

7-2011

# Regulation, Deregulation, and Happiness

Jeffrey L. Harrison

*University of Florida Levin College of Law*, [harrisonj@law.ufl.edu](mailto:harrisonj@law.ufl.edu)

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>



Part of the [Psychology and Psychiatry Commons](#)

---

## Recommended Citation

Jeffery L. Harrison, *Happiness, Regulation, Efficiency*, 32 Cardozo L. Rev. 2369 (2011), available at <http://scholarship.law.ufl.edu/facultypub/353>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

# REGULATION, DEREGULATION, AND HAPPINESS

Jeffrey L. Harrison\*

## INTRODUCTION

It was not uncommon in the latter third of the last century for law students to take a general course on economic regulation. It is best described as the substantive side of administrative law. I first took<sup>1</sup> and then taught the course until enrollments dwindled—perhaps because of the development of more specifically focused courses.<sup>2</sup> In addition, I authored a casebook with Paul Verkuil and Thomas Morgan,<sup>3</sup> first titled *The Economic Regulation of Business*<sup>4</sup> and later *Regulation and Deregulation*.<sup>5</sup> Coincidentally, Paul Verkuil and I have also authored, quite independently, articles about happiness.<sup>6</sup> Happiness (or subjective well-being (SWB) or experienced utility) may seem like an odd topic for those interested in the regulation of business but, in fact, they are natural complements<sup>7</sup>: Ultimately (or perhaps hopefully) regulation should satisfy a test of whether it improves the quality of life. Often this means employing one measure of efficiency or another. The new interest in happiness is driven in large measure by dissatisfaction with traditional notions of economic efficiency. Thus, it is natural for those interested in regulation to also be intrigued by the potential happiness research may hold.

---

\* Stephen C. O'Connell Chair and Professor of Law, College of Law, University of Florida.

<sup>1</sup> Paul Verkuil was my teacher.

<sup>2</sup> The decline in the course's popularity is unfortunate. The course touches many bases to which every lawyer should have some exposure, including economics, jurisprudence, and history.

<sup>3</sup> Thomas Morgan is now at George Washington University.

<sup>4</sup> Thomas Morgan was the single author of the first edition of *CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS* (1976). In addition, Paul Verkuil and David Boies co-authored *PUBLIC CONTROL OF BUSINESS* (1977) before Paul and I joined Thomas Morgan on the second edition of *ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS* (1985).

<sup>5</sup> *REGULATION AND DEREGULATION* appeared as two editions, one in 1997 and one in 2004.

<sup>6</sup> Jeffrey L. Harrison, *Happiness, Efficiency and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935, 955-57 (2009); Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001).

<sup>7</sup> None of the books authored by Thomas Morgan, Paul Verkuil or myself address the issue directly, but some of the reading included in the books can be seen as addressing the issue indirectly or with a different label.

Happiness, in general, is in many respects the topic *du jour*. A great deal of theoretical and empirical work has been devoted to its dissection.<sup>8</sup> Studies of happiness have crossed over to law, and the result is an addition to the long list of “law and” interdisciplinary areas. In fact, in 2010, Eric Posner and Cass Sunstein presented an excellent book of readings called *Law and Happiness*.<sup>9</sup> Peter Henry Huang has written the definitive survey of law and happiness literature.<sup>10</sup> My own writing has reflected on the promise of happiness research and the difficulties of implementing its teachings.<sup>11</sup> Most of the interdisciplinary work evaluates the potential impact of happiness on policies or programs.<sup>12</sup> For example, in response to evidence that hosting large-scale sports events, such as the Olympics or the Super Bowl, is not an unqualified economic success,<sup>13</sup> work is now being conducted that alters the focus to considerations of happiness. The teachings of happiness scholarship have yet to be applied to the traditional rationales for business regulation or to questions of how

---

<sup>8</sup> See generally ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN 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); Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT’L ACAD. SCI. 11176 (2003) [hereinafter Easterlin, *Explaining Happiness*]; Richard A. Easterlin, *Income and Happiness: Toward a Unified Theory*, 111 ECON. J. 465 (2001) [hereinafter Easterlin, *Income and Happiness*]; Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 J. ECON. BEHAV. & ORG. 35 (1995) [hereinafter Easterlin, *Happiness of All*]; INTERPERSONAL COMPARISONS OF WELL-BEING (Jon Elster & John E. Roemer eds., 1991); Tiffany A. Ito & John T. Cacioppo, *The Psychophysiology of Utility Appraisals*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 470 (Daniel Kahneman et al. eds., 1999); Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERS. & SOC. PSYCH. 527 (2003). For an excellent selection of readings, see Ito & Cacioppo, *supra*.

<sup>9</sup> LAW AND HAPPINESS (Eric A. Posner & Cass R. Sunstein eds., 2010) [hereinafter HAPPINESS].

<sup>10</sup> Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405 (2010).

<sup>11</sup> But see Harrison, *supra* note 6.

<sup>12</sup> See, e.g., Paul Dolan & Matthew P. White, *How Can Measures of Subjective Well-Being Be Used to Inform Public Policy?*, 2 PERSP. ON PSYCHOL. SCI. 71 (2007); Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J.L. SCI. & TECH. 755 (2008); Anthony Vitarelli, Note, *Happiness Metrics in Federal Rulemaking*, 27 YALE J. ON REG. 115 (2010).

