GETTING BACK ON YOUR FEET: WRONGFUL DISCHARGE REMEDIES AND DIGNIFYING WORK

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INTRODUCTION

An untimely or unexpected firing from a job can be devastating for individuals or families that had relied on the gainful employment now terminated. When that termination is due to factors other than the ability of the employee to do her job well, it can feel catastrophic. The common law has traditionally treated the employer-employee relationship as strictly transactional, but this treatment often feels out of touch with how we experience work; for many, work is deeply personal. As courts and legislatures have come to recognize this reality, wrongful discharge causes of action have developed,[1] but the effects of these developments have been under-analyzed.

Over the course of the twentieth century, at-will employment and its underlying assumptions about the employee's relationship to her employer were frequently interrogated and found wanting by academics, legislators, and judges alike, and the at-will rule in employment law is today subject to several exceptions. These exceptions range from those created by state and federal legislation to those now recognized by many state courts, such as the cause of action for "wrongful discharge in violation of public policy" (WDVPP). Beyond simply creating new protections for employees and corresponding causes of action, these developments have also significantly changed the remedies available to successful plaintiffs in the employment context.

Because employment at will was the default rule when an employment contract was absent, the common law traditionally only allowed recovery of contract remedies (i.e., economic losses) in disputes arising from terminations of employment. This straightforward traditional rule has given way to complexity, and today a plaintiff may be able to recover damages for emotional distress, depending on her jurisdiction and on what made her termination "wrongful." The various state and federal statutes vary in whether they allow for the recovery of noneconomic damages. A few of the common law exceptions to the at-will rule continue to rely on contract principles, such as a

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1. I will use "wrongful discharge" to refer to all legally actionable terminations of employment, regardless of the cause of action.

wrongful discharge that violates the implied covenant of good faith and fair dealing, and thus those causes of action typically do not permit a plaintiff to recover for emotional distress. However, the most prevalent common law exception to the traditional rule has been the tort of WDVPP,[2] which will generally permit a plaintiff to recover compensatory damages, both economic and noneconomic. Given the trends in employment law over the past fifty years, it is not surprising that emotional distress damages are frequently available in common law wrongful discharge actions.

When judges have recognized new wrongful discharge causes of action, the remedies available are almost universally based on whether the cause of action sounds in tort or contract. Surprisingly, it is rare to find an opinion that incorporates a discussion of downstream effects caused by the different remedies available, and even more rare is a recognition that the employment context presents any unique considerations for deciding on appropriate remedies. In cases from across the country, courts have done little more than declare, "emotional distress damages should be recoverable because emotional distress damages should be recoverable."

This Note aims to fill that void in reasoning by raising the relevant considerations untouched in judicial opinions. After briefly noting the developments in employment law that have led to the current state of emotional distress damages in wrongful discharge cases, Part I will flesh out these considerations and attempt to assess whether, in light of those considerations, emotional distress damages should be available. The availability of damages for emotional distress in employment termination cases has impacts beyond the amount of money an employer must pay a former employee. Compensatory damages do not compensate costs incurred in a vacuum, and emotional distress damages can create significant moral hazard problems.[3] On the other hand, wrongfully terminated employees experience legitimate emotional distress that tort law may frequently compensate, and so allowing an award of emotional distress damages in employment termination contexts may simply be worth the risk of moral hazard or overcompensation.

As is frequently the case with assessing remedies, these considerations fall into two broad categories: those that primarily seek to put the discharged employee in her rightful place, and thus weigh in favor of allowing recovery of emotional distress damages, and those that consider the question from a societal, or law and economics point of view, which both weigh against allowing such recovery. As they are generally understood, these countervailing interests involved are weighty and significantly incommensurable; as such, deciding on an appropriate policy requires prudential balancing. At face value, courts are presented with a choice between risking systematic overcompensation or systematic under compensation.

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2. In a minority of states, this cause of action is governed by contract law.

3. *See* Eugene Kontorovich, Comment, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 491 (2001) ("The absence of mitigation rules means that tort liability for emotional injuries creates moral hazard problems that tend to result in inefficiently low levels of post-injury care by plaintiffs and systematic overcompensation.").

Though this choice is concededly difficult, this Note will argue that the costs of allowing the recovery of emotional distress damages outweigh the benefits. However, given the extent to which emotional distress damages are already available under numerous common law and statutory regimes, availability of emotional distress damages appears to be rather firmly entrenched; therefore, it will present middle ground positions that may limit the potential harms to public policy that emotional distress damages entail.

Beyond its conclusions regarding the insufficiency of the analysis reflected in judicial opinions and the imprudence of allowing recovery of emotional distress damages for wrongful discharge generally, this Note will further argue that allowing emotional distress damages in WDVPP cases frustrates the purpose of the cause of action. While the terminated employee *is* the victim of tortious behavior by her former employer, it does not follow that standard tort remedies are appropriate. There are many unjust terminations which are not legally cognizable; terminations in violation of public policy are an exception to this rule, not because of their wrongfulness to the employee, but because of the damage such terminations would otherwise do to public policy. The most appropriate remedies, then, are ones that adequately incentivize lawful behavior in employees,[4] deter employers from terminating such employees, and efficiently incentivize terminated employees to bring such suits (where such plaintiffs effectively function as whistleblowers if they've been fired for attempted whistleblowing). Emotional distress damages are simply not calculated to this goal, and as such function as something of a cop-out for a more carefully chosen remedy.[5] Part I will conclude by arguing that legislatures have proven themselves able to craft appropriate remedies and should be allowed to do so in this arena.

In assessing the common law as it stands, all of these considerations will have assumed the common law's traditional conception of workers and the nature of their employment (that is, this Note will analyze the common law on its own terms). Under this conception, work is value neutral, and the employment contract is good only insofar as it is economically efficient. The causes of action under consideration Part I are generally concerned with standard aims of tort and contract law, such as returning the terminated employee to her rightful position economically while attempting to properly incentivize efficient behavior. This Note will argue, however, that such the traditional conception has come untethered from how Americans tend to think about their work, and thus it cannot make sense of the developments that employment law has undergone. The common law's traditional doctrines have arguably tended to undervalue work, and thus, when an employer terminates an

4. One of the standard reasons that employees are terminated in this line of cases is their unwillingness to break the law. *See* Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (holding that an employee who was fired for refusing to perjure himself was wrongfully discharged).

5. Admittedly, it's possible that this is (consciously or subconsciously) by design. *See generally* Samuel L. Bray, *On Doctrines That Do Many Things*, 18 GREEN BAG 2D 141 (2015) (arguing that courts often prefer to use doctrines that are not perfectly tailored to any one goal but that allow flexibility in accomplishing many goals with the same doctrine).

employee wrongfully, the common law systematically undercompensates wrongfully terminated employees.

Legislative initiatives like the Americans with Disabilities Act (A.D.A.) explicitly conceptualize work differently.[6] This Note will argue that the common law *should* follow suit in some respects, and yet its current doctrine resembles a half-baked attempt at reflecting the conception of work/employment contained in the A.D.A. This muddled mess has left the remedies available similarly inconsistent and significantly underanalyzed. As a next step in making wrongful termination law remedies more coherent, this Note will seek to reconceptualize employment in a way consistent with the A.D.A.'s conception and will then reassess the appropriateness of emotional distress damages.

