Wrongful Discharge: Toward a More Efficient Remedy

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The common law rules governing remedies for breach of an employment contract by an employer are well established. The same rules are generally applied when there is no contract but a claim for back pay arises from a discharge that is statutorily prohibited. The employee is

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2 Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1976 & Supp. III 1979), makes unlawful employment practices which unjustifiably discriminate on the basis of race, color, religion, sex or national origin. Section 706(f) of the Act, id. § 2000e-5(f) (1976), authorizes private persons or the federal government to bring suit where violations of the Act have allegedly occurred. It also allows intervention by interested parties in suits already commenced. Id. § 2000e-5(f)(1). The remedial section of the Act is § 706(g), id. § 2000e-5(g), which authorizes the courts to grant relief in the form of "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . ., or any other equitable relief as the court deems appropriate."

In addition, id. § 2000e-6(a) authorizes "pattern or practice" employment discrimination suits by the federal government, and also authorizes the government to request such relief as may be necessary "to insure the full enjoyment of the rights" protected by the statute. Annot., 21 A.L.R. Fed. 472 (1974).

The measurement of backpay awards in discrimination suits is essentially the same as the common law measure of damages in breach of employment contract cases. The language of the Act seems to require that this measure of damages be followed. "Damages," used in the context of backpay under Title VII, may be a misnomer, as one court has said that "[t]he demand for backpay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); accord, Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971). The language of § 706(g) of the Act, 42 U.S.C. § 2000e-5(g) (1976), states that "[t]he interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable." Thus, the Act places a duty to minimize on Title VII plaintiffs. This section arguably places a higher duty to minimize on Title VII plaintiffs than on employees suing for breach of employment contracts at common law because there is no language limiting the duty to search for substitute employment to a job of a similar type or salary. The courts, however,
entitled to the income accruing at the time of the suit plus, if there is a contract, the present value of the remaining wage installments. This amount will be offset by the amount that the defendant is able to show the plaintiff could have earned in positions that are reasonable substitutes. If reasonable substitutes are not available, the recovery will be offset by the actual earnings of the employee that were made possible by the defendant’s breach or prohibited discharge.

have generally followed the common law duty to minimize in discrimination cases. Some courts have expressly specified that the common law rule is to be adhered to. See, e.g., Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972). Other courts have limited the minimization duty to a search for similar employment. See, e.g., Lowry v. Whitaker Cable Corp., 472 F.2d 1210 (8th Cir. 1973); Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095 (D.C. Md. 1977). Finally, some courts do not appear to state a common law type rule, but have measured backpay awards in a manner consistent with the common law. See, e.g., Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 517 F.2d 387 (7th Cir. 1975); Jurinko v. Edwin L. Weingand Co., 477 F.2d 1038 (3d Cir. 1973).

The concept of wrongful discharge has also been applied in cases involving terminable-at-will employment contracts and situations in which there is no express statutory protection. In at least one instance the court has based its decision on a contract theory. See Monge v. Beebe Rubber Co., 114 N.H. 130, 192-93, 316 A.2d 549, 551 (1974). In other cases, a tort theory has been used. See, e.g., Petermann v. Local 396, Int’l Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 F.2d 35 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978). Under either theory, the remedy used seems to be similar to the basic common law remedy. Since these are relatively recent developments, and since the policy issues involved are different from those in traditional wrongful discharge cases, this article does not deal directly with them. See generally Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967); Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976).

1 See C. McCORMICK, LAW OF DAMAGES § 158 (1935); notes 27-39 & accompanying text infra.

2 If the contract period has not passed, the offset will also equal the amounts obtainable in reasonable substitute positions.


4 The issue is generally referred to as involving a duty to mitigate damages. There are two problems with this terminology. First, there is really no “duty” in the sense that failure to comply with a duty would give rise to a cause of action. Instead, failure to comply with the duty creates a situation in which the plaintiff cannot recover for avoidable consequences. See C. McCORMICK, supra note 3, § 33, at 128. Despite this imprecision, the word “duty” will be used in this article to indicate the avoidable consequences problem.

5 The second problem is that, rather than “mitigate,” the plaintiff is technically expected to “minimize” damages. The two terms may refer to very different concepts. See D. DOBBS, supra note 1, § 3.7, at 188. In order to avoid confusion the article will use the term “minimize.”

6 If the plaintiff accepts a position which he could have held at the same time as the original position, the earnings generally are not credited to the defendant. See D. DOBBS, supra note 1, § 12.25, at 925; 5 WASH. & LEE L. REV. 232 (1948) (wages should be credited to defendant to mitigate damages).

Likewise, the discharging employer typically is not credited with the income from an additional contract if either the original contract or the new one is not for purely personal ser-
Although many common law rules are economically efficient,\(^7\) this does not appear to be true in the case of wrongful discharge. The common law rule creates what is, in effect, a one hundred percent tax on earnings from nonsubstitute employment; the discharged worker who is unable to find a reasonable substitute has no pecuniary incentive to return to the labor force. Unless there are substantial psychic rewards associated with the nonsubstitute employment, the individual would maximize his utility by remaining idle.\(^8\)

The consequent loss in production is not necessarily inefficient. Leisure is likely to be a crucial element of everyone’s utility function\(^9\) and maximization of social welfare involves a healthy amount of leisure. The current remedial scheme, however, encourages suboptimal leisure. Even leisure is subject to diminishing marginal utility. That is, at some point the additional satisfaction derived from an additional hour of leisure declines.\(^10\) If the worker were able to retain his earnings, he would return to work when obtainable income\(^{11}\)—a measure of the value of labor to society—compensates for leisure foregone plus the disutility of working.\(^{12}\) Under the common law rule, however, wrongfully discharged workers will remain idle, absent reasonable substitutes, until either the disutility associated with leisure\(^{13}\) or the psychic rewards from work are great enough to compensate for the leisure foregone by choosing to work. The result is that society is unable to bid effectively for the productive capacity of the individual even though it may place a higher value on that productive capacity than the individual places on his leisure time.\(^{14}\)

This article proposes and examines three wrongful discharge remedies designed to decrease suboptimal leisure. Of primary interest is whether the problem can be effectively treated while protecting the discharged party’s expectancy.\(^{15}\) The first strategy broadens the defini-
tion of employment the discharged employee must accept in attempting to minimize losses. Rules similar to this are applied in Texas and in some cases involving workers discharged in violation of the National Labor Relations Act. This approach requires that the discharged worker’s claim be offset by the amount he earned, or could have earned, in positions which would not be regarded as reasonable substitutes under the common law.

The second strategy recognizes the “human capital” element of labor. "Human capital" is the term economists use to describe labor which has enhanced productivity because of investments in education, migration or health. The common law rule, while implicitly recognizing the concept, does not allow sellers of labor to retain income resulting from investments in human capital. Application of this strategy would allow the discharged worker to retain that part of the earnings from new employment attributable to his investment in human capital.

The final strategy combines features of both the broader duty to minimize rule and the human capital approach and seems to offer the greatest promise as an efficient wrongful discharge remedy. Under this “compensated duty” rule, the employee’s duty to minimize extends beyond the common law requirement. Failure to minimize, however, would not entail an offset equal to the full amount which could have been earned. Nor would the breaching employer receive full credit for income earned in nonsubstitute positions.

Although each strategy is designed to increase the efficiency of the discharged worker’s work-leisure decision, each is also likely to have an impact on the employer’s decision to breach or otherwise terminate the employment contract. Of particular interest is whether any efficiency gains involved in the worker re-employment decision are offset by less efficient decisions to terminate by employers.

This article first explains the common law rule and its rationale. A simple economic model is used to illustrate the interests it protects. Second, it describes and evaluates the three proposed strategies. Finally, it analyzes the impact of the common law rule and the three proposed strategies on the efficiency of the employer’s decision to terminate.

THE TRADITIONAL RULE

Rationale

The traditional rule, with its efficiency short-comings, developed
largely in the aftermath of the doctrine of constructive service. This doctrine required the wrongfully discharged worker to remain ready to serve through the unexpired term of the contract and to sue for unpaid wages in *indebitatus assumpsit* for work done. This left little room for any efforts to minimize, since the discharged worker spent this time, at least constructively, in the service of the original employer.

Gradually the doctrine of constructive service eroded from clashes with the theory that the action against a discharging employer should be for damages resulting from the employer's breach of contract. Since the damages action implied a minimization requirement, courts found it attractive as a way of preventing the idleness of discharged workers. In a New York opinion, the doctrine of constructive service was characterized as "wholly irreconcilable to the great and beneficent rule... that a person discharged from service must not remain idle, but must accept employment elsewhere if offered." The same court described the concept as being "at war... with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor." For purposes of this article, three aspects of the modern rule are noteworthy. First, although a reasonable effort to minimize damages does not require an individual to accept employment beyond a position which is substantially similar to his previous position, it is impossible to define just how far the duty to minimize extends. The problem is illustrated in *Parker v. Twentieth Century-Fox Film Corp.* In *Parker*, the plaintiff had contracted to play the lead in a musical entitled *Bloomer Girl*. The production company decided not to make the film and offered the plaintiff the lead in a western, which she declined. The lower court granted summary judgment for the plaintiff for the full contract wage, and the defendant appealed, claiming that an issue of fact existed as to the reasonableness of the plaintiff's refusal to accept the role offered as a substitute. The Supreme Court of California found for

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21 See generally 14 MINN. L. REV. 819 (1930); 1 MINN. L. REV. 528 (1917); 31 YALE L.J. 441 (1921).
23 See, e.g., Little Butte Consol. Mines Co. v. Girand, 14 Ariz. 9, 123 P. 309 (1912); Doherty v. Schipper & Block, 250 Ill. 128, 95 N.E. 74 (1911); James v. County of Allen, 44 Ohio St. 226, 6 N.E. 246 (1886).
25 61 N.Y. at 373.
26 Id.
27 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970).
28 Id. at 179, 474 P.2d at 690, 89 Cal. Rptr. at 738.
29 Id.
30 Id. at 181, 474 P.2d at 691, 89 Cal. Rptr. at 739.
the plaintiff, applying the rule that the discharged worker need not accept "different or inferior employment." In dissent, Acting Chief Justice Sullivan noted that a difference per se rule that did not require that the rejected employment be inferior or, at least, different in kind would substantially undermine the minimization requirement.

