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Switching the Default Rule

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Abstract

There is a standard analysis of default rules in contract law, including those forms of contract law that fall under the label of employment law. But behavioral economics raises many complications. The default rule can create an endowment effect, making employees value certain rights more simply because they have been granted such rights in the first instance. Similarly, the default rule for savings plans, set by employers or law, seems to have a large effect on employee behavior. When the default rule affects preferences and behavior, conventional economic analysis seems indeterminate; either default rule can be efficient. In employment law, analysis of distributive consequences also suggests the difficulty of deciding which default rule to favor, because any switch in the rule is unlikely to have significant redistributive effects. Nonetheless, switching the default rule can, in certain circumstances, have desirable effects on workers' welfare. A central question is whether the stickiness of the default rule reflects a genuine change in values, or instead employee confusion or bargaining strategy.

I. Introduction

A. Puzzles

Begin with three puzzles:

—Legislators in a Midwestern state want to give employees greater protection against arbitrary discharges. But critics contend that a new law, flatly banning discharges without cause, would be too rigid and would ultimately hurt employees themselves. Some people have urged a compromise, one that would give employees a right to be discharged only for cause unless they waive that right through contract. Would the compromise have good effects? Would it have any effects at all?

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—Employers in a large Midwestern state typically allow their employees to participate in certain savings plans. Under the existing plans, employees can elect to devote a specified level of their salary to savings, in return for tax relief and some contribution from employers. But only about 20% of employees participate in these plans. State legislators are considering a law that would require an "automatic enrollment plan," by which employees would be enrolled in the plan when hired, but would be expressly authorized to opt out at the same time. Would the new law have any effect on savings rates?

—There is no ban on age discrimination in a European country. Instead of proposing a ban, legislators have urged that employees should have a presumptive right to be free from age discrimination, but that employees should be permitted to relinquish that right through voluntary agreements. Would legislation to this effect be desirable? What would it accomplish?

In many areas of labor and employment law, it is possible to imagine two different sorts of default rules. The employer might be presumed to have the relevant entitlement, but the employee might be entitled to bargain for it. This is a system of waivable employers' rights. Alternatively, the employee might be presumed to have the entitlement, but the employer might be entitled to bargain for it. This is a system of waivable employees' rights. The choice between the two cuts across many substantive issues: job security, vacation time, parental leave, health care, savings plans, pensions, occupational safety, even unionization itself. In these cases, and more, the legal system might give the initial entitlement to one or another side. We could imagine a legal system in which employers enjoy all or most initial entitlements; we could imagine default rules granting all or most initial entitlements to employees.

At common law, employers are typically given almost all of the initial entitlements. In that sense, the default rules set by the common law create a system of waivable employers' rights. Of course employees have a presumptive right to their own time and labor; employers may assert a right to the time and labor of workers if and only if the workers have bound themselves to work. But employees must specifically bargain for everything else. When the contract is silent, an employer may discharge an employee for any reason or for no reason at all; may refuse to provide vacation time, parental leave, or health care; need not offer a safe workplace; need not provide a pension plan; need not allow unionized workers on the premises.

Contrary to appearances, there is nothing natural or inevitable about this state of affairs. When an employer is authorized to deny an employee a safe workplace, or vacation time, and when there is no contractual provision on the point, the law has made a choice about the (right) starting place for bargaining. It would be easy to imagine a legal system, fully committed to freedom of contract, that began with default rules giving certain entitlements to employees. My principal questions in this essay are simple: Would a switch of the entitlement matter? If so, exactly how?

B. Five Sets of Claims

Of course many statutes create nonwaivable rights. They bypass the question of default rules entirely, by banning bargaining altogether. There are many reasons why legislatures and courts might take this approach. Perhaps third party effects argue against waiver. Perhaps waivers would be inadequately informed; behavioral economics offers a number of reasons why this might be so.[1] Perhaps nonwaivable rights can be justified, in the context of accommodation mandates, on redistributive grounds.[2] But I seek here to cast light on a different question: When should employment and labor law proceed, not by preventing bargaining, but by switching the relevant entitlement from employers to employees?

Much attention has been paid to so switching entitlements; for example, freedom from age discrimination now takes the form of a waivable workers' right.[3] Anecdotal evidence suggests that people are often asked to waive race and sex discrimination claims, though such waivers are most unlikely to be enforceable. Another example is the Fair Labor Standards Act, which allows employees to waive their right not to work more than forty hours a week, but also at a governmentally determined premium ("time and a half").[4] Or consider the Model Employment Termination Act, which allows employers and employees to waive the right to for cause discharge, but only on the basis of an agreement by the employer to provide a severance agreement in the event of a discharge not based on poor job performance.[5]

For purposes of the present discussion, let us put to one side those cases where transactions costs impede bargaining. Everyone agrees that these are situations in which the default rule will matter, and prove "sticky," simply because it is costly to contract around it.[6] I will focus instead on cases in which there are no such transactions costs. I urge, most generally, that in such cases, the default rule will matter, but that we can find little guidance from the traditional criteria of efficiency and distribution. The

[1] See Cass R. Sunstein, Human Behavior and the Law of Work, Va. L. Rev. (2001).
[2] See Christine Jolls, Accommodation Mandates, Stan. L. Rev. (forthcoming 2001).
[3] 20 USC 626(f)(1).. Note that the right is waivable for past violations, not for future violations.
[4] 29 USC 207(f)
[5] Model Employment Termination Act, Section 4©, reprinted in Mark Rothstein and Lance Liebman, Employment Law 208-19 (Statutory Supplement) (1997),
[6] For a much-cited discussion, see Ian Ayres and Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale LJ 87 (1989).

key questions are whether the switch of the entitlement genuinely changes values, as opposed to bargaining strategies, and if so whether the switch improves workers' welfare. In some cases, the switch in entitlement will indeed be defensible as a way of making workers' lives better. More particularly, I attempt to support the following sets of points.

1. The switch of the entitlement might well make a difference simply by virtue of the endowment effect – the effect of the initial allocation of the right on people's valuations, possibly employers and almost certainly workers.[7] When the endowment effect is at work, preferences and valuations are affected by the initial allocation of the entitlement; contrary to the Coase theorem, there is no prelegal "preference" from which the legal system can work. The default rule might matter because it has a legitimating effect, carrying important information about what most people are expected to do.[8] If workers value a right more simply because it has been initially allocated to them, and less because it has not been so allocated, a switch in the initial allocation will matter by definition. The principal qualification here is that people might be unaware of the legal rule. They might order their affairs on the basis of norms, rather than law.[9] If this is so, the switch in the entitlement is unlikely to matter.

