Managing Identity: Buying Into the Brand at Work

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ABSTRACT: Employment has shifted from a relatively stable and secure relation in which shareholders bore the risks associated with the market and firms buffered the risks vis-à-vis workers to a dynamic relation characterized by employment insecurity and individual responsibility. Modern businesses face new management challenges stemming from decreased employee loyalty and difficulties in supervising and controlling the workforce. Firms have responded by implementing internal branding programs that parallel consumer marketing programs but target workers rather than consumers. The goal of such programs is to re-align employees' self-interest with that of the firm, persuading employees to internalize the firm's brand so that they "live the brand" and react instinctively "on-brand." Identity-based brand management, the most aggressive and potentially effective of the internal branding programs, aims to induce employees to view their employment as a personal relationship akin to a family tie, imbuing the economic transaction with emotional significance. In this psychological framework, workers' decisions to invest in the firm—by staying and rejecting other labor market alternatives, and by purchasing company stock in their individual retirement plans—signify emotional attachment and faith. Understanding how identity-based brand-management programs work sheds light on why employees consistently ignore conventional advice against over-investment in company stock in their individual retirement accounts, with potentially disastrous effects should the firm fail. The recent wave of "stock drop" litigation triggered by the recession reveals an even more disturbing trend: as the recession deepened, employees invested more, not less, in their firms.

Despite its willingness to regulate consumer advertising and dissemination of information to shareholders, the law has steadfastly refused to regulate

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internal branding or the investment choices that it influences. The traditional justification for the law's refusal to intervene to protect employees from losses stemming from over-investment in their firms has been that employees unilaterally choose to make these investments: they choose employment at a particular firm, they choose to remain at the firm, and they choose to invest in company stock. Drawing on research by management theorists, economists, and sociologists concerning the potential for manipulation of employees' psychological framework through identity-based brand management, I argue that the law's matrix of unilateral choice to invest at a particular moment in time is only half the story. Though employees are not mindless victims or dupes, their vulnerability to brand-management programs that influence their frame of reference over time fundamentally alters the lens through which they view investment choices: branded employees demonstrate their loyalty by buying into the firm's brand. I contend that the absence of regulation is unsustainable, and sketch the contours of possible legal responses.

I. INTRODUCTION

The corporate brand is the most valuable asset that most modern businesses possess.[1] Brands infuse a firm's products or services with cultural meaning, enhancing corporate profit margins in two important ways. First, brands create the opportunity for brand extensions—the expansion of production or service into a previously untapped but related customer base and market already created for the brand. Second, brands allow a firm to separate itself and its reputation from the people who make the products or provide the services, thus rendering workers fungible and facilitating outsourcing of production to lower-cost labor.[2] Marketing research shows that strong brands influence brain cells differently than weak ones, producing a more dramatic neurological reaction.[3] Small wonder, then, that businesses spend billions constructing brands and marketing them to consumers.[4]

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1. TOM BEAUDOIN, CONSUMING FAITH: INTEGRATING WHO WE ARE WITH WHAT WE BUY 76 (2003) (noting that for many firms the identity and strength of the brand are more important to maintaining market share than the quality of the product itself).

Historically, branding simply signified ownership of property, as in the branding of livestock. In the modern era however, branding is designed to differentiate a product, service, or individual from others in the mind of the target market and, in doing so, enhance profits. Modern branding practices have evolved in three waves. The first wave, most prevalent during the 1990s, focused primarily on marketing and advertising the firm's product. The second wave, beginning in the late 1990s and still continuing, emphasized creating and sustaining the brand across the firm internally as well as externally. Brand values and missions thus permeate all aspects of the firm's policies, including human resources. The third wave featured individual branding, first by celebrities, and later by all who sought to market themselves in the labor force. Majken Schultz, Yun Mi Antorini & Fabian F. Csaba, *Corporate Branding—An Evolving Concept*, *in* CORPORATE BRANDING: PURPOSE/PEOPLE/PROCESS 9, 10–11 (Majken Schultz et al. eds., 2005). This Article focuses primarily on developments in the second wave of branding.

2. BEAUDOIN, *supra* note 1, at 70; *see also* NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 195–97 (2000) (arguing that as a firm's brand value increases, its manufacturing process becomes increasingly devalued, and pointing out how this replicates the division of labor between mind and body that has characterized management efforts to control labor). Beaudoin argues that the ultimate goal of some firms is "weightlessness"—to free themselves altogether from the corporeal world of labor. BEAUDOIN, *supra* note 1, at 69.

The corporate brand is also a powerful vehicle for shaping and controlling consumption, increasing the market for the product or service. Professor George Ritzer argues persuasively that modern capitalism is founded primarily on control and exploitation of consumption rather than on control and exploitation of the labor process. GEORGE RITZER, THE MCDONALDIZATION THESIS: EXPLORATIONS AND EXTENSIONS 68–70 (1998).

3. Kevin Helliker, *This Is Your Brain on a Strong Brand: MRIs Show Even Insurers Can Excite*, WALL ST. J., Nov. 28, 2006, at B1 (reporting on a study establishing that the brain reacts powerfully to strong brands, even those associated with "dull" topics such as insurance). *See generally* Carolyn Yoon et al., *A Functional Magnetic Resonance Imaging Study of Neural Dissociations Between Brand and Person Judgments*, 33 J. CONSUMER RES. 31 (2006) (using neuroimaging to study responses to brands).

4. The branding literature is voluminous. On the significance and value added by brands to businesses, their products, and services, see generally DAVID A. AAKER, MANAGING BRAND

But promoting the corporate brand to consumers through advertising is only half the story for service businesses, where front-line workers are the primary point of contact with consumers and labor cannot be so easily separated from its output in the consumer's mind. In a service business, the front-line employee literally embodies the brand.[5] In order to deliver on the brand promise made through advertising, service firms must ensure that

EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME (1991) (describing how brands produce value for businesses); DOUGLAS ATKIN, THE CULTING OF BRANDS: WHEN CUSTOMERS BECOME TRUE BELIEVERS (2004) (comparing brands to cults in terms of their effect upon consumers); JANELLE BARLOW & PAUL STEWART, BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE (2004) (describing service branding); LESLIE DE CHERNATONY & MALCOLM MCDONALD, CREATING POWERFUL BRANDS IN CONSUMER, SERVICE AND INDUSTRIAL MARKETS (2d ed. 1998) (describing the dialogue between consumers and marketers and how consumers adjust brand messages to reinforce prior expectations); KEVIN FORD, BRANDS LAID BARE: USING MARKET RESEARCH FOR EVIDENCE-BASED BRAND MANAGEMENT (2005) (discussing role played by brands in converting market transactions into relationships with customers that in turn generate additional value for the firm); DOUGLAS B. HOLT, HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING (2004) (explaining how brands that provide compelling, consensus expressions of societal values become iconic); NICHOLAS IND, LIVING THE BRAND: HOW TO TRANSFORM EVERY MEMBER OF YOUR ORGANISATION INTO A BRAND (2001) [hereinafter IND, LIVING THE BRAND] (discussing the functions of brands and their role in motivating employees); NICHOLAS IND, THE CORPORATE BRAND (1997) [hereinafter IND, THE CORPORATE BRAND] (explaining why branding has assumed so much significance in modern society, and noting the centrality of employees to the brand experience in service sector businesses); KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY (1998) (describing why brands matter and how they assist businesses with increasing profit margins); KLAUS SCHMIDT & CHRIS LUDLOW, INCLUSIVE BRANDING: THE WHY AND HOW OF A HOLISTIC APPROACH TO BRANDS (2002) (explaining emotional appeal and power of brands).

5. Although my focus here is on psychological branding, appearance regulation is an important aspect of branded service in many businesses. Thus far, legal scholars' analyses of internal branding have focused on its aesthetic aspects. *See, e.g.*, Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2545 (1994) (proposing that appearance codes be evaluated by whether they further gender-based disadvantage in the workplace rather than by whether they conform to community norms); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1112–13 (2006) (reframing appearance regulation in the workplace as an invasion of privacy that damages autonomy even where it does not violate anti-discrimination law); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1445–48 (1992) (arguing for a right of autonomous appearance and for a requirement that employers purchase the power to control appearance, subject to anti-discrimination guidelines). In 2007, Duke University School of Law hosted a symposium inspired by the case of Darlene Jespersen, a bartender at Harrah's Casino; Jespersen was fired for refusing to comply with Harrah's appearance and grooming code, which required her to wear makeup. Devon Carbado, Catherine Fisk & Mitu Gulati, *Foreword: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL'Y 1, 1 (2007) (explaining the premise of the symposium). Articles and essays authored for the symposium, entitled "Makeup, Identity Performance and Discrimination," were published in volume 14 of the Duke Journal on Gender Law and Policy. *Id.* at 1; *see also* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 16 (2007) (addressing sexual stereotypes' impact on branding).

workers internalize brand values and represent the brand effectively.[6] Accordingly, management theorists and business consultants recommend that firms invest at least as much in internal marketing to employees—that is, selling the corporate brand inside the firm—as they do in external advertising campaigns directed at consumers.[7] By managing employees' identities and aligning them with the firm's brand, employers can nurture an emotional attachment to the firm that yields a significant payoff in employee loyalty and productivity, and, ultimately, in customer satisfaction and loyalty.[8]

Internal branding programs utilize a coordinated hiring, training, disciplinary, and reward structure to imprint brand values upon workers' identities and create an emotional connection with the firm so that the boundaries between employees' own interests and those of the firm begin to blur.[9] The most effective branding programs secure a competitive advantage for the branded business by generating a sense of community and belonging that induces extraordinary effort and productivity on the job, furthers cohesion even among an increasingly diverse workforce, minimizes the need

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6. Front-line workers in service firms must "transform espoused brand messages into brand reality for customers and other stakeholders." Khanyapuss Punjaisri & Alan Wilson, *The Role of Internal Branding in the Delivery of Employee Brand Promise*, 15 J. BRAND MGMT. 57, 60 (2007); *see also* Libby Sartain, *Branding from the Inside Out at Yahoo!: HR's Role as Brand Builder*, 44 HUM. RESOURCE MGMT. 89, 89 (2005) (describing branding as "selling a promise").

7. *See, e.g.*, Colin Mitchell, *Selling the Brand Inside*, HARV. BUS. REV., Jan. 2002, at 99, 99–100 (explaining that internal marketing to employees is as important as external advertising).

8. Of course, managing workers' emotions is not a new concept. Arlie Hochschild's path-breaking work in the late 1970s and early 1980s revealed how some service businesses harnessed workers' "emotional labor" in the workplace—"the management of feelings to create a publicly observable facial and bodily display" intended to produce a particular state of mind in others—and converted it into a saleable commodity. ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 7 & n.* (1983); *see also* Cameron Lynne Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, *in* WORKING IN THE SERVICE 1, 3 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996) (explaining that lower-level service workers—the "emotional proletariat"—were most likely to be regulated in this fashion because higher-status professional workers were typically guided by professional norms); Anat Rafaeli & Robert I. Sutton, *Expression of Emotion as Part of the Work Role*, *in* PSYCHOLOGICAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 106, 111–13 (Barry M. Staw ed., 3d ed. 2004) (analyzing the centrality of emotion work in service sector occupations).

Many service businesses require that employees portray particular emotional states while performing their work roles. For example, grocery stores require check-out clerks to greet customers cheerfully and smile while they are serving them; funeral directors must express sadness; and bill collectors and bouncers must convey hostility. *Id.* at 106. Some employers use training programs to socialize employees to display such emotions, monitor them to ascertain that they comply, and reward or discipline them accordingly. *Id.* at 110. Identity-based brand-management programs—the subject of this Article—are different; they seek to transform workers' identities rather than simply to regulate their behavior or emotions relative to job performance.

9. Firms are advised to "bring the brand alive" for workers through a professional campaign that runs parallel to consumer marketing and advertising campaigns, except that the target is the worker rather than the consumer. Mitchell, *supra* note 7, at 101–02, 105.

for surveillance and close supervision, and reduces employee turnover.[10] Once branded "from the inside out," workers will essentially manage themselves, instinctively making decisions as if they were owners rather than workers.[11]

Unlike consumer advertising[12] or information communicated to shareholders,[13] the content of internal branding programs aimed at workers is not directly regulated by law. Even where the employer makes blatantly fraudulent misrepresentations intended to induce greater effort or attachment to the firm, the law affords no remedy to workers who rely upon the firm's statements.[14] The rationale for this seeming inconsistency at law is twofold: first, workers make only a transient investment of labor in the firm (rather than a more permanent investment of capital in the firm's products or the firm itself); and second, any investment made is the product of a freely chosen market exchange—workers are "free to quit" and can easily extricate themselves from the firm when the bargain is no longer advantageous.[15] The law thus distinguishes between marketing efforts aimed at consumers and investors, who receive protection against fraud, and workers, who do not.

This dichotomous legal structure rests upon false premises. Workers are, in fact, investors in the firm. Workers invest psychologically in the firm;

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10. *See infra* Part III.B (discussing the benefits of branding).

11. *See* Sartain, *supra* note 6, at 89–90 (discussing branding); *infra* notes 128–30 and accompanying text (discussing how branding can both engage and constrain workers).

12. False or deceptive advertising may subject an advertiser or advertising agency to oversight by the Federal Trade Commission or the Food and Drug Administration, among other state and federal agencies. Jeffrey S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*, 43 IDEA 509, 510 (2003). Additionally, health regulation in the interests of the public good may impose affirmative obligations on firms to disclose information. For example, New York City recently enacted a health-code provision requiring restaurants with fifteen or more branches nationally to post calorie counts on menus; similar legislation has been introduced in sixteen other states. Wendy N. Davis, *Biting Back at Obesity*, A.B.A. J., Aug. 2009, at 17–18, *available at* http://www.abajournal.com/magazine/article/biting_back_at_obesity/.

13. The Securities and Exchange Commission regulates annual and periodic reporting by publicly held companies; it also reviews the materials used to solicit shareholder's votes and the disclosures required for anyone seeking to acquire more than 5% of a company's securities. U.S. Sec. & Exch. Comm., The Laws That Govern the Securities Industry, http://www.sec.gov/about/laws.shtml (last visited Apr. 15, 2010).

14. *See* Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 719, 735–36 (1997) (highlighting the law's failure to protect workers against fraudulent statements designed to induce investment of labor and contrasting it with the protection afforded to investors and shareholders under federal securities law).

15. Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761 (La. 1932); Savage v. Spur Distrib. Co., 228 S.W.2d 122, 124 (Tenn. Ct. App. 1949); *see also* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 15 (1983) (observing that law assumes that workers possess "no stake, interest, or investment in the 'common enterprise' other than the right to receive wages for the sale of labor power").

for most, work is simultaneously constitutive and economically necessary.[16] Moreover, workers do not make this psychological investment unilaterally, free from employer influence. Modern employers deliberately solicit a deeper psychological investment through internal branding programs designed to engender the sort of loyalty necessary to gain a competitive advantage in the highly competitive service sector market. The more effective the branding program and the more powerful the appeal of the brand, the more completely workers will embrace it and make investments in the firm that transcend the wage bargain. Internal marketing thus plays a significant role in promoting workers' psychological bond with the firm.

Furthermore, many workers invest more than their hearts and bodies in the firm—they invest their savings. A surprisingly high percentage of employees hold disproportionate amounts of company stock in undiversified 401(k) retirement accounts, despite media coverage attendant to the implosion of firms like Enron and WorldCom, where workers lost their jobs and their life savings simultaneously.[17] In fact, workers have responded to the current recession by investing *more*, not less, in the companies that employ them,[18] despite warnings that lack of diversification is particularly risky for those who have both human and financial capital invested in a single company. Here, too, the law has followed a hands-off course: although the Employee Retirement Income Security Act of 1974 ("ERISA")[19] regulates the structure of employer-established retirement accounts, it imposes very few constraints on the offering of company stock to workers as an investment vehicle in individual accounts such as 401(k)s. Reasoning that employees freely choose how to invest their retirement accounts, the law refuses to protect employees from themselves.

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16. Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1890–91 (2000); *see also* HARRY BRAVERMAN, LABOUR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 45–58 (1974) (explaining that we define our humanity at work); PAUL DU GAY, CONSUMPTION AND IDENTITY AT WORK 9 (1996) (observing that work is a stable source of identity and meaning in people's lives); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–33 (1997) (discussing the significance of work in the formation of personal identity and full citizenship).

17. *See* James J. Choi, David Laibson & Brigitte C. Madrian, *Are Empowerment and Education Enough? Underdiversification in 401(k) Plans*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 151, 153 (2005) (arguing that media coverage of the losses suffered by employees at Enron, WorldCom, and Global Crossing as a result of under-diversification of retirement portfolios had only a minimal impact on investment patterns by employees in other companies). The authors found a 2% decline in employee investment in company stock following the media blitz, and conclude that legislative reforms aimed at educating employees about investment in company stock will not be sufficient to address the problem. *Id.*

18. Eleanor Laise, *Despite Risks, Workers Guzzle Company Stock*, WALL ST. J., Mar. 5, 2009, at D1 ("[M]any workers at troubled companies are still gorging on their employers' shares."); *see infra* notes 300–03 and accompanying text (noting a sizable minority of workers with poorly diversified portfolios).

19. Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2006).

This Article argues that the law's assumptions about the voluntariness of workers' investment choices are questionable and its laissez-faire regulatory approach misguided, particularly where employers manipulate workers' psychological frameworks in ways that alter their perceptions of their own self-interest. Part II tells the story of the corporate embrace of new market norms of flexibility, efficiency, and mobility in lieu of the old norms of stability and paternalism vis-à-vis workers. Part III explains how employers are addressing the challenges the new model poses for employee loyalty and retention with internal branding programs and examines how these strategies intersect with the perennial struggle for control in the workplace. Employers simultaneously enhance employee attachment to the firm and obtain a powerful means of control over the labor force in two ways: by substituting a requirement of commitment to the firm's brand for the loyalty that traditionally arose from social norms of long-term job tenure and by adopting sophisticated new psychological branding techniques aimed at influencing employees' identity, rather than simply controlling their behavior.

Part III also discusses how internal branding programs operate, looking to programs at Southwest Airlines, Disney, and Robin Leidner's study of "Combined Insurance" for concrete illustrations; catalogues the advantages that employers reap from such programs; and discusses the reasons why employees do not resist them. Part IV analyzes the impact that identity-based brand management has on workers' psychological investments in the firm, particularly the formation of psychological contracts and the realignment of employees' identities with that of the firm.

Part IV discusses management practices at People Express Airlines to illustrate the interplay between identity-based brand-management programs and psychological and financial investment. Part V addresses the effect of internal branding programs on employees' predisposition to invest financially in the firm, both psychologically and financially. Part VI argues that firms that utilize identity-based brand-management programs to induce workers to make investments that transcend the wage bargain owe something in exchange, at least where the employees lack protection against discharge and thus resist the branding program only at their peril. Where at-will plaintiff–workers allege and prove that employers deliberately induced psychological or financial investment that transcends physical and mental labor, the law should give effect to the psychological contracts that workers form, either through enforcing implied contracts at common law or by strengthening employers' fiduciary-based liability under ERISA.

II. NEW MANAGEMENT STRATEGIES FOR THE CHANGING EMPLOYMENT RELATION

In an influential book, Peter Cappelli describes a fundamental shift in the nature of the employment relation that took hold in the 1980s and

1990s.[20] Once a relatively secure and stable relationship in which shareholders bore the risks associated with the market and firms buffered the risks vis-à-vis their workers,[21] employment morphed into a fluid, dynamic relationship more directly linked to volatile, external product markets. As global competition forced firms to cut costs, reduce time to market, and strive to differentiate themselves from competitors, long-term investments in people and products no longer made good business sense. These changes brought market norms inside the firm and displaced internal labor market structures.[22] Flexibility and efficiency replaced more traditional norms of long-term commitment and equity. New management practices took hold as well: benchmarking, outsourcing, and pay-for-performance replaced job security, employee-development practices, internal job ladders, and seniority systems.[23] Employers calibrated compensation to the external labor market rather than to the firm's internal market structure.[24]

As a part of this shift, workers were encouraged to assume responsibility for their own training and to substitute loyalty to themselves and their

20. PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE vii, 28, 244 (1999). Peter Drucker made similar observations. PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE 165–70 (1995).

21. U.S. firms historically relied upon a metaphor of "the company as family" as a means of promoting worker loyalty to the firm and encouraging long hours. The provision of benefits and internal community-building strategies designed to strengthen ties between workers furthered the family metaphor. Sandy MacDonald & Sonia Liff, *Working for the Family*, 17 HUM. RESOURCE MGMT. J. 118, 126–27 (2007); *see also* Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 374–78 (2003) (describing the social contract of employment that fed the cultural expectation that employers functioned as insurers against employees' lifecycle needs); N.R. Kleinfield, *The Company as Family, No More*, N.Y. TIMES, Mar. 4, 1996, at A1 (describing Chase Manhattan Bank, prior to the 1980s, as a "paternalistic organization" that had "guaranteed a job and a raise and a pension"). In an influential book, Arlie Hochschild argued that companies had become so successful in this endeavor that for many women, the workplace began to feel like home and home began to feel like work. ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 35–45 (1997) (reporting that many workers prefer to spend time at work, where their efforts are socially valued and supported).

22. Internal labor markets were characterized by jobs arrayed in hierarchical ladders; employees were hired in on the bottom rungs and climbed the ladder over their careers. Firms structured benefits and compensation to incentivize attachment to the firm and reward longevity and seniority. The firm assumed responsibility for employee training and development, since each rung of the ladder theoretically provided the training necessary for the employee to advance to the next rung. Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment* 5 (UCLA Law & Econ. Research Paper Series, Paper No. 09-03, 2009), *available at* http://ssrn.com/abstract=1342667. *See generally* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971) (offering a comprehensive analysis of the internal labor market).

23. CAPPELLI, *supra* note 20, at viii, 1.

24. *Id.* at 7 (observing that as a result, "junior people with 'hot' skills end up making much more than their senior colleagues").

careers for loyalty to the firm.[25] Significantly, in the late 1990s almost half of U.S. employers added new material to their employee handbooks outlining the "new deal" for employees.[26] The language was designed to reorient and limit employees' expectations and to clarify employees' personal responsibility for job security.[27] Instead of the job security and internal job ladders that had aligned workers' interests with those of the firm under the old model,[28] employers promised the security of "reemployability" and job

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25. *See, e.g.*, THOMAS GAD & ANETTE ROSENCREUTZ, MANAGING BRAND ME: HOW TO BUILD YOUR PERSONAL BRAND 124–27 (2002) (outlining a strategy for the differentiation and communication of individual workers' personal brands to employers and potential employers); TOM PETERS, REINVENTING WORK: THE BRAND YOU 24–25, 50 (1999) (encouraging employees to develop an individual "brand you" to market to employers); *see also* CLIFF HAKIM, WE ARE ALL SELF-EMPLOYED 4–5 (1994) (encouraging workers to adopt a "self-employed" attitude while working for others). Personal branding encourages workers to commodify themselves and to attach themselves to the market rather than to an individual firm. *See* CAPPELLI, *supra* note 20, at 32. Cappelli notes:

> The suggestions that employees think of their career as going beyond their current employer, that they benchmark their skills against the changing requirements of their field, that their current position may be at risk . . . all send the message that the most important connection they have is not to their current employer but to the market.

Id. Personal branding is particularly attractive in a slack labor market because it emphasizes agency and offers the allure of controlling one's destiny in an increasingly unstable labor market. Daniel J. Lair, Katie Sullivan & George Cheney, *Marketization and the Recasting of the Professional Self: The Rhetoric and Ethics of Personal Branding*, 18 MGMT. COMM. Q. 307, 314, 319–22 (2005).

26. CAPPELLI, *supra* note 20, at 22–25.

27. A statement from a CEO to his employees typical of the era was:

> "You have to accept responsibility for your own personal excellence . . . and understand that the customer is the most important factor in our business life. We cannot guarantee you job security any more than we can guarantee our success in the marketplace. Job security is earned by market success."

Id. at 25 (quoting Patricia A. Milligan, *Regaining Commitment*, *in* THE NEW DEAL IN EMPLOYMENT RELATIONSHIPS: A COUNCIL REPORT 8, 11 (Conference Board, Report No. 1162-96-CR, 1996)).

28. In the old—or "lifetime"—model of employment, the employer promised job security and opportunities for internal promotion in exchange for loyalty and good performance. *Id.* at 21. Employees' interests were thus organically aligned with the firm's interests. Cappelli is careful to note however, that this old deal was an artifact of white-collar employment. *Id.* Blue-collar workers relied instead on unions and collective bargaining to obtain job security and pay linked to seniority. *Id.* at 21–22. Nor did unionized workers' interests ever become so aligned with the firm's; the union functioned to highlight the conflict between the interests of workers as a class and those of the firm.

Interestingly, some unions were at the forefront of the effort to realign employees' job-security expectations once it became clear that market volatility had rendered the old deal obsolete. At AT&T, for example, Cappelli reports that the effort to draft a new deal in the wake of deregulation and the Bell system breakup was initiated by unions. *Id.* at 26. Concerned about reemployability of their members after corporate restructuring and layoffs, the union sought and obtained funding for programs designed to anticipate work trends and to provide appropriate retraining for employees. *Id.* at 26–27.

training.[29] Cappelli summarized the transformation in employment norms in these compelling terms: "If the traditional, lifetime employment relationship was like a marriage, then the new employment relationship is like a lifetime of divorces and remarriages, a series of close relationships governed by the expectation going in that they . . . will inevitably not last."[30]

Expanding upon Cappelli's description of the new deal, Katherine V.W. Stone described the evolution of the "new psychological contract" associated with the new deal at work, in which employees gave up job security in exchange for promises of training to enhance employability, access to networks to enhance employees' social capital, and compensation tied to market rates, reflecting differential talent rather than seniority.[31] Stone argued that the shift from the old deal to the new deal was widespread and enumerated the elements of the new psychological contract offered by employers in lieu of the old model.[32]

Although not all commentators accept Stone's claim of the demise of the old deal,[33] it seems clear that a significant shift has occurred in social

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29. *Id.* at 29–30. Cappelli references a written contract promulgated by Apple in the 1980s that applied to each of its full-time employees. *Id.* at 25–26. Far more explicit in its rejection of long-term job security and more clear-eyed in its description of the new deal, the contract provided:

> Here's the deal Apple will give you; here's what we want from you. We're going to give you a really neat trip while you're here. We're going to teach you stuff you couldn't learn anywhere else. In return . . . we expect you to work like hell, [and] buy the vision as long as you're here . . . . We're not interested in employing you for a lifetime, but that's not the way we are thinking about this. It's a good opportunity for both of us that is probably finite.