Although it is not clear that the court actually applied a per se rule, it is clear that a multitude of phrases have been used to describe the duty to minimize. Courts are in the predicament of attempting to protect the benefit of the bargain of the employee while encouraging efforts to minimize damages. Thus, even though it is somewhat vague, Professor McCormick's description of the rule as one requiring the discharged worker to "only search for, or accept, employment of a like rank and grade, in the same kind of work, in the same locality," comes as close as possible to a concise statement of the worker's obligations.

Second, although the actual measure of damages may resemble the contract-minus-market-value measure found in the sale of goods, the route to this result is considerably different. Wrongful discharge damages are usually measured by the full contract wage offset by the amount the defendant is able to show the plaintiff earned or could have earned through reasonable efforts. The market value concept employed, unlike that used in the sale of goods, is not the going rate for a particular type of employment. For example, a party who has wrongfully discharged a law professor will not be permitted an offset equal to the going wage for law professors. In the sale of labor, the "market" is very narrow and the question is what this particular professor could have earned.

Finally, the traditional rule is consistent with the remedial policy of not permitting the nonbreaching party to retain gains made possible by the breach. With limited exceptions, income earned by the wrongfully

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31 Id. at 182, 474 P.2d at 699, 89 Cal. Rptr. at 741.
32 Id. at 186-87, 474 P.2d at 696, 89 Cal. Rptr. at 744 (Sullivan, C.J., dissenting).
33 For the variety of ways in which the duty has been expressed, see id. at 186, 474 P.2d at 695, 89 Cal. Rptr. at 793-94; Gregg v. McDonald, 73 Cal. App. 748, 757, 239 P. 373, 376 (1925); Annot., 28 A.L.R. 736 (1924).
34 See notes 90-92 & accompanying text infra.
35 C. McCormick, supra note 3, § 160, at 629.
36 See U.C.C. § 2-708.
37 D. Dobbs, supra note 1, § 12.25, at 924-25.
38 According to Professor Dobbs, the distinction is between a "theoretical" market value and the actual ability to obtain a job. Id. at 925. In fact, the distinction is probably based on how narrowly the market is defined. In the case of employment, unlike fungible goods, the market is individual-specific.
40 See 5 A. Corbin, CONTRACTS § 1095, at 517 (1964); RESTATEMENT OF CONTRACTS § 336, comment c (1932). There is a question as to whether the gains are actually made possible by the breach. See text accompanying notes 94-164 infra.
41 As noted earlier, see note 6 supra, the employer is typically not credited with income that the plaintiff could have earned while employed by the defendant.
discharged worker, even in nonsubstitute positions, is credited to the breaching party. A different policy would have a punitive effect in that the breaching party would be liable for damages in excess of the plaintiff's actual losses. Adherence to the remedial goal in this context reduces the discharged worker's incentive to search for nonsubstitute employment and may result in suboptimal leisure.

**Economic Analysis**

The Leisure Windfall

The common law rule is designed to encourage minimization and to protect the employee's benefit of the bargain. The rule also seems to limit the employee's recovery to actual damages. Figure I illustrates the proposition. Suppose at the beginning of a month the worker and the employer enter into an employment contract for a certain number of days of work at a particular wage. The $X$ axis in the figure is presented in terms of days per month. The $Y$ axis is in terms of absolute utility Curve $U$ shows the amount of utility or pleasure derived from the income earned by an additional day of work. Curve $D$ plots the disutility associated with an additional day of work. $U$ is downward sloping, in-

<table>
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<th>Absolute Utility</th>
<th>Days per Month</th>
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<td>$A$</td>
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**FIGURE I**

Similarly, in some instances courts have not allowed full credit when it is determined that the new position is more rigorous. See, e.g., Williams v. Chicago Coal Co., 60 Ill. 149 (1871); Evesson v. Ziegfeld, 20 Pa. Super. Ct. 79 (1903).

The nonmonetary utility associated with the position could be represented by raising $U$ or by lowering $D$. For simplicity, it may be assumed that $U$ is exclusively monetary income-related and that psychic income has been netted out in deriving $D$. 
indicating that the individual receives less income per day as the number of days increases and that, as he has more income, the additional pleasure derived from the additional income decreases. Conversely, the disutility associated with an extra day of work increases as the worker has less leisure time available. In effect, the curves show the costs and benefits associated with a particular position.

The individual will choose to work those days on which the extra utility derived from the income earned exceeds the disutility associated with the work. In the figure, he would choose to contract for \( Q \) days in the month. Beyond \( Q \) days the additional disutility begins to exceed the utility. The area \( ABC \) shows the total amount by which the utility derived from the income earned by working \( Q \) days exceeds the total amount of disutility. This area represents, in effect, the benefit of the bargain to the employee, or his utility expectancy.

The common law rule protects the benefit of the bargain in that the discharged employee is expected to minimize damages only by accepting substantially similar employment. In the figure, this would be employment with basically the same disutility as the original position. Of course, if no jobs are available of this character, the individual may remain idle. One problem should be obvious: the common law rule that the discharged worker is not permitted to keep income earned in substitute or nonsubstitute employment flows from the premise that contract remedies should be designed so that the nonbreaching party does not retain gains made possible by the breach. The rule, however, does exactly what it is designed to prevent. Before the breach, the utility surplus is equal to \( ABC \). After the breach, if there are no substitutes, the utility surplus expands to \( OBCQ \). Thus, while the common law does not allow retention of income earned in nonsubstitute employment, it does permit retention of what is essentially a leisure windfall.

The Bargaining Solution

The decision that a discharge has been wrongful amounts, in effect, to a determination that the employee has a "right," if there are no substitutes available, to remain idle. The actual value of this right to the employee is somewhat limited in that he may not keep the income a new employer would pay him for not exercising it. The discharging party also gains nothing from his right to income earned because the worker is unlikely to accept nonsubstitute employment.

The situation is one in which the parties are in a bilateral monopoly

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43 Even if there is no decrease in wages per day, as the number of days increases the curve will retain its basic shape as long as income is subject to diminishing marginal utility. If the curves have different shapes the analysis will remain the same.
relationship with respect to the prospective idleness rights. The employee possesses monopoly power over these rights and the discharging employer has monopsony power. The parties would be expected to determine a "price" amounting to the portion of income obtainable from nonsubstitute employment which the discharged worker would be permitted to retain. In a situation in which outside employment is particularly distasteful, the price to the discharging party of the discharged party's right not to expand his minimization efforts may be extremely high or even prohibitive. Still, if the discharging party is able to retain any of the normally worthless right to income earned, he would be benefited and should be willing to bargain.

Ideally, then, the discharged worker would compare outside employment with the portion of the income obtainable which the discharging party would allow him to retain. The effect would be to encourage the discharged worker to re-enter the labor market. One could argue, therefore, that the common law rule is not as inefficient as it originally appears; or, if it is inefficient, it is an inefficiency around which the parties would be willing to negotiate.

While the bilateral monopoly model has appeal, it is probably unrealistic to expect it to work effectively. First, by the time the parties have litigated the issue of whether the discharge was wrongful and, therefore, the assignment of idleness rights, a substantial period of suboptimal leisure may have already passed. Second, the willingness to negotiate will be a function of the parties' attitudes toward risk and how strongly they feel about the merits of the discharge. Under the present rule, once the wrongfulness of the discharge has been established and the damages determined, the possibility of negotiating around the inefficiency will be eliminated. Continued litigation in this area indicates that parties are frequently willing to push the issue as far as possible.

Since it is unlikely that the inefficiency in the traditional remedial scheme is eliminated through a bilateral monopoly transaction, it is worthwhile to consider alternative methods of bringing wrongfully discharged workers back into the labor market. The three strategies presented are evaluated as to their effectiveness, their retention of common law fairness vis à vis the nonbreaching party's benefit of the bargain and their impact on the decision to breach.

EXPANDING THE SCOPE OF THE DUTY TO MINIMIZE

Expanding the scope of the duty to minimize results in the discharged

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4 The availability of severance pay in some instances and decisions to settle rather than go to trial in others indicate that the problem is amenable to negotiation. See generally R. Posner, supra note 7, at 434-41.
worker's being charged with the income he could have earned by accepting positions different from and, perhaps, inferior to those originally held. Deciding whether to return to the labor force differs from the usual work/leisure decision in that the worker is attempting to preserve his original income level, rather than to increase it. Despite this difference, the determinants of whether an individual will return to work should remain the same. An expanded duty rule has been applied in Texas and in back pay actions stemming from discharges in violation of the National Labor Relations Act (NLRA). An examination of these rules in practice is a useful preface to an analysis of this alternative.

