tracey C. Lintern, et al., *Quality of Life (QoL) in Severely Disabled Multiple Sclerosis Patients: Comparison of Three QoL Measures Using Multidimensional Scaling*, 10 QUALITY OF LIFE RES. 371, 372 (2001) ("Most currently available forms of QoL assessment employ external value systems; thus specific goals or activities important to the individual patient may not be included in the measurement scale.")

⁹³ Dijkers, *supra* note 92, at 833; but cf. Mehnert, et al., *supra* note 72, at 10-12 (finding that degree of functional limitation was directly associated with reduced life satisfaction, but that "social interactional variables" were important as well).

⁹⁴ See Dijkers, *supra* note 92, at 835; see also Brent W. Chase, et al., *Life Satisfaction Among Persons with Spinal Cord Injuries*, J. REHAB., July-Sept. 2000, at 14 (finding that marital status and "perceived control"—the ability to make decisions about one's life—were the most significant predictors of positive life satisfaction among people with spinal cord injuries, and that the opportunity to direct personal assistants and the availability of at least part-time work were highly correlated with positive perceptions of control); Vappu Viemero & Christina Krause, *Quality of Life in Individuals with Physical Disabilities*, 67

does not inherently limit an individual's opportunities along these dimensions; rather, such limitations often "stem from the frustration of social rejection, of physically inaccessible movies and restaurants, of inadequate social gatherings, or of discrimination in the workplace."⁹⁵

The doctrine allowing hedonic damages for disabling injuries fails to take account of the degree to which people with disabilities adapt to their conditions. Contrary to the view of many of the courts whose decisions we cited in Part I,⁹⁶ people with disabilities do not, by and large, experience disability as inherently limiting their enjoyment of life. And even those courts that identify particular pleasure-creating activities that people with disabilities can no longer perform are missing two significant points. First, the degree to which disability actually limits those activities is often overstated.⁹⁷ Although courts frequently suggest that a disabling injury makes an individual unable to have sex, participate in athletics, and otherwise lead an active life,⁹⁸ that is not generally true. People with disabilities can still have sex,⁹⁹

PSYCHOTHERAPY & PSYCHOSOMATICS 317, 321 (1998) (finding that social factors, and not the degree of medical impairment, were key determinants of life satisfaction in individuals with disabilities); Ashley R. Craig, *et al.*, *Spinal Cord Injury: A Search for Determinants of Depression Two Years After the Event*, 33 BRIT. J. CLIN. PSYCHOL. 221, 227 (1994) (finding that physical pain and perceived loss of control of one's life were the major determinants of depression in people with spinal cord injuries, and that "medical characteristics such as level of lesion and completeness of lesion" were not associated with depression); Fuhrer, *et al.*, *supra* note 92, at 555-556 (finding that the social factors of disablement, and not the degree of medical impairment, were the determinants of lower life satisfaction among people with spinal cord injuries); Schulz & Decker, *supra* note 92, at 1170 ("Persons [with spinal cord injuries] who had high levels of social support, were satisfied with their social contacts, and felt that they had high levels of control reported high levels of well-being."); Ville & Ravaud, *supra* note 92, at 370, 377-379 (noting that self-reported well-being measures in individuals with spinal cord injuries "increase with increased quality and richness of social contacts" and with "indicators of social status such as income and level of education" as well as occupational level, and reporting results of study showing that similar "sociological variables" play a major role in perceived well-being).

⁹⁵ Asch, *Distracted by Disability*, *supra* note 90, at 80; see also Nancy Weinberg, *Physically Disabled People Assess the Quality of Their Lives*, 45 REHAB. LIT. 12, 14 (1984) (finding that "adjustment to societal attitudes was the most difficult" for interview subjects with disabilities). We develop this point *infra* at text accompanying notes 141-151.

⁹⁶ See *supra* text accompanying notes 33-58.

⁹⁷ See *infra* note 146 and accompanying text.

⁹⁸ See *supra* notes 46-58 and accompanying text.

⁹⁹ See, e.g., Colette Ray & Julia West, *Social, Sexual, and Personal Implications of Paraplegia*, 22 PARAPLEGIA 75, 75-76, 81-83 (1984) (describing

work,¹⁰⁰ compete athletically and go to ballgames,¹⁰¹ and participate in other activities in the community.¹⁰² Second, and more fundamental, hedonic adaptation often works by transforming what one values and enjoys. Even if a disability prevents an individual from performing a task that she previously enjoyed, she will not necessarily experience that as an hedonic loss. People who acquire spinal cord injuries, for example, come to believe that “mental functioning, communication, social participation, and seeing”—all things they can still do—are more important to their enjoyment of life than mobility.¹⁰³ More generally, they begin to think of autonomy as consisting in being “in charge of how, when, by whom, and in what ways certain tasks are performed” rather than in personally performing those tasks.¹⁰⁴ By this process, the inability to move around without a wheelchair, or to dress and bathe oneself, is not perceived as an hedonic loss. Indeed, people who acquire disabilities often come to find that “[t]hey have incorporated the disabilities into their

ability of people with spinal cord injuries to have sex, despite obstacles). For extensive discussions of sex and disability, from very different perspectives, see TOM SHAKESPEARE, *ET AL.*, *THE SEXUAL POLITICS OF DISABILITY: UNTOLD DESIRES* (1996); *THE PSYCHOLOGICAL AND SOCIAL IMPACT OF PHYSICAL DISABILITY* 207-255 (Robert P. Marinelli & Arthur E. Dell Orto, eds., 1977).

¹⁰⁰ The employment rate for people with disabilities does lag well behind that of people without disabilities, but that is to a large extent the result of discrimination and the lack of social services, see Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 19-54 (2004)—for which courts could compensate directly.

¹⁰¹ See, e.g., *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (requiring sports arena to provide wheelchair users seating areas with a line of sight over standing spectators).

¹⁰² See, e.g., *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003) (requiring movie theaters to be accessible to people who use wheelchairs).

¹⁰³ Kannisto & Sintonen, *supra* note 90, at 749; see also Schulz & Decker, *supra* note 92, at 1171 (noting that individuals with spinal cord injuries “saw themselves as better off than most nondisabled persons,” and that they did so “partly by selectively focusing on attributes that made them appear advantaged (e.g., brain is more important than brawn”); Weinberg, *supra* note 95, at 14 (similar, but noting that the process of adjustment “was not always easy”).

¹⁰⁴ Asch, *Distracted by Disability*, *supra* note 90, at 79; see also *id.* (“The father or mother who accompanies a child to a sporting event supervises the child even if they are both driven by an assistant because the child is too young to drive and the parent’s seizure disorder makes driving unsafe. The woman with a mobility impairment whose personal assistant shops for food she selects is no less in charge of her life than the woman who trades shopping for babysitting so that she and her friend can both maintain homes and work lives.”).

identities, into their very selves. And they see their experiences as yielding much that is positive in their personal growth.”¹⁰⁵

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

The discussion in the previous section should demonstrate that people who acquire disabilities do not find that their enjoyment of life is impaired—perhaps not at all, and at least not substantially. But people without disabilities think differently. They tend to believe that disability inevitably has a very negative effect on the enjoyment and quality of one’s life.¹⁰⁶ This is true of the general public,¹⁰⁷ and it is true even of professionals who spend a great deal of time interacting with people with disabilities. Reviewing over a dozen studies, Carol Gill found it “consistent and stunning” that “health professionals significantly underestimate the quality of life of persons with disabilities compared with the actual assessments made by persons with disabilities themselves.”¹⁰⁸

¹⁰⁵ PAUL LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 209 (2003); *see also* Weinberg, *supra* note 95, at 13 (describing interviews with individuals who said they would refuse, if offered, a risk-free surgery that would completely cure their disabilities: “a primary factor in their opposition to a cure was the fear that they would no longer be the same person”).

¹⁰⁶ *See* NATIONAL COUNCIL ON DISABILITY, *ASSISTED SUICIDE: A POSITION PAPER* 22-25 (1997).

