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## Law and Happiness (Eric A. Posner & Cass R. Sunstein eds., 2010)

Jeffrey L. Harrison

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## BOOK REVIEW

*Law and Happiness* (Eric A. Posner & Cass R. Sunstein eds., 2010)

Jeffrey L. Harrison\*

I.	INTRODUCTION .....	413
II.	THE COMPLEXITIES OF HAPPINESS.....	415
	A. <i>Why it is Seductive</i> .....	415
	B. <i>Why Not to Trust Happiness</i> .....	417
III.	EMPIRICISM MEETS THEORY: A RELEVANT HAPPINESS STANDARD AND SOME APPLICATIONS .....	423
IV.	IS HAPPINESS ALL THAT MATTERS?.....	427
V.	CONCLUSION.....	432

### I. INTRODUCTION

Happiness and its relationship to law is clearly the topic *du jour* among those interested in interdisciplinary efforts. Discussions of the topic are pervasive and range from standard self-help books<sup>1</sup> to serious scholarship.<sup>2</sup> This is to be expected, because quite clearly, happiness—

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1. See, e.g., RUSS HARRIS & STEVEN HAYES, *THE HAPPINESS TRAP: HOW TO STOP STRUGGLING AND START LIVING* (2008); SONJA LYUBOMIRSKY, *THE HOW OF HAPPINESS: A NEW APPROACH TO GETTING THE LIFE YOU WANT* (2008).

2. See generally ROBERT FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985); BRINO S. FREY & ALOIS STUTZER, *HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING* (2002); DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006); JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* (2006); JENNIFER MICHAEL HECHT, *THE HAPPINESS MYTH: WHY WHAT WE THINK IS RIGHT IS WRONG* (2007); RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* (2005); MATTHIEU RICARD, *HAPPINESS: A GUIDE TO DEVELOPING LIFE'S MOST IMPORTANT SKILL* (Jesse Browner trans., Little, Brown & Co. 2006); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005) [hereinafter Blumenthal, *Law and the Emotions*]; Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT'L ACAD. SCI. 11176 (2003) [hereinafter Easterlin, *Explaining Happiness*]; Richard A. Easterlin, *Income and Happiness: Toward a Unified Theory*, 111 ECON. J. 465 (2001) [hereinafter Easterlin, *Income and Happiness*]; Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 J. ECON. BEHAV. & ORG. 35 (1995) [hereinafter Easterlin, *Happiness of All*]; INTERPERSONAL COMPARISONS OF WELL-BEING (Jon

or some version of well-being—is a dominant concern for most of us.<sup>3</sup> Consequently, it is not unreasonable to expect law, broadly speaking, to be designed to address this desire to achieve happiness.<sup>4</sup>

Part of the rationale for the interest in happiness is that it is a potential substitute for conventional notions of efficiency. Every conventional efficiency-oriented standard is based on expectations that one *will be* better off.<sup>5</sup> For example, demand is based on willingness to pay but not on the outcome of the actual purchase. Happiness, on the other hand, is about how things turn out. Indeed, the importance of a topic is evident when two well-published and eminent law professors present a book of readings on the topic. *Law and Happiness*, edited by Eric Posner and Cass Sunstein, is such a book. It suggests that even the most serious people regard the law and happiness relationship as something to examine closely.

*Law and Happiness*—perhaps a play on Law and Economics—is composed of twelve previously published articles, including a brief introduction culled from the pages of the *Journal of Legal Studies*,<sup>6</sup> in particular those reproducing the works presented at a University of Chicago conference on happiness and its implications for law and public policy.<sup>7</sup> A review of a book of readings can be approached in two ways. First, one may review the individual contributions, each of which may or may not have something valuable to say. In this case, they all do. A second approach asks, what does this collection, viewed as a snapshot of happiness research, tell us more generally about the state of affairs in this new area of interdisciplinary study? This Review adopts this second perspective. Although most of the individual contributions are assessed, that exercise serves the end of bringing the overall picture into focus. This is not to say that each contribution is not of high quality.

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Elster & John E. Roemer eds., 1991); Tiffany A. Ito & John T. Cacioppo, *The Psychophysiology of Utility Appraisals*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 470 (Daniel Kahneman et al. eds., 1999); Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERS. & SOC. PSYCH. 527 (2003). For an excellent selection of readings, see WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra*. The most comprehensive review of the literature is found in Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. OF LAW & SOC. SCI. (Dec. 2010).

3. Throughout this Review, happiness will be equated with a *sense* of well-being or subjective well-being. It is important not to confuse this with actual well-being. See Matthew Adler & Eric A. Posner, *Happiness and Cost-Benefit Analysis*, in LAW AND HAPPINESS 257 (Matthew Adler & Eric A. Posner eds., 2010) [hereinafter HAPPINESS].

4. “Well-being” may not necessarily mean a sense of well-being.

5. See *infra* text accompanying notes 13-15.

6. Matthew Adler & Eric Posner, *Happiness Research and Cost Benefit Analysis*, 37 J. LEG. STUD. S253 (2008).

7. The book represents an improvement for readers and researchers in that it includes a relatively brief index.

The collection is highly useful in this respect because its range is broad. Some articles are highly quantitative and non-normative in nature. Others are more philosophical, while still others describe the implications of happiness for specific areas of law, including damages for personal harm and crime. It should be noted that although the authors refer to each other from time to time, the articles do not reveal an in-depth exchange between the authors. In addition, the most obvious impression one draws from the collection is that there are many issues to be resolved before policy can be reliably designed to advance happiness.