**The “Texas Rule”**

In Texas, the wrongfully discharged worker is permitted to search for a substantially similar position for a reasonable time. After this, the duty to minimize extends to other employment for which he is “fitted.” The extent to which results under the Texas rule differ from those under the typical common law rule is not clear. For example, in *Buffalo Bayou v. Lorentz,* the plaintiff was employed as a tugboat captain on a month-to-month basis at a salary of $100 per month. At mid-month he was discharged and offered an inferior position at a salary of $90 per

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4. Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their § 7 rights (the employees' basic rights to organize and bargain collectively) which the Act seeks to protect, id. § 157. Section 8(a)(3) of the Act, id. § 158(a)(3), makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Thus, the firing of an employee for union activity amounts to a violation of §§ 8(a)(1) and 8(a)(3). NLRB v. MacKay Radio & Tel. Co., 504 U.S. 333 (1990). The refusal to hire persons because of their affiliation with a particular labor union constitutes a violation of § 8(a)(3). Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Section 10 of the Act gives the National Labor Relations Board various powers for preventing and remedying unfair labor practices. Section 10(c), 29 U.S.C. § 160(c) (1976), empowers the Board “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this act.” This language is consistently interpreted to give the Board the power to award backpay to employees who have been fired or refused employment due to their union activity. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

7. There seems to be some question as to whether the Texas courts are continuing to apply this rule. Although not expressly overruling it, the courts have recently phrased the rule as requiring the discharged worker to make a reasonable effort to seek and accept other employment. Compare Simon v. Allen, 76 Tex. 398, 13 S.W. 296 (1890), with Wolf Cigar Stores Co. v. Kramer, 50 Tex. Civ. App. 411, 909 S.W. 990, 994 (1908), with Cole v. City of Houston, 442 S.W.2d 445, 451 (Tex. Civ. App. 1969), and Mr. Eddie, Inc. v. Ginsberg, 430 S.W.2d 5, 9 (Tex. Civ. App. 1968), and A.J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W.2d 445, 447 (Tex. Civ. App. 1979).

month, which he refused. The trial court awarded the plaintiff $100—the expected salary for the contract period of one month. On appeal, the employer argued that the plaintiff had failed to minimize because he had not taken the employment offered when he was discharged. The appellate court affirmed, indicating that the “law does not contemplate that when a contract is broken the aggrieved party shall humiliate himself at once by accepting a lower grade of employment.” The court noted that after a reasonable time, the plaintiff would have been charged with income that could have been earned in an inferior position, although perhaps not that offered by the discharging employer, but that here a reasonable time had not passed. In this and other Texas cases, the “reasonable time” factor has produced results consistent with those reached under the typical common law rule.

The Texas rule has also been interpreted as retaining elements of the majority rule. One case involved a railroad worker who was discharged from his position in Houston and offered a similar, but inferior, position in San Antonio or Kennedy. The trial court found that the plaintiff was unable to find “similar or other employment” and entered judgment for the full amount of lost wages. The defendant appealed, arguing that the plaintiff had failed to minimize by refusing the positions offered. The Commission of Appeals announced that the Texas rule allows the discharged worker to look for a similar position for a reasonable time, after which he will be charged with income obtainable in “other employment for which he [was] fitted.” It affirmed the lower court, however, indicating that the plaintiff had attempted to secure other employment in Houston, and was not obligated to “seek or accept employment elsewhere in a distant locality.”

The Texas rule has not always been applied in such a way that the results are consistent with those produced by the traditional rule. In Wolf Cigar Stores Co. v. Kramer, the plaintiff contracted for a one year term of employment as general manager of the defendant's cigar store at a salary of $250 per month. After five months, the plaintiff was reassigned to manage a hotel cigar stand. He regarded this as a demo-

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51 Id. at 1183.
52 Id. at 1185.
53 Id.
56 Id. at 89.
57 Id. at 87.
58 Id. at 89.
59 Id.
61 Id. at 413, 109 S.W. at 992.
tion and elected to treat it as a breach of the employment contract and a wrongful discharge. Two months later the plaintiff opened his own business which operated at a loss for the remainder of the contract period. At trial, the plaintiff testified that he could have taken a position as a bookkeeper at $75 per month. The court of appeals approved an award of the full contract wage minus the greater of what he could have earned as a bookkeeper or his value in his own business. Under the common law rule, the amount the plaintiff could have earned as a bookkeeper would have been irrelevant; the defendant would have been credited with the income from the bookkeeping position only if the plaintiff had actually accepted that position.

**NLRA Backpay Claims**

A broader duty to minimize damages has also been sporadically applied in cases involving backpay awards arising under the NLRA. Applications of this broader duty seem to derive from *Phelps Dodge v. NLRB*, in which the Supreme Court was faced with the issue of whether the amounts wrongfully discharged individuals could have earned would be allowed as an offset in calculating the backpay award. The Court ruled that losses "willfully incurred" by discharged workers should be deducted from the award, but did not specify whether the concept of willfully incurred losses involved a duty to minimize comparable to that under the common law rule. It did, however, indicate that it had a greater interest in "promoting production and employment" than in the "minimization of damages" and that the Board should "give appropriate weight to a clearly unjustifiable refusal to take desirable new employment."

Regardless of the scope of the duty envisioned by the Court, some lower courts have held that deductions from backpay awards are to be made for income that could have been earned in positions other than the common law reasonable substitute. In *NLRB v. Moss Planing Mill Co.*, 

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64 *Id.* at 414, 109 S.W. at 992.
65 *Id.* at 418, 109 S.W. at 994.
66 See, e.g., *NLRB v. Madison Courier, Inc.*, 505 F.2d 391 (D.C. Cir. 1974); *NLRB v. Southern Silk Mills, Inc.*, 242 F.2d 697 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957); *NLRB v. Moss Planing Mill Co.*, 224 F.2d 702 (4th Cir. 1955). Although this development seems to be independent of the Texas rule, at least one Texas decision, *Simon v. Allen*, 76 Tex. 398, 13 S.W. 296 (1890), has been cited in the context of an NLRA backpay award. See *NLRB v. Moss Planing Mill Co.*, 224 F.2d at 705.
68 313 U.S. at 200.
69 *Id.* at 198.
70 *Id.* at 200.
71 *Id.* at 199-200.
72 224 F.2d 702 (4th Cir. 1955).
the Court of Appeals for the Fourth Circuit held that a wrongfully discharged mill worker was obligated to seek and accept other suitable employment; the court indicated that "suitable employment" for a healthy man living in an agricultural community and having experience in agricultural jobs included agricultural employment. Likewise, in NLRB v. Southern Silk Mills, Inc., the Court of Appeals for the Sixth Circuit cited Phelps and applied what has been labeled the "lower sights doctrine." The court ruled that reasonable efforts to "secure 'substantially equivalent' employment may not be sufficient minimization." Thus, losses that could be avoided by lowering one's sights as to acceptable employment could be regarded as "willfully incurred."

More recently, in NLRB v. Madison Courier, Inc., the Court of Appeals for the District of Columbia Circuit applied a slightly different version of the broader duty to minimize. In Madison Courier, it was held that wrongfully discharged skilled workers in the printing trade were expected to minimize damages by accepting employment outside their usual line of work. The court noted that common law rules were not "directly applicable" to the statutory area; it claimed, however, not to be applying the lower sights doctrine. Instead, this court seemed to employ a "different but equal" standard to objectively categorize the positions available to discharged workers according to their danger, distastefulness and uncongeniality. Failure to accept employment similar in terms of these characteristics, even though in different trades, was held to be inconsistent with a reasonable effort to minimize damages.

It would be incorrect to say that the broader duty to minimize has received widespread support in the context of the NLRA; the circuits are in significant disagreement as to the appropriate minimization rule. In addition, the Board has consistently resisted applying any rule that imposes more than the common law duty to minimize.

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71 Id. at 705-06.
72 Id.
74 Id. at 700.
76 242 F.2d at 700.
77 Id.
78 Id.
79 505 F.2d 391 (D.C. Cir. 1974).
80 Id. at 402-03.
81 Id. at 398.
82 Id. at 396.
83 Id. at 398.
84 Id. at 402.
86 Madison Courier is an example of the struggle between the Board and the circuit
Analysis

Although an argument can be made that the expanded duty to minimize in the context of the NLRA, or other legislatively created claims for backpay, may undercut the effectiveness of the legislation, there seems to be little doubt that the expanded duty to minimize would lower the probability that the worker will remain idle. Even in the context of the goal of bringing the discharged worker back into the labor force, however, this strategy is beset by severe practical, as well as conceptual, problems.

From a practical standpoint, determining the obligations of the wrongfully discharged worker to minimize is difficult enough under the common law rule. The broader duty places the nonbreaching party in an even riskier position: If reasonable substitute employment is not available, how long may the individual search before his sights must be lowered or changed? How far from the original employment must one search? Once the worker has accepted nonsubstitute employment, must he continue to search for employment that would be a reasonable substitute or that would be higher paying? The latter problem arose in Madison Courier; two workers had accepted part-time jobs outside their area of skill. The court described the dilemma of the discharged worker:

If he accepts the lower-paying job too soon, he may be held to have incurred a willful loss of earnings by accepting an unsuitable position. But if he turns down the lower-paying job, he may be held to have incurred a willful loss of earnings by failing to "lower his sights." Clearly, the nonbreaching or nonviolating party should not be forced to bear this increased risk. The court in Madison Courier concluded that, while there were still limitations on how long one could keep a lower-paying position when better jobs were available, any doubt should be resolved in favor of the discharged worker. Although this is a sensible way to deal with the problem, the discharged worker still seems to be in the difficult to justify position of bearing additional risks thrust upon him by the breaching or violating party.

One bothersome conceptual problem in the context of employment contracts is that the expanded scope may not be consistent with the interests that are generally protected by contract remedies. The common
law rule protects the employee's benefit of the bargain by limiting the scope of the duty to minimize. Figure II illustrates how this would be altered under a strict application of the Texas rule.\(^1\) \(D_1\) shows the disutility associated with the original position and \(D_2\) the disutility associated with a less desirable alternative. \(U_1\) remains the same even if the alternative is lower-paying, since the breaching party would be liable for the difference between the income earned in the new position and the income in the old position. In the figure, the new utility-maximizing level of employment would shift from \(Q_1\) to \(Q_2\). The total utility surplus would be \(EBF\). The worker would lose the utility associated with the days \(Q_2\) through \(Q_1\).\(^2\) In addition, \(AEFG\) is part of the original benefit of the bargain which would no longer accrue to the individual. The fact that he would have income or utility equal to what could have been earned for \(Q_2\) days of work in the old position is irrelevant. In fact, he would have paid a higher price by incurring more disutility in order to earn this amount, and the surplus would be decreased. Thus, the common law rule protects the benefit of the bargain at the risk of creating a leisure windfall for the nonbreaching party. The Texas rule, on the other hand, subordinates the discharged worker's interest

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\(^1\) A strict application would require the discharged worker to lower his sights continually until he found employment.

