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## How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor"

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# HOW THE NEW ECONOMICS CAN IMPROVE EMPLOYMENT DISCRIMINATION LAW, AND HOW ECONOMICS CAN SURVIVE THE DEMISE OF THE "RATIONAL ACTOR"

SCOTT A. MOSS\* & PETER H. HUANG\*\*

## ABSTRACT

*Much employment discrimination law is premised on a purely money-focused "reasonable" employee, the sort who can be made whole with damages equal to lost wages, and who does not hesitate to challenge workplace discrimination. This type of "rational" actor populated older economic models but has been since modified by behavioral economics and research on happiness. Behavioral and traditional economists alike have analyzed broad employment policies, such as the wisdom of discrimination statutes, but the devil is in the details of employment law. On the critical damages-and-liability issues the Supreme Court and litigators face regularly, the law essentially ignores the lessons of behavioral economics and the affective sciences.*

- (1) *Damages:* With emotional distress and punitive damages limited, the basic discrimination damages are the employee's lost income. Courts draw *no* distinction between a failure to hire a job applicant and a termination of a long-term employee, yet endowment effect and happiness research indicate that terminated long-term employees typically suffer greater psychological loss, justifying greater damages.
- (2) *Employer Duties:* Effective antidiscrimination programs can shield employers from liability, but the cases and scholarship say little about what programs

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are effective. Research showing that people think and problem solve best in positive emotional states indicates that programs focused on negativity (for example, “discrimination gets us sued”) yield fear and backlash but not the productive employee effort, understanding, and empathy that lessen bias.

- (3) *Employee Duties*: Harassment victims often cannot sue unless they first complained to their employer. Courts should recognize the reasonableness of not complaining due to learned helplessness and because the endowment effect and loss aversion explain reluctance to upset even a bad status quo (a job with harassment). The risk of loss (retaliation) outweighs the possible gain (ending harassment).

*This Article also analyzes broad implications of behavioral and happiness research for law and economics:*

- (1) Do behavioral and happiness adjustments to a rational actor model make economics indeterminate? Economics still can yield useful legal analyses, but likely narrower ones (for example, improving individual, micro-level determinations of damages and reasonable behavior) than past economic analyses of macro-level issues, like whether all discrimination law is “efficient.”
- (2) Psychologically informed economics often prescribes regulation of markets. It asks, “When is such regulation worth the transaction costs and incentive distortions?” More complex rules, like those this Article prescribes, are worth the cost in higher-stakes, less-repeated transactions like employment than in lower-stakes, often-repeated transactions like consumer purchases.
- (3) Should courts rely on these new findings or instead disclaim reliance on any social science because new research often displaces prior findings? In employment cases, courts *must* assess make-whole damages and employee reasonableness, so they cannot avoid *some* conception of well-being and cognition—and

even imperfect new findings beat disproven, too-narrow “rationality” assumptions.

*This Article thus offers a half-full/half-empty assessment of the usefulness of economics, and of behavioral and happiness research, to law. It sounds a cautionary note against using social science to assess grand legal policies, but a hopeful note that such research can improve decision making by judges, firms, and individuals.*

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*If it makes you happy, then why the hell are you so sad?*  
— Sheryl Crow

*The most beautiful things in the world are the most useless,  
peacocks and lilies for instance.*  
— John Ruskin

## INTRODUCTION

Employment discrimination law is stuck in the law-and-economics stone ages—before economists began revising the “rational actor” model with research findings in behavioral economics<sup>1</sup> and on factors affecting subjective well-being (“happiness research”),<sup>2</sup> and before legal scholars started applying those behavioral<sup>3</sup> and happiness<sup>4</sup> findings to law. Worse, in assuming a wholly money-focused “reasonable” employee, many employment doctrines are far narrower than even the earliest, most narrow rationality-based law-and-economics scholarship.<sup>5</sup> Employment discrimination law thus

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1. See generally ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer et al. eds., 2003); BEHAVIORAL ECONOMICS AND ITS APPLICATIONS (Peter Diamond & Hannu Vartiainen eds., 2007); JOHN MALCOLM DOWLING & YAP CHIN-FANG, MODERN DEVELOPMENTS IN BEHAVIORAL ECONOMICS (2007); NICK WILKINSON, AN INTRODUCTION TO BEHAVIORAL ECONOMICS (2008).

2. See generally MARK ANIELSKI, THE ECONOMICS OF HAPPINESS: BUILDING GENUINE WEALTH (2007); BRUNO S. FREY, HAPPINESS: A REVOLUTION IN ECONOMICS (2008); HANDBOOK ON THE ECONOMICS OF HAPPINESS (Luigi Bruni & Pier Luigi Porta eds., 2007); RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005).

3. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell Korobkin, *The Endowment Effect And Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

4. See generally Peter H. Huang, *Authentic Happiness, Self-Knowledge, & Legal Policy*, 9 MNN. J. L. SCI. & TECH. 755 (2008); Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness, & Trust?*, 3 J. BUS. & TECH. L. 257 (2008); Peter H. Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2008); Nancy Levit & Douglas O. Linder, *Happy Law Students, Happy Lawyers*, 58 SYRACUSE L. REV. 351 (2008).

5. Even some 1970s economic analyses of law noted nonmonetary preferences. *E.g.*, GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 19-21 (1976) (noting nonpecuniary costs and benefits in regulating discrimination, incorporating subjective values such as “tastes for discrimination” into the “rational actor” model); RICHARD A. POSNER, ECONOMIC ANALYSIS



is based upon economic conceptions of decision making and preferences that are so narrow, they at best are out of date, and at worst never really existed.

[L]abor market specialists and human resources economists are coming to realize that traditional economics has been too simplistic in its assumptions on human motivation .... [L]abor market research must be rewritten.... [N]eoclassical economists have maintained that the labor market is no different ... than the market in goods .... [Yet] experiments and empirical investigations on the effectiveness of incentives indicate ... individuals do not exclusively think of themselves.<sup>6</sup>

There has been great debate among economists about whether and to what extent there should be laws against employment discrimination,<sup>7</sup> which, given the employment-at-will doctrine, is both the main field of employment regulation and the source of doctrine for other areas of employment law, like whistleblowing.<sup>8</sup> Yet the devil is in the details of employment discrimination law, and there has been little contemporary economic or social science thinking about those details.

- (1) *Damages*: Whether lawsuits are filed depends heavily on what damages are available, as shown by the dramatic increase in Title VII litigation<sup>9</sup> after Con-

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OF LAW 545 (2d ed. 1977) (same as to pornography).

6. NORBERT HARING & OLAF STORBECK, *ECONOMICS 2.0: WHAT THE BEST MINDS IN ECONOMICS CAN TEACH YOU ABOUT BUSINESS AND LIFE* 10 (2009); see also DACHER KELTNER, *BORN TO BE GOOD: THE SCIENCE OF A MEANINGFUL LIFE* (2009) (offering broader theories of human behavior).

7. Compare John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (concluding that a ban on discrimination is efficient), with RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing the contrary).

8. See generally Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295 (2005).

9. See Marcela Noemi Siderman, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1886-87 & n.1 (2000) (noting how, once the 1991 amendments to Title VII created a jury trial right and increased remedies, "[b]ased on these increased protections for employees, employment litigation has exploded," with employment discrimination lawsuits more than doubling in four years (citations omitted)).

gress increased available damages in 1991.<sup>10</sup> What monetary relief is needed to “make whole” (the Title VII command)<sup>11</sup> a worker who lost a job due to discrimination?

- (2) *Employer Duties*: Even in egregious cases of discrimination or harassment, employers have affirmative defenses, either to punitive damages<sup>12</sup> or to all liability,<sup>13</sup> based on efforts to prevent and redress discrimination. When should employers’ antibias efforts be sufficient to shield them from liability for proven discrimination?
- (3) *Employee Duties*: Employers may not be liable for discriminatory or retaliatory harassment,<sup>14</sup> even by supervisors. If an employer has an internal complaint process, an employee must file a prompt internal complaint to a supervisor or with the human resources department before suing.<sup>15</sup> When, if ever, should employees be excused from complaining internally?

10. See Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1629 (2006) (noting that Title VII originally limited relief “to the equitable remedies of ... back pay and possible reinstatement,” but since 1991 has also allowed compensatory and punitive damages).

11. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975).

12. See, e.g., *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (“[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” (citation omitted)).

13. See, e.g., *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998) (holding that an employer may raise an affirmative defense to a vicarious liability charge when the employer exercised reasonable care to prevent or correct discrimination and harassment, and the employee unreasonably failed to take advantage of opportunities for correcting the problem); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (same).

14. Harassment is just one form of discrimination in “terms and conditions” of employment based on grounds such as sex, race, age, disability, or retaliation. See *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 436, 446 (2d Cir. 1999) (describing racial and retaliatory harassment as possible sources of employer liability); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (holding that retaliatory harassment by co-workers may be a source of employer liability).

15. *Faragher*, 524 U.S. at 807-08 (holding that an employee’s failure to use a complaint procedure provided by the employer establishes an affirmative defense for the employer); *Ellerth*, 524 U.S. at 765 (same).

The Supreme Court<sup>16</sup> and practicing lawyers<sup>17</sup> regularly grapple with these critical damages-and-liability issues, yet the law essentially ignores the lessons of behavioral economics and cognitive science.

- (1) *Damages*: The basic discrimination damages are the employee's lost income. Courts draw *no* distinction between a failure to hire an applicant and the termination of a long-term employee, yet damages for the latter should be higher. Behavioral economic findings (on the endowment effect), and happiness research findings (on the effects of unemployment) indicate that a nonhired employee typically suffers less psychological loss than a terminated long-term employee.<sup>18</sup>
- (2) *Employer Duties*: Antidiscrimination/harassment programs vary. Some are effective; others are ineffectual or disingenuous. The cases and scholarship are not well-developed as to what programs suffice. Findings that people think and problem solve best in positive emotional states indicate that programs focused on negativity (for example, do not discriminate because

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16. For Supreme Court cases on defenses to liability or damages based on employer/employee antidiscrimination duties, see *infra* notes 222, 223, and 262 and accompanying text (citing *Faragher*, *Ellerth*, and *Kolstad*, respectively). For cases on relief, see, for example, *Pollard v. E.I. Du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that Title VII damages caps do not apply to awards of front pay for future economic loss); *Carey v. Phipus*, 435 U.S. 247 (1978) (requiring specific evidence of injury for an award of emotional distress damages on civil rights claims); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (finding broad equitable powers to award relief, including retroactive seniority, to Title VII plaintiffs); *Albemarle Paper Co.*, 422 U.S. 405 (holding that prevailing Title VII plaintiffs should presumptively receive back pay, not just upon employer bad faith).

17. For example, the Practicing Law Institute's *Annual Institute on Employment Law*, a prominent continuing legal education event, frequently covers these issues of employment damages and affirmative defenses. See, e.g., Michael Delikat, *Legal Issues In the Defense of Sexual Harassment*, 727 PLI/LIT 231 (2005); Michael Faillace, *Training Your Employees and Managers on Employment Discrimination: A Risk Prevention Strategy*, 188 PLI/CRIM 443 (2001); Willis Goldsmith, *Employment Compliance Programs, Audits and Investigations*, 746 PLI/LIT 651 (2006); Debra Morway & Melissa C. Rodriguez, *Damages Under Federal and New York Employment Statutes*, 782 PLI/LIT 119 (2008); Wayne Outten et al., *Practice Pointers on Opposing the Affirmative Defense that the Employer Took Reasonable Steps To Prevent Sexual Harassment*, 656 PLI/LIT 187 (2001); Theodore O. Rogers, Jr. & Gary Trachten, *Damages in Employment Law*, 727 PLI/LIT 539 (2005).

18. See *infra* Part I.

it causes lawsuits and disharmony) risk fear and backlash but are unlikely to yield productive employee effort or the co-worker understanding and empathy that lessen bias.<sup>19</sup>

- (3) *Employee Duties*: Only upon specific evidence of retaliation do courts excuse harassed employees from complaining internally. Yet research findings show why harassed employees may not complain: (a) endowment effects and loss aversion explain reluctance to upset even a bad status quo (a job with harassment), because the risk of loss (retaliation) outweighs the prospect of gain (ending harassment); (b) salience and availability biases heighten that fear; and (c) learned helplessness can make harassment victims unable to complain.<sup>20</sup>

It is particularly surprising that behavioral economics has not been applied to these employment law issues. Behavioral economics has proven popular in the “is there inefficient discrimination?” debate<sup>21</sup> and has helped illuminate similar questions in other areas of law economists more regularly analyze, such as compensation for private property “takings”<sup>22</sup> and the reasonableness of tort victim behavior.<sup>23</sup> This major gap in the scholarship probably traces to a disconnect between those with practical knowledge of Title VII litigation (practicing lawyers and some litigation scholars) and those with knowledge about behavioral economics and happiness research (economists and law professors steeped in economic theory). This Article seeks to bridge this gap, which has left employment doctrine

19. See *infra* Part II.B.

20. See *infra* Part II.A.

21. See, e.g., Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 207-08 (1998) (noting how behavioral biases can yield disability discrimination).

22. For an argument that the endowment effect justifies higher compensation than “market value” in the context of government takings of real estate, see, for example, Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1533-34 (1998).

23. For criticism that the traditional conception of the tort law “reasonable person” assumes an unrealistic ability to process information accurately and without vulnerability to manipulation, see, for example, Hanson & Kysar, *supra* note 3, at 634-35.

flawed because of its unawareness of recent social science theories and findings.

In sum, this Article suggests that based on behavioral and happiness findings, courts should do the following: (1) reform employment damages rules to provide greater damages for terminated long-term employees, which judges could do under the existing statutory scheme and case law; (2) cast a more critical eye upon employer antidiscrimination programs that foster not positive but negative emotions; and (3) cast a more understanding eye upon whether employees complain internally about harassment, given their understandable but underappreciated reluctance to risk retaliation. This Article then discusses what those specific analyses of employment law say about three broader, more theoretical questions about what behavioral and happiness research have done, for good or for ill, to the project of economic analysis of law.

First, have behavioral and happiness modifications to the old “rational actor” model rendered economics too indeterminate to be useful? This Article’s employment law diagnoses are examples of how economics still can provide useful analyses and prescriptions. But they also are examples of how conclusions reachable with behavioral- and happiness-infused economics are likely narrower—for example, improving individual, “micro-level” determinations like damages and reasonableness of party behavior—than many past economic analyses on “macro” questions, like whether the whole of Title VII is “efficient.”<sup>24</sup>

Second, with social science-based economic analysis more often prescribing regulation of free markets (such as employment laws modifying employment at will), when do paternalistic regulations help enough to be worth the transaction costs and incentive distortions? Admittedly, this Article’s proposals yield more complex, transaction-costly rules, but regulation is more worth the cost in higher-stakes, less-repeated transactions like employment (or housing, mortgages, and so on) than in lower-stakes, often-repeated transactions like consumer purchases. This Article thus differs from legal scholarship that sees behavioral economics as justifying regulating transactions both minor and major.<sup>25</sup>

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24. See *infra* Part III.A.

25. See *infra* Part III.B.

Third, with behavioral and happiness research undercutting prior economic models, should courts rely on this newer social science, or instead decline to rely on social science at all, because each research finding displaces prior ones? This Article's replacement of the old with the new is a cautionary tale about relying upon social science, especially current findings that have not stood the test of time. Yet courts have no choice but to decide what damages make an employee whole, and what employee behavior is "reasonable," so they cannot avoid using *some* conception of employee well-being and cognition. Even imperfect new social science beats relying on disproven, too-narrow "rationality" assumptions.<sup>26</sup>

This Article thus offers a half-full/half-empty assessment of the usefulness of behavioral and happiness research. It sounds a cautionary note that social science cannot often assess broad policies, but that it can improve decision making by judges, administrative bodies, firms, and individuals. A premise of this Article—that employment law ignores important research findings—is that social science insights have been too slow to penetrate into noneconomic scholarship and courts' decision making. The lag between academic insight and real-world implementation can be long, at least for applying deep theory to practical matters like damages and litigation defenses. Pessimists may despair that academic knowledge fails to improve the real world, but eventually critiques get loud enough to force courts and policymakers to listen.

## I. "MAKE-WHOLE" RELIEF: COMPENSATING NOT JUST MONETARY LOSS, BUT ENDOWMENT LOSS AND HAPPINESS LOSS

### A. *How Relief Is Limited Primarily to Economic Loss in Employment Discrimination Cases*

In employment lawsuits alleging unlawful loss of a job, courts aim to award relief that "make[s] persons whole for injuries suffered"<sup>27</sup>—a concept that, to courts, primarily means awarding plaintiffs economic damages in the amount of the pay they lost<sup>28</sup> plus their

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26. See *infra* Part III.C.

27. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

28. *Id.* (holding that awarding lost pay is presumptively appropriate because "the purpose of Title VII [is] to make persons whole for injuries ... [from] discrimination"); *Geller v.*

attorney's fees.<sup>29</sup> Under Title VII as originally written, this "make-whole" relief was limited to compensating "injuries of an economic character," not emotional or physical injury.<sup>30</sup> Since 1991, plaintiffs in most discrimination cases (race, sex, religion, and national origin discrimination under Title VII, as well as disability discrimination under the Americans with Disabilities Act) also can recover compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses"<sup>31</sup> and punitive damages for violations committed "with malice or with reckless indifference to [plaintiff's] federally protected rights."<sup>32</sup>

Even under employment statutes allowing noneconomic damages, economic damages remain the main form of relief because emotional distress and punitive damages are limited. In Title VII and Americans with Disabilities Act claims, the total of compensatory (emotional distress) and punitive damages faces a statutory cap of \$50,000-\$300,000 (based on employer size).<sup>33</sup> For other claims, punitive and emotional distress damages are entirely unavailable, including claims brought under the Age Discrimination in Employ-

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Markham, 635 F.2d 1027, 1036 (2d Cir. 1980) (holding similarly in age discrimination case that, because courts should award "make-whole" relief to wronged plaintiffs, "the district court ... [should] award pension rights to plaintiff" in addition to back pay).

29. 42 U.S.C. § 1988(b) (2006).

30. *Albemarle Paper Co.*, 422 U.S. at 418 ("Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination.").

31. 42 U.S.C. § 1981A(b)(3) (2006).

32. *Id.* § 1981A(b)(1).

