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Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination

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MAINSTREAMING EMPLOYMENT CONTRACT LAW: THE COMMON LAW CASE FOR REASONABLE NOTICE OF TERMINATION

*Rachel Arnow-Richman**

This Article simultaneously exposes a fundamental error in employment termination doctrine and a paradox in contract law jurisprudence. Contemporary employment law has developed under the assumption that at-will parties may terminate their relationship both without reason and without notice. This Article argues that the second half of this formulation—the idea that parties reserve the procedural right to terminate without notice—is neither historically supported nor legally correct. Employment at will, as originally expressed, was a mere duration presumption reflecting America’s rejection of the predominant British rule favoring one-year employment terms. While subsequent case law expanded the presumption in various ways, a reinterpretation that requires advance notice of termination remains compatible with the way in which most contemporary courts articulate the rule.

In fact, an examination of general contract law reveals that in a variety of nonemployment contexts, courts impose on parties to an indefinite relationship the duty to provide reasonable notice while still safeguarding their right to terminate at will. Such an obligation serves not only as a gap filler in the face of contractual silence, but also as a good faith limitation on parties’ exercise of substantive discretion. Absent such a notice requirement, employment is an illusory relationship, one that lacks the modicum of consideration necessary to create a binding contract. While courts have sought to circumvent this problem by theorizing employment as a unilateral contract, that formulation is ill-suited to the reality that both sides generally anticipate an ongoing, dynamic relationship.

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This Article recasts employment as a bilateral contract terminable at will by either party upon reasonable notice. Establishing a reasonable notice obligation will grant terminated workers paid transition time to seek new employment and develop new skills. At the same time, adopting this rule paves the way for a more unified body of contract law. The case for deviations from general contract principles is strongest where context-specific rules fulfill the reasonable expectations of the weaker party. Employment-specific contract rules, as they currently stand, do precisely the opposite. While ordinary contract law cannot adequately protect workers' interests in all circumstances, this Article demonstrates that in at least some instances mainstream doctrine, properly understood and applied, can produce results that are both good for workers and in harmony with existing law.

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INTRODUCTION

Employment contract law is an outlier. And not in the way one might expect. Because workers are generally in positions of dependence, one would anticipate that the law of employment contracts would eschew strict application of contract principles in favor of giving force to workers’ reasonable expectations. Certainly, some of the highly publicized decisions of 1980s employment contract jurisprudence, viewed in isolation, can be characterized as manipulating the formalities of contract formation in favor of finding liability on the part of the employer.¹ However, an overall examination of employment contract

1. See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985) (assigning contractual significance to employer personnel manual); *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Cal. Ct. App. 1981) (concluding that a contractually enforceable promise of long-term security may be derived from the totality of the circumstances surrounding

law reveals a very different landscape. Generally, judicial assumptions about how contract principles apply to employment relationships are at odds with contemporary, realist-inspired contract doctrine.² The upshot is that contemporary courts counterintuitively apply contract rules in ways that leave workers worse off than commercial entities that deal with financial equals.

This Article focuses on one example of this counterintuitive distinction between the law of contracts and the law of employment contracts—the absence of an affirmative obligation to provide notice of termination under employment law. Under the Uniform Commercial Code (UCC) and common law contracts cases outside of the employment context, parties to an at-will relationship must provide advance notice prior to exercising their right to terminate.³ In contrast, employment relationships of indefinite duration are generally assumed to be both terminable without reason and terminable without notice.

This Article aims to change that. It argues that the dominant assumption that employment at will permits employers to terminate workers without notice is neither historically accurate nor doctrinally justified.⁴ Employment at will, as originally adopted, was a mere

the parties' relationship). See generally Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 345 (1986) (observing that “some courts have found [enforceable employment] agreements under circumstances that would probably garner a first-year Contracts student an F for saying that a contract was formed at all”).

2. Particularly in recent years, there has been a move toward more formalistic approaches to contract enforcement, most notably with respect to judicial deference to employer-drafted disclaimer language. Contemporary courts are generally willing to credit boilerplate language reciting that employment is at will and disclaiming contractual liability for arbitrary termination, even in the face of competing evidence of contractual commitment. See, e.g., *Grossman v. Computer Curriculum Corp.*, 131 F. Supp. 2d 299, 305–06 (D. Conn. 2000); *Finch v. Farmers Co-op Oil Co. of Sheridan*, 109 P.3d 537, 541–42 (Wyo. 2005); *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1094–95 (Cal. 2000); *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 271 (Mich. 1991). See generally Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 469 (2009) (describing courts' willingness to rubberstamp employer-drafted disclaimers in personnel manuals); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 351–52 (2008) (discussing the limitations of the implied contract theory in light of employers' ability to insist on their preferred express terms).

3. See U.C.C. § 2-309(3) (2012) (“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party”); *infra* Section III.A.

4. The doctrinal theories proposed in this Article would necessarily give rise to a reciprocal obligation to provide reasonable notice of termination—both terminating employers and departing employees would be required to provide advance notice. However, the amount of notice required would vary depending on the factual circumstances. See *infra* Section V.A. It is therefore likely that the notice obligations of employees who voluntarily quit would be minimal compared to those of terminating employers. This Article also assumes that a common law right to advance notice of termination will be more valuable to and more frequently invoked by

duration presumption supplied in the absence of an express term regarding the length of the engagement.⁵ Nothing in the original articulation of the rule or its subsequent adoption or expansion by courts compels the conclusion that employers may terminate without advance warning. In fact, general contract law, viewed outside the lens of employment at will, suggests precisely the opposite. Reasonable notice is at a minimum the doctrinally appropriate default term for the termination of indefinite contractual relationships. It is also an integral component of the duty of good faith and an implied term necessary for the recognition of an enforceable contract.⁶ Such theories suggest that reasonable notice is not just the proper default for at-will employment relationships, but rather a rule of indefinite contracts from which parties have only limited ability to deviate.⁷

In this way, the argument presented in this Article is prescriptive but non-normative. There are numerous reasons why the law *ought* to require employers to provide advance notice of termination.⁸ Advance notice can be seen as a matter of fundamental fairness. Most workers rely on their employers as their sole source of income, and a sudden disruption in that flow of income takes an enormous personal and financial toll. Providing advance notice of termination gives the worker a paid window in which to seek alternate work and potentially avoid (or at least mitigate) the period of time she or he is without income.⁹ A notice requirement may also be socially beneficial. Employees who

employees than employers. Employers are generally well equipped to withstand the loss of a single employee and are therefore unlikely to be able to show more than minimal damage in routine cases. They are also likely to be deterred from pursuing claims by the practical impediments to recovering from an individual defendant. For these reasons, this Article focuses principally on advance notice given by employers to involuntarily terminated employees, recognizing however that, in certain cases involving the defection of highly valuable employees, the theories advanced here would be available to the employer in pursuing rights against former employees.

5. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (John D. Parsons, Jr. ed., 1877).

6. See *infra* Sections III.B–C.

7. The degree to which the parties may alter the proposed reasonable notice rule, I will contend, depends on the doctrinal foundation for its adoption. If reasonable notice is treated as a contract “gap filler,” it is vulnerable to employer efforts to contract back into a “no notice” regime. See *infra* Section III.A. However, there are additional contractual bases for implying a reasonable notice rule into at-will employment relationships under which parties’ abilities to avoid that obligation through drafting would be limited. See *infra* Sections III.B–C.

8. The arguments that follow are summarized from my prior work on this subject. See Rachel Arnow-Richman, *From Just Cause to Just Notice in Reforming Employment Termination Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW *passim* (Cynthia L. Estlund & Michael L. Wachter eds., 2012) [hereinafter Arnow-Richman, *From Just Cause*]; Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1 *passim* (2010) [hereinafter Arnow-Richman, *Just Notice*].

9. See Arnow-Richman, *Just Notice*, *supra* note 8, at 37.

receive notice are less likely to require unemployment insurance or other government benefits.¹⁰ Finally, notice may effectuate parties' implicit understanding of the terms of their relationship. While the days of lifetime employment with a single company have past, employers still make implicit promises to their workers, including the promise that they will receive skills and training that will keep them marketable.¹¹ A notice rule translates that promise into a legal obligation, requiring employers to underwrite the costs of its workers' transition, positioning them to better take advantage of their skills in the inevitable situation of job loss.¹²

Arguments such as these have given rise to existing legislative inroads into employment at will, such as plant closing laws that require advance notice in the case of mass terminations.¹³ They have also been invoked in calls to replace employment at will with a "just cause" rule,¹⁴ and could support a general statute requiring notice.¹⁵ I have explored these arguments, and their limitations,¹⁶ at length elsewhere. My aim here is narrower and more pragmatic. My argument is not that a notice requirement is normatively grounded, but rather that it can be doctrinally supported, and indeed, may be doctrinally compelled. In this way, this Article lays a foundation for litigation seeking judicial recognition of a right to reasonable notice of at-will termination.

At a more abstract level, however, this Article makes a claim about the viability of contract-based solutions to issues of worker protection

10. See Arnow-Richman, *From Just Cause*, *supra* note 8, at 321.

11. See Arnow-Richman, *Just Notice*, *supra* note 8, at 32–33.

12. See *id.* at 39.

13. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–09 (2006), requires large employers to provide sixty days' advance notice to workers who will be affected by a plant closing or mass layoff affecting a large portion of the workforce. See *id.* §§ 2101(a)(2)–(3), 2102.

14. See, e.g., Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404–05 (1967) (emphasizing employee vulnerability in calling for just cause reform); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 65–66 (1988) (offering the view that replacing employment at will with a just cause rule "is a matter of simple justice" and that there is "little or nothing to be said in favor of an employer's right to treat its employees arbitrarily or unfairly"); Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 77–78 (2000) (arguing that the employment at-will rule results in the subordination of workers).

15. See Arnow-Richman, *Just Notice*, *supra* note 8, at 35–37.

16. For instance, an important countervailing policy consideration in contemplating adoption of a notice of termination rule is the extent to which it will impose additional costs on employers that may ultimately translate into fewer jobs, lower wages, or both. I explore these possibilities in *From Just Cause*, *supra* note 8, at 319–22, concluding that the costs of a notice requirement will be less than the amount of wages paid by employers during the notice period and that employers are unlikely to be able to fully pass such costs on to workers in the form of lower wages.

and the relationship between contract and employment law generally. It has been observed that employment is anticontractual both in its application of employment at will and its treatment of other contract rules.¹⁷ Yet to date, no scholar has delineated a competing vision of employment at will that better aligns with contract doctrine while enhancing common law protection for workers. This Article fills that gap. It argues that employment contracts should be “mainstreamed,” that is, analyzed consistent with contract principles of general applicability. Basic contract interpretation principles offer a doctrinal foundation for requiring employers to provide notice of termination, much as the law does for other contracting parties.¹⁸ In so doing, this Article claims neither that contract law should be exceptionally generous toward workers nor that contract law can adequately protect workers’ interests in all cases. Rather it argues that contract doctrine, properly understood and applied, can produce better results for workers, while bringing the law of employment more in line with the law of contracts.

This Article proceeds as follows. Part I revisits the history of employment at will, focusing on issues of notice rather than cause. It argues that whatever the origin or the accuracy of the American rule permitting employers to terminate without reason, the at-will rule never clearly embraced the idea that employment may be terminated without notice. Part II surveys the contemporary law regarding notice of at-will

17. See, e.g., Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 125 (1976) [hereinafter Feinman, *Employment At Will*] (describing the employment at will rule as a “departure” from “pure [contract] doctrine” and noting that “[i]f the law on duration of service contracts had followed the teachings of pure contract theory, the agreement established by the parties would have been enforced [and all evidence of party intent would have been considered]. . . . But the contract approach was never implemented because of the rise of employment at will”); W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 12 (2003) (arguing that courts’ treatment of the enforceability of employer modifications of binding personnel manuals reflects a “misunderstanding [of] existing contract law” that defeats employees’ reasonable expectations, and creates bad public policy without enhancing employers’ ability to alter their contracts); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1098–99 (1984) [hereinafter Summers, *Contract of Employment*] (describing the concept that “additional consideration” is required to overcome the presumption of employment at will as a “spurious contractual doctrine” and arguing that “[a]ny first semester law student knows . . . one performance can be consideration to support two or even twenty promises” and that “[t]he work performed could be consideration for both the wages paid and the promise of future employment”).

18. Since Section III.C presents, among the various legal foundations supporting a reasonable notice term, one that would treat notice as the requisite consideration for an enforceable indefinite contract, I will refer to reasonable notice in mandatory language—as a requirement, obligation, or duty—recognizing the possibility that a court might choose to adopt reasonable notice as a mere presumption or default term. See *infra* Section III.A.

termination. Contrary to what scholars assume, there is only minimal case law authority for the proposition that employers may terminate at-will employees without notice, and there is precedent in a handful of jurisdictions to support the conclusion that parties to at-will employment contracts are in fact obligated to provide reasonable notice of termination. Part III lays the contract law foundation for reinterpreting employment at will to include a reasonable notice obligation. It argues that various principles of contract interpretation—the use of judicially or legislatively supplied “gap fillers,” the notion of a robust implied duty of good faith and fair dealing, and the willingness of courts to imply consideration to create enforceable obligations—support an understanding of employment at will that embraces an obligation to provide advance notice of termination. Part IV shows how employment law has inexplicably deviated from this basic understanding of contract law and demonstrates how employment contract law can be “mainstreamed” without sacrificing the substantive discretion afforded to employers under employment at will. Part V explores some of the limitations of the proposed reinterpretation of the common law, including the likelihood that employers will attempt to reimpose a “no notice” regime through standard form contracts. It suggests that this risk, coupled with other practical limitations of a reasonable notice rule, may be best resolved through clarifying legislation.