The initial section of this Review starts with an examination of why it is difficult to discuss happiness and a discussion of the many issues that arise when people discuss happiness. It also identifies the overall themes found in *Law and Happiness*. Indeed, even the use of the word “happiness” as a topic is terribly imprecise. What it means may vary from reader to reader. Then, the Review assesses how this collection of writings can assist in linking one notion of happiness or another with actual policy. Ultimately, whether intentionally or not, the collection reveals how far we are from a consensus on what should count in an assessment of happiness, and how much enhancing happiness, however defined, can be used in determining policy. Although the contributions to *Law and Happiness* are a collection of the highest quality, like law and happiness literature more generally, there is much work still left to be done. Ultimately, we may find that a focus on happiness is no less complex and imprecise than relying on standard notions of economic efficiency. Fortunately, that question does not need to be answered at this early stage.

## II. THE COMPLEXITIES OF HAPPINESS

“I don’t trust happiness. I never did, I never will.”<sup>8</sup>

### A. *Why it is Seductive*

The editors of *Law and Happiness* note the importance of happiness studies to those dissatisfied with traditional notions of economic efficiency.<sup>9</sup> The idea of maximizing utility—one possible concept of efficiency—leads to the impossibility of interpersonal comparisons of

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8. TENDER MERCIES (Universal Pictures 1983) (spoken by Robert Duvall).

9. HAPPINESS, *supra* note 3, at 1.

utility and the numerous dangers of strict utilitarianism.<sup>10</sup> Paretian concepts of efficiency<sup>11</sup> create a public policy straitjacket in the sense that all but voluntary exchanges are likely to leave someone in a worse situation. Finally, Kaldor-Hicks efficiency only requires that the gainers from a resource reallocation be capable of compensating the losers.<sup>12</sup> None of these guarantees that net happiness is increased.

Part of the problem is tied to the economic notion that we assess a person's preferences by observing choices.<sup>13</sup> The disconnect between these measures of efficiency and happiness is obvious.<sup>14</sup> Each measure only considers choices when made, and not the outcome in terms of happiness or well-being. To the extent economics focuses on utility, it is actually *ex ante* utility. The simple fact is that preferences at one point and the choices those preferences lead to do not necessarily produce happiness in the future.<sup>15</sup> In addition, for the most part, these notions of efficiency view increases in utility as a product of change and acquisition. That is, they concentrate on external stimuli as sources of happiness but do not consider the possibility that one can psychologically adapt to the status quo and become happy.<sup>16</sup>

Problems with various notions of efficiency lead to a desire to consider outcomes—actual states of well-being. In fact, happiness may be regarded as *ex post* happiness or utility. Moreover, an argument can

10. See generally J.J.C. SMART & BERNARD WILLIAMSON, UTILITARIANISM: FOR AND AGAINST 17-27 (1973); R.M. HARE, FREEDOM AND REASON 118-34 (1962).

11. The standard of Pareto Superiority is met when a change in resources results in at least one person being better off and no one being worse off. See generally JEFFREY L. HARRISON & JULES THEEUWES, LAW AND ECONOMICS 229-30 (2008). See also Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2 (1997).

12. For a general discussion, see JEFFREY L. HARRISON, LAW AND ECONOMICS 42-44 (2007); see Jeffrey L. Harrison, *Happiness, Efficiency and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935, 942-94 [hereinafter *Decisional Equity*].

13. This is known as "revealed preference" and seems to have originated with Paul Samuelson. See P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 ECONOMICA 61, 70-71 (1938). For a discussion, see Nicholas Georgescu-Roegen, *Choice and Revealed Preference*, 21 SO. ECON. REV. 119 (1954).

14. In their own contribution to the collection, the editors write "[e]conomists traditionally equate well-being with the satisfaction of actual preferences." HAPPINESS, *supra* note 3, at 257. This is somewhat misleading. Economists assume that the choices made in the market reveal preferences. Economists typically do not measure whether actual satisfaction occurs.

15. Daniel Kahneman et al. capture this distinction, distinguishing "decision utility" from "experienced utility." See Daniel Kahneman et al., *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375 (1997) [hereinafter Kahneman et al., *Back to Bentham?*]. They describe the circularity of conventional economics like this: "In current economics and in decision theory, the utility of outcomes and attributes refers to their weight in decisions: utility is inferred from observed choices and is in turn used to explain these choices." *Id.* at 375.

16. *Decisional Equity*, *supra* note 12, at 951-57.

be made that law should be about people as they actually are and not simply about their often misguided choices. This seemingly logical leap, however, is not so simple. Just as economists have struggled with what efficiency means, those who speak and write about happiness encounter a similar set of problems. Unless these problems can be resolved, happiness studies may wind up with the same indeterminacy problems that haunt economics analysis.

### B. *Why Not to Trust Happiness*

The issues that arise with happiness can be viewed as belonging to two groups that are not wholly independent. One group consists of issues with which economic analysis has unsuccessfully contended. Another encompasses those issues associated with happiness studies alone. The questions happiness research shares with economics is whether individuals are rational maximizers. In the case of economics, it is whether people are rational maximizers of (ex ante) utility.<sup>17</sup> If one switches to happiness, the question can be restated as whether individuals are rational maximizers of happiness or ex post utility. This can be broken down into whether individuals seek to maximize anything, including happiness, and whether they are rational. In economics, the issue is finessed by assuming that people are rational maximizers of utility. Studies in behavioral economics over the last thirty years have gone a long way toward testing these assumptions.<sup>18</sup>

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17. For convenience purposes, I will use the term ex ante happiness to describe how an individual anticipates a decision will turn out. Ex post refers the subjective response to the actual impact on happiness.