33. *Id.* § 1981A(b)(3). Some plaintiffs can sue under statutes without a damages cap, such as 42 U.S.C. § 1981 for race discrimination claims, which allows uncapped emotional distress and punitive damages. *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 910 (9th Cir. 1999). Some state and local laws also allow uncapped emotional distress and/or punitive damages. *See, e.g.*, *Thoreson v. Penthouse Int'l, Ltd.*, 606 N.E.2d 1369 (N.Y. 1992), *aff'g* 563 N.Y.S.2d 968 (N.Y. Sup. Ct. 1990) (allowing uncapped emotional distress damages, but no punitive damages, under New York law); N.Y.C. Admin. Code § 8-502(a) (2008) (providing uncapped emotional distress and punitive damages under New York City law). However, the federal damages cap remains for most cases: Section 1981 covers only race claims, and state laws vary in effectiveness, yielding a "potluck" characteristic of state statutory schemes." Joseph J. Shelton, *In the Wake of Garrett: State Law Alternatives to the Americans with Disabilities Act*, 52 CATH. U. L. REV. 837, 851 (2003); *see* Brent W. Landau, Note, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 189-194 (2002) (deeming various state employment laws "insufficient" because some disallow jury trials, allow lesser relief, or cover fewer groups or disabilities).

ment Act,<sup>34</sup> the National Labor Relations Act (as to antiunion practices),<sup>35</sup> and many state whistleblower laws.<sup>36</sup>

### 1. *The Limited Prospect of Punitive Damages*

Punitive damages are limited in two ways. First, by statute, punitive damages are available for employment discrimination only when the employer acted “with malice or with reckless indifference” to employees’ antidiscrimination rights.<sup>37</sup> This means, under *Kolstad v. American Dental Ass’n*,<sup>38</sup> that punitive damages are unavailable if the employer proves that the discriminatory act of its manager or agent was contrary to the employer’s good faith antidiscrimination efforts.<sup>39</sup> Employers thereby can avoid punitive damages for proven discrimination as long as they show the basic range of garden-variety antidiscrimination policies that any reputable company’s human resources would administer—mainly a policy against discrimination, an internal complaint procedure, and diversity/discrimination training.<sup>40</sup>

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34. 29 U.S.C. § 626(b) (2006) (listing forms of relief under ADEA); see *Comm’r v. Schleier*, 515 U.S. 323, 325-26 (1995) (noting that ADEA allows no emotional distress or punitive damages, only liquidated damages that can double the economic damages).

35. 29 U.S.C. § 160(c) (2006); see *Albemarle Paper Co.*, 422 U.S. at 419-20 (“The [Title VII] backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, ‘(m)aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy’ .... [T]he [National Labor Relations] Board, since its inception, has awarded backpay as a matter of course ... and not merely where employer violations are peculiarly deliberate, egregious, or inexcusable.” (citations omitted)).

36. Such state laws provide widely varied relief. See, e.g., MICH. COMP. LAWS ANN. § 15.363(1), (3) (West 2009) (providing emotional distress damages, but not punitive damages, under Michigan Whistleblowers’ Protection Act); N.J. STAT. ANN. § 34:19-5 (West 2009) (providing emotional distress and punitive damages under New Jersey Conscientious Employee Protection Act); N.Y. LAB. LAW § 740(5) (McKinney 2008) (providing only back pay, not emotional distress or punitive damages, under New York Whistleblower Law).

37. 42 U.S.C. § 1981A(b)(1) (2006).

38. 527 U.S. 526 (1999).

39. *Id.* at 544.

40. See, e.g., *Bryant v. Aiken Reg’l Med. Ctr.*, 333 F.3d 536, 548-49 (4th Cir. 2003) (holding *Kolstad* defense satisfied by employer’s “organization-wide Equal Employment Opportunity Policy,” which barred discrimination and instituted (1) a grievance policy encouraging employees to report discrimination or harassment, (2) a diversity program of classes and group exercises, and (3) a tracking of employee demographics by department); *Cooke v. Stefani Mgmt. Servs.*, 250 F.3d 564, 568-69 (7th Cir. 2001) (holding *Kolstad* defense satisfied by employer program of promulgating a harassment policy, holding a seminar on harassment



Second, in *any* case allowing punitive damages (that is, not just employment cases), the Due Process Clause imposes constitutional limits on the size of the awards. Punitive damages cannot be too many times greater than a plaintiff's actual damages,<sup>41</sup> and in employment cases in particular, absent exceptional circumstances, the limit may be four or five times actual damages.<sup>42</sup>

In sum, punitive damages awards, especially large ones, are rare.<sup>43</sup> They are unavailable entirely for many claim types (by

for managers, and mounting an antiharassment poster, and rejecting employee's counter argument that the internal complaint policy lacked a "bypass" provision, only allowing for reporting to an employee's managers). *But see* Swinton v. Potomac Corp., 270 F.3d 794, 810-11 (9th Cir. 2001) (collecting cases explaining circumstances when employer cannot establish *Kolstad* defense: "the inaction of ... supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment.... [I]t is insufficient for an employer simply to have in place antiharassment policies; it must also implement them.").

41. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (establishing that Due Process Clause limits punitive damages awards); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 418 (2003) (limiting punitive damages based on "three guideposts: (1) the degree of reprehensibility ... (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages ... and the civil penalties authorized or imposed in comparable cases"). The most specific guidance comes from *State Farm*:

[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process .... [R]atios greater ... may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.... [A] higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm ... [is] difficult to determine .... [H]owever[,] [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.

*Id.* at 425.

42. "Decisions involving discrimination claims ... have generally approved ratios of less than 5:1" between punitive and actual damages. *Chopra v. Gen. Elec. Co.*, 527 F. Supp. 2d 230, 246 (D. Conn. 2007) (reducing punitive award from 10 to 4.3 times actual damages); *see, e.g., Parrish v. Sollecito*, 280 F. Supp. 2d 145, 162-64 (S.D.N.Y. 2003) (reducing punitive award from \$500,000 to \$50,000 where actual damages were \$15,000. "[A] punitive award significantly above the \$50,000 ... would reach broadly across the divide between an appropriate award and an unconstitutional penalty .... '[A]n award of more than four times the amount of compensatory damages might be close to the line.'" (quoting *State Farm*, 538 U.S. at 425) (emphasis added). *Parrish* featured "reprehensible" harassment exploiting the plaintiffs' "vulnerable economic position," but several factors limited award size—factors applicable to most employment cases, "There was no violence or threat.... The actual harm ... was economic, not physical .... [T]he record does not demonstrate that Parrish was financially vulnerable to the point of being deprived of food, shelter or basic necessities." *Id.* at 163.

43. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 635 (1997) (noting that punitive damages are awarded in less than 10 percent of jury

statute or common law); even when allowed, they cannot be awarded except upon certain showings (under *Kolstad*); even when awarded, they are limited in size (under Due Process). Punitive damages thus are not a significant factor in employment claims.<sup>44</sup>

## 2. *The Limited Prospect of Emotional Distress Damages*

Emotional distress damages likewise are limited by the case law. Without a professional diagnosis that the illegal behavior caused the plaintiff a specific psychiatric impairment, courts typically limit emotional distress damages to four figures or low five figures.<sup>45</sup> A plaintiff can win more upon showing either a professional diagnosis or personal evidence, typically corroborated by others, of impaired psychological or physical well-being that had a significant quality-of-life impact.<sup>46</sup> Yet most higher awards are based upon actual

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trials).

44. See Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 514 (1998) ("Any reform that reduces the frequency and size of punitive awards or drives down the settlement value of punitive claims would tend to reduce (for good or ill) their impact on defendants.").

45. See, e.g., *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809 (5th Cir. 1996) (upholding \$7,500 award on Title VII hostile work environment sexual harassment claim in which supervisor made numerous comments on plaintiff's sexual activities and personal life, and plaintiff (with corroboration from co-worker) testified that she felt stressed, embarrassed, belittled, disgusted, hopeless, and stupid); *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498 (1st Cir. 1996) (\$2,500 in damages for sexual harassment); *Cowan v. Prudential Ins. Co. of Am.*, 852 F.2d 688 (2d Cir. 1988) (awarding, on § 1981 race discrimination claim, \$15,000 in compensatory damages, and rejecting plaintiff's argument for more, on claim of emotional distress and humiliation from employer's failure to promote him, when plaintiff did not face public humiliation and did not seek counseling).

46. See, e.g., *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349 (8th Cir. 1997) (reducing award from \$150,000 to \$50,000 when plaintiff presented evidence of emotional hurt plus headaches, ulcer-like symptoms, and withdrawal from his wife as a result of a racially hostile work environment); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997) (upholding \$100,000 award on claim of discriminatory denial of promotion and retaliation: where "[plaintiff], his wife and his son testified about the anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation he suffered[,] ... medical or other expert evidence was not required to prove emotional distress"); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215-16 (6th Cir. 1996) (upholding award of \$50,000 for plaintiff terminated for contemplating an abortion, when witnesses testified plaintiff was upset and frightened after termination, and where plaintiff testified she suffered nightmares, weight loss during pregnancy, and nervousness: "plaintiffs can prove emotional injury by testimony without medical support.... However, damages for mental and emotional distress will not be presumed, and must be proven by 'competent evidence.'"); *Ramsey v. Am. Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985) (reducing award, on § 1981 race discrimination claim, from \$75,000 to

professional diagnoses (not just laypersons' testimony), plus evidence of severe impact on the plaintiff.<sup>47</sup>

The best evidence that emotional distress awards tend to be low absent professional medical evidence is that plaintiffs often *waive* such damages to avoid intrusive discovery. A plaintiff may waive any right to claim specific, substantial emotional distress, instead claiming only modest, "garden-variety" emotional distress damages, in order to prevent the defendant from obtaining intrusive discovery such as a psychological exam of the plaintiff or discovery of plaintiff's otherwise private psychological records.<sup>48</sup>

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\$35,000, even though evidence showed plaintiff suffered mental anguish and humiliation, because no medical evidence showed treatment for depression or emotional distress).

47. *See, e.g.*, *E.E.O.C. v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790 (8th Cir. 2007) (upholding award of \$100,000 for emotional damages to a wheelchair-using employee with a rare bone condition, commonly known as brittle bone disease, terminated for excessive tardiness, when the tardiness was caused by a lack of adequate handicap parking and workspaces, and the disability could have been reasonably accommodated by extending the employee's lunch break just fifteen minutes); *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002) (reducing \$300,000 award to \$150,000, when evidence showed that plaintiff suffered high levels of paranoia about further retaliation by superiors, deteriorating relations with his family, and numerous physician visits).

48. *Compare Sabree v. United Bhd. of Carpenters & Joiners*, 126 F.R.D. 422, 426 (D. Mass. 1989) (disallowing defendant discovery of plaintiff's psychotherapy records because plaintiff, by claiming only limited emotional distress damages, avoided placing his mental condition at issue: "Sabree has not placed his mental condition at issue. Sabree makes a 'garden-variety' claim of emotional distress, not a claim of psychological injury or psychiatric disorder resulting from the alleged discrimination."), *with Doe v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D. Cal. 1999) (allowing discovery into plaintiff's psychotherapy: plaintiff claimed more than modest emotional distress damages so "Defendants must be free to test the ... contention that she is emotionally upset because of the defendants' conduct"). *See also Gatsas v. Manchester Sch. Dist.*, No. 05-CV-315, 2006 WL 1424417, at \*1 (D.N.H. May 17, 2006) ("Defendant moves to compel production of plaintiff's psychological records ... and for a [psychological] examination.... If plaintiff clearly waives all but garden variety mental anguish then the motion should be denied.... I therefore deny the motion but without prejudice to renew if plaintiff does not make a written waiver.").

### *3. The Lack of Distinction Between Hiring Discrimination Damages and Termination Discrimination Damages*

#### *a. Back and Front Pay Calculations: Formulaic, but with Uncertain Length of Pay Continuation*

Compensating economic loss in an employment claim, especially ongoing future losses, is a formulaic task for the judge in one respect,<sup>49</sup> but an arbitrary task in another respect. The award is formulaic in that the basic annual loss is easily calculable, but arbitrary as to *how many years* of annual damages to award the plaintiff, an arbitrariness apparent in the following typical fact pattern.

Assume a worker is fired from a \$50,000 job in early 2009, then is unemployed for a year, but then lands a \$40,000 job in early 2010. Assume that she sues in early 2010 (after satisfying all pre-suit administrative requirements), presses the case through discovery and motion practice for two years, and wins a verdict in early 2012. She typically would win her lost pay, both “back pay” (covering the period from termination to verdict) and “front pay” (from the verdict date into the future).<sup>50</sup> Back pay of one year of her \$50,000 lost pay

49. Under Title VII and most other statutes, the judge, not jury, makes front pay awards. *See, e.g.,* *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 157 (2d Cir. 2001) (“Because back pay and front pay have historically been recognized as equitable relief ... , neither party was entitled to a jury trial.”); *McCue v. Kan. Dep’t of Human Res.*, 165 F.3d 784, 791 (10th Cir. 1999) (holding that judge, not jury, determines front pay); *accord Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 423 n.19 (5th Cir. 1998); *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 613 (8th Cir. 1997); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141-42 (7th Cir. 1994); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991).

50. *See Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995) (noting that back pay runs until verdict date, followed by reinstatement or front pay for ongoing losses); *Shore v. Fed. Express Corp.*, 777 F.2d 1155, 1158 (6th Cir. 1985) (“The back pay award is limited by the date [of] judgment.... Front pay is therefore simply compensation for the post-judgment effects.”).

Front pay need not be calculated when a court instead orders the plaintiff reinstated. Although

it is a bedrock principle of discrimination law that reinstatement is the preferred remedy[,] [and] [f]ront pay is described as simply a substitute for reinstatement, ... the notion that reinstatement is the preferred remedy is nothing but a legal fiction. Neither the employee nor the employer, at the end of litigation over employment discrimination, ‘prefers’ reinstatement, and courts rarely require it.

Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of “After-Acquired Evidence,”*

(the year she was unemployed) plus two years of the \$10,000 annual pay gap between her current job and the job she lost, and front pay of her \$10,000 pay gap per year, all are awarded as a “lump sum” at the time of the verdict.<sup>51</sup>

The formula gets murky because one of the key variables—the number of years of pay continuation—is chosen at worst arbitrarily, and at best by “intelligent guesswork” and calculations that “cannot be totally accurate because they are prospective and necessarily speculative.”<sup>52</sup> Courts base their front pay duration “guesswork” on many factors, but as discussed immediately below,<sup>53</sup> those factors do not include whether the plaintiff brought a *termination* claim (that is, loss of a job she *had been holding*) or a *hiring* claim (that is, loss of a job she had *applied for, without ever holding* the job)—which is a critical distinction, as discussed later.<sup>54</sup>

40 ARIZ. ST. L.J. 401, 437-38 (2008) (citations omitted); *see also* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 595 n.71 (1999) (citing studies “that few employees accept reinstatement if it is offered, and those who do are often discharged or leave quickly”). Courts commonly award front pay by finding reinstatement not appropriate for any number of reasons: “where the plaintiff has found other work,” *Arban v. West Pub. Corp.*, 345 F.3d 390, 406 (6th Cir. 2003) (citation omitted); where the employer does not have a position open, *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); where after discrimination and litigation “the employer-employee relationship ... [is] irreparably damaged by animosity,” *id.*; where reinstatement would displace another employee, *Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003, 1010 (N.D. Iowa 1998); or where any other factors make reinstatement impractical or less desirable than a simple front pay award, *id.* (collecting cases listing varied factors).

Reinstatement is more common in union-administered grievance proceedings, likely because a union strong enough to press a grievance makes reinstatement to a hostile employer more feasible. Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 920 (1994) (documenting that without union protection, reinstatement works badly due to employer hostility). This Article does not oppose reinstatement when feasible; it just focuses on the substantial body of cases in which reinstatement is, for good or ill, uncommon.

51. *Downes*, 41 F.3d at 1141 n.8 (noting that although “front pay” compensates ongoing losses, courts award it “as ‘a lump sum ... representing the discounted present value of the difference between the earnings [plaintiff] would have received in his old employment and the earnings he can be expected to receive in his present and future ... employment.’” (citations omitted)).

52. *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 870 (5th Cir. 1991) (citations omitted); *see also* *Shore v. Fed. Express Corp.*, 42 F.3d 373, 378 (6th Cir. 1994) (“[B]ecause future damages are often speculative, flexibility and wide discretion are especially important.” (quoting *Fite v. First Tenn. Prod. Credit Ass’n*, 861 F.2d 884, 893 (6th Cir. 1988))).

53. *See infra* Part I.A.3.b.

54. *See infra* Part I.B.

*b. Factors Determining Duration of Front and Back Pay—Which Do Not Distinguish Hiring from Termination*

Courts provide lengthy and varied, but ultimately similar, lists of the factors relevant to front pay duration. One court, surveying the case law, compiled the following fairly comprehensive list of factors:

- (1) the plaintiff's age;
- (2) the length of time the plaintiff was employed by the defendant employer;
- (3) the likelihood the employment would have continued absent the discrimination;
- (4) the length of time it will take the plaintiff, using reasonable effort, to secure comparable employment;
- (5) the plaintiff's work and life expectancy;
- (6) the plaintiff's status as an at-will-employee;
- (7) the length of time other employees typically held the position lost;
- (8) the plaintiff's ability to work;
- (9) the plaintiff's ability to work for the defendant-employer;
- (10) the employee's efforts to mitigate damages; and
- (11) the amount of any liquidated or punitive damage award.<sup>55</sup>

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55. *Ogden*, 29 F. Supp. 2d at 1015 ("Of course this list is not all-inclusive.") (collecting cases) (citations omitted); see *McInnis v. Fairfield Cmty., Inc.*, 458 F.3d 1129, 1146 (10th Cir. 2006) (listing factors such as "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which the plaintiff may become reemployed with reasonable efforts, and methods to discount any award to net present value" (quoting *Whittington v. Nordham Group, Inc.*, 429 F.3d 986, 1000-01 (10th Cir. 2005))); *Arban*, 345 F.3d at 406 (listing factors such as "[the] employee's duty to mitigate, the availability of employment opportunities, the period within which one by reasonable efforts may be reemployed, the employee's work and life expectancy, ... the present value of future damages and other factors") (citations omitted); *Barbour*, 48 F.3d at 1280 (noting that factors "include, but are not necessarily limited to [plaintiff] Barbour's age ... [and] intention to remain at [defendant employer] until retirement ... ; the length of time [employees] ... typically held that position; how long Rich [the person hired instead of plaintiff] held that position; the length of time persons in similar positions at other companies generally hold those positions; Barbour's efforts at mitigation (including ... job market and industry conditions, as well as the amount of time reasonably required for Barbour to secure comparable employment); and ... [evidence supporting defendant's] claim that Barbour would not have remained ... until his retirement"); *Reneau*, 945 F.2d at 871 (listing the "length of prior employment, the permanency of the position held, the nature of work, the age and physical condition of the employee, possible consolidation of jobs and the myriad other nondiscriminatory factors which could validly affect the ... post-discharge employment

The list of front pay factors does include duration of employment (#2)—but not as a way to estimate the psychological, endowment, or happiness loss that a termination caused. Rather, this and most other front pay factors aim to estimate (1) *how many more years the plaintiff would have spent* at that job, but for the employer's discrimination (factors 1-3 and 5-9 above), as well as (2) whether, because of other wages or compensation the plaintiff may earn, an award of less than full pay continuation would suffice as full relief (factors 4, 10, and 11).

The one case expressly noting a difference between the impact of not being hired and the impact of being terminated is, oddly, not even a Title VII case. In a Fourteenth Amendment Equal Protection decision about government affirmative action, the Supreme Court in *Wygant v. Jackson Board of Education*<sup>56</sup> rejected an affirmative action plan that gave members of racial minorities more protection against layoffs than their seniority levels warranted.<sup>57</sup> The Court distinguished affirmative action racial preferences in *hiring* from such preferences in *layoffs*, because being terminated has a greater impact than not being hired:

[H]iring goals ... simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.... While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in the serious disruption of their lives.<sup>58</sup>

While aptly noting a distinction between termination and nonhiring, *Wygant* has not established any such distinction in the Title VII damages jurisprudence.<sup>59</sup> More broadly, *Wygant* does not quite note that termination imposes a greater risk of *endowment* and *happiness* loss than nonhiring. In focusing on how nonhiring

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relationship as factors").

56. 476 U.S. 267 (1986).

57. *Id.* at 283-84 (plurality opinion of Powell, J.).

58. *Id.* at 282-83.