I. A REVISED HISTORY OF EMPLOYMENT AT WILL

Scholars have long debated the origin and accuracy of the employment at-will rule.¹⁹ Most agree that courts’ wide-scale adoption of the doctrine in the late nineteenth and twentieth centuries owes at least in part to treatise writer Horace Wood, who in 1877 famously penned the “inflexible” proposition that in the United States, “a general or indefinite hiring is *prima facie* a hiring at will.”²⁰ Several scholars have called into question the accuracy of Wood’s statement as a reflection of then-prevailing law.²¹ This critique, however, has done little to advance broader claims about the desirability of changing the at-will rule. Since almost every jurisdiction has judicially embraced

19. See generally Daniel P. O’Gorman, *The Statute of Frauds and Oral Promises of Job Security: The Tenuous Distinction Between Performance and Excusable Nonperformance*, 40 SETON HALL L. REV. 1023, 1044–45 (2010) (summarizing the literature).

20. See WOOD, *supra* note 5, § 134, at 272.

21. See, e.g., Feinman, *Employment At Will*, *supra* note 17, at 126–27; Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 735–37 (1991) [hereinafter Feinman, *Revisited*]; Summers, *Contract of Employment*, *supra* note 17, at 1083; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974); see also Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 970 (1985) (“Commentators now agree that Wood invented his own rule.”).

Wood's statement of the law, it is now firmly ensconced, and inquiries into the origin of the rule provide little insight.²² In addition, the historical critique of Wood's rule comprised part of a larger movement in legal scholarship supporting the adoption of a "just cause" rule in place of the prevailing rule permitting employers to terminate for any or no reason.²³ Unsurprisingly, this movement gained little traction outside academic circles because it targeted the part of the at-will doctrine that courts most clearly embraced and employers most revered.²⁴

What has escaped wide notice is that there is a far more vulnerable component of the employment at-will rule, one that has even less historical foundation and judicial support—the idea that employers may terminate without notice. A reexamination of Wood's rule and the precedents at the time reveal minimal support for the idea that the right to terminate at will (that is, at any time for any reason) was coextensive with a right to terminate *without prior notice*. Thus, the employment at-will rule is, as some scholars suggest, vulnerable from a historical and doctrinal perspective, albeit in a different way and for a different reason.

This Part places Wood's articulation of the employment at-will rule in the context of the historical law regarding notice of termination. It demonstrates that Wood's rule and the precedents he cited primarily served to reject the English "one-year presumption." Wood did not articulate a "no notice" rule, nor did the then-prevailing law clearly embrace such a principal. Thus, the rule on notice of termination—a question distinct from that of contract duration—remained unresolved

22. By the early twentieth century, most states in the union had explicitly adopted employment at will. See Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 708 (2006); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 717–20 (1994). See Montana later adopted a statutory just cause rule superseding the common law at-will doctrine. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -15 (West 2013). Most scholars agree about the current state of the law, irrespective of their views on its origin. 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, 460 (2008); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 461–62 (1979). See generally Summers, *supra* note 14, at 67–68 (conceding that employment at will is "embedded in American law").

23. For examples of scholarship in this vein, see generally, Blades, *supra* note 14, at 1404–05, 1410; Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4 (1979); St. Antoine, *supra* note 14, at 65–66; Summers, *supra* note 14, at 77–78.

24. It also encountered serious backlash within some academic circles, notably by those legal scholars working in the law and economics tradition. See, e.g., Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 948–51 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1901–02 (1996); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 841–42.

subsequent to Wood's treatise and judicial adoption of his rule.

A. Notice to Terminate in Wood's Rule

Critiques of Wood's rule generally take issue with the authority he cites in his treatise and the degree to which it supports the existence of an at-will rule.²⁵ Whether Wood was "right" about these precedents depends largely on what one thinks he was trying to prove. Although it is generally thought of and treated as a single rule, employment at will is a multipart doctrine from which three distinct principles can be derived: (1) a presumption that employment is of indefinite duration, what this Article refers to as the "indefinite duration" rule; (2) a presumption that employers may terminate for any or no reason, what this section refers to as the "substantive discretion" rule; and (3) a presumption that employers may terminate without notice or warning, what this Article refers to as the "procedural discretion" rule.²⁶

Historically the notion of employment at will existed only in the first sense of the term, that is, it supplied a mechanism for determining the duration of a contract in the absence of an express term.²⁷ In the early nineteenth century, the law of England followed the "one-year presumption" under which employment of indefinite duration was presumed to endure for one year.²⁸ The reason for the presumption is

25. See Feinman, *Employment At Will*, *supra* note 17, at 126; Feinman, *Revisited*, *supra* note 21, at 737–39; Summers, *Contract of Employment*, *supra* note 17, at 1083; Shapiro & Tune, *supra* note 21, at 341. *But see* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (countering that "Wood relied on four American cases for his black letter rule, and notwithstanding the persistent assertions to the contrary, these cases do indeed support the principle for which Wood cited them").

26. Although courts often describe employment at will as a "presumption," I refer to the doctrine and its three components as "rules," as do other scholars, recognizing that in light of how courts have interpreted and applied the doctrine, it is extraordinarily difficult for employees to demonstrate that employment is other than at will. *See, e.g.*, Matthew Finkin, et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 110 (2009) ("[Employment] at-will is either a rebuttable presumption that is almost irrebuttable or a default rule that tends toward an immutable rule"); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 677 (1996) (noting that "the presumption of at-will employment was applied [by early twentieth century courts] with such vigor that it was virtually impossible to overcome"); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1097 (1984) (asserting that "courts transformed Wood's presumption into a virtual rule of law . . . made nearly irrebuttable by [their requirement] that the parties expressly agree to a definite term").

27. WOOD, *supra* note 5, § 134, at 272

28. Feinman, *Employment At Will*, *supra* note 17, at 119–20; Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 95 (1982).

often attributed to a desire to support the mutual interests of employers and employees in an agrarian economy. By holding both sides to a one-year contract, the worker was ensured a continuous stream of income during the idle winter months, while the employer could rely on a supply of available labor during peak planting and harvesting seasons.²⁹

Although the presumption was never limited to agricultural workers, the advent of an industrialized economy put pressure on the doctrine both in the United Kingdom, where it originated, and in the United States, where courts frequently relied on British law, such that in time courts abandoned it.³⁰ In the United Kingdom, courts moved toward the use of notice periods, under which parties could terminate at any time with sufficient advance warning.³¹ The same practice developed in Canada, which also took its cues from British law.³² By contrast, in the United States courts moved toward the presumption that employment was terminable at will, that is, terminable at any time absent proof of a defined period of engagement.³³ The American trend toward at-will employment neither took a position on the use of notice periods nor precluded a reading that would require notice.