Id. at 26; *see also* Barbara Ettorre, *The Contingency Workforce Moves Mainstream*, 83 MGMT. REV. 10, 13 (1994) (discussing employers' mixed messages of full participation without long-term stability).

30. CAPPELLI, *supra* note 20, at 2–3; *see also* Marion Crain, *"Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1909–10 (1999) (arguing that the values and structure of paid work, including its insecurity, bleed into family relationships, and suggesting connections between employment insecurity and marital instability).

31. Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773, 779–80 (2002) [hereinafter Stone, *Employee Representation*]; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 540 (2001).

32. Stone, *Employee Representation*, *supra* note 31, at 783–84; *see also* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 107, 128, 131, 286–88 (2004) (arguing that the new challenge for workplace regulation is to establish support structures that enable workers to weather career transitions, particularly ongoing training opportunities, portable benefits, and protections for skill development and worker ownership of human capital).

33. *See, e.g.*, Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1204, 1219–20 (2000) (examining data on median job tenure and finding only a modest decline in job stability, and arguing that reports of the demise of internal job ladders are exaggerated); *see also* RICHARD B. FREEMAN & JOEL ROGERS, WHAT

norms concerning job tenure and employee attachment to the firm.[34] Moreover, attitudes towards the acceptability of shifting market risks onto employees have changed in dramatic ways, paving the way for the development of new workplace practices.[35] Not only did the calibration of compensation change to a more market-oriented approach, but traditional

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WORKERS WANT 10–11 (1999) (contesting the claim of lowered job tenure and noting intra-group differences along age and job category that affect tenure data).

Evidence on changes in job tenure over time is conflicting. A recent analysis of employee job tenure by the Employee Benefits Research Institute concludes there is little basis for the perception that past generations of workers held career jobs. Craig Copeland, *Employee Tenure*, EMP. BENEFIT RES. INST. NOTES, Apr. 2007, at 1, 1, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-20071.pdf. Moreover, median employee tenure for adults aged 25 or older barely changed between 1983 and 2006, dropping slightly from 5 years to 4.9 years. *Id.* at 2. A small but significant decrease in men's median job tenure is apparent (down from 5.9 to 5 years), but women's tenure increased from 4.2 to 4.8, offsetting the drop in male tenure. *Id.* at 1–2. Median tenure for all workers was 4.1 in January 2008—again, virtually unchanged from 4.0 years in January 2006. News Release, Bureau of Labor Statistics, Employee Tenure in 2008, at 1 (Sept. 26, 2008), *available at* http://www.bls.gov/news.release/pdf/tenure.pdf.

Part of the difficulty in interpreting the data is that job tenure data does not necessarily correlate with job security. An increase in job tenure could be associated with a slack labor market and an increased termination rate for lower-tenured workers, leaving longer-tenured workers employed but less secure. Alternatively, a decrease in median tenure could occur in a tight labor market when more jobs are open to new labor market entrants, job opportunities are plentiful and experienced workers feel comfortable shifting to other employment. *Id.* at 8. Demographic shifts in the labor market also affect job tenure rates, as younger workers tend to have shorter job tenure than older workers. *Id.* at 1.

34. In March 2000, *The New York Times Magazine* devoted an issue to the topic of "The Liberated, Exploited, Pampered, Frazzled, Uneasy New American Worker." N.Y. TIMES, Mar. 5, 2000, § 6 (Magazine). In an introductory essay, Michael Lewis noted the disappearance of the typical corporate employee who possessed strong corporate attachment, and described the modern worker as a "free agent," willing to sell him or herself to the highest bidder. Michael Lewis, *The Artist in the Gray Flannel Pajamas*, N.Y. TIMES, Mar. 5, 2000, § 6 (Magazine), *available at* http://www.nytimes.com/2000/03/05/magazine/the-artist-in-the-gray-flannel-pajamas.html?pagewanted=all. Sociologist Richard Sennett wrote that the motto for the new age of work should be "No long term." RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 22 (1998); *see also* Phred Dvorak & Scott Thurm, *Slump Prods Firms to Seek New Compact with Workers*, WALL ST. J., Oct. 19, 2009, at A1 (describing the shift by employers in the wake of the recent recession toward the use of contract employees and frequent layoffs, because "'the new normal is constant change'" (quoting Edward Lawler III, a professor at the University of Southern California Marshall School of Business)).

35. *See* Jacob S. Hacker, *The Risky Outlook for Middle-Class America*, *in* ENDING POVERTY IN AMERICA: HOW TO RESTORE THE AMERICAN DREAM 66, 68 (John Edwards, Marion Crain & Arne Kalleberg eds., 2007) (explaining that the shift of risk to American workers is the "defining feature of the contemporary economy"). *See generally* JACOB S. HACKER, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE AND RETIREMENT AND HOW YOU CAN FIGHT BACK (2006) (describing trends in public policy that combine to shift risk and responsibility away from governments and employers and onto workers).

The recent recession has accelerated trends away from long-term commitments by employers to workers and in favor of shifting risks of all kinds to workers. *See* Dvorak & Thurm, *supra* note 34 (discussing the permanent shift of responsibility for health care and retirement to workers occasioned by the recession).

health and pension benefits designed to bind the employee to the firm also shifted to accommodate a mobile workforce and to afford the new entrepreneurial worker more control and choice over health-insurance and retirement vehicles that were still linked to employment. These shifts in turn created new challenges: decreased employee loyalty and difficulties in supervising and controlling a workforce that was critical to retaining customers and expanding into new markets.

A. *CHANGING COMPENSATION AND BENEFITS STRUCTURES*

Employers have long relied upon compensation and benefits structures as tools to align workers' financial interests with those of the firm, seeking to encourage attachment to the firm and enhance productivity. Historically, profit-sharing plans, the formal organization of businesses as cooperatives, discounted employer stock, and employee stock-ownership plans have all played a role in structuring the compensation packages offered to workers.[36] Stock options in particular have played a major role in enhancing productivity and increasing commitment to the firm and retention in the modern era.[37] The technology firms have popularized this model of compensation.[38] Google, whose employment policies are often emulated by firms in the modern economy, sees employee ownership as central to its culture and uses stock options to enhance hiring and retention.[39]

Under the old model of employment, employer-sponsored pension plans were important management practices designed to recruit and retain a stable workforce and to regulate employee tenure. In the post-World War II era, pension benefits became part of the basic compensation package that firms used to attract and retain a high-quality workforce.[40] Moreover,

36. Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(k) Plans*, 14 ELDER L.J. 1, 5 (2006). *See generally* COREY M. ROSEN, KATHERINE J. KLEIN & KAREN M. YOUNG, EMPLOYEE OWNERSHIP IN AMERICA: THE EQUITY SOLUTION (1986) (surveying and describing forms of employee ownership).

37. Of course, stock options also comprise a significant portion of executive compensation, a context in which they are intended to serve as pay for performance. *See* Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL'Y 283, 290 tbl.4 (2005) (reporting a dramatic rise in the portion of executive compensation attributable to stock options); Brian J. Hall & Jeffrey B. Liebman, *Are CEOs Really Paid Like Bureaucrats?*, 113 Q.J. ECON. 653, 655 (1998) (explaining that stock-option-based compensation represents pay for performance).

38. *See* Muir, *supra* note 36, at 7–8 (describing the growth of the employee-ownership model and stock-option culture in Silicon Valley).

39. Joyce E. Cutler, *Google Offers Stock Exchange for Employees' 'Underwater' Options*, Daily Lab. Rep. (BNA) No. 14, at A-7 (Jan. 26, 2009).

40. Wage and price controls instituted during World War II that precluded firms from paying higher wages have been credited with providing the impetus for employer-based health insurance and pension benefits. *See* David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 25–26 (2002) (describing the evolution of employer-provided fringe benefits). Because they were not counted as wages for

employer-provided pension benefits were useful in regulating workforce tenure. Workers were more willing to retire if they had a stable income available during retirement, and by facilitating retirement and establishing a formula based on years of service, employers could control the rate of workforce turnover.[41]

With the shift away from the model of long-term employment and toward a more entrepreneurial model that transfers responsibility to employees for their career prospects, employers altered the way in which they used retirement plans to influence employee commitment to the firm. During the rise of the industrial and manufacturing era, most firms offered "defined benefit plans" that promised a secure retirement income until death at a guaranteed level geared to seniority and salary at the firm.[42] In defined-benefit plans, the employer—not the employee—bears the risk of plan investment performance. Firms are contractually obligated to make payments even if the assets designed to finance them have diminished.[43] Defined-benefit plans make employee turnover relatively costly for employers once the worker completes the vesting period. If the worker quits, the firm still bears the contractual responsibility for the worker's pension in the form of an annuity, but loses the benefit of the worker's future performance. Defined-benefit plans also tend to tie the worker to the firm because benefit calculations are typically based upon the employee's highest

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purposes of the statutory wage and price controls, employers were able to substitute health insurance and pension benefits to attract scarce workers in the tight World War II labor market. *Id.* at 25. Favorable tax treatment and aggressive bargaining by labor unions completed the picture, and health insurance and pension benefits became part of the standard package of fringe benefits. *Id.*

41. MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 838 (2005).

42. This terminology was established by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461 (2006)). Defined-benefit plans entitle worker–participants to predetermined benefit levels upon retirement according to a formula based on salary, years of service, and age. Payout amounts are "backloaded"—calculated on the basis of final years of service and salary at the end of employment—so that long-term employees receive greater benefits, incentivizing employees to stay until they reach their highest earning rate and to retire close in time to that point. *Id.*

43. PETER J. WIEDENBECK, ERISA IN THE COURTS 10–11 (2008). Additionally, defined-benefit plans that are severely underfunded or that become bankrupt are insured by the Pension Benefit Guaranty Corporation, which is modeled on the Federal Deposit Insurance Corporation. *See* 29 U.S.C. § 1302 (2006) (establishing the Pension Benefit Guaranty Corporation within the Department of Labor); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 636–37 (1990) (describing the Pension Benefit Guaranty Corporation's purpose and structure). Still, defined-benefit plans are not absolute guarantees against all risk—they can be amended, converted to cash-balance plans, or terminated upon employer bankruptcy. *See* David Madland, *The Politics of Pension Cuts*, *in* EMPLOYEE PENSIONS: POLICIES, PROBLEMS, & POSSIBILITIES 187, 190–91 (Teresa Ghilarducci & Christian E. Weller eds., 2007) (discussing ways in which benefits may be cut); Maria O'Brien Hylton, *Together We Can: Imagining the Future of Employee Pensions*, 12 EMP. RTS. & EMP. POL'Y J. 383, 387 (2008) (describing noteworthy instances where employee benefit plans terminated following the employer's bankruptcy).

salary and length of service.[44] However, the incentive is limited, since vested workers who leave do not lose the retirement benefit associated with the defined-benefit plan (although the benefit is frozen).[45] Defined-benefit plans made good business sense for employers in an era where long-term career employment with a single firm was desired and securities investments were relatively stable; defined-benefit plans were less well-suited to a labor market characterized by high mobility and a stock market characterized by volatility.

Beginning in the 1980s, private industry began to move toward "defined contribution plans" in which employees owned their own accounts and assumed the risk of investment losses (as well as the benefits of investment gains).[46] Defined-contribution plans (also known as individual account plans, and most commonly held as 401(k) plan accounts) are the dominant form of pension account today.[47] As the name implies, these plans establish an individual account for each participant to which both the participant and the company may contribute. Employee contributions vest immediately. Most 401(k) plans feature an employer "matching" contribution component,[48] which typically vests either immediately or after a waiting period of two years.[49] Importantly, the risk of gain or loss on investments in a defined-contribution plan is borne by the employee, not the employer.

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44. CRAIN, KIM & SELMI, *supra* note 41, at 838.

45. CAPPELLI, *supra* note 20, at 151–52. Under ERISA, defined-benefit plans must vest gradually over a three-to-seven-year period, or all at once within five years of employment (known as "cliff vesting"). I.R.C. § 411(a)(2)(A) (West 2010).

46. As recently as 1979, 83% of all workers covered by a pension plan participated in a defined-benefit plan. CAPPELLI, *supra* note 20, at 151–52. Since then, the trend has shifted dramatically away from defined-benefit plans and toward defined-contribution plans. By 1988, 66% of such workers were covered by defined-benefit plans. *Id.* By 2006, only 30.9% participated in defined benefits plans. Michael W. Wyand, *Workers Rely on Defined Contribution Plans, While Employers Seek To Reduce Plan Costs*, 26 Daily Lab. Rep. (BNA) A-6 (Feb. 11, 2009). A simultaneous increase in participation in defined-contribution plans occurred, rising to 67% in 2006, more than double the level in 1988. *Id.* The majority of workers still covered by a defined-benefit plan are either unionized or belong to a state retirement system. CRAIN, KIM & SELMI, *supra* note 41, at 838.

47. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008).

48. *But see* Joel J. Meyer, *As Recession Drains 401(k) Balances, Employers Pull Back on Contributions*, 84 Daily Lab. Rep. (BNA) C-1 (May 5, 2009) (listing and discussing the growing number of large firms reducing or terminating company matches, but noting that the majority of employers still have not done so); Phred Dvorak & Scott Thurm, *Slump Prods Firms to Seek New Compact with Workers*, WALL ST. J., Oct. 19, 2009, at A1 (reporting that Ford Motor Company has frequently suspended its employer-matching program, contributing the match in only 2.5 of the last 8 years); Jilian Mincer, *Many U.S. Employers Cut 401(k) Matches*, WALL ST. J., Mar. 26, 2009, at D2 (reporting that firms in most economically distressed industries including retail, newspaper, auto, and gaming dropped or decreased their employer match).

49. Most 401(k) plans provide for immediate full vesting in order to satisfy special nondiscrimination rules applicable to 401(k) plans. *See* I.R.C. § 401(k)(2)(C), (k)(3)(D)(ii), (k)(12)(E)(i), (m)(4)(C)(ii) (West 2010). Two-year "cliff" vesting is possible for matching contributions pursuant to I.R.C. § 401(k)(13)(D)(iii)(I).

The corollary to this is that employees, not employers, control and manage the accounts, choose the investments, and control their disposition if the employee leaves the firm.[50] Departing employees usually receive a lump sum distribution at the point of departure or have the option to leave the benefits in the account where they will continue to grow.[51]

This shift from defined-benefit plans to defined-contribution plans tracked the transition away from long-term employment and toward labor market flexibility. Defined-contribution plans effectively neutralize employees' pension-related incentives to stay with the same firm beyond vesting of pension benefits.[52] Because contributions and costs cease when the employee leaves, 401(k) plans impose no future costs on the employer if employment terminates. Most employees appear to prefer defined-contribution plans, whether because of their relative portability or because workers see them as an opportunity to exercise consumer sovereignty with regard to their pension investments.[53] Such views were particularly likely to dominate in an era of rising stock-market values.[54] In short, 401(k) defined-contribution plans make good economic sense for a mobile labor force.[55]

B. THE EMPLOYEE LOYALTY PROBLEM

The new deal, the risk-shift, and the accompanying worker mobility[56] present retention and loyalty issues for employers. Turnover costs can be

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50. ERISA does not require that the employer afford the employee–participant control over investment decisions in 401(k) accounts, but § 404(c) provides a "safe harbor" for employers or plan administrators who would otherwise incur fiduciary obligations. To take advantage of § 404(c)'s safe harbor, the employer must be able to demonstrate that the employee–participant has control over the account, the plan offers a diverse array of investment alternatives (at least three), and that the participant has received adequate information about the investment options. 29 C.F.R. § 2550.404c-1 (2009).

51. Some workers laid off in the current recession have been unable to withdraw their 401(k) funds at the time of departure due to withdrawal freezes resulting from the economic downturn—at the time when they most need access to their funds. *See* Eleanor Laise, *401(k)s Hit by Withdrawal Freezes*, WALL ST. J., May 5, 2009, at C1 (discussing recent plan freezes).

52. CAPPELLI, *supra* note 20, at 151–52. Cappelli argues that the collapse of the career model of employment and shift toward a more mobile workforce with a transient attachment to any single employer created pressure favoring more portable accounts managed by individual workers, which mobile employees favored. *Id.* at 152. Others suggest that employers moved away from defined-benefit plans during periods of stock-market decline because of the substantial liabilities they posed and the administrative costs associated with them. *See, e.g.*, Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 76–77 (2002) (discussing the advantages of defined-contribution plans for employers).

53. Stabile, *supra* note 52, at 77.

54. *Id.*

55. Katherine V.W. Stone, *A Fatal Mismatch: Employer-Centric Benefits in a Boundaryless World*, 11 LEWIS & CLARK L. REV. 451, 475 (2007).

56. *See supra* notes 20–32 and accompanying text (discussing the new deal at work); *supra* notes 33–34 and accompanying text (discussing increased job mobility); *supra* note 35 and accompanying text (discussing the shift of risk to workers).

substantial, as firms simultaneously lose their training investments in departing workers and incur new expenses in training replacements.[57] Moreover, workers operating as free agents have few incentives to invest in firm-specific learning and skills that have limited value beyond the firm. Finally, the reduced attachment that workers feel to the firm means that they are less likely to engage in extra-role behaviors—to pitch in where needed.

At the same time, firms are more dependent than ever before on extra-role behavior by front-line employees in order to be competitive in the new economy. Managers need employees to exhibit "spontaneous and innovative activity that goes beyond role requirements,"[58] sometimes collectively referred to as "organizational citizenship behavior."[59] Organizational citizenship behavior is a fancy name for what management theorists once referred to as employee loyalty. Research shows that loyal employees are most likely to further the firm's mission in their daily work: an overwhelming majority of workers characterized through a recent survey questionnaire as "loyal" say that they will work to make the company successful (92%) and will lend a hand with heavy workloads (89%), as contrasted with just 49% and 60% of less-loyal workers respectively.[60] Moreover, employee loyalty correlates closely with customer loyalty and thus with profitability.[61] Yet according to the same survey, employee loyalty is at an all-time low: 36% of employees are "high risk" (uncommitted to the firm and likely to leave within the next two years)—up 5% from 2005.[62]

Firms have responded to the challenge of reduced employee attachment in either of two ways.[63] Some firms, operating in low-skilled

57. CAPPELLI, *supra* note 20, at 6.

58. John R. Deckop et al., *Getting More Than You Pay for: Organizational Citizenship Behavior and Pay-for-Performance Plans*, 42 ACAD. MGMT. J. 420, 420 (1999).

59. *See* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4–5 (1988). Organizational citizenship behavior refers to "discretionary behavior that goes beyond the requirements of specific role definitions and that is not rewarded through the formal reward structure of the firm." STONE, *supra* note 32, at 95.

60. WALKER INFO., LOYALTY REPORT: LOYALTY IN THE WORKPLACE 6 (2007). The Walker Loyalty Report survey consists of online responses from 2950 full- and part-time workers eighteen years or older and employed by firms with at least fifty employees. Employees are classified as "truly loyal," "accessible," "trapped," and "high risk." *Id.* at 8.

61. *Id.* at 6; Frederick F. Reichheld, *Lead for Loyalty*, HARV. BUS. REV., July–Aug. 2001, at 76 (noting correlation between customer loyalty, employee loyalty, and profitability).

62. WALKER INFO., *supra* note 60, at 5. Employee loyalty is lowest for workers with less than one year of job tenure (26% categorized as "high risk"), and highest for those employed between six and nine years (45% "truly loyal"), diminishing to 36% for those ten to nineteen years on the job and to 30% for those with twenty years or more of job tenure. *Id.* at 6.

63. *See* CAPPELLI, *supra* note 20, at 191 (explaining that firms either foster group relationships to maintain a low turnover rate, or develop highly regulated positions that accommodate a high turnover rate); BARBARA A. GUTEK, THE DYNAMICS OF SERVICE: REFLECTIONS ON THE CHANGING NATURE OF CUSTOMER/PROVIDER INTERACTIONS 267–68 (1995) (discussing the growth of encounter systems in provider–customer interactions). Cynthia

sectors with narrow profit margins that depend on multiple, brief, encounter-style transactions with consumers, embraced high turnover and a lack of attachment to the firm as industrial realities and developed management practices designed to accommodate turnover.[64] Fast-food businesses and high-volume retail firms like Walmart typify this group. Others whose business model or service require more sustained contact with consumers envision customer service as relational in style rather than encounter-oriented.[65] These relationship-style service businesses developed internal marketing programs designed to foster an emotional attachment

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Estlund describes this strategic choice as one between a "low-cost, low-wage strategy" and a "high commitment-and-cooperation strategy," and suggests that law might steer employers toward the strategy with the most positive spillover effects for society. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 168 (2003).

64. Because the quality or nature of the interaction between customer and worker is often the essence of the service that an encounter-style business is selling, control and consistency are critical. Accordingly, work is organized in ways that make supervision easier and render workers more fungible. ROBIN LEIDNER, FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE 26–27 (1993). *See generally* BARLOW & STEWART, *supra* note 4 (describing service branding).

Encounter-style businesses are interested primarily in high-volume interactions and prioritizing efficiency. They rely on standardization of the service and are likely to script the interactions and to use extensive monitoring and surveillance of workers to enforce the script. Ultimately, although transaction-encounter-style services require significant management and are burdened with costs of high turnover due to the monotony and tedium of the jobs, the labor performed may also be more easily outsourced or transferred to machines (ATMs, airline kiosks) or to customer self-service (u-scan machines in retail settings, self-serve salad and drink bars). GUTEK, *supra* note 63, at 34, 46, 52, 57, 219.

Encounter-style service has the greatest potential for shaving labor costs and freeing the employer from dependence upon labor; workers in this model are largely fungible. McDonald's is a leader in the systematic standardization and routinization of labor processes in the service industry. Its employment practices have successfully separated workers from the services that they provide and substituted the corporate brand in the customer's mind so that the customer bonds to the brand rather than to an individual worker or even a particular franchise: it is the Golden Arches that draw customers, not the interactions with counter-service workers. *See* GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY 81–82 (1996) (arguing that the principles of routinization and standardization developed by McDonald's are being transferred to other sectors of the market).

Nevertheless, customer loyalty is a valuable asset in an ever-more competitive business environment. Thus, even firms committed to encounter-style service seek to import the best aspects of the relationship model by developing a branded form of personal service, which workers are then trained to convey to customers. GUTEK, *supra* note 63, at 68. For example, the employer may school workers to identify with customers and to behave as if they were in pseudo-relationships with the customers (e.g., for wait staff, "Hi, I'm Tom," or, "Is this your first visit to our restaurant?"). *Id.* at 70–71. Emotional labor—or at least, the appearance of emotion—is a significant part of this model. *Id.* at 80; *see also* Robin Leidner, *Emotional Labor in Service Work*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1999, at 81, 82 (discussing Kentucky Fried Chicken's "now hiring smiling faces" ad).

65. DENISE M. ROUSSEAU, PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS: UNDERSTANDING WRITTEN AND UNWRITTEN AGREEMENTS 194–95 (1995). Rousseau suggests that the firm's choice of employment relations drives its customer-relations model, but the causation may well work the other way. *Id.*

from employees that would substitute for the internal job ladders, longevity, and job security that incentivized loyalty under the old model of employment.

C. THE CONTROL PROBLEM

The loss of control inherent in the shift to customer-service interactions presented another challenge to the old model. Rigid control over labor processes and scientific management techniques[66] were less easily applied to the customer-service context because the interjection of an unpredictable third party with interests of her own—the customer—made it more difficult to predict how the transaction would transpire. Moreover, supervision and monitoring of workers in the service context was more difficult and expensive than monitoring workers in a manufacturing context. At the same time, high levels of effort were more critical and a certain level of discretion and judgment had to be delegated to the employee.

Encounter-style businesses interested in high-volume interactions and efficiency were willing to manage around both the control and loyalty problems by scripting and routinizing work so that workers became relatively fungible and supervision was more practical. By rigorously controlling behavior, paradigmatic encounter-style businesses like McDonald's could minimize management costs and reduce the risk of off-brand performance.

Not all encounter-style businesses were able to follow this path however. Those whose corporate brand depended upon workers' emotion-work—that is, the display of a particular emotional state in order to further the brand promise to the customer[67]—found this most difficult. For example, Disney's trade in fantasy and happiness requires that its workers display a particular

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66. Frederick Winslow Taylor is credited with developing principles of scientific management designed to control labor. Through the use of time and motion studies designed to maximize output, Taylor sought to separate the execution of work from its conception by reducing the performance of work to a series of "scientific" rules, scripted movements, and even mathematical formulae. FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 31–32 (1911); *see also* BRAVERMAN, *supra* note 16, at 85–121 (discussing the use of scientific management to control workers); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 9–57, 214–56 (1987) (discussing the roots and evolution of the scientific-management movement); DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA 9–10 (1979) (discussing the evolution of methods for control of production during the nineteenth century). For a more modern analysis, see Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 985–86 (1990). Parallel strategies were developed to control professional and skilled workforces in the post-industrial era, but they act less directly upon workers' bodies. *See* Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 557–58 (2004) (describing manipulation of the social organization of work through a pattern of specialization designed to maximize productivity and centralize control in management).

67. *See* HOCHSCHILD, *supra* note 8, at 6 (discussing the significance of emotional labor at work and the forms that it may assume).

emotional state: they must perform "on-brand."[68] Similarly, some sales positions require an investment of emotion—or at least a display of emotion—by the employee that cannot be completely captured by scripting and routinizing behavior.[69]

Relationship-style businesses faced the most difficult challenges because the service they provide depends on more than employee behavior and a display of a particular emotion: employees must channel the brand's values into a relationship that is deliberately forged with the customer. The personal nature of the relationship, in turn, yields high customer loyalty to the individual performing the service, which poses a serious threat to bureaucratic control.[70] Moreover, in an employment regime characterized by short job tenure and high employee mobility, such asset-specific relationships unique to the worker are also rather fragile. Accordingly, relationship-style service businesses looked beyond scripting and routinization for tools that would assist in severing the link between customer and worker and substitute a bond between the customer and the brand, with the worker acting as the symbolic representation of the brand.[71] Customer loyalty that was once based on the service-worker–customer relationship would henceforth be linked to the brand.[72]

Accordingly, relationship-style businesses have been at the forefront of developing new strategies aimed at replacing the old norm of "blind loyalty" to the firm as a whole with a more targeted commitment to the firm's vision and values.[73] These new strategies, collectively referred to as "identity-based brand management" or simply "internal branding programs," are more sophisticated than simple scripting and routinization (though they may possess elements of both). Directed by or in collaboration with the corporate marketing department, identity-based brand-management programs go beyond traditional loyalty-enhancing programs such as family-friendly workplace policies, retirement vehicles based on longevity, and

68. *See infra* Part III.C.2 (discussing the centrality of emotion-work at Disney).

