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OSHA, the Opportunism Police

Jason R. Bent*

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I. INTRODUCTION

What is the normative justification for workplace safety regulation? The prevailing account, rooted in economic theory, is that regulatory interventions in this field are justified only by spillover and informational market failures.¹ This article challenges the prevailing account by contending that worker safety regulations are also justified when they are necessary to enforce the relational expectations of employees. If my contention is correct, then it follows that the Occupational Safety and Health Act (the Act) is justified by anti-opportunism—preventing employers from engaging in opportunistic, self-interested behavior that runs contrary to the principles of the relational contract between employees and their employers.²

Recognition of the Act's anti-opportunism purpose sheds new light on questions about the regulation of inherently dangerous jobs. A recent case involving the tragic death of a SeaWorld orca whale trainer, Dawn Brancheau, illustrates the issue. In 2010, Brancheau was killed by an orca whale named Tilikum.³ Following the incident, SeaWorld significantly changed its orca whale shows⁴ and was cited by the Occupational Safety and Health Administration (OSHA) for a violation of the Act's "general duty" clause.⁵ The general duty clause requires employers to provide

1. See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 23, 26–28 (1982) (describing the classic justifications for regulating in response to externalities (or spillovers) and in response to inadequate information); W. Kip Viscusi & Ted Gayer, *Safety at Any Price?*, 25 REG. 54, 54 (2002) ("Government action in the health and safety arena can be justified when there are shortcomings in risk information or textbook cases of externalities.").

2. See Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 NW. U. L. REV. 1018, 1024 n.20 (1981) (defining opportunism as "[s]elf-interest seeking contrary to the principles of the relation in which it occurs").

3. *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1205 (D.C. Cir. 2014).

4. Lori Weisberg, *SeaWorld Settles Orca Trainer Safety Citations*, L.A. TIMES (Jan. 6, 2016, 3:00 A.M.), <http://www.latimes.com/business/la-fi-seaworld-osha-20160106-story.html> (noting that SeaWorld "put an end to trainers cavorting in the water with the whales" after Brancheau's death in 2010). SeaWorld has since announced that it is phasing out entirely its practice of keeping and breeding orca whales in captivity. Greg Allen, *SeaWorld Agrees to End Captive Breeding of Killer Whales*, NAT'L PUB. RADIO (Mar. 17, 2016, 5:59 AM), <http://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales>.

5. 29 U.S.C. § 654(a)(1) (2014); *SeaWorld of Florida, LLC*, 24 BNA OSHC 1303 (No. 10-1705, 2012) (ALJ). The general duty citation was for "exposing animal trainers to struck-

“employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]”⁶ OSHA proposed that SeaWorld abate the violation by either providing a physical barrier between trainers and whales or maintaining a minimum distance between them.⁷ In *SeaWorld of Florida, LLC v. Perez*, a divided panel of the U.S. Court of Appeals for the D.C. Circuit ultimately upheld the citation, including the proposed abatement: there would be no more SeaWorld trainers in the water with orca whales during shows.⁸ Then-Judge Brett Kavanaugh dissented.⁹

Judge Kavanaugh believed OSHA had overstepped its bounds by regulating employment that is, by nature, inherently dangerous, just like many other sports or entertainment jobs. Judge Kavanaugh wondered how the abatement required in *SeaWorld* was any different than OSHA prohibiting tackling in the National Football League (NFL) or imposing speed limits in NASCAR races.¹⁰ Grappling with this issue, Judge Kavanaugh questioned:

by and drowning hazards” when working with the orcas. *See id.* In addition to legal proceedings, SeaWorld faced significant public pressure regarding its handling of orca whales in the wake of the popular documentary film *Blackfish* (CNN Films 2013). *See* Michal Addady, *SeaWorld Will Stop Making Killer Whales Dance for You*, FORTUNE (May 2, 2016), <http://fortune.com/2016/05/02/seaworld-orcas/>.

6. 29 U.S.C. § 654(a)(1) (2012). The elements of a general duty clause violation are: (1) an activity or condition in the employer’s workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.

SeaWorld of Florida, LLC, 748 F.3d at 1207.

7. *SeaWorld of Florida, LLC*, 748 F.3d at 1204–05, 1211, 1215 (denying petition for review). The proposed abatement would specifically prohibit trainers from working with orcas “unless the trainers are protected through the use of physical barriers or through the use of decking systems [which can raise pool floors], oxygen supply systems or other engineering or administrative controls that provide the same or greater level of protection for the trainers.” *SeaWorld of Florida, LLC*, 2012 WL 3019734 at *11. The citation was first upheld by an Administrative Law Judge of the Occupational Safety and Health Review Commission. *SeaWorld of Florida, LLC*, 2012 WL 3019734 at *30.

8. *SeaWorld of Florida, LLC*, 748 F.3d at 1204–05, 1211, 1215 (finding the ordered abatement feasible and noting that SeaWorld had already implemented many of the abatement procedures voluntarily after Brancheau’s death, including the cessation of all “waterwork” by trainers during performances).

9. *Id.* at 1216–22 (Kavanaugh, J., dissenting).

10. Both Judge Kavanaugh and counsel for SeaWorld, Eugene Scalia, relied on the NFL and NASCAR examples. *Id.* at 1220; Final Opening Brief for Petitioner SeaWorld of

When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, *who decides* that the risk to participants is too high?¹¹

These are important normative questions about the appropriate boundaries of workplace safety regulation and OSHA's administrative enforcement authority.¹² Judge Kavanaugh's questions can be answered only by carefully examining the theoretical justifications for OSHA regulation. Traditional economic justifications would only permit OSHA regulation where the participants (here, the trainers) suffer from a specified information deficiency severe enough to undermine the contention that they are truly "eager and willing" participants. Even then, adherents of efficiency analysis would prescribe only narrow information-forcing regulation.¹³ But if an additional purpose of the Act is to combat employer opportunism, then regulation would

Florida, LLC at 2–3, *SeaWorld*, 748 F.3d 1202 (No. 12-1375); see also Natalie Rodriguez, *SeaWorld Ruling May Embolden OSHA to Tackle New Sectors*, LAW360 (Apr. 28, 2014, 7:01 PM), <http://www.law360.com/articles/528544/seaworld-ruling-may-embolden-osh-a-to-tackle-new-sectors>; Gloria Gonzalez, *OSHA Flexes Its Regulatory Muscle*, BUS. INS. (Jan. 3, 2016), <http://www.businessinsurance.com/article/20160103/NEWS08/151239972/osh-a-flexes-its-regulatory-muscle-under-guidance-of-assistant?tags=%7C329%7C304>.

11. *SeaWorld of Florida, LLC*, 748 F.3d at 1217 (emphasis in original). Judge Kavanaugh concluded that the Department of Labor, applying occupational safety laws, was not the proper body to determine whether the risks posed by sports or entertainment jobs were unreasonable. Instead, he argued other institutions including Congress, state legislatures, state regulators, and state or federal courts applying tort law were in a better position to make those determinations. *Id.* at 1222. Judge Kavanaugh's argument echoes a position first taken by former Chief Justice Rehnquist in *Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 671–88 (1980) (Rehnquist, C.J., concurring), and later revived by Professor Cass Sunstein, that the Act's operative provisions on health standards amount to an unconstitutional delegation of Congress's legislative authority. Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1410–11 (2008).

12. Questions about OSHA's authority to regulate inherently dangerous jobs under the general duty clause were raised shortly after the Act became effective yet have never been satisfactorily answered. See, e.g., Richard S. Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROBS. 612, 623 (1974) (identifying "professional athletics, police work, fire prevention, explosives manufacturing, and some kinds of scientific experimentation" as occupations of great social importance that "cannot be carried on without the presence of some such hazards").

13. See Thomas A. Lambert, *Avoiding Regulatory Mismatch in the Workplace: An Informational Approach to Workplace Safety Regulation*, 82 NEB. L. REV. 1006, 1009 (2004) (rejecting risk-prohibition regulation in workplace safety, in favor of information-forcing regulation that is narrowly crafted to respond to information failures).

also be prescribed where necessary to enforce the relational expectations of employees like the trainers at SeaWorld. A relational view would take a closer look at the details of the employment exchange and craft a regulatory response designed to eliminate employer opportunism. A close inspection of the factual record in *SeaWorld*, with a focus on the parties' relational expectations, confirms that OSHA's citation and abatement order were proper.

As a society, we recognize that all work poses some degree of risk and that employees, like Brancheau, are generally free to take on risky work in exchange for consideration.¹⁴ But regulatory limits on this general freedom, including the imposition of OSHA standards, are justified when necessary to respond to identified market failures or prevent opportunistic behavior. Moreover, anti-opportunism functions as a limiting principle. The anti-opportunism purpose of OSHA can be used to identify meaningful distinctions between the *SeaWorld* employment exchange and the NFL and NASCAR hypotheticals that troubled Judge Kavanaugh. It could serve as the basis for the creation of an affirmative defense to avoid overbroad application of the general duty clause. The anti-opportunism principle explains how we can at once conclude that the *SeaWorld* case was correctly decided, and also that the NFL should be permitted to continue employing professional tackle football players.

This Article argues that the Act has an anti-opportunism purpose, justifying regulatory action designed to enforce the relational expectations of employees and employers.¹⁵ Part II sets

14. See *id.* at 1014 (“[S]ome degree of safety risk necessarily accompanies productive activity, and the only way to eliminate all risk would be to eliminate all productive activity.”); see, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1168 (1986) (citing studies providing “evidence that workers demand and obtain considerable wage premiums for exposing themselves to workplace hazards”); Lambert, *supra* note 13, at 1022 n.69 (collecting empirical studies supporting the proposition that “employers must pay risk premiums for exposing their employees to perceived risks”). Aside from the empirical evidence on compensating wage differentials, the idea dates back to at least Adam Smith. See generally ADAM SMITH, *WEALTH OF NATIONS* (1776).

15. Many other scholars have previously noted the importance of the relational character of employment contracts, including the father of relational contract theory, Ian Macneil. See, e.g., Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 897 (2000) (“Relational contract law is so all-pervasive that one feels almost foolish in giving examples. A few examples from but one type of contractual relation,

the stage by outlining the ongoing search for the unifying normative purpose(s) of employment law in the United States. Part III draws on the core tenets of relational contract theory, as well as new scholarly insights on the quasi-fiduciary nature of the employment relationship, to posit another central purpose for employment law—anti-opportunism. Part IV then narrows the focus by applying an anti-opportunism principle to the subfield of workplace safety law. In doing so, Part IV develops a set of corollaries, all drawn from the central anti-opportunism purpose, that ought to guide the case-by-case application of OSHA regulations. Finally, Part V addresses Judge Kavanaugh’s questions by examining OSHA’s enforcement structure and applying the anti-opportunism principle to a close review of the factual record in *SeaWorld*.

II. SEARCHING FOR THE PURPOSE(S) OF EMPLOYMENT LAW

Before considering the Act’s purposes, we must begin by considering the purpose of employment law generally.

Individual employment law¹⁶ is a sprawling field, sometimes characterized as a mishmash, a jumble, a hotchpotch, or a grab bag of largely disconnected federal and state constitutional protections; federal, state, and local statutory protections; administrative regulations, and common law governing the employment

employment, will do: workmen’s compensation, numerous anti-discrimination laws, social security taxation and benefits, ERISA, OSHA, other workplace regulations, wage and hours legislation. All of these are relational contract law.”); Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 215 (2005) (“Employment is a relational contract. . . . Yet, current law insufficiently acknowledges relational norms.”); see also Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 681 (2005) (comments of Professor Rachel Arnow-Richman).

16. Employment law, or what I will sometimes refer to as *individual* employment law, should be distinguished from traditional labor law governing collective bargaining between employers and the bargaining representatives of groups of employees. Relational contract theorists such as Ian Macneil view traditional labor law as another example of relational contract law. See Macneil, *supra* note 15, at 897 (“All of these are relational contract law. . . . To which needs to be added where collective bargaining is in place, the NLRA, LMRA, and a wide range of law governing unions and other aspects of collective bargaining.”). My focus here is on workplace safety law applicable to individual employees, apart from any separate considerations that may arise in the context of collective bargaining.

relationship.¹⁷ This mishmash includes subjects such as the principle of employment at-will, express and implied contracts for employment, tort limitations on the at-will principle, speech, association, and privacy rights; trade secret and intellectual property rights; duties of loyalty, wage and hour protections; family and sick leave protections; antidiscrimination protections, employee benefit protections, health and safety protections; and more.¹⁸

Despite its breadth, the American Law Institute (ALI) recognized employment law as a sufficiently cohesive field to warrant the ALI's publication, in July 2015, of the Restatement of Employment Law.¹⁹ The Restatement project was controversial from the start,²⁰ and much of the controversy centered on a lack of

17. See STEVEN WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 10 (5th ed. 2012) (noting that texts on employment law can run into a “grab-bag problem”); see also Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, BERKELEY J. EMP. & LAB. L. 159, 164 (2013) (one of the restatement reporters, writing “employment law focuses on the employment contract and a grab bag of other regulatory provisions”); Jonathan D. Canter, *The Employment Arbitrator and the Pro Se Party*, 57 DISP. RESOL. J. 52, 53 (2002) (“a jumble of statutory and common law rights and remedies”); Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 279 (2005) (“The law of employment in the United States is a hotchpotch of constitutional provisions, legislative dictates, administrative rules, and common law – of tort and contract – that varies widely from state to state.”); Brishen Rogers, *What Does Social Equality Require of Employers? A Response to Professor Bagenstos*, 112 MICH. L. REV. FIRST IMPRESSIONS 83, 83 (2014) (“apparent doctrinal mishmash”); Charles A. Sullivan, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079, 1080 n.3 (2014) (noting that some would describe the Restatement of Employment Law as a “mishmash”); Michael J. Zimmer, *The Restatement of Employment Law Is the Wrong Project*, 13 EMP. RTS. & EMP. POL'Y J. 205, 206 (2009) (“[L]abor and employment law in this country is a mishmash.”).

18. See generally TIMOTHY P. GLYNN, ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS*, at xi-xix (3d ed. 2015). See also WILLBORN, *supra* note 17, at vii-xxi.

19. RESTATEMENT OF EMPLOYMENT LAW (AM. LAW INST. 2015). The ALI's charter defines its own purpose as “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” See American Law Institute, *Certificate of Incorporation*, https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf (last visited October 13, 2019); see also Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 434 (2004).

20. The entire project of restating the field of employment law was called into question by several notable scholars, including several members of the Labor Law Group, an organization originally founded in 1947 that includes law professors specializing in labor and employment law. See *Group History*, LABOR LAW GROUP, http://laborlawgroup.org/?page_id=8s (last visited October 13, 2019). The Labor Law Group submitted a petition in 2007, signed by sixty-two professors of labor and employment law, urging that the project

consensus about the overarching purpose (or purposes) of employment law.²¹ Why should there exist a separate body of law that uniquely governs the employment relationship, rather than simply having general principles of contract and tort law govern the parties?²² What should be the purpose of this separate body of employment law? The ALI's Restatement reporters did not answer these questions, nor did they ever set out to do so.²³ But the extended controversy surrounding whether a Restatement of Employment Law should exist at all hints at the deeply uncertain

be halted. See Kenneth G. Dau-Schmidt, *A Conference on the American Law Institute's Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL'Y J. 1 app. 2 at 32 (2009).