The precedents relied on by Wood reflect the move away from the one-year presumption toward an indefinite duration rule, and to that extent his defenders are correct that his cases support his assertion.³⁴ However, Wood's rule and the precedents he cites are either silent or ambiguous on the other aspects of employment at will. They provide no clear support for the idea that employment can be terminated without

29. See Feinman, *Employment At Will*, *supra* note 17, at 120 (“The [one-year presumption] expressed a sound principle: injustice would result if . . . [the employer] could avoid supporting [employees] during the unproductive winter, or if [employees] . . . could leave their [employer] when their labor was most needed.”); Jacoby, *supra* note 28, at 90 (citing Blackstone’s attribution of the presumption to “a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not”); Brian Etherington, *The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario*, 35 MCGILL L.J. 459, 471 (1990) (“The [one-year] presumption meant that a master who had employed a servant through the growing or production season had to maintain him for the rest of the year . . .”). This is not to suggest that benevolence was the principal motivation for the presumption. Concerns about the cost of poverty relief and the economic threat of labor disruptions were arguably more significant factors. See *id.*; Jacoby, *supra* note 28, at 90.

30. Jacoby, *supra* note 28, at 97–98, 101, 106.

31. See *id.* at 100–01.

32. See Etherington, *supra* note 29, at 471.

33. See Feinman, *Employment At Will*, *supra* note 17, at 125–26. Over time, courts also made it increasingly difficult for litigants to overcome that presumption by limiting the type of evidence that could be presented to support the existence of a different contractual understanding. See Feinman, *Revisited*, *supra* note 21, at 736–39.

34. Freed & Polsby, *supra* note 25, at 554.

reason, the substantive discretion rule.³⁵ In addition, and more importantly for present purposes, they fail to support a procedural discretion rule, one that sanctions termination at any time *and* without any notice. Indeed, to the extent Wood's cases say anything about notice, they tend to support the view that notice of at-will termination must be provided.

Wood's cases are a motley bunch. Only two of the four—*Tatterson v. Suffolk Manufacturing Co.*³⁶ and *Franklin Mining v. Harris*³⁷—are truly employment cases. These are probably more fairly characterized as “jury question” cases rather than at-will cases—both affirm verdicts *in favor* of terminated employees who argued successfully that their employment was to endure for at least one year.³⁸ To the extent the cases reject any *presumption* of a one-year term or a term corresponding to the employee's pay period, they implicitly support the conclusion that a contract is presumed to be terminable at will unless the totality of facts demonstrates otherwise.

Neither case, however, addresses the question whether notice of at-will termination is required.³⁹ In fact, in *Tatterson*, the court implicitly treated notice as a condition on the employer's ability to terminate.⁴⁰ In that case the employee was fired three months after his employer advised him that the business would be closing and that he should find other work.⁴¹ The defendants requested a jury instruction that the “plaintiff was not entitled to more than three months' notice [and t]hat, if the jury were satisfied that the plaintiff was noti[f]ied . . . that the mills would stop in October and all the employees be discharged . . . then the plaintiff was not entitled to recover.”⁴² The court found for the plaintiff-employee, presumably accepting his position that the contract was for a full year. Thus, while the case is at least consistent with an indefinite duration rule—the onus is on the employee to prove a one-year entitlement—it does not support any

35. In some of the cases, the employer had a good reason to terminate, in others the reasons are opaque, but in no case does the employee allege or the facts suggest that the employer had a poor or arbitrary reason for its decision.

36. 106 Mass. 56 (1870).

37. 24 Mich. 115 (1871).

38. *See id.* at 116–17; *Tatterson*, 106 Mass. at 59.

39. In *Tatterson*, the court refused to consider a separate notice issue posed by the defendant—whether it had the right to prematurely terminate the employee, even if he was subject to a year-to-year agreement, upon the provision of proper notice—because this defense was not raised below. *Tatterson*, 106 Mass. at 59.

40. *See id.*

41. *Id.* at 57.

42. *Id.*

other aspect of employment at will.⁴³ If anything, the case suggests that an employer's right to terminate, irrespective of the contract's term, is subject to an obligation to provide advance notice.

The other two cases do not lend themselves to easy characterization. One is tangentially about employment, while one is about military contracts; neither addresses the employer's right to terminate without reason or without notice. In *De Briar v. Minturn*, the plaintiff received a monthly salary and a room at the employer's inn.⁴⁴ Upon dismissal, the innkeeper notified the plaintiff that he should vacate his room by the end of the month, which he refused to do.⁴⁵ The parties did not question the innkeeper's right to terminate, and to that extent, the case could be said to support employment at will.⁴⁶ The issue before the court was whether the innkeeper could evict the plaintiff by force when he failed to vacate.⁴⁷ As in *Tatterson*, the court did not address the question of prior notice, either with respect to termination of the employment or the tenancy. However, it is clear that the employer did provide advance notice, at least with respect to the latter.⁴⁸

The final case, *United States v. Wilder*,⁴⁹ could be said to cut in the other direction. The dispute involved an 1861 government contract for the periodic conveyance of supplies between a military storehouse and Fort Abercrombie in the Dakota Territory.⁵⁰ Several years into the contract, upon being requested by the quartermaster to make an exigent delivery, the plaintiff insisted that the military increase its price due to increased "Indian hostilities."⁵¹ The quartermaster orally agreed, but the government subsequently refused to pay more than the original price.⁵² The court found for the plaintiff and awarded the balance owed.⁵³

Wood and his defenders take from *Wilder* that contracts can be terminated at will, and by the same token one could conclude from the case that such at-will terminations can occur without notice.⁵⁴ Yet

43. To the extent there was any discussion of the reason for termination, it was undisputed that the termination owed to the cessation of the defendant's business. *See id.* at 57, 60.

44. 1 Cal. 450, 451 (1851).

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.* It is not clear from the facts whether advance notice of termination was provided. It is also unclear how much advance notice of the eviction was provided, though it was less than one month.

49. 5 Ct. Cl. 462 (1869), *rev'd*, 80 U.S. (1 Wall.) 254 (1871).

50. *Id.* at 466–67.

51. *Id.* at 467.

52. *Id.*

53. *Id.* at 468.

54. I set aside the obvious question whether a case involving a military contract has any bearing, even by analogy, on the law of employment termination, an issue disputed by other scholars. *See Freed & Polsby, supra* note 25, at 555. One should note that besides the obvious

nothing in the court's opinion, which contains no legal analysis, compels that conclusion.⁵⁵ A better reading of *Wilder* is that the contract did not terminate at all, but rather was modified in light of a force majeure.⁵⁶ Where extreme changes in outside circumstances not predictable to the parties fundamentally change the cost of performance, modern courts generally hold that a fair and equitable modification agreed to by the parties is enforceable notwithstanding the parties' prior commitment.⁵⁷ Under this view of the case, even if the original contract in *Wilder* was still in effect at the time of the price increase, it was not terminated at will by the plaintiff, but rather was equitably modified by both parties in light of the prevailing circumstances.