18. The number of articles in law alone that address the implications of behavioral economics is vast and often repetitive. One of the earliest is Jeffrey L. Harrison, *Egoism, Altruism and Market Illusions*, 33 UCLA L. REV. 1309 *passim* (1986) [hereinafter *Egoism*]. See also Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Jeremy Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 *passim* (2007); Blumenthal, *Law and the Emotions*, *supra* note 2, at 155; Grant M. Hayden & Stephen Ellis, *Law and Economics After Behavioral Economics*, 55 KAN. L. REV. 629 *passim* (2007); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1656 (1998); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 *passim* (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 *passim* (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1499-1514, 1516-27 (1998); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 *passim* (2002). Perhaps the most important recent publication to generate significant discussions about how law can account for behavioral economics is Cass R. Sunstein & Richard Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 U. CHI. L. REV. 1159 *passim* (2003). See also Matthew D. Adler et al., *Symposium, Preferences and Rational Choice: New Perspectives and Legal Implications*, 151 U. PA. L. REV. 707, 707-15 (2003); Douglas G. Baird et al., *Symposium, Homo*

Can we be sure individuals strive to maximize happiness? There are several reasons to doubt this. First, people may make decisions and choices based on what seems “right.”<sup>19</sup> It is not clear that this can be equated with happiness. Personal happiness may be subordinate to wanting to feel that one has done the right thing. This in itself may be a source of happiness, but it requires making the assumption that people do not make (as Amartya Sen states) “counterpreferential” choice[s].<sup>20</sup> The other problem with the idea of striving to maximize happiness is that it may not make much difference. One of the leading theories about happiness is that people adjust, and whether good or bad things happen, they eventually return to a “set-point[.]” level of happiness.<sup>21</sup>

The other issue comparable to that associated with the application of economics to law is whether people are rational.<sup>22</sup> In this context, the rationality question is whether, even if they want to maximize happiness, people make consistent choices that advance that end. For the most part, when people make choices, they believe they will be happier with the outcome of the choice made, than how they would be if they failed to make that choice, or if they pursued an alternative choice. It is impossible to know whether that belief is, in fact, correct because people cannot live their lives and assess their happiness in an alternative context. For example, the law student may be quite happy in law school but cannot know if he or she would have been happier if he or she had chosen to attend medical school. Suppose the government surveys physicians and lawyers and finds that physicians say they are, on average, a 7 on a 1-10 scale measuring happiness. Attorneys report they are in the range of 5. Based on that, medical education is subsidized in order to allow more people to become physicians in order to, hopefully, help them become happier. As with economics, the making of a choice does not ensure greater happiness and, even if the level of happiness turns out to be higher, by no means is it maximized.

There are happiness issues that extend beyond the problems often associated with the traditional behavioral assumptions of economics. When people think in terms of being happier, people usually associate

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*Economics, Homo Myopicus, and the Law and Economics of Consumer Choice*, 73 U. CHI. L. REV. 1, 1-2 (2006); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 *passim* (2003); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175-79 (2003).

19. See Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 337 (1977).

20. *Id.* at 328.

21. Lucas et al., *supra* note 2, at 527; see Phillip Brickman & Donald T. Campbell, *Hedonic Relativism and Planning the Good Society*, in ADAPTION-LEVEL THEORY 287, 287, 289 (Mortimer H. Appley ed., 1971).

22. See *Egoism*, *supra* note 18, at 1315-16, 1318; see Korobkin & Ulen, *supra* note 18, at 1107-13.

such thought with a change—a bigger house, a nice car, a more pleasing climate. One can rephrase this by saying that people are less happy than they could be because they *want* something or are missing something. What this means is that another path to greater happiness is, in a rough application of Zen philosophy, to decrease the wanting.<sup>23</sup> Certainly a decrease in longing for unmet desires can lead to less unhappiness and lead to a sense of contentment. This may seem fanciful but probably every reader can think of something he or she wanted very badly, did not get, and eventually forgot about it. In fact, they may be relieved that the state of affairs that they thought would make them happier never materialized.<sup>24</sup>

Perhaps more serious than various ways of achieving greater happiness is the question of when one measures happiness. One possibility, experience sampling,<sup>25</sup> measures happiness in real time. That is, people are monitored from hour to hour or from day to day. The problem is that the perception of happiness or unhappiness changes as time passes. What was excruciatingly painful may, upon recall, not seem that upsetting—perhaps it may even become the source of current happiness for having survived. Or something that was pleasing at the time—eating a huge meal—could result in a great deal of regret. Perhaps the most intriguing example of the complexity of happiness involves an experiment where subjects' hands were submerged into very cold water for different periods of time.<sup>26</sup> In the case of the longer submersion, the temperature was raised slightly before the subjects removed their hands.<sup>27</sup> When asked which experience they would be more willing to redo, they tended to choose the longer emersion.<sup>28</sup>

Not surprisingly, another problem is that having more is not necessarily linked to greater happiness. In fact, in the latter part of the twentieth century, while there was sustained economic growth in the United States, there appears to have been no change in the average level of happiness.<sup>29</sup> Some of this is no doubt driven by the relationship of happiness to relative wealth and the reference group an individual employs. Thus, even a relatively wealthy person in absolute terms may

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23. See *Decisional Equity*, *supra* note 12, at 941, 950-53, 980.

24. Although no contribution discusses this possibility in depth, one essay does suggest an alternative way to achieve happiness. In *Hive Psychology, Happiness and Public Policy*, 37 J. LEGAL STUD. S133, S134-36, S140-41, S143-52 (2008); Jonathan Haidt et al. discuss the importance of groups as sources of happiness. This includes the notion of “transcending the self.” *Id.* at S145.

25. See, e.g., Daniel Kahneman et al., *Toward National Well-Being Accounts*, 94 AM. ECON. REV. 429 (2004) [hereinafter Kahneman et al., *Toward National Well-Being Accounts*].

26. Kahneman et al., *Back to Bentham?*, *supra* note 15, at 386.

27. *Id.*

28. *Id.* at 387.