2. A switch in default rules might be supported by traditional economic analysis of "penalty defaults," alongside a behaviorally informed understanding that employee likely err about the law. Employees often lack information about their legal rights, showing excessive optimism,[10] and the switch of the entitlement from employers to employees might increase the flow of information between the parties and to the legal system.[11] Suppose, for example, that if employees are given certain rights by the default rule, employers will want to buy those rights. If this is the case, we will see a system in which certain information is disclosed to employees, simply as part of the process by

[7] See Richard Thaler, Quasi-Rational Economics 169, 184-86 (1993). The endowment effect might be small or nonexistent for employers if legal entitlements are, for employers, akin to money tokens. See id. at 176. We would not expect hardware stores to show an endowment effect for mousetraps and hammers; for hardware stores, these goods are a form of cash. The question, not yet resolved, is whether legal entitlements have the same characteristic for employers in the context of labor and employment law. Some evidence is provided in Jennifer Arlen, Matthew Spitzer, and Eric Talley, forthcoming, with the finding that endowment effects are greatly reduced when agents are acting for others. Id. Perhaps those acting for employers – such as supervisors and personnel officers -- are generally "agents," not subject to the endowment effect.
[8] I will discuss this possibility in several places below; I believe that in some settings, it accounts for what is described as an endowment effect, and perhaps should be described as a different effect from the endowment effect. Social scientists have yet to sort out the relationship between this legitimating effect and the endowment effect, as found in Daniel Kahneman, Jack Knetch, and Richard Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, in Behavioral Law and Economics 211 (Cass R. Sunstein ed. 1999).
[9] See Robert Ellickson, Order Without Law (1993).
[10] See Richard Freeman and Joel Rogers, What Workers Want 118-22 (1999).
[11] See Samuel Issacharoff, Contracting for Employment, 74 Tex L Rev 1783 (1994).

which employers bargain. A switch in the legal rule, moving the initial allocation of the entitlement from employer to employee, might give important information to workers when they would otherwise overstate their legal rights.[12]

3. A default rule in favor of the employee might be undesirable if some cognitive or motivational failure will lead the employee to demand an excessive amount in order to trade. Suppose, for example, that employees would gain little from a contractual right to be fired only for "just cause." (Employees might have little to gain if discharges rarely occur without cause; in that case, the contractual provision would give employees a right that they enjoy in any event.) Suppose too that if employees are initially given that right, they will not trade it, even for a high price. If this is so, a switch in the entitlement, from employers to employees, would be hard to defend as a way of improving the welfare of workers. Because employees would refuse to trade the right, even though it does them little good, the result would be a situation in which their overall compensation package is actually inferior.

4. In most circumstances, a switch in the default rule, or for that matter a refusal to switch, will not be simple to justify on grounds of efficiency or redistribution. When transactions costs are zero, either allocation will be efficient. From the standpoint of redistribution, the effects are likely to be modest, at least as a general rule. The reason is that the contractual setting will usually allow adjustments by employers, the apparent "losers."

5. What really matters is welfare, not efficiency; the latter is best understood as a crude proxy for the former. A switch in the default rule might improve social welfare in general and workers' welfare in particular. Consider the second case given above, where the switch might well increase savings without having any significant adverse effect on workers. There is a related point: If workers care about <u>relative</u> economic position, but not <u>absolute</u> economic position, a switch of the default rule to workers might be justifiable on welfare grounds, because the switch might give the employees real benefits while also not imposing real costs on them.

It is also possible that switching the default rule will have desirable effects on norms and preferences, because it will inculcate a more appropriate sense of how, and how much, to value the interests at stake. To those who object that this approach is unacceptably paternalistic, the best response is simple: When the default rule has an inevitable effect on valuation, there is no escaping issues of this kind, and it is hopeless

[12] On workers' ignorance of their legal rights, see Richard Freeman and Joel Rogers, What Workers Want 118-122 (1999).

to attempt to "defer" to workers' preferences – which are, by hypothesis, a function of the legal rule. It is possible, however, that the endowment effect reflects no change in welfare with different initial entitlements, but merely a difference in the bargaining situation of employers and workers, and perhaps confusion about the existence of opportunity costs.

The rest of the discussion will be devoted to an elaboration of these ideas.

II. When the Default Rule Will Matter

According to the Coase theorem, a change in the default rule does not matter, at least if there are no transactions costs.[13] No matter the default rule, the parties will bargain their way to a result that is both efficient and the same. It is obvious that this claim has large implications for labor and employment law in particular. If the Coase theorem is correct, the default rules set by the law, for workers and employers alike, does not matter, at least if transactions costs are low. It is irrelevant whether employees or employers are given initial rights with respect to leave time, vacation, health care, job security, age discrimination, and more.

A. Workers' Endowments: The Wrongness of the Coase Theorem

Of all existing claims in behavioral law and economics, perhaps the most well-known is that on this point, the Coase theorem is entirely wrong.[14] No one claims that the Coase theorem is wrong insofar as it says that under the stated conditions, either allocation of the entitlement will produce efficiency. Where the Coase theorem blunders is in suggesting that no matter the initial allocation of the entitlement, people will bargain to the <u>same</u> result. The reason that this is a blunder is that the initial allocation seems to create an endowment effect.[15] When the endowment effect is at work, those who initially receive a legal right value it more than they would if the initial allocation had given the right to someone else.

[13] See Ronald Coase, The Problem of Social Cost, J. Law & Econ. (1961). It has long been acknowledged, however, that wealth effects may mean that the initial entitlement will affect ultimate outcomes. See Richard A. Posner, Economic Analysis of Law 51 (5th ed. 1999). But wealth effects are generally thought to be small. See infra. The traditional analysis ignores the endowment effect. See id.
[14] See Daniel Kahneman, Jack Knetch, and Richard Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, in Behavioral Law and Economics 211 (Cass R. Sunstein ed. 1999).
[15] See Thaler, supra note.