<sup>13</sup> See, e.g., Philip K. Porter & Deborah Fletcher, *The Economic Impact of the Olympic Games: Ex Ante Predictions and Ex Post Reality*, 22 J. SPORTS MGMT. 470 (2008).

regulation could be altered, if at all, by considerations of happiness.<sup>14</sup> This is the topic to which most of what follows is devoted.<sup>15</sup>

First, a compressed survey of the issues raised by the examination and application of happiness is presented. Included are descriptions of the tensions within happiness scholarship. Second, the potential for happiness to provide useful regulatory guidance is assessed in the context of the four basic rationales for regulation as described in the book *Regulation and Deregulation*.<sup>16</sup>

## I. HAPPINESS: A BRIEF SURVEY

As noted above, the impetus for an application of happiness to legal policy and regulation is generated in large measure by dissatisfaction with conventional measures of efficiency.<sup>17</sup> Whether it is Pareto efficiency<sup>18</sup> or Kaldor-Hicks efficiency,<sup>19</sup> the idea of efficiency turns on observing choices<sup>20</sup> people make<sup>21</sup> and not on how much better they *feel* or how they actually *are* after that choice.<sup>22</sup> In other words, conventional efficiency concepts are assessed *ex ante* while happiness is assessed *ex post* with respect to the actual decision-

<sup>14</sup> It is not clear that regulation and policy are entirely separable. In this Article, regulation is more focused than policy and largely involves the implementation of policy.

<sup>15</sup> Perhaps it could just as easily be viewed as a question of what the books on economic regulation from the past twenty-five years would have looked like had the authors known then what they know now. This is not to say that older regulatory standards are inconsistent with happiness. In fact, as explained below, there are many instances in which happiness has been promoted without being a direct goal of regulation.

<sup>16</sup> See JEFFREY HARRISON, THOMAS MORGAN & PAUL VERKUIL, *REGULATION AND DEREGULATION* 121-22 (2d ed. 2004).

<sup>17</sup> In their article, *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375 (1997), Daniel Kahneman, Peter P. Wakker and Rakesh Sarin distinguish experienced utility and decision utility.

<sup>18</sup> According to the concept of Pareto efficiency, efficiency is increased when at least one person is made better off and no one is made worse off. See JEFFREY L. HARRISON & JULES THEEUWES, *LAW AND ECONOMICS* 26-28 (2008).

<sup>19</sup> The Kaldor-Hicks standard is met when those made better off could compensate those made worse off. The term "potential Pareto Superior" is an apt description because no actual compensation is required. *Id.* at 28-31. For a description of the origins of the standard, see Harrison, *supra* note 6.

<sup>20</sup> These measures cannot be completely discounted. Repeat purchases suggest that the happiness or satisfaction of the decision-maker with the first purchase was high.

<sup>21</sup> Or, as discussed *infra*, it turns on observing the decision they would make if transaction costs did not interfere.

<sup>22</sup> The distinction here is intentional. There is a difference between how one feels (subjective well-being) and the *actual* welfare of a person. The latter refers to objective measures of mental and physical health.

making.<sup>23</sup> Daniel Kahneman and Amos Tversky offer another useful way of describing this. They distinguish decisional utility (*ex ante*) from experienced utility (*ex post*)<sup>24</sup> and argue that “experienced utility is both measurable and empirically distinct from decision utility.”<sup>25</sup> Measurement of actual happiness can be done through “experience sampling” or “day reconstruction.” In the former, participants report their level of pleasure on an ongoing basis.<sup>26</sup> In the latter case, participants recall the events of the day before.<sup>27</sup>

Having the capacity to measure, as described by Kahneman and Tversky, does not mean that the information can be put to use in a meaningful way.<sup>28</sup> Additionally, it does not mean *ex ante* and *ex post* can be viewed as unrelated. Today’s expectations are often formed by prior experiences. Thus, for repeat transactions, the measurement of future outcomes based on choices cannot be completely discounted. In fact, perhaps the most promising potential of happiness theory lies in closing the gap between decisional and experienced utility.

#### A. Utilitarian Related Problems

It is ironic that the first problem happiness proponents confront is whether happiness is any different from utilitarianism and its problems. For example, if maximum experienced happiness (or utility) is the goal, is success measured by assessing the average or total amount of happiness? Under the latter possibility, many people who are moderately satisfied would be preferable to a smaller population of people experiencing a very high level of utility. More important is the question of the utility monster’s counterpart—the happiness monster. Under a strict happiness standard, a proponent would have to concede that harm to others is permitted if the happiness experienced by the harmer exceeds the displeasure of the person harmed. As will be

---

<sup>23</sup> Perhaps the most influential factor in shifting the emphasis toward expected, or *ex ante*, utility is Paul Samuelson’s concept of revealed preferences, which maintains that, in effect, we know what people prefer by observing choices. According to Samuelson, the theory is “freed from any vestigial traces of the utility concept.” Paul A. Samuelson, *A Note on the Pure Theory of Consumer’s Behaviour*, 5 *ECONOMICA* 61, 71 (1938).

<sup>24</sup> Kahneman et al., *supra* note 17, at 375-76.

<sup>25</sup> *Id.* at 376.

<sup>26</sup> Daniel Kahneman et al., *Toward National Well-Being Accounts*, 94 *AM. ECON. REV.* 429, 430-33 (2004).

<sup>27</sup> Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experiences: The Day Reconstruction Method*, 306 *SCIENCE* 1776 (2004).

<sup>28</sup> One might instinctively think in terms of compensating those who are affected by something that makes them unhappy. This may not achieve the purpose of restoring happiness because the relationship between happiness and income is not clear. See *infra* text accompanying notes 29-30.

discussed below, there are responses to this, but they deviate from a true happiness standard.

### B. *Adaptations*

A second complexity results from people's capacity to adapt. There are actually two versions of this. One is more directly related to happiness studies and involves hedonic adaptation. When this process takes place, a person who undergoes a very unpleasant or pleasant experience returns to nearly the *ex ante* level of happiness in time. For example, a serious health problem may result in a decrease in happiness but, under this theory, those affected tend to eventually return to their prior levels of happiness.<sup>29</sup> The implications of this theory are enormous. In fact, one application of the theory posits that typical tort damages result in overcompensation because the long-term impact of injury is less severe than assumed when fixing damages.<sup>30</sup>

An older area of study, relative deprivation, intersects with the more recent studies of happiness but has not been fully addressed in that context.<sup>31</sup> Under a theory of relative deprivation, people tend to gauge how well off they are by making comparisons. More importantly, their comparisons tend to be with reference groups that exist in conditions similar to their own. For example, a working-class person might not experience a sense of unhappiness if he or she sees a wealthy person driving an expensive car but may experience unhappiness if he or she sees another working-class person driving a new car. In essence, people adapt in a way that reduces their sense of dissatisfaction or dissonance.<sup>32</sup>

The impact of these phenomena puts into play the legitimacy of feelings of happiness—the normative basis for relying on happiness as a measure of well-being. For example, to some extent, those who do not

---

<sup>29</sup> See, e.g., Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERS. & SOC. PSYCHOL. 527 (2003).