69. *See infra* Part III.C.3 (discussing the obligations of salespeople at Combined Insurance).

70. GUTEK, *supra* note 63, at 15–20, 190.

71. *Id.* at 204–06. The *Jespersen* case involved such a branding strategy by Harrah's. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077–78 (9th Cir. 2004); Avery & Crain, *supra* note 5, at 13, 58 ("Harrah's . . . argued that the company's dress and grooming program 'was a comprehensive initiative to improve the overall service performance of the Beverage Department, which included the creation of a national brand standard. If one employee failed to comply, the brand standard failed.'" (quoting Answering Brief of Appellee at 34, *Jespersen*, 392 F.3d 1076 (No. 03-15045), 2003 WL 22716702)).

72. GUTEK, *supra* note 63, at 189–95; *see also* George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, J. ECON. PERSP., Winter 2005, at 9, 15, 19–22 (explaining why this strategy makes good business sense for firms committed to relationship-style service).

73. CAPPELLI, *supra* note 20, at 216–18.

stock options linked to performance—all of which are typically administered by human resources departments.[74] Instead of acting on employee behavior, internal branding programs function to transform employee identity. Employees are persuaded to internalize brand values through a systematic recruiting, training, development, and compensation program that fosters a psychological commitment to the firm and a "consciousness of kind"[75] that translates into deeper attachment to the firm. The goal is to produce a workforce that reacts and behaves instinctively "on-brand," effectively managing itself.

III. Identity-Based Brand Management

Under the old employment contract, internal job ladders, employee training, and development programs and benefits tied to employment longevity were sufficient to induce loyalty to the firm because they insured that employees' interests were organically aligned with those of the firm. In the new era, identity-based brand-management programs evolved into an important mechanism to encourage mobile workers to invest psychologically in the firm's brand. Sociological,[76] psychological,[77] and economic[78] research suggests that workers' identities are highly malleable in the work setting. Firms already adept at fashioning consumer marketing campaigns aimed at creating brand communities could directly apply insights from human psychology and marketing to personnel management.[79] Employees

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74. *See* Mitchell, *supra* note 7, at 103 (describing the goals of an internal branding campaign and arguing that the design and execution of an internal campaign should be managed by the marketing department). Some firms are more aggressive still, merging human-resources and marketing departments and reassigning internal-branding and personnel-management functions to marketing. Punjaisri & Wilson, *supra* note 6, at 60 ("HR should be led by marketing and incorporate the brand concept into all employee development programmes."). Business consultant Julie Anixter characterizes this strategy as a "diabolical" move. Julie Anixter, *Transparency, or Not: Brand Inside, Brand Outside™*, *in* BEYOND BRANDING: HOW THE NEW VALUES OF TRANSPARENCY AND INTEGRITY ARE CHANGING THE WORLD OF BRANDS 161, 180 (Nicholas Ind ed., 2003).

75. *See* Albert M. Muniz, Jr. & Thomas C. O'Guinn, *Brand Community*, 27 J. CONSUMER RES. 412, 412–13 (2001) (arguing that brand communities consisting of a structured set of social relationships built around a branded product or service are true communities, characterized by "shared consciousness, rituals and traditions, and a sense of moral responsibility").

76. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 245–64 (1977) (discussing structural determinants of behavior in organizations); Schultz, *supra* note 16, at 1890–91 (noting the importance of work to behavior and identity).

77. *See* ROBERT E. LANE, THE MARKET EXPERIENCE 241–54 (1991) (describing several studies examining the impact of work experience on psychological development).

78. *See* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 727–32 (2000) (offering a model of economic analysis based on identity considerations); Akerlof & Kranton, *supra* note 72, at 19–22 (providing examples of situations in which an employee's identity impacted economic productivity).

79. For those seeking further guidance, business consultants have dedicated numerous books to explaining how to construct an identity-based brand-management program. *See, e.g.*,

responded with high levels of extra-role behavior (sometimes called "brand citizenship behavior").[80] In many firms, branding programs now provide the psychological glue and incentive structure that structural mechanisms and longevity once furnished and simultaneously resolve the managerial challenges of loyalty and control. This Part will discuss the mechanics of internal branding and the benefits employers reap from it, offer case studies of internal branding illustrating the range of forms that it may assume, and explain why employees do not overtly resist internal branding, and indeed often embrace it.

A. The Mechanics of Internal Branding

The typical internal branding program consists of several elements: communicating and explaining the brand to employees, convincing employees of its value, linking every job in the organization to delivery of the brand promise, establishing performance standards to measure fulfillment of the brand promise, and "'ruthlessly align[ing] all people practices to support and reinforce the brand promise'" by selecting, training, rewarding, and punishing employees according to their level of on-brand behavior.[81] Both formal and informal methods play important roles in the process.

Formal methods include internal functions traditionally performed by human resources offices: recruiting and staffing (e.g., advertisement of the open position and information about the company presented to applicants, selection, and hiring), training and development (both for the immediate

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CORPORATE BRANDING: PURPOSE/PEOPLE/PROCESS, *supra* note 1 (collecting expert advice on internal branding mechanisms); F. JOSEPH LEPLA & LYNN M. PARKER, INTEGRATED BRANDING: BECOMING BRAND-DRIVEN THROUGH COMPANY-WIDE ACTION 103–05, 178 (1999) (explaining the benefits of integrated branding, the role of brand seminars, and strategies for integrated branding); sources cited *supra* note 4 (listing sources explaining the significance and value added by branding); *see also* LIBBY SARTAIN & MARK SCHUMANN, BRAND FROM THE INSIDE: EIGHT ESSENTIALS TO EMOTIONALLY CONNECT YOUR EMPLOYEES TO YOUR BUSINESS 127, 137 (2006) (discussing internal branding principles developed at Southwest Airlines and applied at Yahoo!). A typical branding process follows the same path whether designed to apply to the firm's target consumer market or internally, to its employees. Mitchell, *supra* note 7, at 103–04.

80. *See, e.g.*, Christoph Burmann & Sabrina Zeplin, *Building Brand Commitment: A Behavioral Approach to Internal Brand Management*, 12 J. BRAND MGMT. 279, 282–84 (2005) (outlining the seven dimensions of brand-citizenship behavior); Sandra Jeanquart Miles & Glynn Mangold, *A Conceptualization of the Employee Branding Process*, 3 J. RELATIONSHIP MKTG. 65, 68 (2004) (defining "employee branding" as the process by which employees adopt a brand image and subsequently project that image to customers); Mitchell, *supra* note 7, at 105 (noting examples such as Apple, Disney, and Virgin Airlines, where brand "zealotry" exists both "inside and outside the company").

81. Pierre Berthon, Michael Ewing & Li Lian Han, *Captivating Company: Dimensions of Attractiveness in Employer Branding*, 24 INT'L J. ADVERTISING 151, 153–54 (2005). Workplace cultural-profiling programs are used to enforce commitment to the firm's values and to reinforce cohesiveness by disciplining workers who threaten the firm's culture. Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 373 (2007).

position and with an eye toward enhancing employees' ability to be able to adapt to shifting job requirements in the future), adopting compensation systems that link promotions and wage or salary raises to the level of customer orientation displayed by the employees, and performance management processes (evaluation, promotion and discipline).[82] Other formal methods are external: public relations designed to build brand image and advertising.[83]

Informal methods include socialization into the brand by coworkers not acting in an official capacity, assimilation into organizational culture and norms, and the influence of organizational leadership and management (because employees are more likely to engage in on-brand behavior when they like and respect corporate leaders and want to assist them in reaching goals).[84] Informal messages about the brand are also relayed through external customer-feedback systems, word of mouth, and the business press.[85]

Several themes characterize all successful branding programs: selection for brand fit; organization of work in structures that emphasize social networks, consistency and authenticity of the brand message, and a set of human resources practices that cumulatively yields an "employer brand" that draws workers to the firm.

1. Selection for Brand Fit

Employees are much more likely to adopt an organizational identity that matches their own self-image, both because it is easier for them to process information about the firm's values and mission that are consistent with their own values, and because the firm's brand offers opportunities for authentic self-expression.[86] Indeed, applied to employees whose values are not fundamentally aligned with the firm's values, identity-based brand management can trigger dissent and catalyze resistance.[87] Accordingly, selecting employees who are receptive to the brand identity is critical to an effective branding program.[88]

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82. Miles & Mangold, *supra* note 80, at 71–74.

83. *Id.* at 77–78.

84. *Id.* at 74–77.

85. *Id.* at 78–79.

86. Jane E. Dutton, Janet M. Dukerich & Celia V. Harquail, *Organizational Images and Member Identification*, 39 ADMIN. SCI. Q. 239, 244–45 (1994).

87. Mats Alvesson & Hugh Willmott, *Identity Regulation as Organizational Control: Producing the Appropriate Individual*, 39 J. MGMT. STUD. 619, 622 (2002).

88. Mitchell, *supra* note 7, at 105. For example, internet and high-technology firms often seek workers who are receptive to their employers' "rebellious" organizational identities, so that the workers' occupational identities align with the firm's mission. *See* ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 145 (2003) (discussing a job-placement website called dice.com that "'captures fairly well the type of high-rolling lifestyle that high-end contractors aspire to'" (citation omitted)); *see also infra* Part III.C.1

Once hired, workers whose values are matched to the firm's and who perform well are promoted. Workers whose values deviate from those of the firm are evaluated during a probationary period for amenability to brand shaping; if they are a poor fit, they are terminated.[89] Alternatively, firms devise organizational "boot camp" experiences that include extensive training and indoctrination in the company's approach as a means of weeding out employees who are poorly matched to the firm's brand.[90]

2. Emphasizing Social Networks

Research demonstrates that when workers bond to their coworkers they are more committed to the organization.[91] A shared group identification both improves retention and enhances productivity.[92] Therefore, internal branding strategies seek to capitalize on feelings of cohesion engendered by social relationships and networks at work.[93] Most firms began by restructuring work to connect workers in teams and on projects.[94] Management practices that tie compensation to team performance rather than to individual performance also help to align the interests of individuals with those of the group and provide an additional incentive for the group to monitor the performance of its members.[95] Peer pressure from team members (who must take up the slack if a worker is absent or his work performance declines) functions to enforce norms of extra-role behavior and to discipline slackers.[96]

(discussing Southwest's efforts to hire only employees who are a perfect fit with its brand values); *infra* Part III.C.2 (discussing Disney's elaborate interview and selection process).

89. Burmann & Zeplin, *supra* note 80, at 285; Punjaisri & Wilson, *supra* note 6, at 68. At Whole Foods, for example, potential hires are integrated into a team for a four-week probationary period, after which coworkers vote on whether the new employee stays or departs; a two-thirds vote is needed to join the team. Whole Foods also links compensation through its profit-sharing program to team performance rather than to individual performance, incentivizing team members to choose new hires carefully—they are hiring coworkers, not friends. Tamara J. Erickson & Lynda Gratton, *What It Means to Work Here*, HARV. BUS. REV., Mar. 2007, at 104, 107.

90. New hires at the Container Store, for example, participate in a five-day training experience and receive at least 235 hours of formal training in their first year of work, contrasted with the retail-industry average of seven hours of training. This intensive orientation and indoctrination results in a significantly lower turnover rate and fosters deep commitment by employees to the store's mission. Erickson & Gratton, *supra* note 89, at 108–09.

91. *See* IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 35 (1982) (explaining impact on employee behavior of shared norms and values, and emphasizing importance of "esprit de corps").

92. CAPPELLI, *supra* note 20, at 190–91; *see* Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869, 905–06 (1999) (discussing studies showing that organizational commitment and a shared group identity enhance productivity).

93. CAPPELLI, *supra* note 20, at 191.

94. *Id.*

95. *Id.* at 218.

96. *Id.* at 218–19.

The most effective branding programs go beyond this, however, tapping into the tension between the drive toward individuality and the longing to affiliate with others as a part of the struggle to make sense of life.[97] True "brand citizenship" entails a sense of belonging and a feeling that the successes and failures of the firm are one's own—a blurring of the lines between individual and group identity.[98] Thus, branding programs are often characterized by intense social engagement off the job, as well as on the job: employees live together, socialize together during off-work time, and interact with one another's families in social settings, forming a community with a shared sense of consciousness organized around the firm's brand.

3. Consistency and Authenticity

Consistency of the brand message is critical if workers are to understand and identify with the brand the firm is selling; only then will they be equipped to deliver on the promises that the firm makes to consumers through its external advertising campaign. Thus, all methods of communication must convey a consistent branded theme; in particular, internal messages must be consistent with external messages.[99] Brand development and "living" the brand must be part of every employee's job description, from the CEO to the bottom-rung worker. [100] Where possible, the brand themes are reinforced at every "touchpoint"—through the firm's physical layout, architecture, décor, and policies, so that workers "live" the brand.[101]

Finally, employee branding must be more than mere advertising: it must be authentic and credible.[102] Authentic brands that are characterized by consistency of messages, products, or services will become "viral"—"talked up" by others, including business publications and employees.[103] Positive

97. *See* ROB WALKER, BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE 22, 30 (2008) (noting how the "fundamental tension of modern life" is the conflict between desire to individuate and the desire to be part of something larger than ourselves; marketing brand communities to consumers offers a path to resolving the tension); *id.* at 257 ("Few stronger emotions exist than the need to belong and make meaning. And brands are poised to exploit that need." (quoting an ad-agency executive)).

98. Burmann & Zeplin, *supra* note 80, at 285.

99. Mitchell, *supra* note 7, at 101–02.

100. *See, e.g.*, Burmann & Zeplin, *supra* note 80, at 284–86 (discussing importance of brand citizenship behavior); *see also* Punjaisri & Wilson, *supra* note 6, at 61–66 (describing a survey of hotel employees in Thailand that demonstrated the importance of delivering on the brand promise to customers through employees' brand-supporting behaviors).

101. Mitchell, *supra* note 7, at 104–05.

102. Miles & Mangold, *supra* note 80, at 80–81.

103. John Sullivan, Don't Be Fooled by Employment Branding: What It Is and What It Is Not! 2 (Jan. 28, 2007) (unpublished manuscript), *available at* http://www.drjohnsullivan.com/articles-mainmenu-27/articles/employment-branding-mainmenu-30/159-dont-be-fooled-by-employment-branding-what-it-is-and-what-it-is-not?format=pdf. An example of effective viral

media coverage and appearance on "best places to work" lists in turn enhance shareholder value.[104] At the same time, branding consultants recommend that external representations through marketing and advertising campaigns stay "slightly ahead" of internal realities so that workers have something to strive toward.[105] The brand thus serves as the bridge linking the firm's external advertising and marketing campaigns, its internal human resources policy, and the products or services it offers.[106]

4. The "Employer Brand"

In addition to imprinting employees with the firm's brand, internal branding is also geared toward creating and sustaining an "employer brand" designed to enhance recruiting, retention, and productivity. SAS, Edward Jones, and Google are all renowned for their powerful employer brands.[107] Just as product or service branding holds out the promise of what life can be like if the consumer purchases the brand, the employer brand holds out a promise of what life can be like if the employee buys into the brand by coming to work at that business.[108] Thus, the employer brand describes the business as a place to work, and seeks to "*inspire* the employee to . . . emotionally invest in [the firm's] mission."[109] Consistency between internal and external marketing messages is important here, as well, since prospective employees learn as consumers what they can expect on the inside of the firm as employees.[110]

The employer brand is more than simply the sum of all the firm's human resource practices and policies—it is explicitly designed to shape employees' expectations by establishing and nurturing an emotional connection to the firm.[111] Ideally, the employer brand will become the filter through which employees process all the information that they learn about the business, and will shape the choices they make.[112]

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marketing is the development of a restaurant's reputation—it is not accomplished by advertising, it is accomplished by word of mouth, restaurant reviews, and "buzz."

104. LEPLA & PARKER, *supra* note 79, at 5 (listing among the benefits of integrated branding "high company financial valuations and less share price volatility").

105. Mitchell, *supra* note 7, at 103.

106. *See* IND, THE CORPORATE BRAND, *supra* note 4, at 13 (describing outdoor gear company Patagonia, its brand, and the relationship between its external marketing and employees' values).

107. *See* Fortune, 100 Best Companies to Work For, http://money.cnn.com/magazines/fortune/bestcompanies/2010/index.html (last visited Apr. 14, 2010) (listing SAS, Edward Jones, and Google as three of Fortune magazine's 2010 100 best companies to work for).

108. SARTAIN & SCHUMANN, *supra* note 79, at 11–12, 53.

109. *Id.* at 23–24, 53.

110. *Id.* at 19.

111. *Id.* at 203–04.

112. *Id.* at 39, 47.

B. The Benefits of Identity-Based Brand Management for Employers

Identity-branding programs offer an array of positive benefits for employers. First, branding reduces hiring costs. Improved corporate reputation leads to a higher volume of unsolicited job applicants, higher offer–acceptance rates, and more employee referrals.[113] Second, it enhances worker productivity and organizational citizenship behavior. Workers who "believe in the brand" are "unified and inspired by a common sense of purpose and identity,"[114] which fits well with the modern shift toward flattened hierarchies and teamwork. Feelings of affection for coworkers—and by extension, for the firm itself—generate a willingness to work harder for the good of the (work) community as a whole.[115] Enhanced service quality stemming from commitment to the brand, in turn, improves customer loyalty and retention.[116]

Third, internal branding programs foster a shared culture and values that promote workplace harmony. The increasingly racial-, ethnic-, and gender-diverse workforce poses a challenge to workforce collaboration—a particular problem in service businesses where teamwork is important.[117] A strong corporate brand offers a bridge across potential divides.[118] Fourth, improved morale translates into additional labor-cost savings as turnover rates drop and training costs plummet.[119] Fifth, internal branding reduces the likelihood of unionization, another factor associated with higher labor costs. By deconstructing the antagonistic relationship between the firm and

113. Berthon, Ewing & Han, *supra* note 81, at 154; John Sullivan, Employment Branding: The Only Long-Term Recruiting Strategy 2 (Jan. 6, 2009) (unpublished manuscript), *available at* http://www.drjohnsullivan.com/articles-mainmenu-27/employment-branding-mainmenu-30/183-employment-branding-the-only-long-term-recruiting-strategy?format=pdf.

114. Mitchell, *supra* note 7, at 99.

115. *See* George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 546–50 (1982) (hypothesizing that workers are willing to work harder out of sentiment for the welfare of their coworkers); Michel Anteby, *Identity Incentives as an Engaging Form of Control: Revisiting Leniencies in an Aeronautic Plant*, 19 ORG. SCI. 202, 215 (2008) (noting that identity incentives may lessen the importance of other organizational incentives, such as financial compensation).

116. LEPLA & PARKER, *supra* note 79, at 5; Miles & Mangold, *supra* note 80, at 70; *see* Rob Duboff & Carla Heaton, *Employee Loyalty: A Key Link to Valuable Growth*, STRATEGY & LEADERSHIP, Jan.–Feb. 1999, at 8, 9 (reporting on a study demonstrating that firms that implemented initiatives designed to enhance employee loyalty had higher stock-price-to-book-value ratios than those that did not).

117. IND, THE CORPORATE BRAND, *supra* note 4, at 86–87; *see also* Punjaisri & Wilson, *supra* note 6, at 60 (explaining that internal branding is critical to bridge gaps across a heterogeneous workforce).

118. IND, THE CORPORATE BRAND, *supra* note 4, at 84–85; *see also* WALKER INFO., *supra* note 60, at 31 (observing that community-joining is "a human phenomenon, [and] we are social beings. . . . If community gets lopped off over here, it will emerge somewhere else" (quoting Albert Muniz)).

119. IND, THE CORPORATE BRAND, *supra* note 4, at 83–85.

its workers,[120] internal branding functions as an effective union-avoidance device. The feedback mechanisms characteristic of internal marketing campaigns mute voice-driven worker desires to mobilize collectively. In addition, identity-based brand-management programs substitute brand-focused communities for group consciousness based on occupational or class identity, further eroding the prospects for unionization.

Finally, some economists suggest that branding functions as a form of compensation that directly substitutes for wages, allowing firms to pay lower salaries for comparable staff relative to firms with weak brands.[121] Because employees socialized into the brand culture are motivated to act in the interests of the firm and derive utility from the mere fact of belonging or being insiders, the wage differential needed to garner higher levels of effort from the employees is lower.[122]

Moreover, identity-based brand management solves the intractable problem of controlling employees who provide direct service to customers in settings that render supervision impractical or expensive.[123] In the classic management model, employers exercise control through the imposition of work rules and constraints; workers resist those constraints, overtly or covertly, as they seek to reenact their own identities. Workers who do not resist are considered to be as either duped or powerless (submitting out of learned helplessness and a lack of other viable alternatives). Under the brand-based identity model however, employers exercise managerial control indirectly by influencing workers to adopt an organizational identity that is desired, even valued. Workers affirmatively embrace the brand identity because of the psychological benefits occasioned by affiliation with the firm—prestige, status, and even power.[124]

Workers' adoption of organizational identity itself confers significant power on management to control and channel workers' behavior. In a fascinating study of the function of occupational identity at an aeronautics plant, organizational theorist Michael Anteby found that identities the employer fosters and workers desire operate both as an incentive (enabling

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120. DU GAY, *supra* note 16, at 10.

121. Akerlof, *supra* note 115, at 549–50; Burmann & Zeplin, *supra* note 80, at 284; Rafael Gely, *The Law and Economics of Identity*, 14 DUKE J. GENDER L. & POL'Y 229, 236 (2007); *see* Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 73 (2008) (arguing that judges' interest in status, prestige and the opportunity to influence policy compensates for the absence of higher pay scales).

122. Akerlof & Kranton, *supra* note 72, at 15; Gely, *supra* note 121, at 236.

123. Gely, *supra* note 121, at 240–41.

124. *See* Olivier Herrbach & Karim Mignonac, *How Organisational Image Affects Employee Attitudes*, HUM. RESOURCE MGMT. J., Nov. 2004, at 76, 78 (finding that employees infer parts of their own individual identities from the firm's organizational identity and are most likely to identify with a firm that enjoys a positive image because association with the firm bolsters employees' self-image; further, perceived external prestige of the firm correlates positively with employee job satisfaction).

employers to pay workers less) and as a locus of control (because workers seek to maintain the identity itself, rather than simply the job with which the identity is associated).[125] Through the creation of "identity incentives"—which Anteby defines as "the selective positive arousal of identity feelings that induce action or motivate effort"[126]—employers gained a valuable tool for workforce motivation and control.[127]

In short, internal branding programs both engage and constrain workers. Employers who use identity branding can expect to reap an engaged and loyal workforce, lower turnover, happier customers, better press, and the ability to withstand difficult financial periods.[128] And by manipulating employees' identities to align them with the corporate brand, employers can obtain a more comprehensive level of control and standardization than was possible with direct supervision and traditional management strategies.[129] This highly sophisticated form of regulation allows firms to "manage[e] the 'insides'—the hopes, fears, and aspirations—of workers, rather than their behaviors directly," and carries a much lower

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125. Anteby, *supra* note 115, at 209, 211–12. Anteby studied occupational identities at a French aeronautics plant. He found that a policy of managerial tolerance for the use of company-owned tools and materials during working time to create artifacts such as kitchenware, toys, miniature engines, and other items for personal use (called "homers" in factory lingo) fostered occupational identities in the subset of workers who crafted them. *Id.* at 204. Because manufacturing homers is a cooperative endeavor involving multiple participants, their production assists in creating a collective identity; at the same time, their creation reinforces and enhances the craft identities of those who make them, sometimes in ways that differ from the workers' assigned jobs. *Id.* at 205, 207–11. Since workers valued and desired the occupational identity that homer-making conferred, managerial tolerance for this otherwise unlawful practice became a form of compensation, and thus an implicit locus of discipline and control. *Id.* at 211–12.

Anteby concluded that the firm was well aware of the significance of occupational identity organized around the creation of homers and that it deliberately exploited lenience as a tool to control the workers and enhance production. Like branding, homer-creation served several positive functions for the firm: it enhanced worker morale, improved relations between craftsmen, facilitated cooperation in production, and kept craftsmen engaged during periods of reduced activity. *Id.* at 211–12.

126. *Id.* at 213.

127. *Id.* at 217. Anteby theorized that occupational-identity incentives might be especially appealing to workers whose formal labor does not affirm the occupational identity to which they aspire, suggesting that group identification might be most appealing to lower-level service workers whose jobs are inherently unrewarding and do not affirm the identities that they envision for themselves; the opportunity to enact a desired, affirming identity would likely be most valuable to them. *Id.* at 209.

128. Anixter, *supra* note 74, at 162. Anixter describes in considerable detail the philosophy of her collaborator Tom Peters and his trademarked process entitled "Brand Inside/Brand Outside," defined as "the systemic development of the organization's brand promise brought to life through the committed action of every employee for every customer experience." *Id.* at 164; *see also* tompeters!, http://www.tompeters.com/ (last visited Feb. 26, 2010) (featuring branding resources created by Tom Peters).

129. Sartain, *supra* note 6, at 91.

price tag than direct monitoring in many modern service settings.[130] If employees can be persuaded "to embrace the notion of 'We' . . . in preference to 'The Company', 'It' or 'They,'" workers will manage themselves.[131]

C. *ILLUSTRATIONS*[132]

1. Southwest Airlines: Instilling Loyalty

Frequently ranked on the list of best-managed and most successful firms with favorable reputation in the business community, high customer satisfaction and loyalty, high employee morale, and consistent delivery of on-brand service, Southwest Airlines relies heavily upon internal employee branding for its competitive advantage.[133] Southwest's rather abstract-sounding reputational advantages have very concrete economic consequences for personnel management, productivity, and sales. First, high customer satisfaction and brand loyalty means increased sales volume attributable to repeat business and fewer complaints to government agencies.[134] Favorable reputation with stakeholders means more advantageous financing terms, positive press coverage, and better relations with government agencies. Southwest's low employee-turnover rate—

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130. STANLEY DEETZ, TRANSFORMING COMMUNICATION, TRANSFORMING BUSINESS: BUILDING RESPONSIVE AND RESPONSIBLE WORKPLACES 87 (1995).