¹⁰⁷ *See* Loewenstein & Schkade, *Wouldn't it be Nice?*, *supra* note 60, at 92 (discussing “very substantial evidence” that healthy people underestimate the quality of life of sick people”); George Loewenstein, *et al.*, *Projection Bias in Predicting Future Utility*, 118 Q. J. ECON. 1209, 1212 (2003) (“[C]ross-sectional studies have consistently found that nonpatients’ predictions of the quality of life associated with serious medical conditions are lower than actual patients’ self-reported quality of life.”); *see also* Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1508 & n.12 (2001) (discussing how the Oregon health rationing plan incorporated biases toward disability through the use of a public quality-of-life survey); Asch, *Distracted by Disability*, *supra* note 90, at 82 (same).

¹⁰⁸ Gill, *Health Professionals*, *supra* note 72, at 530; *see also* John R. Bach & Margaret C. Tilton, *Life Satisfaction and Well-Being Measures in Ventilator Assisted Individuals with Traumatic Tetraplegia*, 75 ARCH. PHYS. MED. & REHAB. 626, 629 (1994) (finding that nondisabled health care professionals significantly underestimated the life satisfaction expressed by individuals with spinal cord injuries); John R. Bach & Denise I. Campagnolo, *Psychosocial Adjustment of Post-polio myelitis Ventilator Assisted Individuals*, 73 ARCH. PHYS. MED. REHAB. 934, 934 (1992) (reporting that “Muscular Dystrophy Association clinic directors significantly underestimated life satisfaction reported by Duchenne muscular dystrophy ventilator users”); Eugenia Bodenhamer, *et al.*, *Staff and Patient Perceptions of the Psychosocial Concerns of Spinal Cord Injured Persons*, 62 AM. J. PHYS. MED. 182, 182 (1983) (citing studies that “revealed significant discrepancies

That finding should not be stunning, however. When attempting to assess how people in unfamiliar situations feel, we often do so by seeking to predict how we ourselves would feel in those circumstances.¹⁰⁹ And a large body of evidence demonstrates that we tend to do a very poor job of predicting our own future happiness.¹¹⁰ In particular, there is a great deal of evidence that we “overestimate the enduring impact that future events will have on our emotional reactions”¹¹¹ and thus underestimate our ability to adapt to adverse life events.¹¹²

between the way professional staff view spinal cord injured patients’ psychological reactions and the responses the patients actually report”); Laura A. Cushman & Marcel F. Dijkers, *Depressed Mood in Spinal Cord Injured Patients: Staff Perceptions and Patient Realities*, 71 ARCH. PHYS. MED. REHAB. 191, 195 (1990) (finding “a consistent bias on the part of [rehabilitation facility] staff to overestimate depressed mood, relative to the report of patients themselves”); Frederick A. Ernst, *Contrasting Perceptions of Distress by Research Personnel and Their Spinal Cord Injured Subjects*, 66 AM. J. PHYS. MED. 12, 13-14 (1987) (reporting results similar to Bodenhamer, *supra*).

¹⁰⁹ See Leaf Van Boven & George Loewenstein, *Social Projection of Transient Drive States*, 29 PERS. & SOCIAL PSYCHOL. BULL. 1159, 1162, 1165 (2003).

¹¹⁰ See Blumenthal, *supra* note 19, at 162 (“[S]ubstantial empirical evidence demonstrates that people are in fact unable to accurately predict their own or others’ emotional states.”); see generally Loewenstein & Schkade, *Wouldn’t it be Nice?*, *supra* note 60, at 88-94 (reviewing the literature).

¹¹¹ Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 351.

¹¹² See George Loewenstein & Shane Frederick, *Predicting Reactions to Environmental Change*, in ENVIRONMENT, ETHICS, AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION 52, 66 (Max H. Bazerman, *et al.*, eds., 1997) (reporting results of a study of predicted reactions to environmental change in which the subjects “seem[ed] to expect changes in their circumstances to affect their quality of life in the future more than equivalent things have affected their quality of life in the past”); Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 353 (“The impact bias has been found in a variety of populations (e.g., college students, professors, sports fans, dieters, vacationers, snake phobics, people taking medical tests), with a wide range of emotional events (e.g., romantic breakups, personal insults, sports victories, electoral defeats, parachute jumps, failures to lose weight, reading tragic stories, and learning the results of pregnancy and HIV tests.”); Gilbert, *et al.*, *Immune Neglect*, *supra* note 67, at 633 (reporting results of studies in which subjects “overestimated the duration of their affective reactions to romantic disappointments, career difficulties, political defeats, distressing news, clinical devaluations, and personal rejections”); Loewenstein, *et al.*, *Projection Bias*, *supra* note 107, at 1213 (discussing research suggesting “underappreciation of adaptation”); Riis, *et al.*, *supra* note 84, at 3 (“Research in diverse domains has documented a general tendency for people to underestimate their own and others’ speed of adaptation to negative as well as positive outcomes.”); Timothy D. Wilson, *et al.*, *Focalism: A Source of Durability Bias in Affective Forecasting*, 28 J. PERSONALITY & SOCIAL PSYCHOL. 821, 829 (2000) (finding that “[c]ollege football

In the context of disability, this failure of affective forecasting interacts with and feeds the general societal view that disability is a tragedy and that people with disabilities should be pitied.¹¹³ There is no doubt that disability is a condition that is subject to a great deal of social stigma.¹¹⁴ As a result, “[m]any able-bodied persons are tremendously fearful about becoming disabled,”¹¹⁵ and they believe that disabilities are far more limiting than they actually are.¹¹⁶ That fear may stem from “‘existential anxiety’—the dread that such a phenomenon might affect an observer especially in the process of aging—or [from] ‘aesthetic anxiety’—the fear of the alien, strange, displeasing, unattractive, or ‘different.’”¹¹⁷ Or it may simply reflect the well-documented psychological “tendency to automatically associate positive characteristics with [one’s] ingroups more easily than outgroups” and “to associate negative characteristics with outgroups more

fans overestimated the extent to which the outcome of a football game would influence their overall happiness”).

¹¹³ See *infra* note 146 and accompanying text; see also Beatrice A. Wright, *Attitudes and the Fundamental Negative Bias: Conditions and Corrections*, in ATTITUDES TOWARD PERSONS WITH DISABILITIES 3, 8 (Harold E. Yuker, ed., 1988) (collecting studies showing “the ease with which devalued groups are regarded as unfortunate, despite the fact that members of those groups do not view themselves as unfortunate”).

¹¹⁴ See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 436-445 (2000).

¹¹⁵ Paul Steven Miller, *The Impact of Assisted Suicide on Persons with Disabilities—Is It a Right Without Freedom?*, 9 ISSUES L. & MED. 47, 49 (1993).

¹¹⁶ See Bagenstos, *Subordination, Stigma*, *supra* note 114, at 423-424.

¹¹⁷ Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 26, 34 (Linda Hamilton Krieger, ed., 2003); see Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISS. 39, 42-45 (1988); see also Miller, *supra* note 115, at 53 (“The root of prejudice against people with disabilities comes from several sources. Foremost is that of fear: fear of the loss of autonomy and the ‘there but for the grace of God go I’ realization that disability can ‘afflict’ any person. Such fears are, of course, based on the prejudicial assumptions about life with a disability that society itself creates. Able-bodied people see ‘confinement’ to a wheelchair, or reliance upon attendant care, or a lack of hearing or vision, as losses of independence, which, in this society, is often regarded as worse than death itself. Furthermore, nothing in our society is despised like difference. Because our society assumes difference is the equivalent of inferiority and treats people with visible differences accordingly, people have grave fears about being viewed as deviating from accepted societal norms.”); see generally R. William English, *Correlates of Stigma Toward Physically Disabled Persons*, in THE PSYCHOLOGICAL AND SOCIAL IMPACT OF PHYSICAL DISABILITY, *supra* note 99, at 162.

negatively than ingroups.”¹¹⁸ As members of a socially stigmatized class, people with disabilities are a classic outgroup.