21. The late Michael Zimmer, a leading employment law scholar and member of the ALI, argued that the Restatement was premature, because the disorganized common law "black letter rules are fundamentally floating free of any basic theoretical grounding." See Zimmer, *supra* note 17, at 206. He criticized the ALI for beginning the Restatement project without first conducting a principles project that would have as its goal the identification of possible "overarching purposes" of employment law. *Id.* ("I think [the ALI] should start with a project on the principles of labor and employment law. The goal of a principles project would be to answer two questions: First, what are, and what should be, the overarching purposes of constitutional, statutory and common law approaches to labor and employment law? Second, how can the law be developed in ways to best serve those purposes?"). Zimmer recognized that arriving at a consensus on these questions through a principles project was unlikely but saw potential value in identifying those principles supported by consensus and narrowing the "range of difference" on the principles lacking consensus. See *id.*

22. See Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 EMP. RTS. & EMP. POL'Y J. 87, 87 (2009) (criticizing the ALI for not beginning its project with consideration of questions such as "What is employment law? Why does employment law exist as a distinct subject? What is the point of having distinct rules for relations of employment?"); Lea VanderVelde, *The Proposed Restatement of Employment Law at Midpoint*, 16 EMP. RTS. & EMP. POL'Y J. 359, 362 (2012) ("[T]he Institute decision to go forward [with the Restatement project] was made without any sustained discussion within the Institute about two meta-issues critical to its endeavor. First, what is the purpose of employment law? Is it the protection of workers or the containment of tort damages? And, when those purposes are in tension, how should that tension be resolved? Second, . . . what is the purpose of a restatement of the common law, and how is that purpose served here?"); see also Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL'Y J. 413, 417-18 (2012) (comparing drafts of chapters two and eight of the Restatement and arguing that the Restatement is internally inconsistent regarding its "visions about the employment relationship and about employee mobility").

23. Samuel Estreicher et al., *Foreword: The Restatement of Employment Law Project*, 100 CORNELL L. REV. 1245, 1247-48 (2015). The reporters took as their principle audience judges and practitioners, and they viewed the performance of their task as constrained in a way similar to the constraints on judges—discerning, understanding, and articulating what the law is on a given point, apart from their personal views about what the law ought to be. See *id.* at 1248. The reporters recognized that the law governing employment relationships is influenced by a range of public policies, that these policies will at times be in direct tension with each other, and that the policies are shaped by social values that change over time. See *id.*

footing of employment law and highlights the need for continued attention to these questions.

Scholars have been struggling to identify the normative purposes of employment law since long before the Restatement project began,²⁴ and that work continues.²⁵ The theory that implicitly or explicitly undergirds the majority of academic literature and pedagogy in the field is economic efficiency.²⁶ If economic efficiency is the purpose of employment law, then the role of law generally is to intervene only where there exists an identified failure of the unregulated labor market to produce socially efficient outcomes.²⁷ As Samuel Bagenstos puts it: “In line

24. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 976 (1984) (defending a strong employment at will rule on efficiency grounds); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1019 (1984) (“We should consider afresh what goals [our employment law system] should seek to attain and what rights it must respect.”); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 12 (1993) (considering employment, and particularly career employment, as a type of relational contract); see also Simon Deakin, *The Law and Economics of Employment Protection Legislation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 330, 333–38 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (describing the early “first generation” of economics-based critiques of employment legislation, including Epstein, *supra*, as well as subsequent developments in the economic analysis of employment laws).

25. See, e.g., Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 229 (2013); Hyde, *supra* note 22, at 87; Rogers, *supra* note 17, at 83 (asking whether employment law, “[g]iven its decentralized origins,” can “even have a normative core?” and agreeing with Bagenstos that it can); Zimmer, *supra* note 17, at 206.

26. STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTS: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS* 47 (2009) (“[T]he efficiency objective is currently ascendant in the American workplace.”); Bagenstos, *supra* note 25, at 229, 229 n.12 (“One approach, exemplified by the work of Stewart Schwab and Alan Hyde, argues that individual employment law is justified if, and to the extent that, it serves the goal of economic efficiency.”). As Professor Bagenstos notes, one of the leading employment law textbooks uses economic efficiency as its first organizing theme. See *id.* at 229, 229 n.13 (referring to WILLBORN ET AL., *supra* note 17); see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 436–55 (8th ed. 2011) (applying economic analysis to various subtopics within individual employment law).

27. See, e.g., Hyde, *supra* note 22, at 89 (noting that federal employment legislation “is typically adopted when market failures prevent atomized markets from reaching efficient results”); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 35 (2001) (“[E]mployment laws increasingly will have to be justified as responding to market failure . . . Such market failures include collective goods problems or asymmetric-information problems.”); see generally Christine Jolls, *Law and the Labor Market*, 2 ANN. REV. L. & SOC. SCI. 359, 360 (2006) (“Because of the way in which the market constrains the prospects for using employment law purely to effect transfers of resources, the economic analysis of employment law in this review gives primary emphasis

with [this economic efficiency] argument, employment law scholarship fairly drips with economic-efficiency analysis.”²⁸ Professor Simon Deakin details multiple generations of theoretical accounts of employment law based on increasingly sophisticated tools and understandings of economic analysis.²⁹ The powerful influence of the economic efficiency theory is likewise reflected in a number of judicial opinions interpreting and applying the existing individual employment laws with reference to efficiency goals.³⁰

A second possibility is that the purpose of employment law is to counteract bargaining power disparities by protecting the weaker party (employee) against the stronger party (employer).³¹

to market failures in the employer-employee relationship. In the presence of a market failure, legal intervention through employment law may both enhance efficiency and make employees better off.”).

28. Bagenstos, *supra* note 25, at 229.

29. See Deakin, *supra* note 24, at 333–38. Deakin highlights the insights that have been incorporated into later iterations of economic analysis of employment laws. These include, among other things, concepts of transaction costs, information asymmetries, and externalities that can undermine assumptions of a perfectly competitive labor market. See *id.* at 334–35. An even more recent wave of analysis, termed “a systemic-evolutionary” approach, views employment laws as “endogenous” to labor markets. That is, governmental interventions “often do no more than crystallize social norms or conventions that first emerge at the level of the market, in the form of behavioural patterns or routines, and that then go on to acquire greater formality in contractual agreements and legislative texts.” *Id.* at 336.

30. See, e.g., *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445–48 (Del. 1996) (disapproving punitive damages for an employer’s breach of employment contract, citing efficient breach theory and the market forces applicable to employers); see also *Gaglidari v. Denny’s Rests., Inc.*, 815 P.2d 1362, 1377 (Wash. 1991) (Utter, J., concurring in part, dissenting in part) (contending that emotional distress damages should be available against a breaching employer as a means of discouraging economically inefficient breaches); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 396 (Cal. 1988) (applying economic analysis to reject an employee’s tort claim for breach of good faith and fair dealing); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 913 (W. Va. 1982) (“Economic analysis compels the conclusion that restrictive covenants should be upheld where the employee has undergone certain types of training. Restrictive covenant protection is necessary, for example, to encourage efficient and extensive investment in ‘human capital.’”).

31. See Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 KAN. J.L. & PUB. POL’Y 71, 74–75 (1999) (noting that non-economists view unequal bargaining power as “the basic argument for legal intervention in employment markets[,]” and criticizing bargaining power disparity as a rationale for employment law intervention); Bagenstos, *supra* note 25, at 230 (“The other approach argues that the government should regulate the employment relationship to rectify imbalances of bargaining power between employers and employees.”); Dau-Schmidt, *supra* note 20, at 10 (describing the comments of Matthew Finkin at a conference of the Labor Law Group, who noted that “protecting employees from

In this account, existing individual employment law interventions are designed to protect employees from unfair outcomes resulting from the employer's superior financial position and the employee's financial dependence on a regular income stream.³² As a guiding normative justification for employment law, the bargaining power theory has received less support than the economic efficiency theory.³³ Economics scholars are generally critical of this theory of employment law because a neoclassical economic analysis would not consider bargaining power disparities to constitute a systemic "market failure" justifying legal intervention.³⁴

Legal scholars have recently hit upon a third category of possible normative justifications for employment law: addressing concerns about persistent social or status inequality.³⁵ In this view, the purpose of individual employment law is to promote social equality by intervening where necessary to eliminate or mitigate "not merely those practices that entrench caste-based deprivations

exploitation because of inequity in bargaining power was indeed a guiding principle of employment law in many European countries."); Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PENN. L. REV. 379, 384-85 (2006) ("Skepticism about the bargaining power of employees has contributed to courts' willingness to intervene in the employment contract to redress abuses that offend public policy[.]"); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (illustrating the weaknesses of bargaining power disparity as a justification for law's imposition of mandatory terms).

32. See BEFORT & BUDD, *supra* note 26, at 14, 30, 150 (describing the need to balance bargaining power disparities as one important component of the authors' pluralist account of the purpose of employment law, discussed further below).

33. See Ayres & Schwab, *supra* note 31, at 77 ("It's not unequal bargaining power. That's the argument that economists think is just not a coherent or logical explanation for why the preferences of workers won't be honored. It's not an example of market failure. Other examples of market failure may explain or justify intervention in the name of safety. . . . But unequal bargaining power is not the explanation for what went wrong."); Kennedy, *supra* note 31. As Aditi Bagchi notes, bargaining power disparities are not unique to employment contracts and the existence of a bargaining power disparity alone "tells us little about the fairness of the transaction, let alone the need for legal treatment favorable to the weaker party." Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 585 (2009). Bagchi contends that recognizing bargaining power disparity does not sufficiently capture the full extent of inequality between employees and employers, *see id.* at 589, and urges a status-based approach to employment law that would justify legal interventions to mitigate status inequalities. *See id.* at 582-83, 609-14, 628.

34. See Ayres & Schwab, *supra* note 31, at 74-77.

35. See Bagenstos, *supra* note 25, at 228; Bagchi, *supra* note 33, at 582-83.

but also those practices that would tend to undermine *any* worker's status as an equal to her employer, boss, or supervisor."³⁶

A fourth view, pluralism, appeals to those who question whether there is or should be any *single* unifying purpose driving all statutory and doctrinal facets of employment law. Stephen Befort and John Budd advance this type of pluralist theory in *Invisible Hands, Invisible Objects*.³⁷ Befort and Budd argue:

Our proposals for principled reform start with the pluralist model of the employment relationship. We see employees as more than simply commodities—employees are human beings with economic and psychological needs, as well as with citizenship rights in a democratic society. We see markets as important, but as falling short of the textbook economics model of perfect competition. . . . And we see the employment relationship as characterized by a plurality of legitimate interests; employers and employees have shared as well as conflicting goals. Putting these assumptions together means that workplace law should help balance the power of employers and employees to prevent substandard work outcomes, promote a vibrant, participatory democracy, and create broadly shared prosperity.³⁸

In Befort and Budd's view, then, employment law ought to be driven by a careful balancing of three principles—recognizing the importance of economic efficiency, ensuring adequate balancing of bargaining power between employees and employers, and maintaining minimum standards of social equality and democratic participation.³⁹ Befort and Budd contend that “the central purpose of a reformed system of workplace law and public policy should be to balance efficiency, equity, and voice.”⁴⁰ An obvious difficulty

36. Bagenstos, *supra* note 25, at 228 (emphasis in original).

37. See BEFORT & BUDD, *supra* note 26, at 117–31.

38. *Id.* at 120–21.

39. See *id.* at 122. Befort and Budd recognize the importance of efficiency but urge that it must be subject to “social and human boundaries.” *Id.* at 121. In Befort and Budd's account, these social and human boundaries are “equity,” which they define as “the fairness of the distribution and security of economic rewards[;]” and “voice,” defined as “opportunities for workers to shape their working lives[.]” *Id.* at 6, 121. Befort and Budd sometimes refer to this as employment “with a human face,” *id.* at 130, which can only be achieved “when efficiency is *balanced* with equity and voice.” *Id.* at 122.

40. *Id.* at 121. Befort and Budd acknowledge that it can be “difficult to know when a balance has been achieved.” *Id.* at 123. But they argue, “this does not obviate the need for guiding principles.” *Id.* They set out a “scorecard” for evaluating how well current

with this approach is discerning precisely where that balance lies for any given question within employment law.

Finally, while it shares some common ground with the pluralist account, relationalism might be categorized as a fifth distinct way of ordering and explaining the broad field of employment law. Relationalism as a normative guide for employment law builds upon the relational theory of contract, whose chief proponent is Ian Macneil.⁴¹ The relational contract theory is discussed in detail below, in Part III. For now, it is enough simply to note that the critical insight of relational contract theory is that many contracts are characterized more by ongoing relationships with some elements of both competition and cooperation, than by discrete one-shot exchanges, where competitive elements dominate and each side tries to extract maximum gains from the one-shot trade.⁴²

To say that employment contracts may be particularly well-suited to characterization as relational contracts is an understatement. While some scholars have considered the possibility of building employment law doctrine more explicitly around a recognition that employment contracts are relational, these efforts have been exclusively focused on the employment at-will doctrine.⁴³ There has been no sustained scholarly effort to extend a relational theory beyond the employment at-will doctrine and into other employment law subfields, such as workplace safety. This Article attempts to do just that, drawing from relational contract theory the guiding principle of anti-opportunism.

The Restatement of Employment Law does not discernably follow any of the foregoing normative approaches to employment

employment law (and potential reforms) perform on the axes of efficiency, equity, and voice. *See id.* at 6, 112. In their evaluation, Befort and Budd conclude that current U.S. employment law is strong in attaining economic efficiency, but weak on measures of worker voice and social equity. *Id.* at 112.

41. *See generally* IAN MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001) [hereinafter SELECTED WORKS OF IAN MACNEIL]. It should be noted that Macneil routinely disclaimed that his writings included any normative prescriptions for the law. *See* Ian Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 899 (2000) (“I challenge to a duel anyone who, after this notice, persists in converting my descriptions of relational contract law into prescriptions of what the law should be, particularly prescriptions of some universal application of relational contract law.”).

42. *See generally* SELECTED WORKS OF IAN MACNEIL, *supra* note 41.