There is a great deal of evidence to this effect.[16] One of the initial studies involved the effect of the initial allocation of mugs and chocolate bars.[17] Here the endowment effect was found to be instantaneous: People initially allocated the relevant good demanded a great deal more to sell it than people not initially allocated the good were willing to pay to obtain it. Countless studies have found a disparity between willingness to pay (for a good owned by someone) else and willingness to accept (payment for a good already owned).[18] Some of these studies have shown an endowment effect in a contractual setting, akin to that involved in labor and employment law.[19] As I have suggested, the default rule might matter, not because of a "pure" endowment effect, but because it carries information about what most people do, or about what it is most reasonable to do. In this event too, the default rule can have significant consequences.

In the context of insurance, an unplanned, natural experiment showed that the default rule can be very "sticky."[20] New Jersey created a system in which the default insurance program for motorists included a relatively low premium and no right to sue; purchasers were allowed to deviate from the default program and to purchase the right to sue by choosing a program with that right and also a higher premium. By contrast, Philadelphia offered a default program containing a full right to sue and a relatively high premium; purchasers could elect to switch to a new plan by "selling" the more ample right to sue and paying a lower premium. In both cases, the default rule tended to stick. A strong majority accepted the default rule in both states, with only about 20% of New Jersey drivers acquiring the full right to sue, and 75% of Pennsylvanians retaining that right. Experiments confirm the basic effect, showing that the value of the right to sue is much higher when it is presented as part of the default package.[21]

It is not clear that the difference reflects an endowment effect, involving a change in valuation as a result of the initial entitlement. But it does demonstrate a large consequence from a change in the default rule. It seems reasonable to speculate that in many cases, the default rule carries information about what ordinary or sensible practice.[22] This too is a central reason that the default rule can matter.

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[16] See, e.g, Russell Korobkin, Behavioral Economics, Contract Formation, and Contract Law, in Behavioral Law and Economcis, supra, at 311.
[17]See Kahneman, Knetch, and Thaler, supra.
[18] For citations, see Thaler, supra note, at 168.
[19] See Korobkin, supra, in Behavioral Law and Economics.
[20] See Colin Camerer, Prospect Theory in the Wild, in Choices, Values, and Frames 294-95 (Daniel Kahneman and Amos Tversky eds. 2000); Eric Johnson et al., Framing, Probability Distortions, and Insurance Decisions, in id. at 224, 238.
[21] Id. at 235-38.
[22] See below.

From all this we might reach a simple conclusion: When labor and employment sets a default rule, it is likely to prove "sticky," because of its effect on employees' judgments and valuations. If there is a default rule against age discrimination, the ultimate outcome will be quite different from that produced by a default rule permitting age discrimination. If a default rule creates a right to a generous pension program, the outcome will differ from that produced by a default rule creating no such right. In fact the default rule selected by employers will matter no less than that set by law. I now turn to an example.

B. Private Default Packages and the Case of Savings

Some people think that workers do not save enough for retirement. Without arguing the point, let us simply suppose, for purposes of argument, that they are right. Might employees' failure to save be a function of the default rule? Might a change in the default rule alter savings rates? The evidence seems clear. A mere change in the default rule will dramatically alter employee behavior[23] – probably because in some contexts, the default rule carries information about the ordinary and sensible course of action. Whatever the mechanism, the default rule has significant consequences for employee behavior. Note that the issue here involves an employer's decision, not about whether the employer or employee should enjoy an entitlement, but about the default rule governing the allocation of workers' benefits between salary and retirement savings.

An important study has demonstrated the basic effect.[24] For some years, employees would not be enrolled in a 401(k) plan unless they affirmatively chose to do so. The employer instituted a change by which employees would be automatically enrolled, and would be removed from the program only if they so chose. The change in the default option had dramatic effects. When employees had 3-15 months of tenure, the participation rate was 37% under the old plan; under the new plan, the participation rate, for those with the same amount of tenure, was no less than 86% for employees with that amount of tenure. Automatic enrollment had especially pronounced effects on the participation rates of women and African-Americans.

In a separate phenomenon, the default rule also had a significant effect on the chosen contribution rate. The default contribution rate (3%) tended to stick; <u>a majority of employees maintained that rate even though this particular rate was chosen by less than 1% of employees hired before the automatic enrollment</u>. The same result was found for the default allocation of the investment: While less than 1% of employees

[23] B.C. Madrian and D. Shear, The Power of Suggestion: An Analysis of 401(k) Participation and Savings Behavior, available on SSRN.com.
[24] Id.

chose a 100% investment allocation to the money market fund, a substantial majority of employees chose that allocation when it was the default rule.

As I have suggested, the significant effect from the default rule is probably a product of its informational signal. With respect to savings, the initially proposed plan carries a certain legitimacy, perhaps because it seems to have resulted from some conscious thought about what makes most sense for most people. This understanding is supported by the finding that the largest effects, from the new default rule, are shown by women and African-Americans. We might speculate that members of such groups tend to be less confident in their judgments in this domain and to have less experience in assessing different savings plans.[25]

Richard Thaler and Schlomo Benartzi have exploited the endowment effect and loss aversion to propose a new plan, Save More Tomorrow, designed to increase savings by workers.[26] The authors' suggestion is that employers should offer employees the option to choose a retirement plan that favors savings. Under the Save More Tomorrow plan, employees are invited to join a plan in which they can to precommit to give a certain amount of their future salary increases to be used in their retirement savings. The rationale behind the proposal is that while people would be reluctant to give some of their current salary to savings (because they would then suffer a loss), they would be willing to give some of their future salary increases to savings (because they would then remain "gainers" after the increase). Would this plan have any effect? Thaler and Benartzi found a dramatic impact. A company that adopted the plan found that the plan was chosen by over three-quarters of those offered it; that almost all of those who adopted it remained in it; and that the consequence of the plan was to increase average savings rates of those enrolled in the plan from 3.5% to 9.4% over sixteen months. Significantly, only a tiny portion of those who joined the plan (less than 3%) dropped out after two pay increases.

The studies that I have just described show significant effects from changes in the default option – but these changes are produced by employers, not by law. Understood in this narrow form, the point itself carries considerable importance. It suggests that voluntary behavior by employers, perhaps in concert with unions, can greatly affect employees, not by mandating any particular course, but by suggesting a default option.[27] Employers, acting together with employees, might design any number of

[25] I am grateful to Christine Jolls for pressing this point.
[26] See Richard Thaler and Schlomo Benartzi, Save More Tomorrow: An Easy Way to Increase Employee Savings (unpublished manuscrupt July 2000)
[27] The point might help to explain the finding in Freeman and Rogers, supra note, that workers in unionized firms are almost unanimously satisfied with their union and would not like a change. For most of these workers,

default compensation packages, giving employees some mixture of take-home pay, vacation time, pension plan, job security, and protection from discrimination. What we now know is that the default plan will have significant behavioral consequences.