131. Alvesson & Willmott, *supra* note 87, at 622. Of course, employees are more than "passive consumers of managerially designed and designated identities," and certainly the firm is not necessarily the most powerful influence in identity formation for all. *Id.* at 621. Indeed, as some sociologists have noted, employees may be aware of the superficiality of their branded identities and may refuse to buy into the underlying organizational identity being imposed upon them, striving instead to preserve their authentic identities and multiple selves in the "unmanaged spaces" of their work. *See, e.g.*, Sharon C. Bolton & Carol Boyd, *Trolley Dolly or Skilled Emotion Manager? Moving On from Hochschild's Managed Heart*, 17 WORK, EMP. & SOC'Y 289, 295, 301–03 (2003) (reporting the results of a study of emotion work performed by airline cabin crew employees and explaining that the employees were aware that they were offering "empty performance[s]" in work roles pursuant to their obligations to their employer, but did not necessarily internalize the norms established by the company). Nevertheless, most researchers agree that corporate "identity regulation" remains a powerful "modality of organizational control." Alvesson & Willmott, *supra* note 87, at 621.

132. The branding programs discussed in this Part are well-known and intensively studied. By including them I do not mean to imply that the law should regulate these particular branding programs more intensively. Southwest and Disney, for example, are unionized. Thus, employees at these firms enjoy just-cause protection against discharge under their collective-bargaining contracts and a union represents their interests with regard to their pension plans.

133. Sandra Jeanquart Miles & W. Glynn Mangold, *Positioning Southwest Airlines Through Employee Branding*, 48 BUS. HORIZONS 535, 543 (2005). In 2003, Southwest received the Kozmetsky Award for Branding Excellence and the 2004 Performance Through People Award, among many other positive rankings. *Id.* at 536; *see also* JODY HOFFER GITTELL, THE SOUTHWEST AIRLINES WAY: USING THE POWER OF RELATIONSHIPS TO ACHIEVE HIGH PERFORMANCE 3 (2003) (describing the degree to which the business press has showcased and celebrated Southwest).

134. Miles & Mangold, *supra* note 133, at 543.

consistently under 5%, compared to the industry average of 20–30%—reduces hiring and training costs.[135] Employee morale and productivity are high, which sets the stage for Southwest's twenty-minute-average turnaround time—the most efficient in the industry, with 60% of airplanes leaving the gate within fifteen minutes of arrival.[136] This translates into impressive cost savings since Southwest needs fewer airplanes and fewer gates to service its markets than comparable airlines do.[137]

At the core of Southwest's success is its emphasis on building relationships as a way of doing business—relationships between the firm and its employees, among coworkers, and with customers. Southwest's brand values are "profitability, hard work, low cost, love, and fun."[138] Southwest's mission is clearly and effectively communicated to its workforce from the point of hire throughout the employment relationship, and its internal branding program is geared toward instilling these values in its workforce.

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135. *Id.* By comparison, Southwest's closest competitor, Jet Blue, has a 10–12% turnover rate. *Id.*

136. *Id.* at 544.

137. *Id.*; *see also* GREG J. BAMBER ET AL., UP IN THE AIR: HOW AIRLINES CAN IMPROVE PERFORMANCE BY ENGAGING THEIR EMPLOYEES 87 (2009) (observing that Southwest's business strategy was predicated on attaining rapid turnaround at gates through high employee productivity and coordination); KEVIN FREIBERG & JACKIE FREIBERG, NUTS! SOUTHWEST AIRLINES' CRAZY RECIPE FOR BUSINESS AND PERSONAL SUCCESS 57–60 (1996) (noting that efficient turnaround times require high levels of cooperation between employees in many parts of the organization); THOMAS PETZINGER, JR., HARD LANDING: THE EPIC CONTEST FOR POWER AND PROFITS THAT PLUNGED THE AIRLINES INTO CHAOS 286–87 (1995) (noting relationship between management techniques fostering workforce coordination and Southwest's business model, which would not be sustainable absent short turnaround times at gates).

138. Miles & Mangold, *supra* note 133, at 541; *see also* GITTELL, *supra* note 133, at 119–21. Southwest's fabled sense of humor and the fun-loving spirit that characterizes its workforce has sometimes gone over the line. In one reported case, Southwest supervisors celebrated a customer-service agent's successful completion of her probationary period by staging an elaborate prank in which she was arrested by two police officers, handcuffed, and escorted to a nearby elevator. Fuerschbach v. Sw. Airlines Co., 439 F.3d 1197, 1200–01 (10th Cir. 2006). The employee brought suit under 42 U.S.C. § 1983 against the police officers and the city alleging violations of her Fourth and Fourteenth Amendment rights, as well as tort claims for false arrest, intentional infliction of emotional distress, conspiracy, false imprisonment, assault and battery, and she also brought suit against the airline for defamation. *Id.* at 1202. The district court granted summary judgment for the defendants on all claims, but the appellate court allowed the action to proceed against the city while affirming the grant of summary judgment for the employer on the state tort claims, finding that a workers' compensation claim was the employee's exclusive remedy. *Id.* at 1202, 1214.

The Tenth Circuit took judicial notice of the fact that Southwest's "lighthearted image" permeated not only its customer relations and marketing approaches, but also its corporate culture. *Id.* at 1200. The court described other pranks played upon employees who had recently completed a probationary period, and observed that the record showed that horseplay (pranks) was a "regular incident of employment at Southwest," and thus "'something reasonably to be expected.'" *Id.* at 1212 (citing Leonbruno v. Champlain Silk Mills, 128 N.E. 711, 711 (N.Y. 1920)).

Training is intense, including both classroom training and on-the-job training, lasting for a total of one to five weeks.[139]

During the hiring and screening process, Southwest consciously selects for "brand fit," searching for applicants whose values and attitudes match the firm's brand image.[140] Southwest values "relational competence" and selects recruits who treat coworkers with respect, are team-oriented, desire to serve the public, display a sense of humor, and do not see themselves as superior in status to others.[141] New hires who lack relationship skills are terminated or "counseled out" very early in their job tenure.[142] This careful selection process explains how Southwest is able to encourage its employees to "be themselves" at work—simultaneously encouraging individuality and marketing its consistent brand of humor and fun.[143]

Southwest aligns its human resources and compensation policies with its goal of producing a cooperative workforce that functions well as a team. Southwest emphasizes social networks, strongly encouraging workers to relate to coworkers and the firm as "family." Southwest's "Culture Committees" foster the airline's culture by organizing parties, barbecues, carnivals, volunteer community efforts, and other social events that blur the line between work and family.[144] The airline's personnel practices reflect a sense of compassion and responsiveness to individual employees' needs that is unusual in the industry, and they reinforce the sense of a brand community that the airline seeks to emphasize.[145] Notably, Southwest has embraced unionization and committed itself to employment security for its workers, even during inevitable downturns in the air-travel markets.

139. GITTELL, *supra* note 133, at 88.

140. Miles & Mangold, *supra* note 133, at 540; *see also* LORRAINE GRUBBS-WEST, LESSONS IN LOYALTY: HOW SOUTHWEST AIRLINES DOES IT—AN INSIDER'S VIEW 13 (2005) (explaining that Southwest's employees are "hired for their attitude and trained for the skills they'll need to do their jobs").

141. GITTELL, *supra* note 133, at 86–87.

142. *Id.* at 88.

143. *Id.* at 116–17. Although at first blush it might seem that encouraging employees to "be themselves" at work is at odds with the goal of a branding program, Southwest's emphasis on the selection of employees for brand fit largely resolves the tension. Thus, "be yourself" translates simply into "behave on brand." If the airline required employees to "be themselves" without this strong selection bias in favor of creative, fun-loving employees, it would ultimately find itself in the difficult position of enforcing particularized rules about behavior, with the concomitant need for supervision. Consider, for example, the scene in the film Office Space where Jennifer Aniston's waitress character is instructed that she must don more "flair" (referring to the pins and accessories that servers in this restaurant were instructed to wear on their uniforms in order to express their personalities). OFFICE SPACE (Twentieth Century Fox 1999). Aniston is told that she must develop or at least express a personality that conforms to the restaurant's theme, that each waitress is unique. *Id.* Because the restaurant apparently did not select for these qualities, and because Aniston appears to lack them, the restaurant must enforce its brand through supervision, detailed rules, and ultimately termination.

144. GITTELL, *supra* note 133, at 119–21; Miles & Mangold, *supra* note 133, at 541.

145. Miles & Mangold, *supra* note 133, at 540.

According to CEO Herb Kelleher, "Not furloughing people breeds loyalty. It breeds a sense of security. It breeds a sense of trust."[146] For this reason, some commentators characterize Southwest's management philosophy as a "high-road strategy."[147]

Finally, Southwest is notorious for the authenticity and consistency of its brand. At every level of the company, including its union relationships, Southwest projects consistent brand messages.[148] Further, Southwest's branding program consciously fosters a strong employer brand, making it one of the most sought-after employers in the industry. Compensation practices are consistent with the airline's mission—for example, "pilots are paid by the flight rather than by the hour,"[149] encouraging them to take efficiency very seriously. By making clear the company's guidelines for success and its expectations for its employees, and then delivering on these expectations, the airline consistently reaps benefits of trust and high motivation from its workforce.[150]

Southwest employees display great affection for the firm and wholeheartedly embrace its training and branding efforts, understanding the corporate training process as affording the opportunity to make a personal transformation at work.[151] Workers speak of the company "as though it were an extension of their own families."[152] One worker summed up her feelings this way: "We *belong* to this company."[153]

Indeed, Southwest's branding program is so successful that some have compared its indoctrination program to a religious conversion. As one consultant described the program, "The real secret to Southwest's marketing is its almost religious fervor to maintain and perpetuate the core values of the [corporate] culture."[154] Southwest's philosophy is that employment at the airline is not a job, it's a "crusade."[155] Southwest refers to workers as "living advertisements," instructs employees to "spread[] the word as missionaries," and some have observed that Southwest uses "the souls of its

146. BAMBER ET AL., *supra* note 137, at 92.

147. *Id.* at 95.

148. Miles & Mangold, *supra* note 133, at 541–42.

149. *Id.* at 540.

150. *Id.* at 542. The success of Southwest's branding effort and the high level of trust that the company enjoys is undoubtedly attributable to the opportunity for employee input that exists through Southwest's unions. Southwest is one of the most heavily unionized airlines flying today, with 88% of its workforce unionized. BAMBER ET AL., *supra* note 137, at 92; *see also* GITTELL, *supra* note 133, at 5 (noting and refuting the popular misconception that Southwest has no unions).

151. GITTELL, *supra* note 133, at 117.

152. *Id.* at 119.

153. *Id.* at 118.

154. FREIBERG & FREIBERG, *supra* note 137, at 267.

155. *Id.* at 10; *see also* PETZINGER, *supra* note 137, at 287 (describing the culture of martyrdom and quoting from Kelleher's speech to employees).

employees to legitimize [its profits]."[156] Southwest differentiates its employer brand from other airlines' brands, noting that while others appeal to employees' desires for personal advancement, money, or status, Southwest offers "meaning, joy, and fulfillment" to employees who choose to "work[] for a company they love."[157] Southwest portrays customer service as a "cause," and frames employment with Southwest as the route to personal, and even spiritual, fulfillment: "True happiness is found in serving a cause that we believe has lasting significance. As we begin to serve the customers for which the cause exists, and thus embody the values and ideals inherent in the cause, our lives become more whole."[158]

Little wonder that some have mistaken Southwest's branded community for a religion!

2. Walt Disney: Strict Brand Standards

Disney's management philosophies also rate high on the lists of best-run companies.[159] Because its trade in happiness and fantasy depends on a workforce that is eager to meet customer expectations, Disney has developed branding methodologies and human resources policies expressly geared to producing and maintaining the highest level of service. Its brand service standards and human resources policies have been admired and emulated by many; indeed, it has profited directly from marketing the branding method itself to other companies through its instructional arm, the Disney Institute.[160]

Disney designed its extensive screening process not only to enhance loyalty, but also to further control. Disney selects for brand fit and appearance (it prefers single white males and females or minorities who fit the Disney image and who radiate good health, athleticism, and optimism).[161] Once hired, a strict set of appearance and grooming regulations further defines the Disney employee.[162] Disney provides a full

156. FREIBERG & FREIBERG, *supra* note 137, at 261.

157. *Id.* at 279–80.

158. *Id.* at 281.

159. *See, e.g.*, THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES 167 (1982) (naming Walt Disney Productions—along with McDonald's—as one of the "best mass service providers in America").

160. Disney runs an institute dedicated to training human-resources professionals who wish to learn more about its management philosophy. *See* BILL CAPODAGLI & LYNN JACKSON, THE DISNEY WAY: HARNESSING THE MANAGEMENT SYSTEM OF DISNEY IN YOUR COMPANY 107 (1999) (noting that Michael Eisner invited ABC television executives to the Disney Institute in 1996 "so that the two companies could build a more personal relationship"); *see also* Disney Institute, http://www.disneyinstitute.com/ (last visited Apr. 17, 2010) (a website discussing the benefits that the Disney Institute training programs can offer to other organizations).

161. John Van Maanen, *The Smile Factory: Work at Disneyland*, *in* PSYCHOLOGICAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 294, 295 (Barry M. Staw ed., 3d ed. 2003).

162. *Id.*

week of training at "Disney University" in a program called Traditions, designed to immerse new hires in the culture and thoroughly acquaint them with all the rules and obligations associated with employment at Disney, including skills, appearance standards, and displays of emotion (happiness and cheer).[163] Because Disney's product is experiential, it is critical that employees convey a sense of happiness that facilitates the transport of Disney's guests to fantasyland.[164] Accordingly, Disney's training includes comprehensive management of employee emotion. New hires are told, "'You were cast for a role, not hired for a job.'"[165]

During the training and internship period, Disney carefully strips away other sources of identity that have negligible job relevance, schooling employees in the adoption of new identities instrumental to the firm and laden with social approval.[166] Disney inculcates its own special language designed to shape workers' attitudes toward service in a way that furthers the Disney brand: employees are "cast members" or "hosts," customers are "guests," workers wear "costumes" rather than uniforms and put on a "show," regardless of whether they are sweeping floors or wearing a Mickey Mouse costume.[167]

Disney's brand-training program goes well beyond the inculcation of skills, appearance standards, and display-of-emotion rules. Disney employees socialize heavily and nearly exclusively with other park employees, forming a well-developed youth culture reminiscent of summer camp or college dormitories. Romantic pairings are common. Softball and volleyball leagues, parties (officially sponsored at Disney's park or off premises), and other activities provide ample opportunity for interaction. Many employees live together in the low-cost apartment complexes adjacent to Disney's parks, which they refer to as "the projects" or "worker housing."[168]

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163. *Id.* at 298–300; Cheryl Hall, *Disney School Fashions Workers in Its Image*, DALLAS MORNING NEWS, May 9, 1993, at 1H; *see* Disney Institute, *supra* note 160 (discussing how the Disney Institute provides world-class training for a wide range of skills to its cast members).

164. Sociologist John Van Maanen explains:

> Disneyland as the self-proclaimed "Happiest Place on Earth" certainly occupies an enviable position in the amusement and entertainment worlds as well as the commercial world in general. Its product . . . is emotion—"laughter and well-being" . . . . [T]he corporate position [can be summarized as follows]: "although we focus our attention on profit and loss, day-in and day-out . . . this is a feeling business and we make our profits from that."

Van Maanen, *supra* note 161, at 294 (quoting Bill Ross, a Disneyland executive).

165. Rafaeli & Sutton, *supra* note 8, at 109 (quoting WALT DISNEY PRODS., YOUR ROLE IN THE WALT DISNEY WORLD SHOW (1982)).

166. Van Maanen, *supra* note 161, at 304.

167. PETERS & WATERMAN, *supra* note 159, at 167–68; Dan Malovany, *Backstage at Disney World: The International Theme of the Disney World Bakery*, BAKERY PROD. & MKTG., April 24, 1990, at 120, 120; Hall, *supra* note 163.

168. Van Maanen, *supra* note 161, at 298.

Disney is renowned for its dedication to brand consistency. Its brand standards play an important role in controlling its workforce. Rigorous enforcement is a vital part of Disney's "social engineering" of corporate culture.[169] Employees who fail to conform to Disney's brand standards are quickly punished with excommunication.[170] Sociologist John Van Maanen writes about his termination by Disney for failing to comply with a hair-length and grooming regulation, highlighting the signaling effect of his public discharge process:

> Dismissal began by being pulled off the ride after my work shift had begun by an area supervisor in full view of my cohorts. A forced march to the administration building followed where my employee card was turned over and a short statement read to me by a personnel officer as to the formal cause of termination. Security officers then walked me to the employee locker room where my work uniforms and equipment were collected and my personal belongings returned to me while an inspection of my locker was made. The next step was the time shed where my employee's time card was removed from its slot, marked "terminated" across the top in red ink, and replaced in its customary position (presumably for Disneylanders to see when clocking on or off the job over the next few days). As now an ex-ride operator, I was escorted to the parking lot where two security officers scraped off the employee parking sticker attached to my car.[171]

For the most part, employees welcome and embrace Disney's branding process, feeling as if their employment confers upon them "the keys to a very special kingdom."[172] Despite the low pay, close supervision, and "almost fanatical" requirements of loyalty and sacrifice that accompany the job, Disney's applicant pool is impressive and its staff strikingly competent.[173] Further, employee loyalty is a hallmark of "The Disney Way."[174] Disney

169. *Id.* at 303.

170. *Id.* at 306 n.3.

171. *Id.* Van Maanen notes, "[T]he process still irks." *Id.*

172. Anixter, *supra* note 74, at 173.

173. Van Maanen, *supra* note 161, at 303–04. Van Maanen observes:

> Disneyland does not pay well; its supervision is arbitrary and skin-close; its working conditions are chaotic; its jobs require minimal amounts of intelligence or judgment; and [it]asks a kind of sacrifice and loyalty of its employees that is almost fanatical. Yet, it attracts a particularly able workforce whose personal backgrounds suggest abilities far exceeding those required of a Disneyland traffic cop, people stuffer, queue or line manager, and button pusher. . . . [A]dherence and support for the organization are remarkable.

Id.

174. *See supra* note 160 and accompanying text (discussing the company's unique philosophy and its efforts to market this philosophy to other businesses).

enjoys low turnover and high retention rates: turnover was just 15% in the 1990s,[175] and "like swallows returning to Capistrano, many part-timers look forward to their migration back to the park for several seasons."[176] Clearly, Disney's collective and intensive socialization process and deliberate efforts to remake identity rather than simply shape behavior powerfully impact employee loyalty.[177]

3. "Combined Insurance": The Scientific Management of Identity

Other firms have experimented with programs aimed primarily at control. Although strategies reminiscent of scientific management such as scripting and routinization have some role in these branding programs, the programs also have transformative agendas and are aimed at altering workers' identities in ways that are designed to increase productivity. Sociologist Robin Leidner's study of identity management at Combined Insurance ("CI") (a fictionally named subsidiary of Aon Corp) is instructive.[178] CI's success in selling insurance policies was directly linked to its agents' efficacy as salespeople who sold door-to-door.[179] In an effort to improve its agents' performance, the company sought to script worker behavior during the sales transaction, standardizing agents' words, tone of voice, eye contact, personal styles, and bodily movements.[180] CI required workers to keep the routinization hidden, so that their personalities would appear natural and spontaneous.[181] Because their jobs required that they use their personalities when interacting with customers, and that they throw

175. Hall, *supra* note 163.

176. Van Maanen, *supra* note 161, at 304.

177. *Id.*

178. Combined Insurance targeted lower and working-class families in small towns and rural areas for door-to-door sales of life insurance. LEIDNER, *supra* note 64, at 88, 90. Leidner gathered her data during the mid to late 1980s, using both interviewing and participant-observation techniques. *Id.* at 15–16.

179. LEIDNER, *supra* note 64, at 90.

180. *Id.* at 112, 148. For example, Leidner's notes from a class lecture during CI's training program contain the following scripted sales encounter at the customer's home:

> After ringing the doorbell and opening the screen door, wait for them to answer with your side to the front of the door. Do a half-turn when they open it. It's almost as though they catch you by surprise—nonconfrontational. Be casual.
>
> Lean back a little when they open the door. Give them space. . . .
>
> To get inside, use The Combined Shuffle. It has three steps:
>
> 1. Say, "Hi, I'm John Doe with Combined Insurance Company. May I come in?" Handshake is optional. Break eye contact when you say, "May I come in?"
>
> 2. Wipe your feet. This makes you seem considerate and also gives the impression that you don't doubt that you'll be coming in.
>
> 3. START WALKING. Don't wait for them to say yes. Walk right in. . . . [A]ct like a friend; assume you'll come in.

Id. at 111.

181. *Id.* at 113.

themselves into the role, workers had to "reconcile their self-concepts with the qualities" that CI required them to demonstrate.[182] A detailed script was not adequate to the dynamic nature of this sales setting; in particular, a script provided little support to workers facing the pressures inherent in door-to-door sales and its high-rejection ratio.[183] Agents needed to adopt certain habits of thinking and ways of relating to others, as well as develop emotional resources to deal with rejection.[184] Moreover, supervision in the field was extraordinarily difficult given the setting of the agents' work—one-on-one in customers' homes; the company could not rely solely on scripting to solve its problems of control.[185]

Accordingly, CI developed a training and routinization program that was designed to turn "recruits into certain kinds of people"[186] and instill the personal qualities that it considered essential to effective selling: self-

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182. *Id.* at 184, 192–93 (noting how the process of forced reconciliation posed the risk of self-alientation).

Some question whether individuals possess some default, relatively stable, "authentic" identity that would emerge absent the impact of pressure to assimilate into the corporate culture at work. *See, e.g.*, Cas Wouters, *The Sociology of Emotions and Flight Attendants: Hochschild's Managed Heart*, 6 THEORY CULTURE & SOC'Y 95, 103 (1989) (questioning whether a stable self, unadulterated by social learning, could exist). As many have written, identity formation is an evolutionary process that is influenced by social forces. Yet the very instability of identity makes it simultaneously easier to mount the argument that law could (and should) intervene, and more difficult to determine which factors influence its development and to what degree. Employer practices are critical in shaping identity, both in determining how workers perceive job "fit" in deciding whether to apply for jobs in the first place, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1759–69 (1990) (arguing that employer job descriptions and interview and application procedures effectively convey the gender identity that the employer seeks for that job), and in how workers perform their identities at work over time, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–85 (2000) (examining the work that minorities must perform to counteract negative stereotypes held by their employers). Workers who resist corporate branding consistently mention awareness of the branding as a force operating against their natural or chosen identities. *See* Avery & Crain, *supra* note 5, at 46 (noting Darlene Jespersen's deposition testimony that wearing makeup made her feel not like herself, "'"very degraded and very demeaned,"' that it adversely affected her '"credibility as an individual and as a person,"' and '"forced her to be feminine"' and to become 'dolled up' like a sexual object." (footnote omitted)). As a Pizza Hut worker in a Kentucky restaurant put it, workers had to become "the kind of person that they wanted you to be . . . to work there." FAST FOOD WOMEN (Appalshop Films 1991).

183. LEIDNER, *supra* note 64, at 113.

184. *Id.*

185. Leidner also conducted a study of scripting and routinization at McDonald's, and she contrasted the customer encounters and work setting at McDonald's with those existing at CI. *Id.* at 147. At McDonald's, routinization and scripting were quite effective in standardizing and controlling the workforce, while at CI, because of the nature of its business, they were more flexible. *Id.*

186. *Id.* at 120.

confidence, drive, and persistence.[187] CI's two-week training program sought to transform workers by inculcating a "positive mental attitude" ("PMA").[188] PMA training was intended to alter not only agents' behavior on the job, but their self-concepts and framework for thinking about their experiences.[189] The training utilized techniques of commitment well-known among social psychologists, who had begun attending to such processes when studying brainwashing processes developed for use on prisoners of war.[190] Its goal was to create workers who would make the same decisions that the firm would when dealing with customers, obviating the need for supervision in the field.[191]

CI's training program taught workers to regard their personalities as something to be worked on, and asked them to "cede to the company the right to reshape many aspects of their selves, including their emotions, values, and ways of thinking."[192] Each trainee signed a "pledge of commitment" to the self-transformation process, framed as a "commitment to personal success" to be attained by learning and applying the CI system.[193] Though the commitment pledge was required, it was cloaked in the garb of voluntariness, appearing as a personal choice made by each individual employee to take advantage of PMA training and highly scripted routines as vehicles by which employees could empower themselves, control their destiny, and improve their job performance.[194] As Leidner explained, "The apparent paradox [between the PMA training and the scripting standardization] was bridged by stressing that the sales system worked. It could be thought of, not as an imposed routine, but as a framework for success, which the trainees would choose freely if they had perfect information."[195] Thus, CI's management practices combined principles of scientific management more typical of the industrial era with a modern gloss of psychological conditioning designed to induce employees to invest psychologically in firm-specific training that both facilitated improved job performance and bound them to the firm.

D. *WORKERS' EMBRACE OF ORGANIZATIONAL IDENTITY*

For the firms described above, the benefits of identity-based brand management are clear: lower labor costs, lower turnover, higher levels of

187. *Id.* at 123.

188. LEIDNER, *supra* note 64, at 100–01. Workers were asked to embrace PMA in all areas of their lives. *Id.* at 104.

189. *Id.* at 123.

190. *Id.* at 117 n.23.

191. *Id.* at 87.

192. *Id.*

193. LEIDNER, *supra* note 64, at 117–18.

194. *Id.*

195. *Id.* at 104.

organizational loyalty, enhanced productivity, and an effective method of control.[196] But what about the workers?