\(^2\) Even though the individual receives income per unit of time equal to that in the original employment, he maximizes utility by working less in the new higher disutility position than he did in the original position.
in the benefit of the bargain to the goal of decreasing idleness. Of course, even under the Texas rule, the worker is permitted to retain the benefit of the bargain for a reasonable time.

Statutory actions for backpay do not fit easily into the contract model since their purpose is to discourage discharge but not necessarily to protect the utility expectancy of the employee. Policies similar to those involved in the NLRA could, however, be applied in the area of employment contracts. The "lower sights doctrine" would operate in the same manner as the Texas rule. The *Madison Courier* "different but equal" rule would be slightly different. In dealing with an employment contract, the procedure would require objectifying a position with respect to several crucial variables. The employee would be expected to accept different employment so long as it was found to be essentially similar to the previous employment based on the selected characteristics. The *Madison Courier* approach attempts to find positions that have the same disutility associated with them as the original job. It permits much less subjective job evaluation than the common law rule, but seems to go further than the Texas rule in protecting the benefit of the bargain.

**THE HUMAN CAPITAL APPROACH**

The human capital approach to the problem of suboptimal leisure is quite different from that involved in expanding the scope of the duty to minimize. Rather than threaten the wrongfully discharged worker with a loss of income, the human capital approach relies on the opportunity for additional income to motivate the worker to re-enter the labor market. The following materials introduce the concept and explain the rationale for treating the discharged seller of labor in a fashion similar to the treatment of the seller of goods.

**The Concept of Human Capital**

Economists traditionally list three factors of production: land, labor and capital. Capital is the label used to identify those goods that are inputs as well as outputs of productive processes. Labor and land, on the other hand, are natural inputs that are not products of economic activity. In reality, the productive potential of human beings cannot be regarded as labor in its purest sense. Most, if not all, human productive

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92 See note 47 supra.

93 The employee would be permitted to retain a portion of the income obtained in non-substitute positions.

94 For an application of the concept of human capital in a different context, see Kay & Amyx, Marvin v. Marvin: Preserving the Options, 65 CALIF. L. REV. 937, 964 (1977).

effort is made possible by both inherited attributes and by the skills and knowledge acquired within the economic system. This mixed factor of production is referred to as human capital.  

Human capital is not a new concept to economists, but it has recently generated a great deal of interest. This interest was stimulated by a desire to explain increases in economic growth that were not accounted for by traditional input analysis. For example, while income increased at a rate of 3.1% per year during the period from 1919 through 1957, physical capital increased at a rate of only 1.8% per year. Likewise, it has been estimated that only one-fourth of the increase in output in the United States in the period from 1869 through 1953 was due to the conventional factors of production. Economists began to hypothesize that the divergence was a function of an increase in the quality of human inputs. A leading authority in this area explains the proposition as one in which "[t]he observed growth in productivity per unit of labor is simply a consequence of holding the unit of labor constant over time although in fact this unit of labor has been increasing as a result of a steadily growing amount of human capital per worker."  

The emphasis on human capital has intensified research efforts designed to calculate rates of returns for various forms of human capital investment. The methodology employed is similar to that used in calculating the rate of returns to investments in physical capital. Studies indicate

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97 See T. SCHULTZ, INVESTMENT IN HUMAN CAPITAL 48 (1971); L. THUROW, INVESTMENT IN HUMAN CAPITAL 1-2 (1970). Any activity that increases or preserves the productivity of humans can be regarded as adding to the development of human capital. The most obvious example is education. This would include not simply higher education but elementary education and on-the-job training. In addition, health care, accident prevention and even migration are forms of developing and investing in human capital. T. SCHULTZ, supra, at 36.  
98 The earliest human capital studies seem to have been conducted in the mid-seventeenth century. See Kiker, Human Capital in Retrospect, in 16 ESSAYS IN ECONOMICS 1-5 (June 1968). Generally, however, mixing of the concepts of capital and labor was resisted or neglected. There are several reasons for this: first, tradition has dictated that land, labor and capital be separately considered; second, economists have generally included as capital only things that were marketable; finally, human capital has been considered difficult to measure. Kiker, The Concept of Human Capital, in 14 ESSAYS IN ECONOMICS 1-3 (Nov. 1966). See also Schultz, Investment in Man: An Economist's View, 33 SOC. SERV. REV. 109, 109-12 (1959).

99 Kiker, The Concept of Human Capital, in 14 ESSAYS IN ECONOMICS 4-6 (Nov. 1966).
100 SCHULTZ, supra note 98, at 114.
102 See, e.g., Schultz, supra note 98, at 114.
103 SCHULTZ, supra note 97, at 33.
that the return may vary with race, sex and region. The returns also vary with the nature of the investment. Using rate of return data, economists supply the information from which judgments can be made concerning the issues of over-investment or under-investment in particular areas and the amount of public investment in human capital.

**Sellers of Labor as Capitalists**

Critical to the case for treating sellers of labor as capitalists is the question of whether sellers of labor behave as capitalists: Are investments in human capital a response to expected returns to the investment? Examinations of investments in migration and education indicate that sellers of labor do exhibit capitalist-like behavior.

In migration, the cost of relocating and the income foregone during the move represent the primary pecuniary components of the investment. The pecuniary returns from the investment are represented by the additional income which will be earned in the new location. One of the major determinants of migration is the opportunity for increased income; economists have linked both interstate and international flows of human capital to income differentials. Studies show that an investment-like analysis is involved in the decision to migrate.

Most human capital research has focused on investments in education. Investors display the expected tendencies in this area as

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106 Id. at 325.
107 Id. at 330.
108 Id. at 336-37.
111 See, e.g., Hines, Tweeten & Redfern, supra note 105.
113 See, e.g., Freeman, supra note 110.
114 See Sjaastad, supra note 112, at 83-91.
115 Id. at 82. See also Borts, The Equalization of Returns and Regional Economic Growth, 50 Am. Econ. Rev., May, 1960, at 319.
116 See, e.g., Sjaastad, supra note 112, at 80 n.2.
117 See, e.g., id. See also Grubel & Scott, supra note 112.
118 The proposition may be further illustrated in the context of a continuing legal and economic problem: one of the costs of illegal migration is the penalty associated with being discovered multiplied by the probability of discovery. One can make a strong argument that one of the reasons that so many are willing to make the investment, despite this cost, is that the cost is simply too low. The decision is, simply, that the returns warrant the investment.
119 See, e.g., Brown, A Model of Optimal Human-Capital Accumulation and the Wages of Young High School Graduates, 84 J. Pol. Econ. 299 (1976); Campbell & Curtis, Graduate Education and Private Rates of Return: A Review of Theory and Empiricalising, 13 Econ. Inquiry 99 (1975); Freeman, supra note 110; Raymond & Sesnowitz, supra note 104.
well. For example, while the actual rate of return varies from study to study, it does appear that the returns to higher education were fairly stable until 1970. In the 1970's, however, there was a marked decline in the rates of return to higher education, apparently because job opportunities in professional and managerial positions began to increase at a slower pace than previously. One study indicates that the rate of return fell from 11% in 1959 to 8.5% in 1974. The investment component of higher education was not as attractive as it had once been, and the result was a significant decline in college enrollments.

The figures show that investors in human capital respond in the same fashion as do investors in physical capital. Human capital analysis is particularly difficult because, unlike physical capital, some of the returns to investments in human capital are nonpecuniary. If these nonpecuniary returns could be included in the investment analysis, the argument that sellers of labor exhibit capitalist-like behavior would certainly be more compelling.

The Human Capital/Physical Capital Analogy

The Seller of Goods

The problem of waste considered here normally does not arise in the sale of goods. It seems clear that, under the Uniform Commercial Code, a seller will not profit by remaining idle. The physical capitalist is, unlike his human capital counterpart, able to retain the benefits of non-substitute performance. Thus, one method of avoiding the waste inherent in the common law wrongful discharge remedy is to treat the human capitalist, as far as is possible, the same as the physical capitalist seller of goods.

The Code analogue for the wrongfully discharged worker is the seller of unfinished goods. Under section 2-704(2), the seller, in the exercise

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192 Campbell & Curtis, supra note 119, at 101.
191 Carnoy & Marenbach, supra note 104, at 316, 318, 322.
192 Freeman, supra note 110, at 296-97.
193 Id. at 291.
194 Id. at 296.
195 Higher education is also used for present consumption.
196 For example, in 1968, 44% of male civilians enrolled in college. By contrast, in 1974, the percentage entering college from the same age group fell to 35%. Freeman, supra note 110, at 298. Enrollments fell from 1.4 million to 1.3 million during this period while there was a 25% increase in the number of 18-19 year old males. Id.
197 See notes 128-36 & accompanying text infra.
198 See U.C.C. § 2-704(2). There may be a question as to whether the wrongfully discharged human capitalist is in the position of selling finished or unfinished goods. One could argue that the wrongfully discharged employee holds an inventory of productive capacity which he has been prevented from delivering; the finished goods were available but not called for. On the other hand, one could identify the human capital goods as a composite of
of reasonable judgment, must decide whether to stop manufacture or to complete the goods. If he stops, he is entitled to be placed in the position he would have been in had there been no breach. Actual damages would then be equal to the price less the expenses saved and the resale value of the materials or the partially completed goods. This leaves the seller in the net position of having received lost profits including overhead. The recovery would not be reduced if the seller elected to use the same capital goods to produce other goods.