Perhaps it will be thought that any suggested default plan would represent an objectionable interference with workers' freedom of choice. But because any default option is likely to stick, this objection is implausible.[28] A sensible approach for the future would involve consultations between employers and groups of workers, not to mandate any particular outcome, but to identify default rules that are likely to be in the interest of most workers. Since any such default rule will not work well for everyone, there should be an opportunity, in ordinary circumstances, for workers to opt out if they wish.

The point has implications for law as well. With respect to savings, it is easy to imagine a statutory intervention designed not to mandate anything in particular, but to ensure a particular default rule. Employers might be encouraged (through information or economic incentives) or required to propose a certain savings package for employees, while at the same time allowing employees to divert some of the money to salary if they wish. Perhaps a statutory program to this effect could build on the "Save More Tomorrow" plan. It is even possible to imagine a system of social security reform that would make creative use of default rules to offer workers starting points that would be most likely to improve their welfare.

C. General Lessons

The domain of savings might reflect an unusually loud informational signal, but we know enough to know that the initial entitlement is likely to have large consequences.[29] To the extent that large effects can be expended from a change in the default rule, there is a general lesson for labor law. If employees are given a waivable right to be fired only for cause, to take vacation leave, to have a certain level of occupational safety, or to be free from age discrimination, they are likely to value that right more than they would if the right were allocated to employers in the first instance. The conclusion is that if a default rule is switched, so that entitlements initially enjoyed

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unionization has become the default option. Of course we cannot know the extent to which workers' satisfaction is the product of this effect, or whether workers who have voted for a union are likely to like unions.

[28] See Thaler and Benartzi, supra.

[29] See Russell Korobkin, Behavioral Economics, Contract Formation, and Contract Law, in Behavioral Law and Economics 116 (Cass R. Sunstein ed. 2000); Christine Jolls et al., A Behavioral Approach to Law and Economics, in id. at 13, 30 (discussing study by Jonathan Gruber).

by employers are now owned by employees, the outcome would not be the same. Very generally, the entitlement will have a tendency to stick.

But there is an important qualification. The default rule might not matter for a reason unrelated to the Coase theorem: People might not know about the default rule, and they might not order their affairs by reference to it. Suppose, for example, that workers and employers decide on job security, or vacation time, or pension plans, without reference to the legal rule. Robert Ellickson has shown, in some domains, that it is a mistake to be "lawcentric"; people might well produce outcomes with little reference to legal rules.[30] Norms, not traceable to law, may do the work of law. To the extent that this is so, switching the default rule will have no impact, because people do not enter into agreements with anything like close reference to it.

Is this likely to be the case in most domains of labor and employment law? No general answer would make sense. But in the area of labor-management relations, employers, at least, are likely to know about the nature of the governing default rules, and they are likely to act on the basis of that understanding, If law confers initial entitlements on employees, employers are likely to know about the fact, and to respond. Perhaps this step will not be necessary if employers know that employees are unaware of what the law has done; in that case, employers will have little to worry about in the event that they do not "buy back" the relevant right. But a sensible employer is unlikely to be willing to take his chances with employee ignorance. I now turn to the resulting questions.

III. Default Rules and Information Flow

The simplest effect of switching the default rule will therefore be to increase the likelihood that it will end up where it was initially placed. If workers are initially given certain rights or options, those rights or options will tend to stick. But what will be the consequence for bargaining in the labor market? A potential result – for labor and employment law, a fortunate one -- will be to ensure that more information is disclosed to workers who might otherwise have overestimated their legal rights, and also to the legal system.[31] In particular, a switch of entitlement from employer to employee will increase the likelihood that workers will know what the law has and has not given them, and bargain accordingly. The optimistic view would that a switch of that sort might even overcome a market failure, in the form of inadequate information on the part of employees. When the employer is given the initial entitlement, bargains might

[30] See Robert Ellickson, Order Without Law (1991).
[31] This is a large theme in the law of contract, see Ayres and Gertner, supra note.

not represent anything like a meeting of the minds. A switch of the default rule can solve the problem.

In one sense, this point is entirely old hat. It is well known that default rules can operate as "penalties" that impose the burden of disclosure on those who have it, for the benefit of those who need it.[32] But the point has not been greatly discussed in the context of labor and employment law.[33] What I add here is a behavioral suggestion: For as yet ill-understood reasons,, workers frequently, and generally, have a false and exaggerated understanding of their legal rights. It is for this reason that switching the entitlement for employers to employees might be especially desirable, as a means of correcting employee ignorance.

To see why this is so, imagine a situation, by itself apparently unproblematic, in which the right is initially vested in employers, and it rarely happens that employees bargain for that right. It might be, for example, that employers have a right to fire employees at will, or to replace strikers permanently, or to deny employees parental leave, occupational safety, or freedom from age discrimination. If the entitlement tends to stay where it was initially allocated, the reason might be (a) significant transactions costs, (b) little employee enthusiasm for purchasing the right at the market price, (c) an endowment effect, or (d) an employees' failure to know that they do not have the right in any case. Reason (a) and (b) can be analyzed conventionally. If transactions costs are high, a central efficiency question is whether the default rule "mimics the market," in the sense it reflects what the parties would have done if they had bargained.[34] If employees do not attempt to purchase the right at market price, there seems to be no problem from the standpoint of efficiency, though perhaps there is some other reason for concern.[35] I have just discussed the endowment effect. For present purposes, the interesting case is (d) – employee ignorance about the content of the default rule.