The upshot is that, whatever one's view of Wood's rule and its provenance, Wood's articulation of the American employment at-will doctrine did not embrace any particular rule regarding notice of termination, nor did the cases on which he relied. In one of Wood's precedents, there is no mention of notice whatsoever.⁵⁸ In two, the facts indicate that the terminating party provided advance notice to the plaintiff, although notice was not an issue in dispute.⁵⁹ In the fourth case, and the one most factually distinguishable from the employment

substantive differences between the two contexts, the contract in *Wilder* was for multiple individual deliveries rather than a continuous performance like employment. *See Wilder*, 5 Ct. Cl. at 467.

55. The issue, as framed by the parties, was whether the original contract was still in effect when the new price was negotiated. *See Wilder*, 5 Ct. Cl. at 468. The defendant argued that the transporter had failed to provide "reasonable notice" of termination, while the plaintiff argued that the agreement terminated after one year pursuant to statutory law concerning military contracts. *See id.* at 463–65. The result in favor of the plaintiff could as easily have been based on the conclusion that the original contract had expired by statute as on the principle that indefinite contracts can be terminated at will. A third possibility is that the court concluded reasonable notice was given to the extent that the transporter notified the quartermaster of its new price requirements before agreeing to the new transport.

56. The "Indian hostilities" referred to in the opinion were a series of battles between the notorious Colonel Sibley and his army against a coalition of Native American tribes during and in the aftermath of the Dakota War of 1862. *See* Paul Finkelman, "I Could Not Afford to Hang Men for Votes." *Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405, 417 (2013). Fort Abercrombie, the military's transport destination under the *Wilder* contract, was the stronghold supplying Sibley's forces.

57. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) ("A promise modifying a duty under a contract not fully performed on either side is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . ."). In other words, such a modification does not run afoul of the preexisting legal duty rule that requires "new" consideration to support the modification of an executory contract. *See id.* § 73 ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .").

58. *See* *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871).

59. *See* *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 59 (1870); *De Briar v. Minturn*, 1 Cal. 450, 451 (1851).

context, the losing party unsuccessfully argued that it was entitled to reasonable notice of contract termination.⁶⁰ However, a fair reading of the case suggests that the contract had not terminated at all but rather had been voluntarily modified by the parties. In short, there is nothing in Wood's rule or in the cases he cites that suggests that employers may terminate at-will employees without advance notice.

B. *Notice to Terminate in Wood's Time*

Following the publication of his treatise, Wood's rule became the key source supporting the idea that an employment relationship has no fixed duration and, ultimately, that parties enjoy complete substantive discretion to terminate employment "at will."⁶¹ However, no comparable rule evolved regarding notice. Rather, the law, both at the time of and subsequent to Wood's rule, was unsettled.

The slim body of reported case law from the turn of the twentieth century reveals at least three different approaches to notice of at-will termination. A handful of decisions hold or suggest that termination of an indefinite engagement could be effected without notice.⁶² For instance, in *Coffin v. Landis*, the Supreme Court of Pennsylvania permitted the immediate termination of an exclusive agency contract between a landowner and his hired sales agent.⁶³ The defendant terminated the agreement several months after it was executed and before the plaintiff was able to earn any commissions.⁶⁴ In the subsequent suit, the court explicitly rejected the plaintiff's invitation to apply the one-year presumption of English law.⁶⁵ It instead held that the agreement was terminable at the parties' pleasure and that "no notice was necessary."⁶⁶

Meanwhile, another group of cases from the same period hold the opposite. In *Harper v. Hassard*, decided less than ten years after *Coffin*,

60. *See Wilder*, 5 Ct. Cl. at 465–66, 468.

61. *See Summers*, *supra* note 14, at 67–68.

62. *See The Pokanoket*, 156 F. 241, 243 (4th Cir. 1907) (rejecting a claim by a marine engineer for wages for the remainder of the month, irrespective of whether he performed satisfactorily, concluding that "the contract constitutes . . . a hiring at will, which could be ended at any time, by either party, without notice"); *Boyer v. W. Union Tel. Co.*, 124 F. 246, 247–48 (E.D. Mo. 1903) (rejecting a claim by workers terminated without notice and blacklisted for union activity, concluding that "in a free country like ours every employ[ee] . . . has the legal right to quit the service of his employer without notice, and either with or without cause, . . . [and] any employer may legally discharge his employ[ee], with or without notice, at any time"); *Coffin v. Landis*, 46 Pa. 426, 434 (1864) (finding that an employer had the "right to discharge [his sales agent employee] from his service at any time" without notice).

63. 46 Pa. at 434.

64. *Id.* at 431.

65. *Id.* at 433–34.

66. *Id.*

the Supreme Judicial Court of Massachusetts opined that “reasonable notice” was required in the context of an at-will termination.⁶⁷ There the defendants engaged the plaintiff to prepare and instruct them in the art of manufacturing color paints for a period not to exceed three years.⁶⁸ Within a few months, the defendants grew disappointed with the plaintiff’s skills and terminated him.⁶⁹ The court held that because the written agreement did not commit the parties to a three-year term, it was an indefinite agreement and that consequently, “the defendants had the right to elect to terminate . . . at any time by reasonable notice.”⁷⁰

A third group of cases treat notice as a matter of custom. In *Hathaway v. Bennett*, a New York court rejected a claim brought by a newspaper carrier who was terminated without prior warning.⁷¹ The court held that the carrier did not demonstrate a practice in the newspaper industry of providing a month’s notice.⁷² Similarly, in *Gray v. Wulff*, an Illinois court rejected a claim by a terminated orchestra leader upon finding that his employer had provided one week’s notice.⁷³ Absent a fixed term, the court observed, the employer–opera house “had the right to discharge [the plaintiff] on giving him the usual and customary notice . . . independent of the question whether he was competent” to remain employed.⁷⁴

As these cases indicate, there was no consistent rule in the United States with respect to notice. Over time, employers developed the practice of requiring *employees* to provide notice of voluntary departure, largely in response to efforts at worker organizing.⁷⁵ The threat of breach of contract actions and wage withholding deterred workers from engaging in sudden strikes and other job actions.⁷⁶ Some states passed laws effectively codifying a reciprocal notice requirement by precluding employers from pursuing claims against their workers if

67. 113 Mass. 187, 190 (1873).

68. *Id.* at 189.

69. *Id.* at 188.

70. *Id.* at 190; *see also* *Ward v. Ruckman*, 34 Barb. 419, 420 (N.Y. App. Div. 1861) (concluding that in the absence of a fixed duration, an employment contract with a vessel captain was “subject to be terminated by either party on reasonable notice, if the interest of either requires a change”); *infra* Section II.B (summarizing turn-of-the century Maryland case law referring to a reasonable notice requirement).