In Part II, this Note will attempt to accomplish this goal by following the lead of a quite different perspective: the thought of the late Pope John Paul II. In expounding and developing the Catholic Church's teaching on the "dignity of work," specifically in his 1981 encyclical *Laborem Exercens*, John Paul II produced a theory of work that, this Note will argue, both captures the *ethos* underpinning the developments in employment law of the latter half of the twentieth century and provides a solution to the incommensurability problem of the current paradigm. Rather than conceptualizing work as something to be bought and sold on a free market, John Paul II conceived of meaningful work as an action that is fundamentally dignifying for workers and argued that workers have a right to dignified work. For John Paul II, the primary good of work is for the worker, and societal benefits (e.g., the goods or services produced, the economic benefits) fall somewhere in line behind.[7]

This Note will argue that John Paul II's worker-focused approach to labor successfully captures the animating spirit behind the legislative efforts to protect employees against certain types of discrimination and certain other unjust[8] adverse treatment, and as such is instructive for its purposes. Finally, in analyzing remedies under this new paradigm, it will argue that, contrary to what one might expect, emotional distress damages should not generally be recoverable in wrongful discharge cases. Since the priority is on workers working, the best legal framework will be one that gets the most workers doing dignified work. As noted above, economics will have much to add to this

6. Throughout this Note, I will use legislation as a very rough proxy for public opinion generally. Legislation, I will assume, is more likely to reflect the attitudes of society at large than developments in the common law are; in the employment context, common law developments have frequently tended to most acutely reflect the shifting attitudes of the legal profession.

7. This prioritization comes with the significant caveat that economic considerations retain an important role to play in policymaking; John Paul II acknowledges that economics and other social sciences can be descriptively very useful for working toward the values he advocates for. Economic efficiency should not be the normative priority, but the perspective of economics should not be set aside.

8. Here, I intend a distinction between "wrongful" employment actions and "unjust" ones. I mean wrongful to capture those actions that give rise to successful claims in American law, while I will use unjust to describe a broader category of injustices that workers may suffer, many of which are not (and likely should not attempt to be) remedied by employment law.

discussion, as the best legal framework will be the one that provides the most incentive for workers to work and creates the best possible work for workers to perform (that is, the best job market). This Note will argue that the best rule for accomplishing this goal is for emotional distress damages to generally be unavailable to wrongfully terminated employees, since emotional distress damages will tend to disincentivize a return to meaningful work for a wrongfully terminated employee.

I. EMOTIONAL DISTRESS DAMAGES FOR COMMON LAW WRONGFUL DISCHARGE

Suppose that a hypothetical old apartment building currently exists as it has since its initial construction some 150 years ago. Because of its lack of significant improvement, the old stone building has almost no modern amenities, but its inhabitants have learned to adapt, and the managers of the apartment building allow individual tenants almost complete freedom to modify their apartments as they see fit. Given this arrangement and the general hands-off approach of management, the rent is sufficiently low that the building is almost always fully inhabited. New tenants that desire to cook in their apartment may at times be frustrated by the lack of sufficient apparatuses built into their apartments, but they are permitted and even encouraged to furnish the necessary equipment to suit their needs, and many of those who have lived there for a long time have come to appreciate the simplicity of the arrangement.

Suppose that in spite of this relative consistency, residents collectively (or, at the very least, a very vocal minority who have direct access to management) decide that they would prefer a more expensive but modern apartment, and moving out is generally out of the question. Management is happy to comply, but since it isn't feasible to renovate the building from the ground up (people need to continue to live there, after all), the renovations must happen incrementally, even within the individual apartments. One day a wall is knocked down in one apartment to make room for a renovation, on another day a door is removed and replaced, and so on.

Midway through renovation, money unexpectedly runs tight. Suddenly, management is much less keen on renovation, as are some of the residents who had previously favored a modernized building. Construction is halted, and the apartment building is mostly left as is. As a result, many new problems arise that hadn't existed previously. For example, some units are more updated than others, leading to confusion as to how much rent each resident should owe. Most troubling, however, is the new reality that some of the modern amenities were never fully installed, and so they simply don't function as they were supposed to; others create unforeseen problems, and frequently they stop working out of the blue. Gratefully, some of the improvements work exactly as planned, but even then, they sometimes create a burden for other units that hadn't been considered when they were being installed. Floors now sag in ways that make tenants cautious about walking on them, ovens create fire risks and smoke that the current ventilation and escape pathways are unequipped to deal with, etc. For obvious reasons, many of the tenants wish they could go back to the old arrangement (and advocate for un-renovating the supposed

improvements), while the same vocal minority as before continues to request a finished renovation. The state of employment law largely resembles this apartment building, and emotional distress damages are among the many amenities that were initially installed but whose use is, at best, unreliable, and at worst is counterproductive.

A. The State of Emotional Distress Damages

In his seminal 1984 article, *In Defense of the Contract at Will*, Professor Richard Epstein noted that "[t]he judicial erosion of the [contract at will] has been spurred on by academic commentators, who have been almost unanimous in their condemnation of the at-will relationship, often treating it as an archaic relic that should be jettisoned along with other vestiges of nineteenth[]century laissez-faire."[9] Approximately forty years later, the debate over the at-will doctrine rages on among those academic commentators,[10] though the "judicial erosion" that Professor Epstein argued against has mostly subsided (his side of the debate has, however, remained significantly outnumbered among academics). The developments in the common law that were then underway have, up to today, largely stayed in place, though their expansion has been quite limited in the last forty years.[11] The result of this freeze in doctrinal development is a patchwork combination of common law and statutory exceptions to the employment at-will doctrine, which remains the default rule in all states except for Montana. The academic consensus on both sides of the at-will doctrine debate is that, as it currently stands, this body of law is frequently incoherent.[12]

There are now many legislative exceptions to the at-will doctrine, and they tend to function quite differently from each other theoretically, procedurally, and in the remedies available for a successful plaintiff. For a wrongfully discharged employee, much depends on how or why she was wrongfully discharged. Such statutory exceptions provide protections to all employees from being discharged for "bad" reasons, but they do not shift any employment from an at-will regime to a "just cause" regime.[13] Federal statutes such as Title VII of the Civil Rights Act (C.R.A.) of 1964 provide causes of action when an employee is terminated and when the motivation for such action is prohibited

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9. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948 (1984).

10. This Note does not intend to wade into this debate and instead assumes that the at-will doctrine is sound as a default rule but that its exceptions are also sound.

11. *See* Cynthia Estlund, *Employment-at-Will: Too Simple for a Complex World*, 10 TEX. A&M L. REV. 403, 423 (2023) (describing the momentum in the 1970s and 1980s that made the adoption of "good-cause" regimes nationally seem inevitable and speculating as to why this momentum may have died out prior to achieving an overhaul of the employment-at-will doctrine); *see also* Walter Olson, *The Trouble with Employment Law*, 8 KAN. J.L. & PUB. POL'Y 32, 41 (1998).