<sup>30</sup> See Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, in *HAPPINESS*, *supra* note 9, at 217.

<sup>31</sup> But see Harrison, *supra* note 6.

<sup>32</sup> See generally Faye Crosby, *Relative Deprivation Revisited: A Response to Miller, Bolce, and Halligan*, 73 AM. POL. SCI. REV. 103 (1979); Ted Robert Gurr, *Sources of Rebellion in Western Societies: Some Quantitative Evidence*, 391 ANNALS OF AM. ACAD. POL. & SOC. SCI. 128, 129 (1970); William H. Panning, *Inequality, Social Comparison, and Relative Deprivation*, 77 AM. POL. SCI. REV. 323 (1983). In many respects adaptations of this nature seem similar to "prospect theory" as formulated by Kahneman and Tversky. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979), and indeed, the authors suggest as much. *Id.* at 288. There also seems to be a similarity between adaptation and the endowment effect. See generally HARRISON & THEEUWES, *supra* note 18, at 229-30. In both instances, there is a tendency for people to maintain a status quo position.

experience a feeling of deprivation have *learned* to accept less.<sup>33</sup> And those who experience a serious injury or loss may recalibrate their expectations.<sup>34</sup> They may be asked if they are happy but the question they “hear” is: “Are you happy given your loss?” If they say they are happy but would much prefer to be back in the position they were in, the conclusion that they are as happy or almost as happy as they once were is thin.<sup>35</sup>

### C. *Subjective Well-Being or Something Else*

One question that arises in the context of happiness proposals is whether happiness is all that matters.<sup>36</sup> In this instance the reference is to subjective happiness. It is probably essential to adopt a version of happiness other than subjective happiness to avoid falling into a utilitarian analysis. One version of the “something else” point of view accepts the possibility that what makes one feel happy may not be in one’s long run best interest or consistent with the subjective well-being of others. One formulation of this concern limits the measure of well-being to those things consistent with “prudence.”<sup>37</sup> This has been described as the difference between “the good life” and “living a life that is good for the individual concerned.”<sup>38</sup> This deviation from subjective well-being makes sense from one point of view but infuses the analysis with judgments about taste. For example, today people continue to smoke even though the evidence is overwhelming that smoking is dangerous. The “good for the individual” standard comes

---

<sup>33</sup> See Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 465 (1994).

<sup>34</sup> See Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Should Not Be (Just) About Pain and Suffering*, in HAPPINESS, *supra* note 9, at 195, 199-201; Peter A. Ubel et al., *What is Perfect Health to an 85 Year Old: Evidence For Scale Recalibration in Subjective Health Ratings*, 43 MED. CARE 1054 (2005); see also Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 4 (1997).

<sup>35</sup> See Cass Sunstein, *Illusory Losses*, in HAPPINESS, *supra* note 9, at 157, 177. Sunstein observes that “there is no evidence of recalibration.” *Id.* at 165. Work by Ubel and others suggests the opposite. See Peter A. Ubel et al., *supra* note 34.

<sup>36</sup> Perhaps the most well-known thought experiment in this regard is Robert Nozick’s experience machine. Once you enter it you will feel happy without exception. Or, at least that is how you would feel. Nozick argues that it is unlikely to have many takers because there is more that is important to us than happiness. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 42-45 (1974). More recently, philosopher David Sosa distinguished between happiness and experience. See David Sosa, *The Spoils of Happiness*, N.Y. TIMES OPINIONATOR (Oct. 6, 2010, 7:30 PM), <http://opinionator.blogs.nytimes.com/2010/10/06/the-spoils-of-happiness/?scp=1&sq=nozick&st=cse>.

<sup>37</sup> Paul Dolan & Tessa Peasgood, *Measuring Well-Being for Public Policy: Preferences or Experiences*, in HAPPINESS *supra* note 9, at 5, 11.

<sup>38</sup> *Id.*

close to one in which the preferences that others have for another person's preferences carry considerable weight.

Another approach that helps distinguish happiness from utilitarianism involves "capability" as formulated by Amartya Sen.<sup>39</sup> One way to understand the concept is to think in terms of set-point happiness—the idea that people are destined to return eventually to an *ex ante* level of happiness after either very pleasing or damaging events. For example, suppose an avid skier is involved in an accident that makes skiing no longer possible. Further suppose that three years after the accident the person reports being as happy as he or she ever was. Aside from recalibration issues, there seems to be something amiss about a view of happiness that does not account for the loss. In effect, a capability has been lost. If one thinks of tort recoveries as a method of requiring those who harm others to internalize the harm they cause, that goal seems to fall short if lost capabilities are not accounted for. In fact, if the same person could be asked before the fact, "What would it take to compensate you for never skiing again?," the answer is likely to be quite different. Perhaps the cost of harm is better assessed before there is an adjustment. In short, an evaluation based on subjective well-being may not fully account for the loss of capabilities.

#### D. *Practical Difficulties*

All of the above concerns are largely about how to measure happiness. The dominant view is that subjective happiness is perhaps unsupportable as an ethical matter or, at least, does not properly recognize prudence and capabilities. A further concern is when to assess happiness.<sup>40</sup> This problem can be understood by reference to common experiences. One may be elated with a purchase and regret it later. One may find an experience unpleasant at the time and then take great pride in having survived or accomplished a difficult task later. Virtually everyone can relate to enjoying oneself during a meal or festive event and then waking up the next morning feeling quite unhappy.