71. 10 N.Y. 108, 110–11 (1854).

72. *Id.* at 113.

73. 68 Ill. App. 376, 377–78 (Ill. App. Ct. 1896).

74. *Id.* at 378; *cf.* *The Pokanoket*, 156 F. 241, 243 (4th Cir. 1907) (finding “no evidence of any settled usage or custom of the port which would take the [marine engineer’s employment] contract . . . out of the [general] rule” that “a hiring at will [can] . . . be ended at any time, by either party, without notice”).

75. *See* *Jacoby*, *supra* note 28, at 107.

76. *See id.* at 106–07.

they had not similarly contracted to provide notice of termination.⁷⁷ Thus, for a time, a *de facto* employer notice obligation existed in the United States. But as the threat of labor unrest dissipated, so too did employer-imposed notice obligations and the reciprocal duty of employers. Ultimately, companies preferred the freedom to terminate without warning to the modest protection against concerted action and sudden departures afforded by employee notice obligations.

In contrast, the law of the United Kingdom (and ultimately Canada) evolved to affirmatively require notice of termination.⁷⁸ As in the United States, the advent of an industrial economy and the demand for shorter-term employment put pressure on a rule designed primarily for an agrarian society.⁷⁹ However, British employers, faced with a more significant threat of worker unrest, were unwilling to completely abandon the idea of a contractual employment duration.⁸⁰ By the mid-nineteenth century, the United Kingdom's one-year presumption began to be replaced by contracts of indefinite duration subject to notice, and Canada followed suit.⁸¹ Although such notice periods were generally short, often corresponding to the worker's pay period, they continued to serve the purpose of binding workers to their employers for a minimum period of time. The resulting "implied reasonable notice term" was ultimately codified in the United Kingdom, with the statute requiring employers to provide a certain number of weeks' notice (or its equivalent in severance pay) per year of service.⁸² The Canadian provinces similarly have statutory notice laws that set a "floor" for notice of termination,⁸³ although contemporary Canadian law also maintains a common law reasonable notice obligation that may require employers to provide additional notice or pay.⁸⁴

In contrast, notice remained a loose thread in American employment

77. *See id.*

78. *See* Etherington, *supra* note 29, at 472–73 (discussing development of the Canadian rule); Jacoby, *supra* note 28, at 100–01 (discussing development of the English rule).

79. *See* Feinman, *Employment At Will*, *supra* note 17, at 122–24; Jacoby, *supra* note 28, at 91. Another factor was the demise of British "settlement laws" that recognized individuals as citizens of a particular parish and entitled to its protections provided they had a contract for at least one year's employment. Jacoby, *supra* note 28, at 88, 90; Etherington, *supra* note 29, at 471–72.

80. *See* Feinman, *Employment At Will*, *supra* note 17, at 122.

81. *See id.* at 121–22.

82. *See* Employment Rights Act, 1996, c. 18, § 86 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/18/section/86>.

83. *See, e.g.*, Ontario Employment Standards Act, S.O. 2000, c. 41, § 57 (Can.), available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm#BK103.

84. *See* Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. 2d 140, paras. 12–14 (Can. Ont. High Ct. J.) (articulating the common law reasonable notice standard); GEOFFREY ENGLAND, ESSENTIALS OF CANADIAN LAW: INDIVIDUAL EMPLOYMENT LAW 290–96 (2d ed. 2008) (detailing the interaction of common law and statutory notice requirements in Canada); *infra* Section V.A.

termination law. A century after Wood's rule, the at-will doctrine had solidified as a substantive discretion rule permitting employers (and employees) to terminate without reason. Implicitly, it has also been understood as a procedural discretion rule permitting both parties to terminate without notice. However, the history of employment termination law both here and abroad demonstrates that there is no legal or historical reason why the right to terminate without notice must follow from the indefinite duration rule that Wood proposed.⁸⁵ Indeed, both Canada and the United Kingdom ultimately abandoned the one-year presumption and adopted a legal regime that requires advance notice.⁸⁶

In short, U.S. law on notice was as ambiguous as the law of employment duration at the time Wood articulated his rule. For better or for worse, Wood's treatise laid down a rule on the issue of duration, but questions regarding notice remained open. As the next Part demonstrates, contemporary courts, unlike their counterparts abroad, have failed to pick up this issue, and the question of employee notice rights remains open.

II. NOTICE AND THE CONTEMPORARY AT-WILL DOCTRINE

Since Wood's time, there have been numerous developments in the common law of wrongful discharge. However, there has been almost no development in the law of notice. Unlike the idea that employers can terminate without reason, the idea that termination may occur without notice has not been explicitly and consistently articulated. Indeed, judicial statements of the employment at-will rule that reference the right of the parties to terminate without notice are the exception rather than the rule. As this Part describes, the law of only ten states can be characterized as purporting to allow employers to terminate at-will employees without notice.⁸⁷ In some jurisdictions the principle is found in a single or small handful of cases, often in dicta and based on limited

85. Cf. Feinman, *Employment At Will*, *supra* note 17, at 119 (noting that the "English, unlike the Americans, saw that the questions [of the duration of the relationship and the length of notice required to terminate it] were not the same and eventually developed a response to the second that mitigated somewhat the strictness of the early response to the first").

86. Although contemporary British law also imposes a universal just cause rule, *see* Employment Rights Act §§ 94–98, outside a few provincial exceptions, Canada does not. Canadian law uses the term "wrongful dismissal" to refer to a termination without notice and the presence of cause supporting the employee's termination is treated as a defense to his or her claim. *See* ENGLAND, *supra* note 84, at 324. But Canadian employers may terminate without cause if they provide the requisite notice. *See id.* at 65. Contemporary Canadian law thus provides an example of how a system of mandatory notice can exist alongside a system of substantive discretion reminiscent of American-style employment at will.

87. *See infra* Section I.A.

analysis.⁸⁸ On the other end of the spectrum, the law in three states can be read to support an argument that employers are in fact *required* to provide some amount of advance notice when terminating at-will employees.⁸⁹ These cases recognize a duty to provide “reasonable notice” alongside employers’ basic right to terminate at-will workers for any or no reason.

This Part reviews existing law on notice of termination in at-will employment relationships.⁹⁰ It reveals that procedural discretion—the ability to terminate without notice—is not a settled or intrinsic aspect of the employment at-will doctrine, but rather an open question distinct from whether the relationship was at will in the substantive discretion sense of the term. In fact, in most states there is no law that expressly holds that employers may terminate without notice, while in those states where “no notice” appears to be the rule, the issue remains ripe for challenge.