Most employees welcome identity-based branding. Researchers have provided three explanations for workers' receptivity to branding. First, much contemporary service work holds little promise of a positive identity associated with the work itself.[197] Association with a powerful or desirable brand thus offers a dignified and empowering alternative to the reality of most low-waged workers' lives. Second, brands fill a void of connection inherent in modern life, bringing meaningful order and coherence to people's lives that spiritual or religious disciplines once provided. They school our imagination, "offer membership in a community, . . . issue an invitation to unconditional trust," offer a consistent, coherent identity, and "promise . . . conversion and new life."[198] They tap into the human desire to bond with others, to become part of something larger than ourselves, to bring meaning to our day-to-day lives, and ultimately, to defend property and accomplishments that we have come to see as our own.[199] The most seductive and effective branding programs harness this longing to belong and direct it toward the brand.[200] A branded identity has particular appeal in the modern era where employee mobility is high, job longevity is relatively short, and the traditional sources of community are increasingly rare. As Professor Cynthia Estlund has observed, although "we may be bowling alone,[201] . . . we are working together."[202] Thus, the human desire to belong

196. *See* Akerlof & Kranton, *supra* note 72, at 14–15 (discussing a model that predicts how employees will act based on how they identify with the company for which they work); *see also* Gely, *supra* note 121, at 236 (elaborating on the Akerlof and Kranton model).

197. DU GAY, *supra* note 16, at 4.

198. BEAUDOIN, *supra* note 1, at 44–56. Beaudoin argues that "[b]randing is a . . . spiritual discipline, that can provide as persuasive a worldview as . . . traditional religion." *Id.* at 39.

199. *See* Nitin Nohria, Boris Groysberg & Linda Eling-Lee, *Employee Motivation: A Powerful New Model*, HARV. BUS. REV., July–Aug. 2008, at 78, 80–81 (describing drives that shape worker motivation).

200. IND, LIVING THE BRAND, *supra* note 4, at 33–47 (discussing the fulfillment of needs, such as meaning and belonging, through brands). At the same time, association with a brand offers the seductive allure of approval for one's individuality from a group of like-minded people. ATKIN, *supra* note 4, at 57–66.

201. In an influential book, Robert Putnam argues persuasively that Americans are increasingly less likely to participate in community-based activities, including clubs, fraternal organizations, labor unions, and even bowling leagues. The powerful image of a solitary bowler epitomized for Putnam a lack of the civic engagement that is essential to a vital, healthy democracy. ROBERT B. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 275 (2000).

202. ESTLUND, *supra* note 63, at 5–7 (arguing that for most Americans the workplace is a more vital source of connection and belonging than any affinity group other than family or friends).

readily translates into eagerness, or at least willingness, to adopt an organizational identity at work.[203]

Third, some workers see the brand standard as empowering—a tool that expands their capacity to control service interactions.[204] For example, despite the intrusive nature of the training, scripting, and routinization required of door-to-door life-insurance sales agents, trainees in sociologist Robin Leidner's study did not resent it.[205] From the workers' standpoint, such routinization restored control over the labor process that workers lost with the introduction of the unpredictable customer into the traditional industrial dyad.[206] Participants in Leidner's study viewed the training as "a lifeline rather than a constraint."[207] Still others embrace brand-management training because they believe it will facilitate positive change in their personalities. Rather than seeing the firm as a "profit-seeking 'controller'" manipulating workers for its own ends, these recruits perceive the firm as "a benevolent 'helper,'" facilitating attainment of their personal goals.[208]

IV. THE PSYCHOLOGY OF IDENTITY BRANDING

Why, then, should we worry about corporate branding in the employment context? If employees embrace it and employers profit from it, where is the harm? The law's commitment to the liberal values of individual autonomy, dignity, and free will argues for respecting employees' choice to embrace the branded identities offered to them by employers. And on a practical level, policy and law should support choices that enhance personal feelings of competence and satisfaction with one's life, including one's job—whether the choice is made out of false consciousness or well-informed logic.[209] If internal branding programs facilitate social support networks that contribute to happiness on the job, why should it matter that the employer benefits significantly in the bargain? Why not simply view this as a "win-win?"

203. Workers report that their sense of community and belonging is increasingly linked to work and coworkers rather than to community, civic, or even religious groups. *Id.* at 28.

204. LEIDNER, *supra* note 64, at 100–20 (reporting on field study of scripting and routinization imposed on insurance salespeople at Combined Insurance); *see supra* Part III.C.3 for a more detailed discussion of Leidner's study.

205. LEIDNER, *supra* note 64, at 148. For workers, the training functioned as a "shield[] against the insults and indignities these workers were asked to accept from the public." *Id.* at 5.

206. *Id.* at 174–75.

207. *Id.* at 116.

208. *Id.* at 118 (quoting NICOLE WOOLSEY BIGGART, CHARISMATIC CAPITALISM: DIRECT SELLING ORGANIZATIONS IN AMERICA 165 (1989)).

209. Positive psychologists would certainly make this argument. *See, e.g.*, CHRISTOPHER PETERSON, A PRIMER IN POSITIVE PSYCHOLOGY 249–71 (2006) (describing the relationship between social attachments to friendships and coworkers and subjective well-being); Harry T. Reis & Shelly L. Gable, *Toward a Positive Psychology of Relationships*, *in* FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED 129, 129–31 (Corey L.M. Keyes & Jonathan Haidt eds., 2003) (same).

This Part argues that identity-based brand management aimed at altering employee perceptions of the nature of the employment relation has potentially serious spillover effects for workers and, ultimately, for society. Identity-based branding programs promote a false sense of intimacy, trust, and security that is at odds with the law's view of employment as a market transaction terminable at the will of the employer. Backed by the at-will doctrine, firms are free to impose branding programs on employees who resist them at the risk of their job security. Through branding, the firm nurtures unrealistic levels of trust and influences how employees assess the risks they face in employment, altering how they respond to labor market alternatives and how they evaluate opportunities to invest financially in the firm. If the law's assumption that these choices are the product of a cognitive weighing of alternatives is unfounded, so too is the law's unwillingness to examine the psychological influence of branding programs.

A. *EXIT, CHOICE, AND COERCION*

The law presumes that employees' choice to enter and exit employment—and thus, to subject themselves to or liberate themselves from exposure to internal branding programs—is both free and rational, a product of unfettered cognitive weighing of market alternatives.[210] If employees reject the brand identity that the employer advances, they are free to quit,[211] just as the employer is free to condition employment upon

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210. The concept of exit has a powerful grip on law. The idea that individuals are free to exit the various constitutive relationships in which they invest has served as justification for moral responsibility, cultural blame, and legal liability in a wide variety of contexts. *See, e.g.*, Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1290 (1992) [hereinafter Mahoney, *Exit*] (arguing that law's undue focus on the possibility of exit in violent intimate partnerships and work settings characterized by sexual harassment misses the significance of the relationships and attachments that victims value); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61–65 (1991) (describing a battered woman's decision to stay in an abusive relationship as an exercise of agency that represents a reasonable response to the constraints on leaving, particularly to the heightened risk of separation assault that accompanies exit); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1739–42 (2004) (examining how the employment-at-will doctrine prioritizes exit as a response to workplace conflict).

211. Since the early 1900s, American courts have applied a default rule of employment at will to employment relationships of undefined duration. Pursuant to the at-will doctrine, either the employer or the employee may terminate the employment relationship at any time and for any reason without notice. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884) ("All [employers] may dismiss their employes [sic] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."). In its strictest incarnation, "[t]he at-will contract lasts only from moment to moment, at every moment completed and at every moment renewed." Stone, *supra* note 22, at 1. For interesting discussions of the evolution and spread of the employment-at-will doctrine, see Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 464 (2008) (explaining that the at-will doctrine spread across the country as states competed with one another to attract capital investment), Jay

the employees' embrace of the branded identity.[212] Similarly, the law assumes that employees make choices between investment alternatives in their retirement portfolios based upon an objective assessment of risk and return.[213] Thus, branded workers who "choose" to remain at the firm and to invest both psychologically and financially are seen as having exercised agency in a way that negates coercion.

The counter-narrative is that market forces coerce employees into the available jobs for which they are qualified, and employers dupe them into investing in company stock. As dependent victims of coercion, employees lack any agency at all. The "choices" they make to embrace branding, to remain at the firm, or to invest financially are not choices at all, but the result of coercion.

The reality is far more complex than this "either-free-agents-or-victims" account. As Martha Mahoney has explained in another context, the idealization of "moments of . . . freedom" to enter and exit relationships overlooks the day-by-day construction of those relationships, whether they are intimate relationships, employment relationships, or investment relationships.[214] While employees choose which jobs to take, their choices become more constrained over time as they make firm-specific investments and advance along the pay ladders in their firms, simultaneously aging and pricing themselves out of alternative employment.[215] They build families, forge social networks, and invest in their homes and communities, binding them more closely to the geographic region where the employer's firm is

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M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 131 (1976) (arguing that the employment-at-will rule spread from salaried managers to manual workers, functioning as "an adjunct to the development of advanced capitalism in America"), and Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 121, 126 (1982) (suggesting that weak U.S. labor unions failed to combat the application of at-will employment to manual laborers, and the rule then spread to salaried managers).

212. Because it is lawful for employers to dismiss employees at will, employers may credibly threaten to discharge workers for failure to comply with any term or condition of employment. *Payne*, 81 Tenn. at 518.

213. Susan J. Stabile, *Freedom To Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 378–91 (2002) (explaining how ERISA's regulatory framework and employers' economic incentives to persuade employees to invest in company stock contribute to under-diversification of employees' 401(k) accounts).

214. *See* Mahoney, *Exit*, *supra* note 210, at 1284–85 (describing relationships and "idealized moments of mutual freedom to enter and leave"); *see also* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 502 (explaining that focusing only "on the decision to join the firm, rather than the myriad of minute, ongoing adjustments in terms," results in a skewed view of the employment relation as a single-event transaction rather than a relationship forged over time).

215. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 19–24 (1993) (discussing shifting risks of opportunism throughout the employment life cycle).

located. And while employees choose how to invest their monies in 401(k) retirement accounts, they do so within a framework of default rules and with limited information about the financial state of the firm and the risks of non-diversification that create a strong pull toward investment in company stock.

The intricate interplay of agency and coercion in the human psyche is demonstrated most vividly by how employees process information about legal rules when those legal rules are perceived as unjust. In a pathbreaking empirical study, Pauline Kim demonstrated that employees internalize social norms relevant to their workplaces and consequently ignore or misunderstand legal rules governing the employment relation, instead equating the law with what they think is fair.[216] Erroneously believing that they could not be discharged except for cause, workers were less likely to take measures to protect their investment in the relationship.[217] While their beliefs were rational in an era when internal labor market practices reinforced a fairness norm, they do not square with the "new deal at work,"[218] in which employers' freedom to discharge at will occupies center stage. Kim found that employees' beliefs were remarkably resistant to change, even when the employer promulgated disclaimers and the employee herself had some experience with at-will terminations. Kim explained that employees persist in their beliefs out of a combination of cognitive dissonance and instincts of self-preservation: once persuaded that the employer would deal fairly with them, employees clung to that view and rejected contradictory information, including disclaimers and their own experience. The greater the worker's investment in the firm—emotional, financial, or otherwise—the greater the threat to her sense of "personal competence" arising from recognition of her vulnerability to employer opportunism, and thus, the greater her persistence in the erroneous belief.[219] The risk, then, is that the normal influence of legal rules on employee behavior is altered or crowded out by employees' psychological framework.[220]

The law's single-minded focus on the possibility of exit as the *sine qua non* of free choice overlooks this complex dance between the human psyche and the operation of legal rules. Employer branding practices designed to build strong emotional ties to the firm and to align employees' financial

216. 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, 133–46 (1997) (reporting results of an empirical study concluding that employees consistently overestimate their legal rights to job security); Kim, *supra* note 214, at 448 ("[W]orkers do not readily distinguish between . . . what they believe the law should be and what it actually is.").

217. Kim, *supra* note 214, at 486.

218. *See supra* Part II (describing new market norms).

219. Kim, *supra* note 214, at 496.

220. *Id.* at 485.

interests directly with those of the firm create a psychological framework or lens through which employees view their choices to stay and invest, or exit. Backed by the at-will rule, branding programs enable employers simultaneously to exert control over workers' psyches and to induce additional financial investment in the firm. If we are to understand the decisions employees make to stay and invest in the firm, then, we must attend to the psychological framework within which those choices are made.

B. THE PSYCHOLOGICAL CONTRACT AT WORK

The phrase "psychological [employment] contract" refers to a concept developed by psychologist and management theorist Denise Rousseau.[221] Rousseau defined the psychological contract as "an individual's beliefs regarding the terms and conditions of a reciprocal exchange agreement between [the employee] and [the firm]."[222] Rousseau's focus was on the perceived promises, explicit or implicit, that workers understand to be operative.[223] Such promises could be made by formal or informal means, including contracts, offer letters, employee handbooks, oral discussions, or through organizational practices and policies.[224] Increasingly, such promises are made more indirectly, and in more powerful ways, through internal branding programs.

Rousseau's emphasis on the promissory nature of psychological contracts and her focus on the perspective of the individual and his or her subjective perception were critical contributions not only to management theory, but to the development of law. Rather than being predicated on

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221. ROUSSEAU, *supra* note 65, at 34–40; Denise M. Rousseau, *Psychological and Implied Contracts in Organizations*, 2 EMP. RESPONSIBILITIES & RTS. J. 121, 121–22 (1989). Rousseau's psychological contract framework has proved influential in shaping management theory and has enjoyed widespread practical application by human-resources practitioners in the workplace. *See* NEIL CONWAY & ROB B. BRINER, UNDERSTANDING PSYCHOLOGICAL CONTRACTS AT WORK: A CRITICAL EVALUATION OF THEORY AND RESEARCH 14–15 (2005) (describing the impact of Rousseau's ideas on research in the field).

222. Rousseau, *supra* note 221, at 123.

223. Elizabeth Wolfe Morrison & Sandra L. Robinson, *When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops*, 22 ACAD. MGMT. REV. 226, 228 (1997) (discussing Rousseau's psychological contract concept). Morrison and Robinson explain that because the firm cannot "perceive," psychological contracts are held only by employees, not by firms. Moreover, the contract is understood to be between the worker and the firm rather than with particular agents acting on the firm's behalf; the firm itself assumes an anthropomorphic identity in the employees' eyes. *Id.* at 228–29.

224. *Id.* at 228. On the employer side of the equation, a typical psychological contract might include promotion opportunities, training and skills development, compensation, respect, and regular feedback; on the employee side of the equation, the psychological contract entails offering sufficient effort, skill and knowledge, protection of proprietary information, working extra hours, striving for high quality, demonstrating a willingness to be transferred, and remaining flexible about assignments. CONWAY & BRINER, *supra* note 221, at 37, 39; Denise M. Rousseau, *New Hire Perceptions of Their Own and Their Employer's Obligations: A Study of Psychological Contracts*, 11 J. ORGANIZATIONAL BEHAV. 389, 394 (1990).

unilateral employee expectations arising out of basic human needs, the psychological contract as Rousseau defined it was formed in response to observable behaviors by the firm and its agents, such as explicit verbal or written promises or implied promises arising from patterns of conduct.[225] The significance of this contribution was twofold: first, management could manipulate the formation of psychological contracts and "manage" them to its benefit; and second, if the promises were the product of management's conduct rather than unilateral employee expectations stemming from innate human needs, then management could be held legally responsible for reliance it induced.[226] Although psychological contracts are not legal contracts,[227] the concept undoubtedly contributed to the widespread acceptance by courts of a common-law claim for breach of implied contract, an exception to the employment-at-will doctrine.[228]

Moreover, because the violation of a psychological contract amounts to a betrayal in the eyes of employees,[229] the theory explains why workers respond with such intense emotions.[230] Promises are far more

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225. CONWAY & BRINER, *supra* note 221, at 14.

226. Some scholars have argued that psychological contracts also arise through the operation of market forces; as worker job tenure increases, workers become more dependent on the firm due to a combination of aging, investment in firm-specific human capital (such as learning how to use a particular piece of equipment, how to navigate particular social networks inside the firm or among the firm's suppliers or vendors, etc.), and seniority systems that render more experienced workers uncompetitive in the labor market (i.e., price them out). *See, e.g.*, Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty To Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1206–07 (1991) (discussing the market forces that create psychological contracts). Such scholars use the phrase loosely however and focus more on employee expectations than on the promissory and reciprocal elements that characterize Rousseau's theory.

227. Rousseau was careful to distinguish the psychological contract from an implied contract. Psychological contracts are subjective, based on the perceptions of the individual employee about the nature of the employment bargain. Implied contracts represent objective third-party assessments that a legal contract exists. ROUSSEAU, *supra* note 65, at 52.

228. Court decisions consistent with Rousseau's psychological contract construct include *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1265 (N.J. 1985) (finding provisions of an employee handbook enforceable and noting the benefits of loyalty and union avoidance that the employer reaped from shaping employee expectations), discussed *infra* at text accompanying notes 338–41, and *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087–89 (Wash. 1984) (en banc) (enforcing provisions in employee handbook where the employer reaped the benefits of "'an orderly, cooperative and loyal work force'" as a result of its promises to workers), discussed *infra* at text accompanying notes 342–43. For a more detailed analysis of the evolution of implied contract theory in employment law, see *infra* Part VI.A.1.

229. Rousseau defined violation of a psychological contract as the "failure of organizations or other parties to respond to an employee's contribution in ways the individual believes they are obligated to . . . ." Rousseau, *supra* note 221, at 128.

230. Workers' anger can be vitriolic. *See* ROUSSEAU, *supra* note 65, at 134–38 (discussing four possible reactions to dissatisfaction in organizations); Judy Pate & Charles Malone, *Post-"Psychological Contract" Violation: The Durability and Transferability of Employee Perceptions: The Case of TimTec*, 24 J. EUR. INDUS. TRAINING 158, 161 (2000) (describing case study of multinational corporation that responded to a strike by terminating all of its employees and hiring new ones,

"psychologically engaging" than general expectations, probably because they are induced by the other party and are typically quite specific.[231] Further, the emotional response triggered by violation lingers after the violation, profoundly impacting the employee's view of the firm and of the employment relationship itself.[232] Its impact is most closely analogous to a breach of trust in a marriage.[233]

Psychological contracts at work have an important temporal dimension as well: over time, employees expect more and more of employers in order to match their increasing levels of investment in the firm. If employers do not respond to their expectations, workers perceive a violation of the contract, lose trust in the firm, and withdraw performance. Depending on the context, employees may voice their complaints, quit—or more commonly—withdraw psychologically and adjust their own obligations to the firm downward.[234]

Rousseau's research is important for modern service firms because it suggests that organizational citizenship behavior derives from employees' sense of indebtedness and obligation to the employer stemming from the psychological contract—a set of expectations created by the employer's practices—rather than from abstract feelings of loyalty or attachment to the firm.[235] Psychological contracts motivate employees only when they trust the employer to deliver on its side of the bargain. Reciprocity is key; the employee makes her contribution in return for something that flows back from the firm.[236] Thus, the employer's actions, practices, and policies play an important role in shaping the psychological contract.

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and later closed its doors; employees made statements such as "I would go out of my way to ruin TimTec. I hate them with a passion.").

231. CONWAY & BRINER, *supra* note 221, at 25, 30.

232. *Id.* at 71–72.

233. *See also supra* note 30 and accompanying text (noting the parallels between employment and family in the context of trends in job and marital tenure).

234. Voice assumes many forms. Although collective mobilization and legal action are the most traditional channels for its exercise, talking with supervisors, one-on-one confrontations, or threats to leave or sue are also common forms of workplace voice. ROUSSEAU, *supra* note 65, at 136–38. Exit is most likely where there are other employment options and other people are also exiting. *Id.* at 134–37. Psychological withdrawal is sometimes accompanied by acting out through petty theft, vandalism, or sabotage. *Id.* at 138.

235. CONWAY & BRINER, *supra* note 221, at 57; Sandra L. Robinson, Matthew S. Kraatz & Denise M. Rousseau, *Changing Obligations and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137, 149 (1994).

236. CONWAY & BRINER, *supra* note 221, at 38. Of course, not all employment relationships involve the same type of psychological contract. Rousseau describes psychological contracts as existing along a continuum. At one end of the spectrum are "relational" contracts characterized by workforce stability and abstract, open-ended, long-term obligation. Relational contracts are typical of older-era employment relations such as that favored by the so-called "Mensch of Malden Mills"—Aaron Feuerstein—who continued to pay the workers at his factory after it burned down until a new facility could be built. Denise M. Rousseau, *Psychological Contracts in the Workplace: Understanding the Ties That Motivate*, 18 ACAD. MGMT. EXECUTIVE 120, 122 & 126 n.7

C. *Promoting Deep Structure Identification Through Internal Branding*

Clearly, all human resources management practices impact the psychological contracts employees hold. Recruitment, socialization, training and development activities, performance appraisals, promotion opportunities, and communications from management all influence employees' expectations.[237] In branding terminology, these attributes cumulatively comprise the employer brand.[238] Surely, though, not all branding strategies pose risks to worker identity that would undermine the law's assumption of rational decisions to invest in the firm. At what point do internal branding programs cease being simply effective techniques for motivational management and begin to morph into psychological manipulation strategies that bear watching?

Some identity-based brand-management programs actively seek to foster what psychologists call "deep structure identification." Deep structure identification occurs when the worker experiences fundamental and enduring changes in her self-conceptualization that are sustained across

(2004). Such contracts involve affective elements as well as monetizable terms. Immediate repayment is not the focus; instead, reciprocity is indirect and delayed. Emotional attachment to the firm and feelings of trust undermine vigilance, shaping employees' perceptions of contract performance to conform to their preexisting positive expectations. Morrison & Robinson, *supra* note 223, at 229, 238–39, 244–45. Thus, employees may overlook initial breaches of the psychological contract or attribute them to external forces or extenuating circumstances, seeking to find causal explanations for events that conform to and reinforce their preexisting beliefs. *Id.* at 244.

At the other end of the spectrum lie "transactional" contracts more typical of encounter-style businesses such as McDonald's. In these arrangements, employees are less important to the firm's function or the firm operates in a more unstable market; long-term commitments are neither offered nor desired, and concrete, short-term obligations more readily translate into financial terms. Employees' orientation is instrumental, and workers tend to be vigilant about contractual violations. *See id.* at 229, 238, 245 (describing transactional contracts).

In the middle of the spectrum are "balanced" psychological contracts, a hybrid form of relationship featuring an open-ended time frame and more rigorous performance demands, where workers give up job security in exchange for the opportunity to learn new skills and reap the benefits of their affiliation with the firm through stock investments—Apple is typical. *See supra* note 29.

237. Rousseau, *supra* note 236, at 124. *See generally* ROUSSEAU, *supra* note 65 (explaining how human-resources practices give rise to psychological contracts). Communications may be formal or informal and include representations made in connection with the hiring process (both written job advertisements and statements made to applicants during screening), expressions of organizational policy (the distribution of formal and informal information about the company and the position once on the job including handbooks and personnel manuals, performance reviews, how compensation is distributed, and so on), observation of how others are treated, and informal communications between coworkers. All of these practices combine to establish the firm's history or reputation for dealing fairly or unfairly with employees. CONWAY & BRINER, *supra* note 221, at 22–23; ROUSSEAU, *supra* note 65, at 35–40.

238. CONWAY & BRINER, *supra* note 221, at 22–23; ROUSSEAU, *supra* note 65, at 35–40; *see supra* notes 107–12 and accompanying text (discussing the employer brand).

situations and roles.[239] Employees who feel deep structure identification with the firm respond as if they were in an intimate relationship with the firm, not simply a contractual exchange of money for labor. Because the boundaries between their own self-interest and the firm's have blurred, employees' self-concept and personal identity become aligned with the firm's: the firm's success becomes their success, the firm's power their power. Extra-role performance and extraordinary effort on the firm's behalf are indistinguishable from effort in their own interests.[240] The employee's identity becomes linked with the broad objectives of the firm, including "its reputation, survival, and continued success."[241] Such workers willingly make sacrifices for their organizations: they are said, for example, to "'bleed[] brown'" (United Parcel Service) or "'bleed[] purple'" (Federal Express).[242]

Deep structure identification actually alters the meaning that workers attach to the economic exchange. Thus, Christmas bonuses in a firm whose branding practices promote deep structure identification appear as more than mere compensation: workers see them as a tribute to the nature of the employment relationship itself, signifying attachment, affection, and connection.[243] Further, noneconomic status signals such as "employee of the month" awards acquire the most meaning and value in contexts involving deep structure identification.[244] Thus, employers who foster relationships with employees through internal branding can "pay" employees in non-monetary terms, while those who do not must pay in traditional currency.[245] Workers reciprocate by staying at the firm when other market alternatives beckon, performing as extraordinary organizational citizens and investing in the firm financially through purchases of company stock in their 401(k) accounts.

Workers who feel deep structure identification with the firm and have responded by investing in the relationship are far more likely to perceive that the firm has made promises and to rely upon them than those who do not.[246] When violation of these expectations occurs, workers react with levels of anger and betrayal that transcend the cognitive calculation that one has

239. Denise M. Rousseau, *Why Workers Still Identify with Organizations*, 19 J. ORGANIZATIONAL BEHAV. 217, 221 (1998).

240. *Id.* at 222, 226.

241. *Id.* at 222.

242. *Id.* at 221.

243. *Id.* at 222.

244. Rousseau, *supra* note 239, at 223.

245. *Id.* at 222–23.

246. CONWAY & BRINER, *supra* note 221, at 51. Indeed, this is the expressed intent of many internal branding programs. Libby Sartain, formerly Chief Human Resources officer at Yahoo! and Southwest and now affiliated with "Brand for Talent," a management consulting firm, advises employers: "Your employer brand is your *promise* to your employees to provide an experience that, in return, will motivate their commitment to deliver your customer brand." SARTAIN & SCHUMANN, *supra* note 79, at 23 (emphasis added).

not received what one was promised.[247] Lowered morale, reduced organizational citizenship behavior, slacking, high turnover rates, disloyal behavior (including sabotage),[248] damage to the firm's reputation, and costly litigation may ensue.[249]

At the extreme, identity-based brand-management programs geared toward producing deep structure identification contain elements typical of religious or cult-like indoctrination programs. Designed to convert employees into "brand evangelists,"[250] they personalize the corporation,[251] deify its CEO,[252] and infantilize workers.[253] I turn next to the story of one such extreme that offers a powerful illustration of the relationship between internal branding and psychological and financial investment.