59. We are aware of no cases drawing that distinction, and no relevant cases arose in a fairly broad Westlaw search of cases citing *Wygant* that contained the following terms: (*terminat! fire! firing*) /s (*hire! hiring*) /s (*damages relief "front pay" "back pay"*).

“often foreclos[es] only one of several opportunities,” *Wygant* seems to be saying that nonhiring is less likely to result in *economic (income) loss*: the nonhired often pursue “several [job] opportunities” simultaneously, so losing just one job possibility is less certain to cause income loss than termination is.<sup>60</sup>

In short, *Wygant* was insightful as to the hiring/termination distinction, but it did not, as this Article does, note how termination and nonhiring inflict different *nonmonetary* losses. It also did not advocate any *damages* distinction between termination and nonhiring. Additionally, its hiring-versus-termination insight has gone unfortunately unnoticed in the ensuing decades of Title VII jurisprudence. Thus, the cases on employment damages draw no distinction between the losses due to an unlawful failure to hire and an unlawful termination, much less between unlawful terminations of short- and long-term employees.<sup>61</sup>

### *B. Why Relief for Termination Presumptively Should Exceed Economic Loss: Endowment Value and Happiness Impact*

For two reasons, it is inadequate for employment damages in termination claims, as distinct from hiring claims, to be based presumptively on economic loss, with little or no additional award. First, due to the endowment effect, someone *terminated from an existing job* often suffers greater loss than someone merely *not hired*

60. Other passages of *Wygant* are cryptic as to whether they focus on income or other harms; in noting that terminated employees are more likely to suffer “serious disruption of their lives,” *Wygant* may have meant disruption due to income loss, due to traditionally compensable emotional distress, or due to something like endowment or happiness loss. *Id.* at 283.

61. Courts do tend to award more in age discrimination cases, which (because they feature older workers) tend to involve terminated longer-term employees, but that does not mean longer-tenured plaintiffs are receiving compensation for their greater psychological loss, because the federal age discrimination statute does not allow emotional distress damages at all. See 29 U.S.C. § 216(b) (2006). Thus, age discrimination damages cover only lost wages, and “[s]ome of the higher wages recouped by older employees are undoubtedly attributable to job-specific skills.” Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1786-87 (1996). In sum, some age discrimination plaintiffs recover more damages because their longer tenure yields higher *economic* (not endowment or happiness) losses. Firm-specific human capital is destroyed by terminations of longer-term employees who cannot find similarly high-paid work elsewhere. See *infra* note 177 (on *Padilla* and other cases awarding lengthy front pay when workers with job- or firm-specific skills cannot find similarly paid work).



into a new job.<sup>62</sup> Second, studies show that unemployment causes a long-term loss of happiness, so firing a worker typically causes greater harm than not hiring someone who held another job or already was unemployed through no fault of the discriminatory employer.<sup>63</sup> For both of these reasons, the damages to make whole a terminated employee (especially a long-term employee) are greater than those needed to make whole an individual not hired into a new job.<sup>64</sup>

*1. Strong Evidence, but Still-Heated Debate, over Existence and Extent of an Endowment Effect*

Whether an “endowment effect” exists in employment depends on whether endowment effects exist at all—a topic of heated scholarly debate. Traditional rational-actor economics “assumes that the value of an entitlement to an individual is independent of ... [whether] she presently owns” that entitlement.<sup>65</sup> Under that view, “[a]n individual may prefer to own either a house in the city or a house in the country, but the location of the house that she presently owns should not affect her preference.”<sup>66</sup> Yet a “robust body of social science scholarship” disproves that assumption, Professor Russell Korobkin notes:<sup>67</sup>

[P]eople tend to value goods more when they own them than when they do not. Move a person from a city house to a country house and ... he is quite likely to prefer the country house more than he did when he resided in the city ... [T]he “status quo bias” ... is often used interchangeably ... but actually has a slightly broader connotation: individuals tend to prefer the present state of the world to alternative states, all other things being equal.<sup>68</sup>

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62. See *infra* Part I.B.2.

63. See *infra* Part I.B.3.

64. See *infra* Part I.C.

65. Korobkin, *supra* note 3, at 1228.

66. *Id.*

67. *Id.*

68. *Id.* at 1228-29 (citations omitted).

“[A] broad array of experiments ... demonstrates that the [endowment] effect is robust across different types of endowments,” Korobkin recounts.<sup>69</sup> One experiment gave half the subjects coffee mugs and then offered to trade a large Swiss chocolate bar for the mug; the other half received the chocolate and were allowed to trade for the mug.<sup>70</sup> The assignments were arbitrary, so traditional rationality sees no reason those given a mug would like mugs better than those given chocolate, or vice-versa, so one would expect similar preferences among each group. That is, if X percent of subjects preferred the mug to the chocolate, that percentage should be identical in both groups. To the contrary, 90 percent of those given chocolate preferred to keep it rather than trade it for a mug, and almost 90 percent of those given mugs preferred to keep it rather than trade it for chocolate.<sup>71</sup>

Experiments that ask subjects to *price* goods find a roughly two-to-one “offer-asking gap,” ... demand[ing] a higher price to sell a good that they possess than they would pay for the same good if they did not possess it at present.”<sup>72</sup> The most famous experiment “provided one-half of their subjects with a coffee mug bearing the Cornell University logo ... [and] told the subjects who received the mug that they would have an opportunity to sell it, and ... [gave] the remainder of subjects ... an opportunity to purchase one of the mugs.”<sup>73</sup> Traditional rationality “predicts that eleven [of twenty-two possible] mug trades would take place (50 percent) because there is only a 50 percent chance that any seller would value a mug more than would any buyer.”<sup>74</sup> Yet only one to four trades occurred, because sellers’ asking prices exceeded buyers’ offers; the same occurred in experiments involving pens. All yielded a similar two-to-one ratio between sellers’ willingness to accept (WTA) and buyers’ willingness to pay (WTP).<sup>75</sup> The only well-documented exceptions are goods with objective values, such as a token or chip redeemable

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69. *Id.* at 1235.

70. *Id.* at 1233 (citing Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989)).

71. *Id.*

72. *Id.* at 1228.

73. *Id.* at 1234 (citing Kahneman, *infra* note 76).

74. *Id.*

75. *Id.* (“[Mug] buyers provided a median WTP [willingness to pay] of \$2.25 to \$2.75, and sellers provided a median WTA [willingness to accept] of \$5.25 each time.”).

for a cash sum, because whether one owns it or not, everyone agrees that (for example) a \$10 chip and a \$10 bill have equal value.<sup>76</sup>

Theorized sources of the endowment effect have varied. Initially it was depicted as an anomaly, an asymmetry in valuation.<sup>77</sup> More recently, based upon experimental findings that *chimpanzees and monkeys* display endowment effects, it has been depicted as an evolutionary biological fact.<sup>78</sup> Other proposed mechanisms are cognitive focus during evaluation and emotional attachments,<sup>79</sup> and preferences that depend on rationally expected reference points.<sup>80</sup> Further showing an innate aspect to endowment effects are neuroeconomic studies finding neural correlates consistent with loss aversion,<sup>81</sup> and other experimental findings that even large increases in age and experience do not reduce apparent endowment effects.<sup>82</sup> Related experiments have analyzed the roles in endowment effects of emotions that people either anticipate they will feel in the future or merely incidentally feel in the present (for example, regret about giving up something).<sup>83</sup>

This breadth of evidence does not, however, make the endowment effect uncontroversial, or easy to assume it is present. “[A]lthough

76. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1332 tbl.2 (1990); Eric van Dijk & Daan van Knippenberg, *Buying and Selling Exchange Goods: Loss Aversion and the Endowment Effect*, 17 J. ECON. PSYCHOL. 517 (1996).

77. Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 194.

78. Sarah F. Brosnan et al., *Endowment Effect in Chimpanzees*, 17 CURRENT BIOLOGY 1704 (2008); M. Keith Chen et al., *How Basic Are Behavioral Biases? Evidence from Capuchin Monkey Trading Behavior*, 114 J. POL. ECON. 517 (2006); Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1988 (2008); Venkat Lakshminarayanan et al., *Endowment Effect in Capuchin Monkeys*, 363 PHIL. TRANSACTIONS ROYAL SOC'Y B. 3837 (2008).

79. Nathan Novemsky & Daniel Kahneman, *How Do Intentions Affect Loss Aversion?*, 62 J. MARKETING RES. 139 (2005).

80. Botond Köszegi & Matthew Rabin, *A Model of Reference-Dependent Preferences*, 121 Q.J. ECON. 1133 (2006).

81. George Loewenstein et al., *Neuroeconomics*, 59 ANN. REV. PSYCHOL. 647, 652-55 (2008) (reviewing neuroeconomics literature about loss aversion).

82. William Harbaugh et al., *Are Adults Better Behaved Than Children? Age, Experience, and the Endowment Effect*, 70 ECON. LETTERS 175 (2001).

83. Jennifer S. Lerner et al., *Heart Strings and Purse Strings: Carryover Effects of Emotions on Economic Decisions*, 15 PSYCHOL. SCI. 337 (2004); Chien-Huang Lin et al., *The Role of Emotions in the Endowment Effect*, 27 J. ECON. PSYCHOL. 589 (2006); Ying Zhang & Ayelet Fishbach, *The Role of Anticipated Emotions in the Endowment Effect*, 15 J. CONSUMER PSYCHOL. 316 (2005).

the effect has proven robust across a range of contexts," Korobkin notes, "there is no a priori reason to believe that the effect will be equally pronounced, or even exist at all, in all contexts."<sup>84</sup> The following factors affect the presence or size of the effect:

- *Uncertainty of value.* A prerequisite for the effect is that the good's value must be uncertain (unlike a token redeemable for a fixed sum).<sup>85</sup>
- *Limited information.* "The more difficult it is for individuals to compare two items in a proposed trade, the larger the effect tends to be,"<sup>86</sup> such as when little is known about the goods at issue.<sup>87</sup>
- *Earned assignment.* The effect is larger "when the good is obtained as a result of skill or performance," such as when good work on a task determines who gets the good,<sup>88</sup> "rather than as a result of chance."<sup>89</sup>
- *Lack of market substitutes.* "[T]he endowment effect is more robust for entitlements with no close market substitutes,"<sup>90</sup> like foods better-or worse-screened for pathogens, than for goods with well-defined markets, like mass-produced candy bars;<sup>91</sup> a survey of dozens of studies found the endowment effect "highest for public and non-market goods, next highest for ordinary private goods, and lowest for ... money."<sup>92</sup>
- *The irrelevance of legal "entitlement."* The endowment effect even applies to things there is no legal entitlement to continue enjoying (for example, high levels of customer

84. Korobkin, *supra* note 3, at 1241.

85. *Id.* at 1237.

86. *Id.*

87. Eric van Dijk & Daan van Knippenberg, *Trading Wine: On the Endowment Effect, Loss Aversion, and the Comparability of Consumer Goods*, 19 J. ECON. PSYCHOL. 485 (1998).

88. Korobkin, *supra* note 3, at 1236; see George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 J. BEHAV. DECISION MAKING 157, 161-64 (1994) (finding 30 percent higher valuation by those told they received a mug due to their high performance, compared to those told they received it randomly).

89. Korobkin, *supra* note 3, at 1236.

90. *Id.* at 1238.

91. Jason F. Shogren et al., *Resolving Differences in Willingness To Pay and Willingness To Accept*, 84 AM. ECON. REV. 255, 259-64 (1994).

92. John K. Horowitz & Kenneth E. McConnell, *A Review of WTA/WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 427 (2002).

service),<sup>93</sup> so what matters is possession or enjoyment, not formal ownership or rights to continued enjoyment.<sup>94</sup>

A stronger note of caution comes from Professors Charles Plott and Kathryn Zeiler, the most prominent dissenters to the view that an “endowment effect” explains differences between willingness to pay and willingness to accept.<sup>95</sup> Plott and Zeiler note that no endowment effect appeared in certain studies that either gave subjects real monetary incentives (rather than asking what they would do in hypothetical situations) or gave subjects practice rounds or “training” before their trades.<sup>96</sup> To Plott and Zeiler, such studies show that endowment effects “are not reliably observed across experimental designs” and that “experimental procedures might account for the differences.”<sup>97</sup> Plott and Zeiler conclude that while “many broad claims have been made regarding the robustness of the [valuation] gap,” scholars seeing evidence of “endowment effects” are making “an incorrect interpretation of experimental results.”<sup>98</sup>

Korobkin disagrees with Plott and Zeiler. “[T]he weight of the evidence suggests that it is extremely unlikely that the effect is merely an artifact of the experimental methods that demonstrate it,”<sup>99</sup> given the wide range of settings featuring endowment effects.<sup>100</sup> As discussed below,<sup>101</sup> some of the Plott/Zweiler evidence may actually support Korobkin’s view that endowment effects exist, but are context-specific.

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93. Raymond S. Hartman et al., *Consumer Rationality and the Status Quo*, 106 Q.J. ECON. 141, 143-44 (1991).

94. Korobkin, *supra* note 3, at 1235-36.

95. See, e.g., Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007) [hereinafter Plott & Zeiler, *Exchange*]; Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 537 (2005) [hereinafter Plott & Zeiler, *Willingness*].

96. Plott & Zeiler, *Willingness*, *supra* note 95, at 532-34.

97. *Id.* at 542.

98. *Id.* at 531.

99. Korobkin, *supra* note 3, at 1243.

100. *Id.* at 1242-47.

101. See *infra* Part I.B.2.

## *2. Is There an Endowment Effect for Jobs? The Evidence from Experimental Studies*

So is there an endowment effect in jobs? There is some, but little, literature on the point, in part because of the impossibility of good experimental evidence.

Professor Ian Ayres and student Fredrick Vars proposed, based on evidence from laboratory experiments asking questions about hypothetical jobs, that employees have an endowment effect in their jobs, and that this explains courts' mixed responses to affirmative action plans.<sup>102</sup> Professor Samuel Issacharoff also has suggested that there probably is an endowment effect in jobs,<sup>103</sup> and one experiment provides supporting evidence. Having assigned some subjects to a (fictional) higher-paying job and others to a better-working-conditions job, Professors Daniel Kahneman and Amos Tversky found that most declined a chance to trade for the other job,<sup>104</sup> just as mug- and chocolate-owners declined to trade in experiments about physical goods.<sup>105</sup> Professor Zeiler, however, notes that her experimental results with Professor Plott call such evidence into question and suggest that judges' decisions do not suggest an endowment effect in jobs.<sup>106</sup>

Yet any employment experiment is unlikely to be conclusive because it is destined to be hypothetical; experimenters cannot actually wield the power to fire forty individuals from actual jobs, and refuse to hire forty others into jobs they actually want. While

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102. Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1617 & n.139 (1998); Fredrick E. Vars, *Attitudes Toward Affirmative Action: Paradox or Paradigm?*, in RACE VERSUS CLASS: THE NEW AFFIRMATIVE ACTION DEBATE 73 (Carol M. Swain ed., 1996) (applying loss aversion to affirmative action).

103. Issacharoff, *supra* note 61, at 1802 ("The endowment effect would predict that jobholders would value their positions more than would people in an undifferentiated job market. Having a particular job should endow the incumbent ... with a greater attachment to it and give it greater value than would the market at large.").

104. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 348 (1984).

105. See Jack L. Knetsch & J.A. Sinden, *Willingness To Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507 (1984).

106. Kathryn Zeiler, *The Endowment Effect: Implications of Recent Empirical Developments for Legal Theory* 28 (2008) (unpublished manuscript, on file with the author).

data from hypothetical decisions beats no data, a lack of monetary incentive makes subjects less thoughtful about their decisions,<sup>107</sup> especially compared to the sustained thought people give real career decisions. People also often make career decisions based at least in part on such emotional factors and personal reasons as duty, family, and loyalty; such idiosyncratic and path-dependent variables are hard to replicate in experiments.

There are two reasons to believe, however, that there is an endowment effect in employment. First, as discussed below,<sup>108</sup> an independent line of scholarship on happiness shows that job loss imposes a surprisingly substantial and sustained happiness loss, which corroborates the notion that job loss causes substantially more harm than the undisputed economic losses it generates. Second, the body of experimental studies indicates what *sorts* of goods or entitlements yield an endowment, and employment features all the factors that make endowment value present and substantial in size:

- *Uncertain value.* The “value” to an individual of a job is only partly monetary, as known by anyone who has turned down a high-paying job for a more subjectively desirable, less grueling, or more fulfilling job.
- *Limited information.* It is hard to compare one’s job to a new job about which one cannot have full information.<sup>109</sup> Is the workplace culture cooperative or competitive? Is the boss a jerk? How pressured are deadlines? Under what conditions are employees disciplined or fired (a question new hires cannot easily ask for fear of signaling shirking)?<sup>110</sup>

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107. See, e.g., Plott & Zeiler, *Willingness*, *supra* note 95, at 537 (“Lack of incentives can be associated with ... arbitrary behavior ... [A]ttention, thought, and care in understanding instructions depend on ... incentives. If earnings depend on subjects’ decisions, subjects probably are more likely to allocate attention ... during experiments.”).

108. See *infra* Part I.B.3.

109. Issacharoff, *supra* note 61, at 1799 (“[P]arties are inherently handicapped in their capacity to fully explicate the terms of a long-term contractual relationship at the point of hire.”).

110. *Id.* at 1794-95 (“[I]t is extraordinarily difficult for employees to discuss conditions of discharge ... without signaling concern that she may be a laggard.”).

- *Earned assignment.* Employees “earn” jobs in a very real sense, by getting hired over other applicants; similarly, workers get promoted (or just keep jobs) by being better than the employer’s other options.
- *Lack of market substitutes.* There is no real market for exchanging jobs, given that a job is not something an employee can just trade with another employee without going through both employers’ hiring process.
- *Irrelevance of legal “entitlement.”* Most employees are “at will,” with no legal right to the job, but incumbents (though not new hires) have experienced possession and enjoyment of the job, the relevant factor.

Some aspects of the Plott/Zeiler analysis actually support the above pro-“endowment” view. Admittedly, Plott and Zeiler are endowment skeptics who do not see the evidence that way; further, some of the factors they cite that affect endowment value—like implied messages from experimenters that subjects should keep rather than trade goods<sup>111</sup>—support their view that endowment effects “are not reliably observed across experimental designs .... [E]xperimental procedures might account for the differences.”<sup>112</sup> Yet other factors are not so easily dismissed as artificial conditions. For example, studies show endowment effects when only “seller” subjects had a mug to trade, but not when the buyer and seller equally held a mug the seller had the right to sell.<sup>113</sup> To Plott and Zeiler, these studies prove endowments are artifacts of experiment conditions, yet they corroborate a key, real distinction. What generates endowment value is not *formal legal entitlement*, but *actual enjoyment or possession*.<sup>114</sup>

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111.

[S]ignaling theories suggest that experimenter choice of which good to endow might influence choices if subjects interpret the experimenter’s choice as a signal of relative quality .... [A]symmetries of choice unrelated to the value of the goods might occur if subjects feel obliged to avoid rejecting a good perceived as a gift from the experimenter.

Plott & Zeiler, *Exchange*, *supra* note 95, at 1450.

112. Plott & Zeiler, *Willingness*, *supra* note 95, at 542.

113. Plott and Zeiler found no endowment effect in this variation of the mug experiments. “All subjects were handed a mug before the start of the round. Sellers were told that they owned the mug. Buyers were told that they could inspect the mug but they did not own it.” *Id.* at 539.