There is growing evidence that workers overestimate their legal rights – a phenomenon that we might label the "fairness heuristic," by which employees bleive that the law is what (they think) fair law would be. For example, Pauline Kim has shown that employees generally believe that the legal rule is one of "for cause rather than "at will" – that, in other words, employees can be fired only for cause.[36] Of course

[32] See id.
[33] The leading exception is Samuel Issacharoff, Contracting for Employment, 74 Tex L Rev 1783 (1994), from which I have learned a great deal. The point is also treated in Pauline Kim, Norms, Learning, and Law, 1999 Univ of Ill L Rev 447.
[34] This oversimplifies some complex issues. See Ayres and Gertner, supra.
[35] There is a possibility of uninformed or otherwise objectionable preferences, discussed below.
[36] Pauline Kim, Norms, Learning, and Law, 1999 Univ of Ill L Rev 447; Pauline Kim, Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L Rev 105 (1997);

employees are wrong on this point; without a contractual provision giving them job security, they do not, in fact, have a right not to be discharged "at will." On this point employees systematically err; they think that they have a right that they lack. Richard Freeman and Joel Rogers have greatly generalized this finding, showing that workers believe that they have a number of rights that they in fact lack.[37] Workers believe, for example, that employers cannot hire permanent replacements for strikers; that employers cannot require employees to do dangerous work; that workers have ample rights against arbitrary discharge.[38]

These findings do not establish that employees should be given a right to job security or to anything else. But they do appear to establish an apparently serious problem with the current situation, in the form of pervasive worker overestimation of their legal rights.[39] To be sure, it is possible that this is not a reason for special concern, at least if workers are speaking for employer's ordinary practices (as seems plausible in the context of job security). If employees have the law wrong but the practices right, the problem is not so troublesome. But something does seem to be amiss if workers believe that they have legal rights that they lack as a matter of law. An obvious remedy would be to switch the default rule, not to ensure that employees have job security and so forth, but to ensure that whatever they have, it is a product of informed bargai ning. Here the likely consequence of a switch in the default rule, giving employees a right (for example) to be fired only for cause, would be to ensure that employers would buy the right via contract if that is where, on conventional grounds, the right belongs.[40] And if the idea is sound, it might be applied in many other areas in which employees erroneously believe that they have certain legal rights.

Nor is this idea entirely foreign to labor and employment law. State courts have made significant inroads on the at will rule, by taking ambiguous "promises" from employers as a basis for creating a right to job security.[41] A possible understanding of these cases is close to what I have suggested here: Employees should not be unaware of their rights, and doctrines should be developed to ensure that when they are entering into employment contracts, they are aware of what they do and do not have. With a doctrine that takes ambiguous statements, apparently promising job security, as a basis for rights of job security, it is possible to give employers a good incentive to tell employees exactly where they stand. In fact employers in Michigan have done exactly

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[37] See Freeman and Rogers, What Workers Want (1999).
[38] Id. at 118-121.
[39] See id.
[40] See Issacharoff, supra note.
[41] See, eg, Touissant v. Blue Cross, 408 Mich 579 (1980); McDonald v., Mobil Coal, 820 P. 2d 986, 987 (1991). For an overview, see Mark Rothstein et al., Employment Law 530-32 (1994).

this – responding to the cases by giving employees a clear signal that they lack job security. The advantage of this approach is that it promotes a better information flow between the parties, so that workers are more likely to know what they are (not) getting.[42]

Of course an understanding of behavioral economics raises many questions about allowing waiver at all.[43] Perhaps employees will be unaware of what it is that they are waiving. Perhaps they will think that they have the relevant rights even after wiaver. Perhaps they will engage in wishful thinking. But at the very least, a switch of the default rule will increase the information that is provided to employees – and that probably counts as a good thing.

IV. Default Rules and Cognitive or Motivational Failure

For those concerned about improving the welfare of employees, it seems to make sense to create default rules that favor workers. If what matters is the welfare of workers, shouldn't workers be given certain rights, with the proviso that employers might be able to buy them if workers find the bargain to be worthwhile?

In general, the implication of the question is not entirely wrong (see section V). But there is an important qualification. Suppose that a significant endowment effect accompanies the switch of the default rule. Suppose too that employees are extremely reluctant to trade the relevant right, so much so that employers are infrequently willing to offer enough to produce a trade. At first glance, nothing seems amiss; the entitlement should stay where it was initially allocated, because employees value it more than employers do (given that initial allocation).

But here we can find another twist from behavioral economics: Some employees might refuse to waive because of cognitive and motivational problems. Suppose, for example, that most workers have little to gain from a right to be fired only for cause, because in a market economy, such workers are not really at risk.[44] Why would an employer fire someone without cause? In that event, it should be expected that workers would be willing to waive for a relatively low price. But at least it is possible that workers will refuse to do so, simply because they "overvalue" the right, and hence will

[42] There is, however, a possible disadvantage: Employees might not really be getting anything they don't really have, because arbitrary discharges are (on one view) unlikely in a competitive market. If this is so, the switch of the rule produces wasted paperwork. Note also that it is possible that even with a change in default rule, employees will not understand, or believe, that they are waiving their rights. Kim's data suggest that many employee will not even believe in the legal effectiveness of a waiver. See Kim, supra.
[43] See Sunstein, supra note.
[44] See Richard Epstein, In Defense of Contract At Will, 51 U Chi L Rev. 947 (1984).

not sell except for a price that is too high, from the standpoint of their own welfare. Workers might, for example, overestimate the probability that the small risk will come to fruition, perhaps because they can think of a salient example.[45] We do not have the empirical work that would justify an unequivocal view on this issue. But we know enough to know that the risk is real.

The cautionary lesson here is that concern about workers' waivers is a double-edged sword. In some circumstances, that concern justifies the creation of nonwaivable workers' rights.[46] But in some circumstances, the same concern justifies a system of waivable employers' rights, on the theory that a default rule in favor of workers might jeopardize workers' own welfare.

V. Which Default Rule? Efficiency, Distribution, and Welfare

The largest question remains. In the presence of an endowment effect, or some other stickiness in the initial entitlement, which default rule is best? To answer this question, it is necessary to identify the criteria by which to answer that question.

A. Efficiency

On a familiar view, the default rule should be chosen by the efficiency criterion. The question is which default rule will promote efficiency – the standard claim in the economic analysis of law.[47]

To be sure, no sensible person would contend that efficiency is the only thing that labor and employment law should be concerned with. Few people, however, would deny that an efficiency loss is at least relevant to the inquiry, because it is relevant to the welfare of workers and everyone else.[48] But there is a serious problem in using the efficiency criterion to choose among default rules (when transactions costs are zero). If the endowment effect is at work, the two results are different, but they will <u>both</u> be efficient. If an employee refuses to trade a right to be free from age discrimination except at a very high price, and if employers will not offer that price, the outcome – no trade – is efficient. If an employee is not willing to buy a right to be free from age discrimination, and if employers will not sell that right except at a very high price, the outcome – no trade – is also efficient. In the presence of an endowment effect, the efficiency criterion is indeterminate and therefore unhelpful.