On the other hand, the seller may complete the goods, identify them to the contract and resell them under section 2-706. Damages would equal "the difference between the resale price and the contract price together with any incidental damages . . . , but less expenses saved in consequence of the buyer's breach." If the goods cannot be resold, the seller may proceed in an action for the price under section 2-709. In the case of manufactured goods, the seller has the additional option of proceeding under section 2-708 for the difference between the contract and market price or for lost profit. Comment 2 to section 2-704 states that the seller need not make what appears to have been, with the benefit of hindsight, the best decision with regard to completion of the goods. Moreover, the burden is on the buyer to show that the plaintiff/seller's decision was commercially unreasonable.

It is clear in this remedial scheme that the seller is encouraged to make use of available productive capacity. If there are sales opportunities in which revenues exceed the costs of production, the seller may keep the excess and there is no disincentive to produce. There appear to be no circumstances under which the seller is better off passing up opportunities. The decision on any additional activity is independent of the previous breach.

The rationale for this scheme seems to flow from the common law and is due to two characteristics of sellers of manufactured goods. First, the additional production is not made possible by the breach. The seller of human capital plus effort, so that when the seller is discharged, the goods are unfinished. While the matter is debatable, it does not affect the following analysis.

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130 In effect, the seller may opt for a U.C.C. § 2-708 recovery under which he recovers lost profit as a lost volume seller. See generally Childres & Burgess, Seller's Remedies: The Primary Use of U.C.C. 2-708(e), 48 N.Y.U. L. Rev. 833 (1973).
132 U.C.C. § 2-706.
133 Id. § 2-709; see Bradford Novelty Co. v. Technomatic, Inc., 142 Conn. 166, 112 A.2d 214 (1955), cited in R. Nordstrom, supra note 129, § 179, at 549 n.75.
134 The seller may complete the goods but elect not to treat their sale as a § 2-706 resale. See R. Nordstrom, supra note 129, § 179, at 549.
135 U.C.C. § 2-704, Comment 2.
136 Id.
manufactured goods is assumed to be capable of finishing the goods contracted for and producing additional goods. The Code merely reflects the common law view that “manufacturing facilities can usually be expanded to meet all demands; therefore, profit made of the manufacture and sale of a second article is not deducted.”

A second consideration is that the seller is not required to suffer any “undue risk, expense, or humiliation” in the effort to minimize damages. Part of the compensation to any seller of goods is that associated with risk taking. Profits resulting from the use of physical capital to produce the same type of goods or goods different from those originally called for can be attributed to the assumption of additional risks. The seller is not expected to take additional risks on behalf of the defendant and, therefore, the benefits of these risks are retained by the seller.

The Seller of Labor

Can the logic of the Code accommodate the seller of outputs of human capital? The answer, in short, is that even the human capital approach does not permit precise Code-like treatment. It does seem clear, however, that the seller of goods and the seller of labor are far more similar than they initially appear to be. This is borne out by an examination of the human capitalist in terms of the logic of the Code.

Suppose that A is employed by B on a two year contract as an engineer specializing in aircraft design. Due to a general downturn in the market for aircraft, A is discharged. A searches diligently and finds that there are no jobs that are reasonable substitutes. At this point A may stop his search and collect the full contract rate from B, or he may seek additional employment. Suppose A does find a job making ice cream sundaes at a local ice cream parlor. Under the common law, if the two jobs are mutually exclusive, any income earned by A would be used to offset A’s claim against B. Is A’s position so different from the seller of goods in terms of risk and lost volume that the treatment afforded this additional income should be different?

With respect to risk, Professor Corbin has observed that “[t]he discharged worker can reasonably be expected to take another job for wages or salary since the gain therefrom is practically certain, and the

13 A. CORBIN, supra note 40, § 1041, at 258 (footnotes omitted).
134 RESTATEMENT OF CONTRACTS § 336(1) (1932).
135 Id., comment c. The seller is, in effect, a lost volume seller and is, therefore, permitted to recover the lost profit associated with the buyer’s breach and retain earnings associated with the new sale. See Grinnell Co. v. Voorhees, 1 F.2d 693, 695 (3d Cir. 1924).
136 One may also view the human capitalist as renting, as opposed to selling, his efforts, as the capital itself does not change ownership. See A. REES, supra note 10, at 35.
risk of loss negligible."

Although Professor Corbin's conclusions as to the risks borne by the seller of labor are correct, this is an issue separate from that of whether any risks actually exist. In the example, A already possesses the human capital necessary for designing aircraft. Now, additional human capital must be acquired. Time and money spent searching for the new position are significant investments. A may be forced to relocate or travel greater distances to and from work. If he receives on-the-job training, his investment may be in the form of lower income during the initial period of employment. All of this will be wasted if the new position is terminated or if a reasonable substitute position becomes available.

Thus, A's new employment venture is fraught with risk. As long as these risks and expenses are associated with reasonable mitigation efforts, they are borne by the wrongfully discharging employer. Although it makes sense not to permit A to keep income from the development of human capital that the discharging party has, in effect, paid for, the net result is that very little investment will occur. The seller of goods may take risks, but when he does, the benefit of this risk taking accrues to him, as do the losses if the investment is a bad one. The seller of labor, on the other hand, determines whether risks are to be taken, but does not stand to lose or gain from this decision as long as it is reasonable.

In short, as far as investment risks are concerned, sellers of labor and sellers of goods are treated differently. It would seem logical, though, to treat them similarly. In the absence of substitutes, the employee would be on his own in deciding whether to take risks. A should be allowed to keep income from the risks associated with the development of new human capital and should not be shielded if the investment decision results in a loss.

The more difficult problem in the analogy is the lost volume issue. As long as the positions are mutually exclusive, one may argue that the employer should be credited with gains made possible by the breach. This argument, though, ignores the human capital aspect of the transaction. While the breach has made the new position possible, it is not sufficient in and of itself. The other critical element in the proposition, if the employee is the risk taker, is the willingness of the seller to make the additional investment. One may view the output of the seller of labor

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141 5 A. CORBIN, supra note 40, § 1041, at 261.
143 The case for allowing A to retain all earnings obtained from nonsubstitute employment would be that if he were unable to find a position designing aircraft, the market value of his services would have fallen to zero. He would be entitled to the contract/market differential which would equal the contract salary. If he takes a position as a sundae maker, he is not involved in a resale as he is selling an entirely different type of human capital.
as a result of both a human capital element and a pure effort element.\textsuperscript{144} When the contract is breached, both become available. If the discharged employee is able to find a position that is a reasonable substitute, both the human capital and pure effort elements are used and the breaching party is entitled to full credit. In any other case, only the pure effort element is resold as a result of the breach and only a portion of the new compensation should accrue to the defendant. The human capital element of the new position involves a new investment decision, the returns of which should remain with the discharged worker who, ideally, would be incurring the new risk.\textsuperscript{145}

The policy of not allowing a breaching party to profit from the breach offers limited support for the human capital approach. For example, if the seller of goods is able to resell at a price in excess of the contract price, the breaching party is not entitled to the excess.\textsuperscript{146} The higher price may be, in effect, a reward for the seller's negotiation skills. Using the human capital view and following the same line of reasoning, the breaching employer should only be credited with the amount earned in the resale of what was made available as a result of the breach. If the employee is in a new occupation using different human capital in which he has invested, the breaching party should only be entitled to the compensation for the pure effort factor. To allow a full credit is tantamount to allowing the employer to benefit from the extra efforts of the plaintiff.\textsuperscript{147}

Finally, the human capital issue is very similar to the situation in which the discharged worker, rather than seeking employment in a similar job, enters into business for himself. Generally, the position of the courts has been that any income earned is subtracted from the lost income.\textsuperscript{148}

\textsuperscript{144} This distinction has been made in A. Rees, supra note 10, at 19-53. For this analysis, it may be more accurate to view the new position as involving three elements. The pure effort portion would be the worker's willingness to forego leisure. New human capital would involve the acquisition of new skills, changes in location and so on. Finally, some existing human capital will be used in the new position. This human capital can be included in one of the two other categories. To the extent it is used in work or leisure in an unadapted form, it can be reflected as "effort." If it must be adapted, then it can be included as new investment. Thus, the label "effort" refers to both unchanged human capital and leisure foregone.

\textsuperscript{145} Of course, since the worker would be expected to pay the expense of new human capital and permitted to retain the returns if the investment were unprofitable, this should not affect the former employer's right to the effort income.

Another objection to allowing the discharged worker to keep the earnings would be that he is involved in a resale of scrap. Indeed, U.C.C. § 2-704(2) allows the seller to cease manufacture and "resell for scrap or salvage value." Again, the human capital element of the transaction is ignored. If there is an occupation which requires no more than pure effort, the "scrap" argument would hold. On the other hand, it is difficult to imagine a position that does not require learning, practice and the acquisition of skills.

\textsuperscript{147} Of course, as long as the employer is liable for the expenses associated with these efforts, it is logical to allow him to retain the benefits.
This view, in effect, credits the employer with the risk taking of the employee, which is independent of the breach. Professor Corbin has argued that gains associated with this use of capital should accrue to the investor and not to the breaching employer. This suggestion has a great deal of merit in terms of economic analysis and is consistent with a human capital approach to wrongful discharge.

The Human Capital Approach in Practice

The human capital approach is severely limited in its ability to eliminate suboptimal leisure. No matter how much income the worker can obtain, the "effort" portion is credited to the breaching employer. Thus, while there is some motivation to return to work, the decision concerning re-entry into the labor force is clouded by the fact of the previous breach. Unlike situations involving the seller of manufactured goods, the new employment venture is not independent of the previous one. The amount credited to the former employer is, in effect, a tax on additional income and would have similar disincentive effects. This is not to say that the human capital approach would do nothing to reduce waste. Although it would not eliminate the "former employer tax," it could lower it significantly from its current one hundred percent and, therefore, reduce the disincentive effects.