114. *See supra* notes 93-94 (noting this factor in the presence or absence of endowment



In short, Plott and Zeiler offer an important note of caution: endowment effects may not be as omnipresent as some assert. Employment, however, remains a setting featuring all the factors that yield a substantial endowment effect. Just as Plott and Zeiler do not share a consensus about how to interpret their experimental results,<sup>115</sup> we also respectfully differ over whether existing data supports endowment effects in jobs.

### *3. Happiness Economics Evidence: Job Loss Yields Substantially More Harm than the Income Loss*

While the endowment effect's use in legal scholarship is relatively recent (mostly this decade),<sup>116</sup> a still more recent field of scholarship—happiness economics, more formally the economics of subjective well-being—demonstrates that job loss yields a surprisingly large and durable happiness loss.<sup>117</sup> There is overwhelming empirical evidence that life satisfaction does not adapt to the duration of an unemployment spell,<sup>118</sup> including data from several large-scale national and multinational surveys.<sup>119</sup>

Unemployment has a long-term scarring psychological effect, and having a past experience of unemployment lowers ongoing subjective well-being.<sup>120</sup> For example, one fifteen-year longitudinal study found that, on average, people who suffer unemployment never

effects).

115. Plott & Zeiler, *Willingness*, *supra* note 95, at 542.

116. Law review citations to endowment effects increased fivefold from 2001 to 2003 alone. Korobkin, *supra* note 3, at 1229.

117. See, e.g., FREY, *supra* note 2, at 45-53 (summarizing research); HARING & STORBECK, *supra* note 6, at 28 (same); PETER WARR, *WORK, HAPPINESS, AND UNHAPPINESS* (2007); Andrew E. Clark & Andrew J. Oswald, *Unhappiness and Unemployment*, 104 *ECON. J.* 648 (1994) (finding the unemployed report less happiness and poorer mental health); Andrew J. Oswald, *Happiness and Economic Performance*, 107 *ECON. J.* 1815 (1997); Andrew E. Clark, *Work, Jobs and Well-Being Across the Millennium* (Apr. 2, 2007), <http://www.oecd.org/dataoecd/30/3/38315809.pdf>.

118. Liliana Winkelmann & Rainer Winkelmann, *Why Are the Unemployed So Unhappy? Evidence from Panel Data*, 65 *ECONOMICA* 1 (1998).

119. Andrew E. Clark, *A Note on Unhappiness and Unemployment Duration* (Institute for the Study of Labor (IZA), Discussion Paper No. 2406, 2006), available at <http://ftp.iza.org/dp2406.pdf>.

120. Andrew E. Clark et al., *Scarring: The Psychological Impact of Past Unemployment*, 68 *ECONOMICA* 221 (2001); Wiji Arulamalam et al., *Unemployment Scarring*, 111 *ECON. J.* F577 (2001).

fully returned to their former levels of life satisfaction, *even after becoming re-employed*.<sup>121</sup> Past unemployment scars, two economists have argued, because it increases fears of future unemployment, an insecurity that decreases happiness.<sup>122</sup> This proposed explanation of scarring draws support from empirical findings that even when employed, people during recessions experience fear and upset about the prospect of unemployment, so unemployment rates decrease average happiness even for those still employed.<sup>123</sup>

Unemployment not only is costly in terms of increased unhappiness<sup>124</sup> but also worsens mental and physical health outcomes.<sup>125</sup> The nonmonetary costs of unemployment far exceeded the monetary costs in numerous large-scale studies of various countries,<sup>126</sup> in-

121. Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 PSYCHOL. SCI. 8 (2004).

122. Andreas Knabe & Steffen Rätzel, *Scarring or Scaring? The Psychological Impact of Past Unemployment and Future Unemployment Risk*, (CESIFO, Working Paper No. 2457, 2008), available at <http://ssrn.com/abstract=1299535>.

123. Survey data from a quarter of a million randomly sampled Americans and Europeans from the 1970s to the 1990s in response to questions about self-reported happiness reveal that levels of national unemployment and inflation negatively impact life satisfaction, with a 1 percent increase in the unemployment rate having about twice the effect on unhappiness as a 1 percent increase in the inflation rate. Rafael Di Tella, Robert J. MacCullough & Andrew J. Oswald, *Preferences Over Inflation and Unemployment: Evidence from Surveys of Happiness*, 91 AM. ECON. REV. 335, 340 (2001). Specifically, recessions induce large reductions in subjective well-being above and beyond the drop in national income, and increased unemployment benefits are associated with increased national well-being. Rafael Di Tella, Robert J. MacCullough & Andrew J. Oswald, *The Macroeconomics of Happiness*, 85 REV. ECON. & STAT. 809 (2003). Corroborating evidence comes from data showing that public sector employees, who enjoy greater average job security due to civil service protections and the limited prospect of employer bankruptcy, do not lose as much happiness due to high unemployment rates as private sector employees do. Simon Luechinger et al., *Why Does Unemployment Hurt the Employed? Evidence from the Life Satisfaction Gap between the Public and the Private Sector* (Institute for the Study of Labor (IZA), Discussion Paper No. 3385, 2008), available at <http://ftp.org/dp3385.pdf>.

124. Justin Wolfers, *Is Business Cycle Volatility Costly? Evidence from Surveys of Subjective Well-Being*, 6 INT'L FIN. 1 (2003).

125. Mary P. Merva & Richard Fowles, *Economic Outcomes & Mental Health*, in BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA 69 (Ray F. Marshall ed., 1999); MARY P. MERVA & RICHARD FOWLES, ECONOMIC POLICY INSTITUTE, EFFECTS OF DIMINISHED ECONOMIC OPPORTUNITIES ON SOCIAL STRESS: HEART ATTACKS, STROKES, AND CRIMES (1992), [http://www.epinet.org/page/-/old/briefingpapers/1992\\_bp\\_stress.pdf](http://www.epinet.org/page/-/old/briefingpapers/1992_bp_stress.pdf).

126. Liliana Winkelmann & Rainer Winkelmann, *Unemployment: Where Does It Hurt?*, (Ctr. for Econ. Policy Research, Discussion Paper No. 1093, 1995) (finding that of the total costs of unemployment on well-being, between 85-93 percent are nonmonetary and at most 7-15 percent are monetary costs).

cluding studies based on United States General Social Survey (GSS) data,<sup>127</sup> Britain Household Panel Survey (BHPS) data,<sup>128</sup> Dutch data,<sup>129</sup> German Socio-Economic Panel (GSEP) data,<sup>130</sup> Italian data,<sup>131</sup> Swedish data,<sup>132</sup> and Swiss data.<sup>133</sup> Cross-country studies find similar conclusions for eleven European countries,<sup>134</sup> twenty-three central and Eastern European countries,<sup>135</sup> and youth in twenty-three countries.<sup>136</sup> The effects of unemployment cut across not only nations, but social classes. One study (based on GSEP data) found no evidence that social capital moderates the negative effects of unemployment.<sup>137</sup>

The robust empirical finding that most people fail to adapt emotionally to unemployment is all the more surprising given the overwhelming data that people do adapt to most positive and negative events alike.<sup>138</sup> People underestimate their own capacity for

127. David G. Blanchflower & Andrew J. Oswald, *Well-Being over Time in Britain and the USA*, 88 J. PUBLIC ECON. 1359 (2004).

128. Andrew E. Clark & Andrew J. Oswald, *Unhappiness and Unemployment*, 104 ECON. J. 648 (1994).

129. Isolde Wottiez & Jules Theeuwes, *Well-Being and Labor Market Status*, in THE DISTRIBUTION OF WELFARE AND HOUSEHOLD PRODUCTION: INTERNATIONAL PERSPECTIVES 211 (Stephen P. Jenkins et al., eds. 1998).

130. Knut Gerlach & Gesine Stephan, *A Paper on Unhappiness and Unemployment in Germany*, 52 ECON. LETTERS 325 (1996); Winkelmann & Winkelmann, *supra* note 118.

131. Vincenzo Scoppa & Michela Ponzo, *An Empirical Study of Happiness in Italy*, 8 B.E. J. OF ECON. ANALYSIS & POL., Article 15, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1965&content=bejeap> (“[U]nemployment is extremely bad for subjective well-being.”).

132. Tomas Korpi, *Is Utility Related to Employment Status? Employment, Unemployment, Labor Market Policies and Subjective Well-Being among Swedish Youth*, 4 LABOUR ECON. 125 (1997).

133. Bruno S. Frey & Alois Stutzer, *Happiness, Economy and Institutions*, 110 ECON. J. 918 (2000).

134. Di Tella, MacCullough & Oswald, *Macroeconomics of Happiness*, *supra* note 123.

135. David G. Blanchflower, *Unemployment, Well-Being and Wage Curves in Eastern and Central Europe*, 15 J. JAPANESE & INT’L ECONOMIES 364 (2001).

136. David G. Blanchflower, *Youth Labor Markets in Twenty-Three Countries: A Comparison Using Micro Data*, in SCHOOL TO WORK TRANSITIONS IN OECD COUNTRIES: A COMPARATIVE ANALYSIS (David Stern, ed.) (forthcoming).

137. Rainer Winkelmann, *Unemployment, Social Capital, and Subjective Well-Being*, 10 J. HAPPINESS STUD. 421 (2009).

138. See, e.g., Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978); Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302 (Daniel Kahneman et al. eds., 1999); Eunkook Suh et al., *Events and Subjective Well-Being: Only Recent Events Matter*, 70 J. PERSONALITY & SOC. PSYCHOL. 1091

“hedonic” (happiness) adaptation because they overestimate the duration and intensity of the impact of an external event.<sup>139</sup> Legal scholars are starting to explore the legal implications of such affective misforecasting,<sup>140</sup> with several engaged in a heated ongoing debate about whether emotional distress damages, for example, should be lower than they typically are, because people adapt to negative events (for example, physical disability) more than they, and juries, expect.<sup>141</sup> Others, however, caution against too quickly changing legal doctrine on the premise that people adapt to losses, given more recent empirical and longitudinal findings about hedonic adaptation and proposed explanations for those findings.<sup>142</sup> Specifically, recent evidence finds that hedonic adaptation is neither as complete nor as ubiquitous as once thought.<sup>143</sup> Things people simply fail to adapt to emotionally include depression and chronic

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(1996).

139. George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in WELL-BEING, *supra* note 138, at 85; Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 131 (2005); see also DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006); TIMOTHY WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 137-58 (2004); Kenneth Savitsky, *Magic Kisses and Mispredictions: A Review of Daniel Gilbert's (2006) Stumbling on Happiness*, 3 J. POSITIVE PSYCHOL. 76 (2008).

140. See, e.g., Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155, 165-81 (2005).

141. See, e.g., Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008); George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. PUB. ECON. 1795 (2008); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157 (2008); Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't Be (Just) About Pain and Suffering*, 37 J. LEGAL STUD. S195 (2008).

142. Peter H. Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 COLUM. L. REV. SIDEBAR 50 (2008), available at [http://www.columbialawreview.org/Sidebar/volume/108/50\\_Huang.pdf](http://www.columbialawreview.org/Sidebar/volume/108/50_Huang.pdf); Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 COLUM. L. REV. SIDEBAR 39 (2008), available at [http://www.columbialawreview.org/Sidebar/volume/108/39\\_Swedloff.pdf](http://www.columbialawreview.org/Sidebar/volume/108/39_Swedloff.pdf).

143. See Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L. J. (forthcoming 2010).

pain,<sup>144</sup> loud and unpleasant noises,<sup>145</sup> and spousal separation.<sup>146</sup> Three legal scholars recently summarized studies of disabilities to which people do not adapt:

Low-level, chronic stimuli like noise, dull pain, and headaches have substantial long-term effects on happiness, as do diseases associated with progressive deterioration. [In] [o]ne study, ... instead of adapting to noise ... [people] became sensitized to it, experiencing higher levels of annoyance as time went on .... [P]eople are less likely to adapt to unemployment and negative changes in marital status such as widowhood .... [C]hronic or progressive disorders such as rheumatoid arthritis and multiple sclerosis appear to be resistant to adaptation in part due to the[ir] deteriorating nature .... [E]ven where hedonic adaptation occurs, it is neither inevitable nor invariable. Although adaptation ... [exists] in the aggregate, individuals experience a range of responses.<sup>147</sup>

There are numerous theories why and when people do and do not experience hedonic adaptation, including these five:<sup>148</sup> (1) variation in happiness is mostly due to personality and disposition (whether genetic or ingrained early in life), not external events (for example, cheerful people respond cheerfully to bad news; pessimists respond with paranoia to good news);<sup>149</sup> (2) people's repeated experiences of the same external event alter the reference points from which they compare new experiences (for example, after a certain amount of time in prison, one defines downward what constitutes a "good day");<sup>150</sup> (3) happiness derives more from pursuing rather than

144. Peter A. Ubel et al., *Whose Quality of Life? A Commentary Exploring Discrepancies between Health State Evaluations of Patients and the General Public*, 12 QUALITY OF LIFE RES. 599 (2003).

145. Neil D. Weinstein, *Community Noise Problems: Evidence against Adaptation*, 2 J. ENV'TL PSYCHOL. 87 (1982).

146. RICHARD LAYARD, HAPPINESS 64-65 (2005); Richard E. Lucas, *Time Does Not Heal All Wounds: A Longitudinal Study of Reaction and Adaptation to Divorce*, 16 PSYCHOL. SCI. 945 (2005) (finding that adaptation in people's life satisfaction to divorce is not complete).

147. John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1530-31 (2008) (citations omitted).

148. WILKINSON, *supra* note 1, at 411-15.

149. David Lykken & Auke Tellegen, *Happiness is a Stochastic Phenomenon*, 7 PSYCHOL. SCI. 186 (1996).

150. ALLEN PARDUCCI, HAPPINESS, PLEASURE, AND JUDGMENT: THE CONTEXTUAL THEORY

attaining goals (so attaining or missing a goal does not, in the long-run, have as large an impact as commonly assumed);<sup>151</sup> (4) people have a psychological “immune system” that helps them recover from bad events;<sup>152</sup> and (5) people have a basic human need to explain and make sense of external stimuli (for example, coming to terms with a death), which reduces the long-term impact of an event by eventually making it no longer seem extraordinary.<sup>153</sup>

Each of the above five theories explains some of the empirical data, but all except the fifth are incomplete. The first does not account for why happiness is affected by external events and why only temporarily; the second does not apply to adaptation to one-time events; the third does not address negative events; and the fourth does not address positive events. The fifth theory is the most satisfactory empirically and has the added feature of understanding happiness as a trait that varies in response to environmental demands, but maintains itself within a baseline range, just like blood pressure, heart rate, and hormone levels.<sup>154</sup> Proponents of the fifth theory summarize it by the acronym AREA: people *Attend* to self-relevant but unexplained events, emotionally *React* to such events, come to understand or *Explain* them, and so come to *Adapt* in the sense of attending less and experiencing diminishing emotional reactions.<sup>155</sup>

The fifth theory—that to adapt to loss, people must be able to make sense of it—implies that those who lose jobs *due to discrimination* are less likely to adapt than those who lose jobs for other reasons. They may understand that discrimination occurs, but that understanding makes it harder, not easier, to make sense of the world and of their fate. This interpretation draws support from the literature on dignitary harms—emotional reactions such as insult,

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AND ITS APPLICATIONS (1995).

151. Ed Diener, *Subjective Well-Being: The Science of Happiness and a Proposal for a National Index*, 55 AM. PSYCHOL. 34 (2000).

152. Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 621-33 (1998).

153. Timothy D. Wilson & Daniel T. Gilbert, *Explaining Away: A Model of Affective Adaptation*, 3 PERSP. PSYCHOL. SCI. 370 (2008).

154. Timothy D. Wilson et al., *Making Sense: The Causes of Emotional Evanesence*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS: RATIONALITY AND WELL-BEING 209 (Isabelle Brocas & Juan D. Carrillo eds., 2003).

155. Wilson & Gilbert, *supra* note 153, at 371 fig.1.

outrages, and resentment from unfair treatment.<sup>156</sup> People feel particularly harmed by discrimination because of the animosity and hatred it expresses,<sup>157</sup> and the illegitimacy of discrimination makes the loss harder to make sense of, which in turn magnifies the dignitary harms and subjective losses from unemployment.<sup>158</sup> A cross-sectional study of over 66,000 people in 66 countries found that women are more satisfied with their lives today if there was less discrimination in an economy 20 years ago.<sup>159</sup>

### *C. How Courts Could, Under Current Law, Compensate Terminated Employees' Endowment Loss and Happiness Loss*

To date, nobody has suggested adjusting employment damages to account for terminated employees' endowment losses, happiness losses, or both.<sup>160</sup> As discussed above, given the persuasive evidence such losses are real, any effort to make a terminated employee's damages an accurate assessment of the employee's losses should include these intangible but real losses.

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156. See Nicole Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

157. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement* 148 U. PA. L. REV. 1503 (2000) (describing theories that evaluate legal actions by what those actions express, mean, or symbolize).

158. Rachlinski & Jourden, *supra* note 22; see also Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL L. STUD. 713, 721-22 (2008) (discussing dignitary harms).

159. Christian Bjørnskov et al., *On Gender Inequality and Life Satisfaction: Does Discrimination Matter?* 1 (KOF Swiss Econ. Inst., Working Paper No. 07161, 2009).

160. Issacharoff has suggested that endowments in jobs justify greater legal protection for long-term employees, but what he advocated was not more damages but more legal liability (that is, deviation from the employment-at-will rule) for opportunistic terminations of late-career workers. Issacharoff, *supra* note 61, at 1786 (arguing "for a limited 'penalty default' in the interpretation of the early-stage contract formation and for an analysis of late-stage employment relatively untethered to the initial contract formation"). Issacharoff did not address damages beyond noting "tremendous difficulties in valuing the precise nature of the loss a long-term employee suffers in cases of opportunistic discharges." *Id.* at 1805. He advocated not enhanced damages but making *modest* damages more available: "A no-fault severance scheme" similar to those in Europe giving "protection against dismissal after some arbitrary time, say two years after hiring .... [T]ermination after that time would yield a liquidated damages recovery of one month per year." *Id.* at 1806-07.

This section offers several ways courts could modify the standard relief model to consider terminated employees' endowment and happiness loss. Some (though not all) of the below methods could be used by district or appellate courts without any changes to statutes or Supreme Court precedents.

*1. Presume Emotional Distress Damages from Unlawful Termination, Especially for Long-Term Employees—and Make Such Damages Available for all Employment Claims*

Courts could recognize the endowment and happiness loss resulting from certain terminations as a basis for awarding emotional distress damages. Specifically, courts could presume, absent a contrary showing by the defendant, that compensatory damages for emotional distress are proper when a plaintiff was terminated *and* was thereby *either* rendered unemployed for a nontrivial duration, *or* permanently deprived of his or her chosen field of work (for example, if his or her next job is in a different field than the one he or she previously had worked and seen as a “calling”).

One limitation on this proposal is that in some circuits, substantial emotional distress damages awards are hard to sustain without a professional psychiatric diagnosis.<sup>161</sup> But various forms of evidence, from professionals and laypersons, could sustain an emotional distress damages award based on the psychological impact of a termination. Even if a professional diagnosis is the most reliable way to prove emotional distress, an award can be based on personal testimony from the employee and her friends and family about the toll the discrimination took.<sup>162</sup> Similarly, lay testimony could address the psychological impact of the career harm, such as whether the plaintiff's life experience supports a claim that the job was his or her “calling.” For example, a pediatrics nurse could show that her whole background was aimed at a life helping and treating children.