43. *See* Bird, *supra* note 15, *passim*; Marion Crain, *Arm’s-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL’Y 163, 180–81 (2011).

law. The Restatement reporters did not set out to resolve fundamental questions about the overarching purposes of employment law.⁴⁴ Nor did the reporters consistently refer to any particular normative theory when explaining choices made between competing lines of common law authority on points of black letter law.⁴⁵ If the reporters went about their work with a pluralist balancing of possible normative goals in mind, that balancing is not explained. Nor did the reporters leave evidence of the sort of careful balancing that might fit Befort and Budd's explicitly pluralist formulation.⁴⁶ Likewise, the reporters left no evidence that relationalist insights drove any of their doctrinal choices. Instead, the ALI's effort was restricted to a descriptive exposition of key principles of the black letter law.⁴⁷

Locating a single normative justification for the entire field of employment law may be impossible. Some jumbled blend of the justifications described above, along with other distributional or political motivations, probably best explains the mishmash of individual employment law doctrines and statutory

44. See VanderVelde, *supra* note 22, at 362–63.

45. See Dau-Schmidt, *supra* note 20, at 23 (“[W]ithout such a fundamental discussion [about the purpose of a separate Restatement of employment law], it would be hard to make it consistent with the other ALI Restatements on contract and tort or to determine what the Restatement of employment law ‘should be’ in choosing among competing precedents.”). The Reporters’ Notes to the final version of the Restatement often only identify the existence of authority contrary to the black letter restatement formulation, without any attempt to tie the choice of black letter rule to a normative theory. See, e.g., RESTATEMENT OF EMPLOYMENT LAW § 3.05 cmt. b (AM. LAW INST. 2018) (Reporters’ Notes) (split of authority regarding recognition of an implied duty of good faith in at-will employment arrangements); § 5.03 cmt. c (Reporters’ Notes) (split of authority on whether federal law may serve as a source of state public policy for an employee’s tort claim). In some cases, the reporters offered cursory explanations for their choices, but these explanations were not clearly grounded in any identifiable normative principles. See, e.g., RESTATEMENT OF EMPLOYMENT LAW § 2.06 cmt. a (AM. LAW INST. 2018) (Reporters’ Notes) (“This Restatement rejects the position of those courts requiring employees formally to agree to any adverse change in terms from prior unilateral statements [of employer policy], regardless of whether the prior statement created vested or accrued rights. . . . Some of these holdings remain unclear.”).

46. See *supra* note 45; see generally RESTATEMENT OF EMPLOYMENT LAW (AM. LAW INST. 2015).

47. See Estreicher et al., *supra* note 23, at 1247–48 (“The Restatement of Employment Law is not a law review article. . . . Although we are academics and have written many law review articles and books over the years, that was not our mission or orientation as Reporters. Our task and constraints were closer to those of judges. . . . The Restatement task, as we see it, is to articulate a relatively precise and detailed set of principles that help explain most results in a particular field or, at the least, provide useful guidance for judges and practicing lawyers laboring in the field.”).

interventions.⁴⁸ But this recognition should not end the search for employment law's normative purposes.

This Article explores the possibility that relationalism can give purpose to employment law in the context of OSHA and workplace safety regulation. This subfield of employment law has received relatively little scholarly attention from employment law theorists. In the literature that does exist, strong adherents of economic efficiency theory have questioned whether *any* workplace safety regulatory interventions are necessary or wise.⁴⁹ As described in Part III, the relational dimension of employment contracts suggests an important qualification on the now-dominant use of economic analysis in workplace safety regulation. Part III introduces the reader to the relational theory of contract, its chief proponent, Ian Macneil,⁵⁰ and its implications for the development and ordering of employment law.

III. THE ANTI-OPPORTUNISM PURPOSE: INSIGHTS FROM RELATIONAL CONTRACT THEORY

Why does employment law exist apart from ordinary contract law? If employment is simply a contractual relationship, then why is a separate Restatement of Employment Law even necessary at all when the Restatement (Second) of Contracts is available to us? And why does the Restatement of Employment Law draw, in many places, on principles of tort and agency in combination with some principles of contract law to construct a seemingly

48. See BEFORT & BUDD, *supra* note 26, at 16 (“[T]he patchwork system of workplace law and public policy undoubtedly reflects the changing power dynamics of various interest groups in different eras[.]”).

49. The most extreme version of this argument is that OSHA should be abolished entirely. See John Hood, *OSHA's Trivial Pursuit: In Workplace Safety, Business Outperforms the Regulators*, 73 POL'Y REV. 59, at 59–60 (1995); Thomas J. Kniesner & John D. Leeth, *Abolishing OSHA*, 4 REG. 46, 46 (1995); William J. Maakestad & Charles Helm, *Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards*, 17 N. KY. L. REV. 9, 13–14 (1989).

50. See David Campbell, *Ian Macneil and the Relational Theory of Contract*, in SELECTED WORKS OF IAN MACNEIL, *supra* note 41, at 4 (David Campbell ed., 2001) (“[Macneil’s] principal achievement has been that in thirty or so of the more than fifty books and articles he has published since 1960 he has set out the principal formulation of what has come to be known as ‘the relational theory’ of the law of contract.”).

inconsistent blend of rules that is unique to the governance of employment relationships?⁵¹

The answer, of course, is that employment is not simply a contractual relationship.⁵² Special features—relational features—of the employment contract have long been viewed as justification for the application of a special set of rules to govern employment. What we now call employment law has its roots in the preindustrial English common law of “Master and Servant,” the applicability of which turned on the *status* of the individuals’ relationship.⁵³ As Robert Bird notes, despite the rise of neoclassical and free-labor contract theories, employment, in practice, still reflects a great deal of interdependence between employees and employers and “retains much of its master-servant roots.”⁵⁴ That is to say, the Restatement of Employment Law, as a new legal authority separate

51. See, e.g., RESTATEMENT OF EMPLOYMENT LAW § 4.05 (AM. LAW INST. 2018) (Reporters’ Notes) (citing various provisions of the Restatement (Second) of Torts, the Restatement (Third) of Torts, and the Restatement (Second) of Agency); Dau-Schmidt, *supra* note 20, at 10 (describing Alan Hyde’s concern, expressed at a conference of the Labor Law Group, that the reporters would need to “discuss what is unique about the employment relationship and why it needs a Restatement apart from the general Restatements of tort and contract.”); Sullivan, *supra* note 17, at 1080 n.3 (the Restatement includes pure contract and pure tort, as well as doctrines that are neither clearly contract nor clearly tort).

52. See Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 836 (2017) (“But this contractual account [of employment] is incomplete. Our society has, in fact, imposed a series of significant duties upon employers with respect to the employment relationship. . . . It is not simply contractual, and it is not simply a principal-agent relationship. Instead, as these primarily statutory duties suggest, we view the employment relationship as a unique one in which both employers and employees take on significant responsibilities when they undertake such an arrangement.”).

53. See Bird, *supra* note 1515, at 215 (“In essence, employment law has its origins in a master-servant relationship, characterized by status-based relationships of profound interdependence.”); Richard R. Carlson, *Why the Law Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001); Robert W. Gordon, *Using History in Teaching Contracts: The Case of Britton v. Turner*, 26 U. HAW. L. REV. 423, 428 (2004) (“American courts in the early republic invented the new field of ‘employment law’ to govern work relations in industrial society. The template they used . . . was lifted, however, from the pre-industrial household—from the law of Master and Servant.”); Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1100–01 (2015); see also Bodie, *supra* note 52, at 830–31 (recognizing pre-industrial English master-servant common law as the historical origin of employment law, and arguing that the shift to modern business organizations compels consideration of the theory of the “firm” to understand the fiduciary or quasi-fiduciary nature of the modern employee-employer relationship); Stephen Nayak-Young, *Revising the Roles of Master and Servant: A Theory of Work Law*, 17 U. PA. J. BUS. L. 1223, 1228 (2015) (describing work law’s “emergence from the laws of master and servant[,]” which was “a distinctive form of status-based law”).

54. See Bird, *supra* note 15, at 160–61.

from its Contract and Tort counterparts, is really just the latest version of a centuries-long legal tradition of treating the employment relation differently, precisely because of certain special characteristics of that relationship.⁵⁵

This Part advances the claim that any formulation of organizing principles of employment law must account for the uniquely relational aspect of the employment contract, which in turn leads to recognition of an anti-opportunism principle. We begin with an introduction to the relational theory of contract and the fundamental ideas about human exchange that gave rise to it.⁵⁶ We will then identify the internal and external norms that shape relational expectations, followed by a discussion of how those relational expectations can give rise to opportunism.

A. Relational Contract Theory

It is probably impossible to accurately distill into a short summary the relational theory of contract. One complication is that it can only be conveyed effectively by contrasting it with the prevailing classical, and now neoclassical, account of contract.⁵⁷ Classical contract law is a relatively rigid, unitary body of law (with some contextualizing exceptions introduced in the neoclassical account) constructed on the fundamental assumption that contracting parties are rational, wealth-maximizing actors who are

55. See Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 34 (2003) (arguing that “employment is not really a contractual relationship at all; it is, and always has been, one of *status*” and that “it has been one since time immemorial and continues to be treated so today, regardless of the legal theories applied”).

56. A comprehensive account of the theory is neither necessary nor attempted here. For more detail, see SELECTED WORKS OF IAN MACNEIL, *supra* note 41.

57. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000) (“Like most modern contract theories, relational contract theory can only be understood against the backdrop of the school of classical contract law, to which it stands in opposition.”). Neoclassical contract law represents a modern refinement of classical contract law in response to critiques about the rigidity of classical contract theory and its resulting inability to account for different factual contexts. See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738–39 (2000) (describing the Uniform Commercial Code and the Restatement (Second) of Contracts as neoclassical, in the sense that they soften and permit contextualization of classical contract doctrine); James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 6 (2003).

acting within a competitive market.⁵⁸ Classical contract law is implicitly built upon the assumption that the exchanges governed by contract law are essentially “discrete” – one-shot, spot market transactions entered into by strangers with no shared history of dealings, no expected future dealings, and ultimately no reason to act in any way cooperatively with the other party to the contract.⁵⁹

One of Macneil’s critical insights, now widely accepted, is that, as an empirical matter, the assumption of discrete exchange does not accurately reflect most contractual exchanges in the real world.⁶⁰ In reality, all contracts take place within the context of some larger relation.⁶¹ Some transactions have more complex, long-term relational components while others are less relational, or more “discrete.” The various types of transactions can be thought of along a continuum. The relational contract theory is perhaps best known for its depiction of a spectrum of types of transactions, ranging from “as-if-discrete” (but not quite *perfectly* discrete⁶²)

58. See Eisenberg, *supra* note 57, at 805 (“Classical contract law . . . was axiomatic and deductive . . . objective and standardized . . . [and] static. It was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market. It was based on a rational-actor model of psychology.”); see also Feinman, *supra* note 57, at 738 (“[A]s the realm of consensual relations, contract law simply set ground rules for self-maximizing private ordering.”).

59. See Eisenberg, *supra* note 57, at 812 (“Classical contract law was based on the paradigm of strangers transacting on a perfect market[.]”).

60. Chapin F. Cimino, *The Relational Economics of Commercial Contract*, 3 TEX. A&M L. REV. 91, 92 (2015); Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 653–54 (2010); see Symposium, *supra* note 15, at 675.

61. See IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 10–11 (1980); Fox, *supra* note 57, at 9 (“[T]he primary insight of its main theorist Ian Macneil, is that *all* contracts are relational. Contract is always a social act involving multiple layers of relationships.”); Macneil, *supra* note 15, at 881 (“First, every transaction is embedded in complex relations.”); Symposium, *supra* note 15, at 675.

62. See Campbell, *supra* note 50, at 41 (describing an arguable ambiguity regarding whether any perfectly discrete exchanges are truly possible); see also Eisenberg, *supra* note 57, at 821 (arguing that, because all contracts are relational, there can be no special, separate law of contracts for relational contracts). While all contracts will have at least some minimal relational components, Macneil describes, as an example of an as-if-discrete exchange, a spot purchase of gasoline where the parties had not previously dealt with each other, nor would they in the future. Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 720–21 (1974). This nuance regarding the extreme “discrete” end of the spectrum is not particularly relevant to discussion of employment exchanges. In even the most discrete form of transaction that could possibly be categorized as “employment,” (perhaps gig-work providing intellectual services to a purchaser on Amazon’s Mechanical Turk) there will be some minimal relational aspect. Questions about the level and types of relation necessary to trigger the status of “employee” and the protections of employment law are discussed further, *infra* Part III.

transactions at one end, to highly relational, long-term, complex, and interdependent transactions at the other end.⁶³

The concept of a relationalist spectrum is based on Macneil's thinking on the "primal roots" of exchange between humans.⁶⁴ He observed that once any specialization of labor is introduced into primal society, exchange necessarily follows; without exchange, specialization would cease.⁶⁵ Taking an extraordinarily broad view of exchange and the purposes of exchange in human society, Macneil argues that the root of all contract is *social* behavior.⁶⁶ That is: all contracts are motivated (seemingly in irrationally inconsistent ways) partly by cooperation and partly by competition.⁶⁷ Of course, some contracts have stronger cooperative motivations at work than others. Some contracts are so predominately motivated by cooperation that, in the view of relationalists, classical contract law is relatively ill-suited to govern them.⁶⁸ Macneil generally insists on stopping at this descriptive point,⁶⁹ though his observations raise obvious normative questions about how the law should respond, if at all, to this observed phenomenon.

The normative implications for contract law are quite uncertain and heavily debated by contracts scholars. Suggested possibilities include viewing relational contract as a complete rival to classical theory, such that all of contract law should be reoriented to focus

63. See MACNEIL, *supra* note 61, at 12-13; Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 764 (1998) (describing the spectrum); Macneil, *supra* note 15, at 894-98 (using the "as-if-discrete" language to describe the spectrum, and noting that the concept is "[p]robably the most recognized aspect of my work in contract").

64. Feinman, *supra* note 57, at 741 ("Macneil begins with the 'primal roots of contract,' and this beginning leads him to broad definitions of 'contract' and 'exchange' . . ."); Cimino, *supra* note 60, at 97.

65. See MACNEIL, *supra* note 61, at 2-3; Campbell, *supra* note 50, at 46-47; Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 485 (1985).

66. See Cimino, *supra* note 60, at 97.

67. See Campbell, *supra* note 50, at 49 ("The basic claim is that co-operation is an integral part of any sort of society displaying an at all settled diversity of roles . . ."); Cimino, *supra* note 60, at 101 ("Relational contract theory takes it as a given that all exchange is both competitive and cooperative. In this respect, exchange is unavoidably dualistic. Macneil explained that exchange is unavoidably dualistic because human nature is dualistic.").