12. *See* Estlund, *supra* note 11 at 416–25; *see also generally* William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63 (2020).

13. *See* Corbett, *supra* note 12, at 77.

by the statute.[14] Antidiscrimination statutes make up much of this category of statutory exceptions, but not the entirety. The procedure followed in bringing a wrongful termination case, the burdens of proof, and the remedies available all vary from statute to statute. Though at first, they did not generally allow for recovery of compensatory damages, such statutory exceptions were the first crack in the wall of the at-will doctrine, and likely led to the common law developments that followed.

Sometime later, state courts began to recognize a variety of different causes of action that would permit unjustly terminated former employees some recovery for their loss.[15] These causes of action, like the antidiscrimination statutes, functioned as exceptions to the default rule that all employment of an indefinite duration is at will absent a contract saying otherwise. Two different lines of cases developed. The first line tended to expand protections for employees from unjust discharge either by applying the implied duty of good faith and fair dealing to employment-at-will contracts[16] or by inferring just cause protections from employment handbooks and statements by supervisors.[17] This line of cases relied on contract principles, including the traditional disallowance of recovery for emotional distress as a result of a breach of an (implied) contract.[18]

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14. *See* 42 U.S.C. § 2000e-2. Under the C.R.A. of 1964, courts could enjoin an employer "from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." *Id.* § 2000e-5(g)(1). The C.R.A. of 1991, passed alongside the A.D.A., amended the C.R.A. of 1964 to permit recovery of "compensatory and punitive damages . . . , in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." *Id.* § 1981a(a)(1). Compensatory damages expressly include damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ." *Id.* § 1981a(b)(3). Other adverse employment actions are covered by the statute but are not the focus of this discussion. *See id.*; *see also id.* § 2000e-3 (listing additional unlawful employment practices).

15. *Petermann v. International Brotherhood of Teamsters, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) is typically hailed as the first of these cases. Decided by an appeals court, it was not immediately recognized as groundbreaking, and thus there was a lull of some fifteen years before its thread began to be picked up by state supreme courts. For a longer history of the various exceptions to the employment-at-will doctrine, see Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719 (1991).

16. *See, e.g.*, Fortune v. Nat'l Cash Reg. Co., 364 N.E.2d 1251 (Mass. 1977). As in *Fortune*, states that recognize this cause of action frequently only do so when the discharge is meant to prevent the employee from obtaining compensation for prior work, such as a bonus or a commission.

17. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980). Because this line of cases relied on representations in some form by employers, employers responded by expressly disclaiming any implied contract that might form from their representations. Courts have generally allowed these disclaimers to have their desired effect. *See, e.g.*, Dolan v. Cont'l Airlines, 563 N.W.2d 23 (Mich. 1997).

18. *See, e.g.*, Gaglidari v. Denny's Rests., Inc., 815 P.2d 1362, 1370–71 (Wash. 1991) (affirming the traditional rule that "tort damages for emotional distress caused by breach of an

The second line of cases recognized what has come to be called the cause of action for wrongful discharge in violation of public policy (WDVPP). The reasoning in this line tends to be more diverse from jurisdiction to jurisdiction, including a divergence on whether the cause of action sounds in tort or contract. This distinction tends to be the deciding factor in whether emotional distress damages will be recoverable;[19] in the approximately thirty-nine jurisdictions where this cause of action sounds in tort, the rule is generally that emotional distress damages are recoverable,[20] whereas in the approximately seven jurisdictions that recognize a contract cause of action, recovery is limited to those traditionally recoverable for breach of contract.[21]

Given the significant impact that the availability of remedies will have on the way a cause of action is litigated (or whether it is brought at all)[22] and the unique way that employment law has developed in the common law, one would reasonably expect judges to spend considerable energy on sorting through all of the factors in play when deciding what kind of remedies ought to be available in a newly recognized tort. The norm, however, is quite the opposite. One representative example is (the entirety of) the reasoning contained in *Adams v. George W. Cochran & Co.*:

> We also follow the majority rule and hold that this cause of action sounds in tort, and that the tort is intentional. Because the goal of the exception is to further an officially declared public policy, the law should allow for the full range of remedies to discourage employers from such conduct . . . . Those remedies should include compensatory damages not only for lost wages and other financial benefits, such as health insurance and retirement payments, but also for any emotional distress or mental anguish that the employee may suffer as a result of the wrongful discharge.[23]

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employment contract are not recoverable" and citing to decisions from other states holding the same). *See also* Valentine v. Gen. Am. Credit, Inc., 362 N.W.2d 628 (Mich. 1984).

19. Obviously, this distinction also has other impacts, such as the defenses available, the applicable statute of limitations, etc.

20. *See, e.g.*, Wendeln v. Beatrice Manor, Inc., 712 N.W.2d 226 (Neb. 2006) (holding that the public policy exception sounds in tort and citing cases holding the same in other jurisdictions).

21. *See, e.g.*, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983). Notably, this court bases its decision between tort and contract on the remedies that each type of action would make available. "The most significant distinction in our view between the two causes of action in wrongful discharge suits is in the damages that may be recovered. . . . The remedies established by the majority of Wisconsin wrongful discharge statutes are limited to reinstatement and backpay, contractual remedy concepts. We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee 'whole.' Therefore, we conclude that a contract action is most appropriate for wrongful discharges." *Id.* at 841.

22. *See generally* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992) (rigorously analyzing early empirical data on the impact that available remedies have on wrongful termination cases being brought).

23. 597 A.2d 28, 34 (D.C. 1991) (citations omitted).

One hopes that there is more behind the scenes that has been edited out of opinions for the sake of concision. The fact is, though, that in the opinions that address emotional distress damages, there is little recognition of the various factors that weigh both for and against.

B. Evaluating the Implications of Emotional Distress Damages

As may be expected, it is common for judges to reference reasons *for* allowing emotional distress damages when they ultimately decide to do so. These reasons often center around the subjective injury of the plaintiff, which would be hard to contest; successful plaintiffs in this line of cases are frequently subject to abominable behavior by their former employers. Given this, it makes good sense that courts would, in awarding compensatory damages, see fit to compensate the psychological damage to the plaintiff, which may very well be much more significant than the economic damage.

Beyond being arguably fairer to the victims of this tort, emotional distress damages also serve the purpose of *affirming* the emotional distress of terminated employees. While legal remedies typically aim to avoid incentivizing unsavory behavior (e.g., by requiring reasonable mitigation), they may also serve the purpose of signaling something about society's values.[24] When contract remedies are the default, the employment relationship is arguably a mere business relationship: assuming rational actors, both parties to the relationship continue it so long as it is economically efficient for each, and thus when courts grant exclusively economic damages, it signals that the employment relationship is itself exclusively economic. However, awarding emotional distress damages for a wrongfully discharged employee communicates something very different about what employment is and what employment means in people's lives. Allowing the recovery of emotional distress damages may function as a signal that wrongfully terminated employees are correct to understand their work as more than just economic. Though this factor is never stated, it may underly the impulse that many courts share towards allowing the recovery of emotional distress damages.