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247. Morrison & Robinson, *supra* note 223, at 230. Although violation is an emotional experience, the authors explain, it arises from an interpretative process that is cognitive. *Id.*

248. For example, a recent survey found that 59% of employees who are discharged or quit their jobs steal sensitive confidential data on the way out the door. Workers who felt unfairly treated were far more likely to steal company data than those who left with a favorable impression of their employer (61% of those with negative feelings about the employer reported stealing data, while only 26% of those with a positive impression reported stealing data). *Nearly 60 Percent of Departing Employees Steal Sensitive Company Data, Survey Finds*, Daily Lab. Rep. (BNA) No. 35, at A-8 (Feb. 25, 2009).

249. Morrison & Robinson, *supra* note 223, at 227.

250. *See, e.g.*, William Arruda, More Than Employees: Brand Evangelists (Feb. 19, 2002) (unpublished manuscript), *available at* http://www.pedroguitton.com/adrianajordan/pdf/EmployeesBrandEvangelists.pdf; *see also* Esben Karmark, *Living the Brand*, *in* CORPORATE BRANDING: PURPOSE/PEOPLE/PROCESS, *supra* note 1, at 103, 107 (referring to employees as "brand ambassadors" and "brand champions").

251. Mitchell, *supra* note 7, at 101 (noting that themes for internal branding should be "drawn from the company's very soul").

252. Walt Disney reportedly had a talent for making his employees feel like part of a family—his family. Revered and admired by employees, Walt Disney was often compared to God and described as "omnipotent." NEIL GABLER, WALT DISNEY: THE TRIUMPH OF THE AMERICAN IMAGINATION 211 (2006). According to Gabler:

> [T]he Disney studio did not operate like any other studio in Hollywood with a tyrannical boss lording over a group of disaffected employees who complained of being thwarted. In fact, it didn't operate like a commercial institution at all, where talk of products and profits predominate. By the mid-1930s the Disney studio operated like a cult, with a messianic figure inspiring a group of devoted, sometimes frenzied acolytes. . . . [T]he employees were not just making cartoons to divert or entertain the public. They were disciples on a mission.

Id. at 212. The omnipotent imagery continued even after Walt Disney's death. Trainers at Disney University supposedly told recruits that "Walt's in the park all the time now." Van Maanen, *supra* note 161, at 300.

253. Consider this advice from brand-management consultants: "[T]rying to keep a company on the brand path is like taking a group of toddlers to the zoo—someone is always wandering off." LEPLA & PARKER, *supra* note 79, at 177.

D. *THE CASE OF PEOPLE EXPRESS AIRLINES*

Launched by Donald Burr[254] and two associates in 1980 in the wake of airline deregulation, People Express Airlines enjoyed a brief and meteoric rise before its aggressive expansion drove it into a forced sale to Continental Airlines in 1987. Continental subsequently filed for bankruptcy.[255] People Express's unique business model and human resources policies drew praise in business publications and made it a fruitful subject for management theorists; many of its practices have been emulated more successfully by others since its demise.

People Express's business strategy was to provide low-cost, no-frills air service out of a little-used hub (Newark) by highly motivated employees whose productivity would outstrip that of People Express's competitors. The airline's name was drawn from Burr's philosophy that "people"—the airline's employees—would make the difference.[256] The People Express management model included a powerful social-conditioning program designed to render its employees "self-managing."[257] The airline "prided itself on promoting a family feeling among employees."[258] The family was an exclusive one, however: the airline aggressively screened for young, nonunion "free spirits"[259] who possessed a "quality of attractiveness."[260] The training program deliberately isolated recruits from their families and friends in an effort to cement the bond with the firm; employees routinely worked seventy to eighty hours per week.[261] Removed from family and friends, workers bonded closely with each other. Employees socialized and

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254. Burr was a graduate of Harvard Business School, and professors and students at Harvard took a particular interest in his methodology. Philip Holland, a student at the business school, prepared a case study on People Express under the supervision of Professor Michael Beer; the study was widely circulated and discussed among business media. Many of the facts in this section are drawn from Holland's case study. *See* PHILIP HOLLAND, PEOPLE EXPRESS AIRLINES: RISE AND DECLINE (Harvard Bus. Sch., Case Study No. 9-490-012, 1993).

255. Sara Rimer, *The Airline That Shook the Industry*, N.Y. TIMES, Dec. 23, 1984, § 6 (Magazine), at 18.

256. HOLLAND, *supra* note 254, at 2.

257. *Id.* at 6. In Burr's terminology, employees would internalize People Express's values and become "individual power centers." *Id.* at 4.

258. Geraldine Spruell, *Will Competition Knock the People Out of People Express?*, TRAINING & DEV. J., May 1986, at 50, 51.

259. John A. Byrne, *Up, Up and Away? Expansion Is Threatening the 'Humane' Culture at People Express*, BUS. WK., Nov. 25, 1985, at 80.

260. PETZINGER, *supra* note 137, at 115 (quoting CEO Donald Burr's instruction to People Express's personnel office).

261. Rousseau, *supra* note 239, at 226. At least one employee blamed his divorce on People Express's workaholic culture and complete control over employees' lives. Byrne, *supra* note 259, at 80 ("Among them is Geoffrey Crowley, one of People's first dozen employees, who partly blames his divorce on People's workaholic ethic and charges that its employees lack autonomy.").

lived together, sharing houses and apartments.[262] In 1984, the airline's growth prompted a restructuring: the workforce was divided into ten operational groups, or "mini-families,"[263] that functioned as "mini-airline[s]."[264] The explicit goal of this restructuring was to recapture the close-knit teamwork that had characterized the airline's wildly successful earliest days. In short, working at People Express was "more than just a 'job'"—it was a way of life.[265]

Another notable feature of People Express's structure was its lack of hierarchy. Its highest-level management structures consisted of Burr, seven other officers, and eight general managers. All other employees were denominated simply "managers." Employees were either flight managers (pilots), customer-service managers (generalists who provided direct service to customers, including taking reservations, checking them in, and serving as flight attendants), or maintenance managers (responsible for overseeing the aircraft and facilities maintenance, all of which People Express contracted out to other airlines' maintenance crews).[266] The corporate culture emphasized information-sharing, participatory management, and cross-utilization.[267] The company required employees to rotate through the various operating functions of the airline, including "recruitment, training, marketing, and accounting."[268] People Express frequently solicited employee views and each night produced a well-organized, detailed fifteen-minute news show aired on its internal station, PEX.[269]

People Express's branding program promised employees partnership and participation in managerial decisions in exchange for complete assimilation to its mission. The airline was heralded as an exciting place to work, offering a chance for workers to "self-actualiz[e]" and become

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262. Byrne, *supra* note 259, at 80 ("'We lived, drank, and slept People Express,' says one former manager."). Burr condoned office romances, telling employees "the greatest thing that can happen to you is to fall in love at work." PETZINGER, *supra* note 137, at 130. Some employees believed that Burr promoted extramarital affairs at work in a deliberate attempt to further distance employees from their homes and families. *Id.*

263. Spruell, *supra* note 258, at 53.

264. HOLLAND, *supra* note 254, at 13.

265. *Id.* at 3–4.

266. *Id.* at 6; Spruell, *supra* note 258, at 51.

267. Byrne, *supra* note 259 at 80; HOLLAND, *supra* note 254, at 6–7; Michael Norman, *At Newark, the Airport Is Humming*, N.Y. TIMES, Feb. 3, 1984, at B1.

268. Spruell, *supra* note 258, at 51. People Express designed cross-utilization of workers to introduce fresh ideas into all aspects of the company's operations, breed humility, and maximize workers' utility: pilots, for example, could work additional hours for the airline after reaching their monthly limit of flight hours. Tom Belden, *At His Airline, the Emphasis Is on People*, PHILA. INQUIRER, Jan. 17, 1983, at B5; Norman, *supra* note 267.

269. Rimer, *supra* note 255, § 6, at 18.

owners.[270] Eschewing unions as "the ultimate humiliation," Burr insisted that he would consider a successful union drive a sign of personal failure.[271]

Workers responded enthusiastically to the promise of challenging jobs, fair treatment, and the chance to be consulted in a relatively horizontal employment structure that was very different from the vertical structures that characterized most airlines.[272] For a brief period—from 1980 to 1985—People Express outperformed its competitors by an impressive margin.[273]

The label "cult" was often applied to People Express in its heyday.[274] Burr was described as its "spiritual leader," and the passengers who were drawn to its low-fare flights were its "flock."[275] Part of the reason for the moniker was the wholesale investment that most employees made in the airline, financial as well as psychological.[276] Employees were required as a condition of employment to purchase one hundred shares of People Express stock at book value; the requirement for pilots was two hundred shares.[277] Thereafter, the company offered stock every six to twelve months at a significant discount, and many employees bought much more.[278] Some had their life savings invested in People Express stock.[279] Although employees' salaries were modest compared with those for similar positions at other airlines, rising stock prices and profit-sharing plans made People's employees converts.[280] In the end, workers provided $40 million in capital for People's Express and controlled approximately 40% of the company's stock.[281] Said Burr in response to a questioner worrying about the risks of such under-diversification, "I believe very strongly in putting all your eggs in one basket and making that basket grow. . . . I wanted [workers] to be

270. *Id.*

271. Byrne, *supra* note 259, at 80.

272. Rimer, *supra* note 255, § 6, at 18.

273. In 1983, People Express's flying cost per airline seat per mile was 5.5 cents, compared with an industry average of 9.5 cents. Belden, *supra* note 268.

274. *See* Byrne, *supra* note 259, at 80 ("[W]orking at People was like being part of a cult.").

275. Steven Prokesch, *Behind People Express's Fall: An Offbeat Managerial Style*, N.Y. TIMES, Sept. 23, 1986, at A1; *see also* PETZINGER, *supra* note 137, at 117 (referencing employees as Burr's followers, behaving almost as his "disciples").

276. Norman, *supra* note 267.

277. Adam Bryant, *Betting the Farm on the Company Stock*, N.Y. TIMES, Apr. 16, 1995, at F1.

278. Under People Express's 401(k) stock-purchase plan, employees could invest up to 15% of their salary in PE stock with a $0.25/$1.00 match from the company; an employee ownership program provided an additional investment opportunity that paid quarterly dividends. HOLLAND, *supra* note 254, at 8–9.

279. Prokesch, *supra* note 275.

280. *See* Steven Prokesch, *People Express: A Case Study; Can Don Burr Go Back to the Future?*, N.Y. TIMES, July 6, 1986, § 3, at 1 (describing how People Express increased productivity and kept costs low). Profit sharing added as much as 27% to employees' paychecks. Byrne, *supra* note 259, at 80. Some People Express employees became millionaires. HOLLAND, *supra* note 254, at 9–10.

281. Bryant, *supra* note 277.

building People Express first and foremost. I didn't hire them to build a diversified portfolio. . . . If they didn't like it, they could take their marbles somewhere else."[282]

People's workers did not quit, however.[283] In boom times when share prices were high, management and employees alike viewed the investment in People Express shares as compensation for relatively low salaries, which were not comparable to those earned by others in the industry.[284] It was not until the staggering pressure of People's debt load forced a sale to Texas Air Corporation and employees received new stock traded at a deep discount (which subsequently proved worthless when Continental Airlines filed for bankruptcy) that disillusionment set in.[285] Workers lost their jobs and their retirement savings simultaneously.

People's case may seem extreme, but its management practices were widely praised in the business press and hailed as forward-thinking.[286] People's identity-based brand-management system promoted a level of corporate control that was both "invisible and irresistible" to workers, inducing them to depend upon the firm for their identities as well as for their livelihoods and portraying the firm as a substitute for more traditional familial and friendship bonds.[287] People's requirement that employees buy into the firm by purchasing company stock was an important part of the identity realignment process. Once employees bought in, they were even more tightly bound to the firm psychologically and even less likely to quit. Their investment of human capital—induced by People's branding program—reinforced their investment of financial capital and vice versa.

Now suppose that an at-will employer with an identity-based brand-management program does not mandate the purchase of company stock, but offers company stock as one option among several to employees for investment through their retirement plans. Are their decisions to invest categorically different—more free—than the choices of People Express employees?

V. BUYING IN: FINANCIAL INVESTMENT IN THE FIRM

Despite the People Express debacle, under-diversification of employee pension plans received little attention prior to the end of the twentieth century beyond a narrow circle of economists who cautioned that under-diversification was nearing dangerous levels: employees should not have

282. *Id.*

283. *Id.* (noting that employees continued to invest in the company).

284. *Id.* (stating that the top salary paid to executives was $48,000).

285. *Id.* (noting that Continental Airlines bought Texas Air Corporation before it filed for bankruptcy).

286. Byrne, *supra* note 259, at 80 (explaining that Harvard MBA students watched tapes of Burr as part of their education).

287. Rousseau, *supra* note 239, at 226.

both their human capital and their retirement savings invested in the same firm, since the firm's insolvency would impose a simultaneous loss of employment and loss of retirement savings. Then came the collapse of Enron and widespread media reports of losses to employee pension-plan accounts. Nearly two-thirds of 401(k) assets at Enron were invested in the company's stock and many employees had nearly the entirety of their accounts so invested.[288] As Enron's stock plummeted in value by 98.8% in 2001, fifteen thousand Enron employees lost a total of $1.3 billion from their 401(k) pension plans[289]—as well as their jobs.

A. *BUYING IN AT ENRON*

What induced Enron employees to invest as they did? During the congressional hearings following the Enron collapse, employees testified to their emotional attachment to the company. Deborah Perrotta, a former senior administrative assistant with Enron who was laid off in the wake of Enron's collapse, explained that workers at Enron regarded Enron as "family," and talked about her "110[%]" dedication to the company.[290] According to Perrotta, employees trusted, respected, and even "loved" Enron and considered Enron "invincib[le]."[291] Senator Collins summarized Perrotta's testimony in the following way:

> I was struck as I listened to you what a true believer you were in this company. That you had such strong faith in the . . . company, in your job, and you believed if you just worked really hard . . . that you were going to be financially rewarded . . . .[292]

Enron's management induced this attachment and then exploited it, conducting an internal marketing campaign urging employees to invest.[293]

288. *Retirement Insecurity: 401(k) Crisis at Enron: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 3 (2002) [hereinafter *Retirement Insecurity*] (statement of Sen. Joseph Lieberman, Chairman, S. Comm. on Governmental Affairs); *see also id.* at 160 (statement of Susan J. Stabile, Professor, St. John's University School of Law) ("At the end of 2000, 62% of Enron's 401(k) plan assets were invested in Enron common stock.").

289. *Retirement Security and Defined Contribution Plans: Hearing Before the H. Comm. on Ways and Means*, 107th Cong. 65 (2002) [hereinafter *Retirement Security and Defined Contribution Plans*] (statement of Jack L. Vanderhei, Research Director, Employee Benefit Research Institute Fellows Program); *Retirement Insecurity*, *supra* note 288, at 5 (statement of Sen. Susan Collins, Member, Permanent Subcomm. on Investigations).

290. *Retirement Insecurity*, *supra* note 288, at 12 (statement of Deborah G. Perrotta, former Senior Administrative Assistant, Enron Corporation). Perrotta's testimony is particularly remarkable because she had only worked for Enron for four years, indicating that it is not only career employees who are susceptible to employer attachment. *Id.*

291. *Id.* Perrotta stated, "I was ecstatic and proud to become part of the Enron Family." *Id.*

292. *Id.* at 17 (statement of Sen. Susan M. Collins).

293. *Id.* at 3 (statement of Sen. Joseph I. Lieberman). Moreover, Enron's plan blocked employees' ability to shift the company-contributed stock to a different investment until they reached age fifty, making them particularly vulnerable to catastrophic losses when the stock values crashed. *Id.* at 4.

Enron's internal campaign included company newsletter articles attesting to the company's prosperous future, e-mails from management expressing confidence in the company's future, and face-to-face meetings where corporate executives represented company stock as undervalued and destined to rise.[294] Moreover, Enron deliberately marketed itself to its workers as a brand that workers could trust: its motto, posted on the company's walls, was Respect-Integrity-Communications-Excellence ("RICE")—a motto designed to induce worker investment (in the form of work hours, loyalty, and dollars).[295] The fact that Enron continued and even strengthened its internal marketing campaign after management should have been aware that the company's collapse was imminent[296] ultimately gave rise to litigation.[297]

Public awareness about the risks of insufficient diversification of employee retirement portfolios slowly increased. Although post-Enron pension-law reforms and related litigation significantly diminished the problem of under-diversification,[298] the potential for over-concentration in

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294. *Id.* at 10 (statement of William D. Miller, Jr., Business Manager and Financial Secretary, International Brotherhood of Electrical Workers, Local 125, Portland General Electric); *id.* at 12 (statement of Deborah G. Perrotta).

295. *See Retirement Insecurity*, *supra* note 288, at 7 (statement of Sen. Jean Carnahan, Member, S. Comm. on Governmental Affairs).

296. In the Enron situation, the harm to employees' investments was exacerbated by the timing of a "lockdown period" imposed by the company as a routine part of a change in plan administrator. *Id.* at 71–72 (statement of Susan J. Stabile). Pursuant to the lockdown, employees were locked into their accounts for a two-week period at a critical time when the company's financial situation was precarious. *Id.* at 4 (statement of Sen. Joseph I. Lieberman). Employees who watched their stock values crash, yet were unable to divest, understandably felt "like their hands were tied to the deck of a sinking ship." *Id.* To make matters worse, executives were not bound by the same lockdown rules and were contemporaneously selling their stock, further shifting the risks of the financial meltdown onto the backs of the company's rank-and-file and middle-level employees. *Id.*

297. Litigation ensued under both the securities laws and ERISA. *See In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 284 F. Supp. 2d 511, 531 (S.D. Tex. 2003). The case ultimately settled. Matthew L. Weiner & Brian T. Ortelere, *Employee Stock Plans*, NAT'L L.J., Oct. 14, 2004, at 13. *See generally* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002) (discussing the implications of Enron's collapse for the phenomenon of corporate self-governance); David Millon, *Enron and the Dark Side of Worker Ownership*, 1 SEATTLE J. FOR SOC. JUST. 113 (2002) (discussing the pros and cons of worker ownership in light of Enron's downfall); Wendy Zellner, *The Fall of Enron*, BUS. WK., Dec. 17, 2001, at 30 (describing Enron's slide into bankruptcy).

298. The Pension Protection Act of 2006 limited the restrictions that the plan may place on divestiture of company stock as a partial step toward encouraging diversification of investments in 401(k) accounts. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified in scattered sections of 26, 29 U.S.C.). Since its enactment, the trend toward diversification has continued. There is now a clear propensity for employer plans to less regularly default to investing the employer-matching contribution exclusively in company stock. *See* HEWITT ASSOCIATES LLC, TRENDS AND EXPERIENCE IN 401(K) PLANS: 2007, at 3 (2007), *available at* http://www.hewittassociates.com/_MetaBasicCMAssetCache_/Assets/Articles/401k HI07.pdf (reporting that while 45% of 401(k) plans surveyed invested employer-matching

company stock lingers, exposing many workers to disproportionate risk in the event of the company's collapse.[299] The situation has proven remarkably resistant to change: at the time of the congressional hearings on Enron's collapse in 2002, workers at some companies still had as much as 90% of their pension plans invested in their employer's stock.[300] Although the majority of participants in these plans were significantly more diversified than the Enron employees were,[301] almost 9% still had more than 80% of their account balances invested in company stock.[302] Some employees are 100% invested in the stock of the companies for which they work.[303]

The current recession has forced some employers to shift from making matching contributions in cash to making them in the form of company

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contributions solely in company stock in 2001, 36% did so in 2005, and only 23% did so in 2007). The Hewitt Associates report attributes this shift to the Pension Protection Act's diversification requirements and plan sponsors' concerns about fiduciary risk and exposure to litigation. An EBRI Issue Brief notes, however, that the downward trend in the share of 401(k) investments in company stock actually began in 1999—before the Enron situation transpired. This source attributes the trend to the fact that recently hired 401(k) participants are less likely to invest in employer stock and less likely to hold a high percentage of their account balances in company stock. Sarah Holden, Jack VanDerhei & Luis Alonso, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2006*, RES. PERSP., Aug. 2007, at 19, 36, *available at* http://www.ici.org/pdf/per13-01.pdf. Nevertheless, in 2007 almost two-thirds of 401(k) plans still offered company stock as an investment option. *Id.* at 16; Laise, *supra* note 18.

299. *See* Susan Strother Clarke, *Area Workers' 401(k)s Bet on Employer Stock*, ORLANDO SENTINEL, Mar. 3, 2002, at A1 (noting disproportionate investments in employer stock among the twenty largest employers in Central Florida). The majority of firms that offer company stock as an investment option are large plans—69% of participants in plans with more than 5000 participants are offered company stock as an investment option, while less than 1% of participants in small plans are offered company stock as an investment choice. Holden, VanDerhei & Alonso, *supra* note 298, at 16. Thus, workers at large firms are more likely to have their retirement investments concentrated in company stock than those at small firms. In 2002, the average asset allocation to company stock for large plans (more than 5000 participants) was 25.6%. Middle-aged workers also tend to have higher allocations of company stock than do younger and older workers, and low-waged workers tend to have larger allocations of company stock than high-waged workers. *Retirement Security and Defined Contribution Plans*, *supra* note 289, at 4.

300. *Retirement Insecurity*, *supra* note 288, at 5 (statement of Sen. Susan M. Collins, Member, Comm. on Gov't Affairs); *id.* at 160–61 (statement of Susan J. Stabile, Professor, St. John's University School of Law) (noting that in 2001, 401(k) assets at one in five companies were at least 50% invested in the company's own stock, and that higher figures were not unusual). Stabile listed the following as illustrative: Proctor & Gamble, 94.7%; Sherwin-Williams, 91.6%; Abbott Laboratories, 90.2%; Pfizer, 85.5%. *Id.*

301. In 2006, 67% of the participants held 20% or less of their account balances in company stock, including almost 45% who held none. Holden, VanDerhei & Alonso, *supra* note 298, at 16. The trend toward diversification reversed in 2009. *See infra* note 305 and accompanying text (discussing that the recession prompted employees to invest more heavily in the firms that employ them).

302. Holden, VanDerhei & Alonso, *supra* note 298, at 16.

303. *See, e.g.*, *In re* Harley-Davidson, Inc., Sec. Litig., 660 F. Supp. 2d 953, 960 (E.D. Wis. 2009) (noting that the plaintiff–employee invested 100% of her 401(k) contributions in Harley-Davidson stock).

stock, exacerbating the problem.[304] Worse, workers have begun shifting the self-directed portion of their investments *toward* company stock in their 401(k) plans—exactly the opposite of what financial advisors recommend in a market characterized by job instability and high unemployment.[305] In September 2008, General Motors reported that "unexpectedly high demand" for its shares by workers seeking to shift investments in their 401(k) plans had forced it to suspend purchases of company stock by its workers.[306] The risk of having all of one's eggs in a single basket looms large.

B. The Psychology of Investment

Prior researchers have articulated several explanations for employees' apparent preference for company stock: the employer match and the "endorsement effect," excessive employee optimism, the illusion of control, and direct employer pressure. I discuss each in turn below, and then lay out an additional explanation: the signaling function that investing in the firm performs.

1. The Employer Match

Probably the single most important influence on investment allocations is the practice of contributing the employer match in the form of company stock. This practice not only directly boosts the percentage of company-stock holdings in the workers' 401(k) accounts, but also indirectly encourages workers to allocate more of their own self-directed contributions toward company stock.[307] The latter phenomenon is known as the "endorsement effect." The endorsement effect refers to employees' tendency to interpret the employer's match as implicit investment advice.[308] Moreover, many firms

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304. Laise, *supra* note 18 (reporting that International Paper made this shift and predicting that others will be forced to follow); *see also* Wyand, *supra* note 46 (reporting on a Hewitt Associates projection that some cash-strapped employers will eliminate the company match). As the economy begins to recover, some firms that suspended the company match at the end of 2008 are moving to reinstate it, at least for higher-level employees that they seek to retain. *See* Susan R. Hobbs, *Ford, GM To Resume Merit Pay, 401(k) Matches for Salaried Employees*, Daily Lab. Rep. (BNA) No. 241, at A-3 (Dec. 18, 2009) (reporting that Ford will match at 60% up to 5%).

305. In January 2009, a significant cadre of 401(k) participants moved funds into company stock from other stock investments and more conservative investment vehicles such as bonds. Laise, *supra* note 18.

306. *Id.* In November, GM's independent fiduciary determined that it was no longer prudent to allow workers to continue to purchase company stock, which had declined dramatically in value over the preceding year (a 90% drop in March 2009 compared to the March 2008 value). *Id.*

307. *Retirement Security and Defined Contribution Plans*, *supra* note 289, at 60 (testimony of Jack Vanderhei) (noting that company stock represents 33% of the self-directed account balance in plans including an employer match in company stock, as contrasted with only 22% of account balances in plans that do not require employer contributions to be invested in company stock).

308. *Retirement Insecurity*, *supra* note 288, at 70–71 (statement of Susan Stabile). The so-called "endorsement effect" of the company match on employee investment decisions

impose time or age restrictions on the participants' ability to sell their company stock in order to diversify holdings, which, in combination with inertia,[309] effectively maintains under-diversification.

From the firm's perspective, matches in the form of company stock as opposed to cash have several practical advantages. They are associated with favorable corporate-tax treatment if the firm pays dividends, lower administrative costs, and enhanced liquidity, freeing up cash for other uses.[310] Publicly traded firms have shown a particular interest in ensuring that corporate stock remains in friendly hands—hands that are unlikely to impose effective checks on management discretion because of workers' strong feelings of identification with the firm and its current management.[311] The more deeply workers identify with the firm, the less likely they are to resist the direction pursued by current management.

Many employers promote investment in company stock because they believe that stock ownership aligns workers' interests more completely with those of shareholders, enhancing productivity and robust job performance. Although the data on whether employee investment actually yields higher productivity is mixed,[312] at least one study finds that increased worker loyalty

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regarding self-directed funds has been most fully documented by Shlomo Benartzi. Shlomo Benartzi, *Excessive Extrapolation and the Allocation of 401(k) Accounts to Company Stock*, 56 J. FIN. 1747, 1752 (2001); Shlomo Bernartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & ECON. 45, 47 (2007); *see also* Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1182 (2001) (finding support for the behavioral explanation that employees view the default investment allocation as implicit advice from the employer on the "best" allocation of pension funds).