68. See Campbell, *supra* note 50, at 18.

69. Macneil, *supra* note 15, at 894-99 ("I challenge to a duel anyone who, after this notice, persists in converting my descriptions of relational contract law into prescriptions of what the law should be, particularly prescriptions of some universal application of relational contract law."). Nonetheless, Macneil does go on to offer a carefully-limited general prescription that "relational contract law should generally track the relational behavior and norms found in the relations to which it applies." *Id.* at 900.

on analyzing the norms relevant to each individual relationship at issue;⁷⁰ applying a special set of relational contract standards to those contracts falling toward the relational end of the spectrum;⁷¹ making modest doctrinal changes (such as imposing duties of good faith, looking to course of dealing, etc.) for all or some contracts in recognition of their partly cooperative motivation;⁷² or doing nothing.⁷³ Some argue that there can be no special contract law applicable to only relational contracts, because distinguishing between relational and discrete contracts is operationally impossible.⁷⁴

For our purposes, we need not resolve this long-running debate about the implications of relational theory *for contract law*. We are concerned here with the theory's implications *for employment law*, an area of law that has already been—in fact, has always been—singled out for special treatment apart from ordinary contract law. Employment law is somewhat unique in this regard. As classical or neoclassical contract law began to appear ill-suited to govern certain types of agreements, several specialized sub-areas broke away from general contract law and developed independently (*e.g.*, commercial transactions, insurance, collective bargaining labor relations, secured transactions).⁷⁵

But employment law, with its historical roots in master-servant common law, was status-based law from its origin; only later did jurists infuse it with some classical contract ideas during the apex

70. Feinman, *supra* note 57, at 740–43 (presenting an account of “what a truly relational contract law would look like”); see Leib, *supra* note 60, at 664 (“[M]ore thoroughgoing relationalists . . . would have contract law develop a generalized law to apply to all or most contracts, in light of their relational nature.”).

71. See Leib, *supra* note 60, at 664 (“[I]t is only one brand of the normative claim [of relationalism] that seeks special treatment for a small class of relational contracts . . .”).

72. *Id.* at 661–63 (noting that these reforms have largely already been accomplished by the U.C.C. and refinements to the common law).

73. Cimino, *supra* note 60, at 91–92 (identifying the contradiction that “most legal scholars accept the core insight” of relational contract theory, yet “many of these same contract scholars believe that there is nothing contract law could or should do about it.”).

74. Eisenberg, *supra* note 57, at 817 (“There can be no special law of relational contracts, because relational contracts and contracts are virtually one and the same.”). *But see* Leib, *supra* note 60, at 665 (arguing that “Eisenberg fails to prove that there is no way to operationalize a law of relational contracts” because he has not shown that standards, as opposed to rules, are incapable of accomplishing the task).

75. See Campbell, *supra* note 50, at 7 (quoting Ian R. Macneil, *Whither Contracts?*, 21 J. LEGAL EDUC. 403, 403 (1969)); Feinman, *supra* note 57, at 738–40.

of the free labor contract movement.⁷⁶ Employment law's existence as a separate field of law has *always* been justified by special aspects of the employer-employee relationship. These aspects both set it apart from the paradigmatic "as-if-discrete" exchanges and trigger duties apart from those expressed in any manifestation of their contractual agreement. Neoclassical contract law ideas and rules have, of course, worked their way into the Restatement of Employment Law, but they have never completely governed the employment relationship. Quite the contrary, special status rules formerly *completely* governed the employment relationship, and the infusion of neoclassical contract concepts came later.

Return to the question at the outset of Part II: What is the purpose of employment law generally? Whether one subscribes primarily to an efficiency view, a bargaining power view, an equity view, or a pluralistic view, my position here is that the partly cooperative nature of the employment relation cannot be completely ignored in any theoretical account of employment law. If employment law is to continue as a separate legal field apart from contract law, then the existence of cooperative motivations must play *some* role in defining the purposes of employment law, and in the resulting articulation of the rules or standards that will govern the cases. My claim here is that no coherent articulation of first principles of employment law, or any subfield of employment law, can be advanced without proper regard for the degree of partly cooperative, interdependent motivations that underlie the employment relationship, as revealed by the key insight of relational contract theory.⁷⁷

In one sense, the claim that employment law must account for the relational aspect of employment is really just a reminder that employment law itself actually *is* relational contract law. I say

76. Marion Crain, *supra* note 43; Gordon, *supra* note 53, at 427–28 (“‘Contract’ in 1800, generally referred to relations that the parties agreed to enter voluntarily, but that once entered bound them to prescribed terms.”); Snyder, *supra* note 55, at 42 (“In the 19th century employment law and contract law suddenly came together.”). The infusion was never complete. Snyder observes that even at the height of the deployment of contractual rhetoric in employment law cases during the *Lochner* era, “most employment law still turned on questions of status, not contract.” *Id.* at 45.

77. See Macneil, *supra* note 15, at 898–99 (“This observation [that a great deal of relational contract law, in fact, exists] does *not* mean that relational contracts can never be dealt with by relatively discrete contract law. . . . It does mean, however that discrete contract law can never be the beginning and the end of the law applicable to relational contracts.”).

“reminder” because I am certainly not the first to note that employment is a relational contract or that the field of employment law *is* relational contract law.⁷⁸ Macneil himself cited employment and labor statutes as primary illustrative examples of relational contract law.⁷⁹ Professor Bird published *Employment as a Relational Contract* in 2005.⁸⁰ Stewart Schwab, in 1993, hypothesized that certain exceptions to the at-will employment default rule might be justified based on a “life cycle” model of career employment that takes into account the longer-term relationship dynamics between an employer and employee.⁸¹ If my claim here is just a reminder, however, it is a warranted one. Rachel Arnow-Richman, in a recent symposium on relational contracts, observed that in the field of employment law disputed issues are often resolved as though formal (neoclassical) contract rules applied, without reference to the parties’ broader employment relationship.⁸² Despite the efforts of Bird, Arnow-Richman, and others, most scholarly critiques of current employment law generally are not grounded in relational contract theory.⁸³

But in an important sense, my claim here is more than just a reminder. If the project of identifying the guiding normative purpose(s) of employment law is ever to succeed, then the successful account must acknowledge and accommodate the cooperative motivation of employment relationships, and must

78. See sources cited *supra* note 15.

79. See Macneil, *supra* note 15, at 897. In his early work, Macneil expected to find his relational contract insights in the existing literature stemming from the field of labor relations, and found it in Philip Selznick’s *Law Society and Industrial Justice* (1969). See Ian R. Macneil, *Reflections on Relational Contract*, 141 J. INSTITUTIONAL & THEORETICAL ECON. 541, 541 (1985). But see Eisenberg, *supra* note 57, at 820–21 (contending that the employment statutes cited by Macneil, including the Act, do not actually constitute a form of contract law).

80. Bird, *supra* note 15; see also Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 395–99 (2008) (describing Bird’s framework for application of relational contract principles to employment).

81. Schwab, *supra* note 24, at 11–13.

82. See Symposium, *supra* note 15, at 681 (“What you find in the employment context is that, although relationships are extremely important to the parties, the legal issues that arise often are not resolved in the manner you would expect. In fact, relatively little of employment contract law follows a relational approach and reaches what we might consider correct relational results.”).

83. See *id.* at 706 (Arnow-Richman observing: “While employment scholars . . . have been critical of such decisions [applying traditional contract law], I think it is fair to say that those critiques generally have not sounded in relational contract theory”).

also recognize that the degree of cooperative motivation will necessarily vary in different employment contexts. This recognition would rule out a pure efficiency-based purpose for all of employment law, which acknowledges no exceptions for the influence of cooperative motivations. The microeconomic theory that forms the basis of the economic efficiency normative justification, and that also provides the template for any formal economic modeling of competing legal rules, assumes self-interested competition by rational utility maximizers under certain stylized market conditions.⁸⁴ More sophisticated economic accounts that strive to model adjustments to assumptions of rationality and perfect information will more closely approximate a relational account, but these generally do not fully incorporate cooperative motivations.⁸⁵ Relational contract theory, as discussed above, is rooted in the notion that exchanges—especially those falling closer to the relational end of the discrete/relational spectrum—are characterized by both competitive (“utility maximizing”) and cooperative (“solidarity enhancing”) motivations, thus undermining both the factual predictions and the normative claims of the neoclassical economic model.⁸⁶

84. See generally POSNER, *supra* note 26, at 3 (“As conceived in this book, economics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”); Campbell, *supra* note 50, at 13 (“Neo-classical economics assumes that rational economic action is motivated by a form of pure selfishness which it terms rational individual utility maximization.”).

85. See Campbell, *supra* note 50, at 35 (Macneil argued that his relational theory tried to capture a “sense of co-operation that will always escape even [Oliver E.] Williamson’s reasoning from what remain neo-classical assumptions of individual utility maximization, even though Williamson may attempt to model such co-operation in broadly game-theoretical, and increasingly complex . . . terms.”)

86. See, e.g., Jay Fienman, *The Reception of Ian Macneil’s Work on Contract in the USA*, in SELECTED WORKS OF IAN MACNEIL, *supra* note 41, at 62 (“[W]ealth maximization becomes only one among many factors motivating people to engage in contractual relationships and to be considered by courts in evaluating those relationships. . . . In the neo-classical view, contracts are exchanges entered into for gain. In the relational view, contracts are social relationships in which economic gain is an important factor but, particularly in intertwined relationships of long standing not the only factor.”) (citations omitted); Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 589 (1986) (“The constant conflict between the utility maximizer and the solidarity enhancer in each person always creates two-dimensional social relations. Any single-dimension model can have no legitimate claims to social completeness. Thus typical utilitarian models purporting to be

This is not to say that economic efficiency analysis is misguided. Efficiency remains an important and worthy goal of employment law. In some contexts, efficiency concerns may predominate over competing goals suggested by partly-cooperative motivations, leading legislation or doctrine to develop accordingly. Recognizing the conflicting competitive and cooperative motivations of actors in the labor market does not mean that economic analysis offers no insight. It only requires that efficiency determinations be placed into a larger relational context. The governing principles of any subfield of employment law can be formulated with an understanding of what neoclassical microeconomic theory would prescribe as the efficiency-maximizing rule, while maintaining flexibility to adopt an alternate rule if necessary, in light of the cooperative motivations underlying the employment relationship.⁸⁷

Although not couched in terms of Macneil's relational contract theory, Befort and Budd describe the building blocks of their pluralist model of employment in terms that would be quite familiar to relational contract theorists:

The model of the pluralist employment relationship . . . assumes that there are multiple parties (e.g., employers and employees) with legitimate but sometimes conflicting interests—employers might want lower labor costs, flexibility, and an intense pace of work while employees might want higher wages, employment security, and a safe workplace—as well as shared interests such

complete analyses of behavior—whether micro or macro—are not merely unsound at the periphery, but at the center as well since the conflict in human nature itself is not logically reconcilable within one consistent system.”).

87. Robert Bird demonstrated as much in analyzing the employment at-will doctrine in the United States. While neoclassical microeconomic analysis suggests that the current at-will doctrine in the United States efficiently maximizes social welfare, *see* Epstein, *supra* note 24, at 976, 982, Bird points out that this efficiency-based conclusion can and ought to be tempered by an understanding of relational contract principles. Bird, *supra* note 15, at 207–08. He argues for a flexible “relational opportunism” standard in employment termination cases that accounts for contract norms shaped by an employer’s promises and practices. *Id.* at 196–208. This standard would prevent employers from taking advantage of employees’ information deficit regarding the discrepancy between the law of at-will employment and the psychological employment contract created by an employer’s promises and practices. *Id.*; *see also* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (finding that employees broadly and mistakenly believe they are legally protected from termination by a standard other than the at-will default rule).

as quality products, productive workers, and profitable companies.

...

Institutions and customs shape these interactions and are therefore essential determinants of employment outcomes.⁸⁸

Exactly how cooperative motivations and the contract norms of an employment exchange should be taken into account is a difficult question necessarily bound up in the context of the subfield of employment law at issue and also in the specific employment relationship at issue.⁸⁹ Closer examination of the common contract norms and external norms that guide and shape the parties' behavior is required.⁹⁰

B. Internal and External Norms

In relational contract theory, the specific facts of each exchange relationship are "filtered through the structure of the relational method," including a consideration of common contract norms,⁹¹ as well as external norms. In Macneil's account, certain contract norms (such as the parties' effectuation of consent) play a larger role in more discrete contracts, while other norms (such as the preservation of the relation) play a larger role in contracts falling toward the relational end of the spectrum.⁹²

88. BEFORT & BUDD, *supra* note 26, at 12-13. Befort and Budd's reference to "institutions and customs" may align well with the internal and external norms referenced by Professor Macneil. *Id.*

89. See Feinman, *supra* note 57, at 742 ("Relational analysis is contextual with a vengeance, immersing itself in the facts of the particular contract and of the contexts from which it arises.").

90. See Cimino, *supra* note 60, at 98 & n.25 ("[Macneil] called them norms because he saw them as descriptions of the normal nature of all contract activity.").

91. See Feinman, *supra* note 57, at 742. Macneil identified ten common contract norms, including:

(1) role integrity (requiring consistency, involving internal conflict, and being inherently complex), (2) reciprocity (simply stated as the principle of getting something back for something given), (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the restitution, reliance, and expectation interests (the "linking norms"), (8) creation and restraint of power (the "power norm"), (9) propriety of means, and (10) harmonization with the social matrix.

Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 347 (1983) (footnote call numbers omitted).

92. Feinman, *supra* note 57, at 742.

These internal contract norms play an important role in interpreting the parties' expectations and obligations under relational contract theory. Macneil's theory "includes the possibility that norms internal to the parties' relationship but not clearly expressed in the agreement will become part of their obligation to each other."⁹³ By definition, these norms will vary with the circumstances of each employment exchange and can be difficult to identify. But some generalization is possible where many employment exchanges carry similar features. In the context of job security, Robert Bird pointed to "psychological contracts,"⁹⁴ "company credos" or "corporate codes,"⁹⁵ and "organizational cultures"⁹⁶ as sources of internal relational contract norms.⁹⁷ Given the prevalence of corporate codes, credos, and employee handbooks, a significant percentage of employment relations share some similar (though not identical) internal norms.⁹⁸

External norms also guide the parties' behavior and expectations. External norms are those imposed by the positive laws of the sovereign, as well as the expectations imposed by trade associations or customs.⁹⁹ They are the larger social context against

93. Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 827 (2000).

94. Bird defined psychological contracts as "an employee's perception of the mutual obligations that exist between the employee and her employer. Not contracts in the legal sense, psychological contracts emerge when an employee perceives that contributions she makes obligate her employer to reciprocal acts." Bird, *supra* note 15, at 165 (footnote call numbers omitted).

95. A company credo or code "is a document developed by an organization that expresses that organization's values and the ethical rules it expects employees to follow." *Id.* at 170.

96. Bird defined corporate culture as "internal consistency within an organization that influences the behavior and values of its employees. . . . A corporate culture represents the cumulative philosophies, beliefs, values, assumptions, and norms of an organization." *Id.* at 180-81 (internal footnote citations omitted). More colloquially, a corporate culture is a "feeling in the organization, to rules of the game, to how things are done around here." *Id.* at 181 (internal quotation marks omitted) (citing Alan M. Wilson, *Understanding Organizational Culture and the Implications for Corporate Meetings*, 35 EUR. J. MARKETING 353, 355 (2001)).

97. *See id.* at 165-85.