However, awarding emotional distress damages in wrongful termination cases creates costs as well. Firstly, emotional distress damages are notoriously difficult to calculate, making efficient compensation nearly impossible.[25] Further, "running up the bill" on emotional distress may be the only means of making these cases practically worth bringing for a wrongfully terminated employee.[26] Most importantly, such damages are arguably not subject to the duty to mitigate and are thus highly likely to lead to ex post moral hazard problems.[27] Such moral hazard would disincentivize both limiting emotional

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24. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820–24 (1994).

25. *See* Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1845–57 (1995).

26. *See* Summers, *supra* note 22, at 471.

27. *See generally* Kontorovich, *supra* note 3. Kontorovich noted that, because courts almost universally ignored a duty to mitigate when discussing emotional distress damages, there was a "de

distress and trying to return to gainful employment. This could arise both because proving emotional distress damages in court will be more difficult if one makes a quick return to work and because the availability of compensation for emotional distress may limit the subjective motivation of the plaintiff to work to lessen emotional distress.[28] It's admittedly almost impossible to imagine a terminated employee refusing to return to work simply because emotional distress damages are available, but it's not hard to see how this disincentive could work with other factors to prevent a return to work. That is, one might question just how strong this disincentive is, but it's incontrovertible that emotional distress damages may disincentivize objectively good outcomes.

This implicates public policy in the employment context in ways it is not implicated in other areas of tort law. The concern about the disincentive to return to work could be partially addressed by the duty to mitigate the plaintiff's economic damages—i.e., mitigating lost wages by finding new work—which terminated employees remain bound by. Yet the current wrongful discharge regime doesn't have anything else in place to counter the moral hazard created by emotional distress damages.

Ideally, tort law should incentivize behavior conducive to happy and healthy citizens. In an ideal legal system, emotional distress damages would compensate the legitimate suffering of plaintiffs and allow them to return to their formerly healthy and employed lives. In reality, awarding such damages incentivizes emotionally distressed citizens, and, if there is no end in sight for the emotional distress, all the better, one's reward will be larger for it. Employers are generally able to pass off some of the cost of liability for massive damage awards by spreading it to other employees and to consumers; as the award grows, so does the cost to third parties. Therefore, though it may be initially easy to prefer erring on the side of overcompensation, such a risk is borne (to some extent) by society at large to the monetary benefit of individual plaintiffs.

A reasonable response to consideration of these disincentives may be that these issues exist whenever noneconomic damages are available; this Note

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facto exception" in the duty with respect to emotional distress damages. *See id.* at 500–01. He then persuasively argues that courts likely avoid the issue because of the difficulty in creating a standard for how plaintiffs are to mitigate emotional distress damages. *See id.* at 507–13. The lack of a duty to mitigate creates significant moral hazard. *See id.* at 501–06. Since his article, the de facto exception has largely remained. There are a select few cases that have allowed a failure to mitigate emotional distress damages as a valid affirmative defense, but these cases are few and far between. *See, e.g.*, Equal Emp. Opportunity Comm'n v. SDI of Mineola, LLC, 631 F. Supp. 3d 418 (E.D. Tex. 2022) (holding that, under Title VII, plaintiffs did have a duty to mitigate emotional distress damages).

28. One may legitimately wonder whether plaintiffs have as much control over their emotional state as seems implied by this discussion. While this is certainly a contested question, this Note will assume that there are some actions plaintiffs can take to affect their emotional state but which courts will not hold against them (by limiting their compensatory damages) if they fail to take them. This Note will later argue that a return to gainful employment is one such concrete step that plaintiffs can take to dramatically improve their subjective sense of well-being. *See infra* Part II.

certainly does not aim to call into question doctrines allowing recovery for emotional distress generally. It is worth noting the ways that the employment context is further *sui generis*. Traditionally, emotional distress damages needed to be "parasitic," attaching to some physical injury that could ground an otherwise completely subjective injury; such a requirement obviously doesn't apply here. Of course, IIED and NIED are independent torts that don't require a physical injury, but wrongful discharge claims are not, in the first instance, about emotional distress, they are about the loss of gainful employment; if a plaintiff experienced joy at being wrongfully discharged, she would still have a claim against her former employer. There is almost no fact pattern which would make the act of terminating an employee "outrageous" conduct on its own. So, it appears that compensating emotional distress flowing from a wrongful discharge falls somewhere between these two categories, but courts have not gone to the trouble of explaining exactly why and how. What cannot be doubted is that a job, even a beloved one, is generally replaceable in a way that a limb lost in a serious accident is not; emotional distress which is parasitic to the loss of a very good job ought to be analyzed on its own terms.

C. Limiting the Damage of Emotional Distress

There are, then, good reasons for allowing the recovery of emotional distress damages, and good reasons to disallow such recovery. When deciding whether the WDVPP action should sound in tort or contract, courts have been tasked with (or, rather, have tasked themselves with) deciding which factors weigh more heavily. This asks courts to compare incommensurate burdens and benefits, "a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines."[29] Should a court create a rule that systematically undercompensates plaintiffs, or should courts attempt to fully compensate plaintiffs, knowing that this would incentivize future overcompensation and disincentivize healthy behavior in terminated employees (both those with ultimately successful claims and those without)? It's not clear that they can or should try to.

Courts may respond that it is standard practice for common law courts to engage in the balancing of goods that don't admit of straightforward weighing. Deciding on appropriate remedies, in particular, frequently involves weighing the benefit to one plaintiff or a class of plaintiffs against the incentives and disincentives created by benefiting that plaintiff. The concept of a windfall is related to this sort of balancing, when a party receives a benefit far out of proportion to what they may have reasonably expected, and what one party may call a windfall may be considered necessary for a broader goal by a court. For example, in these cases, to not permit recovery for emotional distress damages may seem a windfall for employers who have tortiously caused significant emotional distress but are let off the hook for reasons unrelated to their tortious act. Further, it's no revelation that noneconomic damages always ask the law

29. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part).

to put a monetary value on something that evades valuation.[30] Why are the goods here anymore incommensurable than all emotional distress damages?

It's possible that this response is correct. Though the balancing is hard, this is just what courts do. However, it seems plausible that the employment context creates complications that move this question outside the competence of courts. Wrongful discharge implicates the monetary costs to employers and employees, trying to place a value (or letting juries place a value) on emotional pain, *and* public policy regarding the labor force and employment rates. Courts are up to the task of balancing the monetary effects for plaintiffs and defendants, and it can be granted that courts are as well-equipped as anyone to grapple with the problems of putting a price tag on emotional distress. In the employment context, though, the choice of what remedies to allow implicates far-reaching public policy in a way that a typical tort remedy may not. This factor may not persuade courts to take a more hands off approach; however, perhaps courts could be talked into directly engaging with this difficult question instead of implying that wrongful discharge suits are business as usual.