It is true, of course, that under what is (unintuitively) called the “Golden Rule,” jurors are not supposed to figure damages by asking how much money they themselves would want in exchange for experiencing the injury in question.¹¹⁹ Nonetheless, jurors must calculate damages using some sense of the value of a loss—and their own perspective is unavoidable when they assign that value. Thus when judges and jurors make decisions about what damages properly compensate for disabling injuries, they are likely to hold and use the nondisabled public’s pessimistic views of disabled quality of life. Very few judges have disabilities.¹²⁰ And individuals with disabilities are often excluded from juries.¹²¹ As Wendy Hensel has written in the context of “wrongful birth” actions, jurors tend to have a “distance from the disabled perspective” that leaves them “subject to bias and prejudice.”¹²² The *Schindler* case we discussed in Part I.B. above,

¹¹⁸ Niljana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). For discussions in the legal literature of this general phenomenon, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 91 CAL. L. REV. 1, 6-7 (2006); Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 383-409 (2000). For a good overview of theories and research on the attitudes of people without disabilities toward people with disabilities, see generally ATTITUDES TOWARD PERSONS WITH DISABILITIES, *supra* note 113.

¹¹⁹ See L.R. James, Annot., *Instructions in a Personal Injury Action Which, in Effect, Tell Jurors That in Assessing Damages They Should Put Themselves in Injured Person’s Place*, 96 A.L.R.2d 760 (1964); McCaffery, *et al.*, *supra* note 19, at 1383-1387 (discussing this “golden rule” and lawyers’ ways around it).

¹²⁰ See *Brown Will Present at ABA Conference*, <http://www.wicourts.gov/news/thirdbranch/current/connects.htm> (visited May 30, 2006) (“While statistics on lawyers and judges with disabilities nationwide have not been reliably gathered, [Wisconsin Court of Appeals Judge Richard] Brown said he knows of two blind judges and that he currently is the nation’s only deaf judge.”) Given the age of the members of the judiciary, it stands to reason that there are some with mobility impairments, and others presumably have less visible disabilities.

¹²¹ In the past, that exclusion took the form of categorical statutory prohibitions, some of which remain on the statute books. See *Tennessee v. Lane*, 541 U.S. 509, 524 n.9 (2004) (citing statutes from Tennessee and Michigan). Today, it more often occurs through the use of peremptory challenges. See generally Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1 (1997).

¹²² Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 185 (2005).

in which judges and jurors disregarded extensive evidence that the plaintiff had in fact adapted hedonically, is hardly a surprise in this context.¹²³

Indeed, the litigation process itself is structured in a manner that is likely to trigger the very cognitive shortcuts that make affective forecasting so flawed. Daniel Gilbert and his colleagues have found that our tendency to be unaware of our own effective “psychological immune systems”—they term this tendency “immune neglect”—is a substantial contributor to our inability to predict adaptation to adverse events.¹²⁴ Because the presentation of evidence in litigation emphasizes the pain and unhappiness plaintiffs have felt as a result of their injuries, it further directs jurors’ attention away from the likelihood of hedonic adaptation.

Even more, the litigation process encourages “focalism,” another key contributor to the inability to predict adaptation. “Focalism” is a phenomenon under which people who are asked to predict an event’s effects on happiness “focus too much on the occurrence in question” and “fail to consider the consequences of other events that are likely to occur”: “People think about the focal event in a vacuum without reminding themselves that their lives will not occur in a vacuum but will be filled with many other events.”¹²⁵ A trial, of course, focuses attention on the particular injury,¹²⁶ and “when attention is drawn to the possibility of a change in any significant aspect of life, the perceived effect of this change on well-being is likely to be exaggerated.”¹²⁷ Such focalism is likely to be particularly strong in cases where nondisabled jurors must assess the prospects of happiness with a disability: As Paul Longmore has written, “outsiders,’ nondisabled people, latch onto a single trait (for example, paraplegia or arthritic pain), while

¹²³ See *supra* text accompanying notes 49-58.

¹²⁴ Gilbert, *et al.*, *Immune Neglect*, *supra* note 67, at 619, 633; see also Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 369 (“A major source of the impact bias, we suggest, is that people fail to anticipate the extent to which they will transform events psychologically in ways that ameliorate their impact.”).

¹²⁵ Wilson, *et al.*, *Focalism*, *supra* note 112, at 822; see also Wilson & Gilbert, *Affective Forecasting*, *supra* note 60, at 366 (“By neglecting to consider how much these other events will capture their attention and influence their emotions, people overestimate the impact of the focal event.”).

¹²⁶ See Schkade & Kahneman, *Living in California*, *supra* note 66, at 340 (“[A] judge who tries to imagine the life of a paraplegic or of a lottery winner will naturally focus attention on the special circumstances of these cases.”).

¹²⁷ Schkade & Kahneman, *Living in California*, *supra* note 66, at 340.

‘insiders,’ people with disabilities, take into account the full range of their experience.”¹²⁸

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

III. NORMATIVE IMPLICATIONS

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

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

In this Part, we address the normative question that the discussion in the previous Part leaves open: How should the law of hedonic damages respond to the tendency of nondisabled people to believe that disabling injuries limit life’s enjoyment far more than people with disabilities tend to experience? We believe that the law should not award any damages for loss of enjoyment of life based on disability. Where courts uphold hedonic damages awards

¹²⁸ LONGMORE, *supra* note 105, at 209.

based on the view that disabling injuries limit life's enjoyment by keeping the plaintiff from being a "whole person," they entrench the societal view that disability is inherently tragic, and they encourage people with disabilities to see their lives as tragedies. The view of disability as tragedy, for which the proper response is pity, charity, or compensation, has been one of the major targets of disability rights activists (and this is a campaign we endorse).¹²⁹ But we also argue that it is important to disaggregate the various ways in which disability can limit life's pleasures. The law can compensate for some of the negative results of disablement without sending the message that disability is a tragedy; others are at least in part endogenous to a society and a legal regime that consistently send the message that disability is tragic. In particular, we contend that while tort law should compensate for the physical pain, societal exclusion, and social stigma resulting from disabling injuries, as well as for the cost of medical care, assistive technology, and personal assistance, there should be no recovery for hedonic losses believed to attend disability.

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

In the succeeding sections, we identify two bad consequences of incorporating into tort damages the nondisabled perspective that disability inevitably limits enjoyment of life. In Section B, we contend that a legal doctrine that disability inevitably limits life's enjoyment encourages paternalism and pity and distracts political attention from efforts to change the social, attitudinal, and physical barriers that make impairments disabling. In Section C, we argue that such a doctrine also is likely

¹²⁹ See Bagenstos, *Subordination, Stigma*, *supra* note 114, at 427-428 (2000); JOSEPH P. SHAPIRO, *NO PITY : PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993).

in many cases to harm individuals with disabilities by augmenting the negative consequences of their injury.

We then turn to two other important normative considerations. In Section D, we respond to a natural objection to our argument—that measuring hedonic damages according to the adaptive preferences of people with disabilities will lead to undercompensation and underdeterrence. Finally, in Section E, we consider the complex relationship between our argument and the antipaternalist position of most disability rights activists.

A. Taking Adaptive Preferences Seriously

When people with disabilities experience their lives as just as happy as those of people without disabilities, that experience often results from hedonic adaptation. That is the import of the studies discussed in Part II.A. Should we, then, disregard those experiences? Professors John McKie, Peter Singer, Helga Kuhse, and Jeff Richardson have argued, indeed, that public policy should disregard the views individuals with disabilities hold about the quality of their lives, if those views are the result of the individuals' having "adjust[ed] psychologically to their condition."¹³⁰ But they offer no reason to disregard the experiences of people with disabilities and use instead the experiences of nondisabled people. The assumed neutral baseline of non-disability is not, in fact, neutral; the preferences and experiences of people without disabilities are just as conditioned by their situations as are those of people with disabilities.¹³¹ Neither people with nor those without disabilities have epistemic access to the "true" enjoyment of life with a disability.¹³²

¹³⁰ MCKIE, *ET AL.*, *supra* note 21, at 34.