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161. See *supra* notes 44-45.

162. See *supra* note 46.



Expert testimony on the psychological effects of employment also could satisfy courts' need for evidence of emotional distress. For example:

- Economists utilizing U.S. General Social Survey data calculated "that to 'compensate' ... for unemployment would take a rise in income of ~ \$60,000 per annum."<sup>163</sup>
- Similarly, economists utilizing regression equations, based on data on the happiness levels of people who do and do not suffer various losses, suggest amounts of compensatory damages for wrongful death of a child, parent, or spouse in tort cases.<sup>164</sup>
- Other empirical evidence shows that any partial adaptation to unemployment is nonlinear. Most adaptation is in the first year of unemployment, with later adaptation coming at a decreasing rate.<sup>165</sup>

Based on these research findings, emotional distress damages should increase with unemployment duration, but at a declining rate (for example, damages from four years' unemployment should be greater than, but not double, damages from two years' unemployment). More generally, adjusting emotional distress damages based on the impact of job loss is feasible in two key respects. First, courts already must make discretionary determinations of emotional distress damages, so this new consideration would not thrust a new, unfamiliar task upon courts; it simply would add another consideration to an already murky determination.

Second, although there is no current law supporting such awards, there is no law forbidding them; courts could make such awards without any statutory amendment or abrogation of Supreme Court precedent. The statutory provisions authorizing compensatory damages for emotional distress are sparse,<sup>166</sup> leaving courts the job of

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163. Blanchflower & Oswald, *supra* note 127, at 1373.

164. Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, 37 J. LEGAL STUD. S217 (2008).

165. See Andrew E. Clark, et al., *Is Job Satisfaction U-shaped in Age?*, 69 J. OCCUPATIONAL & ORG. PSYCHOL. 57 (1996) (finding that current unemployment has less negative impact on mental stress for people with a higher lifetime unemployment rate, defined as the percentage of time unemployed since entry into the labor force); Yannis Georgellis et al., *Adaptation Towards Reference Values: A NonLinear Perspective*, 67 J. ECON. BEHAV. & ORG. 768 (2008) (finding nonlinearity of adjustment dynamics towards reference points in job satisfaction).

166. "Compensatory damages" in Title VII and ADEA cases are defined broadly with a

developing case law on the propriety and amounts of such awards. That case law is primarily district court and circuit court precedent; the Supreme Court's jurisprudence on emotional distress damages is limited to the principle that in civil rights cases, courts cannot presume such damages appropriate, but instead must base any such awards on evidence, leaving district and appellate courts to determine what evidence suffices.<sup>167</sup>

One final note, but an important one, is that many employment statutes and common law doctrines draw criticism<sup>168</sup> for not authorizing *any* emotional distress damages; examples include claims under the Age Discrimination in Employment Act (ADEA),<sup>169</sup> of terminations interfering with rights to claim health or pension benefits under the Employee Retirement Income Security Act (ERISA),<sup>170</sup> and of state whistleblower rights violations.<sup>171</sup> The lack of emotional distress damages is even more troubling, towards the goal of having damages match the actionable harm, in termination lawsuits that constitute the vast majority of employment claims. Accordingly, this Article's analysis supports existing, and future, efforts to add emotional distress damages to the full range of employment rights statutes that aim to provide relief to workers terminated for unlawful reasons.<sup>172</sup>

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nonexhaustive list. "[F]uture pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," 42 U.S.C. § 1981a(b)(3), but not "backpay [or] interest on backpay," which is a separate form of relief. *Id.* § 1981a(b)(2).

167. See *Carey v. Phipus*, 435 U.S. 247 (1978) (holding that although mental and emotional distress caused by constitutional rights violations are compensable, damages above nominal \$1 awards require evidence of the presence and extent of such damages).

168. See *infra* note 172 (discussing the proposed Paycheck Fairness Act).

169. 29 U.S.C. §§ 216(b), 626 (2006) (limiting relief available for age discrimination claims to lost pay due, supplemented only by attorney's fees and, for willful violations, liquidated damages equal to the lost pay); see *Comm'r v. Schleier*, 515 U.S. 323, 325-26 (1995) (detailing relief for ADEA claims).

170. 29 U.S.C. § 1140 (2006); see *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-54 (1987) (holding that ERISA preempted state-law claims for punitive and emotional distress damages unavailable under ERISA).

171. See *supra* note 36 (noting the remedies under various state whistleblower laws).

172. Most notably, proposed legislation would add punitive damages and compensatory damages for emotional distress to the remedies for Equal Pay Act pay discrimination claims. See Paycheck Fairness Act, H.R. 1388, 110th Cong. (2007). The legislation has not passed but has substantial support, with 254 Congressional cosponsors as of 2008. See U.S. Library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01338>: (last visited Sept. 23, 2009).

## *2. Award More Years of Front Pay for Terminated than Nonhired Employees*

Courts already have wide discretion as to the duration of front pay awarded (and also as to back pay, when many years pass between termination and verdict). Those discretionary choices are rarely reversed under the deferential “abuse of discretion” standard of review;<sup>173</sup> the few reversals in the case law tend to be of (1) awards that do not explain the basis for the pay duration chosen,<sup>174</sup> (2) awards to plaintiffs who did not mitigate their damages with reasonable effort to find comparable work,<sup>175</sup> and (3) unusually long (for example, twenty-year) front pay awards compensating young plaintiffs until retirement age.<sup>176</sup> A district court that avoids these pitfalls—by explaining the pay duration, by avoiding awards to plaintiffs who do not mitigate damages, and by avoiding two-decade

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173. See *Downey v. Strain*, 510 F.3d 534, 544 (5th Cir. 2007); *Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1098 (8th Cir. 2007).

174.

Because the purpose of front pay is to make each plaintiff whole, the district court must look at the individualized circumstances .... A flat rule awarding front pay for a specific period ... would defeat the purpose .... It is unclear here why the district court thought a two year front pay award would adequately compensate plaintiffs; the record does not appear to support that assessment. We do not ... hold that two years is definitely inappropriate in these cases. We ... reverse and remand the front pay award and instruct the district court to articulate the specific bases for the end date for each plaintiff.

*Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999).

175. See, e.g., *Sellers v. Mineta*, 358 F.3d 1058, 1066 (8th Cir. 2004) (“Sellers had a duty to mitigate her damages by seeking comparable employment .... [O]n remand, the district court should determine an amount that Sellers could have earned if she had attempted to find comparable work, and reduce any award accordingly.”) (citations omitted).

176. See, e.g., *United Paperworkers Int’l Union v. Champion Int’l Corp.*, 81 F.3d 798, 805 (8th Cir. 1996) (“Fiedler was awarded front pay for twenty-four years, until ... retirement age. An award of front pay until retirement ignores the plaintiff’s duty to mitigate damages and the district court’s corresponding obligation to estimate the financial impact of future mitigation. Instead of warranting a lifetime of front pay, Fiedler’s relatively young age should improve his future opportunities to mitigate through other employment .... [A] number of cases have rejected far shorter awards as improperly speculative. For these reasons, ... we express grave doubt that an award of ... [such] front pay could be upheld.”) (collecting cases) (citations omitted).

awards except in exceptional cases<sup>177</sup>—has great freedom as to front pay duration.<sup>178</sup>

Because a district court has such great discretion, subject to limited review, it could err on the side of a longer front pay period for plaintiffs who lost more endowment or happiness due to the job loss or ensuing unemployment. Such a consideration is not classically part of the front pay analysis, but it is an easy way for a court to make sure the plaintiff's package of relief covers any endowment or happiness loss. Given the discretionary nature of a court's choice of a number of years of pay, there certainly are cases in which a court's best estimate of the proper duration is not a specific number (for example, four years) but a range (for example, three to five years). Rather than *arbitrarily* choose a number within that range, a court could choose a higher number for cases of high endowment or happiness impact (for example, the five-year upper end of a three-to-five-year range) and a lower number in that range for plaintiffs lacking such endowment or happiness impact.

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177. For a classic example of a justified award of two decades of front pay, see *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 126 (2d Cir. 1996) (affirming award of front pay for "well over twenty years," until plaintiff reached retirement age at 67, where the job plaintiff lost was highly specialized and there was little prospect of him finding "substantially comparable employment"). As the court there explained,

Padilla has only a high school education and his vocational experience has been confined primarily to serving as a dispatcher and a supervisor of dispatchers in the railroad industry. Padilla was able to obtain a salary of approximately \$65,800 by developing these unique and narrowly focused skills, and it is very unlikely that he will be able to find alternative employment at this salary.

*Id.*

178. There are exceptions, of course, where an appellate panel reverses a front pay award because it strongly believes the district court got the facts badly wrong. *See, e.g., EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 732 (5th Cir. 2007) ("Given Barrios's steadily deteriorating medical condition, however, her doctor's repeated statements as time went on that she remained unable to work, and the fact that the trial occurred more than three years after her doctor's first disability determination ... , the court's finding that Barrios could work for nearly ten more years postjudgment defies reality and the record .... [U]nable to work in the future, Barrios was not eligible to receive 'future wages and benefits.' ... [The] frontpay award must not grant plaintiff a windfall.").

*D. Objections to Compensating Endowment and Happiness Loss, and Responses to Those Objections*

Below are responses to several key objections to compensating terminated employees' endowment and happiness loss: (1) not all terminated employees suffer such loss;<sup>179</sup> (2) some nonhired employees suffer great harm due to ongoing unemployment;<sup>180</sup> (3) compensating such loss could inhibit labor mobility by encouraging high subjective values;<sup>181</sup> (4) and increasing termination damages could be unfair to women and minorities, because it could disincentivize hiring members of discriminated-against groups,<sup>182</sup> as well as (5) because job loss may yield greater damages for men than for women.<sup>183</sup>

*1. Which Employees Actually Feel an "Endowment" in Their Jobs, or Suffer "Happiness" Loss Due to Employment?*

How can a court know whether a plaintiff felt an "endowment" in a job or whether the termination caused a "happiness" loss justifying enhanced damages? Not all employees feel an endowment in even a long-term job. Many hate their jobs, keeping them only out of pure economic need; some terminated employees may not be that unhappy about the job loss, because, for example, they were already on the fence about whether to keep the job.<sup>184</sup> Even for employees who clearly did suffer endowment or happiness loss, uncertainty remains as to the proper amount of compensation for such a loss, yielding an "unpredictability" that undercuts the feasibility of heightened damages based on endowment value.<sup>185</sup>

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179. *See infra* Part I.D.1.

180. *See infra* Part I.D.2.

181. *See infra* Part I.D.3.

182. *See infra* Part I.D.4.

183. *See infra* Part I.D.5.

184. *See* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42 (offering statistics and examples of how "ambitious, achieving women" with a range of career options "leave [jobs] more easily and find other parts of life more fulfilling," and that "of the 108 women who have appeared on [a] list of the top 50 most powerful women over the years, at least 20 have chosen to leave their high-powered jobs, most voluntarily, for lives that are less intense and more fulfilling").

185. Issacharoff, *supra* note 61, at 1808. Issacharoff elaborates that heightened damages would be consequential damages, which would "create confusion ... by making uncertain

These uncertainties are real but, for several reasons, should not be exaggerated, and should not prevent courts from undertaking more accurate damages inquiries by considering endowment and happiness loss. First, inquiry into employees' subjective job attachment (endowment) and psychological state (happiness loss) would not threaten to muddy damages proceedings that *already* require discretionary, subjective, even arbitrary determinations. As discussed above, to assess damages, the court must do the following:

- (1) The court must choose a duration of front and back pay based on "guesswork" as to not only what the plaintiff's job prospects will be in the future, but also what the plaintiff's job prospects *would have been* in a hypothetical world in which he or she was not terminated.
- (2) The court must pick an amount of emotional distress damages in conformity with a body of precedent that includes a wide range of awards for similar levels of harm, and in which essentially the only guiding principle is that more evidence allows higher damages.
- (3) Finally, the court also has "latitude" to pick whatever amount of punitive damages it deems appropriate to "vindicate the State's legitimate interests in punishment and deterrence,"<sup>186</sup> subject only to a statutory cap and broad Due Process limits.<sup>187</sup>

In short, adding one more consideration—subjective job attachment (endowment) and psychological state (happiness loss)—just would make already-murky damages inquiries more accurate at matching damages to harm suffered.

Second, current law does not really avoid assessing endowment and happiness loss. In not awarding damages for the endowment loss of a long-term job or the happiness loss from unemployment,

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valuation of the harms suffered by the employee ... [and] making it difficult to place the employer fully on notice at the stage of hire." *Id.* at 1805. This leads Issacharoff to doubt "whether an employer should be liable for harms suffered outside the normal expectations of the contractual relationship." *Id.*

186. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

187. See *supra* Part I.A.1 (discussing limits on the size and permissibility of punitive damages).

current law just estimates the harm from those losses as zero, surely an inaccurate estimate in many cases.

Third, while the damages inquiry this Article proposes would be subjective, it would not be wholly arbitrary; there are relevant factors for courts to consider. The following are some of the factors courts could consider in determining the presence or absence, and the size, of any endowment or happiness loss:

- *The job substance.* Does it pay less than others requiring similar skill or training because it provides “psychological income”? If so, there more likely is endowment value, in contrast to more generic or replaceable jobs, as indicated by studies finding no endowments in goods (for example, tokens with a cash value) lacking subjective value.<sup>188</sup>
- *Availability of similar employment.* Can the plaintiff find a similar job—or is the plaintiff forced to go into a different field of work? Those who find similar work suffer less endowment loss than those forced to give up fields in which they worked for years or decades.<sup>189</sup>
- *Length of tenure.* Longer-tenured employees are more likely to feel attachment to a job. Their endowment value might grow over time. Alternatively, employees who do *not* feel attachment to a job are more likely to leave for another job (or leave the workforce for personal reasons), a “revealed preferences” argument that on average, longer-tenured employees have, by staying, indicated they more likely feel an endowment value than employees new to a job.<sup>190</sup>

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188. See *supra* note 76 and accompanying text.

189. See Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. RES. PERSONALITY 21 (1997) (finding that people perennially underemployed in their jobs are likely to experience less fulfillment, meaning, and satisfaction than people who are not).

190. See Issacharoff, *supra* note 61, at 1796. Of course, it is only on average, other things equal, that longer-term employees have more endowment value; other factors that may not be equal include being a primary or secondary earner, one's family situation, macroeconomic conditions, labor market conditions, regional economic conditions, and transactions costs of job search.

*2. Couldn't Nonhired Employees Suffer the Same Happiness Loss Due to Unemployment as Fired Employees?*

Most of the above data on happiness losses due to unemployment documents not that *firing* causes unhappiness, but that *unemployment* does.<sup>191</sup> Conceivably, the same happiness loss could result from unemployment (a) from a failure to hire and (b) from a firing.<sup>192</sup> While true, this observation does not undercut the idea of enhanced damages for terminations for three reasons.

- (1) Even if there may not be a *happiness* difference between firing and nonhiring, the *endowment* distinction remains. Firings cause endowment loss, but failures to hire cannot (because an individual cannot come to feel an “endowment” in a job she never had).
- (2) While virtually all terminations leave the worker unemployed at least briefly (it is the rare employee who lands a job immediately after being fired), many failures to hire cause no unemployment (because the worker already had a job and was just seeking a new one).
- (3) When people suffer failures to hire that leave them unemployed, it is hard to blame the employer for a

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191. *But see* Sonja C. Kassenboehmer & John P. Haisken-DeNew, *You're Fired! The Causal Negative Effect of Entry Unemployment on Life Satisfaction*, 119 *ECON. J.* 448 (2009) (examining whether and how these three reasons for unemployment—voluntary, being fired, and company closing—impacted life satisfaction based upon the German Socio-Economic Panel from 1991 to 2006); *see also* Rafael Di Tella & Robert MacCulloch, *Happiness, Contentment and Other Emotions for Central Banks* 31 figs.2A & 2B (Nat'l Bureau Econ. Research, Working Paper No. 13622, 2007) (differentiating between changes in life satisfaction from unexpected unemployment due to plant closing versus expected unemployment due to retirement); Rafael Di Tella & Robert MacCulloch, *Happiness for Central Banks* 27 fig.2 (Sept. 13, 2007), <http://www.bos.frb.org/economic/conf/BehavioralPolicy2007/papers/DiTella.pdf> (same).

192. Happiness surveys can include a question asking respondents to self-report why their previous employment was terminated from a number of possible listed reasons. While none of those reasons is discriminatory firing, one reason is being fired. For example, this is true of both the British Household Panel Survey (BHPS) and the German Socio-Economic Panel (GSEP). *See* INST. FOR SOC. & ECON. RESEARCH, *BHPS QUESTIONNAIRES AND SURVEY DOCUMENTS* (2008), <http://www.iser.essex.ac.uk/survey/bhps/documentation-and-questionnaires/questionnaires-and-survey-documents> (BHPS questionnaires); DIW BERLIN, *GERMAN SOCIO-ECONOMIC PANEL QUESTIONNAIRES & FIELDWORK DOCUMENTS* (2008), [http://www.diw-berlin.de/sixcms/detail.php?id=diw\\_02.c.238114.en](http://www.diw-berlin.de/sixcms/detail.php?id=diw_02.c.238114.en) (GSEP questionnaires).



happiness loss that traces to *preexisting* joblessness; people unemployed for a long time do not lose much more happiness loss from continuing that unemployment.<sup>193</sup>

Thus, while there surely are some failures to hire that cause as much happiness loss as certain firings, this Article's point remains: on average, terminations are more likely to yield happiness loss than failures to hire are—which justifies presuming greater damages in termination cases than in hiring cases.

### *3. Is It Desirable To Compensate Endowment and Happiness Loss, Even Assuming Those Losses Are Real?*

If endowment and happiness loss increase a terminated employee's damages beyond economic loss, that raises a key question: if the *harm* to the victim exceeds the *expenditures* the breacher (employer) should have made to the victim (that is, paying the victim's salary), which is the proper measure of damages? Put in terms of the broader debate on the endowment effect: if the willingness-to-accept price ("WTA," the amount the party with the endowment would require to give it up) exceeds the willingness-to-pay price ("WTP," the amount the party taking away the entitlement would spend), which is the "right" value—WTA or WTP?

Whether WTP or WTA is the proper measure of damages is a major debate in many fields, such as eminent domain.<sup>194</sup> In employment law, the issue is less vexing, because there are strong reasons for courts to choose WTA over WTP, that is, for damages to compensate full endowment and happiness losses. In employment jurisprudence, the rule is "make-whole" relief; harm to the plaintiff is presumed recoverable even if it requires the defendant to make an expenditure that, unlike salary, it would not have made if it had complied with its legal duties.<sup>195</sup> In contrast, in cases of less in-

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193. Andrew E. Clark, et al., *supra* note 165 (finding that current unemployment has less negative impact on mental stress for people with a higher lifetime unemployment rate, defined as the percentage of time unemployed since entry into the labor force).

194. *See, e.g.*, Rachlinski & Jourden, *supra* note 22 (arguing that damages for real property are too low because the endowment effect and subjective valuation mean market value is insufficient compensation).