---

<sup>39</sup> See AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 353-69 (1997); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985). The same themes have been advanced by Martha Nussbaum. For a collection of readings edited by and written by Professors Sen and Nussbaum, see *THE QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993).

<sup>40</sup> Other factors that may be of concern are those that typically are associated with conventional economic analysis. Specifically, are individuals rational and self-interested? An effort to maximize happiness seems equally dependent on these assumptions. See Harrison, *supra* note 6, at 947-52.



Experience sampling, pioneered by Daniel Kahneman, illustrates the problems created when time is injected into an analysis of happiness.<sup>41</sup> In this process, subjects record their level of pleasure contemporaneously. That assessment can be compared with how subjects reflect on the events of the previous time period. This is a comparison of “instant utility” with “remembered utility.” As discussed earlier, perhaps the most important distinction the authors make is between “decisional” and “experienced” utility. “Experienced” refers to actual outcomes while “decisional” refers to the weight *expected* utility plays in decision making.<sup>42</sup> The authors note that decisional utility is what economists generally employ today but make the case that experienced utility is measurable.<sup>43</sup>

One excellent example of the difficulty of measuring happiness involves the immersion of the hands of experimental subjects in very cold water. In one trial, a hand was immersed for sixty seconds. In the second trial a hand was immersed for ninety seconds but for the last thirty seconds the temperature of the water was gradually raised by one degree, from fourteen to fifteen degrees Celsius.<sup>44</sup> Afterward the subjects were asked which experiment they would be more willing to repeat. A majority reported a preference for repeating the longer trial.<sup>45</sup> In effect, although undergoing the same period of intense discomfort the subjects recalled them differently due to an additional period of discomfort that was slightly less intense. The subjects tended to ignore the duration of the discomfort and to respond to the average level.

One final observation is in order before examining whether happiness as a factor in regulatory measures will improve the existing analysis. There is a strong tendency to think in terms of increasing happiness in association with addressing unmet needs or wants. In a sense, there is a gap between what one has and what one wants, with the solution being to close the gap by acquiring more of what one wants or needs. In fact, decreasing the amount of desire can also close the gap. From the perspective of Zen philosophy<sup>46</sup> or, perhaps, even common

---

<sup>41</sup> Daniel Kahneman et al., *Toward National Well-Being Accounts*, 94 AM. ECON. REV. 429, 430-32 (2004).

<sup>42</sup> Kahneman et al., *supra* note 17, at 386-87. In fact, Kahneman and his coauthors identify six ways of assessing happiness. The authors offer an example of two toasters, one of which delivers a shock when it is used. One morning the owner uses one toaster and receives a shock. This is experienced utility. If the information is used the next morning in choosing one toaster over another, decisional utility is relevant. *Id.* at 376.

<sup>43</sup> *Id.* at 375-76.

<sup>44</sup> *Id.* at 386.

<sup>45</sup> *Id.*

<sup>46</sup> See David Burton, *Knowledge and Liberation: Philosophical Ruminations on a Buddhist Conundrum*, 52 PHIL. E. & W. 326 (2002); see also Christina Feldman, *The Four Noble Truths: Path of Transformation*, in VOICES OF INSIGHT 103 (Sharon Salzberg ed., 1999).

sense, another means of reducing unhappiness or increasing happiness is simply to want less.<sup>47</sup> All of this may seem idealistic or unrealistic, but even from day to day events, most people know that wanting less does relieve stress. Practically everyone has had the experience of wanting something very badly, not getting it, and then completely forgetting about it or even wondering why he or she wanted it in the first place. This type of contentment or happiness is distinguishable from the concepts of hedonic adaptation and relative deprivation. In the case of happiness through wanting less, the person knows what is possible but simply appreciates what he or she has.

## II. HAPPINESS AND REGULATORY STANDARDS

The notion of regulatory standards is a broad one. Here, the emphasis is on the basic rationales for regulation. Traditionally, they relate to cases in which there is market failure—potential efficiencies are not realized—or instances in which society simply does not like the outcome, whether it is a result of market failure or a collective sense of right and wrong. The casebook on which Paul Verkuil, Tom Morgan, and I collaborated listed four rationales: natural monopoly, excessive competition, transaction costs, and inherently scarce resources.<sup>48</sup> If happiness could be equated with cost/benefit analysis, one would have to conclude—paraphrasing a popular book on the topic of happiness<sup>49</sup>—that regulators have, at most, stumbled upon happiness rather than having carried out a conscious effort to regulate in ways that promote it. But this sidesteps the question of the usefulness of a conscious effort.

The reason why regulators may have only stumbled on happiness is that cost/benefit analysis is not the same as a happiness/unhappiness analysis. The reasons for the difference are fairly well understood. First, many factors that lead to happiness are not expressed in traditional markets. Love, a sense of security, self-esteem, and the capacity to appreciate a clear starry night are examples. Second, markets only reflect the willingness and ability of participants to pay. Or, more directly, costs and benefits are *valuations* that are set by market participants. If one is unable to participate due to a lack of funds, a cost/benefit analysis will not detect the extent to which some things—warm clothes, a vacation—may increase happiness. Third, even if

---

<sup>47</sup> For a study of this possibility, see Jeff T. Larsen & Amie R. McKibban, *Is Happiness Having What You Want, Wanting What You Have, or Both?*, 19 PSYCHOL. SCI. 371 (2008).

<sup>48</sup> See Harrison, Morgan & Verkuil, *supra* note 4, at 121.

<sup>49</sup> GILBERT, *supra* note 8.

cost/benefit analysis were consistent with happiness, it would have to be applied consistently. This is hardly the case. Some regulation is guided by cost/benefit analysis and some is not.<sup>50</sup>

Aside from these factors, what do we know about wealth and happiness in the United States? First, studies indicate that overall happiness in the United States has fallen, while overall wealth has increased, in the latter quarter of the twentieth century.<sup>51</sup> Thus, to the extent cost/benefit analysis has been successfully employed, it has either not promoted happiness or its effects have been offset by other factors. Curiously, during this period income inequality has increased,<sup>52</sup> but happiness inequality has actually declined.<sup>53</sup> At the very least, this means that much more is going on when it comes to happiness than income and wealth.