One answer to this incommensurability problem is to simply let legislators weigh the competing interests and craft legislation for accomplishing the diverse goals in play here. It's possible that separation of powers simply demands it.[31] "[Elected representatives] are entitled to weigh the relevant 'political and economic' costs and benefits for themselves . . . ."[32] In contrast, it is certainly a live debate whether separation of powers requires anything of the sort.[33] The persuasiveness, then, of this argument about incommensurability will be dependent on what one thinks of separation of powers and of the preferred interplay between the common law and statutory law. Though such a question is beyond the scope of this Note and is vigorously contested, it remains clear that the analysis of the question by courts has been woefully inadequate.[34]

Regardless of who's making the final call, it's clear that allowing the recovery of emotional distress damages comes with significant costs, not simply

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30. *See generally* Sunstein, *supra* note 24.

31. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023) ("Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours. More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.").

32. *Id.*

33. *See id.* at 1166 (Sotomayor, J., concurring in part) ("[C]ourts generally are able to weigh disparate burdens and benefits against each other, and . . . they are called on to do so in other areas of the law with some frequency.").

34. A final relevant point is that various statutory frameworks have been created since the WDVPP cause of action was broadly recognized in the late 1970s and early 1980s. The most familiar are whistleblower protection statutes, and, among such statutes, many allow for the recovery of emotional distress damages. *See, e.g.*, LA. STAT. ANN. § 23:967 (1997); MICH. COMP. LAWS § 15.364 (1981). The fact that these allow for the full recovery of compensatory damages may appear to weigh in favor of courts simply allowing the same. However, that courts are adept at predicting what a legislature (and that legislature's constituents) might want does not supplant the right and duty of the legislature to make such decisions.

to employers, but to society. On balance, this author is persuaded emotional distress damages shouldn't be available, and courts and legislatures should rethink their stance toward them. However, knowing that this is a close issue and that reasonable minds may differ as to which way it should be decided, there are perhaps intermediate positions that might be mutually agreeable.

One relatively obvious solution (that this author is not aware of any court requiring) is to require a plaintiff in wrongful discharge cases to mitigate her emotional distress by seeking gainful employment. While susceptible to objective measurement and relatively modest in what it asks of the plaintiff, this requirement would solve some of the moral hazard problems and would deal with the particularity of the employment context. Generally, it's difficult for a court to require mitigation of emotional distress damages, but this context admits of a solution unavailable in other contexts. This solution is also especially appropriate given the emotional benefits inherent in meaningful work.[35] Other solutions which are more commonplace are limiting damages through ceilings and multipliers.[36]

D. The Special Case of Wrongful Discharge in Violation of Public Policy

The tort of WDVPP includes one idiosyncrasy that is worth closer examination: the relationship between the stated purpose of the cause of action and the question of allowing emotional distress damages. The tort has been recognized as a means of vindicating public policy that might otherwise be harmed if the at-will employment rule were to admit of no exceptions.[37] In this way, this tort functions more like a *qui tam action* than it does a "standard" tort, like battery.[38] Likewise, the required remedy will function as much like a civil penalty as it will like damages. The common law recognizes most torts as a means of righting a wrong committed by one against another; however, this tort, though it involves a wrong against a victim, is not primarily recognized for the sake of that victim. Under the at-will rule, unjust terminations (those with "bad cause") are not enough to create a legally cognizable claim; courts are only compelled to remedy certain unjust terminations because of the wider impact that not doing so would have.[39] Given this unusual quality, the presumption that common law tort remedies are appropriate seems, at best, not obviously justified.

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35. *See infra* Section II.

36. *See* Kontorovich, *supra* note 3, at 513–18.

37. *See* Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560 (Iowa 1988) (recognizing the tort "when the discharge serves to frustrate a well-recognized and defined public policy of the state").

38. *Qui tam action* means "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. Or that is at least what they claim. *See* Peck, *supra* note 15, at 719 (arguing that courts originally misused common law principles to accomplish praiseworthy goals, but this "camouflaging" led to a stalling out of the developments and so courts should "abandon the camouflage" and finish moving away from the at-will rule).

Consider again the three-sentence passage from *Adams v. George W. Cochran & Co.* quoted above.[40] The court acknowledges that "the goal of the exception is to further an officially declared public policy . . . ."[41] Given this goal, what are the remedies made available meant to accomplish? "[T]he law should allow for the full range of remedies *to discourage employers from such conduct.*"[42] This statement led the court to the conclusion that all compensatory damages should be available. However, in what way does this conclusion achieve this stated purpose? If the goal is disincentivizing a certain type of behavior in employers, what does the subjective emotional distress of the terminated employee have to do with that?

The most likely explanation for the disconnect is that compensatory damages, while not traditionally employed to accomplish the goal here, do a good enough job (and have enough caselaw already baked in) to adequately serve the court's needs. Traditionally, contract remedies are not intended to disincentivize behavior, so they will be little help here. Punitive damages are the remedy traditionally employed to disincentivize bad behavior, but common law doctrines typically limit the availability of punitive damages in ways that make them an imperfect fit as well (most especially by limiting their availability when other damages are not also available). Thus, lacking an obvious solution from the standard options, it is easy to understand how a court might just choose the best fit available and move on.

An additional reason that the common law is more likely to use a familiar remedy is the way that the law tends to develop. Recognizing a new cause of action but then applying a traditional remedy is more in keeping with the common law method than crafting an entirely new remedy to go along with the new cause of action. Practically speaking, even if a state supreme court thought creating a new remedy to be the most reasonable and coherent way forward, political and legal realist considerations weigh against such a dramatic move.

If a court had the power to develop the ideal remedy for this cause of action, how would it go about accomplishing the three goals mentioned above?[43] Firstly, courts have stated that when an employee is faced with a decision whether to break the law or lose their job, this cause of action should incentivize them to choose the latter.[44] Therefore, the ideal remedy will compensate plaintiffs for the harm they suffer as a result of following the law (i.e., losing their job). This goal is clearly accomplished by the backpay that is already standard in all wrongful termination suits.

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40. 597 A.2d 28, 34 (D.C. 1991).

41. *Id.*

42. *Id.* (emphasis added).

43. *See supra* note 4 and accompanying text; the three purposes of this tort that I have proposed are incentivizing lawful behavior by employees, disincentivizing the termination of employees who refuse to break the law or who exercise a legal right (most commonly, filing a worker's compensation claim), and incentivizing wrongfully terminated employees to bring such suits.

44. *See, e.g.*, Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

The other two purposes are likely affected by the same factors. The remedy ought to disincentivize employers from wrongfully terminating and incentivize plaintiffs to bring a lawsuit against their former employer, without which public policy would be harmed by a lack of enforcement. Tort law generally assumes that a sufficiently large award of money damages will disincentivize tortious behavior; a plaintiff would likely find the litigation process expensive and personally burdensome, and so they would likely also require sufficient monetary compensation. The vindication inherent in a successful lawsuit and the reputational benefit of a court or jury declaring one wrongfully terminated are also likely relevant to most plaintiffs (and the reputational harm is likely relevant to employers), and these factors may allow for a smaller monetary reward to achieve the same goal than would otherwise be required.