[45] Cf. W. Kip Viscusi, Fatal Tradeoffs (1993) (suggesting that people overestimate low probability risks).
[46] See Sunstein, supra note.
[47] See Ayres and Gertner, supra.
[48] See below.

To be sure, familiar economic analysis can suggest a default rule in the face of transactions costs, by seeing whether one or another rule "mimics the market" by replicating the likely outcome of bargaining, or this inquiry proves difficult, by choosing a penalty that produces clarity from the parties.[49] But if there are no transactions costs, and if different default rules produce different but efficient outcomes, economic analysis has little to say about how to choose among the competing possible rules.

The point can be clarified with a simple example. Suppose that most employees would be willing to purchase a right to job security for $200. Suppose that most employers would be willing to sell it for $250. In these circumstances, most contracts will be at will; this is the efficient outcome. But suppose that if employees are initially given the right, they will trade it only for $300 – and that in the same circumstances, most employers (showing o endowment effect) would be willing to buy it for $250. In these circumstances, most contracts will be for cause. Two different outcomes are efficient, and they are different only because of the difference in the initial allocation of the entitlement.

At this stage the efficiency criterion seems indeterminate. For the moment, we should note that willingness to pay (WTP) and willingness to accept (WTA) are important only insofar as they provide administrable indications of the welfare gain from a trade. When the endowment effect means that WTP and WTA are different, there are two interesting possibilities. First, the difference might measure actual welfare differences, depending on the default rule. Second, the difference between WTP and WTA might have nothing to do with welfare at all; it might be produced by confusion, by bargaining behavior, or something else not directly related to workers' welfare under different default rules. I will return to the problem shortly.

B. Distribution

Might some progress be made by asking about distribution? Suppose that there is a general view that in cases of doubt, the law should distribute resources to employees rather than employers. Certainly the impetus for much of labor law has been to transfer resources in this way.

To be sure, it is not clear that this view makes sense, even for those who favor more egalitarian distributions. Many employees are not poor; many poor people are not

[49] See Ayres and Gerner, supra note.

employees; and efforts to redistribute resources from employers to employees are not the same as efforts to redistribute directly from rich to poor. In any case the effect of those efforts may be to increase prices, which is hardly good for poor people. Increased prices are a kind of regressive tax; they are especially hard on the poor. A progressive income tax is far more likely to be an effective method of redistributing income than employment and labor law.[50] But at least it is possible to favor a transfer of resources from employers to employees -- perhaps on the ground that workers as such receive too little of the proceeds from work, perhaps with the thought that anything that distributes resources from employers to employees will tend to increase equality in the distribution of income. If these thoughts turn out to be wrong, we might be able to venture more targeted regulations that have the desired effect.

At first glance, there does seem to be a plausible argument, on grounds of redistribution, for switching entitlements from employers to employees, regardless of the extent of the endowment effect. Employee wealth would appear to be increased by a decision allocating entitlements to employees rather than employers. Suppose, for example, that employees are suddenly given a right to participate in all company decisions – a right that employers can buy for a fee.[51] At least for current employees, the new entitlement should have significant redistributive effects, because employers are likely to be required to, and to be willing to pay. a good deal to reclaim the right. If, then, the entitlement is quite valuable, the shift from employer to employee should, at first glance, have substantial redistributive consequences. The extent of the consequence depends on the value of the entitlement.

But in the contractual setting that typifies labor and employment law, things are far more complicated than that,[52] and far less promising for those who seek to promote redistribution through switching the entitlement. If employees are given an entitlement, whether alienable or inalienable, the rest of the contractual package might well be adjusted accordingly. A right to participate in company decisions, if not traded, will be met with some kind of market response – through, for example, higher prices, less employment, or lower wages. As a result of the enactment of workers' compensation and parental leave programs, for example, many workers lost almost as much in wages as they gained in the relevant rights.[53] In the context of protection against discrimination

[50] See, eg, A. Mitchell Polinsky, Introduction to Law and Economics (2d ed 199X).
[51] I owe the example to Eric Posner.
[52] An excellent, detailed treatment in the context of requirements of accommodation, see Christine Jolls, Accommodation Mandates, Stan L Rev (forthcoming).
[53] See Jonathan Gruber, The Incidence of Mandated Maternity Benefits, 84 Am. Econ. Rev. 622 (1994), and Price Fishback and Shawn Kantor, Did Workers Pay for the Passage of Workers' Compensation Laws, 110 Q J Econ. 713 (1995) (finding substantial wage offsets): "Analysis of the effect of the introduction of workers' compensation on wages shows that in the coal and lumber industries, workers experienced substantial wage offsets. In the coal

on the basis of disability, employers appeared to respond not by cutting wages but by decreasing hiring of disabled people.[54]

From the standpoint of redistribution, the question for labor and employment law is the incidence of the cost, faced only initially by employers, of the switched entitlement. There is a growing body of work, both theoretical and empirical, on the distributional consequence of mandatory terms,[55] and the issues are not altogether different for switched default rules. A grossly simplified overview: The central questions involve (a) the responsiveness of consumers to price increases, (b) the responsiveness of prospective and current workers to wage decreases, and (c) the cost, to employers, of reducing the number of workers. If the cheapest response to higher costs, for employers, is to raise prices, that is what they will do; if the cheapest response is to cut wages or decrease the number of employees, they will choose that route. In the employment context, no general prediction makes sense.[56] But there is a significant risk that any redistributive gain will be nullified, at least in part, through readjustment of the wage package. On plausible assumptions, workers will lose, in wages, some or much of what they gain as a result of the switched entitlement.[57]

This does not mean that a switch cannot be justified on distributive grounds. Workers' compensation programs, for example, seem to have produced distributive gains in the unionized sector, by giving workers a benefit that was not offset by wage cuts.[58] But there is no reason for great confidence, in the abstract, that there will be a significant distributive gain from the switch. If this is true for nonwaivable rights, it is true too for waivable rights, many of which will be waived, with no significant distributional shifts.