A focus on overall wealth, cost/benefit analysis, or even income distribution misses the mark. Unfortunately, it is probably impossible to know by how much and why or even what the "mark" is or should be. Still, whatever the limitation of cost/benefit analysis, it must be considered in light of the controversies described above concerning how one measures happiness, whether set point theory is correct, and when happiness is determined. Ultimately, the question becomes whether what we know about happiness can be sufficiently trusted and applied to refine and change cost/benefit-based regulation. Examining the standard rationales for regulation may help in this inquiry.

#### A. *The Natural Monopoly Rationale*

The bedrock economic rationale for regulation is natural monopoly. These are instances in which demand can be most efficiently met by a single firm. The problem is that to experience the productive efficiencies of natural monopoly, one would have to tolerate monopoly pricing for goods or services that may be regarded as

---

<sup>50</sup> Two excellent examples are the standards applied in the famous snail darter case, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), and legislation applied to those with disabilities. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006).

<sup>51</sup> David G. Blanchflower & Andrew J. Oswald, *Well-Being over Time in Britain and the USA*, 88 J. PUB. ECON. 1359 (2004); Easterlin, *Happiness of All*, *supra* note 8.

<sup>52</sup> Betsey Stevenson & Justin Wolfers, *Happiness Inequality in the United States*, in *HAPPINESS*, *supra* note 9, at 33.

<sup>53</sup> This varies widely by subgroup. For example, the differences by race and gender have both decreased. At the same time the difference by educational level has increased. *Id.* at 59-66. Nevertheless, this period is generally regarded as one in which there was a great deal of deregulation. Thus, there is an inkling of a case to be made—perhaps a hypothesis—that greater income inequality is offset by less government control. This would require some generalized sense by people that there is less control. It is not clear this is the case.

necessities. The policy compromise is to allow the firm to operate as a single supplier but to regulate its prices.<sup>54</sup> In economic terms, the result is both an increase in consumer surplus over what would occur under unregulated conditions and greater productive efficiency.

Consumer surplus, a measure of welfare, is the difference between what is paid for a good or service and the most that a consumer would be willing to pay. In a sense, it is a psychological profit. In the case of natural monopoly, the unregulated seller will establish a higher price and a lower level of output.<sup>55</sup> One might conclude that regulation of natural monopoly pricing is actually guided by a mix of economic and happiness concerns. The theory would be that regulation means paying less for one product, thus allowing consumers to buy other things that they assume will make them happier. Of course, the lower price means less profit for those who would have received that profit and a decreased ability to purchase things that would have made the stakeholders possibly happier. This is all standard analysis, and without going into great detail, we know the consumer surplus that is gained through regulation exceeds the loss to shareholders.<sup>56</sup>

This is, however, still a very long way from knowing the impact of rate regulation on happiness. First, the regulation makes it possible for consumers to purchase things that will *potentially* make them happier. Second, different levels of happiness may be achieved depending on the capacity of the consumer to enjoy the extra income. Third, even though the consumer surplus gained by consumers may exceed the producer surplus that is lost by stakeholders, there is no way to know if the increased experienced utility of ratepayers exceeds the decreased experienced utility of stakeholders.<sup>57</sup>

This last point is particularly important. The most potent criticism of the economic analysis is that it equates the concept of value and the process of making a choice with utility. Value, though, requires that individuals be able to register their choices in the market, and choices can turn out to be disappointing. Thus, even if one settles on utility as the proper measure of efficiency, the conventional view is that it is decisional utility at work.<sup>58</sup> The ability to measure and make decisions on the basis of experienced utility would change the process

---

<sup>54</sup> See Harrison, Morgan & Verkuil, *supra* note 4, at 250-53.

<sup>55</sup> *Id.* at 125-28.

<sup>56</sup> The textbook version of this argues that monopolies not only shift income from consumers to owners of the monopoly but cause a net loss in welfare as well.

<sup>57</sup> This is not a reference to the problem of interpersonal comparisons of utility. Utility, as commonly used these days, is about expectations. And, while comparison of expectations of increased or decreased utility cannot be made, the same may not be true about experienced utility.

<sup>58</sup> See *supra* text accompanying notes 42-43.

significantly in many contexts and the regulation of natural monopolies is no different.

So where does this leave us with respect to the regulation of natural monopolies and happiness? In truth, the idea of experience sampling as a way to guide policy with respect to natural monopolies seems more like science fiction than anything else. Happiness theory does not seem to hold the potential to advance the analysis. On the other hand, a possible exception is the idea of lifeline rates. Lifeline rates are those made available to low income people. They are typically below the cost of production and provide a good basis on which to compare cost/benefit analysis and at least an intuitive consideration of happiness. From the viewpoint of standard economic analysis, rates below the marginal cost of production are inefficient. The rationale is that marginal cost reflects the cost of resources that are consumed in the production of one more unit of output. A price below that cost reflects the fact that the *value* to the buyer is less than the cost of the resources consumed.<sup>59</sup> More technically, a price this low is allocative inefficiency.<sup>60</sup> On the other hand, a rate below cost may very well be "efficient" from the standpoint of happiness. In short, happiness fills the gap between value, as expressed in the market, and a more inclusive sense of experienced welfare.

Perhaps this is only a new way of articulating known concerns. But if this is the conclusion, it is not unimportant. Unless the outpouring of scholarship on happiness can be used to inform policy and regulation in some manner, it is of interest but is not terribly relevant. Nevertheless, what happiness tells us is that traditional ratemaking in the context of natural monopolies may only scratch the surface with respect to experienced utility and actual happiness. The capacity to pay may be but one consideration in pricing decisions. At the very least, a closer examination lends increased support for lifeline rates by suggesting that a conventional efficiency assessment is unnecessarily narrow.