¹³¹ *Cf.* Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 61, 91 (Martha C. Nussbaum & Jonathan Glover, eds., 1995) (describing men's preferences to remain in a privileged position as being just as conditioned as women's preferences for their subordinated position). Richard Abel comes close to arguing that there is simply no way to compare and assess the views of people with disabilities against the views of people without them about disabled persons' quality of life. See Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 *DEPAUL L. REV.* 253, 277 (2006) ("Profound injury, like serious illness, transforms lives. But though no one would choose to suffer the transformation, those different lives are just that—different, neither better nor worse—incommensurable with each other and incapable of being given a financial equivalent.").

¹³² *Cf.* McCaffery, *et al.*, *supra* note 19, at 1389 (arguing, for similar reasons, that neither an *ex ante* nor an *ex post* perspective on non-pecuniary damages "is more 'accurate' than the other"). This issue has some parallels in the debate

This point stands in tension with one of the most prominent discussions of adaptive preferences. Amartya Sen has argued that a “blind or disabled” person should not be denied redistribution simply because his “cheerful and resilient temperament” keeps him from experiencing less happiness.¹³³ Such a person, Sen argued, “is *really* much more deprived [than others] in terms of what he can do” and should not, because of his “buoyancy,” be forced to “forgo the help that he could otherwise claim from the society.”¹³⁴ Sen is, of course, correct that disability limits available modes of activity: By definition, mobility impairments impede walking; visual impairments impede seeing; and so on. Still, the language of “deprivation” is, to our minds, uncomfortably geared towards a nondisabled baseline. Mobility via a wheelchair, for example, can be much faster than walking;¹³⁵ and blind people who know Braille can read in the dark. More important, calling the effect of disability a “real[]” deprivation does not change the point, which we discuss below (and which has its own large literature) that it is not physical impairments that limit activity but societal choices that structure institutions in a way that excludes those with impairments.¹³⁶ A mobility impairment need not impede getting to work, for example, if transportation and buildings are wheelchair accessible. And of course Sen, who was not focusing on the question we are considering, did not contend that there is such a thing as “real” ontologically verifiable happiness.

regarding whether public or expert assessments of risk are correct. Those who favor the experts’ assessments believe that the risk perceptions of the general public are biased in a variety of ways; those who favor the public’s assessment believe that nonexperts are not biased but simply have a richer theory of risk than do the experts. For a discussion of this debate, see Bagenstos, *ADA as Risk Regulation*, *supra* note 107, at 1485-1486; *see also* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 149, 150 (2006) (arguing that disputes like these are not empirical but instead reflect “cultural commitments [that] are prior to factual beliefs on highly charged political issues”).

¹³³ SEN, RESOURCES, VALUES, AND DEVELOPMENT, *supra* note 3, at 318.

¹³⁴ SEN, RESOURCES, VALUES, AND DEVELOPMENT, *supra* note 3, at 318 (emphasis added); *see also* Nussbaum, *Female Human Beings*, *supra* note 131, at 91 (arguing we should not “rely on utility [measured by preference-satisfaction] as our measure of life quality,” because of the phenomenon of adaptive preferences).

¹³⁵ In marathons, for example, wheelchair racers routinely beat runners by over a half hour. *See, e.g.*, Frank Litsky, *Marathon: Boston, Again, Belongs to Kenyans, But This Time Americans Serve Notice*, N.Y. TIMES (April 18, 2006) (describing men’s running victor with course record time of 2 hours 7 minutes, and wheelchair victor with time of 1 hour 25 minutes).

¹³⁶ *See infra* text accompanying notes 141-151.

Accordingly, the choice of frame for assessment of hedonic damages cannot rest on the unexamined use of the word “real.” Rather, it requires a normative determination of which views would be best to credit.¹³⁷ And that determination, we suggest, requires an assessment of outcomes: Which views, when incorporated in policy, would lead to better consequences? Awarding hedonic damages based on the view that disability inevitably limits life’s enjoyment, we seek to show in the next two sections, has bad consequences.

To be clear, we do not deny that disability causes harm, even in the view of people with disabilities. What we deny is that disability itself necessarily limits happiness. It should be clear that disabling injuries typically require the injured person to pay substantial out-of-pocket costs—for medical care, rehabilitation services, assistive technologies, and personal assistance.¹³⁸

¹³⁷ See, e.g., Christine M. Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1542 (1998) (whether “a person’s measure of welfare after (for example) becoming ill [is] the appropriate measure of value” raises “a complex normative question”); Paul Menzel et al., *The Role of Adaptation to Disability and Disease in Health State Valuation: A Preliminary Normative Analysis*, 55 SOC. SCI. & MED. 2149, 2150 (2002) (stating that the question whether policy should incorporate the adaptive views of people with disabilities and diseases regarding their quality of life “is a fundamentally normative question”). This is a major point of Mark Kelman’s recent work on the implications of hedonic psychology for welfarism, see Mark Kelman, *Hedonic Psychology and the Ambiguities of “Welfare,”* 33 PHIL. & PUB. AFF. 391, 410 (2005), work that elaborates on themes Kelman has been exploring since Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; cf. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-421 (1981) (arguing that the notion of efficiency itself provides no basis to decide whether to use offer or asking prices in cost-benefit analysis and that therefore “the analyst will have to make a choice” based on some extrinsic principle). The idea underlies Ellen Smith Pryor’s work, as well. In an argument against what she terms the “insurance theory” of tort damages, Pryor has argued that even if people with disabilities believe that the marginal utility of money is higher pre-injury than post-injury (for example, if a “disabled person . . . conclude[s] that money has been less valuable after injury, at least in part because she has faced social and attitudinal barriers that have diminished the uses of her money and the satisfaction she can garner from those uses), those views cannot be a proper foundation for reduced compensation. Normatively, Pryor argues, beliefs that are “the product of a social order that is unjustifiably hostile and nonaccommodating to the disabled” should not be instantiated by the legal system to further diminish opportunities for people with disabilities. Pryor, *supra* note 74, at 119; *id.* at 145.

¹³⁸ See Pryor, *supra* note 74, at 117 (discussing “the centrality of money to a disabled lifestyle”); see also Bagenstos, *Future of Disability*, *supra* note 100, at 25-26 (discussing the importance of, *inter alia*, assistive technology and personal assistance to people with disabilities).

Disabling injuries often also cause physical pain.¹³⁹ Because of hostile attitudes and our inaccessible environment, disability also often leads to loss of opportunities to work and participate in society.¹⁴⁰ And the social stigma against disability may itself inflict mental distress in people who have disabilities. The studies discussed in Part II.A suggest that it is these social factors, and not anything inherent in disability, that makes some people with disabilities less happy. Courts can, therefore, award damages for those disability-related injuries without endorsing the view that disability inherently limits happiness—and we would urge them to do so, in appropriate cases. Damages for lost enjoyment of life are different, because of the negative consequences we detail below.

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

As Part I demonstrated, hedonic damages cases are filled with reasoning, arguments, and findings that endorse and instantiate a view of disability as personal tragedy. That view is very prevalent in our society. The standard narrative of disability is one of “some terrible chance event which occurs at random to unfortunate individuals.”¹⁴¹ In that narrative, disability is a problem that resides in the individual with a disability. It is a medical characteristic that should be fixed through health care and rehabilitation if possible, and that should be compensated with charity or public assistance if not.¹⁴²

But disability rights activists have mounted a persuasive challenge to that individualistic view. In their view (and ours), disability is not “an inherent personal characteristic that should ideally be fixed” but is instead “a characteristic that draws its meaning from social context.”¹⁴³ In particular, disability is what occurs when a physical or mental condition interacts with social structures and attitudes to create disadvantage. A person who uses a wheelchair, in this view, is disabled only because so many buildings, sidewalks, and modes of transportation are inaccessible, and because so many people have negative attitudes toward people

¹³⁹ For a good discussion of pain, see Ellen Smith Pryor, *Compensation and the Ineradicable Problems of Pain*, 59 GEO. WASH. L. REV. 239, 245-257 (1991).

