

LAW AND THE STABLE SELF

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INTRODUCTION

In his Childress Lecture, John A. Powell noted that Enlightenment thinking proposed a unitary, stable, reason-based self.¹ Enlightenment writers also suggested that individuals had transparency of mind, such that they could fully know those true and unchanging selves.² Further, Powell added, when one views individuals as stable, rational actors with unchanging preferences and behavior, it is easy to imagine the law largely as a backdrop against which action occurs and is subsequently regulated.³ Professor Powell argued that just as Einstein replaced Newton with a relative rather than absolute theory of physics, so too the time has come to reconceptualize the role of the state from a “neutral non actor in the universe” to one in which the state has the capacity to “change[] the . . . actions of people via laws, regulations, and agency action.”⁴ In reality, Powell posited, individual behavior is affected directly by the actions of the state: the structure of laws and regulations can change the way that individuals make decisions and take action.⁵

At the same time, Powell highlighted the Enlightenment’s extensive reliance on scientific knowledge to structure its logic and conclusions.⁶ Modern psychology—relying on Enlightenment principles of scientific

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1. John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond an Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1035–40 (2010). David Hume notably wrote, “It is universally acknowledged that there is a great uniformity among the actions of men, in all nations and ages, and that human nature remains still the same, in its principles and operations. The same motives always produce the same actions.” DAVID HUME, *An Enquiry Concerning Human Understanding*, in *ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 80, 83 (L.A. Selby-Bigge ed., 2d ed. 1902).

2. See, e.g., 2 PETER GAY, *THE SCIENCE OF FREEDOM* 177 (1969); Thomas McCarthy, *Enlightenment and the Idea of Public Reason*, in *QUESTIONING ETHICS: CONTEMPORARY DEBATES IN PHILOSOPHY* 164, 164–65 (Richard Kearney & Mark Dooley eds., 1999).

3. Powell & Menendian, *supra* note 1, at 1064–67.

4. *Id.*

5. *Id.*

6. GAY, *supra* note 2, at 176; McCarthy, *supra* note 2, at 168, 173.

knowledge⁷—has made great strides in understanding the human mind, yet one consistent finding of psychological research is that much of our behavior and mental processes depend on a dizzying array of contexts, situations, and stimuli. Kurt Lewin, the founder of social psychology, suggested that all behavior is a function of the self plus the societal situation.⁸ Indeed, in light of modern research on the importance of external cues and stimuli, it is difficult to conceptualize a completely stable, rational actor who remains constant in her preferences and behavior across settings. The unitary, transparent, reason-based self—the consistently rational actor of the Enlightenment—is not real. Instead, our mental processes and behavior are adaptable, changeable, and often context-specific.⁹

In this Article, I examine several findings in social psychology related to individuals' preferences, and I explore how those findings subvert the Enlightenment vision of a stable and knowable self in ways that are quite relevant to law. I first explore one well-known finding in the cognitive bias literature, the status quo bias, and marshal some of the research suggesting ways in which this bias may affect individuals' behavior vis-à-vis legal systems. Second, I discuss the potential ways in which temporal construal research—research on the way in which individuals see things differently depending on the time frame in which the events will occur—may relate to legal systems. Finally, I address how well some of the fundamental premises of our litigation system dovetail with psychological research on what individuals want. Our civil legal system is predicated on the recovery of money for harm done, but research suggests that money damages may be inadequate to meet some basic human desires.

I. STATUS QUO BIAS

As Professor powell notes, the law, and the actors who create it, are a powerful force influencing human action. Psychological research on the status quo suggests that individuals have a strong preference for things remaining as

7. GAY, *supra* note 2, at 180–81; THOMAS MUNCK, *THE ENLIGHTENMENT A COMPARATIVE SOCIAL HISTORY 1721–1794*, at 12, 14 (2000); Edward E. Jones, *Major Developments in Five Decades of Social Psychology*, in 1 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 16–17 (Daniel T. Gilbert et al., eds., 4th ed. 1998).

8. Lewin developed the concept of the “life space,” which is the interdependent relationship between the individual and her environment. Lewin’s “grand truism” is $B=f(PE)$ —that is, behavior is a function of the person and the environment. Jones, *supra* note 7, at 35.