29. Easterlin, *Happiness of All*, *supra* note 2, at 37-38.

be quite unhappy if his or her aspirations are to be more like those who are even wealthier. Similarly, it is well understood that those who are relatively poor in absolute terms can be happy if their reference group is composed of those in a similar situation.<sup>30</sup>

Unsettling to many, and yet to be fully addressed, is the closeness of happiness to utilitarianism.<sup>31</sup> Economists often rely on indifference curves to discuss matters of welfare. Without going into the technicalities, an indifference curve illustrates a certain level of utility and all the combinations of goods that are consistent with an individual achieving that level of happiness. Higher indifference curves mean greater utility. Obviously, the exercise is based on utilitarian notions. One can substitute the idea of happiness or subjective well-being into the analysis and it appears to be the same and raise the same issues. This leads inevitably to questions of how one makes interpersonal comparisons of happiness, whether average or total happiness should be the goal, and what are we to make of the person from whom harming others is a source of happiness. Most would probably agree, in fact, that there is “good” and “bad” happiness.<sup>32</sup> In fact, we know that happiness alone cannot be the sole aim of public policy if for no other reason that some sources of happiness would be morally unacceptable.<sup>33</sup> Invoking a Paretian notion of happiness (a policy that at least one person must be happier and none less happy) or a Kaldor-Hicks notion (those made happier must be able to compensate those made less happy) simply returns to a standard economic analysis with the emphasis on ex post outcomes as opposed to ex ante choices.

Those writing about happiness have left unresolved another problem with utilitarianism: is everything—good or bad—reducible to a common denominator of utility? For example, is it only the amount of utility that distinguishes eating a chocolate bar from watching a beautiful sunset or are there different types of utility?<sup>34</sup> In the case of

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

31. There is some irony in this in that those proposing happiness as a substitute for traditional economic analysis may be proposing a standard that is viewed as objectionable in the context of economics.

32. In the context of this collection of readings, this theme is discussed in particular in Martha Nussbaum, *Who is the Happy Warrior: Philosophy Poses Questions to Psychology*, in *HAPPINESS*, *supra* note 3, at 81, 96-99.

33. See Kahneman et al., *Toward National Well-Being Accounts*, *supra* note 25, at 429-33.

34. See Nussbaum, *Who is the Happy Warrior: Philosophy Poses Questions to Psychology*, in *HAPPINESS*, *supra* note 3, at 85 (discussing John Stuart Mill). John Stuart Mill's

happiness, is it all reducible to one scale of happiness, or are there different types of happiness? This question actually does come into the traditional economic analysis of law. The basic idea is that some sources deliver different types of pleasure or utility than others. For example, eating a hot fudge sundae may not be the source of the same happiness sensation as watching one's son or daughter being born. At the extreme, some sources of happiness may have lexical priority over others. For example, no amount of material possession may equal the happiness one feels from knowing that he or she is productive or healthy.

Closely related is the question of whether happiness is all that matters.<sup>35</sup> The question was raised perhaps most provocatively by Robert Nozick when he asked whether one would be willing to enter an experience machine that would create a sense of consciousness, giving the person in the machine a feeling that all was well, regardless of whether all was in fact well.<sup>36</sup> If one believes that the experience machine would be unattractive, the implication is that something matters other than happiness. This possibility is especially important in light of set-point happiness theory.<sup>37</sup> Under that theory, people who experience events that lead to great happiness or unhappiness return to what might be called an equilibrium level of happiness. In other words, they undergo a hedonic adaptation. If one accepts this theory, awards based on suffering may overcompensate. On the other hand, studies that purportedly support the set-point theory may be flawed, and even if they are not, it is possible that happiness is not the only thing that counts.

Another problem with substantial policy implications is whether happiness is based on relative or absolute measures. As it turns out, there are forms of consumption that fall into one or the other, or both categories. The problem with consumption based on comparisons is that one may initially experience a sense of well-being as a result of surpassing the Joneses, but there will always be new Joneses available for comparison.<sup>38</sup> Perhaps more troublesome is the phenomenon of

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views on this are discussed in his book. JOHN STUART MILLS, *UTILITARIANISM* 8-9 (George Sher ed., Hackett Publ'g Co. 2d ed. 2001) (1861).

35. One argument that happiness is all that matters it is can be found at RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 111-25 (2005). For proposals suggesting more than subjective well-being matters, see Kahneman et al., *Toward National Well-Being Accounts*, *supra* note 25, at 429; Ed Diener & Martin E.P. Seligman, *Beyond Money: Toward an Economy of Well-Being*, 5 *PSYCHOLOGICAL SCI. IN THE PUB. INT.* 1.1 (2004).

36. ROBERT NOZICK, *ANARCHY STATE AND UTOPIA* 42-44 (1974). Those familiar with the film *the Matrix* will recognize the same dilemma. *See generally* *THE MATRIX* (Warner Bros. Pictures 1999).

37. *See supra* text accompanying note 20.

38. *See generally* Easterlin, *Happiness of All*, *supra* note 2; Easterlin, *Explaining Happiness*, *supra* note 2; Easterlin, *Income and Happiness*, *supra* note 2.

relative deprivation. That is, people make comparisons and feel happy or less happy based on a preselected reference group. Thus, a poorly paid person with limited living conditions and inadequate medical care may feel relatively happy if he compares himself to those who are similarly situated. At the same time, an upper middle class person may be unhappy because his or her house does not have a swimming pool. Yet, it hardly seems acceptable, at least as a normative matter, to allocate funds to build swimming pools but not for improved medical care.

Finally, what is to be made of the “ignorance is bliss” problem? A subjective sense of well-being can be quite different from how one actually is.<sup>39</sup> The obvious case is one in which a person feels perfectly healthy but has a terminable disease. Should their happiness be extinguished by accurate information? Or suppose a person is quite happy with her salary when the issue comes up over lunch with friends. What she does not know is that she is paid less than people who work for the same employer with whom she has not compared salaries. A great deal of happiness is actually the result of ignorance.