¹⁴⁰ See Bagenstos, *Subordination, Stigma*, *supra* note 114, at 419-425.

¹⁴¹ MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32 (1996).

¹⁴² For elaboration of this and some of the other ideas in this section, see Bagenstos, *Subordination, Stigma*, *supra* note 114, at 427-432.

¹⁴³ Bagenstos, *Subordination, Stigma*, *supra* note 114, at 427.

who use wheelchairs. It is not the impairment that has disabled her, but “the set of social choices that has created a built environment that confines wheelchair users to their homes.”¹⁴⁴

Disability rights activists have supported this “social model” of disability in part because it seems to capture the true nature of disability. As a “natural” matter, abilities lie on a spectrum; it is social choices that make some limitations on some abilities “disabling” and others not.¹⁴⁵ And the social choices that deprive people with certain impairments of opportunities are everywhere you look: inaccessible buildings; work schedules that are designed without taking account of the needs of some people (e.g., people with diabetes) to take frequent short breaks; and the “spread effect” in which people assume that an impairment limits more functions, and more severely, than it actually does.¹⁴⁶

But disability rights activists also support the social model for more consequentialist reasons. When disability is seen as an individual tragedy, the policy response is an individualized one that focuses on the person with a disability. She must attempt to get cured or rehabilitated—a process that may consume an enormous amount of time and effort without ultimately achieving much functional gain.¹⁴⁷ If that fails, she must accept the charity or welfare that goes with being a member of the “deserving poor”—acceptance that stigmatizes her as less than a full citizen.¹⁴⁸ And in all events she is subject to the paternalistic control of bureaucrats and professionals: doctors, rehabilitation professionals, welfare caseworkers, and so forth.¹⁴⁹ The individualistic approach thus removes very little of the disadvantage attached to disability, and it in fact exacerbates that disadvantage in a number of ways.

The social model, by contrast, directs attention not at the individual with a disability but at the array of social choices that create most of the disadvantage attached to disability. “Once one

¹⁴⁴ Bagenstos, *Subordination, Stigma*, *supra* note 114, at 429.

¹⁴⁵ See U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 87-91 (1983).

¹⁴⁶ On the spread effect, see, for example, Bagenstos, *Subordination, Stigma*, *supra* note 114, at 423-424; BEATRICE A. WRIGHT, PHYSICAL DISABILITY—A PSYCHOSOCIAL APPROACH 32-39 (2d ed. 1983).

¹⁴⁷ See OLIVER, *supra* note 141, at 31-37.

¹⁴⁸ See Bagenstos, *Future of Disability Law*, *supra* note 100, at 16-17.

¹⁴⁹ See Bagenstos, *Future of Disability Law*, *supra* note 100, at 13-14; Bagenstos, *Subordination, Stigma*, *supra* note 114, at 427.

thinks of disability as arising primarily from the human environment, rather than from anything inherent in an individual's physical or mental condition, it 'becomes a problem of social choice and meaning, a problem for which all onlookers are responsible.'"¹⁵⁰ The social model's policy implications focus not on rehabilitation or charity but on eliminating the physical, social, and attitudinal barriers that make some physical and mental impairments disabling. The Americans with Disabilities Act, with its broad requirements of physical accessibility, reasonable accommodation, and antidiscrimination, is a paradigmatic social-model policy response to disability.¹⁵¹

Hedonic damages doctrine that allows recovery on the basis of the supposed intrinsic effect disability has on the enjoyment of life implements and reinforces the individualistic theory that disability rights advocates have persuasively argued against. The juridical discourse in these cases treats disability as something located in the individual rather than in society, something that in and of itself has negative if not tragic effects, and something that appropriately triggers a form of charitable largesse. Although the psychological evidence suggests that social factors are key contributors when people with disabilities experience enduring hedonic harms,¹⁵² the current doctrine preempts interest in those social factors. To the contrary, the lawyers' advice and cases discussed in Part I treat it as inevitable that a disability makes it harder to enjoy life.

To illustrate the point, consider *Nemmers v. United States*,¹⁵³ one of the cases we cited in Part I. *Nemmers* was a federal case about a boy, twelve years old at the time of trial, who had been born with mental retardation and cerebral palsy as a result of the defendants' negligent obstetric care. The district judge, Judge Michael Mihm, found the defendant liable, but he

¹⁵⁰ Bagenstos, *Subordination, Stigma*, *supra* note 114, at 430 (quoting MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 48 (1990)).

¹⁵¹ *See* Bagenstos, *Subordination, Stigma*, *supra* note 114, at 433-436. This is not to say that the ADA entirely reflects the social model; in its definition of disability in particular, it retains substantial aspects of the individualized medical model. *See* Samuel R. Bagenstos, *Comparative Disability Employment Law from an American Perspective*, 24 *COMP. LAB. L. & POL'Y J.* 649, 657-659 (2003).

¹⁵² *See supra* text accompanying notes 93-95.

¹⁵³ 612 F. Supp. 928 (N.D. Ill. 1985), *rev'd*, 795 F.2d 628, 634 (7th Cir. 1986), *on remand*, 681 F. Supp. 567 (N.D. Ill. 1988).

summarily refused to award “quality of life” damages.¹⁵⁴ The Seventh Circuit, in an opinion by Judge Frank Easterbrook, vacated that ruling and remanded.¹⁵⁵ Judge Easterbrook analyzed the claim for “quality of life” damages by focusing his attention on the plaintiff’s introspective deficits. In a striking example of the natural tendency to focus on one’s own perspective, Judge Easterbrook wrote that a “reduction in the ability to appreciate one’s own life, and to experience the lives of others through books, is a real loss just as surely as pain and suffering is a real loss. Eric does not suffer pain, but he will never live greatly.”¹⁵⁶

On remand, Judge Mihm developed at some length all of “the normal things of life” that the plaintiff’s evidence suggested he could not do.¹⁵⁷ He noted that Eric could not speak well, “climb[] stairs or walk[] on rough terrain,” “hop or skip,” “feed[] himself, car[e] for his own personal hygiene, or dress[].”¹⁵⁸ Moreover, the plaintiff was “antisocial and . . . prone to throwing fits both in private and in public,” although he “like[d] to swim and bowl, and he enjoys riding a bicycle.”¹⁵⁹ The result, Judge Mihm found, was that the plaintiff “will never have the sense of satisfaction, accomplishment, and enjoyment that comes from reading a good book or walking alone in the woods,” and “likewise will never experience the joy of marriage and creating a family of his own.”¹⁶⁰ Indeed, the judge said, “Eric will never be able to do

¹⁵⁴ See *Nemmers*, 612 F. Supp. at 935.

¹⁵⁵ See *Nemmers*, 795 F.2d at 634.

¹⁵⁶ *Id.* Judge Easterbrook’s use of the phrase “live greatly” is a reference to a famous speech by Justice Holmes, in which Holmes suggested that lawyers could live a life of the mind:

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

OLIVER WENDELL HOLMES, *The Profession of Law* (1886), in COLLECTED LEGAL PAPERS 29 (1920); see Francis A. Allen, *Mr. Justice Holmes and “The Life of the Mind,”* 52 B.U. L. REV. 229 (1972). Of course, Judge Easterbrook’s statement also echoes Mill’s comparison of a satisfied pig and an unsatisfied person. See MILL, *supra* note 3, at 10.

¹⁵⁷ *Nemmers*, 681 F. Supp. at 575.

¹⁵⁸ *Id.* at 572-573.