9. This is not to say that we have no true identity, of course—just that we are not completely stable, unchanging actors across contexts. The larger debate in psychology between “situationism” and “dispositionism”—that is, between the importance of the environment and the importance of individual characteristics—is robust and well beyond the scope of this short Article.

they are, regardless of what those things look like.¹⁰ This preference for the status quo means that the way in which the law is structured may lead to behavioral consequences. When the law creates certain endowments, those endowments become a status quo from which individuals are reluctant to depart.

So, for example, consider insurance. An Enlightenment devotee might imagine—even one open to the potential influence of situational factors—that risk preferences are one aspect of the self that would be more stable across situations and less subject to manipulation by the governing legal regime. Some people, this story would go, would be innately risk-seeking (sky-diving, non-seatbelt wearing, motorcycle riding), while others would be innately risk-averse (seatbelt wearing, speed-limit obeying, helmet wearing). Take this premise, and add to it a regime of required automobile insurance that offers two options: one option provides more coverage for more money and the other option provides less coverage for less money. Individuals are likely to have some preference between these choices based on their orientation towards risk. Those who prefer more risk would be likely to choose the limited coverage; those who prefer less risk would be likely to choose comprehensive coverage.¹¹ Purely risk-neutral individuals would be likely to choose the lower-cost option.

Now add to this premise two potential legal structures. In the first legal structure, the state requires the buyer to purchase a basic level of insurance, and allows the buyer to pay more for additional coverage. In the second, the state asks the buyer to purchase a broader package of insurance, with an option to decline a portion of the coverage and pay a lower price. In the first option, the status quo is the basic insurance, and one can pay more for added coverage. In the second option, the status quo is the comprehensive coverage, and one can pay less for more limited coverage. In the world of the Enlightenment self—the rational actor—individual choices should remain the same: those with a high risk preference should still choose the limited coverage, those with a low risk preference should still choose the more comprehensive plan, and those with a neutral risk preference will choose the lowest-cost option. Imagine two adjacent states, one of which offers its drivers the choices in the first scenario and one of which offers its drivers the choices in the second scenario. Unless people in one state are systematically more risk averse than

10. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197–99 (1991).

11. I do not mean to suggest that this fairly simplistic example explains or captures the complex set of decisions involved in the selection of insurance. Issues of cost, resources, and probabilities, to name a few, are surely likely to impact these decisions as well. See, e.g., Kahneman, *supra* note 10, at 199 (discussing a study of insurance policy choices in New Jersey and Pennsylvania).

people in another state, the percentage of people who choose the comprehensive coverage versus the limited coverage should be roughly similar in the different states, regardless of which plan the state presents as the default option.

And yet research suggests that this is not the case. Eric Johnson and his colleagues report that when drivers in Pennsylvania and New Jersey were offered these two different plans, more drivers chose the comprehensive coverage when it was the standard plan;¹² more drivers chose, conversely, the limited coverage when it was offered as the standard plan.¹³ Certainly, there must have been drivers who would have chosen the same option in either location, but there are also many individuals whose preferences appeared to be largely shaped by the structure of the legal rule around insurance.¹⁴ Because state laws mandate car insurance¹⁵ and may set a default option for drivers, the nature of the default is likely to significantly affect the level of insurance chosen and, consequently, how much money consumers pay into the insurance system. The self is malleable in light of the legal regime, and the individual is shaped by the law in ways that are often invisible to the self rather than transparent.¹⁶

Because the law sets the status quo in many ways, it is important to recognize the impact that status quo regulations may have on human behavior.¹⁷ The structure of the law is not a neutral backdrop against which people make decisions.¹⁸ If the architects of legal systems wish to encourage

12. Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 48 (1993).

13. *Id.*

14. *Id.*

15. 7 AM. JUR. 2D *Automobile Insurance* § 22 (2009).

16. The past decade has seen a vast increase in literature detailing ways in which these decisional biases and heuristics affect individual behavior. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL*, at i, xii (2008); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6–7 (Penguin Books 2009).

17. The status quo has important effects in the legal context even outside of the endowments provided by law. For example, Russell Korobkin found that parties valued contract terms differently depending on what was provided as the default term. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 639–41 (1998).