A. “No Notice” States

It is often asserted that employment at will means employers can fire for any or no reason, “with or without notice.”⁹¹ Yet research reveals that there are relatively few jurisdictions that articulate the rule so broadly. Nearly two-thirds of states do not reference “notice” at all in their definition of employment at will.⁹² Cases in those jurisdictions

88. See *infra* Section II.A.

89. See *infra* Section II.B.

90. The research for this section consisted of a fifty-state survey of primarily state court cases defining “employment at will” in the context of a wrongful termination claim brought by a private sector worker with no express contract. I excluded from consideration those cases involving public sector workers challenging an employer’s failure to provide notice as part of a constitutional due process claim and those cases involving workers alleging breach of an express contractual notice provision (usually, but not exclusively, in a written agreement).

91. Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 707 (2006) (“The basic rule, applied by the vast majority of jurisdictions, concerning the at-will relationship—that either party may terminate the relationship at any time, for any reason or no reason, and with or without notice—has been the law in the United States for well over a century.”); John H. Matheson, *Employee Beware: The Irreparable Damage of the Inevitable Disclosure Doctrine*, 10 LOY. CONSUMER L. REV. 145, 152 (1998) (“Pursuant to the employment-at-will doctrine, an employer can discharge a worker for any legal reason or for no reason, with or without notice.”).

92. See *infra* Appendix A. Two of these “open” states, as I refer to them, require further explanation. In Connecticut there is a contemporary decision rejecting an at-will employee’s claim for negligent infliction of emotional distress in which the court observed that “lack of advance warning or written notification is insufficient evidence that an employer acted unreasonably in terminating an employee-at-will.” *Thompson v. Bridgeport Hosp.*, No. CV 980352686, 1999 WL 1212310, *2 (Conn. Super. Ct. Nov. 17, 1999). However, the decision, which ruled on defendant’s motion to strike, addressed only the plaintiff’s negligence claim and not her contract claims. In addition, the plaintiff had received both advance warning that her department was closing and one month’s oral notice of her date of termination. In another of

hold that employment is “at will,” but in explaining the doctrine state only that parties can terminate for any or no reason. They do not go on to add that termination may be with or without notice.⁹³ Such formulations clearly embrace the substantive discretion principle of employment at will. Yet the process by which such discretionary terminations are to be effected—with or without advance notice, warning, or continuing obligations—is an open question in such jurisdictions.

In contrast, only nine states have case law that arguably recognizes a right to terminate at-will employment relationships without advance warning. These “no notice” states have either held, stated, or implied that an at-will employee may be terminated without notice.⁹⁴

However, this is a generous classification. In many of these jurisdictions, the no notice rule is neither well established nor well supported. In three states—Colorado, Oregon, and Ohio—there are no

these states, New Jersey, there is an early twentieth century decision rejecting a claim of a city contractor based on failure to provide notice of termination. *See Miller v. Atlantic City*, 74 N.J.L. 345, 346 (1907). While the court refers to the termination as “at will,” it appears that the employee was terminated pursuant to a satisfaction clause in his written contract permitting immediate termination upon his unreasonable delay. *See id.* 347. There appears to be no other articulation of the employment at-will rule by a New Jersey state court that refers to the right to terminate without notice. For these reasons, I characterize Connecticut and New Jersey as “open” states in which the notice issue has not been decided.

93. Most jurisdictions do, however, define employment at will as the ability to terminate “at any time.” One could argue that such language precludes an interpretation of employment at will that requires the employer to supply advance notice, insofar as such an obligation delays the time at which a firing can be effectuated. If the employer must provide notice, it is unable to execute the termination immediately. This reading of “at any time” is unlikely however. Although there appears to be no case elaborating on the phrase, it is notable that the words “at any time” are not found exclusively in jurisdictions that explicitly adopt the “no notice” version of employment at will. In fact, language referring to the employer’s ability to terminate “at any time” can be found in the same jurisdictions, and sometimes in the same cases, that explicitly refer to an obligation to provide reasonable notice of termination. *See, e.g., Studer v. Hurley*, 82 Va. Cir. 406, 407 (Va. Cir. Ct. 2011) (“One of the incidents of employment at will is the ability of either party to terminate the relationship with or without cause at any time, upon giving reasonable notice.”); *Rubin v. Maloney*, 75 Va. Cir. 452, 453 (Va. Cir. Ct. 2007) (“Virginia has long adhered to the common law doctrine of employment ‘at will’ where when a term of employment cannot be determined from the contract, either party is at liberty to terminate the contract at any time for any reason, upon reasonable notice.”); *Neal v. Altoona Hosp.*, 38 Pa. D. & C.3d 599, 601 (Pa. Ct. Com. Pl. 1985) (“An employment contract which has no definite duration is a hiring at-will, and may be terminated upon reasonable notice by either party at any time.”). The better understanding of “at any time” language is that it refers to the indefinite duration rule, that is, it embodies the American rejection of the British one-year presumption.

94. There are an additional eight states with conflicting case law on this issue. *See infra* Appendix A. The case law in these states includes decisions that either recognize or refer to an obligation to provide reasonable notice of termination, as well as decisions that either explicitly reject a reasonable notice claim or refer to employment at will as the right to terminate “with or without notice.” The law of these jurisdictions is discussed *infra* Section II.C.

reported state court decisions addressing a substantive claim by an at-will employee challenging the failure to provide notice of termination. Rather, in these states, courts simply define at-will employment as the ability to fire with or without reason *and* with or without notice.⁹⁵ The plaintiffs' claims in these cases challenge only the reason for the employer's termination, not the absence of any advance warning or severance pay. In other words, the "without notice" portion of the courts' rule statements in these cases is dicta.⁹⁶

In another three jurisdictions, statutory law suggests, though it does not explicitly state, that employment may not be terminated without notice. The state statutes of North Dakota, South Dakota, and Montana specifically provide that either party may terminate an at-will employment relationship "on notice" to the other.⁹⁷ These references

95. See, e.g., *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987) (en banc); *Bauserman v. Katy Steel & Alum. Co.*, No. WD-85-17, 1986 WL 1689, at *2 (Ohio Ct. App. 1986); *Handam v. Wilsonville Holiday Partners, LLC*, 201 P.3d 920, 923 (Or. Ct. App. 2009).

96. In addition to being dicta, such "no notice" formulations of the at-will rule are often unsupported by legal precedent. Courts generally cite early state supreme court decisions that adopt employment at will, but which themselves contain no reference to notice of termination in either the case facts or the court's statement of the law. For instance, in Colorado, the language "without notice" first appears in that state's case law in *Cont'l Air Lines*, 731 P.2d at 711. All subsequent court references to the ability to terminate without notice cite either *Continental Air Lines* or cases citing *Continental Air Lines*. None of the cases cited by the Colorado Supreme Court in *Continental Air Lines*, however, contain any reference to notice; each refers to employment at will as the ability to terminate without reason. See *Garcia v. Aetna Fin. Co.*, 752 F.2d 488, 491 (10th Cir. 1984); *Smith v. Montgomery Ward & Co.*, 567 F. Supp. 1331, 1334 (D. Colo. 1983); *Johnson v. Jefferson Cnty. Bd. of Health*, 662 P.2d 463, 471 (Colo. 1983); *Hughes v. Mtn. States Tel. & Tel. Co.*, 686 P.2d 814, 815 (Colo. App. 1984); *Lampe v. Presbyterian Med. Ctr.*, 590 P.2d 513, 514 (Colo. 1978); *Justice v. Stanley Aviation Corp.*, 530 P.2d 984, 985 (Colo. 1974). Thus, the Colorado "no notice" language is a judicial creation of the last quarter century, one without support from any precedent in the state.