309. ALICIA H. MUNNELL & ANNIKA SUNDÉN, CTR. FOR RESEARCH AT BOSTON COLL., 401(K)S AND COMPANY STOCK: HOW CAN WE ENCOURAGE DIVERSIFICATION? 4 (2002), *available at* http://crr.bc.edu/images/stories/Briefs/ib_9.pdf?phpMyAdmin=43ac483c4de9t51d9eb41; *see also* Madrian & Shea, *supra* note 308, at 1149 (finding that automatically enrolled pension-plan participants retain both the default contribution rate and fund allocation as a result of inertia coupled with a perception of the default as investment advice).

310. Jeffrey R. Brown, Nellie Liang & Scott Weisbenner, *401(k) Matching Contributions in Company Stock: Costs and Benefits for Firms and Workers*, 90 J. PUB. ECON. 1315, 1316, 1320–21 (2006) (finding weak evidence of support for these advantages).

311. *Retirement Insecurity*, *supra* note 288, at 165 (statement of Susan J. Stabile) (explaining that employers forecast that employees will be focused on job security rather than on the future value of their retirement accounts, and thus will align themselves with current management on issues of shareholder voting and tender offers); Brown, Liang & Weisbenner, *supra* note 310, at 1317 (finding significant evidence that publicly traded firms are interested in placing stock in friendly hands to help thwart hostile takeovers). Employers are not mistaken about this propensity. EBRI survey data from 1994 reveal that 65% of surveyed participants responded that they would not vote in favor of a company acquisition by a hostile acquirer, even if doing so would net them a 50% return on their investment. Moreover, 56% responded that they would not so vote even if the acquisition meant a 100% return on their investment. Susan J. Stabile, *Enron, Global Crossing and Beyond: Implications for Workers*, 76 ST. JOHN'S L. REV. 815, 819–20 (2002) (discussing research in support of the proposition that stock options are a useful tool to enhance productivity because they align employees' interests with those of shareholders).

312. Empirical research on the impact of employee ownership on productivity shows only a weak, short-term relationship between employee ownership and employee motivation. *See Enron*

redounds to the benefit of the firm because the firm may be able to pay its workers lower wages.[313] Some scholars theorize that firms also use stock-ownership programs to counter employee norms of individualism typical of a high-mobility, short-tenured workforce.[314] Stock ownership is deployed to foster a sense of teamwork and community spirit, and to produce a workforce that acts collectively in the firm's interest.[315]

2. Employee Optimism

A second factor predisposing employees to invest in the stock of the companies that employ them is referred to as "over-optimism"—the notion that employees overestimate the likelihood of high returns from investment in company stock as compared with the general market.[316] As a result, they underestimate the risk associated with investing significant portions of their retirement fund in stock of the company that also provides their current income stream.[317] Instead, workers view investment in the company as

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and Beyond: Enhancing Worker Retirement Security: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce, 107 Cong. 11–13, 91–109 (2002) (statement of Douglas Kruse); Douglas Kruse & Joseph Blasi, *Employee Ownership, Employee Attitudes, and Firm Performance: A Review of the Evidence*, *in* 1 HUMAN RESOURCES MANAGEMENT HANDBOOK (David Lewin et al. eds., 1997); Susan J. Stabile, *Pension Plan Investments in Employer Securities: More Is Not Always Better*, 15 YALE J. ON REG. 61, 74 (1998). Alternatively, some studies suggest that increased productivity is associated with a participative management style (which is often coupled with employee ownership), rather than with the fact of employee ownership itself. Stabile, *supra*, at 74.

313. *See* Lauren Cohen, *Loyalty-Based Portfolio Choice*, 22 REV. OF FIN. STUD. 1213, 1240–42 (2009) (finding that the more loyal an employee is to a firm as measured by percentage of pension allocated to company stock, the lower the wage the firm must pay to retain her). Cohen found that a single standard-deviation increase in the percentage of the employee's pension account allocated to company stock reduces the wage bill approximately 5% per employee. *Id.* at 1242. Correspondingly, the cost to employees of under-diversification was large: a 20% loss in retirement income. *Id.* at 1243.

314. *See* Muir, *supra* note 36, at 21–22 (theorizing that firms utilize stock and other ownership options to increase loyalty to the company).

315. *Id.* at 21 ("[T]he use of company stock in 401(k) plans may foster teamwork, collaboration, and a consensus approach to decision making in much the same way as it may lower the level of individualism in a company.").

316. *See* Benartzi, *supra* note 308, at 1754 (employees overinvest in company stock because they excessively extrapolate past high returns into future high returns); Shlomo Benartzi et al., *Company Stock, Market Rationality, and Legal Reform* 4 (John M. Olin Law & Econ., Working Paper No. 218, 2004) (employees underestimate the risk of investing in company stock).

317. In this respect, employees' excessive optimism is completely consistent with research by cognitive psychologists who have documented the fact that people systematically underestimate the likelihood of losses that are low-probability and delayed. *See* Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1123 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)); *see also* Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW & ECONOMICS 1, 4 (Cass R. Sunstein ed., 2000) (noting optimistic-bias effect—employees believe that other companies are more likely to experience losses than their own). Others have speculated that it could be an instance of bounded self-interest or bounded willpower—that is, the tendency to

familiar, safe, or comfortable vis-à-vis other alternatives.[318] This is consistent with research demonstrating that people tend to behave as though familiar gambles are less risky than unfamiliar gambles.[319] Alternatively, overconfidence in one's employer may be a byproduct of bounded rationality: well aware that they are unable to evaluate the array of investment choices, employees substitute faith in the company that they know best.[320]

3. The Illusion of Control

Others have observed the effects of the "illusion of control": employees may purchase company stock because they believe, in some small way, that they can influence the firm's fortunes.[321] Marketing research also supports this idea. "Labor enhances affection for its results"—that is, people tend to be more attached to and to overvalue products that are the result of their own efforts.[322] Called the "IKEA effect" in reference to the Swedish home-goods manufacturer that sells products and furniture which require assembly, this phenomenon suggests a willingness by consumers to pay more for products that they have a role in creating.[323] In essence, workers may view the purchase of company stock in their 401(k) accounts as an investment in something that they can control.

4. Direct Employer Pressure

Alternatively, workers attuned to the employer's preference for investment in company stock may invest out of fear, worrying that the employer will view decisions not to invest in the company's stock as

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act in ways contrary to long-term self-interest in order to satisfy current desires. Stabile, *supra* note 52, at 90–91, 97.

318. *See Retirement Insecurity*, *supra* note 288, at 165 (statement of Susan Stabile, Professor, St. John's University School of Law).

319. *See* Chip Heath & Amos Tversky, *Preference and Belief: Ambiguity and Competence in Choice Under Uncertainty*, 4 J. RISK & UNCERTAINTY 5, 20 (1991) ("[P]eople were paying . . . [a] premium of nearly 20% in order to bet on more familiar propositions.").

320. Stabile, *supra* note 52, at 91.

321. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 311 (1975). Relatedly, employees may lack comparative information about other investment alternatives, and choose to invest in the company as a default. This pattern is particularly likely with lower-income, less-educated workers. *See* Susan J. Stabile, *Another Look at 401(k) Plan Investments in Employer Securities*, 35 J. MARSHALL L. REV. 539, 543–44 (2002) (observing that low-waged workers are significantly more likely to have substantial portions of their plan assets invested in company stock than higher-waged workers).

322. Michael I. Norton, *The IKEA Effect: When Labor Leads to Love*, HARV. BUS. REV., Feb. 2009, at 30, 30.

323. *Id.*

disloyal.[324] Firms may pressure workers to invest in company stock as a means of demonstrating their loyalty to their peers and to the public (presumably in order to retain their jobs or to advance within the company).[325]

5. Signaling Trust and Loyalty

Evidence is mounting that employees' investment in the firms that employ them is intended as a positive expression of feelings of trust and loyalty.[326] The so-called "loyalty effect" is particularly strong for women.[327] However, employees at a wide variety of firms and across a broad expanse of pay grades have equated investment in the firm's stock with a positive demonstration of loyalty.[328] When a CEO purchases significant amounts of company stock during turbulent times, for example, financial media typically characterize the purchase as amounting to a "show of faith" or a "vote of confidence" in the firm's future.[329]

Identity-based brand-management programs capitalize on these psychological forces, increasing the predilection of employees to invest in

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324. *Retirement Insecurity*, *supra* note 288, at 70–71 (statement of Susan J. Stabile); *id.* at 163–64 (noting that complaints in employee lawsuits against Lucent and against Enron allege that the employers pressured employees to invest in company stock).

325. *See* Stabile, *supra* note 321, at 550–51 (noting allegations of employer pressure in stock-drop litigation).

326. *See* Cohen, *supra* note 313, at 4–6. Cohen found empirical support for the proposition that loyalty in the sense of an emotional tie to the company drives employee investment choices to a statistically significant degree. *Id.* at 6–10. Cohen reached this conclusion by comparing employee investment in company stock in stand-alone firms with employee investment in conglomerate-firm stock. *Id.* He found that employees of stand-alone firms invest 10% more in company stock through their 401(k) plans than do employees of conglomerates—a more than 75% difference in own-firm investing—despite the fact that such loyalty costs employees significantly in portfolio returns (roughly 1.75% per year, or a loss of future retirement income of 20% for a mid-career worker). *Id.* at 3; *see also* Stabile, *supra* note 52, at 92 (attributing over-investment in company stock to employee loyalty, which she categorizes as a form of bounded self-interest).

327. Stabile, *supra* note 321, at 550. In a subsequent article, Stabile explained that women are more likely to favor a relational approach to investment, which leads to less frequent investment trading and adds to the lock-in effect of the default investment in company stock. According to Stabile, women are also more likely to feel loyalty towards the firm and to be susceptible to its efforts to induce them to remain invested in company stock. Stabile, *supra* note 311, at 827–28.

328. *See, e.g.*, Robert Luke, *Workers Still Want Company Stock Despite Enron Fall*, ATLANTA J.–CONST., Feb. 1, 2002, at 1C (quoting a Home Depot worker who had chosen to invest his entire 401(k)-plan account in company stock: "I just believe in the company . . . I don't really want to diversify my 401(k).").

329. *See, e.g.*, *Bank of America CEO Buys 200,000 Shares, Stock Soars*, REUTERS, Jan. 21, 2009, *available at* http://www.reuters.com/article/idUSTRE50K6D120090121 (discussing Bank of America CEO Kenneth Lewis's major purchases of Bank of America stock); Christina Rexrode & Rick Rothacker, *Ken Lewis Buys More BofA Shares*, CHARLOTTE OBSERVER, Feb. 5, 2009 (same); David Reynolds, *When an Investment Is Really a Show of Faith*, WALL ST. J., Jan. 28, 2009, (Inside Track), at C5 (same).

company stock through their retirement accounts. Because the employment-at-will doctrine authorizes the firm to discipline or discharge any employee who resists the branding process, it is hard to view the employees' submission to branding as truly voluntary. Nevertheless, work law and public policy are dominated by an ethos of individual choice and consumer sovereignty.[330] The effects of this philosophy have become more pronounced and significant in the modern era as a result of the shift away from a paternalistic lifetime-employment model and toward a model in which employees are the masters and mistresses of their own fortunes.

I have argued that internal branding programs distort employee perceptions of self-interest and persuade employees to internalize and adopt the firm's values and interests as their own, undermining the assumption that employees' choices to invest in the firm are the product of a free cognitive choice. From the workers' standpoint, decisions to invest in the firm signify trust, faith, and commitment to the psychological contract that the firm has offered them. If workers' decisions to invest human and financial capital are not purely cognitive, but laden with emotional significance, and if employer-branding practices encourage this and obscure the risks associated with investment, how should the law respond?

VI. BROKEN PROMISES: WHAT ROLE FOR LAW?

Employees who invested in Enron experienced the deterioration of the corporate brand and the loss of their jobs and pensions as a broken promise.[331] Their testimony at congressional committee hearings on pension reform and the stories they told to the media in the wake of Enron's downfall reveal a sense of deep betrayal operating on two levels. First, they pointed to misrepresentations and behavior by corporate executives best characterized as double-dealing and argued that the employer had deliberately misled them.[332] Second, they argued that the employer had an affirmative moral obligation to its workforce arising out of the loyalty and trust that employees placed in the company and its brand.[333] The basis of

330. *See* DU GAY, *supra* note 16, at 4 (discussing the dislocation of "contemporary economic life" and its effect on "work-based identity"); Stabile, *supra* note 213, at 369 (discussing individuals' freedom to make their own investment choices).

331. *See Retirement Insecurity*, *supra* note 288, at 1 (opening statement of Sen. Lieberman: "For Enron employees . . . the consequences [of Enron's collapse] were crystal clear from the day the company crumbled. They lost their savings. Their nest eggs evaporated. They lost trust in the system, in both the personal and fiscal senses of the word 'trust.'").

332. *See supra* notes 293–95 and accompanying text (discussing Enron's misrepresentations and worker reliance on them); *see also* Thomas S. Mulligan, *Markets in Turmoil: Reactions*, L.A. TIMES, Mar. 18, 2008, at 1 (describing the reactions of Bear Stearns employees who lost their jobs and significant pension-account holdings—30% of the investment bank's shares were owned by employees—in the wake of the company's collapse).

333. *See supra* notes 290–92 and accompanying text (discussing workers' emotional attachment to Enron and their trust in the firm).

their reactions offers a blueprint for a just response by the law. This Part considers how evidence of the structure and effects of identity-based management programs might be used to support common-law claims arising out of implied-in-fact contract doctrine to remedy the violation of trust that employees suffer, and to establish breach of fiduciary duty claims under ERISA to redress financial losses stemming from workers' reliance on representations made as part of brand-management programs.

A. Recognizing Psychological Investment

1. Implied Contracts in Employment

Despite the law's assumption that worker investment in the firm is a product of the employee's unilateral and voluntary choice, state common law has been receptive to individual claims of contractual breach where the firm deliberately induces investment that extends beyond the worker's day-to-day labor and subsequently reneges on its side of the bargain. Beginning in the 1980s, courts in many jurisdictions began to find ways to protect individual employees who claimed that they had invested the best years of their market lives in exchange for a promise of job security.[334] Thus, where an employee could point to oral or written representations of job permanence or promises not to discharge except for cause, courts found claims for breach of implied contract cognizable.[335] In cases where the representations were less than clear, longevity of employment served as an important factor demonstrating the employee's investment.[336] The employee's consideration for the employer's promise was continued work.

Courts hearing these cases were not receptive to arguments by the employer that such representations were not intended to induce reliance, but were merely statements of company philosophy.[337] For example, in

334. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (holding that the employer violated an implied promise that it would not act arbitrarily in dealing with the plaintiff).

335. Implied contract claims arise out of a combination of formal representations (such as those made during the hiring process, in offer letters, or in employee handbooks) and informal practices (a pattern of raises and promotions and a lack of discipline), which together serve as the basis for an exception to the employment-at-will doctrine. *See generally* CRAIN, KIM & SELMI, *supra* note 41, at 117–75 (collecting cases).

336. Longevity is also linked to the increased likelihood of patterns of dealing by the employer that support the employee's claim (consistent raises and promotion, lack of discipline, etc.). *Id.* at 152; *see, e.g.*, Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1104–05 (Cal. 2000) (explaining that length of employment is relevant where it affords sufficient time for conduct to occur from which an implied contract can be inferred).

337. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 626–27 (Minn. 1983) (enforcing, on implied contract theory, handbook provisions that described the stability of employment in the banking industry and provided a four-step process for dismissal); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 443 (N.Y. 1982) (enforcing just cause for discharge and dismissal policies contained in an employee handbook, and agreeing with the dissenting judge's

Woolley v. Hoffmann-La Roche, Inc., the court analyzed an employment handbook that promised to "retain, to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."[338] The court found the promise in the handbook enforceable and refused to discount it as a general agreement covering all workers rather than an individual contract.[339] The court explained:

> Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses . . . .
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> . . . .
>
> All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty . . . .[340]

The court pointed out the advantages that the employer secured by articulating such a company philosophy in its handbook, including union avoidance.[341]

Other courts were willing to recognize more abstract forms of consideration, including enhanced loyalty to the firm and willingness to work with others to advance the firm's interests, presumably beyond the limits of the employee's job description. In *Thompson v. St. Regis Paper Co.*,[342] the court held an employer contractually bound by its employee handbook, noting that the employer's promises of job security and fair treatment had secured "an orderly, cooperative and loyal work force," and finding that it would be unfair to deny enforcement of the promises by workers who were thereby induced to remain on the job.[343] Other courts used equitable principles like unjust enrichment or estoppel to recognize employees' investments. For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*,[344] the court ruled that when an employer establishes personnel policies that enhance its relationship with its employees, it has "created a

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comment in the lower court that it is wrong to think of an employee handbook as a "corporate illusion, 'full of sound . . . signifying nothing'" (quoting Weiner v. Mc.Graw Hill, Inc., 442 N.Y.S.2d 11, 12 (App. Div. 1981) (Kupferman, J., dissenting))).

338. Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1259 n.2 (N.J. 1985).

339. *Id.* at 1262–63.

340. *Id.* at 1266, 1271.

341. *Id.* at 1265.

342. Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984).

343. *Id.* at 1087–89; *see also* Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1263–64 (D. Kan. 1984) (discussing Kansas precedent concerning job security promises in employee handbooks); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. App. 1984) (discussing loyalty as consideration for an employment contract).

344. Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980).

situation instinct with an obligation" which it is contractually and equitably bound to honor.[345]

Courts in a minority of jurisdictions read into the employment contract an implied covenant of good faith and fair dealing designed to protect employees against acts of bad faith by employers that deviate from the employer brand they promise. For example, in *Rulon-Miller v. International Business Machines Corp.*,[346] the court imposed on the employer a duty of good faith and fair dealing consistent with the employer brand that IBM marketed to its employees: a brand of "respect for the individual."[347] IBM had promulgated its policies largely to obtain the benefits of increased loyalty and improved employee morale.[348] The court allowed the jury's verdict in favor of the plaintiff to stand, effectively holding IBM to its brand promise.[349]

2. Limitations and Reform Proposals

Many jurisdictions' strong commitments to the doctrine of employment at will and its underlying premise that employees freely choose to remain and invest in the firm limit these contract- and equity-based advances in judicial recognition of employee investment in the firm. Courts intent upon resisting erosion of the at-will rule have refused to enforce implied contracts on the basis that language in handbooks was insufficiently definite to

345. *Id.* at 892; *see also* Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1234–35 (N.M. 1989) (finding implied contract not to discharge except for cause where handbook provided that "[t]o be discharged as a result of rule infractions, poor performance, or other 'cause' is a situation that you, and only you, control"); Small v. Spring Indus., Inc., 357 S.E.2d 452, 455–56 (S.C. 1987) (finding that employee handbook and bulletin outlining dismissal procedures modified at-will employment arrangement); Worley v. Wyo. Bottling Co., 1 P.3d 615, 621–22 (Wyo. 2000) (finding that employer's practice of dismissing employees only following a progressive discipline process created a material issue of fact as to whether the at-will arrangement was modified). The *Small* court commented:

> It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as a "gratuitous, nonbinding statement of general policy" whenever it works to his disadvantage . . . .
>
> . . . If company policies are not worth the paper on which they are printed, then it would be better not to mislead employees by distributing them.

Small, 357 S.E.2d at 455.

346. Rulon-Miller v. Int'l Bus. Machs. Corp., 208 Cal. Rptr. 524 (Ct. App. 1984), *overruled on other grounds by* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

347. *Id.* at 530.

348. PETERS & WATERMAN, *supra* note 159, at 14–15.

349. *Rulon-Miller*, 208 Cal. Rptr. at 531–32; *see also Foley*, 765 P.2d at 387 (recognizing claim for covenant of good faith and fair dealing as sounding in contract, and observing that "employers may benefit from the increased loyalty and productivity that [implied employment security] agreements may inspire").

ground a contract,[350] or have enforced disclaimers stating that nothing in the handbook was intended to modify the at-will arrangement.[351] Equitable arguments founded on principles of promissory estoppel have enjoyed very limited success.[352] The covenant of good faith and fair dealing is the least accepted of these doctrines because it appears to many courts as an abrogation of employment at will.[353]

Moreover, the rise of the new deal at work and the widespread acceptance of the shift of market risks from employers to employees have reduced the prevalence of long-term employment and with it the longevity that made many implied contract claims so appealing. Shorter-tenured employee–plaintiffs lacked the significant investment made by the long-term worker and the lengthy period of time during which the employer undertook personnel actions and made implicit promises. At the same time, shifting norms about the job tenure undermined plaintiffs' ability to establish that their reliance on a course of dealing from which a court should infer a promise of long-term employment was reasonable.

Several scholars have argued for expansion of contractual theories to encompass opportunistic behavior by the employer that induces investment, even when job tenure is relatively short. Robert Bird has proposed that the law place contractual liability on employers who engage in "relational opportunism," suggesting contractual liability where employees forge a psychological contract with their employers and the firm reaps the benefits of employee loyalty but then violates the implicit contract through termination at will.[354] Katherine Stone has argued that courts should impose

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350. *See, e.g.*, Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 607 (Mich. 1993) (emphasizing that employer's discharge policy was unclear); Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 857–58 (Minn. 1986) (finding that despite employee's "subjective impressions," the handbook did not create a definite contract).

351. *See, e.g.*, Wilkinson v. Shoney's, Inc., 4 P.3d 1149 (Kan. 2000); Conner v. City of Forest Acres, 611 S.E.2d 905, 910 (S.C. 2005).

352. *See* Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 21–26 (1999) (observing that the low success rate of promissory estoppel in the employment setting is attributable to "judicial veneration of the employment-at-will doctrine").

353. *See, e.g.*, Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 91 (N.Y. 1983) (rejecting a claim that the duty of good faith and fair dealing should include an obligation to proceed fairly in making discharge determinations).

354. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 151, 198–200 (2005). Bird argues that implied covenants of the relational employment contract could (and indeed already are, under implied-in-fact contract doctrines that hold sway in most states) be ascertained by looking to both explicit promises, such as those contained in official policies, regulations, employee handbooks, and oral promises by supervisors, and practices that give rise to implicit promises, including rituals designed to promote or reward good behavior, annual company-funded picnics, holiday bonuses, training, and industrial due process. *Id.* at 200. Bird explains that recognition of relational contracts in employment would not function as "a backdoor just cause requirement for employee discharge." *Id.* at 208. Under Bird's proposal, the question in every case would be exactly what the employer promised, explicitly through

contractual terms reflecting the new deal that employers have struck with employees regarding "reemployability security": if employers promise opportunities to develop human capital on the job, then at a minimum, those who do not deliver on the promise should be barred from enforcing covenants not to compete.[355] Stone contends further that courts should hold to their bargain employers who make implied or explicit promises of reemployability security, including retraining, networking, and transition assistance.[356]

Others have mounted a more direct attack on the employment-at-will doctrine, believing that the fundamental assumptions underlying the at-will rule will ultimately cabin any incremental reform. Cass Sunstein and Cynthia Estlund have argued for switching the default rule for discharge from employment at will to just cause for discharge as a means of requiring employers to give accurate information about their corporate culture and reputation as a place to work, as well as to ensure that employees have correct information regarding their legal rights.[357] Aditi Bagchi has joined this chorus, arguing that forcing clarity by requiring full disclosure would help to restrain employers' unbridled discretion over the work relation.[358] Convinced that the root of the problem lies in information deficiencies perpetuated by the status inequality between social classes, she proposes "the replacement of a paternalistic regime . . . with the formality of contract."[359]

Sam Estreicher's recent analysis comes closest to recognizing the realities of psychological investment in response to a branding program.

official policies and statements, or implicitly, through its practices. Only reasonable expectations of employees would be enforceable. So, for example, if an employer encouraged employee suggestions, employee feedback, and invited commentary from its workers, a retaliatory discharge aimed at a worker who complained about company policy would be protected on the ground that the employer encouraged the practice of voice in order to establish trust and loyalty, and terminating the complaining employee would amount to an opportunistic breach of those norms. *Id.* at 213–14. On the other hand, where the firm sends no relational signal that critique is welcome, the firm would be justified in discharging an employee who voices discontent over company policies for the public expression of that discontent—even if the underlying policies are inconsistent with the psychological contract the employer sought to establish. *Id.* at 213–14.

355. *See* Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 754–56 (2002) (discussing how these promises by employers affect employee recruitment).

356. Stone, *supra* note 22, at 21. In the same article, Stone also hints at a right of fair treatment implied in law (regardless of the facts of any particular case), which sounds similar to a covenant of good faith and fair dealing but is more comprehensive. *Id.* at 22.

357. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7–8 (2002); *see* Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 120–21 (2002) (discussing employees' overestimation of their legal rights).

358. *See* Aditi Bagchi, *The Myth of Equality in the Employment Relation* 32–34 (Univ. of Pa. Pub. Law & Legal Theory Research Series, Paper No. 09-07, 2009), *available at* http://ssrn.com/abstract=1357448 (describing how full disclosure would restrain employers' discretion).

359. *Id.* at 11, 32–34.

Estreicher argues that the law should focus on employer promises designed to enhance employer reputation at work—the employer brand—rather than on job security, since many employees have accepted the norm of "no long term" and may not expect or even desire a just-cause employment guarantee; what they really seek is "some assurance that the firm is one with which they reasonably can make a career."[360]

Internal branding programs could and should serve as the basis for implied-in-fact contract claims that reinforce employee perceptions of job security, other terms and benefits associated with employment, and fair dealing. Bird, Stone, and Estreicher have suggested ways within existing contract doctrine recognized in most jurisdictions to give force to these aspects of the psychological contract, and I endorse them. None of these approaches however, responds to the psychological spillover effect of internal branding, particularly its consequences for employee decisions to invest financially in the firm. Thanks to ERISA's broad preemption provision, implied contract claims cannot be used to impose direct liability for the financial investment that employers induce employees to make through purchases of company stock in their individual retirement accounts.[361] Any such claim must be therefore be grounded in ERISA itself.

B. FIDUCIARY OBLIGATIONS UNDER ERISA

ERISA prescribes minimum standards for plan terms, imposes fiduciary obligations upon plan administrators, and mandates disclosure of plan finances in order to control mismanagement and abuse of pension funds.[362]

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360. Samuel Estreicher, *Employer Reputation at Work* 8 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-02, 2009), *available at* http://ssrn.com/abstract=1314257.