18. The Coase Theorem suggests that the legal endowments of a particular legal regime will not matter to the ultimate outcome when people can bargain for optimal solutions and when transaction costs are low or nonexistent. See R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15 (1960). Indeed, in many cases it is transaction costs that are the problem, preventing optimal resolutions. But in this and other cases, the transaction costs are low. Here, the transaction costs when one must choose between options do not really differ very much. Instead, it is something more fundamental that contravenes the Coase Theorem in this case: it is a change in the way that individuals understand their choices, merely by virtue of which choice is the default and which is the alternative. One might almost imagine that choosing the non-default

or discourage certain types of behavior within a set of choices, changing the structure of the law is an effective way to shift people's decisions. In many ways, the law does this implicitly, without a clear mandate from the people or even the legislature. That is, it is not clear that constituents or legislators are aware of the effects of the law's endowments. When we assume that the law is a non-actor, and that individuals have stable preferences, we may end up with legal systems that shape human action in ways that we neither realize nor explicitly condone. An understanding of the active role that legal rules can play in shaping both preferences and behavior is an important step in ensuring an optimal legal system.

II. TEMPORAL CONSTRUAL

The law assumes a unitary, stable actor whose preferences do not change over time. Contract law, for instance, is predicated upon the stable preferences of individuals.¹⁹ When entering into a contract, the present self binds the future self to a course of action approved only by the present self. As a general matter, we do not allow the future self, even if that self sees things differently, to simply disavow the actions of the former self. The future self, in other words, is bound to the terms of the contract negotiated by a different temporal actor. The law of contracts supposes a world in which the preferences of the present and future selves are identical, yet social science research has shown that this is not the case. In particular, the present self is not able to accurately forecast the preferences of the future self, leading to potential commitment errors.

Part of this inaccuracy stems from the way that individuals think about choices over time. Psychologists have suggested that temporal distance to a future event changes the way in which individuals construe those events.²⁰ Construal level theory, or CLT, proposes that people systematically think differently about events in the near future versus events in the distant future.²¹ Specifically, individuals use "higher level construals" to think about events in the distant future, and "lower level construals" when thinking about events in the near future.²² Abstract features that capture the essential nature of an event are considered "higher level construals," whereas the concrete and specific details of the events are considered "lower level construals."²³ Research

option adds *psychological* transaction costs because deviating from the status quo is difficult for people.

19. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 219 (4th ed. 2004).

20. Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 *PSYCHOL. REV.* 403, 405 (2003).

21. *Id.*

22. *Id.*

23. *Id.*

suggests that individuals simply think differently about the same events when they are located differentially in time.²⁴

For example, in one psychological study, individuals given an activity such as “locking the door” were asked to choose between alternative restatements of that same activity, including the very concrete physical act of “putting a key in the lock” and the far more conceptual goal of “securing the house.”²⁵ When the time frame for locking the door was tomorrow, individuals were more likely to choose the restatement that described the concrete physical behavior; when the time frame was sometime next year, individuals were more likely to choose the abstract goal of the action.²⁶ CLT’s supporting research suggests that when people contemplate actions that are imminent, they think of all the mundane, messy, everyday details, and when they contemplate actions in the distant future, they distill them to their conceptual essence.²⁷

CLT is applicable not just to descriptions of events but also to individual preferences about future options. Near-future preferences are more complex and harder to reduce to essential elements, whereas distant-future preferences are more unified and cohesive.²⁸ Consequently, psychologists have found that when making decisions about events in the distant future, individuals focus on the abstract properties of the decision, but in the short-term they tend to focus on the most concrete terms.²⁹ Time delay shifts the attractiveness of an option towards its high-level construal, and near-future choices shift the attractiveness towards the low-level construal.³⁰ Additionally, primary aspects of options are more important in the distant future, while secondary aspects of options play a greater role in the near future.³¹ Finally, feasibility—the possibility that something could happen—appears to be more of a secondary or low-level construal, while desirability is a primary or high-level construal.³² So, for example, in one experiment, individuals choosing which lectures to attend chose the distant-future lecture according to topic, but chose the near-future lecture according to timing.³³ Participants likewise chose a distant-future reading assignment based on interest level, but chose a near-future assignment based on level of difficulty.³⁴

24. *Id.* at 406

25. Trope & Liberman, *supra* note 20, at 406.

26. *Id.*

27. *Id.*

28. *Id.* at 407.