What all this suggests is that happiness as a policy standard may be no less slippery than traditional economic analysis. The important question is whether we know enough about happiness to justify significant public investment in happiness. In some instances, there are probably easy answers, but what the essays in *Law and Happiness* suggest is that the area remains imprecise and undeveloped. What is interesting is that this conclusion flows not from any one article in the collection, but from viewing the collection as a snapshot of the current state of both empirical and theoretical work addressing happiness. Although likely not intentional, the tensions within the field of law and happiness are revealed. For example, some writers are not fully satisfied that the set-point theory of happiness is accurate. Or, even if it is accurate, happiness may not be the only thing that counts. Others evidently feel that is it settled enough to justify policy recommendations. In addition, there appears to be no uniform agreement on how to assess happiness in a manner that would support specific public policies. Finally, the issue of what matters other than happiness is an obvious subtheme of the collection. An undercurrent in this debate is an effort to distinguish happiness-oriented goals from utilitarianism. If more counts than simply happiness, this separation could be made. As will be illustrated below, these efforts range from

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39. This analysis can get a bit sticky. The editors, Professors Adler and Posner write, “an individual’s well-being may depend on her having a spouse who is actually faithful (not just one she believes to be). . . .” HAPPINESS, *supra* note 3, at 259. It is a bit like a proverbial tree falling in the forest. Some information—like having a treatable disease—can make one less happy but lead to greater happiness later. Other information may just result in less happiness.

arguments to add other interests to the happiness analysis to redefinitions of happiness.

### III. EMPIRICISM MEETS THEORY: A RELEVANT HAPPINESS STANDARD AND SOME APPLICATIONS

A number of the selections in *Law and Happiness* have an empirical basis. One of those, with broad implications, is by Professors Paul Dolan and Tessa Peasgood.<sup>40</sup> It takes on the difficult task of identifying a measure of well-being that is relevant for policymaking. Indeed, the obvious link between theory and public policy is the development of a practical measure. According to the authors, there are three requirements. The measure should be “conceptually appropriate,” valid, and “empirically useful.”<sup>41</sup> Validity requires that the measure actually be correlated with well-being on a consistent basis.<sup>42</sup> To be empirically useful, the measure must allow policymakers to assess how much well-being goes up and down, and by how much.<sup>43</sup> Included in this requirement is that the measure not be subject to various decision biases resulting from framing and optimism effects.<sup>44</sup>

The “conceptually appropriate” standard raises the issue of well-being associated with illegal activity or activities that result in externalities.<sup>45</sup> Presumably, it would not be appropriate to promote happiness when it means that some will derive pleasure from the displeasure of others or from addictive activities. Thus, the authors confine their analysis to what they call, “prudential” well-being. In doing this, they distinguish “the good life” from a life that is good for the individual.<sup>46</sup> It is, in effect, an effort to note that there is some moral dimension to considerations of happiness.

Thus, although the “conceptually appropriate” standard is certainly appealing, it is also a good illustration of one of the knottiest problems in the analysis of happiness. For example, directly harming someone as a source of happiness is generally unacceptable. On the other hand, a system of taxation that is part of an effort to redistribute income and increase the happiness of some can reduce the happiness of others. In fact, at the extreme, it can have a detrimental effect on the physical

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40. Paul Dolan & Tessa Peasgood, *Measuring Well-Being For Public Policy: Preferences or Experiences*, in HAPPINESS, *supra* note 3, at 5.

41. *Id.* at 8.

42. *Id.* at 13.

43. *Id.*

44. *Id.*

45. *Id.* at 11.

46. *Id.*

well-being of those taxed. Precisely where the line is drawn for “prudential” well-being is very difficult for people to agree upon.

Nevertheless, using these three criteria, the authors examine income as a proxy for well-being<sup>47</sup> as well as various surveys that involve asking respondents about their satisfaction. Those who doubt that an assessment of well-being can vary with the measures used will be interested to note that the authors compare five possible measures of well-being including income, consumption, general health, general questions about life satisfaction, and life satisfaction with a focus on specific criteria. The authors not only demonstrate the difference across measures, but also that the differences change depending on the subjects studied.<sup>48</sup> In effect, a single standard appears to be difficult to identify.

Given this difference, it is important to identify a possibly superior measure. As one would expect, none of the measures come close to fully meeting the three standards the authors set out. Just the difference between income and how happy people say they are means that the income measure may not be conceptually appropriate. Moreover, factors like marriage, health, and employment are correlated with happiness, but not necessary with income. More subjective measures are also imperfect. A person may report feeling as though he or she is doing well even though he or she is poorly educated and ill-housed. This raises the issue the authors do not, or cannot, fully answer satisfactorily: Which is more important, how well off one is, or how well off one feels?

On the validity standard, the reviews are not quite as mixed. The authors note that income is positively correlated with health, longevity, and similar measures of well-being. On the other hand, the correlation with life satisfaction is less dependable. Subjective measures are possibly even less dependable. For example, feeling happy may be a result of adjusting to unpleasant conditions or eating beans every day until he or she has had steak and crème brûlée. The empirical question is largely one of practicality. Income is a means to an end of some sources of well-being but not all. Thus, there is the problem of accounting for non-market preference-satisfying benefits. On the other hand, when it comes to subjective evaluations of happiness, considerable data suggests that the evaluation remains stable despite circumstances.<sup>49</sup> People adjust to both good and bad events and the disposition to feel satisfied may be genetically determined.

Three other empirical efforts also demonstrate the difficulty of

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47. The authors label this “preference satisfaction” based on the connection between income and the ability to address preferences through the market. *Id.* at 14.