One method of avoiding this problem would be to eliminate the effort/human capital separation and allow the employee to retain all income from nonsubstitute positions; earnings from nonsubstitute employment would be regarded as a return to human capital investment. The argument for this position is that the effort/human capital separation is simply too difficult, and the risk of being unable to make this allocation should be borne by the breaching party.

See D. Dobbs, supra note 1, § 12.25, at 926. Of course, if the new business could be conducted while employed by the original employer, there should be no deduction.

A. Corbin, supra note 40, § 1095, at 517-18, cited in D. Dobbs, supra note 1, § 12.25, at 926 n.21. See also Williams v. Chicago Coal Co., 60 Ill. 149 (1871). The human capital and new business cases may be distinguishable in terms of whether expenses involved in the ventures would be regarded as "reasonable" and, therefore, chargeable to the breaching employer. Currently, the human capitalist is probably in a less risky position than the individual who starts a new business and, therefore, does not have a strong argument for keeping the gains. The position of this article is that the risk of human capital investments should be borne by the breaching party.

This is the opposite of the solution to the "new business" problem. In those cases, the difficulty of apportioning is usually borne by the discharged worker, the result being that the discharging employer is credited with the rewards to both labor and capital. See D. Dobbs, supra note 1, § 12.25, at 926. When there are no reasonable substitutes it seems logical, in both the new business case and the human capital case, to allow the employee to retain the total amount earned. The former employer cannot reasonably expect a credit and the discharged worker would be fully motivated to consider re-entering the labor market.
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arbitrarily assigning a small amount of the extra income to the pure labor portion of the new venture.

The most serious objection to this solution is that it ignores the fact that the seller of labor is only able to resell because of the breach.\textsuperscript{151} Although the income associated with the new investment should accrue to the risk taker, the effort-related income is relatively risk-free and directly related to the breach. Holding the former employer liable for the full amount would be punitive in that he would be liable for more than the damages actually suffered.

An additional problem with the human capital approach is that attempting to apportion a wage into human capital and pure effort components would be as difficult as the generally avoided apportioning problem involved when the discharged worker begins his own business. Whether inconvenience justifies a position that results in inefficiency is a decision for the courts and policy makers. If one accepts the theory involved in human capital analysis, though, there are at least two possibilities. First, at trial, after the defendant/former employer has shown the amount earned by the plaintiff, the plaintiff could be given an opportunity to demonstrate the amount that should be apportioned to human capital. This could be done by using the federal minimum wage, or some other yardstick, as a rough indicator of the value of low human capital or effort-intensive work.

Second, a legislatively determined fixed amount, or proportion, could be retained by the plaintiff. For example, the plaintiff might be allowed to retain everything in excess of two dollars per hour or fifty percent of the earnings. There is a strong argument for assigning a small share to the former employer. From a policy standpoint, once the breach has occurred it is advisable to allow the employee to compare the merits of work and leisure unimpeded by the previous breach.\textsuperscript{152} Also, this is the same type of allocation one could expect if the parties were to bargain over the leisure windfall.\textsuperscript{153}

These suggestions do not begin to apportion accurately the capital and pure effort components of every new occupation. Their application

\begin{footnotes}
\item[151] See 5 A. Corbin, supra note 40, § 1095, at 517 (1964); Restatement of Contracts § 336, comment c (1932).
\item[152] Of course, the new rule may have an impact on whether a breach will occur at all. See text accompanying notes 163-69 infra.
\item[153] As noted earlier, when there is a duty to minimize and there are no reasonable substitutes, the employer/employee relationship resembles that of a bilateral monopoly. See text accompanying notes 44-45 supra. It seems likely that, all other factors being equal, any settlement regarding the right to remain idle will permit the former employee to retain the larger proportion of the income earned. This would result because the employee's lowest acceptable wage is one that offsets the disutility of the new position. The lowest acceptable credit to the former employer is anything in excess of zero. Thus, the range of acceptable solutions is already structured to favor retention of the new employment benefits by the discharged worker.
\end{footnotes}
would, however, be a simple matter, and they provide a logical step
toward bringing the measure of damages in these cases in line with
economic reality.

THE COMPENSATED DUTY APPROACH

Both strategies examined in depth, and the alternative of allowing
the discharged worker to retain all income earned from nonsubstitute
positions, include serious shortcomings in finding an equitable and effec-
tive method of avoiding suboptimal leisure. An ideal strategy would
be one that recognizes human capital, allows the employee to retain the
benefit of the original bargain and allows him to improve his income
position by the full amount earned in nonsubstitute employment. Of
course, no strategy fulfills all these requirements. It is, however, possi-
table to approximate the desired result by combining the two approaches
discussed above. The compensated duty rule is designed to expand the
scope of the duty to minimize, allow the employee to retain all income
from nonsubstitute positions and reduce the size of any leisure windfall.

An example will illustrate the approach. Suppose A, the wrongfully
discharged aircraft designer, was earning $1,000 per month and had
several months remaining on his contract when he was wrongfully
discharged. If no reasonable substitutes were available, A could remain
idle and collect damages equal to the contract wage. Suppose the ice
cream sundae position were available at $500 per month. Under the ex-
panded duty rule, after a reasonable time A's duty to minimize would
extend to the job of making sundaes, and available earnings, whether
obtained or not, would be credited to his former employer, B. Under the
human capital approach the sundae job would not be within the scope of
A's minimization duty, but if he did take the position he would be able
to retain an amount equal to the newly acquired human capital compo-
nent of the new position. If the components were allocated evenly, he
would retain $250 and B would be credited with $250. A would receive
the equivalent of $1,250 per month and he would, therefore, increase his
income by $250 by accepting the position.

The compensated duty rule reflects the view that there is little
justification for allowing A to retain a fortuitous leisure windfall when
reasonable substitutes are not available. In addition, B should be
credited with the effort share of the income that A could have obtained

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1 An expansion of the duty to minimize may reduce the benefit of the original bargain to
the employee. The human capital approach is limited in its impact on suboptimal leisure
because it does not permit the worker to retain all the benefits of re-entry into the labor
force. Denying the defendant any credit for earnings from nonsubstitute employment would
have a punitive effect.

2 See text accompanying notes 140-42 supra.
by going beyond the common law duty to minimize, even if A declined to
do so. Thus, under the rule, A’s options would be either to accept the
nonsubstitute employment and receive total income and damages of
$1,250 per month or to decline the employment and receive damages
equal to $750.  

This approach is attractive for a number of reasons. First, the worker
would make the re-entry decision on the basis of the full amount of
potential income. Unlike the human capital strategy, in which the
discharged worker would compare work disutility with a portion of in-
come, here the worker would be more likely to make his decision in-
dependent of the breach. There is, however, an important difference
between the re-entry decision and the original decision to contract. For
example, although A would compare the ice cream sundae job with $500
income, he would be doing so while being assured of some income
regardless of his decision. If the utility to A of additional income
diminishes as his income increases, the assured income would influence
his decision.  

The decision would still be superior to that made under
the common law because the worker would compare the value of his
leisure to the value society attributes to his productivity.

An additional advantage of this proposal is that it modifies the all-or-
nothing nature of the common law rule. Under the common law rule, if
the worker declines what is, in fact, a reasonable substitute, his
recovery is reduced by the full amount that he could have earned. On
the other hand, if the worker does accept employment that is not a
reasonable substitute, all of the income is credited to the former
employer. Under the compensated duty approach, the risks involved in
deciding to decline employment would be essentially the same as under
the common law rule. The decision to accept employment would, how-
ever, be less risky than under the common law. If the new position were
a reasonable substitute, the worker would receive the contracted-for
compensation and suffer the contract disutility. If it were not a
reasonable substitute, he would still have improved his income position
through the minimization efforts.

154 A would be indifferent to working for $1,000 and not working and receiving $750.
Since the effort components of all positions are the same, see note 143 supra, $250 is the
portion of the $1,000 that compensated A for foregoing leisure. Thus, either work and a
$1,000 income or leisure and a $750 income gives A his expectancy.
155 If the marginal utility of income does not decline over this income range, or if it
decreases very slowly, the existence of an assured income would have little or no impact on
the re-employment decision.
156 The likelihood of this would depend on the risk aversion of the discharged worker. A
risk-averse worker would be more likely to accept employment not within the common law
duty to minimize.
157 A reasonable substitute position is one having basically the same disutility as the
original position. A difference between the contract wage and the new wage will be part of
the damages associated with the discharge.
Although the compensated duty approach does not guarantee protection of the benefit of the original contract bargain, it does, unlike the expanded duty rule, include some protection for the worker. In the previous hypothetical, if A declined nonsubstitute employment, under the expanded duty rule damages would equal $500. Under the compensated duty approach damages would equal $750. Under the expanded duty rule, if A chose to work, his total income would be $1,000. His income under similar circumstances with the compensated duty rule would be $1,250. Whether he chose to work or not, he would be more likely to receive the contracted-for utility surplus under the compensated duty rule.

This is not to say that each individual would wind up with the same utility as under the original contract. Depending on the effort/human capital division and one's preference for leisure, it is possible that the worker would be worse off than under the original contract. On the other hand, the probabilities of a utility surplus loss or a leisure windfall would not be as skewed as under the expanded duty rule or the common law rule. Also, the likelihood of optimal work/leisure decisions should approach that found under the expanded duty rule.

One obvious disadvantage of this strategy is that it increases the minimization risks faced by the discharged worker. Basically, the broader duty to minimize forces the discharged worker to determine

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160 In theory, the compensated duty approach affords complete protection. If the effort component of a wage is defined as the minimum amount necessary to induce the worker to forego leisure and to commit basic human capital to work, see note 144 supra, then the effort component of all portions would be the same. Thus, under the compensated duty approach, the worker who does not accept nonsubstitute employment would be left with an amount equal to the benefit of the bargain plus the portion of the original contract wage that was associated with the human capital for which there is now no market.