98. *See id.*

99. Macneil, *supra* note 91, at 367-68 ("[External social values] would also have to include private law, such as that imposed on professional football teams by league rules, on businesses by trade associations, on colleges and universities by the American Association of University Professors, and on family life by churches. Furthermore, it could not stop with relatively hierarchical or vertical impositions such as those listed. It also would have to deal

which the exchange is entered into by the parties, which helps shape the parties' relational expectations.¹⁰⁰

The sources, contours, and roles of external and internal norms will vary with the circumstances of each individual employment exchange. And they will also vary when ascertaining employer or employee obligations in each of the subfields that make up the mishmash of employment law, including the at-will termination default rule, employee mobility restrictions, employee intellectual property, workplace privacy, workplace safety, employment discrimination, employee speech, wage and hour regulation, and so on. The next subpart draws on relational contract theory (as well as other sources) to identify anti-opportunism as a potential guiding principle in the subfield of worker safety law.

C. An Anti-Opportunism Principle

A signature characteristic of relationalism is the need to examine individual exchanges within their own context, including the internal and external norms guiding the parties' behavior.¹⁰¹ In doing so, relationalists look to prevent or deter opportunism by the parties to the exchange.¹⁰² Macneil defined "opportunism" as "self-interest seeking contrary to the principles of the relation in which it occurs."¹⁰³ Robert Bird, examining opportunism in the context of job security, defined "relational opportunism" as "self-interest seeking that contradicts the terms of an established relational contract."¹⁰⁴ As an example of relational opportunism, Bird pointed to an employer who encourages loyalty with implicit (though not

with more horizontal imposition of external values, such as those arising from customs – not only those customs of closely related people or groups, such as customs of a trade, but also customs of broader origin, such as those of civilized intercourse in the particular society."); see also Campbell, *supra* note 50, at 14; Feinman, *supra* note 57, at 742.

100. See Macneil, *supra* note 91, at 367–68.

101. See Feinman, *supra* note 57.

102. Speidel, *supra* note 93, at 838 ("Both relationalists and transaction-cost economists recognize the importance of preventing opportunism in relational contracts. . . . In short, opportunism threatens the relationship. If the contract does not have a governance structure to regulate or define opportunism, or if that structure fails and the parties cannot agree, a court may be asked to intervene."). For an argument that precontractual commercial negotiations ought to be protected by a legal claim proscribing opportunistic behavior, see G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221 (1991).

103. Bird, *supra* note 15, at 198 n.383 (quoting Macneil, *supra* note 2, at 1024 n.20).

104. *Id.* at 198.

contractually-binding) promises that an employee's job is secure and that the employee will be treated fairly, but who "then retracts that security and fair treatment when they prove inconvenient."¹⁰⁵

Other scholars, outside the self-described relationalists, have also identified the prevention of opportunism as a desirable goal for employment law. Matthew Bodie, drawing on the economic theory of the firm and its modern variants, argues that the discretion lodged in both employers and employees over certain aspects of the employment relationship within a firm creates possibilities for opportunistic behavior.¹⁰⁶ Bodie contends that, where employees have little say in governance, "they have no way to address the employer's discretion, their own vulnerability to that discretion, and the opportunism and agency costs inherent in the relationship."¹⁰⁷ Noting Professor Bird's similar arguments drawn from relational contract theory, Bodie urges a type of fiduciary duty—a "duty not to use its discretion to take undue advantage of employees, either individually or as a group."¹⁰⁸

The heavily relational character of employment contracts, together with the areas of discretion built-in to modern firm structures, present a heightened risk of opportunism in employment. Many of the special common law and statutory duties (running in both directions) that permeate employment law can be best explained as rules designed to anticipate and defeat forms of opportunism by employers or employees. Both Professors Bird and Bodie focused primarily on job security and the at-will employment rule in analyzing the potential for opportunism in employment exchanges,¹⁰⁹ but the law of workplace safety likewise ought to reflect this basic anti-opportunism principle.

105. *Id.* at 199.

106. *See* Bodie, *supra* note 52, at 864.

107. *Id.*

108. *Id.*

109. *See* Bird, *supra* note 15 at 196–200; Bodie, *supra* note 52, at 864. Professor Schwab's life-cycle theory likewise focused on the possibility of opportunism in the context of job security, the at-will employment rule, and courts' willingness to scrutinize terminations at points in the employment life cycle that seemed most vulnerable to the possibility of opportunistic behavior by employers. *See* Schwab, *supra* note 24, at 39 ("Courts are most likely to scrutinize firings at the beginning and end of the life cycle. Courts do not get involved during midcareer unless they see an obvious case of particular opportunism, such as a firing before a pension vests or a sales commission is due.").

The next Part considers the implications of the anti-opportunism purpose for OSHA.

IV. BEYOND THE EFFICIENCY JUSTIFICATION IN WORKPLACE SAFETY: ANTI-OPPORTUNISM AND ITS COROLLARIES

This Part narrows the focus from employment law generally to workplace safety law specifically. The few scholars that have brought relational contract theory to bear on employment law have focused on the at-will employment rule. Those works have either not touched on workplace safety at all, or have considered it only briefly in passing.¹¹⁰ My focus on workplace safety law is motivated in part by recent and anticipated changes in the landscape of workplace safety regulation, including potential challenges to OSHA's expansive approach to the general duty clause along the lines urged by Judge Kavanaugh.¹¹¹

This Part begins by briefly exploring the dominant efficiency analysis approach to workplace safety law. It then lays out an alternative, anti-opportunism view, sketching a set of corollaries informed by relationalism.

A. *The Efficiency Account of Workplace Safety Law*

As with other subfields of employment law, the scholarship on workplace safety is currently dominated by the economic efficiency

110. While not claiming to apply relational theory, Befort and Budd do briefly consider the implications of their pluralist approach for workplace safety and health law. See BEFORT & BUDD, *supra* note 26, at 162–63. Likewise, Bodie, examining employment through the lens of the theory of the firm rather than relational contract, identifies certain employer duties to employees in the subfield of workplace safety that resemble fiduciary duties. See Bodie, *supra* note 52, at 837–38 (claiming employers have a common law duty to provide a reasonably safe workplace, and OSHA supplementation of that duty through the general duty clause).

111. See Gonzalez, *supra* note 10 (“[T]he agency is more actively relying on the Occupational Safety and Health Act’s general duty clause to cite industries for violations where there is no specific standard, such as ergonomics, workplace violence and heat stress/illness hazards.”). The current presidential administration’s deregulatory emphasis may limit OSHA’s approach to the general duty clause. See generally Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Collin Warren, *The OSHA Story Under Trump*, LAW 360 (Mar. 21, 2017, 11:20 AM), <https://www.law360.com/articles/902113/the-osha-story-under-trump> (emphasizing deregulation and requiring the elimination of two rules for every rule enacted).

paradigm and economic analysis.¹¹² With some notable exceptions, critiques to the orthodox law-and-economics prescriptions are usually couched in later-generation economic terms, including the identification of market failures, externalities, transaction costs, information asymmetries, and behavioral economics or bounded-rationality critiques.¹¹³

The efficiency-maximizing account of worker safety regulation is as follows. Workers and employers freely enter into employment contracts where workers exchange their labor and their time for wages and benefits. Express or implicit in these contracts is an acknowledgement that workers are agreeing to expose themselves to certain risks of the job. Workers receive compensating wage differentials in return for taking on risk. And risk-preferring workers can seek out those employers who would rather pay wage differentials than incur greater expenses to reduce risks. By matching the risk preferences of workers with appropriate employers, the free market maximizes efficiency in labor exchanges. Only where a systematic market failure is identified should the government intervene—and then, only in the manner

112. See, e.g., CHRISTINE JOLLS, *Employment Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1349, 1355 (A. Mitchell Polinsky & Steven Shavell eds., 2007); W. KIP VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* (1983); Henry N. Butler & Keith W. Chauvin, *Economic Analysis of Labor Markets: A Framework for Analyzing Employment Law Issues*, 8 KAN. J.L. & PUB. POL'Y 1 (1998); Lambert, *supra* note 13; Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657 (2010); Walter Y. Oi, *On the Economics of Industrial Safety*, 38 L. & CONTEMP. PROBS. 669 (1974); Sunstein, *supra* note 14; W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1436 (1996) (“The most comprehensive regulatory test from an economic efficiency standpoint is benefit-cost analysis.”).

113. See, e.g., Charlotte S. Alexander, *Transmitting the Costs of Unsafe Work*, 54 AM. BUS. L.J. 463, 465 (2017); Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177 (2015); Jason R. Bent, *Health Theft*, 48 CONN. L. REV. 637 (2016); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 723–24 (1998); Sidney A. Shapiro, *The Necessity of OSHA*, 8 KAN. J.L. & PUB. POL'Y 22 (1999). *But see* David M. Driesen, *Two Cheers for Feasible Regulation: A Modest Response to Masur and Posner*, 35 HARV. ENVT. L. REV. 313 (2011) (arguing that distributional considerations are a rational justification for application of a feasibility standard, rather than an efficiency-maximizing cost-benefit standard, under the Act); Sidney A. Shapiro, *Dying at Work: Political Discourse and Occupational Safety and Health*, 49 WAKE FOREST L. REV. 831, 841–46 (2014) (arguing that the dominance of cost-benefit analysis undermines the democratic goal of protecting workers as a social objective).

minimally necessary to correct the identified market failure.¹¹⁴ Accordingly, some efficiency-minded scholars have advocated (for example) that OSHA standards be opt-out standards, because the only identified market failure is one of inadequate information in the possession of workers, which can be corrected with an information-forcing opt-out standard.¹¹⁵

Regarding compensation post-injury, the efficiency-maximizing account posits that the likelihood of recovering all or a portion of any loss due to injury or illness will be factored into the market price for risky work and will also be factored into the employer's willingness to pay for precautions. If a worker expects that, upon injury, she will automatically receive 67% of her lost wages, plus the full payment of medical expenses, in a typical no-fault workers' compensation regime, she will adjust her demand for compensating wages accordingly. On the other hand, if recovery of the losses against the employer were unlikely, as it would be in a tort regime following strong versions of the traditional Unholy Trinity defenses,¹¹⁶ then she will demand appropriately higher wages to compensate her for the risk of incurring an injury that would leave her with no legal recourse. Employers should theoretically take precautions up to the point at which the marginal cost of additional precautions equals the marginal benefit in reduced liability or reduced insurance premiums.¹¹⁷

The foregoing efficiency-maximizing account of the worker safety exchange is often buttressed by empirical evidence suggesting that workers do, in fact, receive some compensating

114. JOLLS, *supra* note 112, at 1357 ("The general starting point for economic analysis of workplace safety regulation is the observation that in the absence of market failure, less safe working conditions should be fully compensated by higher wages—an application of the theory of equalizing wage differentials."); Thomas A. Lambert, *supra* note 13, at 1008 (arguing that, for an information asymmetry market failure, the proper response is not to ban the exchange, but rather to narrowly address the information problem directly by requiring information disclosure).

115. See Lambert, *supra* note 13, at 1070-71, 1078.

116. The Unholy Trinity defenses included the fellow-servant rule, assumption of the risk, and contributory negligence. See, e.g., Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1769 (1981).

117. See Lambert, *supra* note 13, at 1018-19.

wage differential for certain riskier jobs. The empirical evidence on that point, though, is far from conclusive.¹¹⁸

B. Beyond Efficiency: A Relational Account of the Risk Exchange

Relational contract theory offers an alternative way to think about workplace safety laws. A relational account of workplace safety begins by returning to examine the fundamental roots of the exchange at issue and then understanding the contract norms that have developed internally or externally to guide the participants' expectations in that exchange.¹¹⁹ In the employment exchange, one party trades his or her labor to another party who is able to pay for it and has the capital necessary to put the labor to productive use. A careful exploration of the fundamental components, the motivations, and the internal and external norms of the employment exchange will help illuminate this account.

1. Health is property

In understanding the occupational risk exchange, the first thing to recognize—frequently overlooked in the literature—is that an employee's health is the employee's *property*.¹²⁰ The employment exchange is not just an employee agreeing to exchange her time and her labor efforts in return for wages and/or benefits, but also

118. Compare W. Kip Viscusi, *Regulating the Regulators*, *supra* note 112, at 40–41 (finding the existence of compensating wage premiums), with Shapiro, *The Necessity of OSHA*, *supra* note 113, at 24 (“[T]he literature on wage premiums offers only equivocal support that wage premiums are adequate to compensate workers for their occupational risks or that they even exist.”), and Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 *INDUS. & LAB. REL. REV.* 116 (1998) (questioning the variables included in several empirical studies of wage differentials).

119. The discussion of external and internal norms that follows makes a typical assumption that even more fundamental basic societal norms (sometimes called first and second level norms) recognized by Macneil are satisfied. See Campbell, *supra* note 50, at 12–13, 43. These norms require that the parties have shared language or meaning, such that forming an exchange is possible, and that they experience a shared social solidarity, such that they can expect general social peace (rather than simple violence allowing one party to impose its will on another) and some mechanism for the enforcement of promises. See *id.*

120. Macneil notes that the existence of defined property rights is a critical prerequisite to effective exchange. Macneil, *supra* note 65, at 491 (“We know that property, the prerequisite of discrete exchange, was the legal fundament throughout the period [1865–1933], followed closely by liberty, at least insofar as the sale of labor was concerned.”). That an employee has a property interest in his or her health appears to be implicit in the theory of compensating wage differentials, but it is nonetheless often overlooked once attention turns to prescribing appropriate legal rules to govern workplace safety.

involves a health risk exchange. The employee gives not only her leisure time and her labor efforts, but also agrees to bear a risk to her health that she was otherwise under no obligation to assume. Risks to the employee's health constitute one of the commodities being exchanged as part of the overall employment bargain between the parties. Recognition of the role of the employee's health as property in this health risk exchange becomes important as we explore the unstated, implied contractual obligations of the parties.

2. Both competitive and cooperative motivations

The health risk component of the exchange between the employee and employer is complex, including both competitive and cooperative motivations. As Macneil emphasized, this seeming inconsistency in pursuing both competitive and cooperative goals is just a reflection of the irrational duality of human nature in pursuing both social and individualistic goals simultaneously.¹²¹

The competitive motivations in the risk exchange are apparent. An employee will seek to undertake less risk to his health on the job, all else held constant. Factoring in an individual employee's risk preferences,¹²² competitive motivations will lead the employee to pursue the optimal mix of low safety risk with high wages or benefits received in return for his work. Employers, on the other hand, are generally motivated to reduce production costs and maximize profits, which may impose increased risks on the employee's health.¹²³

Line speeds at poultry or meat processing plants offer a modern illustration of competitive motivations.¹²⁴ Employees will generally prefer slower processing line speeds, all else held constant, because they are safer. Employers will prefer faster line speeds, all else held constant, because they would reduce production time and labor

121. See *supra* note 67 and accompanying text.

122. Any given employee may be risk-neutral, risk-averse, or risk-preferring. A relatively risk-averse employee will choose a mix that prioritizes safety, even at the cost of somewhat reduced wages.

123. See BEFORT & BUDD, *supra* note 26, at 11-12 ("[E]mployers might want lower labor costs, flexibility, and an intense pace of work while employees might want higher wages, employment security, and a safe workplace . . .").