48. For example, those over seventy years of age as compared to younger respondents. *See id.* at 20-21.

49. *Id.* at 17.

making happiness into a relevant public policy standard. In “The Effect of Crime on Life Satisfaction,” Mark A. Cohen demonstrates that crime statistics that are indicative of the likelihood that one will be a victim of crime have little connection to a person’s happiness.<sup>50</sup> On the other hand, actually being a victim of crime does have an impact. Two implications are particularly noteworthy. This does not mean that efforts to lower crime statistics are irrelevant. Certainly the lower they are, the lower the likelihood that one will be the target of crime. Still, the statistics themselves are evidently not of great comfort. Second, the outcome may be a result of optimism, an “it will not happen to me bias” attitude which, although a misperception, is itself a source of increased happiness.<sup>51</sup> This raises the sticky issue of whether it should be a policy goal to make people more realistic about crime even though the outcome could be a lower sense of security and well-being. In short, if unrealistic optimism is the source of happiness, should public policy be designed to force people to confront reality? This is a more complex question than it may appear. Reduced optimism today may mean less unhappiness later when an unfortunate event occurs. Moreover, realism may result in a “better life” if not a happier life. The possibility that crime victims may adjust and return to prior levels of happiness simply complicates matters further.<sup>52</sup>

Another empirical offering that highlights the need for a happiness standard and the necessity of distinguishing, if possible, happiness and utilitarianism is “Happiness Inequality in the United States” by Betsy Stevenson and Justin Wolfers.<sup>53</sup> The authors assess the distribution of happiness in the United States over a period of time (in this case 1972-2006) much like one might measure income inequality. This is a different question from whether overall happiness has increased during a period of economic growth. The answer to that question, which may or may not be surprising, is that happiness has not increased.<sup>54</sup>

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50. Mark A. Cohen, *The Effect of Crime on Life Satisfaction*, in HAPPINESS, *supra* note 3, at 1325.

51. See generally W. KIP VISCUSI ET AL., LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSE TO HAZARD INFORMATION 93-96 (1987); Eric Van den Steen, *Rational Overoptimism (And Other Biases)*, 94 AM. ECON. REV. 1141 (2004).

52. The question of whether actual crime victims eventually return to prior levels of happiness was beyond the scope of Cohen’s effort. Another focused application of the teachings of happiness is found in David A. Weisbach’s *What Does Happiness Research Tell About Taxation?*, in HAPPINESS, *supra* note 3, at 293. Professor Weisbach questions the relationship between status and happiness and the usefulness of tax policy, at least based on what is now known about happiness.

53. Betsy Stevenson & Justin Wolfers, *Happiness Inequality in the United States*, in HAPPINESS, *supra* note 3, at 33.

54. *Id.* (citing Easterlin, *Happiness of All*, *supra* note 2, at 33); David Blanchflower & Andrew Oswald, *Well-Being Over Time in Great Britain and the U.S.*, 88 J. PUB. ECON. 1359

Stevenson and Wolfers report striking movements in the distribution of happiness. Perhaps more important in light of the search for a measure of happiness is how they assessed it. They asked a single question: "Taken all together, how would you say things are these days—would you say that you are very happy, pretty happy, or not too happy?" The limitations of such a survey in terms of public policy implications are obvious. Happiness can be a consequence of factors unrelated to publicly undertaken measures. In addition, as already noted, there are sources of happiness that test our sense of what is legitimate—alcohol, drugs, and the mistreatment or exploitation of others.

A study about the distribution of happiness cannot help but lead to the same questions that are troublesome in the context of utilitarianism. What is the goal? Is it to increase total happiness or average happiness? In the context of the distribution of happiness, if we are concerned about total average happiness, the distribution of happiness may not matter. For example, a society composed of people who are extremely happy and people who are extremely unhappy can have the same average happiness as one composed of moderately happy people and moderately unhappy people. It is likely that most people do feel that the distribution of happiness is important; however, that is a normative question and beyond the scope of most social sciences.

The normative question may be informed by some of the data presented by the authors. What the authors report is that differences based on race have declined and differences based on gender have virtually disappeared. At least with respect to race, the narrowing could be associated with a decrease in social injustices more generally. On the other hand, the closing of the gender gap means the usual pattern of women being happier than men has ended. This presents, again, the question related to whether ignorance is bliss. Is it possible that greater opportunities for women have led to increased ambition and more frustration? Making the analysis even more complex is that inequalities associated with different education levels have increased, student happiness has generally declined, and income distribution has become less equal. This may seem discouraging, but in fairness, at least it suggests a path that is ultimately more promising than reliance on income levels.

Together, these three sophisticated empirical efforts expose the extreme practical difficulties of addressing happiness issues directly. In particular, if the desire is to harness public policy to increase happiness, just how is the success of those measures to be assessed? Perhaps more difficult is a determination of whether the means that governments can bring to bear can have a significant impact on happiness.

#### IV. IS HAPPINESS ALL THAT MATTERS?

Another theme that is found throughout *Law and Happiness* is a question of whether happiness is all that matters. As noted in the Introduction, there is possibly a micro and macro version of this question. The micro version involves the issue of what should matter, if anything, other than happiness. The macro version is more in line with redefining happiness.

To understand the importance of the micro version, it is useful to consider “Death, Happiness, and the Calculation of Compensatory Damages” by Andrew J. Oswald and Nattavudh Powdthavee.<sup>55</sup> As the title implies, the subject is one that has been debated for decades: Can one put a value on emotional suffering? Rather than approaching the issue from a “willingness to pay” perspective,<sup>56</sup> the authors present a regression analysis in which a number of variables—income, job status, educational level—are correlated with a life satisfaction measure. In effect, the authors focus on bereavement and income as sources of increases or decreases in life satisfaction. The implication is that, in the aftermath of a death, a certain amount of compensation can return the bereaved to the same level of life satisfaction. The authors present these monetary values as a variation based on the relationship of the bereaved to the deceased.

The authors do an admirable job of assessing the level of bereavement and the factors that influence their intensity. There is no doubt that the methodology is quite clever. Whether it really tells us what the harm is to the bereaved is another question. The implication is that the death of a child or spouse can be offset if compensation is sufficient. Yet, in a context in which the potentially bereaved person is asked to sell the well-being of a relative and his own happiness, it seems unlikely that the numbers developed by the authors would have much relevance. This follows from the possibility that not all sources of happiness are of the same order. In short, there are no compensating variables<sup>57</sup> that offset certain kinds of losses.<sup>58</sup> Ultimately, the suggestion is that enough money to buy, let us say, a bigger house or an

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55. Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness and the Calculation of Compensatory Damages*, in *HAPPINESS*, *supra* note 3, at 217.