### B. *The Excessive Competition Rationale*

The excessive competition rationale has always seemed like an odd basis for regulation. Competition means lower prices and survival of

---

<sup>59</sup> The economic loss is offset by cross-subsidization from other ratepayers or other means of public support.

<sup>60</sup> Allocative efficiency is achieved when resources are drawn into the production of goods that are most valued. It is important to remember that value in this context is registered by a willingness and ability to pay.

the most efficient competitors. On what basis can protecting less efficient competitors from others be supported? Does the addition of a happiness element change the analysis? The question is complicated by a number of factors. The first is that the motivation for protecting competitors is not always clear, and it is likely that those seeking protection have a great deal of influence in the decision. Second, in the case of either regulation or deregulation, success, in terms of happiness or even measures of efficiency is impossible, except in extreme examples, to assess. For example, in the case of deregulation, the only true test of success would require a comparison of the current deregulated state of an industry and what it would have been like had regulation continued. In short, can an examination of happiness enhance the analysis when the rationale for the regulation is difficult to define, the regulation may be the result of capture, and measures of success are elusive?

This question is probably unanswerable across the board. Regulation and deregulation have affected everything from transportation to financial markets. Indeed, to the extent deregulation of financial markets contributed to the recent financial collapse, it would be hard to view deregulation as consistent with happiness. On the other hand, it is not obvious how a happiness-analysis could have been applied. Perhaps all that can be said is that it could not have made things worse.

To the extent deregulation and abandonment of an excessive competition rationale is thought to be economically superior to a regulatory state, the conventional measure of success would be in terms of prices and output—both quantity and quality.<sup>61</sup> As noted throughout this Article, the equation of happiness with so-called superior economic outcomes is not at all clear. But this analysis can work in a variety of ways. For example, a deregulatory effort that could be viewed as an economic failure may still be a happiness success. The opposite is true as well—an economic success may be a happiness failure.

Airline deregulation, in particular, illustrates the problems of applying a consistent happiness approach. Although based on personal observation and experience, it seems self-evident that today's airline travelers do not find the experience an enjoyable one. In fact, as early

---

<sup>61</sup> There are mixed reviews of airline deregulation. See PAUL STEPHEN DEMPSEY & ANDREW R. GOETZ, *AIRLINE DEREGULATION AND LAISSEZ-FAIRE MYTHOLOGY* (1992); STEVEN MORRISON & CLIFFORD WINSTON, *THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION* (1986); William N. Evans & Ioannis Kessides, *Structure, Conduct, and Performance in the Deregulated Airline Industry*, 59 SO. ECON. J. 450 (1993); Alfred E. Kahn, *Surprises of Airline Deregulation*, 78 AM. ECON. REV. 316 (1988). In reality it is impossible to label any regulatory effort a success because it is impossible to perform a controlled experiment that compares today's outcomes with the outcomes under a modern regulatory regime.

as 1989, Alfred Kahn, the chief architect of airline deregulation observed:

Most of us probably did not foresee the deterioration in the average quality of the flying experience, and in particular the congestion and delays that have plagued air travelers in recent years. Fortunately, an audience of economists will readily understand how little this failure constitutes a legitimate criticism of deregulation.<sup>62</sup>

Kahn's comments were written in 1989, well in advance of the additional inconveniences resulting from the September 11th attacks. Still, what it tells, in only a bit more than a single word, is that competition is not always pretty. Lower prices, lower costs of production, etc., may mean a higher probability of business failures, job losses if consolidations occur, and the types of qualitative discomforts Kahn describes.

Would an assessment of experienced happiness make a difference? What makes this question difficult is not simply that we have no readily accepted metric of happiness but that this is happiness that would not reveal itself in the market. Nevertheless, sophisticated modeling should be able to predict outcomes that people generally find unpleasant. This does, however, reveal a further complication. To the extent the lines do not get shorter and crowding in airplane cabins does not decline, but people report, as they recently did,<sup>63</sup> that they are *less* unhappy, the question is whether they would behave as set point theorists<sup>64</sup> predict and find that they were as happy as they ever were.

When it comes to deregulation, airline deregulation is distinguished from most other deregulation—energy, communications, transportation—because the end user is less a direct participant. In these cases, the issue of happiness is probably less relevant. Although quality of service may suffer, for the most part the goods are fungible and readily available. The happiness issues are linked to the impact on happiness of changes in productive efficiency and competition among winners and losers. An examination may not reveal much more than a standard cost/benefit analysis would.

---

<sup>62</sup> Kahn, *supra* note 61, at 320.

<sup>63</sup> Susan Carey, *North American Airline-Passenger Satisfaction Improves*, WALL ST. J., June 8, 2010, available at <http://www.marketwatch.com/story/airline-passenger-satisfaction-improves-2010-06-08-7400>.

<sup>64</sup> See *supra* text accompanying notes 29-31.

### C. *Reacting to Transaction Costs*<sup>65</sup>

When market outcomes are either not efficient or are otherwise unacceptable, transaction costs are often the problem. The mix of regulations when this is the case can, for the most part, be put into three categories. First are instances in which an industry is rationalized. This term refers to the process of assigning property rights or setting standards. An example might be assigning fishing rights.<sup>66</sup> The second category concerns the availability of information. Examples range from nutritional information on foods to licensing requirements for professions. For example, requiring a person to pass a bar exam before holding oneself out as an attorney<sup>67</sup> is a form of providing information about that person's qualifications that might not otherwise be available. In effect, information is provided—this person has completed a certain amount of legal training and passed an exam designed to test his or her capacity to provide legal guidance. Third, there are instances in which transactions are not permitted at all because the exchange is on balance inefficient and, even with complete information, the market solution is not satisfactory. Put differently, because of transaction costs and free-rider problems the distaste for activity cannot be accurately reflected in the market. Banning the sale of a dangerous explosive would fall into this category.<sup>68</sup>

#### 1. Happiness and Transaction Costs: The Marlboro Feeling

In some instances it seems clear that utility, as commonly used, and happiness or experienced utility are quite close to each other, and this is reflected in a regulation. For example, in a very detailed analysis of the costs and benefits of regulations designed to limit smoking by young people, the Food and Drug Administration noted that, “[c]onsumers would incur costs to the extent that they lose positive utility received from the imagery embodied in product advertising

---

<sup>65</sup> It is important to distinguish the cost of a good or service from a transaction cost.