124. See generally SOUTHERN POVERTY LAW CENTER, *Unsafe at These Speeds* (Mar. 01, 2013), <https://www.splcenter.org/20130228/unsafe-these-speeds>.

costs, maximizing profits. The interests of employee and employer, specifically regarding the occupational safety risks to employees, are in direct opposition to each other.

But cooperative motivations are present as well, undercutting some critical assumptions of efficiency theory. First, employees and employers *both* want the company to profit and succeed. Employers, so that investors will maximize their return on investment. Employees, so that the company will be stable, providing a predictable opportunity to continue working and perhaps also an opportunity to share in the company's success through improved wages or benefits. Because of these shared motivations, *both* employers and employees in the business of processing poultry have an incentive to produce safe, reputable, high-quality products. If line speeds are too fast, unsafe food products may escape detection, enter the distribution chain, and sicken consumers, threatening profits and perhaps the survival of the company and the continued employment opportunity.¹²⁵ Employers also have an interest in keeping their employees healthy and avoiding excessive injuries or illnesses. Replacing an injured or ill employee can introduce additional training costs, monitoring costs, or other uncertainties.

Relational contract theory acknowledges the simultaneous and seemingly contradictory existence of both competitive and cooperative motivations in all contracts. More discrete contracts tend to be dominated by competitive motivations, while more relational contracts tend to be characterized by significant cooperative motivations.

3. *Evolving external norms*

External norms about employers' obligations in workplace safety (both in prevention and compensation) have been quite unstable over the last three centuries. Understanding the historical evolution of these external norms helps to situate the current uncertainty simmering in workplace safety law.

In seventeenth and eighteenth century England, the responsibility of caring for individuals rendered unable to work

125. See BEFORT & BUDD, *supra* note 26, at 12 (providing examples of "shared interests such as quality products, productive workers, and profitable companies").

due to injury fell to the local parishes under the Poor Law.¹²⁶ The English Poor Laws were the primary influence on the treatment of the poor in the American colonies.¹²⁷ This meant that in many colonies, religious groups took on the responsibility of caring for the poor, including injured or ill workers.¹²⁸ In the American South, private landowners often provided local poor assistance.¹²⁹ Parish or town responsibility for the injured underpinned Lord Mansfield's reasoning in 1784, in determining that a master was not legally liable to care for a sick or injured servant.¹³⁰

Lord Mansfield contrasted the parish's *legal* responsibility with another common avenue of potential relief for an injured worker — an employer's *benevolence*. While not legally obligated to provide for the injured servant, Lord Mansfield believed that masters *morally* "ought to," and they often did.¹³¹ The moral norm reflected in Lord Mansfield's reasoning pre-dated the free labor movement and its importation of classical contract ideas into the master-servant relationship. According to Christopher Tomlins, legal

126. See Michael Ashley Stein, *Victorian Tort Liability for Workplace Injuries*, 2008 U. ILL. L. REV. 933, 942 (2008) ("Responsibility for medical care traditionally fell upon parishes through the aegis of the Old (meaning, pre-1834) Poor Law . . ."); Christopher L. Tomlins, *A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850*, 6 L. & HIST. REV. 375, 396 (1988) (quoting Lord Mansfield in *Newby v. Wiltshire* (1784)). When a servant was injured or had fallen ill outside of the servant's home parish, the parish where the worker had become injured or ill was generally required to provide care until the servant could be "removed" to the servant's own parish. See Stein, *supra* at 942.

127. See William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 42-43 (1996) ("While individual economic and social circumstances shaped each colony's response to its poor, the English poor laws were usually the frame of reference for local action.").

128. See *id.* at 47 ("Poor relief was accepted as a prime responsibility of religious groups in many parts of the United States. Private church aid existed parallel to the systems later created and maintained by the public authorities.").

129. See *id.* (explaining that Southern landowners were motivated, in part, by a desire to maintain a social system akin to feudalism).

130. *Newby v. Wiltshire*, 2 Esp. 739, 742, 170 Eng. Rep. 515, 516 (K.B.1784) ("I think, in general, a master ought to maintain his servants, and take care of them in sickness; but the question now is, what is the law? There is, in point of law, no action against the master to compel him to repay the parish for the cure of his servant; no authority whatsoever has been cited, and it seems to me that it cannot be. The parish is bound to take care of accidents . . .").

131. See *id.* Some other eighteenth century cases did recognize a master's duty to pay medical expenses in some cases. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 701, n.370 (1989); Tomlins, *supra* note 126, at 396. As Professor Schwartz notes, the "availability of the parish or town as an alternative bearer of liability for disabled and impoverished workers greatly complicates the effort to understand what these early cases and legal rules were all about." Schwartz, *supra* at 701, n.370.

historians “have generally agreed that a paternalistic sense of social responsibility or ‘stewardship’ was a key component of early corporate ideology.”¹³²

By the late 1830s and the 1840s, however, an injured employee’s likelihood of recovering more than the “merest pittance” in corporate benevolence had dwindled.¹³³ Tomlins ascribes this development to the “growing emphasis upon profit and productivity,” i.e., the “political economy of speed” that prevailed in the 1830s and 1840s.¹³⁴ Injured or sick workers took to the courts seeking legal recourse, resulting in the earliest American cases seeking to impose liability on employers for injuries to employees.¹³⁵ The expected value of any post-injury benevolence disappeared *after* employees had already invested in this occupational risk exchange with certain expectations about the employer’s benevolence. This was classic opportunistic behavior by employers in the face of rising profit pressures. In response, employees began pursuing civil tort actions. Initially, these suits were met with jurists importing classical contract ideas—built upon a model of purely competitive motivations—into traditional master-servant law. The fellow servant rule, applied in *Farwell v. Boston & Worcester R.R.*, is the most notable example.¹³⁶ At this point, the employment exchange began to be characterized as just another contract.¹³⁷

The struggle to establish a new external norm of legal responsibility (rather than just moral responsibility) for workplace injuries played out in the judicial creation of several ad hoc exceptions to the fellow servant rule, including the “safe tools, safe worksite, competent servant, constructive knowledge,

132. See Tomlins, *supra* note 126, at 399.

133. See *id.* at 400.

134. See *id.*

135. See *id.*; see also *infra* note 154 (discussing the first such case, *Barnes v. Boston & Worcester R.R. Corp.*).

136. *Farwell v. Boston & Worcester R.R.*, 45 Mass. 49 (1842). The fellow servant rule held that an employee injured on the job could not recover in tort against his employer if the injury was caused by the negligence of a co-employee or “fellow servant.” See also Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 56 (1967) (“Shaw’s opinion [in *Farwell*] makes extreme assumptions about behavior, justified only by a philosophy of economic individualism. . . . Shaw’s generation placed an extremely high value on economic growth.”).

137. See *supra* note 76.

and extraordinary risks” exceptions, as well as the “vice principal (or superior servant), the different department, and the subcontractor” exceptions.¹³⁸ All of these permitted workers, in certain circumstances, to escape the harsh consequences of the *Farwell* fellow servant rule and recover against their employer. These exceptions grew out of a rediscovery of the employer’s old status-based duties under master-servant common law to provide a reasonably safe workplace and to warn employees of dangerous conditions.¹³⁹

The common law did not quickly settle on a stable new external norm for occupational risk exchanges.¹⁴⁰ Exceptions to the fellow servant rule were applied unevenly and inconsistently.¹⁴¹ The increasing number of tort suits and the unruly exceptions led some jurists to advocate for workers’ compensation legislation.¹⁴² Eventually, in the prevailing historical account, workers and employers alike were sufficiently frustrated with the

138. PETER KARSTEN, *HEART VERSUS HEAD* 5, 120–24 (1997) (citing exceptions to the fellow servant rule as examples of innovative instrumentalist jurisprudence “finding ways around an obnoxious rule or, indeed, of . . . changing it in order for those victims to emerge victorious”). See also Friedman & Ladinsky, *supra* note 136, at 59–62 (1967) (arguing that, by the latter part of the nineteenth century, judges began to reject *Farwell*’s reasoning and began developing “scores” of doctrinal exceptions to the rule).

139. See, e.g., *Cleveland, C. & C.R. Co. v. Keary*, 3 Ohio St. 201, 209–10 (Ohio 1854) (“When one enters his employment in a subordinate situation, and agrees to be subject to his orders, either directly or indirectly given, he has a right to expect that his employer will perform the duty resting upon him, to furnish suitable machinery, and control it with care and prudence.”); see also RESTATEMENT OF EMPLOYMENT LAW § 4.05 (AM. LAW INST. 2015); Bodie, *supra* note 52, at 838 (describing the common law roots of these duties).

140. See Friedman & Ladinsky, *supra* note 136, at 65 (“The common law doctrines were designed to preserve a certain economic balance in the community. When the courts and legislatures created numerous exceptions, the rules lost much of their efficiency as a limitation on the liability of businessmen.”). Friedman and Ladinsky’s reference to a “certain economic balance in the community” likely reflects an unstated but understood external norm about the allocation of risks of injury as between an employee and an employer. In addition to common law exceptions, the Federal Employers’ Liability Act of 1908 eliminated the fellow servant rule for railroads. See 35 Stat. 65 (1908); Friedman & Ladinsky, *supra* note 136, at 64–65. State legislation was also making inroads. John Fabian Witt reports that “[b]y 1911 twenty-five states had enacted legislation variously abolishing the fellow servant rule, modifying the contributory negligence doctrine, and limiting the assumption of risk rule.” JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* 67 (2004).

141. Friedman & Ladinsky, *supra* note 136, at 65 (“The rules prevented many plaintiffs from recovering, but not all; a few plaintiffs recovered large verdicts. There were costs of settlements, costs of liability insurance, costs of administration, legal fees and the salaries of staff lawyers. . . . It was desirable to be able to predict costs and insure against fluctuating, unpredictable risks.”).

142. *Id.* at 67–68.

unpredictability of litigation that support grew on both sides for no-fault workers' compensation systems, which are now nearly universal.¹⁴³ Social norms had come a long way from the mere moral employer obligation that Lord Mansfield recognized, and the "Grand Bargain" of workers' compensation grew out of the resulting instability.

External norms imposed by sovereign law continued to evolve, beginning with protections for children, industry-specific laws, and state laws that regulated some workplaces.¹⁴⁴ In 1970, the federal Act was signed into law.¹⁴⁵ The Act's general duty clause, by its terms, was both broader and narrower than the analogous common law master-servant duty.¹⁴⁶ Broader, because the Act is not governed by the common law's negligence (reasonableness)

143. See *id.* at 68–69 (“When considerations of politics were added to those of business economics and industrial peace, it was not surprising to find that businessmen gradually withdrew their veto against workmen’s compensation statutes. They began to say that a reformed system was inevitable—and even desirable.”). See also WITT, *supra* note 140, at 4 (“By the beginning of 1920, compensation systems . . . were in place in forty-two states and three U.S. territories, replacing a wide swath of nineteenth-century common law with compulsory state-administered insurance regimes.”). While some type of reform in response to the “industrial accident crisis” might have been inevitable by the early 1900s, Witt argues that the particular reform adopted in nearly all U.S. jurisdictions was by no means inevitable; indeed, it was “accidental.” See *id.* at 20–21 (“[W]e experimented with a wide array of plausible alternatives in remaking American law for the modern world, each of which represented different paths that American lawmakers might have taken into the twentieth century. In turn, the paths ultimately taken were the contingent outcomes of encounters between these alternatives and the cultures, institutions, and individual men and women of American law.”).

144. See generally Marjorie E. Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOY. U. CHI. L.J. 247, 248 nn.4–5 (1972) (describing the history of occupational safety laws leading up to passage of the Act).

145. See generally Nina G. Stillman & John R. Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969 (1987) (providing a historical account of the development of OSHA, workers' compensation, and other components of workplace safety law).

146. See Richard S. Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 L. & CONTEMP. PROBS. 612, 616 (1974) (“At common law the employer was obliged only to exercise ordinary care to make his workplace safe for his employees.”). Some evidence in the legislative history suggests that lawmakers may have thought the general duty clause was coextensive with common law duties. See *id.* at 621–23 nn.63–65 (citing both Senate and House reports suggesting that the general duty clause imposes common law duties). See generally Richard S. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 1003 (1973) (noting the OSHRC's rejection of the common law unholy trinity defenses when considering the general duty clause).

standard.¹⁴⁷ The Act requires a workplace “free from [certain] recognized hazards.”¹⁴⁸ Narrower, because the Act does not regulate unrecognized hazards, nor hazards imposing risks of only minor injuries. Only recognized hazards “likely to cause death or serious physical harm” trigger violations of the Act’s general duty clause.¹⁴⁹

4. Context-specific internal norms and opportunism

Employers generate internal norms about job security through corporate policies, credos, culture, and handbooks.¹⁵⁰ These internal norms have been effective, resulting in a widespread erroneous perception by many employees that they are protected by something other than the at-will employment rule.¹⁵¹

Similar internal norms are likely at play in worker safety. Corporate credos, codes, and culture often emphasize the primary importance of safety. As just one example, ExxonMobil’s CEO stated, in 2015, that safety “must be more than a priority, it must be a value—a core value that shapes decision-making all the time, at every level.”¹⁵² An emphasis on safety in company rules, standards, and procedures is “not enough;” instead, the “answer is ultimately found in a company’s *culture*—the unwritten standards and norms that shape mindsets, attitudes, and behaviors.”¹⁵³ Messages like these can shape the parties’ understandings of their respective rights and obligations in the exchange.

But formal corporate policies can be used opportunistically by employers to override unwritten, prevailing internal norms and customs after an accident occurs. Tomlins provides an early, vivid example of just this sort of opportunistic employer behavior in a nineteenth century railroad case, *Barnes v. Boston & Worcester R.R.*

147. See *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1265 n.34 (D.C. Cir. 1973) (noting that the statutory duty, unlike the common law, “was not characterized in terms of reasonableness”); Miller, *supra* note 146, at 616.

148. 29 U.S.C. § 654(a)(1) (2012).

149. *Id.*

150. See Bird, *supra* note 15, at 165–85.

151. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997–98).

152. Darren W. Woods, Chairman and CEO, Exxon Mobile, Building a Culture of Safety (Apr. 9, 2015) (transcript available at <http://corporate.exxonmobil.com/en/company/news-and-updates/speeches/building-a-culture-of-safety>).

153. *Id.* (emphasis added).

*Corp.*¹⁵⁴ Barnes was hired to perform maintenance work on bridges and was injured, leading to the loss of his arm, in an accident that occurred while he was riding the “gravel train” (which apparently had cracked wheels) to accompany work materials to the bridge where he planned to “jump off and join his workmen.”¹⁵⁵ In the resulting litigation, the railroad took the position that an implied aspect of the employment contract was that no workers were “allowed to use the gravel train other than the gang of laborers specifically assigned to it.”¹⁵⁶ Workers were to use the first car of the passenger train, and “if Barnes had chosen to ride on the gravel train he had done so at his own risk.”¹⁵⁷ Despite the stated company policy, Barnes presented witnesses who testified that they also rode the gravel train under circumstances similar to those facing Barnes, apparently with the consent of the railroad.¹⁵⁸ The arguments in *Barnes* illustrate that the parties’ understanding of the occupational risk exchange ought to consider not only formal pronouncements and policies about the risk exchange, but also the actual day-to-day practice and customs of the parties.