161 Whether the discharged worker's position is improved or not will depend on the wage obtainable in the next best position and the capital/effort allocation made. Suppose that under the original contract the employee were earning $300 per month. If he were indifferent to working for $300 per month or not working and receiving $150 per month, the benefit of the bargain would be $150 per month. Upon discharge assume the next best position includes a salary of $250 per month. If the effort/capital division were made on a 50-50 basis, the employee electing not to work would receive $100. He would lose a portion of the original benefit of the bargain.

The worker may end up better off. Again assume the worker is indifferent between working for $300 per month and not working and receiving a payment of $150 per month. If the next best position involved a salary of $350 per month and the capital/labor allocation were made on a 50-50 basis, the worker could remain idle and receive damages of $175 per month.

162 Since the worker would not receive the contract wage but an amount equal to the contract wage adjusted for the effort component of alternate employment, the leisure windfall, if any, would be less than under the common law.

163 As noted earlier, see notes 156-59 & accompanying text supra, the deviation from the expanded duty rule would depend on the marginal utility of income.

164 These risks were discussed in connection with the Texas rule. See notes 88-90 & accompanying text supra.
how long he must look for comparable employment before expanding the scope of his search. If he accepts one substitute, he must determine when a better one becomes available and whether he must move into the better position. Earlier it was suggested that any problems in these areas should be resolved in favor of the nonbreaching party. The compensated duty strategy would further reduce the risks borne by this party in that if a superior nonsubstitute position were not taken, the loss to the party who had failed to minimize would only be a portion of the extra income that could have been earned.\footnote{No such protection exists if there are reasonable substitutes available which the plaintiff fails to accept. Since the employee would not lose all income earned in nontestimate positions, acceptance of nontestimates would become a more attractive method for hedging against the possibility that reasonable substitutes exist.}

\section*{The Frequency of Contract Termination}

\subsection*{The Individual Decision}

All of the strategies discussed above tend to decrease damages associated with an employer's breach when there are no common law substitutes. The broader duty to minimize and the compensated duty approach reduce the importance of the substitute/nonsubsitute issue in a way that favors the employer.\footnote{Under the broader duty to minimize rule the substitute/nonsubsitute issue is of little consequence. The breaching party will be credited with income obtainable in the closest substitute. Even here there will be some limit to the duty in the sense that a position beyond the capacity of the worker would not be within the scope of the duty. Under the compensated duty approach, even if there are no reasonable substitutes, the breaching employer would be credited with a portion of the income obtainable in nontestimates.}

The human capital approach retains the common law notion of a reasonable substitute, but creates a situation in which the breaching party is more likely to escape paying the full contract wage even when reasonable substitutes are not available.

Precisely how important a decrease in potential damages would be to the decision to breach is difficult to determine. The rational employer would choose to terminate the contract when the costs of termination are less than the costs of maintaining the relationship. The costs of termination include the present value of the lost revenue contribution\footnote{The revenue contribution is the revenue generated by the efforts of an employee. It will be a function of the employee's output and the demand for that output. See generally C. Ferguson & S. Maurice, Economic Analysis 427-35 (3rd ed. 1978).} of the worker plus either the cost of litigation and the size of the expected judgment\footnote{The expected judgment would equal:}

\[ L \left[ S \left( K_{pv} - W_{pv} \right) + S_n \left( K_{pv} - R_{pv} \right) \right] + S_n \left[ 1 - L \right] \left( K_{pv} - R_{pv} \right) \]

where: \[ L = \text{the probability of the discharge being deemed wrongful} \]

\[ S = \text{the probability that the court will find that reasonable substitutes exist} \]
the employee's contract rights. The cost of continuing includes the present value of contracted-for salary payments. Algebraically, the expression can be stated to indicate that the contract will be terminated when:

\[ K_{pv} \geq RC_{pv} + T_c \]

where:

- \( K_{pv} \) = the present value of contracted-for wage payments
- \( RC_{pv} \) = the productivity of the worker measured in terms of the dollar value of extra revenue he generates for the firm
- \( T_c \) = either the costs of litigation and the size of the expected judgment in a wrongful discharge action, or the cost of purchasing the employee's contract rights whichever is lower.

Several aspects of the model require further explanation. First, \( T \) takes the lower of the two values since the employer will have a choice between the cost of litigation plus expected judgment or the settlement payment. Second, the analysis assumes that the employer is a profit maximizer in the traditional sense. In many instances the buyer of labor may not maximize profit but will apply a more general measure of his or her utility. In these instances, the employer may dismiss or refuse to hire an individual or a group of individuals for reasons unrelated to productivity. When the action is sexually or racially motivated, economists say that the employer has a "taste for discrimination." Of course, wrongful discharge may also occur for noneconomic reasons unrelated to race or sex. In all of these cases, the employer attributes disutility to the continued employment of the individual. These nonmonetary costs are so high that the revenue contribution is insufficient to assure continued employment. In order to fit this possibility into the model, the value of \( K_{pv} \) would have to reflect both monetary and psychic costs of continued employment. In addition, if reinstatement is one of the possible outcomes of litigation, the psychic costs of this would be included as part of the expected judgment.

\[ K_{pv} = \text{the present value of contracted-for wage payments} \]
\[ W_{pv} = \text{the present value of wages in substitute position} \]
\[ (K_{pv} - W_{pv}) \text{ takes a value of zero when } W_{pv} > K_{pv} \]
\[ S_n = \text{the probability that the court will find that substitutes do not exist} \]
\[ I = \text{the probability that the employee will remain idle} \]
\[ R_{pv} = \text{the present value of wages obtainable in nonsubsitute positions} \]

169 See A. Rees, supra note 10, at 181-84.
171 Actually, all discharge rationales are "economic" in a broad sense. "Noneconomic" refers to matters which are unrelated to actual productivity and salary.
Another complication arises from the fact that any change in the remedy will be affected by the possibility that the breach may not be deemed wrongful and the further possibility that high paying common law substitutes may exist. Ultimately, however, the possibility of having to pay the full contract wage will enter into the employer's estimate of $T$. Likewise, the possibility of collecting the full contract wage should be part of the employee's determination of the price at which he will sell his contract rights.

Because all of the strategies involve a lower expected cost if the employer elects to breach, the probability of termination by either wrongful discharge or settlement will increase. The reason for this can be understood by referring to the formulation presented above. Another way of expressing the original proposition is that the decision will be to terminate when:

$$K_{pv} - RC_{pv} > T$$

The employer will breach or agree to terminate if the difference between cost of continued employment ($K_{pv}$) and benefits from future employment ($RC_{pv}$) exceeds termination costs. This difference constitutes a ceiling on what the employer is willing to pay either in the form of expected litigation losses or settlement payments.

The possibility of lower damages increases the probability that the costs of litigation and the expected judgment will fall under the termination-cost ceiling. The change in damages, however, is also likely to alter the relative bargaining strengths of the employer/buyer and the employee/seller in the bilateral monopoly. The alteration, in favor of the employer, increases the probability that the price the employee is willing to accept will fall below the ceiling. Thus, the prospect of a lower judgment will lower both possible values of $T$ and increase the likelihood that the contract will be terminated either by wrongful discharge or by mutual consent.

The Question of Efficiency

A separate issue from that of the individual employer's response to such a change is whether increasing the probability of termination is efficient overall. The ideal remedial scheme, in terms of economic efficiency, encourages the employer to breach or otherwise terminate only when his position is improved and the expectancy of the employee pro-

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172 See note 165 supra.

173 Both the buyer of the contract rights (the employer) and the seller (the employee) would realize that the option of not settling, but breaching, would now be more attractive to the buyer. In terms of the bilateral monopoly, the bargaining strength of the buyer would be improved.
tected. It is with respect to this standard that the common law and suggested alternatives are evaluated.

The Common Law

There is a clear possibility under the common law that the contract will not be terminated when it is efficient to do so. This is because the common law puts the employee in a superior bargaining position in his bilateral monopoly relationship with the employer. The following hypothetical illustrates the problem. Suppose A is hired at a monthly salary of $1,200 and the benefit of the bargain to A is such that he would be indifferent to continued employment and a cash payment of $500 per month. In addition, suppose that A's revenue contribution falls from $1,200 per month to $600 per month. In this case the employer, B, wishes to terminate the contract and would be willing to pay A up to $600 for A's contract rights or for litigation expenses and damages. This would protect A's benefit of the bargain and lower the total costs or production. A, on the other hand, would regard $500 as the lowest acceptable price because, if found to be wrongfully discharged, he is assured of maintaining this utility surplus position.

It seems that the bilateral monopoly solution would be between $500 and $600 for the worker's contract rights. Any price in this range leaves both A and B better off than under the contract.

Under the common law, the model is complicated in that if the employer anticipates that the discharge will be deemed wrongful and there are no reasonable substitutes, termination by breach will be particularly unattractive. This strengthens the employee's bargaining power.

See Barton, The Economic Bases of Damages for Breach of Contract, 1 J. LEGAL STUD. 277, 277-79 (1972). Of course, the issue of efficiency is different from that of fairness. Although economists have documented the costs to individuals and to society of discrimination, see generally R. LEFTWICH & A. SHARP, ECONOMICS OF SOCIAL ISSUES 231-47 (rev. ed. 1976); Betsy, Differences in Unemployment Experience Between Blacks and Whites, 68 AM. ECON. REV., May, 1978, at 192; Barret & Morgenstern, Why Do Blacks and Women Have High Unemployment Rates?, 9 J. HUMAN RESOURCES 452 (1974); Gwartney, Discrimination and Income Differentials, 60 AM. ECON. REV., June, 1976, at 396, there is a question as to whether discrimination is really inefficient, see R. POSNER, supra note 7, at 533-38. In any case, laws concerning the prohibition of discrimination appear to be made on the basis of normative judgments going beyond the issues of economic efficiency.