195. *See supra* notes 27-28.

vidious wrongdoing, courts do not require defendants to pay such full damages. For example, in eminent domain, the proper measure of relief is market value without enhanced endowment or subjective value, because government taking of private property is not a wrong, but a constitutionally authorized government power. Similarly, contract law “generally does not characterize a party in breach as a wrongdoer,”<sup>196</sup> which is why breacher liability does not “extend[] beyond financial remuneration”;<sup>197</sup> breach is compensated in a limited fashion. A defendant pays only economic losses, not emotional distress damages, consequential damages beyond those clearly foreseeable, punitive damages, or attorney’s fees, because the law allows “efficient breaches” that occur when the breaching party can draw greater value elsewhere, so long as that breaching party compensates the victim.<sup>198</sup> This idea underlies some other nations’ laws on termination, which provide for modest severance pay for a no-fault termination, but a punitive allowance for more in wrongful terminations.<sup>199</sup>

Also, employment markets are different from markets in which protecting “endowment value” would troublingly inhibit market transactions. For example, it could inhibit efficient public projects to require property taken by eminent domain to be compensated above market value. No such problem exists in employment termination cases, because endowment value in jobs seems good, not bad, to encourage; corporations affirmatively try to establish firm cultures of optimism because employees who feel positively about their employer, job, and co-workers accomplish more,<sup>200</sup> especially

196. Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679, 1686 (2008).

197. *Id.* at 1685.

198. *Id.* at 1685-86 (“[C]ontract law is not punitive. There may be a moral content to promises, but this does not imply that a promisor’s legal obligation to perform extends beyond financial remuneration. A promisor who chooses to pay damages rather than to perform may be seen as behaving badly, and the promisor may be shunned by others in the business community who expect performance. But ... the law generally will not intercede or condemn the promisor.”).

199. See Issacharoff, *supra* note 61, at 1809 (documenting such laws in European nations).  
200.

[T]he most successful person, on average, tends not to be the realist, but rather the optimist. High levels of self-esteem and self-efficacy are associated with aggressiveness, perseverance, and optimal risk-taking. These biases may be particularly adaptive in business settings, where decisiveness and aggres-

with the decline of the career-wage model of lifetime employment that once aligned employer and employee interests.<sup>201</sup>

#### *4. Would Increasing Termination Damages Increase Hiring Discrimination?*

Increasing the damages for some termination cases beyond those for hiring cases implicates a long-discussed problem in employment law. Already, failure-to-hire claims are far more rare than those by incumbent employees, such as termination, harassment, and accommodation claims.<sup>202</sup> This gap exists partly because of the information difference between, for example, terminated and nonhired workers. Once the discrimination laws eliminated the most obvious discrimination decades ago, discriminatory motivations became hidden, and whereas terminated employees may know much about the termination decisions (their performance evaluations, "dirt" on the decision makers, and so on), nonhired applicants often know no reasons for the rejections (because they typically never spent any time in the workplace, often never even having any communications with the decision makers other than the application and the rejection).<sup>203</sup>

With hiring discrimination all but unactionable but termination decisions risking lawsuits, conceivably an employer could use hiring

siveness are considered indicators of a successful manager .... [T]hey also influence others; exhibitions of confidence and optimism make people more persuasive and influential.... [O]ptimistic culture ... is an ideal motivator, creating the expectation of future growth and profitability that leads individuals to invest their human capital in the firm ... and to defer present consumption in favor of future rewards. Firms with "can-do" cultures will thereby generate higher levels of internal effort and ... be more successful in attracting external resources. Conversely, an optimistic culture can blind managers to the kind of anxiety ... that might otherwise trigger ... selfish "last period" kind of behavior.

Donald Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 153-55 (1997).

201. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993) (noting the decline of the career-wage model).

202. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1024-25 (1991).

203. See Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1, 17-19 (2004).

discrimination to decrease lawsuit risk: avoid hiring groups most likely to have employment claims. The employment-at-will doctrine prevents most employees from challenging an employment decision for mere inaccuracy or unfairness, so those most likely to have hiring claims may be those in the discrimination statutes' "protected classes"—women, racial minorities, the elderly, and workers with disabilities.<sup>204</sup>

Yet this fear—that incentivizing lawsuits increases hiring discrimination—may be illusory for two reasons. First, many employment discrimination claims are brought by middle-aged white men who fit into the "protected classes" of, for example, the age discrimination laws, which require only that the worker be forty years old.<sup>205</sup> Moreover, because late-career workers average higher salaries, the most costly discrimination claimants are terminated late-middle-aged workers with age claims.<sup>206</sup> Thus, it is doubtful that employers could avoid employment claims with hiring discrimination against under-represented groups.

Second, most employment cases lose on pretrial dispositive motions,<sup>207</sup> and those that survive typically yield only modest payouts to employees,<sup>208</sup> so it is hard to depict them as a significant

204. See *id.* (noting this argument).

205. See Joanna Lahey, *State Age Protection Laws and The Age Discrimination in Employment Act*, 51 J.L. & ECON. 433, 438 (2008) (noting that "[t]he majority of people who sue under the ADEA are white male middle managers or professionals over the age of 50").

206. See *supra* note 61.

207. Kevin M. Clermont, Theodore Eisenberg, & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 547-48 (2003) ("Employment-discrimination plaintiffs swim against the tide. Compared to the typical plaintiff, they win a lower proportion of cases during pretrial and after trial. Then, many of their successful cases are appealed. On appeal, they have a harder time in upholding their successes, as well in reversing adverse outcomes."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 557 (2001) ("There is it seems a general consensus that employment discrimination cases are ... too easy to win ... [W]hile there are large numbers of employment discrimination suits ... these suits are far too difficult, rather than easy, to win.")

208. See Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007) (noting that most employment lawsuits end in confidential settlements, and that the one data set on confidential settlement amounts (collected anonymously in one judicial district) found that: (1) the median confidential settlement in an employment discrimination case was \$30,000; (2) the median in personal injury lawsuits was \$181,500; and (3) of the 455 discrimination settlements (the largest group studied), only 9 (just under 2 percent) were above \$300,000, and only 1 (0.2 percent) was above \$1 million).

aspect of labor cost. It seems unlikely that an infrequent five-figure cost would induce illegal hiring practices, especially with any gap between the cost of termination and of hiring claims likely only a small fraction of average cost per suit. Thus, a modest increase in damages in only some termination claims is unlikely to induce hiring discrimination.

*5. Would Compensating Endowment Value Favor Men over Women, and White-Collar over Blue-Collar Workers?*

Men may be likely to draw from their job the sense of self-worth that could be a source of endowment value.<sup>209</sup> Further, male-dominated, higher-paid, and white-collar jobs may be more likely to yield personal fulfillment than many blue-collar jobs typically held only for the paycheck. Also, to the extent women more often take time off from their careers for family reasons, fewer women may have employment relationships as long-term as those of their male counterparts. If endowment value is higher on average for men and white-collar workers, compensating endowment value might increase average damages for those relatively more privileged workers. This is troubling, but the opposite may be true. Women, not men, may have higher endowment values, and even if men's endowment values are higher, that is an indictment of the current state of the American workplace, not of this Article's damages proposal, and it should not stand in the way of more accurate damages determinations.

First, women, not men, may have higher endowment values, because women report higher than men on eight measures of job satisfaction, even controlling for many individual and job characteristics.<sup>210</sup> This gender difference in reported job satisfaction exists despite women earning significantly less for the same job than equivalently qualified men.<sup>211</sup> Further, even if more men than

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209. See Issacharoff, *supra* note 61, at 1803 (noting "the social connections that arise from the workplace—the sense of status and self-worth—and the inevitable source of identity in a society in which the premier social gathering icebreaker is still, 'what do you do for a living?'").

210. Andrew E. Clark, *Job Satisfaction and Gender: Why Are Women So Happy at Work?*, 4 *LABOUR ECON.* 341 (1997).

211. Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap? An Update*, *MONTHLY LAB. REV.*, Mar. 2003, at 9. Social norms concerning the

women feel career attachment,<sup>212</sup> that is changing; it is less true now than a generation ago, and it likely will be even less true a generation from now.<sup>213</sup>

Still, it is conceivable that men have higher endowment values, just as white men now are more likely (due to the glass ceiling and related phenomena) to draw higher salaries (which would mean more economic damages from a termination).<sup>214</sup> These inequalities are real, reflecting a complex mix of discrimination, educational and human capital inequities, and inertia from past discrimination. Yet it is hard to see why refraining from making emotional distress damages more accurate would be a good response to those disparities; it does not improve disadvantaged workers' situation in society to retain the currently inadequate methods of calculating damages for the small fraction of workers who suffer discrimination. In short, if there is a gender social difference as to work attachment to work by gender, that is a broader social problem that cannot be redressed by pretending, in damages calculations, it does not exist.

## II. RECOGNIZING THE REALITIES OF EMPLOYER AND EMPLOYEE DUTIES: WHEN REASONABLE EMPLOYEES MIGHT NOT REPORT DISCRIMINATION; WHEN EMPLOYER ANTIBIAS PROGRAMS ARE (NOT) EFFECTIVE

Proving discrimination often is not the end of a discrimination case. Even after a plaintiff proves discrimination, retaliation, or harassment,<sup>215</sup> employers have powerful affirmative defenses—to all

appropriate relative pay of women compared to men may explain gender differences in well-being. Rafael Lalive & Alois Stutzer, *Approval of Equal Rights and Gender Differences in Well-Being*, J. POPULATION ECON. (forthcoming).

212. See Belkin, *supra* note 184.

213. See generally RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* tbl. 6.1 (8th ed. 2003) (indicating that women's labor force participation was barely 20 percent through 1950 but rose to 37.7 percent in 1960, 43.3 percent in 1970, 51.5 percent in 1980, 57.5 percent in 1990, and 60.0 percent in 2000).

214. See *id.* at 379 (noting that women earned, on average, 59 percent what men earned in 1980, and that percentage rose only to 65 percent by 2000).

215. Technically, harassment is just discrimination as to "terms and conditions" of employment that takes the form of a "hostile work environment" rather than inequity in pay, hiring, firing, etc. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). Although "sexual harassment" doctrine is the best-known, the discrimination laws ban hostile work environments based on any forbidden ground, whether race, age, disability, or retaliation. See, e.g., *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 436, 446 (2d Cir. 1999) (recognizing claims of "racial harassment" and "retaliatory co-worker harassment");

liability in harassment cases,<sup>216</sup> and to punitive damages in all discrimination or harassment cases<sup>217</sup>—based on employer effort to prevent and redress workplace violations. In harassment cases, the employer defense also has a requirement for employees: harassment victims must, before suing, complain internally, typically to a supervisor or to a human resources official, as required by the employer's policies and procedures.

Courts tend to apply these employer and employee requirements fairly formalistically, with little willingness to recognize exceptions. Employees rarely prevail in claiming justification for not reporting harassment internally.<sup>218</sup> Similarly, most courts deem any facially plausible antidiscrimination policy sufficient, despite criticism of many programs as ineffectual or fraudulent.<sup>219</sup>

Behavioral and happiness research findings provide support for criticisms of this jurisprudence as too formalistic and too unwilling to recognize exceptions. As subpart (A) discusses, a rational employee's fear of retaliation might make him or her reluctant to report harassment, a fear that may be increased by various documented behavioral economics phenomena, specifically prospect theory (fear of upsetting even an unpleasant status quo), endowment effect (fearing retaliation more than standard economic "rationality" would predict), and the salience and availability biases (fearing, in an atmosphere of uncertainty, more retaliation than may be likely). As subpart (B) discusses, employer antidiscrimination programs likely are most effective when focused on the positive (because people think and problem solve best in positive emotional states) rather than on the negative (such as by stressing that discrimination yields lawsuits and disharmony), a distinction that could help inform courts' thus-far inadequate efforts to separate effective from ineffective employer programs.

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Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998) (same as to retaliatory harassment).

216. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

217. Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

218. See *infra* Part III.A.

219. See *infra* Part III.B.

*A. Employee Duty To Report Harassment Internally: Too Little Recognition of Reasonable Reluctance To Complain*

*1. Courts' Strict Rule, Almost Without Exceptions, that Employees Must Report Harassment Internally*

Key to whether an employer is liable for workplace harassment is whether the employer had notice (actual or constructive) of that harassment. Only if the harassment culminated in a tangible employment action (for example, termination or demotion) is the employer automatically liable.<sup>220</sup> Otherwise, an employer is liable for harassment by the victim's co-worker (as opposed to supervisor) only if the employer negligently failed to take appropriate action to remedy harassment it knew (or reasonably should have known) occurred.<sup>221</sup> A supervisor's harassment of a subordinate yields vicarious liability more automatically than co-worker harassment, but the employer can defeat liability with an affirmative defense established by two companion Supreme Court cases, *Faragher v. City of Boca Raton*<sup>222</sup> and *Burlington Industries v. Ellerth*.<sup>223</sup> The *Faragher/ Ellerth* defense to vicarious harassment liability has two parts—an employer duty to prevent, and an employee duty to report. An employer is liable for a supervisor's harassment unless it proves both “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>224</sup>

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220. *Pa. State Police v. Suders*, 542 U.S. 129, 137 (2004) (“[A]n employer is strictly liable for supervisor harassment that ‘culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.’”) (quoting *Ellerth*, 524 U.S. at 765).

221. *Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) (“An employer may be held liable for the harassment of one employee by a fellow employee (a nonsupervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action.”); *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999) (“[A]n employer will be liable in negligence for a racially or sexually hostile work environment created by a victim’s co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action.” (citing *Ellerth*, 118 S. Ct. at 2267)).

222. 524 U.S. 775 (1998).

223. 524 U.S. 742 (1998).

224. *Faragher*, 524 U.S. at 807.



The second part of the *Faragher/Ellerth* defense is written in general terms. Most courts interpret it as requiring employees to report harassment internally to the employer before suing,<sup>225</sup> based on this *Faragher/Ellerth* language:

While proof that an employee failed to fulfill the ... obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the [affirmative] defense.<sup>226</sup>

If an employee failed to report harassment internally to the employer, that alone usually lets the employer prevail in arguing that the employee failed her *Faragher/Ellerth* duty. There are not many situations when a court will excuse an employee from failing to report. Courts are unsympathetic to employee arguments that they declined to report for fear of retaliation, absent actual, specific evidence retaliation is likely.<sup>227</sup> The threshold for evidence of retaliation sufficient to justify nonreporting is high; it is insufficient for an employee to argue that retaliation (or not being taken seriously) was likely because the harasser is a friend of key company officials.<sup>228</sup> For retaliation fear to be sufficiently "credible," the employee must have actual evidence "the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints."<sup>229</sup> Further, for an employee's fear of retaliation to excuse a failure to complain, it must

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225. For *co-worker* harassment (rather than the supervisory harassment that *Faragher* and *Ellerth* address directly), employee reporting of the harassment is all the more likely to be dispositive, because the negligence standard applicable to *co-worker* claims is all the more dispositively focused on employer knowledge of the harassment. "[A]n employer will be liable in negligence for a racially or sexually hostile work environment created by a victim's co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action." *Richardson*, 180 F.3d at 446; see *Curry*, 195 F.3d at 660 (holding same).

226. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

227. See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999); *Gonzalez v. Beth Israel Med. Ctr.*, 262 F. Supp. 2d 342, 357 (S.D.N.Y. 2003).

228. See *Barrett*, 240 F.3d at 267; *Gonzalez*, 262 F. Supp. 2d at 357.

229. *Leopold v. Baccarat*, 239 F.3d 243, 246 (2d Cir. 2001); see *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1290 (11th Cir. 2003).

be a credible fear of what the *employer* might do, not just what a *co-worker* might do.<sup>230</sup>

Absent a specific threat of retaliation, the fact that an employee failed to complain internally suffices for an employer to “carry[] its ultimate burden of persuasion” that an employee unreasonably failed to report.<sup>231</sup> Employees rarely are excused from the duty to complain; it is not enough that the employee (1) was uncomfortable reporting details of sexual harassment to the employer,<sup>232</sup> (2) wanted to give the harasser time (or a chance to stop) before being terminated,<sup>233</sup> or (3) wanted to wait to determine whether the harasser was a “predator” or simply an “interested man.”<sup>234</sup> Finally, the employee must not only report the harassment to the employer, but do so *promptly*, with a delay of even several months often leading courts to find that the employee failed the duty to report.<sup>235</sup>

Of course, with no subsequent Supreme Court cases addressing *Faragher/ Ellerth* employee and employer duties, some courts are more forgiving of employees, but the point remains: most courts interpret *Faragher* and *Ellerth* as imposing an employee duty to complain internally about harassment, to do so promptly, and to do so in all cases lacking a highly specific threat of retaliation.

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230. See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999).

231. *Brown v. Henderson*, 155 F. Supp. 2d 502, 512 (M.D.N.C. 2000) (holding that plaintiff acted unreasonably in not reporting, where she lacked evidence of other employees suffering retaliation).

232. See *Williams v. Dep't of Mental Health*, 407 F.3d 972, 977 (8th Cir. 2005) (rejecting employee argument that “shame, shock and humiliation” explained failure to report harassment); *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003); *Barrett*, 240 F.3d at 268; *Shaw*, 180 F.3d at 813.

233. See *Leugers v. Pinkerton Sec. & Investigative Servs.*, 205 F.3d 1340 (6th Cir. 2000) (unpublished table decision).

234. *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 269 (4th Cir. 2001).

235. See *An v. Regents of Univ. of Cal.*, No. 01-2223, 2004 WL 188192, at \*6 (10th Cir. Feb. 2, 2004) (deeming a delay of reporting of nine months to be too long); *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1286 (11th Cir. 2003) (same, two and one half months); *Hardy v. Univ. of Ill.*, 328 F.3d 361, 365-66 (7th Cir. 2003) (deeming six-week delay not too long); *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (same, seven months). See generally Loretta T. Attardo, *Practice Pointers on Opposing The Affirmative Defense Established By Ellerth and Faragher*, 656 PLI/Lit 339, 343 (2001) (arguing that an employee should not be expected to report after the first or second incident of “relatively minor harassment”).

## 2. Critiquing the Strict Requirement of Internal Reporting: Rational Employee Fear, Heightened by Cognitive Biases and Psychological Barriers

The strictness of the employee reporting requirement has drawn substantial scholarly criticism.<sup>236</sup> To begin with, internal complaints are aberrational, not common; workplace studies showed that historically, only 2 to 13 percent of harassment victims actually have complained to their employers.<sup>237</sup> Thus, “[the] requirement placed on employees to report harassment through their employer’s internal grievance procedures ... is at odds with the way employees actually behave and respond to harassment.”<sup>238</sup> Moreover, reluctance to report harassment is quite understandable, given the real risk of retaliation,<sup>239</sup> the more informal or personal alternatives many women choose over formal measures like filing official complaints,<sup>240</sup> and the power imbalance harassment victims may feel due to economic vulnerability or workplace underrepresentation.<sup>241</sup> Consequently, some argue that “the mandatory reporting requirement actually enables workplace harassment by allowing employers to escape responsibility even when a victim has legitimate reasons for not using official procedures.”<sup>242</sup>

236. See, e.g., Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 311-14 (2004); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 671-77 (2000); L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 721-29 (2007); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 197-99 (2004); John H. Marks, *Smoke, Mirrors, and the Disappearance of 'Vicarious' Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor For Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1405-07 (2002); Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMP. RTS. & EMP. POL'Y J. 549 (2001).

237. Chamallas, *supra* note 236, at 374 (collecting studies); Lawton, *supra* note 236, at 208-09 (collecting studies).

238. Chamallas, *supra* note 236, at 313.

239. *Id.* at 376-77; Lawton, *supra* note 236, at 243, 259-60; Marshall, *supra* note 236, at 578-79.