<sup>66</sup> See, e.g., *New York v. Evans*, 162 F. Supp. 2d 161 (E.D.N.Y. 2001).

<sup>67</sup> This does not mean the assessment itself is without controversy. See Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, 843 So. 2d 245 (Fla. 2003).

<sup>68</sup> An example is the prohibition on the manufacture and sale of “lawn darts.” 16 CFR §§ 1306.1-1306.5 (2003). The prohibition of certain transactions reflects a paternalistic tendency in regulation. One critical distinction is between allowing transactions to occur in light of full disclosure and banning certain transactions all together. For more on this, see HARRISON & THEEUWES, *supra* note 18, at 346-47.



campaigns.”<sup>69</sup> Here the idea is that the actual experience of smoking or the experience of making a purchase will be less enjoyable *in fact* and not only as anticipated.

What is interesting about this example is that it illustrates the limitations of both standard cost/benefit analysis and an experienced happiness approach. With respect to cost/benefit analysis, under a strict reading of the discussion, it leaves open the possibility that positive imagery resulting from advertising could be great enough to reject a rule that would reduce smoking and harm to children. There are two problems with this. The idea that pain, suffering, death and a possibly massive use of health care resources resulting from cigarette smoking can be weighed against positive imagery will strike most as silly, at best. What is missing is any sense of lexical ordering<sup>70</sup>—the idea that not all values can be reduced to a common denominator. In addition, the implication is that the tobacco industry could have avoided the limitations on advertising if it had been more adept at creating positive imagery.

Would an experienced happiness approach be free of these objections? In some versions it might be. For example, those who are sick or facing eminent death could be asked if they would do it again or how much they would pay to avoid their own premature death or that of a loved one. In short, the analysis would be based on actual experience. This approach, however, raises most of the limitations of happiness analysis. For example, a suffering person may have little recollection of the actual pleasure or experienced utility resulting from smoking. Or, if set point theory applies, one may adjust somewhat to the thought of premature death and report that they are actually currently happy. Perhaps more importantly, the decision raises both versions of the “is happiness the only thing?” discussion. In one version, subjective happiness must be modified to include those things that are prudent. In another version, subjective self-interest is to be modified by capability concerns.

In the context of the cigarette distribution and promotion policies, both of these concerns come to bear. For example, if we agree that prudent people do not smoke, then the lost imagery cost may be a non-factor. In fact, no matter how powerful it might be, it can be argued that no amount of imagery can offset the threat to one’s life. As for the capability question, the idea that a smoker reports that he or she enjoys

---

<sup>69</sup> Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (proposed Aug. 11, 1995) (to be codified at 21 C.F.R. pts. 801, 803-804, 897).

<sup>70</sup> See Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1331-33 (1986).

smoking may not be all that should be considered. If smoking has debilitating effects, the issue of capability becomes relevant.

## 2. Happiness and Transaction Costs

Stated most succinctly, there are two gaps between cost/benefit analysis and happiness analysis. The first is the use of market transactions as a measure of utility. This problem has already been explored.<sup>71</sup> The second is a result of information shortages. The search for information is a transaction cost, and information, as a good, is probably produced at suboptimal levels. There are two reasons for this. One is that information may be subject to free riding problems. In effect, generally useful information is hard to keep private or, more technically, the producers of information are unable to fully internalize its benefits.<sup>72</sup> Second, some information is not produced because the lowest cost producer of that information is better off if the information remains unknown.<sup>73</sup>

The information shortage in the case of implementing an experienced utility approach to regulation is best understood in the context of the ideal. Under ideal conditions, choices made would be most consistent with happiness if individuals, as buyers or sellers, could visit the future and experience their utility before committing.<sup>74</sup> In effect, they could be asked after the fact what the experience was worth to them. This does not, however, resolve the problem that those unable to pay would report lower amounts even though their experienced utility may exceed that of those reporting a willingness to pay more.

Still, while literally impossible to visit the future, there are some surrogates. First, "cooling off" periods do allow one to experience for a short period of time how it actually feels to make a purchase.<sup>75</sup> In a sense, buyers are able to say how much they are willing to pay after the experience by keeping or returning goods about which they are unenthused. Second, when purchases are made, the purchasers may be

<sup>71</sup> See *supra* text accompanying notes 50-53.

<sup>72</sup> The best examples involve intellectual property, where there is legislation designed to allow internalization.

<sup>73</sup> There are other types of information that may be generally useful—product comparisons—but not protectable; for example, producers do not provide information that will make products less attractive to consumers unless they are required to or it is necessary to avoid liability. Additionally, good information enhances competition, which means lower prices and higher levels of output.

<sup>74</sup> In effect, the transaction costs associated with this information are infinitely high.

<sup>75</sup> Possibly the best-known cooling-off period is that applied by the Federal Trade Commission to door-to-door sales. It allows consumers to change their minds within three days. See 16 C.F.R. § 429.1(a) (2008).

attempting to repeat an experience. In effect their decisional utility is heavily based on experienced utility. Finally, more information and more focused information can engage a purchaser's imagination to the point that decisional utility can be close to that experienced. None of these measures solve the problem of the slippage between happiness and preferences as expressed in markets. Nevertheless, they can mean that even the individual whose market participation is limited can make choices that will be more in line with what will then be experienced.