56. Very generally, this involves asking a person what it would take to compensate for the death of a loved one.

57. Matthew Adler and Eric Posner employ the term “compensation variations” to note the interchangeability of sources of happiness. See Adler & Posner, *Happiness Research and Cost Benefit Analysis*, in *HAPPINESS*, at *supra* note 3, at 253, 264.

58. It is possible that some sources substitute for each other. For example, one’s safety and that of a loved one may be substitute sources of happiness, but no amount of money would compensate for either one. On the other hand, some sources may be lexically prior to all other happiness sources.

extravagant vacation is substitutable for the sense of loss of a loved one. Finally, in the context of happiness, the bereavement of an individual is likely to be independent of whether a tort has been committed. If so, the policy implications would seem to be to compensate all those who lose a loved one. Of course, this raises the utilitarianism-like issue of whether the decrease in happiness among those who are taxed to compensate the bereaved more than offset any decrease in the sense of bereavement.

Ultimately, and most importantly, the effort of Oswald and Powdthavee leads to the question of whether happiness is all that counts as far as public policy. A number of the contributions in *Law and Happiness* address this issue. Peter A. Ubel and George Loewenstein,<sup>59</sup> in their essay “Pain and Suffering Awards: They Should Not Be (Just) About Pain and Suffering,” address the question of how to assess damages even if people who experience misfortune generally return to the ex ante level of happiness. First, Ubel and Loewenstein offer an extended and useful discussion about the validity of claims of hedonic adaption.<sup>60</sup> They question, as have others, the validity of the set-point theory of happiness. Second, they argue that there are “losses” largely unassociated with one’s sense of happiness that should be accounted for in damage awards. These are things that “matter” but are not figured into one’s happiness. For example, a person who loses certain capabilities<sup>61</sup> may adjust, but it does not alter the fact that the capacity is eliminated. The loss of the ability to act altruistically may also be a desired trait that is eliminated but not necessarily related to happiness. Even from a conventional economic approach, the idea that there are things other than pleasure to account for makes sense. The fact that a resource or capability that once was productive is eliminated is a form of externality that should be internalized by those responsible. This does not mean, however, that monetary awards can fully offset all types of losses, nor does it mean the person losing the capability necessarily receives the award. If, in fact, there is no ultimate decrease in happiness, there is damage to society but not necessarily damage to the “injured.”

In his essay, “Illusory Losses,”<sup>62</sup> Cass Sunstein also notes the limitations of a hedonic adaptation rationale for limiting damages or viewing losses as only those that are associated with losses in subjective

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59. Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Should not be (Just) About Pain and Suffering*, in *HAPPINESS*, *supra* note 3, at 195.

60. *Id.* at 199-202.

61. The capabilities they have in mind are largely those described by Amartya Sen and Martha Nussbaum. They include having a political voice, access to education, property rights, and a number of others. See *QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993).

62. Cass Sunstein, *Illusory Losses*, in *HAPPINESS*, *supra* note 3, at 157.

well-being.<sup>63</sup> Like Ubel and Loewenstein, he questions whether hedonic adaptation is universal.<sup>64</sup> For example, is it possible that people who have suffered a great loss actually engage in recalibration, and lower their expectations or assess their well-being relative to others who have suffered the same type of loss?<sup>65</sup> In addition, he maintains that there appears to be a difference between losses that are event-oriented and losses that are persistent.<sup>66</sup> Sunstein notes that this is like the difference between losing toes and being subject to persistent unpleasant noises.<sup>67</sup> In effect, some sources of suffering are not subject to hedonic adaptation because they are continuous. More to point of whether happiness is all that matters, Sunstein also argues that lost capabilities should be considered in the award in damages.<sup>68</sup> In short, suppose a person loses a leg in an accident.<sup>69</sup> It is possible he or she will return to the *ex ante* level of happiness.<sup>70</sup> On the other hand, there is a permanent capability loss. Sunstein's argument here is not based only on the idea that the loss is in fact an externality that affects productivity.<sup>71</sup> It is also based on empirical evidence indicating that people who claim to have suffered little or no hedonic loss after misfortune also say that they would be willing to sacrifice part of their remaining lives to regain the lost capabilities.<sup>72</sup> This type of data, along with data reported by Ubel and Loewenstein,<sup>73</sup> strongly suggest that one can be too casual in articulating the breadth of the set-point phenomenon.

The somewhat broader theme of refining what happiness should mean for public policy purposes is taken on by Matthew Adler and Eric Posner.<sup>74</sup> Their principle assertion is that policies based on measures of subjective well-being are not substitutes for, or do not spell the end for the role of, cost benefit analysis.<sup>75</sup> This is an important effort drawing

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63. *Id.*

64. *Id.* at 165.

65. *Id.* at 166-68.

66. *Id.* at 166-67.

67. *Id.* at 175-81.

68. *Id.* at 176.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 177. Capability analysis seems to have originated with Amartya Sen. See AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 353-69 (1982). The same themes have been advanced by Martha Nussbaum. For a collection of readings edited by and written by Professors Sen and Nussbaum, see QUALITY OF LIFE, *supra* note 61.