361. ERISA's comprehensive regulatory scheme governing employer-provided pension plans contains a broad preemption clause that displaces state regulation, designed to ensure uniform application of its regulatory regime. *See* Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1132, 1144 (2006) (preempting state regulation of pension plans and granting exclusive jurisdiction to federal courts to enforce ERISA's mandates). ERISA does not mandate that employers offer pension benefits; employers who offer them do so voluntarily, a factor that receives significant weight whenever Congress considers amendments to ERISA. Excessive regulation could prompt firms to withdraw such benefits altogether, particularly in a recessionary or slack labor market. Thus, pension regulation requires a carefully calibrated balance between the imposition of standards and the preservation of employers' autonomy to fashion the programs. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (noting the risk that regulation will deter employers from offering plans); WIEDENBECK, *supra* note 43, at 23.

362. WIEDENBECK, *supra* note 43, at 19–21. ERISA was in part a response to the bankruptcy of numerous large employee pension funds, most notably the plan held by the Studebaker-Packard automobile company. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 684 (2001) (discussing the failure of Studebaker Corporation and its impact on thousands of employee pensions, and characterizing Studebaker's closure as a "'focusing event' for the nascent campaign for pension reform"); *cf.* Michael S. Gordon, *Overview, Why Was ERISA Enacted?*, *in* U.S. S. SPEC. COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME

ERISA's primary thrust is consumer protection: it was designed to protect the reasonable expectations of employees from fraud and overreaching by employers regarding pension plans.[363]

ERISA was enacted in an era when defined-benefit plans dominated the employment landscape. Because employers control defined-benefit plans, deciding both how the pension benefit will be calculated and who will receive it, the potential for employer abuse and opportunism related to defined-benefit plans is significant.[364] Accordingly, ERISA imposed stringent fiduciary standards drawn from trust law on employers and plan administrators,[365] as well as limits on the percentage of assets in defined-benefit plans that could be invested in company stock.[366] Although ERISA guarantees neither employee entitlement to defined benefit pensions nor particular account incomes or profits, plan fiduciaries owe duties of loyalty (to act solely in the interest of participants and beneficiaries),[367] prudence (they must manage investments with "care, skill, prudence and diligence" and diversify the fund so as to minimize the risk of loss),[368] and adherence to the plan's terms.[369]

Until recently, the applicability of these fiduciary obligations to defined-contribution plans was in question. Employees typically control defined-contribution plans and thus these plans do not present the same conflicts of interest that have led to abuse and overreaching in the defined-benefit-plan context. Employees contribute the funds (except for the employer match portion) and assume the burden of the risk of loss, as well as the responsibility for making investment decisions. ERISA imposes few diversification requirements on individual employee pension accounts or 401(k) plans, and no limits on holdings of employer securities in such plans.[370] Moreover, Congress itself sought to promote employee investment in company stock by exempting company stock in individual account plans

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SECURITY ACT OF 1974: THE FIRST DECADE 1, 6 (Comm. Print 1984) (describing the cumulative forces that brought pension-protection legislation to the forefront of the legislative agenda).

363. Frank Cummings, *ERISA: The Reasonable Expectations Bill*, 65 TAX NOTES 880, 881 (1994); Stabile, *supra* note 213, at 366–67.

364. Stabile, *supra* note 213, at 370–71.

365. *See* 29 U.S.C. § 1101(a) (defining covered employee-benefit plans); *id.* § 1104(a) (imposing "prudent man" standard of care on fiduciaries charged with administering plans); *id.* § 1106 (listing prohibited transactions between plan and party in interest and between plan and fiduciary).

366. ERISA imposes a 10% ceiling on employer securities as a percentage of a plan's total assets. *Id.* §§ 1104(a)(1)(A), 1107(a)(2).

367. *Id.* §§ 1104(a)(1)(A), 1106.

368. *Id.* § 1104(a)(1)(B), (C).

369. *Id.* § 1104(a)(1)(D).

370. *See* 29 U.S.C. § 1107(b)(1) (exempting eligible individual account plans from the 10% limit on company stock); *id.* § 1104(a)(2) ("[T]he diversification requirement . . . is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities.").

from the diversification requirement.[371] The courts have made it clear that the purpose of individual account plans is to facilitate giving employees an ownership stake in the firm, not to guarantee retirement benefits.[372] Thus, where the participant has control over the investment decisions regarding his or her 401(k), the law offers no protection against under-diversification, reasoning that "the law is *not* intended to protect employees from themselves."[373]

Accordingly, § 404(c)—which imposes the fiduciary obligation in the defined benefit context—exempts both participants (employees) and co-participants (the employer) from liability for loss in defined contribution plans.[374] Section 404(c) serves as a shield against liability for breach of fiduciary obligations where the plan delegates control directly to the participant or beneficiary, and complies with Department of Labor regulations designed to insure that participants have control, information needed to make investment decisions, and an adequate range of investment options.[375]

In *LaRue v. DeWolff, Boberg & Associates, Inc.*[376] however, the Supreme Court held that participants in defined-contribution plans could sue "a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account,"[377] giving a boost to breach of fiduciary obligation claims by employees in the defined-contribution-plan context. In a series of recent cases triggered by the volatility of the market in the pre-recession and recessionary era, courts have been forced to confront the dilemma of how to harmonize ERISA's fiduciary obligations with ERISA's apparent preference for facilitating employee ownership of company stock. So-called "stock drop" cases involve claims by employees that the fiduciaries of the employer-sponsored defined-contribution plan breached their duties to plan participants by continuing to offer company stock as an investment option when it was too risky, or by failing to disclose material facts affecting the value of the stock.[378] The complaints typically allege that the firm

371. *Id.* § 1104(a)(2), (c); *In re* Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 WL 2762708, at *12 (S.D.N.Y. Aug. 31, 2009) (explaining that individual account plans are designed "to give employees an ownership interest and thus a stake in the financial successes—and failures—of the companies for which they work").

372. *See, e.g.*, Steinman v. Hicks, 352 F.3d 1101, 1102–03 (7th Cir. 2003) (the availability of employee stock-ownership vehicles was "intended to encourage employers to make their employees stockholders"); Moench v. Robertson, 62 F.3d 553, 568 (3d Cir. 1995) (employee stock-ownership plans "are not intended to guarantee retirement benefits").

373. Stabile, *supra* note 213, at 368–73.

374. 29 C.F.R. § 2550.404c-1 (2009).

375. 29 U.S.C. § 1104(c); 29 C.F.R. § 2550.404c-1(b)(3).

376. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008).

377. *Id.* at 250.

378. *See, e.g.*, Joel J. Meyer, *ERISA: Bank of America Sued over Losses Connected to Countrywide, Merrill Purchases*, Daily Lab. Rep. (BNA) No. 21, at A-3 (Feb. 4, 2009) (alleging that employees'

offered company stock as an investment option and continued to do so even when it was imprudent; that participants were encouraged to invest in company stock despite the company's knowledge that this was against the participants' objective financial interests; that participants heeded the company's call and thus their accounts were under-diversified; that the company had financial problems and its stock value declined precipitously; and that the company breached its fiduciary duty as plan administrator by failing to provide adequate information, either by making fraudulent misrepresentations or by failing to close company stock as an investment option or to divest the plan of company stock.[379] Such litigation is particularly likely where there are accompanying indicia of a securities-law violation.

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losses in 401(k) accounts were a result of the Bank's involvement in the subprime mortgage industry and complaining that fund administrators encouraged employees to invest in Bank of America stock, resulting in 32% of the plan's assets being invested in Bank of America stock); Joel J. Meyer, *ERISA: GM Employees Sue State Street Bank, Alleging It Dumped GM Stock Too Late*, Daily Lab. Rep. (BNA) No. 113, at A-3 (June 16, 2009) (suit by GM employees arguing that State Street Bank breached its fiduciary duty by waiting too long to divest GM's 401(k) plans of GM stock holdings); Joel J. Meyer, *ERISA: New Class Action Targets American Express for Losses to Its Employees' 401(k) Savings*, Daily Lab. Rep. (BNA) No. 4, at A-3 (Jan. 8, 2009) (alleging that American Express misrepresented the impact of the weakening economy and declines in consumer credit card spending on the company's financial health, resulting in significant over-investment by employees in American Express stock: 24% of the plan's total assets were invested in American Express stock).

379. Complaints in stock-drop cases commonly recite the psychological reasons why employees tend to over-invest in company stock, *see supra* Part V.B, and seek to hold the employer or the plan administrator responsible (or hold both responsible) for adding to these forces by advising workers to invest in company stock. *See, e.g.*, Complaint for Breaches of Fiduciary Duty Under the Employee Retirement Income Security Act at 2, 10–11, Alvidres v. Countrywide Fin. Corp., No. CV07-05810 (C.D. Cal. Sept. 6, 2007), 2007 WL 2899445 (alleging that investment in company stock was imprudent where plan administrators knew or should have known that company's mismanagement and risky business practices were likely to lead to dire financial consequences; that the company made its matching contributions in the form of company stock; and that company stock represented more than 30% of the plan's net assets); Class Action Complaint at 12, 16, McDermott v. Diebold, Inc., No. 5:06CV0170 (N.D. Ohio Jan. 24, 2006), 2006 WL 500044 (complaint included assertions that executives and plan managers knew or should have known that employees tend, out of feelings of loyalty, to invest heavily in company stock when it is offered, even when doing so is counter to their own objective financial interests; company matches were automatically invested in the company's own stock and restrictions existed barring transfer to another investment for one year; 37% of the plan's total assets were invested in company stock); Second Amended Consolidated Class Action Complaint at 7–8, 28–29, *In re* Elec. Data Sys. Corp. "ERISA" Litig., No. 6:03-MD-1512 (E.D. Tex. May 6, 2004), 2004 WL 5329696 (alleging that employer assured participants that the company's corporate performance and future financial prospects were strong, minimized risks, and fostered a "positive attitude" toward company stock as a plan investment; that the company assured its employee–participants that the plan's investments were prudent, explicitly differentiating itself from Enron; that company matches were automatically invested in company stock, and that restrictions existed barring transfer for two years; and that 20.8% of the plan's assets were in company stock).

1. Duty of Prudent Management Claims

Under current case law, a high proof threshold hobbles actions alleging breach of the fiduciary obligation to prudently manage plan investment options. If the plan's design requires that company stock be offered as an investment option, the courts defer to fiduciaries because they lack discretionary authority.[380] On the other hand, if the plan's design permits but does not require that company stock be offered as an investment option, most courts apply a more searching review.[381] Nevertheless, if the plan design encourages fiduciaries to offer company stock as an investment, as most do, a presumption of prudence attaches.[382] To overcome the presumption of prudence, the plaintiff must show, variously, that the fiduciary "could not have believed reasonably that continued adherence to the [plan's] direction was in keeping with the settlor's expectations of how a prudent trustee would operate,"[383] proof of "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest,"[384] or proof that the stock has "become[] so risky that no prudent fiduciary . . . would invest *any* plan assets in it, regardless of what other stocks were also in the plan's portfolio."[385] In general, "[m]ere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence."[386]

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380. *See, e.g.*, Edgar v. Avaya, Inc., 503 F.3d 340, 346 (3d Cir. 2007) ("[I]f the trust 'requires' the trustee to invest in a particular stock, than the trustee is 'immune from judicial inquiry.'" (quoting Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995))); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1097–98 (9th Cir. 2004) (agreeing with the presumption that a fiduciary who invests in employer stock has acted in accordance with ERISA).

381. *See, e.g.*, Graden v. Conexant Sys., Inc., 574 F. Supp. 2d 456, 462 (D.N.J. 2008) (conducting de novo review).

382. *Moench*, 62 F.3d at 571–72 (discussing presumption of prudence applicable to employee stock-option plans).

383. *Id.* at 571.

384. Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 256 (5th Cir. 2008).

385. *In re* Ford Motor Co. ERISA Litig., 590 F. Supp. 2d 883, 893 (E.D. Mich. 2008).

386. Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004); *see, e.g.*, *Kirschbaum*, 526 F.3d at 256 (40% drop in stock price not sufficient to overcome presumption of prudence); Edgar v. Avaya, Inc., 503 F.3d 340, 350–51 (3d Cir. 2007) (20% drop in stock price in a single day not sufficient to overcome presumption of prudence); Kuper v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995) (80% decline in stock price not sufficient to overcome presumption of prudence where stock price fluctuated throughout relevant period); *In re* Harley-Davidson, Inc., Sec. Litig., 660 F. Supp. 2d 953, 966–67 (E.D. Wis. 2009) (23% decline was insufficient to state a valid claim of fiduciary imprudence based on failure to remove stock from pension-plan investment options where employer had a strong revenue record for previous eighteen years); *In re* Bausch & Lomb Inc. ERISA Litig., No. 06-CV-6297, 2008 WL 5234281, at *6 (W.D.N.Y. Dec. 12, 2008) (holding mere stock fluctuations insufficient where company's overall financial viability is not in jeopardy); Nelson v. IPALCO Enters., Inc., 480 F. Supp. 2d 1061, 1097 (S.D. Ind. 2007) (holding 90% decline insufficient), *aff'd sub nom.* Nelson v. Hodowal, 512 F.3d 347 (7th Cir. 2008).

This high proof standard has been applied even to financial institutions whose lending behavior arguably contributed to the dramatic loss of value in the stock market. In one of the first stock-drop cases brought against a financial institution damaged by the lending and credit crisis, a district court in Ohio found that the employer had no duty under ERISA to divest its 401(k) plan of company stock—or even to periodically investigate whether its stock remained an appropriate investment option. Even news coverage of the U.S. housing-market decline and increasing mortgage foreclosures were not sufficient to "raise a red flag" or to trigger a duty to investigate, said the court: "ERISA was simply not intended to be a shield from the sometimes volatile financial markets."[387]

Perhaps more ominously (for workers), a district court denied a breach of fiduciary duty claim by Citigroup workers who alleged that Citigroup continued to offer its stock as a retirement-plan investment option during a period when it incurred stunning losses attributable to the subprime-mortgage crash—for which it arguably bore some responsibility. The court reasoned that individual account plans were designed "to give employees an ownership interest and a stake in the financial successes—*and failures*—of the companies for which they work," not to "guarantee" retirement security.[388] Management attorneys have embraced the *Citigroup* rationale; some suggest that this reasoning, combined with limits on fiduciaries' discretion imposed by the plan itself, should immunize employers against stock-drop breach of fiduciary duty claims.[389] Although a few courts have allowed similar claims to go forward[390] and many more have settled,[391]

387. *In re* Huntington Bancshares Inc. ERISA Litig., 620 F. Supp. 2d 842, 853 (S.D. Ohio 2009) (granting motion to dismiss); *see also* Brieger v. Tellabs, Inc., 652 F. Supp. 2d 925, 928 (N.D. Ill. 2009) (finding no breach of fiduciary duty by Tellabs when it decided to retain company stock as a retirement-plan investment option following significant stock declines); Johnson v. Radian Group, Inc., No. 08-2007, 2009 WL 2137241, at *24 (E.D. Pa. July 16, 2009) (finding no breach of fiduciary duty where employer continued to offer its stock as a retirement-plan investment option and did not provide plan participants with information on the value and risks associated with investment in its stock, despite the fact that its affiliate was embroiled in the subprime-mortgage lending market; summary plan description and SEC filings were sufficient to place investors on notice of the risks); Lingis v. Motorola, Inc., 649 F. Supp. 2d 861, 880 (N.D. Ill. 2009) (finding no breach of fiduciary duty in Motorola's decision to continue offering Motorola stock as a retirement-plan investment option, invoking ERISA § 404(c) safe-harbor provision).

388. *In re* Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 WL 2762708, at *12 (S.D.N.Y. Aug. 31, 2009) (emphasis added).

389. *See* Joel J. Meyer, *ERISA: Recent Dismissal of Citigroup Stock Case Draws Criticism from DOL Associate Solicitor*, Daily Lab. Rep. (BNA) No. 189, at A-6 (Oct. 2, 2009).

390. *See* Jones v. MEMC Elec. Material Inc., 4:08CV1991 HEA, 2010 WL 1038536, at *1 (E.D. Mo. Mar. 17, 2010) (finding employees' stock-drop claims sufficiently plausible to survive a motion to dismiss and to overcome the presumption of prudence); Shanehchian v. Macy's, Inc., No. 1:07-CV-00828, 2009 WL 2524562, at *7 (S.D. Ohio Aug. 14, 2009) (finding that plaintiff had overcome the presumption for purposes of surviving a motion to dismiss where plaintiff alleged that Macy's continued to reassure the market and plan participants that its

prospects seem dim for plaintiffs' breach of fiduciary duty of prudent management and stock-drop claims under current law.[392]

2. Fiduciary Duties of Disclosure

Firms that make affirmative misrepresentations designed to mislead plan participants or who conceal material facts about the company also risk liability for breach of fiduciary duty.[393] Although the firm is not necessarily obligated to disclose truthful information on its own initiative or required to provide information to participants when it contemplates plan changes, firms that choose to convey information to workers must be truthful. As one court put it: "[W]e do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits. Nor do we require a

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merger with May Department Stores was a success, despite difficulties in integrating its operations following the acquisition).

391. *See, e.g.*, Page v. Impac Mortgage Holdings, Inc., No. SACV 07-1447 AG (MGLx), 2009 WL 890722, at *7 (C.D. Cal. Mar. 31, 2009) (approving settlement of claims by employees of a mortgage-investment firm that includes a requirement that the company pay $300,000 in common stock to four hundred class members, as well as offering free investment training classes to its employees); *ERISA: B of A Agrees to $55M Settlement to End ERISA Claims Against Countrywide*, Daily Lab. Rep. (BNA) No. 153, at A-12 (Aug. 12, 2009) (describing settlement of claims by Countrywide employees alleging that the firm breached its fiduciary duties by offering its stock as a retirement-plan investment option); *ERISA: Court Approves $40.15 Million Settlement That Ends ERISA Breach Claims Against GE*, Daily Lab. Rep. (BNA) No. 152, at A-11 (Aug. 11, 2009) (describing settlement of GE employees' claims that firm breached its fiduciary duties by offering GE stock as an investment plan option at a time when GE stock had become an imprudent investment); *ERISA: Tyco Reaches $70.5M Settlement to End Long-Running ERISA Stock Drop Lawsuit*, Daily Lab. Rep. (BNA) No. 153, at A3 (Aug. 12, 2009) (describing settlement of claims by Tyco employees who alleged acts of corporate mismanagement that led to substantial losses to retirement savings for employees who invested in Tyco stock; settlement followed court's ruling that ERISA § 404(c) cannot serve as a defense for plan fiduciaries sued for choice of poor investment options).

392. *See, e.g.*, Joel J. Meyer, *JP Morgan Wins Judgment on Pleadings in Long-Running ERISA 'Stock-Drop' Case*, Daily Lab. Rep. (BNA) No. 64, at A-5 (Apr. 6, 2010) (applying the presumption of prudence even where plan documents did not require that company stock be offered as an investment option, and dismissing plaintiffs' breach of fiduciary duty claims where plan administrator continued offering employer stock to employees as an investment option despite a 55 % drop in stock prices due to significant losses associated with employer's dealings with Enron); Joel J. Meyer, *State Street Wins Dismissal of Most Claims in Class Action Over Conduit Investments*, Daily Lab. Rep. (BNA) No. 52, at A-2 (Mar. 19, 2010) (dismissing breach of fiduciary duty claims based on plan administrator's decision to continue to offer employees the option to invest in company stock despite knowledge of employer's risky investment portfolio, which led to a "massive decline" in State Street's stock value).

393. Varity Corp. v. Howe, 516 U.S. 489, 489 (1996) (where employer deliberately misled employees about the financial condition of a subsidiary with the goal of having the employees transfer employment to the subsidiary and thus relieve Varity Corp. of its health-benefit-plan obligations, such misleading statements about the security of the firm's plan benefits amounted to a fiduciary act upon which ERISA liability could be grounded).

fiduciary to 'disclose its internal deliberations' . . . . We do however, hold that 'when a plan administrator speaks, it must speak truthfully.'"[394]

Nevertheless, the courts have consistently rejected claims of fiduciary liability based on nondisclosure of nonpublic, adverse corporate information on the ground that advance disclosure of such information to participants would violate federal securities law.[395]

3. Duties of Loyalty

Finally, under ERISA, plan administrators must discharge their duties "solely in the interest of" the participants and beneficiaries of the plan, and for the "exclusive purpose" of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.[396] Nevertheless, a plan sponsor may receive "incidental" benefits from the operation of a pension plan, including "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily."[397]

Dana Muir has suggested that there may be a point at which the employer's use of company stock in matching programs to align employees' interests with those of the firm exceeds the standard of "incidental" benefits, generating such significant benefits for the firm that it becomes impossible to say that the core purpose of the plan is to provide benefits for participants and their beneficiaries.[398] To date, no court appears to have utilized this as the basis for allowing a breach of fiduciary duty claim to proceed in the context of a defined-contribution plan.

C. The Law's Role in Reform

ERISA's failure to adapt to the shift of risk from employers to individual employees in retirement plans poses a significant threat to the retirement security of American workers. One need only look to the recent downfall of Enron and the carnage occurring around us in the present recession to appreciate what this will mean for society as a whole. That failure is particularly troubling in light of the law's contribution through the doctrine of employment at will to the coercive effect of employer programs that press employees to buy into the brand, both psychologically and financially. Identity-based brand-management programs—backed by the employment-at-

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394. Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994) (quoting Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993)) (citations omitted).

395. *See, e.g.*, Edgar v. Avaya, Inc., 503 F.3d 340, 350 (3d Cir. 2007); *In re* Bausch & Lomb Inc. ERISA Litig., No. 06-CV-6297, 2008 WL 5234281, at *9 (W.D.N.Y. Dec. 12, 2008).

396. 29 U.S.C. § 1104(a)(1)(A)–(B) (2006).

397. Lockheed Corp. v. Spink, 517 U.S. 882, 893–94 (1996).

398. *See* Muir, *supra* note 36, at 31 (raising this question).

will doctrine—lay the groundwork for subtle and powerful manipulation of the employees' emotional attachment to the firm, eviscerating the assumption of free choice that has grounded the law's refusal to intervene to protect employees "from themselves."

Susan Stabile has argued persuasively in favor of a cadre of regulatory reforms, all of which would dramatically improve the situation of employees conditioned through branding programs to cast their lot with the employer.[399] Her analysis however, overlooks a crucial point: the problem is not that the law resists intervention in situations involving private choice such as the investment decisions made by employee–participants. The law has *already intervened* through the background operation of the doctrine of employment at will, establishing a status relation that renders employees vulnerable to the employer's power. It is the combination of legal compulsion and the employer's practices that yields the psychological framework that renders employees vulnerable to the influence of branding programs. Because it is the law that has caused the problem of employee vulnerability to employer pressure, it is law that must respond to that vulnerability.

I propose that where employees can demonstrate that the employer's internal branding program was designed to induce psychological investment in the firm and the employer maintained an at-will workforce, the employer has exercised such significant influence over employees' psychological framework that it should owe the same fiduciary duties under ERISA that an employer with a defined-benefit plan would owe. In other words, the § 404(c) safe harbor should be repealed or construed very narrowly. Employers could limit their liability either by cabining their internal branding programs or by implementing a just cause for discharge policy, which would offer significant protection for employees who choose to resist the branding program. Where the employer enacts a just cause for discharge policy (whether through a collective-bargaining arrangement with a union or on its own initiative), the usual rules regarding breach of fiduciary duty in a defined-contribution context and the § 404 (c) safe harbor provision would continue to apply, offering protection against the most egregious acts of malfeasance but still respecting employee agency.

399. *See* Stabile, *supra* note 213, at 397–401 (discussing reforms ranging from strengthening the fiduciary obligation of the employer so that it is identical to that owed by administrators of defined-benefit plans, mandating diversification in individual account plans or imposing statutory limits on the percentage of company stock that an account could contain, switching the default to an allocation selected by a professional asset manager so as to require an affirmative election to opt-into the purchase of company stock instead, and building in legal incentives for employers to provide investment counseling).

VII. CONCLUSION

In a labor market characterized by high mobility, short job tenure, and the shift of risks of reemployability and retirement security to workers, businesses can no longer count on worker loyalty stemming from long-term employment and dependence upon a paternalistic regime. Yet worker loyalty and extra-role behavior are more important than ever in a competitive global economy where delivering on the brand promise is critical to creating and maintaining consumer loyalty to the brand, and front-line workers are the primary point of contact with consumers. Modern businesses are thus increasingly committed to managing workers' identities, seeking to harness their hearts and minds in pursuit of corporate objectives.

Backed by the at-will doctrine, identity-based brand-management programs influence employee decision making in ways that are at once more subtle and more powerful than previous researchers have acknowledged. Internal branding programs act directly on the psychological contract-formation process, influencing employees to respond as if employment were an affective relationship rather than a market transaction.

By investing disproportionate percentages of their retirement savings in company stock, employees enact the branded identities that they have been schooled to adopt. The conventional story is that either employees freely choose to invest their pension dollars in the firm, or alternatively, that they are coerced into doing so by employers who condition advancement or continued employment upon a financial demonstration of loyalty. The reality, however, may be more complex: a mix of employees' individual choices and employer pressure, applied indirectly through internal branding programs that mask the coercion and make the voluntariness of the decision nearly impossible to calibrate.

Choices about how we spend money send powerful signals about which relationships matter to us.[400] It should not surprise us in a consumption-oriented economy that our purchases signal attachment and help to define our identity.[401] Indeed, this explains the allure of brands. All I suggest here is that the law should recognize those signals for what they are: expressions of trust in the employer. When employers deliberately induce employees to place faith in the firm's brand and penalize refusal to do so with discipline

400. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 18–19 (2005) (discussing the relationship between economic transactions and intimacy); VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 18–19 (1994) (discussing how the significance of money is "shaped and reshaped by particular networks of social relations"); *see also* Stephanie Simon, *After the Boom: The Guilted Age: Spending To Keep Others Afloat*, WALL ST. J., Mar. 19, 2009, at A12 (discussing how relationships and emotions impact budget-cutting decisions).

401. *See* Nestor M. Davison, *Property and Relative Status*, 107 MICH. L. REV. 757, 760–65 (2009) (arguing that property ownership communicates status, defines personhood, and signals membership in communities).

or discharge, they should be held responsible for the financial losses that result.