¹⁵⁹ *Id.* at 573.

¹⁶⁰ *Id.*

most of the normal things of life: the first date, parenting children, reading, debating the politics of the day, etc.”¹⁶¹

Accordingly, Judge Mihm found an award of hedonic damages to be appropriate.¹⁶² He concluded that damages would benefit the plaintiff, since he was “mentally conscious (‘aware’ to the extent that a person with an I.Q. of 45 can be aware), and [was] capable of some narrow capacity to enjoy life.”¹⁶³ In particular, an award of \$400,000 “could provide him consolation and ease the burden of his condition by making available to him ‘things’ that would occupy his attention and make his life pass more easily.”¹⁶⁴ Some of those “things,” the judge suggested, might include “a big screen television, or a special stereo system, or a razzle dazzle birthday party (with a real magician pulling rabbits out of a hat).”¹⁶⁵

Nemmers is a perfect illustration of the medical/charitable attitude that disability rights activists have mobilized against. We have no doubt that Judge Mihm sincerely thought he was “doing the right thing” by a poor, unfortunate plaintiff. His motives were no doubt those of humanity and decency. But his vision of disability was as a trait that is located in and inherently limits the individual with a disability. Although he discussed at length the activities the plaintiff supposedly could not perform because of his disability, Judge Mihm seems to have both underestimated the capacities of people with mental retardation and treated those limitations as flowing naturally from the disability, rather than contingently from social choices. We don’t know what Eric Nemmers has, in the nearly 20 years since the final opinion in the case, proved capable of.¹⁶⁶ What we do know is that the judge’s

¹⁶¹ *Id.* at 575.

¹⁶² 681 F. Supp. at 575 (internal quotation marks omitted).

¹⁶³ *Id.* at 576.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ The underestimation of the potential of individuals with mental retardation is widespread. Consider Nicholas Romeo, the plaintiff in *Youngberg v. Romeo*, 357 U.S. 307 (1982). Romeo had what the Court characterized as “profound[]” mental retardation, “with an I.Q. between 8 and 10.” *Id.* at 309. His own counsel had conceded, “in light of the severe character of his retardation,” that Romeo could never live outside of an institution. *Id.* at 317-318. Yet “ten months after the Court’s decision, Nicholas Romeo moved to a community residence in Philadelphia.” Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 443 (1991). Eight years later, Cook observed that “[s]ince April 1983, Romeo has been living, receiving services, and working part-time in his neighborhood.” *Id.* Nicholas Romeo’s experience

description seems extreme. An I.Q. of 45 is usually described as “moderate” retardation.¹⁶⁷ Characteristically, people in this category can “learn self care, social, and vocational skills. Their language is functional and they can achieve at least partial independence.”¹⁶⁸ They frequently can learn to read. People with mental retardation and cerebral palsy—including people in the relevant I.Q. range—certainly can date, and marry.¹⁶⁹ And the substantial self-advocacy movement among institutionalized and formerly institutionalized people with mental retardation—who have joined together in a national network of “People First” organizations—shows that developmental disabilities hardly prevent one from “debating the politics of the day.”¹⁷⁰ The ability of people with mental retardation to be good parents has also been significantly underestimated.¹⁷¹ But far from addressing the social choices and stereotypes that limited the plaintiff, the district court uncritically endorsed them and offered only an infantilizing form of charity. Instead of substitute pleasures like “razzle dazzle birthday parties,” the ruling might have geared compensation towards assistance with literacy, vocational training, independent living, and parenting support. That, we contend, is the right posture for courts to take in the disability rights era.

When lawyers ask for and courts make decisions like *Nemmers*, they encourage feelings of pity toward people with disabilities.¹⁷² They also divert attention from society’s

was typical of those who were released from Pennhurst, the institution where he had been confined. See JAMES W. CONROY *ET AL.*, *THE PENNHURST LONGITUDINAL STUDY: COMBINED REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS* (1985).

¹⁶⁷ See MARTHA A. FIELD & VALERIE A. SANCHEZ, *EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN* 32-33 (1999).

¹⁶⁸ *Id.* (internal quotation marks omitted) (quoting ARC, *PREVALENCE OF MENTAL RETARDATION* (1982)).

¹⁶⁹ See, e.g., Amy Dockser Marcus, *Next Chapter: A Young Woman With Disabilities Plans Her Wedding*, *WALL ST. J.*, Oct. 11, 2005.

¹⁷⁰ See SHAPIRO, *supra* note 129, at 184-210.

¹⁷¹ See generally FIELD & SANCHEZ, *supra* note 167. Field and Sanchez cite numerous studies on the subject, many of which included people in the same I.Q. range as Eric Nemmers. *Id.* at 248-258.

¹⁷² Another example is *Kansas City S. R. Co. v. Johnson*, 798 So.2d 374 (Miss. 2001). There, the court stated that the plaintiff’s closed-head injury “left him little more than a child,” *id.* at 377, and upheld an award for hedonic damages in a discussion that was dripping with pity:

Perhaps most telling about the effects of the accident on Johnson’s life is this testimony from Johnson’s daughter, Angela: “I watched an active man sit in a wheelchair all day. I watched an articulate man who took pride in his vocabulary

contribution to the barriers that deny opportunities to people with disabilities. Wendy Hensel has argued that the acceptance of wrongful birth and wrongful life actions (in which children with disabilities and their parents sue for the harm of being born) reinforces the message that disability is “a status inherent in the individual” and that the worth of a person with a disability is “limited to the capability of current medical techniques to identify and correct impairments.”¹⁷³ A very similar effect is likely here.

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

C. Debilitation

There is an additional reason to worry that awarding hedonic damages for disability will actually harm the interests of people with disabilities. To recover hedonic damages in a personal injury suit, a plaintiff will often be called upon to testify that the injury has made her life less enjoyable.¹⁷⁴ But that very testimony

struggle to get one word out. And I have watched a person that was always happy look sullen and sad, stare out into space.”

It is apparent that Johnson is no longer the person he was prior to the accident. We hold today that these restrictions are significant enough to warrant compensation as a separate and distinct element of damages.

Id. at 381 (paragraph numbering omitted).

¹⁷³ Hensel, *supra* note 122, at 181.

¹⁷⁴ Plaintiffs’ counsel may seek to minimize the importance of the plaintiff’s testimony, *see supra* note 32 and accompanying text, but the cases cited in Part I.B. show that that testimony remains important in practice.

is itself likely to be debilitating. Such testimony, often derived from the initial adjustment period during which disability typically does affect happiness, may well reflect the plaintiff's true feelings about her life at the time of the trial. But by focusing on the negative feelings that occur during that period, plaintiffs with disabilities may delay or derail their ultimate ability to adapt to their new condition; their testimony itself may disrupt the hedonic adaptation process that ensures that most people's happiness rebounds after a negative event.¹⁷⁵ The view that disability inherently limits enjoyment of life may therefore become a self-fulfilling prophesy: The fact that nondisabled jurors predictably fail to appreciate hedonic adaptation encourages injured plaintiffs (guided by their counsel) to present evidence that disability has limited their ability to enjoy life.¹⁷⁶ "Remedies inevitably shape wants,"¹⁷⁷ and "the legal process itself inevitably will be an influence on the plaintiff's 'noneconomic' losses."¹⁷⁸

Students of the Social Security Disability Insurance (SSDI) system have reported a parallel phenomenon. To receive benefits, SSDI claimants must prove that their disabilities make them unable to perform any "substantial gainful activity."¹⁷⁹ The very

¹⁷⁵ Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff's Lawyer*, 55 DEPAUL L. REV. 563, 596 (2006) (citing studies showing that writing or talking about a traumatic event may sometimes reduce experienced suffering and grief, but that other times it will exacerbate the problem—particularly "when 'the rehearsals about an emotional experience extend over a long period of time'"). Cf. Roger K. Pitman, Landy F. Sparr, Linda S. Saunders & Alexander C. McFarlane, *Legal Issues in Posttraumatic Stress Disorder*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 378, 382 (Bessell A. van der Kolk *et al.* eds., 1996) ("Requiring the PTSD patient to confront his or her traumatic history during interviews with attorneys and consultants, depositions, and courtroom testimony thwarts characteristic efforts at avoidance and predictably results in the resurgence of intrusive ideation and increased arousal.").