Courts will generally have very little means of ascertaining the proper value for an efficient award (i.e., one that properly incentivizes the bringing of such suits, but which doesn't over-incentivize them);[45] in lieu of such information, they have frequently defaulted to using compensatory damages as the best means of accomplishing these two goals. In fairness, it is entirely likely that the availability of emotional distress damages is the deciding factor in making these cases worth bringing for many plaintiffs.[46] However, emotional distress damages do not exist as a means of incentivizing plaintiffs to act as private attorneys general; their use here is a perversion of the remedy. Here, they function like punitive damages or statutory fines, but there is no reasonable connection between the emotional distress a person feels after being tortiously fired and the penalty that would deter an employer from firing that person. The good news is that this is not a question that admits of no answer. It would be possible to tailor a remedy specifically to accomplish the goals contemplated here; the problem is that courts not only haven't engaged in such tailoring but are simply not equipped to.

This issue is instead particularly susceptible to solution by legislatures. Because such a remedy will be aimed at inducing behavior in individuals who are not currently parties to a case (that is, employers who might otherwise violate public policy if not for this remedy's functioning as a deterrent), this remedy implicates public policy in a way that legislators are better equipped to consider and decide on. Creating a robust framework may require some political capital, but not nearly as much as would be required for courts to accomplish the same. Most importantly, legislatures already craft these sorts of remedies.

A perfect example is the framework setup by the federal False Claims Act (F.C.A.).[47] Under the F.C.A., violators must pay a fine ($5,000–$10,000), plus three times the damages the government sustained because of the violator's

45. Some scholars have complained that allowing a common law cause of action has flooded the courts with frivolous claims. *See generally* Olson, *supra* note 11. This is an empirical claim that legislatures would be better equipped to grapple with.

46. *See* Summers, *supra* note 22, at 471.

47. 31 U.S.C. §§ 3729–33.

actions.[48] Depending on their involvement and how necessary they are for a successful case, *qui tam* relators are entitled to anywhere from zero percent to thirty percent of the penalties collected, as well as reasonable expenses and reasonable attorneys' fees.[49] If the relator was an employee that was retaliated against for her efforts in bringing the case, she is entitled to two times back pay (with interest) and compensatory damages.[50] These remedies, it is quite apparent, are tailored to the goals of the F.C.A., but would hardly need any changes to accomplish the goals of the WDVPP tort equally well. Note that Congress has also opted to allow recovery of *all* compensatory damages, which has been universally interpreted to include emotional distress damages.[51]

For WDVPP, an award of reasonable expenses and reasonable attorneys' fees would be particularly appropriate as a means of efficiently incentivizing plaintiffs to bring such suits. Without emotional distress damages, such actions are frequently only worth bringing for highly compensated employees. Even where emotional distress damages are available, it makes little sense to rely on private parties to vindicate public policy if the only ones who will do so are those who have suffered a significant amount of emotional distress. For the sake of public policy, we are forced to hope that victims of wrongful discharge are seriously devastated. A fee-shifting rule that allows lower-compensated employees and non-emotionally distressed employees to bring these claims would be justified.

E. Fixing Wrongful Discharge Remedies

This Note is not meant to argue that the WDVPP tort is ill-conceived. The debates around the at-will employment doctrine and its exceptions will continue to rage on, but even Professor Epstein acknowledges that there ought to be a public policy exception to the at-will rule.[52] Even where legislatures have created statutory solutions to the same problems, the common law cause of action allows for flexibility in filling in the gaps left by statutes. However, as courts have developed the common law of employment, they have frequently gotten out over their skis; in the case of deciding on remedies for newly recognized causes of action, they have not sufficiently grappled with the implications of allowing recovery of emotional distress damages.

Courts may do well to recognize their limitations in dealing with incommensurable goods, take a step back, and let legislatures adjust public policy as they see fit.[53] At the very least, a legislature might be better equipped

48. *Id.* § 3729.

49. *Id.* § 3730.

50. *Id.*

51. *See, e.g.*, Hammond v. Northland Counseling Ctr., Inc., 218 F.3d 886, 892–93 (8th Cir. 2000). *See supra* note 34.

52. *See* Epstein, *supra* note 9, at 952.

53. One question (of many) left unanswered by this Note is how a court (persuaded to follow these recommendations) might ensure that its respective legislature would follow the court's lead and create an appropriate statutory framework. Though an answer to that question is elusive, the

than courts to craft appropriate remedies for the WDVPP action. Finally, where either courts or decisionmakers are persuaded that the benefits of allowing recovery of emotional distress damages outweigh the costs, they should place a limited duty to mitigate on the plaintiff or limit the amount of damages available as a means of countering the problems created by such damages.

II. THE DIGNITY OF WORK PERSPECTIVE

As has been implicit in many of the legislative and judicial developments discussed, the American public's relationship to work has changed in the last one hundred years. Whether the employment-at-will regime was ever consistent with how Americans thought about their work is part of the ongoing debate about the doctrine; however, there is little evidence that public opinion favors a presumption that employees may be fired for good cause, bad cause, or no cause at all.[54] Professor Epstein argued that the at-will employment ought to be the default rule in employment contracts because "freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets."[55] The evidence of federal employment laws indicates that Americans, at least in part, disagree.

Legislation enacted in the past forty years is emblematic of a shifting conception of work. While the at-will rule retains much value for increasing the overall efficiency of American employment, the implication of the C.R.A. and the A.D.A. are that some goods should be prioritized above economic efficiency (namely, non-discrimination principles). The implications of this shift have not been fully reckoned with, leading to the incoherence currently present in employment law.[56] What remains missing is a fully worked out theory of work and employment that can guide a process of synthesizing the patchwork system we currently have.

A. John Paul II's Theory of Work

The term "dignity of work" was not created by John Paul II, but it was thrust to the forefront of Catholic social thought by Pope John Paul II's encyclical *Laborem Exercens*. John Paul II's predecessors had emphasized the obligation that employers have to respect the human dignity of their employees by creating just working conditions. John Paul II built on this foundation by declaring that work (which includes but is not limited to employment/paid work) itself is a dignified and human act. John Paul II wrote that laborers have a "right to a just wage and to the personal security of the worker and his or her

question itself may serve a cautionary purpose: it is much easier for a court to develop the common law than it is to undo that development upon having second thoughts.

54. *See generally* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (finding that workers are by-and-large not aware of the limited legal protections the at-will rule affords them as employees).

55. *See* Epstein, *supra* note 9, at 951.

56. *See supra* Part I.A.

family,"[57] and that "all who are capable of [suitable employment]" are entitled to it.[58]

It would be easy but mistaken to read *Laborem Exercens* as prescribing labor and employment rules, frameworks, or policies that societies are obligated to establish. Instead, John Paul II diagnoses those values that undergird modern economies and employment policies, and, in contrast to those values, argues for a reconceptualization of labor and employment. This distinction is important because John Paul II, while critical of a capitalism that focuses only on material growth and economic efficiency,[59] also insists that societies ordered around a proper understanding of work need to approach problems pragmatically. Therefore, as noted above,[60] economic efficiency is not an end in itself, but consideration of economic efficiency is an important means to establishing a properly ordered society.[61]

One of the central ideas of *Laborem Exercens* is the distinction between the "objective" and "subjective" value of work. John Paul II uses "objective value" to refer to the value of what is produced by work; however, he argues that work's objective value is secondary to the primary value of work *for* the worker herself, "who is its subject."[62] Contrast this approach with the contract

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57. Pope John Paul II, *Laborem Exercens* paras. 8, 18 (Sept. 14, 1981), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

58. *Id.* para. 7.