240. Chamallas, *supra* note 236, at 376-77; Marks, *supra* note 236, at 1451-52.

241. Grossman, *supra* note 236, at 724-28.

242. Stephen F. Befort & Sarah J. Gorajski, *When Quitting Is Fitting: The Need For a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 OHIO ST. L.J. 593, 633 (2006) (citing Lawton, *supra*

Behavioral research supports these critiques by noting why employees may rationally, or at least unavoidably (and thus “reasonably”), not report harassment. If employees have an endowment effect in their jobs, as discussed above,<sup>243</sup> they will especially fear retaliatory firing because they will hesitate to upset even the unpleasant status quo of having a job but facing harassment. If prospect theory accurately describes people’s job preferences, then the risk of loss (retaliation) is more fearsome than the risk of gain (stopping the harassment) is appealing. Even if endowment effects and related job valuation phenomena are uncertain, other behavioral research finds people prone to the availability heuristic<sup>244</sup> and salience bias.<sup>245</sup> Everyone remembers and spreads rumors about instances of retaliation,<sup>246</sup> but not about uneventful complaints, so that employees may perceive exaggerated, unrealistic probabilities of retaliation. Retaliation is a real phenomenon,<sup>247</sup> but retaliatory motive usually is concealed, so the probability is uncertain, leaving room for the influence of cognitive perceptual biases.

Learned helplessness, a psychological condition in which the lesson people draw from a harmful situation is that changing the situation is beyond their control, is another reason reasonable employees may not report harassment. Psychologist Martin Seligman and his colleagues first accidentally discovered that dogs can be experimentally conditioned to exhibit learned helplessness,<sup>248</sup> and then extended these findings to humans;<sup>249</sup> other psychologists have since further recognized and applied learned helplessness

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note 236, at 199).

243. See *supra* Part I (discussing employees’ endowment value in their jobs, in the context of assessing damages from termination).

244. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207, 207-09 (1973).

245. Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 190, 192-94 (Daniel Kahneman et al. eds., 1982).

246. See generally NICHOLAS DiFONZO, *THE WATERCOOLER EFFECT: A PSYCHOLOGIST EXPLORES THE EXTRAORDINARY POWER OF RUMORS* 13-36 (2008).

247. See *supra* note 239.

248. Martin E. P. Seligman & Stephen F. Maier, *Failure to Escape Traumatic Shock*, 74 *J. EXPERIMENTAL PSYCHOL.* 1, 1-2 (1967).

249. Donald S. Hiroto & Martin E. P. Seligman, *Generality of Learned Helplessness in Man*, 31 *J. PERSONALITY & SOC. PSYCHOL.* 311, 311-13 (1975).

theory.<sup>250</sup> Learned helplessness can result from workplace harassment if employees are subjected to a pattern of repeated harassment over which they have no control, leading them to react passively and form cognitive beliefs that change is not possible.

Thus, the declaration in the *Faragher/Ellerth* jurisprudence that a “reasonable” harassed employee always can complain internally is at odds with the reality that most employees’ cognition and cost-benefit estimates lead them not to complain. The *Faragher/Ellerth* complaint requirement essentially gives most employers automatically one of the two elements of the harassment defense in that the internal complaint requirement makes an unrealistic demand of employees. “If well-intentioned, thoughtful employees fall prey to procedural hurdles they cannot be expected to intuit or discover, then meritorious claims are being dismissed without purpose, i.e., without effectively incentivizing employees to engage in the preferred behavior.”<sup>251</sup> Even if employees can “intuit or discover” the complaint requirement, that requirement still demands of employees something unrealistic and, as discussed below, undesirable.

### *3. The Prescription: Eliminate the Faragher/Ellerth Employee Complaint Requirement, or At Least More Broadly Recognize Exceptions to the Requirement*

The above critique of the *Faragher/Ellerth* employee complaint requirement duty leads to two proposed reforms. First, the *Faragher/Ellerth* employee complaint requirement should be eliminated, which would make employers strictly liable for workplace harassment, just as they are strictly liable for various harms that occur on their premises. Whether employers are liable for harassment only when negligent, or under a strict liability rule, was a raging debate before *Faragher/Ellerth* declared a rule of strict liability with a negligence-based defense.<sup>252</sup> Changing that rule

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250. CHRISTOPHER PETERSON ET AL., *LEARNED HELPLESSNESS: A THEORY FOR THE AGE OF PERSONAL CONTROL* 3-16, 98-140 (1993) (including chapters by many widely recognized psychologists summarizing and integrating the application, research, and theory of learned helplessness).

251. Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 1004 (2007).

252. Shortly before *Faragher/Ellerth*, “[a]t least six different standards [we]re currently in use in the various courts of appeals, ranging from what is, in effect, strict liability to the

would require a Supreme Court decision or a statutory rewrite of the *Faragher/Ellerth* defense. Both are unlikely in the short term, but Title VII is one statute Congress frequently considers amending (and occasionally actually amends) to respond to Supreme Court decisions that (like *Faragher/Ellerth*) restrict Title VII liability by expanding employers' defenses.<sup>253</sup>

Second, district and appellate courts could, within the confines of existing law, be more willing to recognize circumstances in which an employee might not have complained internally of harassment but might still be deemed in compliance with the textual demand of *Faragher/Ellerth*—that the employee cannot have “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>254</sup> Many employment law scholars have argued, though usually not based on social science findings, that courts should be “[i]nfusing more

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less strict 'knew or should have known' standard.” Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for “Hostile Work Environment” Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 670 (1995) (citations omitted).

For academic and judicial support of strict liability, see, for example, David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 71 (1995) (“criticiz[ing] the courts' failure to uniformly impose vicarious liability on employers in cases involving sexual harassment by supervisors, and ... the confusing rules applied by the federal courts”); *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985) (adopting strict liability because “[a]n employer's delegation of [workplace authority] vests in the supervisor such extreme power over the victimized employee that the supervisor's stature as an 'agent' of the employer cannot be doubted”).

For academic and judicial opposition to strict liability, see, for example, Stacey Dansky, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 437 (1997) (criticizing strict liability); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 517 (7th Cir. 1997) (en banc) (Coffey, J., concurring as to the negligence rule, calling strict liability “guilt by association”) (citations omitted).

253. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)) (reversing the interpretation of Title VII the Supreme Court stated in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that pregnancy discrimination was not sex discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (narrowing two employer defenses: disparate impact liability under *Wards Cove v. Antonio Packing Co.*, 490 U.S. 642 (1989), and liability in mixed-motive cases (in which both discrimination and an unbiased rationale motivated the employer's action against the plaintiff) under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (reversing the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that declared a broader employer affirmative defense to pay discrimination cases than most circuits had applied).

254. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

leniency into the *Faragher/ Ellerth* reporting requirement.<sup>255</sup> This Article provides social scientific support for that view and points to factors that could help determine the reasonableness of not complaining internally due to fear of retaliation, such as (1) job security (employees who can be fired only for cause, such as certain civil servants or professors, would have less fear than those employed at-will), (2) minority status (not whether the harassed employee is a member of a minority group, but whether he or she is essentially alone on the job, such as the only woman at that workplace), and (3) economic vulnerability (whether job loss would deprive the employee of essentials of life such as ability to pay for food, housing, or family needs).

#### *4. Objections to More Judicial Recognition of the Reasonableness of Employees Not Reporting Harassment and Responses to Those Objections*

There are two important objections to the idea that courts should be more willing to recognize the reasonableness of an employee deciding not to report harassment: failing to report is based on exaggerated fears the law should not accept and reporting harassment helps others, so courts should increase such reporting by making it a requirement.

##### *a. Failing To Report Harassment Is Based on Irrationally Exaggerated Fear*

Unwillingness to report harassment for fear of retaliation is irrational, and therefore should not be judicially approved as “reasonable” behavior, if—as suggested above—that unwillingness traces to a perception of the odds of retaliation that is exaggerated due to cognitive biases. Requirements of reasonableness should assume rational behavior even—perhaps especially—when rational behavior is not the norm, so as to encourage that rational behavior. In short, if the law requires internal complaints by harassed employees who wish to sue but are unduly fearful of complaining,

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255. Moss, *Fighting Discrimination*, *supra* note 251, at 1009; *see supra* note 236 (collecting citations).

then the law is incentivizing more rational behavior by requiring those internal complaints.

Yet the idea that employees hesitate to complain due to cognitive bias should not be exaggerated. Even without biases, it can be quite rational for an employee in a vulnerable position, or who has reason to think the company knows and is tolerant of on-premises harassment, to refrain from filing an internal complaint that has a low probability of success yet risks retaliation that, given the monetary and psychological costs of unemployment,<sup>256</sup> can have a catastrophic impact.

*b. Reporting Harassment Benefits Others and Should Be Encouraged*

Even if an employee might be reluctant to complain, Title VII seeks to redress social problems of bias beyond just that one employee's complaint, as Congress noted in enacting Title VII.<sup>257</sup> Reporting harassment benefits others, at least in instances when the report does remedy or lessen harassment at that workplace, in two ways: (1) a complaint that generates a productive employer response benefits current and potential future victims of the same harasser, or of other harassers who get away with it due to the same lax company culture; and (2) a successfully resolved internal complaint obviates the need for litigation, which saves public judicial resources. Reporting harassment thus is a "public good" in economic terms; it benefits others who bear no cost or risk for receiving that benefit.<sup>258</sup> Public goods tend to be under-provided, so

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256. See *supra* Part I.C.1.

257. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (holding award of attorney's fees presumptively appropriate for prevailing Title VII plaintiffs). As the court explained,

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.... When a plaintiff brings an action ... he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

*Id.* (citing legislative history).

258. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 593 (5th ed. 2000). Technically, reporting harassment is only *partially* a public good, because sometimes there are no, or not many, broader benefits, or sometimes the confidential nature of the complaint process assures limited third-party benefit. The basic point, however, remains: many



even if it is rational for harassment victims to hesitate to complain internally, perhaps courts should require them to provide the underprovided public good of reporting harassment, and thereby try to have the company resolve the problem itself.

Drafting employees into providing public goods has some logic, but defies the Title VII statutory purpose of redressing discrimination by public legal means. Even before litigation commences in publicly accessible courts, all employment discrimination cases must begin with the filing of a charge of discrimination at a local office of the United States Equal Employment Opportunity Commission. In contrast, most internally resolved matters yield confidential settlements,<sup>259</sup> so internal complaints less often yield third-party antiharassment benefits than public legal complaints of discrimination.

Further, the assumption of a complaint requirement appears to be that the victim is the lowest-cost avoider because she knows most about the harassment. Yet that may not be true; while companies have limited ability to monitor off-premises injuries (for example, customers' off-label uses of products), as employers they can monitor the workplace (easily if a small workplace, or if a large workplace then through the human resources department). Employers thus may have reasonably good monitoring ability, without facing the risk from addressing harassment itself that victims face from reporting that harassment.

## *B. Employers' Antidiscrimination and Antiharassment Duties*

### *1. The Sufficiency of Formalities, and the Lack of Close Factual Scrutiny*

Many have argued that while some employer antidiscrimination/harassment programs can be effective, others are well-intended yet ineffectual, and still others are disingenuous window dressing by

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harassment reports help improve the workplace for the benefit of others, yet the worker who reports bears the entire risk of ostracism or retaliation, so there may be fewer internal reports than would be optimal.

259. See Minna Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006). See generally Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007).

employers intent on perpetuating or ignoring discrimination.<sup>260</sup> The problem, these critics say, is that courts look only to formalities, not substance, in evaluating employers' programs. Although technically distinct, "in practice" there is substantial overlap between what does and does not suffice for the *Faragher / Ellerth* defense to harassment liability (based on an effective antiharassment program) and the *Kolstad* defense to punitive damages (based on good faith Title VII compliance).<sup>261</sup>

As to employers' defense to punitive damages based on "good faith efforts to comply with Title VII" under *Kolstad v. American Dental Association*<sup>262</sup>; in *Cooke v. Stefani Management Services*,<sup>263</sup> the employer's efforts sufficed, the Seventh Circuit held, when the employer promulgated a sexual harassment policy, mounted an antiharassment poster in the work area, and held a seminar on sexual harassment for managers.<sup>264</sup> Many courts have held similarly that these are the basic, and usually sufficient, elements of an employer antidiscrimination program,<sup>265</sup> even where—as in *Cooke*—

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260. Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961-71 (1999); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 490, 537-38 (2001) (noting "risk that employers will adopt legalistic, sham, or symbolic internal processes that leave underlying patterns of bias unchanged," and that "[s]ome courts have deferred to an employer's procedures, regardless of their actual effectiveness .... [This] uncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions").

Bisom-Rapp recounted "how defense lawyers attempt to strategically position employers to safeguard these clients against discrimination and other employment-related litigation," Bisom-Rapp, *supra* at 961, and that "[e]mployers frequently demonstrate fidelity to EEO law through symbolic rather than substantive actions," *id.* at 963. Her article presented a "content analysis of the defense literature advocating preventative practices" showing that employment defense attorneys often "creat[e] the appearance of nondiscriminatory decision making without an equivalent emphasis on facilitating substantive change." *Id.* at 965-66. For example, "[m]any of the internal dispute resolution mechanisms developed by employers ... consist of boilerplate from the most recent decisions of the court or the reproduction of EEOC guidelines." Sturm, *supra* at 543.

261. Bettina B. Plevan, *Training and Other Techniques To Address Complaints of Harassment*, 682 PLI/LIT 675, 755 (2002) ("In theory, failure to establish a Faragher defense should not necessarily defeat the ability to prove a Kolstad defense. In practice, however, that is not always the case.")

262. 527 U.S. 526, 545 (1999).

263. 250 F.3d 564 (7th Cir. 2001).

264. *Id.* at 568-69.

265. *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 548-49 (4th Cir. 2003) (finding sufficient that employer created "an organization-wide Equal Employment Opportunity

there was evidence calling the merits of the program into question. Specifically, in *Cooke*, the policy requiring employees to report harassment internally lacked a “bypass” provision allowing employees to make the report to someone other than the employee’s manager or general manager in the event that one of those managers was the alleged wrongdoer.<sup>266</sup> Many have argued that “bypass” provisions are critical to having a truly effective employer antidiscrimination program,<sup>267</sup> yet the *Cooke* court still approved of the employer’s program, asserting that “common sense” would lead a reasonable person to know she could report to someone other than her manager.<sup>268</sup>

Courts only reject employer antidiscrimination programs under *Kolstad* (a) when the program is obviously too cursory (for example, merely posting a federal government poster regarding discrimination is not a sufficient “good faith” compliance effort,<sup>269</sup> and neither is merely encouraging employees to report grievances to management without any further Title VII efforts)<sup>270</sup> or, more commonly, (b) when there is actual evidence the employer did not truly implement, or failed to comply with, its own policy.<sup>271</sup> As to (b), the level of

Policy” barring discrimination, a grievance policy encouraging victims of discrimination or harassment to complain to the employer, a diversity training program with formal classes and group exercises for employees, and a record of employee demographics); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473 (5th Cir. 2002) (finding an employer liable for harassment despite having an antiharassment policy, employee harassment training, and an internal procedure for receiving and investigating complaints); *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1209 (10th Cir. 2002) (holding that basic requirements include that the employer created a policy and made a good faith effort to disseminate that policy as well as to educate its employees on the policy and on Title VII prohibitions in general).

266. 250 F.3d at 569.

267. Plevan, *supra* note 261, at 754 (noting that harassment policy should have multiple reporting channels); *Outten et al.*, *supra* note 17, at 203-04 (same).

268. 250 F.3d at 569.

269. *See, e.g.*, *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460-61 (4th Cir. 2002).

270. *See, e.g.*, *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999).

271. *See, e.g.*, *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 445-46 (4th Cir. 2000) (denying employer judgment as a matter of law even though it had a facially plausible program). The *Lowery* antiharassment policy had multiple complaint channels, an open-door grievance policy, mandatory training and meetings with human resources, and antidiscrimination posters—but top executives exhibited animus toward African Americans (one buried studies showing reflected racial bias at the workplace) and “several African American employees ... felt intimidated ... in response to their complaints to management about racial animus in promotion[s].” *Id.*; *see* *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 663-64 (7th Cir. 2001) (denying employer motion judgment as a matter of law, when employer had

evidence courts may require to reject a facially plausible antidiscrimination program, is that the employer's failure to comply with or truly implement its program is bad enough to allow an inference that the program is merely "an effort to mask" discrimination, at least tolerance of discrimination.<sup>272</sup>

Compared to the *Kolstad* defense, the *Faragher/ Ellerth* defense requires a bit less; it more narrowly focuses on "reasonable care to prevent and correct promptly any sexually harassing behavior."<sup>273</sup> Yet most courts deem any antiharassment policy with a complaint procedure sufficient, at least absent specific evidence undercutting the policy. "[D]istribution of a valid anti-harassment policy provides compelling proof that [an employer] exercised reasonable care in preventing and promptly correcting sexual harassment," various circuits hold.<sup>274</sup>

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"zero tolerance" policy yet did not make the policy readily available to employees and failed to respond properly to plaintiff's harassment complaint—officials failed to follow procedures requiring putting complaints into writing and told plaintiff she was being "too emotional"; *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) (denying employer motion judgment as a matter of law, given lack of training, manager ignorance, and nonresponse to plaintiff's complaint: "evidence ... undermin[ed] Pacesetter's claim that it made good faith efforts to educate employees about sexual harassment.... [A] manager ... testified that no such ... training sessions occurred.... [S]ubstantial evidence suggest[ed] that Pacesetter knew about Bauersfeld's sexually harassing conduct but failed to take any action .... [Plaintiff's manager] conceded that ... she believed that a male supervisor would not commit sexual harassment if he either exposed his genitalia to a female subordinate or grabbed her breasts, so long as he apologized after the incident."); *Ciesielski v. Hooters Mgmt. Corp.*, No. 03-C-1175, 2004 WL 2997648, at \*4 (N.D. Ill. Dec. 27, 2004) ("[A] reasonable jury could have found that Hooters had a formal anti-discrimination policy.... [However,] after complaints were made about the recurring holes in the changing room walls, Hooters' management did not respond in a timely fashion.").

272. *Lowery*, 206 F.3d at 446.

273. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

274. See *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 929 (8th Cir. 2008) (citation omitted); see also *White v. BFI Waste Servs.*, 375 F.3d 288, 299 (4th Cir. 2004) ("[D]istribution by an employer of an anti-harassment policy provides 'compelling proof ... [of] reasonable care in preventing and promptly correcting harassment.'" (citation omitted)); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1286 (11th Cir. 2003) (noting that disseminating a harassment policy is "fundamental to meeting the requirement for exercising reasonable care in preventing sexual harassment"); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (holding that "[A]n antiharassment policy with complaint procedures is an important consideration in determining whether [an] employer has satisfied" *Faragher/ Ellerth*); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999).

Not many courts, but a few, have gotten into the specifics of employer policies, such as noting that if a policy requires employees to report harassment, it should provide a way for that complaint to be made to someone other than the harassing supervisor.<sup>275</sup> But few cases reject complaint policies for lacking multiple complaint channels; some courts simply assume multiple channels are implicitly available as a matter of “common sense,”<sup>276</sup> and other courts expressly note that the *Faragher/Ellerth* defense does not actually require employers to adopt all of the elements courts have noted as desirable for an employer policy.<sup>277</sup>

In short, under both *Kolstad* and *Faragher/Ellerth*, far from requiring employers to *prove* affirmative defenses focused on the quality of their discrimination policies, courts could apply *deference* to any policies that look facially adequate on paper. Courts rarely require anything beyond adopting the basic policy-plus-complaints formalities; as under *Kolstad*, courts typically reject employer policies as insufficient under *Faragher/Ellerth* only when there is specific evidence that the policy was facially inadequate<sup>278</sup> or that the employer violated or never truly implemented its own policy.<sup>279</sup>

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275. See, e.g., *Walton*, 347 F.3d at 1286; *Leugers v. Pinkerton Sec. & Investigative Servs.*, 205 F.3d 1340, \*3 (6th Cir. Feb. 3, 2000) (unpublished opinion); cf. *Dowdy v. North Carolina*, No. 01-1706, 2001 WL 1408456, at \*1 (4th Cir. Nov. 13, 2001).