By terminating the contract with A, B's costs would decrease by $1,200. B could then replace the lost output by hiring a replacement at a maximum wage of $600 and pay A the $500 benefit of the bargain. In total, B's cost would decline by $100 and production would remain the same.

The actual damages expected by the breaching employer would be determined by the factors included in the equation presented in note 168 supra. If the discharge were for economic reasons, as hypothesized, it seems safe to assume that both the employer and the employee would assign a value to L (the probability that the discharge will be found to be wrongful) approaching one. Of course, this would vary between parties based on their risk aversion and knowledge of the judicial process.
position as the monopoly seller of his contract rights and increases the probability that he will demand more than $500 for these rights. Thus, there may be no termination even though the situation is one in which \( A \) could be fully compensated and \( B \)'s production costs would decline.

The Expanded Duty to Minimize Rule

The broader duty to minimize rule errs in the opposite direction from the common law rule. Assuming that both parties expected the discharge to be deemed wrongful, the highest offer by the employer would be just equal to the difference between the contract wage and any expected wage from alternate employment. The bargaining power of the employee would be severely reduced since the law would not protect his benefit of the bargain or create the possibility of a leisure windfall. The employer may then be able to use his monopsony power in such a way as to buy the contract rights at a price that would be less than \( A \)'s expectancy.

In the original hypothetical, suppose \( A \) were still indifferent to continued employment or a $500 cash payment. If his revenue contribution had dropped from $1,200 to $800, as opposed to $600, the most the employer would be willing to pay for the contract rights would be $400. Given that his duty to minimize extends beyond reasonable substitutes and, perhaps, to high-paying but relatively unpleasant forms of employment, \( A \) may accept less than $500 for his rights.\(^8\) In short, \( B \) would be in a position to breach or otherwise terminate even though his savings would not be sufficient to compensate \( A \) for his expectancy. This is not to say that the employee would never receive a surplus equal to that under the original contract. The problem is that the remedy is not designed to assure him of the contracted-for surplus.

The Human Capital Approach

Under the human capital approach, any inefficiency in contract termination is likely to be in the direction of terminating too infrequently. The employee's original benefit of the bargain would be fully protected and, if there were no reasonable substitutes, he could opt to receive the

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\(^8\) Similarly, the parties may differ in their estimates of the other factors affecting the expected damage award. If their estimates were different, the expected damages suffered by the breaching employer and the expected recovery of the discharged worker would have an impact upon their negotiating posture in the bilateral monopoly and would alter the results. Regardless of the estimates of the factors in the equation, the common law full contract wage remedy will have the influence noted in the text.

\(^{138}\) In such a case the employee may be willing to settle for an amount which does not equal the utility surplus under the contract as his options, should there be a breach, will leave him in an inferior utility position.
full contract wage. Furthermore, the employee would retain all the monopoly power he had under the common law. He would, therefore, be unwilling to accept a settlement offer which amounted to less than his expectancy and he would be in a position to demand more.

The frequency of termination may vary from that under the common law rule for two reasons. First, although the employee would possess the same monopoly power as under the common law rule, he may demand a somewhat lower price for his contract rights, depending upon the attractiveness of alternative human capital investment opportunities. Second, the expected judgment in the case of a discharge would be less than under the common law rule. While the worker would not settle for less than expectancy, he would appear to be less likely to demand a price in excess of the employer's ceiling than he would under the common law.

The Compensated Duty Rule

The compensated duty alternative represents an attempt to protect the benefit of the employee's bargain while limiting the ability of the employee to demand a price for his contract rights in excess of expectancy. The employee's monopoly power would be reduced in that the employee could not remain idle and collect the full contract wage. The probability would be higher than under the common law that the employee would seek alternative employment, even when reasonable substitutes did not exist. This would decrease the price of the employee's contract rights and increase the likelihood, vis à vis the common law rule, that the price would be below the employer's settlement ceiling. If the employee insisted on a price outside the settlement range, the probabilities would be greater than under the common law that the litigation cost plus expected judgment would fall within the acceptable range.

Contract termination would occur more frequently under the compensated duty rule than under the common law rule and any leisure windfall would be less. The question remains, however, whether employers would terminate even though their savings were not at least equal to

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179 This would be a function of the attractiveness of alternative employment and the anticipated effort/capital division.
180 The employer may escape paying the full contract wage even if substitutes do not exist. In the expected damage equation, see note 168 supra, the value assigned to I (the probability of remaining idle) would decrease. Still, if employers adopt the "maximin" strategy, the decision would be not to breach. Under this strategy, a risk-averse employer trying to decide whether he would be better off by breaching or not breaching the contract would look to see what the worst possible outcome of each choice would be and then choose the best worst possible outcome.
181 In the equation, see note 168 supra, the value of I would decrease and K_{pu} in the expression will be replaced by K_{pu} - E where E is the effort component of the next best available employment.
the employee's expectancy. The compensated duty rule would create some uncertainty for the worker in terms of the consequences of refusing to sell his contract rights and might, therefore, affect his ability to negotiate a settlement equal to his expectancy. Furthermore, although in theory he would be fully protected, practical problems would create greater risks than under the common law that he would not receive a fully compensatory judgment if he refused to sell his contract rights. Although his bargaining position would not be as strong as under the common law, the risks associated with demanding an expectancy price for his contract rights would be less than under the expanded duty rule, in that if he were discharged in a market without reasonable substitutes, he would receive a larger portion of his prior salary. Moreover, if the employer did breach, the employee would have an option. He would be entitled to the full contract wage minus a portion of the income obtainable in the most reasonable substitute. He could, in addition, elect to collect this amount and work in any other nonsubstitute position and retain the full amount of income obtained. Although none of these possibilities includes the built-in protection of the common law rule, unlike the expanded duty rule, nothing in the scheme seems to create a situation in which there is any particular barrier to achieving the original utility expectancy.

CONCLUSION

The common law remedies in wrongful discharge cases are designed to protect the expectancy of the discharged party. Consequently, the duty to minimize damages extends only to positions that are reasonable substitutes. The discharging party, however, is credited with any gains made possible by the discharge even in nonsubstitute positions. As a result, there is little motivation for the wrongfully discharged worker to accept nonsubstitute employment. This is true even though the value of the leisure that the worker would forego by accepting nonsubstitute

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182 See note 160 supra.
183 Under the common law, if he elects not to work, he would receive the full contract wage and would be certain to receive his expectancy. Under the compensated duty rule, he would not receive the contracted-for wage and, depending on the effort/human capital division and his own preferences, might not receive the expectancy.
184 If the effort component were calculated correctly, he would be in the same utility position as under the contract. See notes 144 & 160 supra.
185 Two basic changes are involved. First, the common law assurance of not falling below the contract utility surplus would be eliminated because the employee would rely on the court to make the correct effort/capital division. Given the difficulty in making judgments about utility, it is unlikely that the decision would be correct for any one individual. The common law assurances would be replaced by a group of alternatives, any of which could achieve the same result. Second, the employee bias inherent in the common law would be eliminated.
employment is less than the value of his effort in these positions. Furthermore, the common law rule may have the effect of discouraging contract termination even when termination would protect the employee's benefit of the bargain and lower the employer's production costs. Three alternatives to the traditional remedial scheme have been suggested and evaluated in terms of their impact on suboptimal leisure and the efficiency of contract termination.

Under the expanded duty to minimize rule, the employee would be permitted to restrict his search to the scope of common law reasonable substitutes for a limited period of time. After this time, the defendant would be credited with income obtainable in other positions for which the plaintiff was suited. The expanded duty rule would decrease the expected judgment associated with a wrongful discharge and reduce the bargaining power of the employee as a monopoly seller of his contract rights. In terms of the employer's decision to terminate, the employee's expectancy would be in jeopardy since the question of whether the savings to the employer would be sufficient to fully compensate the employee would not be of consequence.

The human capital approach recognizes that nonsubstitute employment may involve a new investment in the worker's productive capabilities. Traditionally, the worker who accepted a new position would be permitted to recover the cost of this investment, if reasonable, from the breaching party. Although the employee is reimbursed for the investment, he is not permitted to retain any of the returns. Thus, there is little motivation to make human capital investments in nonsubstitute occupations. Under the human capital approach, the worker would be permitted to retain a portion of the income earned in nonsubstitute positions and the defendant would not be liable for expenses incurred in making these investments.

The human capital approach would increase the likelihood that discharged workers would accept nonsubstitute employment so that the expected judgment for the wrongful discharge would be less than under the common law. The benefit of the bargain would still be overly protected, as under common law. Thus, the worker would be able to prevent a settlement even though the savings to the discharging employer would be sufficient to fully compensate the employee for his expectancy.

The final proposal—the compensated duty rule—combines aspects of the other two approaches. The wrongfully discharged worker who did not accept nonsubstitute employment would receive the contracted-for wage minus a portion of the amount obtainable in nonsubstitute positions. If he accepted a nonsubstitute position, he would receive this amount and would be permitted to retain all income from the nonsubstitute work. The objective is to place the discharged worker in a position in which he compares the value of leisure with society's valua-
tion of his productive skills. The employee is also less likely to be able to demand a price for his contract rights in excess of his expectancy.

Of the three approaches, the compensated duty rule is particularly attractive. Its effectiveness at decreasing suboptimal leisure rivals that of the expanded duty rule. On the other hand, the employee's benefit of the bargain would be more secure. Finally, the compensated duty rule holds great promise for encouraging efficient employment contract termination.

Implementation of the plans in a manner consistent with the theories illustrated would be extremely difficult. However, the rule that workers in nonsubstitute positions should be permitted to retain some or all of the income obtained would be simple to implement. The approaches discussed here provide a basis for doing so and, in light of the deficiencies of the current rule, deserve careful consideration. They are offered as points of departure for further consideration of a more equitable and efficient wrongful discharge remedy.