59. *Id.* para. 7.

60. *See supra* note 7.

61. While this Note does argue that John Paul II's theory of work is consistent with what Americans broadly have come to believe about work, his underlying assumptions about what a person is, what a government is for, and what society ought to be ordered towards are presumably not majority views in the U.S. On such questions, there is almost certainly no consensus view among Americans; however, this Note assumes that legislation that has been passed is acceptable to enough people that it can be used as a proxy for their collective beliefs. Therefore, even if John Paul II's vision for society cannot be implemented, his vision can inform our views about the law, and where, as here, applying that vision would improve the law, it can be usefully implemented.

62. As John Paul II said:

> [H]owever true it may be that man is destined for work and called to it, in the first place work is 'for man' and not man 'for work.' Through this conclusion one rightly comes to recognize the pre-eminence of the subjective meaning of work over the objective one. Given this way of understanding things, and presupposing that different sorts of work that people do can have greater or lesser objective value, let us try nevertheless to show that each sort is judged above all by *the measure of the dignity* of the subject of work, that is to say the person, *the individual who carries it out*. On the other hand: independently of the work that every man does, and presupposing that this work constitutes a purpose-at times a very demanding one-of his activity, this purpose does not possess a definitive meaning in itself. In fact, in the final analysis it is always man who is *the purpose of the work*, whatever work it is that is done by man-even if the common scale of values rates it as the merest 'service,' as the most monotonous even the most alienating work.

LABOREM EXERCENS, *supra* note 57, para. 6. Following from John Paul II's view that all of society should be structured around the good of its individual citizens and from this understanding of work

at will approach, which has been shaped by laissez faire principles to regard active employment as value neutral. This difference has far-reaching implications for labor and employment law.[63]

For a brief example, consider what this conception would imply about widespread unemployment. Under this view, unemployment does not merely entail a weakened economy or an increased dependence on government support; John Paul II writes that unemployment is "in all cases is an evil . . . which, when it reaches a certain level, can become a real social disaster."[64] His point is borne out in empirical data from the social sciences.[65]

It is necessary at this point to note that, undoubtedly, John Paul II wrote from a Christian perspective. The beginning of his analysis draws on the Bible and the Book of Genesis to ground his conception theologically.[66] Therefore, it may appear that his thought is inapplicable to the modern, pluralistic U.S. While there may be strong normative arguments for his conception of work that can be applied to American law, this Note will not attempt to make them. Instead, as a descriptive matter, John Paul II's thought echoes the shifting approach to employment under discussion here and is similarly incongruous with the at-will doctrine.[67] Therefore, his analysis has the potential to guide a broader reform of employment law; here, it will serve to shed new light on the implications of compensatory damages in the employment context and will clear up the incommensurability problem.

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as fundamentally dignifying for the subject of the work (that is, the worker) is his conclusion that humans have a right to suitable employment.

63. *Laborem Exercens* itself discusses such implications for immigration, just wages, unionization, etc. A discussion of the ways that American society would need to be restructured to actualize John Paul II's prescriptions are well beyond what's possible here (and in many cases attempts to realize his vision would be impractical to the point of being impossible in our society). For further analysis of such issues, see Michael J. White, *Homo Laborans: Work in Modern Catholic Social Thought*, 58 VILL. L. REV. 455 (2013) (overview of the history of Catholic Social Thought up through John Paul II); Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN'S J. LEGAL COMMENT. 1 (2009) (*Laborem Exercens* as applied to unions and collective bargaining).

64. *LABOREM EXERCENS*, *supra* note 57, para. 18.

65. Thomas S. Ulen, *Happiness, Technology, and the Changing Employment Relationship*, 19 EMP. RTS. & EMP. POL'Y J. 61, 71–76 (2015) (arguing that the recent explosion of "happiness" research and literature ought to impact employment law; in particular, arguing based on empirical data that meaningful employment is more important for happiness than a consistent paycheck).

66. *LABOREM EXERCENS*, *supra* note 57, para. 4.

67. John Paul II was a leading proponent of "personalism," a philosophical school that places the human person at the center of philosophical thought. For a larger discussion of personalism, see Thomas D. Williams & Jan Olof Bengtsson, *Personalism*, STAN. ENCYCLOPEDIA PHIL. (Apr. 27, 2022), https://plato.stanford.edu/archives/sum2022/entries/personalism/. Though few Americans would label themselves as personalist or reference John Paul II's thought as influential for their own thinking, personalism has proven highly influential in American thought. For instance, Martin Luther King, Jr., credited his studying under personalists as formative for his "basic philosophical position." *Id.*

B. Dignifying Work Remedially

The best illustration of the convergence of American thought and public policy with the principles advocated for in *Laborem Exercens* is the Americans with Disabilities Act of 1990. In *Laborem Exercens*, John Paul II argued:

> The disabled person is one of us and participates fully in the same humanity that we possess. It would be radically unworthy of man, and a denial of our common humanity, to admit to the life of the community, and thus admit to work, only those who are fully functional. To do so would be to practice [sic] a serious form of discrimination, that of the strong and healthy against the weak and sick. Work in the objective sense should be subordinated, in this circumstance too, to the dignity of man, to the subject of work and not to economic advantage.[68]

About nine years later, Congress passed the A.D.A., which provided in its findings that:

> physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; . . . discrimination against individuals with disabilities persists in such critical areas as employment . . . ; [and] . . . the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .[69]

The similarity in approach to work reflected in these passages is rendered more striking by their shared distance from the approach of the at-will doctrine; this sort of discussion of the value of work is incomprehensible if one considers the employment relationship only from the standpoint of economic efficiency or autonomy. John Paul II recognized that there is something more than a paycheck that workers seek in their jobs, and his thought reflects a fundamental grasp of the way that Americans have come to approach employment.[70]

One may reasonably question what value John Paul II and *Laborem Exercens* have to add to a reflection on employment law. If Congress has already passed legislation theoretically consistent with *Laborem Exercens*, and if that legislation creates a cause of action that allows for the recovery of emotional distress damages, then it may appear that we have our answer, without John Paul II's help. Further, if this Note has argued that selecting and crafting wrongful termination remedies should be left to legislatures as the

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68. *LABOREM EXERCENS*, *supra* note 57, para. 22 (emphasis omitted).

69. 42 U.S.C. § 12101(a)(1).

70. In all likelihood, John Paul II was himself influential in bringing about that evolution. However, this "chicken and egg" problem is irrelevant for the purposes of thinking about employment law, so I will assume for the sake of argument that John Paul II was merely a great expositor of the ongoing development in thinking on work and employment.

bodies best equipped to balance countervailing interests, it appears that this mission has been accomplished; what further analysis is required?