¹⁷⁶ Some of the testimony these plaintiffs have offered about their expectations of life seems strikingly bleak given the limited extent of their disabilities. See, e.g., *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 717 (Tenn. Ct. App. 1999) (plaintiff whose left eye was injured, resulting in disfigurement and loss of vision, testified that "she will not risk going rafting, canoeing, or playing tennis," and her husband testified that she "no longer wants to go out," that, "she bumps into people because she doesn't see them coming on her left side, and that "she hates going to work because she cannot tolerate the stress"); *Varnell v. Louisiana Tech Univ.*, 709 So.2d 890, 896 (La. Ct. App. 1998) (plaintiff who had knee injury that required two surgeries "testified that with her physical limitations and poor prognosis, she does not see that she has 'much of a future'").

¹⁷⁷ Abel, *supra* note 131, at 259.

¹⁷⁸ Pryor, *Noneconomic Damages*, *supra* note 175, at 564.

¹⁷⁹ 42 U.S.C. § 423(d)(2)(A).

effort to prove that inability, however, gives SSDI applicants a powerful psychic investment in the proposition that they cannot work.¹⁸⁰ One commentator has accordingly concluded that “[t]he very process by which disabled applicants become eligible for benefits leads to learned states of helplessness.”¹⁸¹ And that is one of the key reasons why virtually no one leaves the SSDI rolls—people convince themselves that they cannot work, and their testimony in their benefits applications becomes a self-fulfilling prophecy.¹⁸² So too in the hedonic damages context, a newly disabled person’s extensive efforts to prove that she can no longer enjoy life may give her a powerful psychic investment in that proposition.

The phenomenon also finds parallels in wrongful birth and wrongful life actions. Because such actions grant compensation “only to those [people with disabilities] willing to openly disavow their self-worth and dignity,” Hensel has argued that even individuals with disabilities who succeed in their suits “are likely to feel abused and diminished rather than empowered and vindicated.”¹⁸³ And it is not just the plaintiffs and their children who get the message that life with a disability is not worth living. Other people with disabilities get the same message as well.¹⁸⁴

¹⁸⁰ See Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 85, 85 (Carolyn L. Weaver, ed., 1991).

¹⁸¹ Cheryl Rogers, *The Employment Dilemma for Disabled Persons*, in *IMAGES OF THE DISABLED, DISABLING IMAGES* 117, 122 (Alan Gartner & Tom Joe, eds., 1987); see also Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535, 555 (1987-88) (“The [Social Security Act’s] definition of disability is in many ways a negation of self-empowerment.”).

¹⁸² See Bagenstos, *Future of Disability Law*, *supra* note 100, at 32, 64.

¹⁸³ Hensel, *supra* note 122, at 171-172.

¹⁸⁴ See Hensel, *supra* note 122, at 174 (“Wrongful birth and life actions transmit a potentially powerful message to all people with disabilities: as a matter of law, your impairment, standing alone, is a sufficient basis upon which to evaluate the quality of your life.”); see also Adrienne Asch, *Reproductive Technology and Disability*, in *REPRODUCTIVE LAWS FOR THE 1990S* 69, 94 (Sherrill Cohen & Nadine Taub, eds., 1989) (“There is reason for us to fear wrongful birth suits and to oppose suits for wrongful life: it is the message they send to the children themselves, disabled people, and society about the worth of lives with impairments”); Lori B. Andrews & Michelle Hibbert, *Courts and Wrongful Birth: Can Disability Itself Be Viewed as a Legal Wrong?*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 318, 325 (Leslie Pickering Francis & Anita Silvers, eds., 2000) (similar).

When courts declare that disability inherently limits the ability to enjoy life, and thereby encourage plaintiffs with disabilities to testify to that effect, they send a message that is difficult for people with disabilities generally to ignore. True, people with disabilities who are not plaintiffs may not come to believe the courts' view that disability does in fact reduce the quality of their lives, and even plaintiffs whose adaptation is delayed by their testimony seeking hedonic damages may ultimately make the adjustment. But judicial decisions affirming hedonic damages for disability powerfully reinforce the notion that society treats people with disabilities as inherently having lives of lower quality (and perhaps importance) than others.¹⁸⁵

Damages that compensate for the out-of-pocket costs of rehabilitation, assistive technology, or personal assistance would not cause these disempowering effects; they are in fact means to empowerment. And damages that compensate for stigma and denial of opportunities are also empowering, because they represent an official recognition that it is societal choices that exclude people with disabilities, and that those choices are a wrong that the government will address.¹⁸⁶ But hedonic damages for disability are as likely to cause as to compensate for hedonic harm.

D. The Undercompensation and Underdeterrence Objections

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

One might respond, however, that our proposal will lead to undercompensation and underdeterrence. Even if many people with disabilities find that their disabilities do not limit their

¹⁸⁵ Cf. Adam A. Milani, *Better Off Dead Than Disabled? Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149, 217-220 (1997) (arguing that "wrongful living" actions have this impact for similar reasons).

¹⁸⁶ Cf. Bagenstos, *Subordination, Stigma*, *supra* note 114, at 472-473 (advocating, for similar reasons, an approach to reading the ADA's "disability" definition that focuses on society's perceptions of disability rather than anything "inherent" in disability itself).

ability to enjoy life, not all do. For those who do authentically experience a loss of enjoyment of life, our proposal appears to deny full compensation. From a deterrence perspective, one might again wonder why the adaptive preferences of people with disabilities should be taken seriously at all: Even if every person with a disability adapted to his or her condition hedonically, surely that does not mean that, *ex ante*, potential defendants should be indifferent about whether they cause disabling injuries. Awarding hedonic damages based on a view that disability inherently limits life's enjoyment might be thought to provide the necessary deterrent signal to discourage acts that cause disabling injuries.¹⁸⁷

We can offer a couple of responses to both the undercompensation and the underdeterrence objections. First of all, we do not propose to leave disabling injuries uncompensated. To the contrary, under our proposal courts would award damages for medical expenses, rehabilitation counseling, assistive technology, and personal assistance, as well as for the economic costs of society's denial of opportunities to people with disabilities and the abstract harm of social stigma. (It is worth recalling that social factors like those for which our proposal would compensate are the most important contributors to the hedonic loss experienced by those people with disabilities who experience hedonic loss.¹⁸⁸) Some of these forms of damages are not typically awarded for disabling injuries under current tort law. Our argument therefore is not that courts currently award too much in damages for disabling injuries (indeed, they may award too little) but that they award the *wrong* damages. Under our proposal, total compensation for disabling injuries—and thus the aggregate deterrent signal against actions that cause disabling injuries—might be as large as or even larger than under current law

More broadly, modern tort law is shot through with doctrines rendering real harms non-compensable. For starters, in some (though by no means all) situations in which a victim is no longer able to receive compensation, modern tort doctrine sacrifices deterrent goals. Thus wrongful death statutes offer only

¹⁸⁷ See McCaffrey, *et al.*, *supra* note 19, at 1397 (“Even if we believed that the lower, *ex post* making whole value adequately compensated an injured plaintiff once an injury had occurred, it does not follow that the damages faced by putative defendants, for purposes of calibrating their *ex ante* incentives and expressing society's values, should also be set at this making whole level.”).