Internal norms will, by definition, vary on a case-by-case basis, but a relational view of the occupational risk exchange counsels to carefully consider how these internal norms shape the parties’ expectations. Internal norms help shape the parties’ understandings of their individual rights and obligations in the exchange and can reduce the transaction costs that would otherwise accompany formal contracting between an employer and employee on every possible anticipated factual scenario. Internal norms will often reflect the influence of cooperative motivations underlying the occupational risk exchange.

154. *Barnes* is an unreported case from the Suffolk County Court of Common Pleas, October Term 1837. See Tomlins, *supra* note 126, at 376–77 & n.4; see also John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467, 1479 n.66 (1998). Tomlins notes that *Barnes* was the “first in a flood of suits alleging that employers were legally obliged to compensate employees for injuries arising in the course of their employment that came before American courts in the quarter century prior to the Civil War.” Tomlins, *supra* note 126, at 377.

155. See Tomlins, *supra* note 126, at 376.

156. *Id.* at 401.

157. *Id.*

158. *Id.* Tomlins describes the testimony as showing that the railroad’s “‘rule’ was less than prescriptive in practice.” *Id.*

C. Anti-Opportunism Corollaries for Workplace Law

What does anti-opportunism look like in practice for workplace safety regulation? What are its core prescriptions? This subpart addresses these questions by developing a short list of corollaries flowing from the fundamental anti-opportunism principle that employment regulations ought to be used to defeat opportunistic behavior by employers or employees.

A relational account of worker safety recognizes that, in employment relationships, the parties' significant cooperative motivations suggest a baseline level of trust that requires both parties to act in good faith regarding risks. One of the commonly-suggested normative prescriptions growing out of relational contract theory is imposing a meaningful duty of good faith in contracts falling toward the relational end of the spectrum.¹⁵⁹ A meaningful duty of good faith makes an obvious starting point for anti-opportunism in workplace safety, but it does not go far enough.

Professor Bodie has argued that employment relationships are and should be imbued with more than simply a contractual good faith duty; rather, he recommends something more like a fiduciary duty.¹⁶⁰ Whether owing to Professor Macneil's relational contract theory or to the quasi-fiduciary duties that Professor Bodie identifies as flowing from the structure of modern firms, a basic set of anti-opportunism corollaries governing workplace safety can be articulated, as follows:

Anti-Opportunism Corollaries for Worker Safety Law:

- A. Employers and employees owe obligations not to engage in opportunistic behavior that deprives the other of the benefit of the occupational risk exchange, taking

159. See *supra* note 71 and accompanying text.

160. See Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 854 (2017) ("Both employees and the employer have a set of mutual interests that differentiate employment from other contractual relationships. And the employment relationship gives both employees and the employer discretion over aspects of the relationship that allow for opportunism. The employer—as legal entity, and as aggregate of the individuals who comprise the employer—has relational responsibilities similar to fiduciary duties. Therefore, it makes sense to characterize the employment relationship as a whole as fiduciary, and the employer as a fiduciary of its employees.").

- into account both the external and internal norms guiding that exchange.
- B. An employer owes a fiduciary obligation to reasonably investigate and understand the safety and health risks presented by the working conditions of its employees.
 - C. An employer owes a fiduciary obligation to disclose all relevant information about these safety and health risks to employees and prospective employees, including an obligation to warn of any specific, nonobvious or complex risks.
 - D. Employees owe a fiduciary obligation to reasonably inform the employer of any safety and health risks which may not be known or understood by the employer.
 - E. An employer owes a fiduciary obligation to not subject their employees to unnecessarily dangerous working conditions that most reasonable employees would reject in light of their terms of employment.
 - F. Employees owe a fiduciary obligation to take care in the performance of their duties.

This set of substantive anti-opportunism obligations extends beyond the formal contractual obligations in typical employment exchanges. And the obligations are fundamentally contrary to the presumption underlying the strong version of *Farwell's* fellow servant rule and the economic account – that a worker is presumed to understand and accept all risks of the work and that wages are presumed to have been adjusted accordingly. But the formulation tracks the parties' cooperative motivations and accepts the influence of external and internal norms.

Despite being extra-contractual, this formulation is largely reflected in existing worker safety law. The Act's general duty clause obligates employers to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his

employees.”¹⁶¹ Nothing in the reasoning of *Farwell* would require that a workplace be free from such recognized hazards; nor can the general duty clause be attributed entirely to the existence of any identified market failure. The general duty clause is the legal manifestation of prevailing social (external) norms surrounding the employment relationship.¹⁶²

This formulation is also consistent with OSHA’s Hazard Communication standard, which obligates an employer to disclose Material Safety Data Sheets (MSDS) to employees to explain existing scientific knowledge on the risks posed by exposure to potentially hazardous substances in the workplace.¹⁶³ The relational account would go further, however, by imposing an affirmative good faith duty on employers to *investigate* potential hazards presented in their workplaces. Skeptics of the Hazard Communication standard worry that it leaves employers (and chemical manufacturers and suppliers) free to use and market potentially hazardous substances without imposing any affirmative duty to research the substances, and also allows employers to withhold information about the chemical makeup of substances under an assertion of trade secret protection.¹⁶⁴ A

161. 29 U.S.C. § 654(a)(1) (2012). The Act’s general duty clause is both broader and narrower than the common law duty. Broader, because the clause requires employers to ensure that their workplaces are “free” from all “recognized hazards” if the hazards threaten serious injury or death; in contrast, the common law required only that employers exercise ordinary care (i.e., a negligence standard) in providing safe workplaces. See Miller, *supra* note 146, at 616. Narrower, because the clause imposes no obligation to eliminate unrecognized hazards (regardless of the potential harm or the unreasonableness of failing to eliminate such hazards) and no obligation to remove hazards that are likely to cause harm falling short of serious physical harm or death. See *id.* at 617. The Restatement of Employment Law adopts a negligence standard, setting out a duty “to provide a reasonably safe workplace, including reasonably safe equipment . . .” RESTATEMENT OF EMPLOYMENT LAW, § 4.05 (AM. LAW. INST. 2015).

162. Congress recognized that it would be impossible to speak with specificity to every possible workplace hazard in a manner that would be universally applicable to employers, given the infinite possible conditions of various workplaces. See *infra* note 171 and accompanying text.

163. 29 C.F.R. § 1910.1200(c) (2012).

164. See, e.g., Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1702 n.285 (2004); Susan D. Carle, Note, *A Hazardous Mix: Discretion to Disclose and Incentives to Suppress Under OSHA’s Hazard Communication Standard*, 97 YALE L.J. 581, 585 (1988). The absence of any affirmative duty to investigate has made it difficult for OSHA to promulgate specific standards identifying permissible exposure limits for individual substances. This led former

relational account, built on recognition of cooperative motivations, suggests that the Hazard Communication standard should be strengthened.

Anti-opportunism ought to be recognized as a proper purpose of the Act, whether that recognition is based on relational contract theory or on an express recognition of quasi-fiduciary duties inherent in the special relationship of employment. The corollaries that flow from that recognition can help guide the further development of workplace safety regulation, including the resolution of disputes about the boundaries of occupational safety regulation.¹⁶⁵

V. ANTI-OPPORTUNISM AS A LIMITING PRINCIPLE:
RESOLVING THE *SEA*WORLD DILEMMA

Return to Judge Kavanaugh's two questions in *SeaWorld*.¹⁶⁶ When should we paternalistically decide that willing participants in sports or entertainment activities must be protected from themselves? And who decides whether the risk to participants is too high? This Part provides answers to both questions, showing that the anti-opportunism purpose of OSHA can function as a limiting principle. Taking Judge Kavanaugh's question about *who decides* first, this Part contends that OSHA (in its enforcement role) and the Occupational Safety and Health Review Commission (OSHRC) (in its adjudicatory role) are well-positioned to police relational opportunism in cases like *SeaWorld* because they have the technical expertise to carefully evaluate the factual context of individual employment relationships. Next, this Part examines the enforcement and fact-finding in *SeaWorld*, with an eye toward facts in the record demonstrating relational opportunism. This Part then

OSHA Director David Michael to solicit the public for ideas about creative ways to address OSHA's recognized inability to effectively promulgate and update PELs. *See also* David Michaels, Assistant Sec'y of Labor, Occupational Safety and Health Administration, Request for Information on Updating OSHA's Chemical Permissible Exposure Limits (Oct. 9, 2014) (transcript available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=3313).

165. The anti-opportunism principle and relational contract theory may also have important implications for resolving employee classification questions, considering the propriety of deregulatory reforms, and questioning the wisdom of workers' compensation opt-out alternatives and other workers' compensation reforms.

166. *See supra* note 11 and accompanying text.

compares the findings of fact in *SeaWorld* to the NFL and NASCAR hypotheticals, identifying potential distinctions. Finally, this Part urges the creation of an affirmative defense that can help cabin application of the general duty clause in inherently dangerous occupations to only those cases involving relational opportunism.

A. OSHA's Enforcement Structure

Judge Kavanaugh suggests that Congress, state legislators or regulators, or federal or state courts applying tort law are more appropriate entities to make determinations about restricting inherently dangerous jobs.¹⁶⁷ Congress, however, determined that workplace safety concerns merited a federal response¹⁶⁸ and that OSHA and OSHRC should be delegated enforcement and adjudicatory authority, respectively.¹⁶⁹ The choice was an appropriate and defensible one.

The Act's general duty clause is strikingly broad, but it has nonetheless withstood constitutional challenges based on its vagueness.¹⁷⁰ Congress included the general duty clause in the Act based on its recognition that it would be impossible to develop specific standards for every possible employment hazard.¹⁷¹ Congress presumably recognized that employment relationships and their accompanying safety risks are too diverse to capture fully in a comprehensive schedule of standards.

167. See *supra* note 11.

168. See Gross, *supra* note 144, at 249 ("Private industry and state regulation were not doing an adequate job of insuring health and safety in the workplace.").

169. See *id.* at 250-51.

170. Constitutional challenges to the Act's general duty clause on the basis of vagueness have been rejected by multiple federal courts of appeals. See *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983); *Bethlehem Steel v. OSHRC*, 607 F.2d 871, 875 (3d Cir. 1979); *Georgia Elec. v. Marshall*, 595 F.2d 309, 322, n.32 (5th Cir. 1979); see also *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981) (noting that any problems of fair notice under the general duty clause "dissipate when we read the clause as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required under the job conditions where the citation was issued.").

171. See S. Rep. 91-1282 (Oct. 6, 1970), as reprinted in 1970 U.S.C.C.A.N. 5177, 5186; Gross, *supra* note 144, at 253-54 ("The general duty clause is not a general substitute for reliance on standards, but simply enables the Secretary of Labor to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.").

After considerable debate about the Secretary of Labor's role, Congress ultimately decided on a split-enforcement model.¹⁷² It assigned only the prosecutorial function (including investigation, issuance of citations, and assessing penalties) to the Secretary of Labor, which exercises this authority through its designee, OSHA.¹⁷³ The authority to adjudicate citations is assigned to a separate agency, OSHRC, which acts as an impartial arbiter when employers challenge OSHA citations.¹⁷⁴

OSHA enforces the general duty clause through case-by-case adjudication.¹⁷⁵ Due to the residual nature of the general duty clause, any determination by OSHA to execute its prosecutorial function by citing employers for its violation will require highly fact-specific judgments by OSHA. But this appears to have been fully understood by Congress.¹⁷⁶ And it is a defensible choice. As Jay Feinman notes, a relational approach to interpreting parties' obligations is "contextual with a vengeance."¹⁷⁷ He writes that such a relational analysis requires "immersing itself in the facts of the

172. See Gross, *supra* note 144, at 250-51; George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987) ("[The Act] adopted a relatively novel and seldom-used feature in federal administrative practice—the split-enforcement model for agency adjudications.").

173. See 29 U.S.C. 658-59, 666 (2012); *Martin v. OSHRC*, 499 U.S. 144, 147, 151 (1991) ("If the Secretary (or the Secretary's designate) determines upon investigation that an employer is failing to comply with such a standard, the Secretary is authorized to issue a citation and to assess the employer a monetary penalty."); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 103 (2d Cir. 1996).

174. *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Although a neutral arbiter, the OSHRC owes a duty to actively and affirmatively protect the public. See *Brennan v. OSHRC*, 492 F.2d 1027, 1032 (2d Cir. 1974) (quoting *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965)) (comparing the OSHRC to the Federal Power Commission and noting that its role "as representative of the public interest" does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.").

175. See *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 17 (1st Cir. 1984).

176. Congressman William Hathaway drew a comparison between OSHA enforcing the general duty clause and the police making initial determinations about criminal violations:

[It has been said that] it would be up to an inspector to decide what the general duty was. I suppose that is true; it is up to the policeman to decide in the first instance whether or not we have broken a law, too, but we do have resort to the courts And hopefully, after a while, a body of law could be formulated so that later cases would have precedents behind them

116 Cong. Rec. 10631 (daily ed. Nov. 23, 1970) (statement of Rep. William Hathaway); see Gross, *supra* note 144, at 267-68.

177. See Feinman, *supra* note 57, at 742.

particular contract and of the contexts from which it arises.”¹⁷⁸ For such a specialized, highly-contextual, fact-specific analysis, administrative enforcement and adjudication in a specialized quasi-judicial forum makes sense.¹⁷⁹

Despite Judge Kavanaugh’s misgivings, Congress delegated to OSHA the enforcement function and to OSHRC the adjudicative function for fact-finding and determinations of general duty clause violations. This reflects a Congressional judgment to vest these powers, subject to judicial review, with OSHA and OSHRC, in recognition of their expertise in dealing with the infinite variety of employment relationships and threats to workplace safety. In the Act, Congress defensibly answered the question of *who decides* that the risks to employees are too high – OSHA and OSHRC.

B. Relational Opportunism in SeaWorld

Evidence of extra-contractual internal norms and indications of opportunism permeate the factual record in *SeaWorld*. OSHA’s issuance of the general duty citation and proposed abatement, along with OSHA’s defense of its actions in litigation before OSHRC and the D.C. Circuit, reveal that OSHA was acting as an effective check on the employer’s opportunistic behavior. The record reveals that SeaWorld was acting opportunistically by exposing trainers to preventable but known and unpredictable risks, while minimizing and mischaracterizing those risks to the trainers. The record also supports the conclusion that SeaWorld was shifting to trainers the responsibility to ensure that the workplace was adequately safe. To view the employment relationship in its full context requires careful attention to the factual record.

SeaWorld relied on its trainers to engage in what SeaWorld termed “operant conditioning” of the orcas and to recognize signs of any abnormal behavior.¹⁸⁰ Operant conditioning involved

178. *See id.*

179. *See generally* Gross, *supra* note 144, at 260 (“In fact, next to the Tax Court of the United States and the United States Court of Military Appeals, [the OSHRC] is the closest approximation to a court existing in the executive branch.”).