While Americans have come to see the value and dignity of work for the worker, this recognition has been largely subconscious, and the implications of this evolution have not been fully realized. Though John Paul II and the A.D.A. argue for the same end result when it comes to respecting the ability of individuals with disabilities, a second look at the two passages reveals that John Paul II has grounded his prescription in his prioritization of the subjective value of work over the objective. Such grounding is absent in the A.D.A.'s findings; the closest thing to a theoretical underpinning is an acknowledgement of "a person's right to fully participate in all aspects of society . . . ."[71] Though it has instinctive appeal, this justification does not explain why "full participation, independent living, and economic self-sufficiency" are goods that individuals with disabilities are owed; put differently, why are these goals better for an individual than comprehensive support from the government? Thus phrased, the question reveals an obvious answer: work is dignifying for the worker, and, as a matter of public policy, respecting the dignity of individuals with disabilities is more important than economic efficiency. Thus, *Laborem Exercens* sees through to the heart of the issue, and can provide us a fully fleshed-out theory that is merely implied in the A.D.A.

In *Laborem Exercens*, John Paul II calls on "all the agents at the national and international level that are responsible for the whole orientation of labour [sic] policy" to prioritize "suitable employment for all who are capable of it."[72] In a separate passage, he writes that "[m]any practical problems arise at this point, as well as legal and economic ones; but the community, that is to say, the public authorities, associations[,] and intermediate groups, business enterprises . . . should pool their ideas and resources so as to attain this goal that must not be shirked . . . ."[73] These excerpts represent a different sort of "separation of powers" on the part of John Paul II. He knows that it is his role to provide moral clarity, but that implementing these ideas is the role of government leaders. In particular, he notes the role that legal and economic considerations are to have in creating a well-ordered society.

If the legal profession is tasked with working out the best means of attaining suitable employment for those capable, the next question is relatively straightforward: if American law followed John Paul II's lead in prioritizing the subjective value of work over the objective (i.e., a "dignity of work" approach), what policy decisions would that entail? In answering this question, it will be helpful to return to the considerations raised earlier.[74] On one side of the scale there were the interests of the individual plaintiff (compensating her for every injury suffered) and on the other side there were the downstream incentives emotional distress damages might lead to (e.g., overcompensation, moral hazard). Most relevantly, awarding emotional distress damages ran the risk that

71. 42 U.S.C. § 12101(a)(1).

72. *LABOREM EXERCENS*, *supra* note 57, para. 18 (emphasis omitted).

73. *Id.* para. 22.

74. *See supra* Part I.B.

terminated employees may be incentivized to experience greater emotional distress and may be disincentivized to re-enter the workforce.

Obviously, the best case scenario for a dignity of work approach is that when people find dignified work, their employment is and remains stable and secure. However, if one is unjustly discharged, and the law considers it a tortious discharge and sees fit to remedy the situation, what would be the best outcome for the employee? The common law answer is to compensate her for her loss via money damages. The dignity of work perspective will respond by saying that what is best for her is that she be returned to gainful employment. For John Paul II, being wrongfully terminated isn't primarily about the inability to earn money; the greatest harm is to the dignity of the worker. To return her to meaningful work is to restore her dignity as a worker and to restore her humanity.[75]

With this new goal in mind, what impact does this have on the remedial considerations laid out above? Here, the significant contribution of the dignity of work perspective is on full display. Previously, the interests involved in shaping remedies were difficult to balance and arguably incommensurable. Now, the individual's interests and society's line up quite nicely.

For the employee, reinstatement is likely to be the most natural solution, with the caveat that this will prove impractical in many situations. She likely still deserves compensation for what she has lost, namely the wage that she relies on to support herself and any other dependents she may have, and so backpay as well will almost always be appropriate. Because money damages do not accomplish the primary goal of returning employees to meaningful employment, it is entirely possible that equitable remedies may be appropriate as well. If a legislature were to enact a framework consistent with this approach, one can imagine solutions available to the executive branch (in executing this hypothetical framework) that would also accomplish the stated goals in ways that common law remedies simply cannot.

Returning to the primary question of this Note, are emotional distress damages appropriate? The answer is almost certainly no. While recognizing that the signaling function of emotional distress damages would accomplish a worthy goal and weigh in favor of their availability, generally emotional distress damages would work against the goal of prioritizing dignified work. Emotional distress damages have the probable effect of disincentivizing a return to work, and as such they are counterproductive to the ends sought. Therefore, they would do a disservice to individual plaintiffs while simultaneously creating costs and unfavorable effects for all of society. Though they aim to serve a

75. The Subjective Well-Being literature would produce basically the same answer. *See* Ulen, *supra* note 65 at 73 ("They expected to find dislocation and unhappiness, but what they found exceeded their worst expectations and became a classic study on the social importance of work . . . . The researchers logically concluded that what had destroyed life in Marienthal was not the loss of wages, but the loss of the ability to earn them.") (quoting ARTHUR BROOKS, GROSS NATIONAL HAPPINESS: WHY HAPPINESS MATTERS—AND HOW WE CAN GET MORE OF IT (2008)).

worthy purpose, under the dignity of work approach[76], emotional distress damages should never be recoverable as a remedy for wrongful discharge.

CONCLUSION

Due to the unique history of development for the common law of employment, and specifically wrongful termination, the situations in which plaintiffs can recover emotional distress damages have become somewhat arbitrary. Even more troubling is the absence of rigorous analysis by judges when they have developed this common law. Because the tort of WDVPP is perhaps the only common law cause of action to make them broadly available, their availability in such cases justifies closer scrutiny.

The interests involved in allowing recovery of emotional distress damages turn out to be weighty and not easily sorted out. While an individual plaintiff may have a strong claim that her emotional distress ought to be compensated, the costs for a larger award may be borne by society, and the promise of a larger award may incentivize her to behave in undesirable ways as well; namely, instead of minimizing her emotional distress, such awards may incentivize her to experience more and more emotional distress.

Based on the standard approach of the common law, there is no easy answer on how to sort out these complicated interests. Legislatures may be better equipped than courts to craft remedies and decide on whether emotional distress damages should be available in wrongful termination torts, but either way there are intermediate rules available that allow for the recovery of emotional distress damages without letting them get out of hand.

Additionally, in WDVPP cases, emotional distress damages are a rough substitute for a remedy tailored to the task at hand. Though this tort was recognized to have a deterrent effect, the recoverable remedies treat the cause of action and the plaintiff like those in any other tort case, despite this tort functioning more like a *qui tam action* than like a standard tort. For these reasons, legislatures ought to step in and craft better remedies than those currently used by common law courts.

On the other hand, if one eschews the common law's standard approach, the incommensurable goods are capable of being harmonized. One such approach that can have this effect is that of Pope John Paul II. John Paul II's thought echoes the way that people have come to think about employment law and about their work, and as such is useful for reconsidering the remedial question in wrongful termination. If followed to its logical conclusion, John Paul II and his concept of the dignity of work can clarify the conflicting interests present in the common law approach, and ultimately recommend against allowing emotional distress damages in wrongful termination contexts.

76. That is, recall, an approach which mirrors closely the perspective of the American public.