In the standard analysis of mandates directed to workers as a whole,[59] distributive gains and efficiency gains march hand-in-hand; without efficiency gains, there can be no efficiency gains. Because of the empirical considerations just discussed, I think that this claim is too simple: It is imaginable that workers will benefit, on balance, from an inefficient mandate. But even if this is right, the claim that a switch in

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industry the offsets were large enough to cover not only the expected monetary value the benefits, but also the employers' costs of purchasing the insurance to provide those benefits." Id. at 736.

[54] See Christine Jolls, Accommodation Mandates, Stan L Rev (forthcoming).

[55] See Lawrence Summers, Some Simple Economics of Mandated Benefits, 79 Am Econ Rev (Papers & Proceedings) 177 (1989); Jolls, supra note; note supra.

[56] See id.

[57] See the discussion of wage cuts in the nonunionized sector in Price Fishback and Shawn Kantor, A Prelude to the Welfare State 64-69 (1999).

[58] See id. (showing no wage offsets in unionized firms).

[59] See Summers, supra note.

entitlements will make for distributional improvements is quite fragile, with the exception of accommodation mandates, on which I am not focussing here.[60]

C. Welfare

Sensible conclusions, from what has been said thus far, are that (a) a switch of the entitlement will be neither good nor bad on efficiency grounds, and (b) the switch might possibly be justified on redistributive grounds, but this depends on a complex inquiry into the incidence of the burden represented by these greater costs. Is there any other way to resolve the problem?

In theory, at least, it is worthwhile to ask whether the aggregate welfare of employers and employees is improved with one or another default rule. I have noted that "efficiency," as understood through the criterion of willingness to pay (or willingness to accept) is at best a proxy for welfare, suitable for guiding policy only because it provides an administrable, though quite crude, way of inquiring into welfare consequences.[61] If the efficiency calculus proves unhelpful, perhaps we should avoid the middleman and go to welfare directly. If the difference between WTP and WTA has nothing to do with a difference in welfare, we have reason to think that a switch in the entitlement will matter neither to efficiency nor to welfare. If a new default rule would give the winners more than the losers lose, it will be justified on welfare grounds, endowment effect or no endowment effect. The most serious difficulty here is that the legal system lacks direct access to welfare consequences, and in this setting, the normal proxies are unreliable.[62]

1. <u>Savings</u>. To make the analysis tractable, begin with the relatively easy case of savings. If a default rule increases savings, and if the increase improves workers' welfare, the case for a pro-savings default rule seems extremely plausible. Suppose, for example, that workers lose little or nothing from the reduction in take-home pay but that they gain significantly from the increase in savings. If so, and if employers lose nothing, the switch seems easily defensible on welfare grounds.

What I am suggesting here is that with the suggested default rule, workers will be better off, because they will accumulate more in the way of savings, and because they will not much suffer, in terms of welfare, from the somewhat lower weekly take-home pay. Of course some workers will be somewhat worse off with a reduction in take-home pay, and for some, that welfare loss will not be overcome by the increase in

[60] See Jolls, supra note.
[61] See Mathew Adler and Eric Posner, Rethinking Cost-Benefit Analysis, 109 Yale L.J (1999).
[62] See id.

savings. And at some point, a transfer of money from salary to savings would certainly hurt most or all employees. But we are speaking here only of a default rule, allowing workers to opt out; and for the small salary reductions involved here, automatic enrollment plans, suggested by employers or mandated by law, seem substantial improvements.

2. Welfare, utility, and relative position. But many of the cases that I have discussed are far more complicated. If we had direct access to the welfare of employers and employers, we might be able to make choices on grounds of welfare. Of course the idea of "welfare" can be specified in many different ways.[63] To simplify matters, let us assume, without insisting the point, that "utility" is what is most important. Might one or another default rule increase utility? This is certainly possible. After a switch, aggregate utility might be increased, perhaps because employees gain more than employers lose. Suppose, for example, that employees' utility is far higher if they have a right to job security, or parental leave, or paid vacations; suppose too that the utility loss (because of costs faced initially by employers, with the accompanying incidence of those costs) is not very high. If this is so, the argument for the switch seems quite plausible.

In pointing to the importance of relative (as opposed to absolute) economic position, some people have made an argument of just this sort on behalf of mandatory terms in employment contracts.[64] The argument is that mandatory terms can improve workers' welfare if they give workers an important good (such as improved safety or increased leisure time) while diminishing absolute, but not relative, income. A shift of this kind would improve workers' income if the reduction in absolute income does not really reduce workers' welfare and if the new good leads, for all or most workers, to a welfare improvement.

If it is correct, this argument is based on reasonable claims about what really promotes workers' welfare. Some such claims might also be reasonable in the context of a switch in the default rule, especially, but not only, if relative economic position is what matters to workers. If relative position is what matters, the switch in the default rule might turn out to be a special case of the argument just given: Any income loss will not matter much, because relative position will be held constant, and relative position is what matters. If relative position is not what matters, it is nonetheless possible that

[63] See Martha Nussbaum, Women and Human Development: The Capabilities Approach (2000): Amartya Sen, Development As Freedom (1999).
[64] See Robert H. Frank, Choosing the Right Pond; see also Robert H. Frank and Cass R. Sunstein, Cost-Benefit Analysis and Relative Position, U Chi L Rev (forthcoming); Cass R. Sunstein, Human Behavior and the Law of Work, Va. L Rev (forthcoming).

employee welfare will be improved after the switch. The problem is that the legal system is likely to lack the tools to know whether this is so. One possible avenue for inquiry would involve objective indicators of welfare – suicide attempts, health, longevity[65] – but of course it will be most difficult, in this context, to control for confounding variables.

3. Sources of the endowment effect. Another possibility would be to inquire into the basis for the endowment effect in the particular case. If we know why the endowment effect exists, we might be able to make some progress in deciding on the default rule. In asking about whether to use "willingness to pay" or instead "willingness to accept," some progress has been made on this question.[66] Suppose, for example, that willingness to pay is lower than willingness to accept because of wealth effects: Willingness to pay is constrained by existing holdings, as willingness to accept is not. If this is so, we might choose willingness to accept, on the ground that it is a more accurate measure of the value of the good in question.[67] But there is a serious problem with this argument: The difference between WTP and WTA might have nothing to do with a general wealth effect, as demonstrated by the fact that it has been observed in many contexts lacking significant wealth effects.[68] When workers demand more for an entitlement than they would be willing to pay for it, the reason need not be the wealth effects of the default rule.