180. *See* Final Brief for Respondent Secretary of Labor at 30–31, *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2013) (No. 12-1375). The D.C. Circuit majority noted

trainers offering the whale positive reinforcement for desirable behavior, ignoring (offering no reward for) undesirable behavior, and recognizing any “precursors” or cues that the whale may not be behaving as expected.¹⁸¹ SeaWorld then kept incident reports on abnormal behavior exhibited by the orcas, though a SeaWorld witness admitted that SeaWorld failed to document “a few” incidents.¹⁸² SeaWorld and other marine parks having a relationship with SeaWorld had experienced three prior human deaths in connection with orca whales, as well as several physical injuries and close calls.¹⁸³ SeaWorld’s management relied primarily on information provided by the employees themselves to determine whether conditions were safe.¹⁸⁴

The record contained significant evidence of internal norms specific to trainers’ employment relationship that likely influenced trainers’ relational expectations. Trainers were required to sign a waiver-like document acknowledging the “inherent risks” in the job and indicating that they agreed to tell a supervisor if they became uncomfortable with taking “the calculated risks.”¹⁸⁵

But SeaWorld characterized these risks as both controllable and predictable, through corporate documents and culture. One of the trainers’ manuals provided: “While the potential for serious physical injuries exists, if trainers maintain top physical condition, and adhere to safety and departmental procedures, the potential for injury is dramatically reduced.”¹⁸⁶ This was driven home by a culture that cultivated a false “mythology among the trainers that they have a deep understanding of the whales.”¹⁸⁷ SeaWorld’s training and discussion of orca behavior, including likening it to the ability to read or predict the behavior of horses or dogs, may

that SeaWorld’s “operant conditioning” measures and safety protocols did not make the orcas “safe,” but rather “demonstrate[d] SeaWorld’s recognition that the killer whales interacting with trainers are dangerous and unpredictable.” *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1209 (2014).

181. *SeaWorld of Florida*, 2012 WL 3019734, at *4.

182. *Id.* at *18.

183. *Id.* at *14–15, *17–18. One of these three prior deaths was not a trainer, but an individual who stayed in the park after hours and entered Tilikum’s pool. It is not known whether Tilikum played a role in his death. *Id.*

184. Final Brief for Respondent Secretary of Labor, *supra* note 180, at 30–31.

185. *SeaWorld of Florida*, 2012 WL 3019734, at *16.

186. *Id.*

187. Final Brief for Respondent Secretary of Labor, *supra* note 180, at 18.

have led trainers to misunderstand the real, inevitable, and ultimately non-controllable and unpredictable risks posed by orcas in captivity.¹⁸⁸

The ALJ cited an example that highlights the true relational expectations of the parties. On incident report forms, one standard question was whether the acts of the employee (trainer) contributed to the accident. A trainer comment circulated in response to an incident suggested that this form question was unnecessary, because the answer was always yes:

Since we condition all aspects of the behavior and the behavior broke down then we do contribute to the incident. I also seem to remember that we discussed this and said that since the answer is always yes that we would drop this from future incident reports and just assume it as such.¹⁸⁹

As the ALJ observed, this revealed the culture that SeaWorld cultivated: “All behavior is thus predictable. . . . [I]njuries sustained by a trainer will always be traceable to human error. It is not the operant conditioning program that is inadequate; it is the performance of the trainer that is flawed.”¹⁹⁰

SeaWorld’s stated policies also conflicted with the reality of the employment relationship in a way that parallels *Barnes*, discussed above. In *Barnes*, employees often rode the gravel train with the consent of the railroad, in an effort to save time and be more productive—seemingly demonstrating a cooperative motivation. Only after Barnes’ injury did the railroad opportunistically claim that he should have waited for a passenger car, and that by riding the gravel train he did so at his own risk. Likewise, the ALJ found that SeaWorld had an “expectation that [trainers] will continue with the show performance regardless of the precursors demonstrated by the killer whales.”¹⁹¹ The ALJ continued, “Although SeaWorld’s official stance is that trainers have the option to end a show if they feel uncomfortable with the situation, the reality is SeaWorld discourages such action.”¹⁹² SeaWorld engaged in “a form of Monday morning quarterbacking,” by

188. *See id.*

189. *SeaWorld of Florida*, 2012 WL 3019734, at *25.

190. *Id.* at *26.

191. *Id.* at *27.

192. *Id.* at **27-28 (citing critiques of trainers who cut performances short).

“second-guessing” their actions and invariably identifying a trainer error that contributed to the incident.¹⁹³

In its investigation and prosecution of the general duty clause violation, OSHA was in a position to get a complete picture of the SeaWorld trainers’ relationship with their employer, in the context of all the external and internal norms that shaped that relationship. OSHA pinpointed opportunistic behavior, and the OSHRC ALJ, acting as neutral arbiter of the citation, cited evidence of that opportunistic behavior in affirming the citation. SeaWorld did not live up to the relational expectations of its trainers, and OSHA was well-positioned to recognize that. Far from acting as if it had quasi-fiduciary duties to its employees, SeaWorld appears to have intentionally and opportunistically instilled a culture that misleadingly suggested that operant conditioning rendered the workplace safe, despite formalistic disclaimers. If OSHA regulation can be justified by an anti-opportunism purpose, then the citation and proposed abatement in *SeaWorld* were appropriate.

C. NASCAR and the NFL

Judge Kavanaugh saw no principled distinction between the proposed abatement in *SeaWorld* and banning tackling in the NFL or setting speed limits in NASCAR races. But by examining the available evidence of internal norms in the relevant employment relationships, distinctions from *SeaWorld* emerge. This subpart considers those distinctions.

NASCAR is the easier case.¹⁹⁴ Over the years since the first “Strictly Stock” race in 1949, NASCAR has introduced a number of features designed to make stock car racing safer.¹⁹⁵ These include, *inter alia*, six-point restraint systems, body panel specifications, frame enhancements, roll cages, roof flaps, and impact-absorbing

193. *Id.* at *28.

194. Set aside for purposes of this discussion the question whether NASCAR drivers are employees or independent contractors. NASCAR maintains that its drivers are independent contractors. See Steven Cole Smith, *How the NFL's Hidden Scourge Threatens NASCAR Drivers*, ROAD & TRACK (Jan. 31, 2014), <http://www.roadandtrack.com/car-culture/a6253/slipping-away-65-6-roa0214/>.

195. See generally Mark Aumann, *Safety Improvements, Changes Define Racing Eras*, NASCAR.COM (Feb. 16, 2011), https://www.nascar.com/en_us/news-media/articles/2011/02/16/nascar-safety-history.html.

track walls.¹⁹⁶ But there does not appear to be publicly available concrete allegations or evidence that NASCAR acted opportunistically—contrary to the relational expectations of the drivers. For example, my research uncovered no evidence that NASCAR has been accused of hiding evidence of risks of injury or death from high-speed collisions. Although chronic traumatic encephalopathy (CTE) is now on NASCAR's (and drivers') radar,¹⁹⁷ I have uncovered no concrete allegation (unlike in *SeaWorld* or in litigation against the NFL) that NASCAR unreasonably mischaracterized or failed to investigate or disclose evidence of any connection between racing crashes and the development of CTE.

If NASCAR had indeed acted contrary to the relational expectations of the parties—including by breaching a fiduciary obligation to reasonably investigate and disclose any risks of stock car racing—then an OSHA general duty clause citation and abatement might well have been appropriate.¹⁹⁸ But without any such indication, Judge Kavanaugh's comparison of NASCAR drivers to the position of *SeaWorld's* orca trainers, as revealed by the factual record in the OSHRC proceedings, is unconvincing.

The NFL hypothetical advanced by Judge Kavanaugh is more complex. For NFL players, there appears to be an important distinction between current and former players. Several former players have specifically alleged in litigation that the league was aware of research on the long-term effects of repeated head trauma caused by tackling on the brain, yet intentionally concealed that

196. See *NASCAR Safety Improvements*, FOX SPORTS (Oct. 20, 2016, 4:52 PM), <https://www.foxsports.com/nascar/gallery/nascar-safety-improvements-060614>.

197. See Smith, *supra* note 194; see also *Concussions in NASCAR Gain Drivers' Attention*, N.Y. TIMES (Feb. 23, 2013), <http://www.nytimes.com/2013/02/24/sports/nascar-acknowledges-risk-and-dangers-of-drivers-concussions.html>; Ken Willis, *NASCAR and Concussions: An Old Problem, a New Concern*, GATEHOUSE MEDIA, <http://gatehousenews.com/nascarconcussion/> (last visited Feb. 23, 2019).

198. See *supra* Part IV.C. (discussing the anti-opportunism corollaries B. and C.); see also Plaintiffs' Complaint for Damages and Demand for Jury Trial, *Maxwell v. NFL*, No. BC465842, (Cal. Super. July 19, 2011), 2011 WL 2834814. Again, for purposes of this discussion I will assume that NASCAR drivers are protected by OSHA. See *supra* note 194. Another hurdle for an OSHA citation of NASCAR is that any ordered abatement must be feasible, and speed limits may fail this test if they would fundamentally alter the nature of the product. A similar argument was made and rejected in *SeaWorld*. 748 F.3d 1202, 1215 (2014).

information from players.¹⁹⁹ A class of *retired* NFL players sued the league, and a settlement fund, including payouts of up to \$5 million per participating class member, has been approved.²⁰⁰ In the case of those former players, the NFL may well have been operating in violation of the general duty clause, interpreted as an instrument of anti-opportunism.

But for current NFL players who joined the league after widespread reports about CTE concerns, the situation is different. Their relational exchanges look different, because the internal and external norms have changed, as well as the NFL's behavior. The NFL has pledged to fund further scientific research into CTE and the potential connection to head trauma resulting from tackle football.²⁰¹ The NFL has also instituted a number of rule changes designed to reduce the risk.²⁰² These steps alone might not be enough to show that the NFL has not acted opportunistically with regard to current players; but the contextual facts shaping current players' relational expectations certainly differ significantly from those that faced retired players.²⁰³ On the evidence now publicly available, current players appear to have a weaker case (with respect to them) that the NFL engaged in opportunistic, self-interested behavior that ran contrary to their relational expectations.²⁰⁴

199. See *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2019 WL 95917 (E.D. Pa. Jan. 3, 2019). Similar concussion litigation has been filed by former National Hockey League (NHL) players. See *In re Nat'l Hockey League Players' Concussion Injury Litig.*, MDL No. 14-2551, 2017 WL 3141921 (D. Minn. July 24, 2017).

200. See *In re Nat'l Football League Players' Concussion Injury Litig.*, 2019 WL 95917. A final class settlement was approved by the district court, as amended, on May 11, 2015, and became effective following appeals on January 7, 2017. The settlement includes payment for medical monitoring and monetary awards for certain diagnoses, including CTE, Alzheimer's Disease, ALS, Parkinson's Disease, and dementia. See NFL CONCUSSION SETTLEMENT, www.nflconcussionsettlement.com (last visited February 25, 2018).

201. *NFL Issues Response to CTE Research Report*, NFL, <http://www.nfl.com/news/story/0ap3000000822159/article/nfl-issues-response-to-cte-research-report> (last updated July 26, 12:02 PM).

202. *Id.*

203. Bill Bradley, *Richard Sherman: NFL Players Are Aware of Risks of Playing Football*, NFL, <http://www.nfl.com/news/story/0ap2000000268627/article/richard-sherman-nfl-players-are-aware-of-risks-of-playing-football> (last updated Oct. 24, 2013, 12:24 PM) ("The players before us took that risk too, but they still sued the league because they felt like they were lied to about the long-term risks. Today, we're fully educating guys on the risks and we're still playing. We have not hidden from the facts.").

204. See *id.*

D. A Proposed Affirmative Defense

Applying relational insights to the *SeaWorld* case and the NFL and NASCAR hypotheticals suggests the creation of a doctrinal affirmative defense to an OSHA general duty clause citation. The affirmative defense would be based on the anti-opportunism corollaries identified above²⁰⁵ and would be designed to cabin OSHA citations to only those cases involving employers who act contrary to the relational expectations of the parties to the employment exchange. An employer in an industry that involves inherent danger could successfully defend against an OSHA general duty clause citation and abatement order by demonstrating both of the following two elements:

- (1) the occupation involves necessary health or safety risks, the elimination of which is not possible without changing the essence of the business; and
- (2) the employer has met its fiduciary obligations to (a) reasonably investigate the health and safety risks posed by the occupation, and (b) disclose all relevant information about the health and safety risks to employees and prospective employees, including warning of any specific, nonobvious or complex risks.

This affirmative defense would provide a safe harbor for certain professional sports, entertainment, law enforcement, emergency response, and other occupations in which some level of risk is inherent and unavoidable. It would also permit context-specific analysis of the unique risks posed in a variety of employment exchanges, potentially including NASCAR, the NFL, and other contact professional sports. Yet, a finding that an occupation contains some level of inherent risk would not alone be sufficient to avoid citation. Rather, the employer must affirmatively demonstrate that it has not acted opportunistically with respect to those risks. This required showing could provide the distinction that Judge Kavanaugh seeks between the factual record in *SeaWorld* (and perhaps former NFL players) and the situation for current NASCAR drivers and NFL players. The narrowly limited nature of

205. See *supra* Part IV.C. (specifically, Corollaries A.-C.).

this affirmative defense would serve the Act's purposes by protecting employees from precisely the sort of opportunistic behavior by employers that was found by the ALJ in *SeaWorld*.²⁰⁶

VI. CONCLUSION

The search continues for the overarching purpose(s) of employment law, as a field distinct from contract and tort law. Employment contracts are not discrete bargains, and utility maximization is not the sole motivation for the parties. Cooperative motivations also drive the exchange and must be considered when identifying the justifications for employment regulation. Relational contract theory suggests that anti-opportunism is an important justification for market interventions that regulate the employment relationship. This anti-opportunism purpose has been underappreciated in the employment law scholarship generally, and has not been given sustained consideration in the specific context of worker safety regulation under the Act.

In this Article, I have attempted to show that the anti-opportunism principle can answer both of Judge Kavanaugh's questions. If anti-opportunism is a proper purpose of the Act, then it can justify workplace safety regulations in a broader set of cases than previously recognized, but also serve as a limiting principle to guide enforcement of the Act's admittedly broad general duty clause. The anti-opportunism principle has the potential to answer fundamental questions about the appropriateness of market interventions in inherently dangerous jobs. And the anti-opportunism principle can also explain Congress' decision to delegate enforcement and adjudicatory authority over such difficult questions to OSHA and OSHRC, respectively.

Relational contract theory and the principle of anti-opportunism hold promise for bringing a degree of order to the mishmash of employment law. The implications likely extend beyond worker safety regulation to questions of employee classification, the possibility of reciprocal fiduciary (or quasi-fiduciary) duties of loyalty, employee privacy rights, workers' compensation reforms, and the wide variety of common law and

206. *See supra* Section V.B.

statutory limitations on the employment at-will rule. Such questions are ripe for further scholarly exploration.