29. *Id.*

30. Trope & Liberman, *supra* note 20, at 407.

31. *Id.* at 408.

32. *Id.* at 411.

33. *Id.*

34. *Id.*

Similarly, consider the case of subjects in an experiment who were asked to select a snack that they would have once a week for the next three weeks.³⁵ Subjects reliably chose a variety of items to enjoy at snack time.³⁶ But subjects who were asked to pick their snacks each week did not pick a variety: they reliably chose the same item each week.³⁷ If one assumes that the present self's preferences are the "true" preferences, then those who chose snacks in advance for the entire three-week period made an error. Why? It seems as though when looking at "the whole picture," more abstract attributes like variety, diversity, and opportunity are more important in decision-making, but when considering the immediate choice of what to actually eat, attributes like chocolate, or crunchy, or cheesy (or perhaps merely "my favorite") are more important.

In a way, one might conceptualize the self here as stable: the preferences remain the same for an individual, merely differing depending on the timing. That is, we always want X for our present and Y for our future, regardless of whether we're asked in January or July, 1995 or 2010. But since we constantly move forward in time, our present selves become our future selves all too soon, and what our present self might want for its future incarnation clashes with what that future incarnation does actually want. The Enlightenment's vision of the stable self cannot make sense of the individual whose preferences about the very same options change merely due to temporal distance.

It is not possible to import these findings wholesale into the body of contract law; there is no simple answer to explain how temporal construal relates to every contract, or to contract law generally. Some contracts bind the parties to take an action in the near future, while others bind parties for a lengthier term, including both the near and the more distant future. Still other contracts may bind parties only *in* the distant future. Because contracts are so varied in their terms and conditions, relating temporal construal to contracting behavior must be done on a more individualized basis. But this research is clearly relevant to the ways that people think about their choices and their commitments. People will perceive the features of contractual agreements differently when they think about them in the near future versus the distant future. When thinking about contract terms that describe actions that will occur soon, contracting parties will focus on the details and the specifics. But when thinking about contract terms that describe actions that will occur in the distant future, they will focus on the abstract and broad-brush essentials. Contract law pays little attention to this; instead, contract law largely pretends

35. Itamar Simonson, *The Effect of Purchase Quantity and Timing on Variety-Seeking Behavior*, 27 J. MARKETING RES. 150, 153, 156 (1990).

36. *Id.* at 158.

37. *Id.* at 156.

that individuals' preferences are stable,³⁸ perhaps because the alternative would destabilize contract law irrevocably, potentially eliminating the benefits of contracts altogether.

There are, however, several contract doctrines that address the problems of shifting opportunities and preferences. In efficient breach, for example, contract law allows parties to be released from their obligations if the breaching party compensates the other party for his or her loss of goods or services.³⁹ Efficient breach allows people to take advantage of better, more efficient market opportunities;⁴⁰ the doctrine is not expressly meant to address the party who simply changes his or her mind. In any event, a stable, rational self would always prefer the choice with the highest market value, whether at time period one or at time period two. In the efficient breach context, the problem is that the self was not aware of the most efficient option at time period one.

Nonetheless, the doctrine of efficient breach leaves room for changing preferences to play an important role. The doctrine is conceptually broad enough to encompass changing preferences that can be sufficiently monetized. For example, suppose party A contracts to sell goods to party B, but then changes her mind and decides she would derive greater utility from selling to party C. Party A can efficiently breach and pay damages to party B if the difference in utility between the sales (however Party A may define such utility) is greater than the amount she will pay to B in damages.⁴¹

Similarly, the doctrine of contracts of adhesion relates to temporal construal and potential changes in preference. Contracts of adhesion, which are contracts of asymmetrical power, typically bind a small party to many future terms that might be onerous for her.⁴² The onerous future terms are

38. See *supra* note 19 and accompanying text.

39. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 133–34 (6th ed. 2003); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1637 (2009); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 630 (1988).