276. *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 568-69 (7th Cir. 2001) (so holding in evaluation of employer's *Kolstad* efforts) (citing *Parkins v. Civil Constr. of Ill.*, 163 F.3d 1027, 1038 (7th Cir. 1998), which held an employer not liable for harassment where employee failed to re-complain to a different individual after her first complaint yielded no useful employer response. “A reasonable person, realizing that her complaints were ineffective, would ... seek a remedy elsewhere.”).

277. See, e.g., *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (noting that although many courts express approval of guaranteed confidentiality and nonretaliation in employer policies, these elements are not mandatory for a policy to suffice under *Faragher/Ellerth*).

278. See *supra* notes 269-72 for cases in which employers failed to establish a *Kolstad* defense; for a similar holding specific to the harassment context, see, for example, *Morgan v. Fellini's Pizza, Inc.*, 64 F. Supp. 2d 1304, 1315 (N.D. Ga. 1999) (rejecting antiharassment policy that consisted of only a few sentences within a larger policy regarding employee obligations, and failed to state the person(s) with whom complaints should be lodged, and where management did not review any complaints made, explain the policy to new employees, post the policy, or train supervisors in the policy).

279. See *supra* notes 269-72 for cases in which employers failed to establish a *Kolstad* defense; for a similar holding specific to the harassment context, see, for example, *Homesley v. Freightliner Corp.*, 2003 WL 1908744, at \*7 (4th Cir. Apr. 22, 2003) (rejecting a facially plausible harassment policy where employer failed to respond genuinely to complaints: “Homesley’s complaint ... [was] not investigated at all. When Chitwood complained ... Lang

Effectively, this means that once an employer meets a light burden of establishing a facially plausible program, the court will assume its efficacy, without evidence as to its substance, unless the employee, in an unstated shifting of the burden of proof,<sup>280</sup> proves a reason the court should reject the employer policy.

*2. The Need to Scrutinize the Specifics of Employer Policies for Negativity- and Fear-Focused Policies, Which are Least Likely to be Productive*

In addition to research about happiness from primarily a hedonic psychology perspective,<sup>281</sup> another body of happiness research—positive psychology<sup>282</sup>—studies positive emotions,<sup>283</sup> positive character traits,<sup>284</sup> positive institutions,<sup>285</sup> and positive organizations.<sup>286</sup> A large psychological literature demonstrates that people's emotional states, particularly positive affect, significantly affect their

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said that Yarborough was 'just kidding, [and] he don't mean anything by it.' ... Lang's approach violated one ... polic[y] which required that rumors of sexual harassment be investigated.... This evidence suggests that Freightliner was not interested in preventing, let alone correcting, sexual harassment.”)

280. See Lawton, *supra* note 236, at 199 (“[T]he courts’ focus on paper policies and procedures impermissibly shifts the burden of proof on prevention from the employer to the employee.”).

281. See, e.g., Frederick & Loewenstein, *Hedonic Adaptation*, *supra* note 138.

282. See generally MARTIN SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* (2002) (generally describing positive psychology).

283. See, e.g., Shelly L. Gable & Jonathan Haidt, *What (and Why) is Positive Psychology?*, 9 REV. GEN. PSYCHOL. 103 (2005).

284. See, e.g., CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 3-5 (Christopher Peterson & Martin E. P. Seligman eds., 2004).

285. See, e.g., Peter H. Huang & Jeremy A. Blumenthal, *Positive Institutions, Law, and Policy*, in HANDBOOK OF POSITIVE PSYCHOLOGY 589 (Shane J. Lopez & C.R. Snyder eds., 2d ed. 2009).

286. See, e.g., EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 3-5, 8-12 (Jane E. Dutton & Belle Rose Ragins eds., 2007); POSITIVE ORGANIZATIONAL BEHAVIOR (Debra Nelson & Cary L. Cooper eds., 2007); POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE 3-6 (Kim S. Cameron et al. eds., 2003).

decision making,<sup>287</sup> problem solving,<sup>288</sup> and behavior.<sup>289</sup> In particular,

- (1) people in positive emotional states are better at problem solving than people in negative emotional states;<sup>290</sup>
- (2) emotional states, positive or negative, can be contagious;<sup>291</sup> and
- (3) diversity itself can improve group decision making.<sup>292</sup>

The above findings imply that courts should examine employer antidiscrimination programs with a critical eye toward their content, not with the deference existing case law appears to grant to just about any sort of “training.” In particular, programs focused on fear, for example, “don’t do this or get sued,” are undesirable because fear is a form of negative affect not conducive to good judgment and decision making.<sup>293</sup> Social psychologist Susan Fiske

287. See, e.g., Benjamin E. Hermalin & Alice M. Isen, *A Model of the Effect of Affect on Economic Decision Making*, 6 *QUANTITATIVE MARKETING & ECON.* 17, 17-18, 35-36 (2008); Alice M. Isen, *An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues in Practical Implications*, 11 *J. CONSUMER PSYCHOL.* 75, 75, 78-81 (2001); Alice M. Isen, *Positive Affect and Decision Making*, in *HANDBOOK OF EMOTIONS* 417 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000).

288. See, e.g., Alice M. Isen et al., *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DECISION MAKING* 221 (1991).

289. See, e.g., BARBARA FREDRICKSON, *POSITIVITY: GROUNDBREAKING RESEARCH REVEALS HOW TO EMBRACE THE HIDDEN STRENGTH OF POSITIVE EMOTIONS, OVERCOME NEGATIVITY AND THRIVE* (2009); Barbara L. Fredrickson, *Positive Emotions and Upward Spirals in Organizational Settings*, in *POSITIVE ORGANIZATIONAL SCHOLARSHIP* 163 (Kim S. Cameron et al. eds., 2003); Kareem J. Johnson & Barbara L. Fredrickson, *“We All Look the Same to Me”: Positive Emotions Eliminate the Own-Race Bias in Face Recognition*, 16 *PSYCHOL. SCI.* 875 (2005).

290. Sigal G. Barsade & Donald E. Gibson, *Why Does Affect Matter in Organizations?*, *ACAD. MGMT. PERSP.*, Feb. 2007, at 36, 45-46; Sonja Lyubomirsky et al., *The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?*, 131 *PSYCHOL. BULL.* 803, 803-04, 822-23 (2005); Barry M. Staw et al., *Employee Positive Emotion and Favorable Outcomes at the Workplace*, 5 *ORG. SCI.* 51, 61 (1994). See generally FREDRICKSON, *supra* note 289.

291. James H. Fowler & Nicholas A. Christakis, *The Dynamic Spread of Happiness in a Large Social Network: Longitudinal Analysis over 20 Years in the Framingham Heart Study*, 338 *BRIT. MED. J.* 23, at 23, 30-31 (2009). See generally ELAINE HATFIELD ET AL., *EMOTIONAL CONTAGION* (1994).

292. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 131-74 (2007) (describing how diversity with a group facilitates problem solving).

293. See DANIEL GARDNER, *THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN’T—AND PUT OURSELVES IN GREATER DANGER* 6 (2008). *But see* ROBERT H. ROSEN, *JUST ENOUGH ANXIETY: THE HIDDEN DRIVER OF BUSINESS SUCCESS* 1 (2008) (noting that the

has researched how and why particular social contexts can discourage prejudice,<sup>294</sup> finding that people naturally categorize others, especially based upon such observable categories as age, gender, and race.<sup>295</sup> Fiske also found that people must be motivated to get past such categorizations and learn about others.<sup>296</sup> In experimental laboratory settings, being a team member, or otherwise being dependent upon others, motivates people to get past stereotyping.<sup>297</sup> In other studies, Fiske showed that competition might lead people to view competitors as individuals, because people are motivated to learn how competitors will act.<sup>298</sup> This body of research suggests that training programs that involve collaboration or even competition among different kinds of people are likely to be successful types of antidiscrimination/harassment training. So, for example, a program could have people alternate between the roles of being teachers and trainees.

Admittedly, this prescription is no panacea. Cooperative, positive programs can be ineffective. Even if courts demand those features, unsavory employers could add positive-sounding elements to ineffectual or pretextual programs. All this Article suggests is that courts' current treatment of these relevant factors—completely ignoring them—certainly yields suboptimal decisions. Courts can consider these factors without going too far by deeming them necessary and sufficient elements of an antibias program. Courts face a perhaps dauntingly subjective and holistic inquiry into the quality of such programs, but that inquiry is one the Supreme Court has demanded, so courts might as well consider, rather than ignore, the critical subjective components of those programs.

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opposite occasionally can be true).

294. Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 123 (2002). See generally SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY 397-457 (2004).

295. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 2d ed. 1998).

296. Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 122-24 (2004).

297. Susan T. Fiske, *Interdependence and the Reduction of Prejudice*, in REDUCING PREJUDICE AND DISCRIMINATION 115 (Stuart Oskamp ed., 2000).

298. Janet B. Ruscher & Susan T. Fiske, *Interpersonal Competition Can Cause Individuating Processes*, 58 J. PERSONALITY & SOC. PSYCHOL. 832, 842 (1990).



### III. A BROADER ISSUE: HOW ECONOMICS STILL CAN PROVIDE USEFUL ANALYSES IN A POST-BEHAVIORAL, POST-HAPPINESS WORLD

This Article aims to provide useful diagnoses and prescriptions for two significant issues in employment law (plaintiffs' damages and employers' defenses), but more broadly, this employment law analysis helps answer three broader questions about the usefulness to law of economics and social science:

- (1) Social science findings on human behavior, cognition, and preferences add complexity to the older, simpler "rational actor" economic model that generated easy predictions and prescriptions; has this added complexity made economics too indeterminate to be of practical use?
- (2) Compared to rational-actor models, newer social science-based economics often prescribes paternalistic regulations to improve or redress imperfect decision making; when are such regulations—including all deviations from free-market employment-at-will—worth the transaction costs and incentive distortions they create?
- (3) That social science findings evolve and change is a good thing, but it creates risks for courts relying on recent findings that might become out of date; should courts base decisions on recent social science at all?

#### *A. Is Economics Now Too Indeterminate To Be of Practical Use?*

This Article asserts that useful economic prescriptions for improving law still are possible, contrary to those who criticize behavioral economics and happiness research as too indeterminate,<sup>299</sup> or who see little hope for prescriptions absent far more

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299. See, e.g., Michael E. DeBow & Dwight R. Lee, *Happiness and Public Policy: A Partial Dissent (or, Why a Department of Homeland Happiness Would Be a Bad Idea)*, 22 J.L. & POL. 283, 284-85 (2006); Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomiosis*, 2 BROOK. J. CORP. FIN. & COM. L. 41, 62-64

data.<sup>300</sup> Yet while prescriptions are feasible, those prescriptions may be narrower than those proposed in the past. Behavioral economics and happiness research cannot find holy grail answers to galactic-sized questions such as, “Is Title VII efficient?”<sup>301</sup> but they can help us find rules encouraging better “micro”-level decisions by “retail” decision makers. For example, as this Article argues, judges should be authorized to consider possible endowment values and happiness impacts of unemployment in assessing “make-whole” damages and to consider behavioral and happiness realities in assessing whether a reasonable employee would report harassment internally. This principle applies broadly outside employment. For example, we cannot make *all* eminent domain compensation higher because “society” features endowment effects—but we can ask judges, zoning boards, or city councils making specific land decisions to consider whether individual property owners have endowment values. In sum, the new economics still can offer concrete, useful prescriptions to improve law and judicial decisions—but these prescriptions are likely “micro”-level suggestions usable by “retail”-level decision makers, not “macro”-level recommendations for broad social policy.

More broadly, the import and impact of behavioral economics and happiness research fit into a more general historical pattern of what happens to scientific discoveries. Having been applied to almost all legal fields, economic analysis of law is following a pattern common within the history of science: (1) early proponents of new ideas enthusiastically claiming overly broad revolutionary potential, followed by (2) a second generation of proponents of those ideas providing more balanced, careful, and nuanced analysis, followed by (3) a third generation of proponents of those ideas finally being able to synthesize and incorporate those ideas within a more general conceptual setting.<sup>302</sup> Recent behavioral and happiness scholarship

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(2007); Will Wilkinson, *In Pursuit of Happiness Research: Is It Reliable? What Does It Imply for Policy?*, 590 POL’Y ANALYSIS 1, 1, 5-17 (2007).

300. See, e.g., Samuel Issacharoff, *The Difficult Path from Observation to Prescription*, 77 N.Y.U. L. REV. 36, 39-40 (2002); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559-60 (1998); Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470, 492, 509-11 (2007).

301. See *supra* note 7 (citing such scholarship).

302. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52-53 (3d ed. 1996).

probably qualifies as first-generation, but this paper offers a mix of second-generation nuanced analysis and (hopefully, but time will tell) third-generation synthesis and refinement.

*B. When Are Paternalistic Regulations Worth the Transaction Costs and Incentive Distortions?*

When does regulating market transactions like those of employers and employees help enough to be worth the (a) transaction costs and (b) distortion of incentives? One partial but important answer is that different balances are proper in different markets. As to (a), imposing transaction costs to improve decisions may not be worth it for low-stakes, frequently repeated consumer decisions (for example, rebates) but may be for major, less-repeated decisions like job searches and home purchases. This Article thus differs from those who see behavioral economics as justifying broader tort liability for run-of-the-mill consumer transactions.

As to (b), incentive distortion, one counterargument to regulations (or legal liability) is, “we should be more libertarian to minimize preference distortion,” such as by having flat taxes rather than the current progressive and exception-riddled tax system. Yet concern for distorting preferences assumes preferences not only exist already, but are stable and worthy of not being distorted. Much of behavioral economics and happiness research calls into question whether preferences exist or are instead socially constructed.<sup>303</sup> If preferences are constructed by marketing and other influences, they may not deserve as much deference as economics traditionally assumes;<sup>304</sup> to the extent that the status quo is not neutral, it is not necessarily paternalist for the law to guide people in desirable directions.<sup>305</sup> Further, incentive distortion is *inevitable* in employment markets, given how pervasively regulated those markets are. Paternalism is thus less objectionable as preference-distorting in

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303. See generally THE CONSTRUCTION OF PREFERENCE (Sarah Lichtenstein & Paul Slovic eds., 2006).

304. See generally PETER A. UBEL, FREE MARKET MADNESS: WHY HUMAN NATURE IS AT ODDS WITH ECONOMICS—AND WHY IT MATTERS (2009).

305. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, & HAPPINESS 5 (2008); Jeremy A. Blumenthal & Peter H. Huang, *Positive Parentalism*, NAT'L L.J., Jan. 26, 2008.

employment than in most other markets; unless we go back to unregulated nineteenth century labor markets, employment markets inevitably are distorted by law and policy.

*C. Should Courts Base Decisions on Recent Social Science at All?*

Governed by precedent, courts are slow to adopt economics and social science findings. This is not always a bad thing; as Justice White once wrote in a securities fraud case, "with no staff economists, no experts schooled in the 'efficient-capital-market hypothesis,' no ability to test the validity of empirical market studies, [judges] are not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory."<sup>306</sup> The recent history of the efficient capital market hypothesis (ECMH) mentioned in that quote may be a cautionary tale. "Of all recent developments in financial economics, the efficient capital market hypothesis ('ECMH') has achieved the widest acceptance by the legal culture.... [T]he ECMH is now *the* context in which serious discussion of the regulation of financial markets takes place,"<sup>307</sup> two law professors wrote six years after the (in)famous pronouncement by financial economist Michael Jensen that "there is no other proposition in economics which has more solid empirical evidence supporting it than the Efficient Market Hypothesis."<sup>308</sup> Yet just six years ago, another leading corporate and securities professor summed up a newer, contrary central tenet of behavioral finance: "recently, however, the idea of market efficiency has fallen into disrepute as a result of market events and growing empirical evidence of inefficiencies."<sup>309</sup>

Yet employment discrimination law features several areas in which exploiting even less-than-certain social science findings beats the alternative. In employment discrimination law, courts *must* undertake discretionary decisions such as damages awards requiring

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306. *Basic, Inc. v. Levinson*, 485 U.S. 224, 253 (1988) (White, J., concurring in part and dissenting in part).

307. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549-50 (1984).

308. Michael C. Jensen, *Some Anomalous Evidence Regarding Market Efficiency*, 6 J. FIN. ECON. 95, 95 (1978).

309. Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635, 635 (2003).

assessing the impact of job loss, holistic evaluations of employers' antibias programs, and assessment of whether it was "reasonable" for a harassment victim not to complain internally. Admittedly, relying on social science findings creates a risk of relying on soon-to-be-disproven assumptions, but there is no alternative of relying on solely objective facts for these sorts of unavoidably subjective, discretionary decisions. Courts hamper their efforts by excluding considerations with solid empirical support, like the behavioral economics and happiness research findings this Article discusses.

### CONCLUSION

This Article has two aims. First, it applies behavioral economics and happiness research findings to provide reforms of a field of law—employment discrimination and all employment law based on discrimination law. Specifically:

- Employment damages should consider whether the plaintiff possessed an endowment value in the lost job, which typically will occur in cases of unlawful termination, rather than cases of unlawful failures to hire.
- Courts should not be so quick to assume, and dismiss cases by holding, that all harassed employees must complain on the job; courts should recognize that complaints cannot be expected from employees who feel endowments in their jobs, who perceive a particular vulnerability to retaliation, or who suffer learned helplessness due to the harassment.
- Rather than assume virtually any employer antidiscrimination program sufficient, courts should scrutinize programs more critically based on research findings about the greater effectiveness of learning and problem solving in positive rather than negative emotional states.

This Article's second aim is broader and more methodological. It illustrates how, and to what extent, economic analyses incorporating behavioral and happiness research findings still can offer insightful analyses and prescriptions. Social science-infused economics may well incorporate too many considerations—nonmonetary utilities and motivations, endowment value, cognitive imperfections,

and so on—to allow the sort of definitive conclusions on broad social issues (like whether a given market should be regulated at all) that once were common fare within economic analysis of law. Yet even with multiple cognitive, psychological, and emotional realities added, economics still can offer helpful advice in the individualized determinations that are the bread and butter of law in action:

- damages determinations of the harm an individual suffered from a job loss or a property taking;
- evaluations of when it is reasonable to expect an employee to complain on the job about harassment; and
- inquiries into the effectiveness of antidiscrimination programs, or more broadly of other compliance programs laws require of corporations.

That courts have not yet incorporated such considerations into their analyses is disappointing but unsurprising. Judges make decisions that are based on precedent and that create precedent, so they are appropriately cautious and slow to start basing their decisions on recent social science. Further, judges are not social scientists. They cannot be expected to know recent research findings until publications (such as, hopefully, this Article) call those findings to their attention and outline their relevance to the damages, reasonableness, and other determinations the law commonly requires courts and other governmental decision-making bodies to make in various fields of law.