¹⁸⁸ See *supra* text accompanying notes 93-95.

very limited damages;¹⁸⁹ pain and suffering damages in some jurisdictions do not survive the death of the plaintiff,¹⁹⁰ and many jurisdictions do not allow any recovery for lost enjoyment of life in either wrongful death actions or where the plaintiff is unconscious of the loss.¹⁹¹ As Rick Abel has argued, “If tort law excludes significant damages because victims cannot be compensated, then arguments for general damages grounded in corrective or distributive justice lose some of their force.”¹⁹²

Even where injured persons can receive compensation, it is simply not the case that the law generally awards or should award damages for all injuries caused by a wrongful injury. To the contrary, as Robert Rabin has persuasively argued, “fidelity to the goals of tort law, and more particularly to the compensation objectives of accident law, does not require efforts to engage in precisely contoured case-by-case implementation of a make-whole principle.”¹⁹³ One familiar example, made prominent by Judge Cardozo in *Palsgraf v. Long Island R.R.*,¹⁹⁴ is often labeled the “duty” rule; it holds that no damages are available for physical injuries caused by the defendant’s negligence, if the defendant’s conduct was foreseeably risky, *ex ante*, only with respect to

¹⁸⁹ For a list of wrongful death statutes for all fifty states, see Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 25–26 nn.129–31 (2005). The statutes allow only limited liability; at common law, the rule was against any liability at all. *Id.* at 18–20; see also Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).

¹⁹⁰ See, e.g., West’s Ann. Cal. C.C.P. § 377.34 (“In an action or proceeding by a decedent’s personal representative or successor in interest on the decedent’s cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.”).

¹⁹¹ See cases from twenty states cited by the dissenting opinion in *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 931 n.6 (Miss. 2000) (en banc, Cobb, J., dissenting); Miss. Code Ann. § 11-1-69 (2003) (overruling majority decision in *Choctaw Maid Farm*).

¹⁹² Abel, *supra* note 131, at 270.

¹⁹³ Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 375 (2006); see also John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 466-467 (2006) (arguing for a theory of “fair” rather than “full” compensation, under which “a fact-finder might be entitled to award less-than-fully compensatory damages, even to a not-at-fault tort plaintiff”).

¹⁹⁴ 162 N.E. 99, 100 (N.Y. 1928).

someone other than the plaintiff.¹⁹⁵ Another doctrine perhaps more closely related to the topic of this article governs negligent infliction of emotional distress. Common law courts generally do not award damages for emotional distress incurred when the plaintiff witnesses someone else's physical injury or narrowly avoids such injury herself, unless the plaintiff herself was in the "zone of danger" in which she was at risk of sustaining such an injury.¹⁹⁶ Other similar policy judgments abound: While damages are available for the emotional toll wrought by the wrongful death of a spouse or minor child, in many states there is no authorized emotional distress recovery for wrongful death of an adult son or daughter, or of the parent of an adult plaintiff, or of a sibling or dear friend.¹⁹⁷ These rules do not reflect a belief that people who are outside of the zone of danger or whose adult children are wrongfully killed never in fact experience emotional distress; nor do they reflect a belief that such emotional distress is not in fact an injury. Instead, they rest on a policy judgment that awarding emotional distress damages in the specified circumstances would create uncertain, and potentially limitless, liability, and, perhaps, that it would unhelpfully encourage would-be claimants to dwell on their traumas.¹⁹⁸

Our argument, too, rests on a policy judgment, though one of a different and perhaps even more defensible kind. Even if some individuals who experience disabling injuries honestly find that their conditions inherently limit their enjoyment of life, we believe that awarding damages on that basis is on balance harmful to people with disabilities—even those people with disabilities who phenomenologically experience hedonic loss. If, for example, damages for negligent infliction of emotional distress can be limited out of a concern for fairness to people who negligently

¹⁹⁵ See, e.g., *Bryant v. Glastetter*, 32 Cal. App. 4th 770, 774 (Cal. Ct. App. 1995) (denying recovery to plaintiff tow truck operator killed after being summoned by police to haul away defendant drunk driver's car, notwithstanding the defendant's negligence with respect to earlier users of the road).

¹⁹⁶ See *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963) (applying the "zone of danger" rule); *Dillon v. Legg*, 441 P.2d 912, 924-925 (Cal. 1968) (allowing recovery for emotional trauma caused when mother witnessed the death of her child as a result of defendant motorist's negligence); *Tobin v. Grossman*, 249 N.E.2d 419, 423 (N.Y. 1969) (disallowing recovery in similar circumstances).

¹⁹⁷ See, e.g., *Weimer v. Wolf*, 641 So.2d 480 (Fla. Ct. App. 1994) (discussing evolution of Florida statutory law on this point); *Stewart v. Price* 718 So.2d 205, 209 (Fla. Ct. App. 1998) (same).

¹⁹⁸ Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1679-1682 (2002).

cause harm, surely damages for disabling injuries can be limited out of concern for people with disabilities themselves.

E. Of Paternalism

At this point, it is worthwhile to consider the relationship between our argument and the antipaternalist position articulated by most disability rights activists. As we suggested above,¹⁹⁹ paternalism has historically been one of the most significant contributors to the disadvantage people with disabilities experience. Nondisabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities.²⁰⁰ In so doing, they have deprived people with disabilities of opportunities to work and participate in the community.²⁰¹ They have denied people with disabilities the autonomy that consists in making one's own choices. And they have denied people with disabilities the "dignity of risk"—"the opportunity to develop their skills, test them in the world, and succeed or fail according to their talents."²⁰² Antipaternalism thus has become one of the core tenets on which most disability rights advocates agree.²⁰³

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

¹⁹⁹ See *supra* note 149 and accompanying text.

²⁰⁰ For a discussion of the role of paternalism in disability oppression, see JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 52-55 (1998).

²⁰¹ For an example, see *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002). For criticism of the Court's decision in *Echazabal*, see Samuel R. Bagenstos, *The Supreme Court, The Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004).

²⁰² Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 997 (2003).

²⁰³ See *id.* at 1010-1012; Bagenstos, *The Supreme Court*, *supra* note 201, at 932 n.70.

substitute the nondisabled public’s view of disability for that of most people with disabilities.

Yet the matter is complicated, in a way that underscores the analytical and normative limitations of a purely antipaternalist position. At least some people with disabilities hold what we have sometimes been calling the “nondisabled view”—that disability does limit their ability to enjoy life. Under our proposal, those individuals would not be able to recover damages for their sincerely felt hedonic losses. To that extent, as the discussion in the previous section highlights, our position itself could reasonably be described as paternalist.²⁰⁴ We might defend ourselves on the ground that when people with disabilities believe they are less able to enjoy life, those beliefs are artifacts of the adjustment period or are endogenous to a society that believes disability inherently limits life’s enjoyment and a legal system that encourages people with disabilities to testify that it does.²⁰⁵ But then we would be making exactly the same move as do those who would write off the positive hedonic experiences of most people with disabilities. In the end, our argument must rest on the consequences of using the adaptive preferences of most people with disabilities as the basis for damages law: Using those preferences avoids demoralization and puts the focus where it should be—on society’s responsibility for the disadvantage attached to disability.

Paternalism is an individualistic concept, and our proposal may be regarded as paternalistic in many individual cases. But when disability rights activists talk about paternalism, they are not simply challenging decisions to override the choices of particular individuals with disabilities. They are also challenging a system in which the views of most people with disabilities—that disability is a trauma, not a tragedy; and that its disadvantages are largely socially created—are written off as irrational and illegitimate.²⁰⁶ In that respect, our position is very much in line with the “antipaternalist” view espoused by disability rights activists.

CONCLUSION

We have argued that courts should not award hedonic damages for disabling injuries. Most people with disabilities find

²⁰⁴ Cf. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1171-1190 (2003) (arguing that paternalism is inevitable).

²⁰⁵ See *supra* text accompanying notes 174-186.

²⁰⁶ See, e.g., SHAPIRO, *supra* note 129, at 12-40.

that their conditions do not limit their ability to enjoy life, though most people without disabilities do not believe them. Incorporating the views of people without disabilities in the law distracts attention from the social choices that attach disadvantage to disability, and it may itself inflict hedonic harm on people with disabilities.

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