40. See POSNER, *supra* note 39, at 133.

41. Perhaps because the doctrine of efficient breach is so neutral as to outcome, because it merely privileges the outcome that provides the most utility, a number of commentators have attacked it on moral grounds. See Kraus, *supra* note 39, at 1605–06; Seana V. Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 730–32 (2007). Indeed, the use of the doctrine to allow breach to be considered efficient merely when someone might prefer a different outcome (thus deriving greater utility) brings up a grave concern with the stability of contracts in an “efficient breach” world. See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 978 (2005).

42. Black's Law Dictionary defines an “adhesion contract” as a standard form contract “offered . . . on essentially ‘take it or leave it’ basis without affording consumer realistic

probabilistic rather than certain, and the abstract, high-level construal of the future terms of such a contract is more salient to the party than the concrete, low-level construal of those terms.⁴³ For example, the high-level construal of enjoying a cruise preoccupies the contracting party, while the low-level construal of the accelerated payment schedule, the required arbitration clause, or even the high-interest monthly payments (not due for six months, perhaps) fade. Legal safeguards designed to protect low-power consumers in these settings are a way to protect people who are bedazzled by the present benefit and may fail to accurately comprehend the future consequences.⁴⁴

III. WHAT PEOPLE REALLY WANT

Finally, the vision of a fully self-aware, unitary, and stable self is belied by a robust body of research suggesting that people are, simply put, not very good at knowing what will make them happy. A host of research on happiness has suggested that people are terrible predictors of how events will impact their level of happiness—what researchers call “affective forecasting.”⁴⁵ Individuals think that large-scale events, like winning the lottery, will make them happy, but actual lottery winners report no higher level of happiness than non-lottery winners.⁴⁶ Similarly, negative events do not have the same long-term impact that most people expect them to have.⁴⁷ Part of the reason that

opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract.” BLACK’S LAW DICTIONARY 40 (6th ed. 1990).

43. For another way of viewing contracts of adhesion that similarly relies on the difference in salient features, see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003).

44. Similarly, courts have found certain contract terms unconscionable in ways that dovetail with temporal construal. For example, the Fourth Circuit found that employment contract terms were too one-sided in favor of the employer in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999). In that case, one could imagine that when thinking about her employment contract in the long-term, the employee was not focused on the concrete details of who might make-up an arbitration panel if she became involved in a dispute with the company, but rather on the larger conceptual element of having a steady job with a stable company.

45. For a review of this literature, see Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, in 35 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 345, 353 (Mark P. Zanna ed., 2003). Wilson and Gilbert describe the most common affective forecasting error, the impact bias, as people’s tendency to “overestimate the impact of future events on their emotional reactions.” *Id.*

46. Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917, 917 (1978). Similarly, although people predict that others will be happier living in California than living in the Midwest because of the better weather, people in both settings report similar levels of happiness. David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340, 342–43 (1998).

47. See, e.g., Eunkook Suh et al., *Events and Subjective Well-Being: Only Recent Events Matter*, 70 J. PERSONALITY & SOC. PSYCHOL. 1091, 1096 (1996).

people are such poor predictors of happiness is that they are more adaptable to circumstances—both positive and negative—than they realize.⁴⁸ Indeed, research in psychology suggests that people are tremendously adaptable to a wide variety of changing circumstances, in ways that the law does not always acknowledge or respect.⁴⁹ For example, Samuel Bagenstos and Margo Schlanger have suggested that “hedonic damages”—damages that compensate for the loss of happiness—are misguided.⁵⁰ Marshalling research that documents the happiness of those with disabilities,⁵¹ they argue that when the law allows recovery for this type of damages, the law actually may foster unhappiness among disabled people by suggesting to them that their lives must be wanting.⁵² The law, rather than acting neutrally, suggests to people what the appropriate reaction is to their circumstances.⁵³

The role of apology in litigation follows a similar course. Apologies have been found to have important effects on parties: cases where apologies are offered seem to settle more frequently,⁵⁴ more quickly,⁵⁵ and with lower litigation costs.⁵⁶ Claimants who have been offered an apology may change their aspirations,⁵⁷ and apologies help to preserve relationships and may even forestall lawsuits.⁵⁸ Yet lawyers are notoriously hostile to the idea of

48. For a discussion of this “psychological immune system,” see Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 619 (1998).