What, then, accounts for the endowment effect? The question has no obvious answer.[69] It might be that the effect is "hard-wired"; it might be a fact of human psychology that more is demanded to relinquish ownership of X than to obtain X in the first instance.[70] Or perhaps the endowment effect has to do, not with the higher actual value of things owned, but with the some asymmetry in anticipated after-the-fact regret. People might fear that they would regret a change from the existing rule, and this bias in anticipated regret might play a role in creating the endowment effect. Perhaps people, and workers in particular, believe that the initial allocation of the entitlement carries a certain moral weight, or presumptive validity, so much so as to drive a wedge between WTP and WTA. In some circumstances, selling a good might be appear illegitimate, an insult to dignity.[71] Or perhaps some people simply ignore, much of the time, the existence of opportunity costs.[72] For goods that are not simply money

[65] See Robert H. Frank, Luxury Fever (1998).
[66] As suggested in Comment, Policymaking and the Offer/Asking Price Gap, 46 Stan L Rev 663 (1994).
[67] See Herbert Hovenkamp, Legal Policy and the Endowment Effect, 20 J Legal Stud 225 (1991).
[68] See note, supra, at 680.
[69] See id. at 689-97.
[70] Cf. Richard A. Posner, Rational Choice, Behavioral Economics, and the Law, 50 Stan L Rev 1551 (1999).
[71] Id.
[72] See Thaler, supra note.

tokens, people appear to think that continued ownership is costless, or that the cost of not selling is far less than it is in effect. This might well be simple confusion. If there is the source of the endowment effect, we should not use WTA, and there is no good reason to switch the default rule.

Perhaps a better understanding of the source of the endowment effect could help us to know whether the default rule should be switched on welfare grounds. One thing that we would like to know is whether the difference between WTP and WTA, in the context of labor law, reflects real welfare or utility differences between different states of affairs, or is instead an artifact of the bargaining situation and confusion about opportunity costs. I suspect that in many contexts, bargaining considerations, alongside that confusion, are responsible; the mugs and chocolates experiments seem to support that conclusion. If this is so, WTP is better than WTA, because the higher amount represented by WTA does not really mean that people's utility will be higher as a result of having the initial allocation. And if this is so, the existence of an effect, from the initial entitlement, does not argue for shifting the entitlement to workers.

D. Preferences and Value Formation

More controversially, we might think that people's lives will simply be <u>better</u> if the endowment effect pushes valuation in one direction rather than another. To make the point vividly, suppose that a legal system is considering whether to give employees a presumptive right to be free from sexual harassment, or instead to say that employers can engage in sexual harassment unless employees can buy a right to be free from it. It is easy to imagine that if employees are given that presumptive right, they will be most reluctant to give it up. They would demand a high premium for the right not to be subject to (some probability of) sexual harassment; they might even refuse the trade that right even for a large fee. The clear implication is that workers will value the right to be free from sexual harassment more highly if they have an initial right to that freedom. If it is believed that the higher valuation of that right is better, then a right, in employees, might well be best. It is even possible to think, on this ground, that the right should be inalienable.[73] But short of accepting this conclusion, a shift of the right from employer to employee might well be best.

It is possible to object that an inquiry of this kind is unacceptably partisan – that it takes a stand on appropriate preferences and values. But this is a weak objection.[74] If

[73] See Sunstein, supra note.

[74] It should be recalled here that as a historical matter, enthusiasm for markets was itself a product, not of neutrality about preferences, but instead of a desire to produce preferences of a certain sort, but encouraging independence,

the endowment effect is at work, there is no avoiding a legal effect on workers' preferences. Whatever the content of the legal rule, preferences will be affected (if there is an endowment effect). A preference-shaping effect, from the default rule, is inevitable. If this is so, a sensible question is how labor and employment law might create a preferable system of values. To be sure, it is not easy to answer that question, not least because it raises normative issues on which reasonable people will differ. But let me begin with some controversial suggestions: It would be highly desirable if workers placed a very high premium on ensuring that workplaces are safe; in spending time with young children, with relatives who are sick, and with their families; and in making decent provision for retirement. To the extent that default rules will increase workers' interests in these goods, a switch in the default rule, by employers or by law, would be a good idea.

Conclusion

In this Essay I have explored the possibility of producing labor law reform through a simple step: Switch the default rule. More particularly, labor law reform might promote a situation in which workers, rather than employers, have more presumptive rights, to be tradeable only through voluntary bargaining.

Echoing the emerging orthodoxy in behavioral law and economics, I have argued that the default rule might well matter. If the legal rule has an endowment effect, it is potentially important to ultimate outcomes, even in the absence of transactions costs. The principal qualification here is that in some domains, workers and employers might order their affairs with little or no reference to legal rules. To the extent that this is so, a switch in the default rule should not matter; but usually this will not be so. I have also urged that a switch in the default rule, to an initial allocation in favor of employees, might have the fortunate result of ensuring that important information is disclosed to employees – a corrective to what seems to be a "fairness heuristic" by which people identify likely legal rules. By itself this is an argument in favor of the switch.

I have also urged that considerations of efficiency and distribution are unlikely to argue strongly in favor of maintaining or switching the default rule. If transactions costs are zero, the outcome will be efficient, no matter the initial allocation. If the endowment effect is at work, the outcome will not be the same; but it will be efficient. At first glance, the efficiency criterion therefore seems indeterminate. As a distributional matter, a grant of entitlements to employees might make employees somewhat wealthier. But

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entrepreneurship, and indifference to certain ascriptive characteristics. See Albert Hirschmann, The Passions and the Interests (19d).

market readjusments will ultimately force someone – perhaps workers, perhaps consumers -- to bear the resulting cost, and it is quite possible that the adjustment will swallow the redistributive effect, perhaps through changes in the rest of the wage package. Significant distributive changes should not be expected from switching default rules in labor and employment law.

We have also seen the possibility that the endowment effect reflects no real difference in terms of welfare under different default rules, but something about the different bargaining situations in which owners and buyers find themselves. Nonetheless, I have suggested several grounds on which a switch in the default rule might be justified. Sometimes such a switch will produce relatively clear improvements in terms of workers' welfare. If, for example, the consequence of the switch is to increase savings without produce any real harm, the new default rule seems to produce an unambiguous improvement. More controversially, I have suggested that a switch might be justified because of its desirable effects on individual and social valuations of the rights at stake. This is a more controversial basis for a choice of default rule. But in some cases, at least, it seems the only basis on which the choice might be made.

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