Even this, however, may be too rosy a picture. Providing information can take a variety of forms. Information about how one will feel if he or she buys a product can encourage purchases that are imprudent in the view of happiness theorists. Moreover, sometimes the information itself or how it is presented can be the source of happiness. The question is whether the happiness generated by the way in which the information is presented is consistent with a legitimate happiness goal. And as has been shown, there really is a phenomenon of too much information.<sup>76</sup>

Nevertheless, the most realistic implementation of happiness teaching may come in the form of information regulation and disclosures. Discovering the types of information that enrich decisional utility so that it is as consistent as possible with experienced utility may be the greatest contribution possible.

This type of information could reflect the experienced utility of others as determined by surveys like those explored by surveys like those explored by Daniel Kahneman and others and accurate reports of efforts by those having the experience to repeat it. In fact, the first step would be to determine the validity and reliability of experience sampling as a means of predicting the happiness experienced by others. This is probably not a process to be entrusted to those in the industry. Anyone familiar with the *U.S. News & World Report* survey of law schools and its effects understands the moral hazard of allowing those affected by surveys to self-report information. Nevertheless, the importance of both experience sampling and day reconstruction should not be discounted as important sources of information that can decrease the divide between decisional and experienced utility.

---

<sup>76</sup> See Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1994).

D. *The Allocation of Inherently Scarce Resources:*  
*Concluding Remarks*

The final category of regulation includes those that allocate inherently scarce resources. These are resources that cannot be reproduced.<sup>77</sup> The focus here has shifted over the years. At one point, the idea was that broadcast frequencies were inherently scarce<sup>78</sup> and air and water were what economists call free goods. We now know that air and water are not free goods; there is not enough of either of sufficient quality to satisfy all demanders. Under this category, two concerns are evident. One is that depletion may occur. This is reflected in actions ranging from regulatory limitations on industrial emissions to quotas on fishing and hunting. If this were the only concern, at least in theory, the limited amounts of these resources that could be consumed could be subject to an auction and allocated to the highest bidders. This is represented by so-called cap and trade programs, which limit emissions amounts and leave the market to allocate the rights to pollute.<sup>79</sup> The second concern is that an allocation by auction may not be socially desirable. For example, in Alaska legislation exists to ensure that subsistence users have priority in terms of access to fish and game.<sup>80</sup> This was also the original basis for the efforts to allocate broadcast frequencies.

Rather than assessing how theories of happiness and experienced utility might enrich the policy analysis, these examples are used to illustrate the challenges in applying happiness theories to regulatory matters. In the first instance—cap and trade—the questions are whether capping can be guided by happiness and, then, whether the allocation itself can be a function of happiness. Since both of these processes deal with what might be regarded as “macro” concerns as opposed to

---

<sup>77</sup> Another very important area of business regulation reflects a reaction to social inequities. A good example is the Americans with Disabilities Act, which requires employers to accommodate those with disabilities. Obviously, if the market created an incentive to do so, legislation would not be required. Clearly, these regulations can be connected to happiness or experienced utility that is not reflected in the market. A better rationale may be that they represent a kind of social insurance based on an instinctive sense that each person should only absorb a limited amount of the misfortune life can create.

<sup>78</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400-01 (1969).

<sup>79</sup> See generally Michael Burger, “It’s Not Easy Being Green”: *Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835 (2010); Dirk Forrester, *U.S. Climate Policy Implementation: Effective Use of Carbon Markets for Cost Saving*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,585 (2010).

<sup>80</sup> For examples of issues arising under Alaska’s efforts to allocate fish and game, see Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35 (2005).

individualized assessments of happiness, the question of whether there is anything promising in the studies of happiness that could improve the current standards is even more difficult. There is, however, evidence of happiness concerns in both facets of regulations of this type. Measures taken today to cap environmental pollution are unlikely to be justified on the basis of improving the experienced utility of those currently alive.<sup>81</sup> On the other hand, to the extent they reflect assumptions about the potential experienced utility of those living in the future, those assumptions are based on current experiences, which may or may not be good surrogates for future experiences.

A market solution available to those currently alive is one that discounts the happiness of those unable to participate in the market. But even here there is evidence of a future experienced utility consciousness found in the existence of organizations that purchase and effectively retire pollution rights. These purchases seem to be based on a sense that future generations will enjoy a more pleasant existence if air and water are clean, as defined by current measures. In short, these efforts seem to preserve the *experienced* (or to be experienced) happiness of future generations. But there is an important question here that points out the limitations of applying happiness in this context. What studies of happiness indicate quite clearly is that the quality of an experience can change depending upon when people assess it. More importantly, happiness is a function of adaptations and expectations. Thus, it is impossible to say that those living in a less pristine environment in the future would be subjectively less happy than people living in a cleaner environment today. In particular we know that people adapt psychologically to what exists at the time. Moreover, today's effort to protect future experienced utility are based in part on an assumption that measures to improve environmental conditions will somehow remain static.

The analysis is much the same in the case of resources that are both limited and not subject to market allocation. The idea of allocation of natural resources to subsistence users cannot be based on a cost/benefit analysis. In all likelihood, the basis is moral. But it could also have an implicit experienced-utility basis. Again, it is one that imagines that the enjoyment of subsistence users somehow exceeds that of others. One could design an experienced utility experiment that would test this assumption and the possibility that it is wrong. But that simply raises another issue that shadows happiness analysis: Is happiness all that matters?

---

<sup>81</sup> That is not to say that there is no experienced utility associated with the action of limiting environmental degradation or the knowledge that future generations may have a more pleasant time of it.

## CONCLUSION

Recent revelations about happiness or experienced utility make for fascinating reading and lead to science fiction-like possibilities for our regulatory future. Applying these teachings means narrowing the gap between decisional utility and experienced utility. They can never be the same, but the most promising possibility lies in increasing the availability of information that enriches the decision-making process. Information about the experienced utility of others as evidenced by repeated behaviors or actual experimentation may hold the greatest promise for closing the gap.