73. See Ubel & Loewenstein, *supra* note 59, at 199-203.

74. Adler & Posner, *Happiness Research and Cost-Benefit Analysis*, in HAPPINESS, *supra* note 3, at 253.

75. *Id.* at 253.

from the authors' previous work.<sup>76</sup> In the context of this essay, the proposal is more along the lines that well-being depends on more than how one actually feels. Thus, they note the difference between well-being and subjective well-being. Much of their thesis is captured by the statement that "[an] individual's well-being is determined by the satisfaction of her preferences—more precisely, by the attainment of those items that well-informed, rational, self-interested individuals would generally prefer."<sup>77</sup> They add, "[w]ell-informed, rational individuals can have self-interested preferences for items other than their own happiness: for example, health, physical security, status in the community, or having a family."<sup>78</sup> They use the phrase "full-information preferentialism" to describe their policy standard.<sup>79</sup> In essence, the authors prefer a notion of well-being that is broader than an individual's own assessment of his or her mental state at any particular point in time. For example, the well-being of a person would consider subjective well-being but also health conditions about which the person may not be aware. Or, a person may enjoy activities like smoking that are ultimately harmful. Well-being would consider both factors.

Adler and Posner address the question of balancing information and happiness. For example, a person may find that he has dangerously high cholesterol levels and then stop eating ice cream, a food from which he derives great pleasure. He is less happy but probably better off, and may actually choose a diet that is not as enjoyable. A different example might involve an employee who, based on her friends in other lines of employment, is quite happy with her salary. Then she hears for the first time that people working for her employer and doing the same work are actually paid more. Happiness turns to unhappiness, not because she is paid less, but because of what she now knows. The question is whether she would choose ignorance in order to maintain happiness. It is only supposition, but it seems likely that she would reject the higher level of happiness in favor of the highest level of happiness consistent with being well-informed.

The argument that actual well-being depends on more than how people feel is a convincing one. The idea that public policy should favor the standard requires a normative step. To some extent, it is the normative step involved in the decision not to enter Nozick's experience machine.<sup>80</sup> Perhaps the most powerful normative argument would be

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76. MATTHEW A. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

77. Adler & Posner, *Happiness Research and Cost-Benefit Analysis*, in *HAPPINESS*, *supra* note 3, at 254.

78. *Id.*

79. *Id.* at 260.

80. JOHN RAWLS, *A THEORY OF JUSTICE* (2010) (defining the veil of ignorance).

based on the question of what people would prefer behind something like the Rawlsian veil of ignorance.<sup>81</sup> The question might be posed: Would you prefer 1) a public policy that means you feel happy all the time even if it is inconsistent with some measures of objective well-being about which you will remain unaware? or 2) a policy that allows you to experience life with its ups and downs but which advances some programs that are generally regarded as consistent with objective well-being? Again, is it about mental states or some broader notion of well-being?<sup>82</sup> In all likelihood, most people would prefer to know what is actually happening as opposed to what they sense is happening. The question that remains unanswered is whether this interest in actual facts is itself a path to subjective happiness. In short, is knowledge of reality—no matter how dire—a source of happiness that trumps other, possibly “thinner,” notions of happiness?

Ultimately, the goal of Adler and Posner is to defend their view of cost-benefit analysis against happiness proponents. In the process, they examine three possibilities. One is that money or income is irrelevant to well-being—the extreme view.<sup>83</sup> Another is that money or income plays a minor role, and a final one is that subjective well-being is the only relevant standard.<sup>84</sup> The second two possibilities are more relevant, but somewhat awkward, since there is no coherent model that rests entirely on the basis of subjective well-being. Most of this criticism in both cases is leveled against utilitarianism—how to measure and how to compare<sup>85</sup>—or the existence of hedonic adaptation. In other words, and going back to the first essay examined in this review, what is a coherent, valid, and dependable measure of happiness? Perhaps the best to hope for in this context is that public policy can launder preferences, or at least their expression, so that people are less likely to make choices that

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This “veil” blinds people to all facts about themselves which cloud what they believe justice is. [N]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.

81. NOZICK, *supra* note 36, at 42-44.

82. Adler and Posner note that different scholars have developed extensive lists of factors that are consistent with objective well-being. HAPPINESS, *supra* note 3, at 262-63 tbl.2.

83. *Id.* at 270-71. The authors devote significant effort to defending their version of cost-benefit analysis against the view that money or income plays no role in determining subjective well-being. Much of this discussion is not so much a defense but a description of how things would change if it were true that money was unrelated to subjective well-being. *Id.* at 276.

84. *Id.* at 277, 279.

85. HAPPINESS, *supra* note 3, at 284-85.

are ultimately inconsistent with their well-being.<sup>86</sup>

In an interesting concluding note, the authors argue that cost-benefit analysis can be useful even if subjective well-being is the exclusive end.<sup>87</sup> A simple version of the argument is that cost-benefit analysis can lead to increases in wealth which mean the possibility of increased taxation and revenue for the use in subjective well-being increasing projects.

Ultimately, the skepticism of Alder and Posner seems well founded. A review of the introductory comments to this Review suggest why. Moreover, the cost-benefit analysis they envision is superior to an exclusively subjective self-interest standard. This is, however, a very low bar, and much of the standard criticisms of conventional economic models as discussed earlier apply equally to the views of Adler and Posner.

## V. CONCLUSION

*Law and Happiness* has a Rashomon-like character. Each author looks at the topic from a different perspective. There is a great deal of agreement and disagreement. What it provides for the reader is an overview of the status of this newest addition to the line of “law and . . .” discussions. A theory of happiness has great appeal because it seems to bypass the principal problems of standard law and economics. That is, it does not rely on the process of choice-making to determine welfare, but examines the results of those choices. Whether the issues that exist in the application of happiness to law can be satisfactorily resolved to justify a direct public policy goal of happiness is yet to be determined. Three tensions are most pressing. How does one consistently measure happiness with enough precision to guide public policy? When and to what extent does the set-point phenomenon apply? Finally, what matters other than subjective well-being? There is little doubt that many things do matter, but there is disagreement as to what those factors are or what those factors should be and how to weigh them—especially when they may reduce subjective well-being.

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86. *Id.* at 281-84.

87. *Id.* at 288.