49. *Id.*

50. Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 750 (2007).

51. *Id.* at 763–69.

52. *Id.* at 774 (“When courts uphold hedonic damages awards based on the view that disabling injuries limit life’s enjoyment and keep plaintiffs from being a ‘whole person,’ they entrench the societal view that disability is inherently tragic, and encourage people with disabilities to see their lives as tragedies.”).

53. A number of legal scholars have recently considered the role that poor affective forecasting may play in a variety of legal contexts. See, e.g., John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1080 (2009); Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the “Rational Actor,”* 51 WM. & MARY L. REV. 183, 216–17 (2009); Jeffrey L. Harrison, *Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935, 935–36 (2009).

54. Chris S. Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City’s Pilot Project*, 25 HEALTH AFF. 1394, 1395 (2006).

55. Steve S. Kraman, *A Risk Management Program Based on Full Disclosure and Trust: Does Everyone Win?*, 27 COMPREHENSIVE THERAPY 253, 254–55 (2001).

56. *Id.* at 255.

57. Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 342 (2006).

58. Kathleen M. Mazor et al., *Health Plan Members’ Views about Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 413 (2004).

apologies,⁵⁹ and our legal system has traditionally discouraged apologies by allowing apologies that include an admission of injury to be admissible as evidence at trial.⁶⁰ Indeed, Jennifer Robbennolt has found that the effects of apologies on lawyers are almost the inverse of the effects on clients in some respects: lawyers are largely indifferent to the emotional appeal of apologies, and certain types of apologies tend to make lawyers raise, rather than lower, their expectations about what they ought to receive in settlement.⁶¹ If what injured people truly want—what will feel, to them, like real redress—includes an apology from a wrongdoer, then our legal system, both its infrastructure and its primary players, must rethink its approach to defining recompense through money alone. And, in fact, a number of states have recently acted to encourage apologies by making such statements inadmissible in court.⁶²

In a related vein, research has suggested that people thinking about what they want out of litigation or other dispute resolution processes may believe that they want the most amount of money possible.⁶³ After a dispute is resolved, however, people report that they care a lot about the fairness of the treatment—the procedural justice—that they received, sometimes even more than the financial outcome.⁶⁴ As with affective forecasting, individuals have difficulty predicting what will make them feel satisfied with the resolution of a dispute. Recent research has indicated that individuals even care about procedural justice in dispute resolution settings without a third party, such as negotiation.⁶⁵ Although lawyers are accustomed to the procedural safeguards that surround litigation, arbitration, and even mediation, they are not necessarily fully aware of the effects of fairness in these settings, let alone in even more informal dispute resolution processes. If parties truly value fairness of process, either separate and apart from the monetary value of their outcomes, or sometimes even more than the monetary value of their outcomes, then it may be time to rethink the way that lawyers advise clients and resolve cases in our legal system.

59. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 353 (2008).

60. Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 824 (2002) (stating that existing federal rules of evidence and analogous state provisions allow apologies to be admitted to prove liability unless they are made during mediation or settlement negotiations).

61. *Id.* at 376.

62. *Id.* at 356.

63. See, e.g., Tom R. Tyler et al., *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 GROUP PROCESSES & INTERGROUP REL. 99, 114–15 (1999).

64. *Id.*

65. See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478 (2008).

CONCLUSION

In this Article, I have identified just a handful of ways in which empirical data help us understand the effect that the law and legal systems can have on individuals, their preferences, and their behavior. The Enlightenment era paved the way for the empirical data on human behavior that I have highlighted here. And yet that same research fundamentally undermines the Enlightenment vision of a stable, unitary, fully knowable self. Ironically, an understanding of the way in which the law can effect change on individual behavior belies the Enlightenment's conception of the stable, unitary self. As Professor powell urges, the project of the Enlightenment is not complete. When these two titans of the Enlightenment clash, it is imperative that we continue to explore and process the role of empirical data, rather than cling to an outdated vision of the self, so that the law can better understand, deliberately shape, or adequately respond to the realities of human behavior.