97. See N.D. CENT. CODE § 34-03-01 (West 2014) ("An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title."); S.D. CODIFIED LAWS § 60-4-4 ("An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute."). Although Montana has legislatively overruled the substantive discretion principle of employment at will, its "just cause" statute includes an exception for "probationary" (i.e., at will) employees, which contains notice language identical to that in North Dakota and South Dakota. See MONT. CODE ANN. § 39-2-904(2)(a) (2000) ("During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee *on notice to the other* for any reason or for no reason." (emphasis added)). In addition, the Montana statute explicitly preempts common law contract claims. *Id.* § 39-2-913. Thus, while employment at will is the exception rather than the rule in Montana, it is appropriate to conclude that Montana employers have both substantive and procedural discretion with respect to at-will employees.

A fourth state, California, has a statute containing notice language similar to that in North Dakota, South Dakota, and Montana. See CAL. LAB. CODE § 2922 (West 2014) ("An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term, may be terminated at the will of either party on

suggest that the terminating party must *notify* the losing party, that is, make the employee aware of its decision. An explicit requirement of *actual* notice could be said to belie any requirement of *advance* notice, and at least a few courts in Montana have seemingly made that assumption.⁹⁸

In each of the remaining three states, there is at least one state court decision that rejects a challenge to the failure to provide notice of termination in an at-will employment relationship. In only one of these states, Hawaii, the relevant case is on point and the ruling is explicit, although the decision is old and the reasoning sparse. In 1920, the Supreme Court of Hawaii rejected a notice claim in *Crawford v. Stewart*, a one-page decision containing no explanation of the case facts.⁹⁹ The full explanation of its decision is as follows:

In answer to plaintiff's contention that the majority opinion overlooked the fact that no notice whatever was given of any intention to terminate the contract we hold that the requirement of such notice would abrogate entirely the main principle laid down in our opinion to the effect that a hiring for a stipulated sum per month without anything further being agreed upon to fix the term of hiring constitutes an indefinite hiring and is terminable at the will of either party.¹⁰⁰

Explicit though it may be, this precedent is an isolated decision. There appears to be no reported state court decision referencing the ability to terminate without notice since *Crawford* was issued nearly one hundred years ago.

notice to the other. Employment for a specified term means an employment for a period greater than one month.”). However, there is case law in California that presumes the existence of a common law “reasonable notice” requirement. *See, e.g.,* *Consol. Theatres, Inc., v. Theatrical Stage Emps. Union, Local 16*, 447 P.2d 325, 337 (Cal. 1968) (stating that seven months constituted reasonable notice of termination of union contract between theater and stagehand employees). For this reason, I classify California as a “reasonable notice” state. *See infra* Section II.B.

98. *See* *Scott v. Eagle Watch Invs., Inc.*, 828 P.2d 1346, 1350 (Mont. 1991) (holding that the employer met the statutory notice requirement by informing the athletic club manager that his employment was terminated); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982) (asserting that Montana statutory law “does not require *prior* notice”). Both *Scott* and *Gates* were decided under Montana’s employment at-will rule, which was in effect prior to the passage of the Montana Wrongful Discharge in Employment Act (MWDEA). That statute contained notice language identical to what appears in the probationary employee exception to the MWDEA. *See* MONT. CODE ANN. § 39-2-901 (1986) (“Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party.”).

99. 25 Haw. 300, 300–01 (1920).

100. *Id.* at 300.

In the remaining two states—Alabama and Michigan—the law is somewhat more opaque. The state court decisions that sanction termination at will without notice to the losing party are factually idiosyncratic. For instance, in the only Alabama case to reference notice of at-will termination, *Allied Supply Co., Inc. v. Brown*, the employer sued its former employees arguing that they had breached their fiduciary duties by, among other things, conspiring to depart en masse without warning.¹⁰¹ The Supreme Court of Alabama held that the principle of employment at will precluded an interpretation of the fiduciary duty doctrine that would prohibit employees from quitting immediately: “Implicit in the ‘employment-at-will’ doctrine is the concept that an employee at will can be discharged, or, conversely, can terminate his employment, without prior notice.”¹⁰² Thus, while the court was explicit about the right to terminate at-will relationships without notice, it made such assertions in the context of protecting an *employee’s* right to quit and engage in postemployment competition.

In the Michigan case, *Garavaglia v. Centra*, the primary issue was not notice but whether the plaintiff’s consulting contract contemplated a fixed or indefinite period of employment.¹⁰³ Although the Michigan appellate court found that the contract was at will, it affirmed the trial court’s award of two quarters’ retainer fees to the plaintiff, concluding that the plaintiff had not been properly notified that the contract had been cancelled.¹⁰⁴ Explaining this decision, the court made clear that parties need not provide *prior* notice of termination under employment at will:

Defendants correctly note that in cases of employment terminable at will, notice is not required by either party. However, such notice relates to the advance warning of intended action. While defendants were not required to give advance notice of their intentions to terminate the parties’ agreement, defendants should have notified plaintiff that the contract was terminated.¹⁰⁵

101. *Allied Supply Co. v. Brown*, 585 So. 2d 33, 35 (Ala. 1991).

102. *Id.* In support of its conclusion, the court cited three other Alabama Supreme Court cases, all of which refer to employment at will as the right to terminate “with or without cause or justification,” and contain no reference to notice. *See Bell v. S. Cent. Bell*, 564 So. 2d 46, 48 (Ala. 1990); *Bailey v. Intergraph Corp.*, 537 So. 2d 21, 21 (Ala. 1988); *Martin v. Tapley*, 360 So. 2d 708, 709 (Ala. 1978). It appears that no other state court decision has addressed the issue.

103. *Garavaglia v. Centra, Inc.*, No. 196203, 1998 WL 1991630, at *1 (Mich. Ct. App. 1998).

104. *Id.* at *2, *4. Apparently the defendant stopped paying the plaintiff’s retainer fees, but did not otherwise communicate that it considered the contract terminated, and the plaintiff assumed that the defendant was merely late with his payment. *Id.* at *4.

105. *Id.* at *4 (citation omitted).

Thus, while the court explicitly rejected the notion of an advance notice requirement, the claim in the case rested on the failure to provide *actual* notice of termination and the employee was awarded lost salary.¹⁰⁶

In sum, while there is some case law asserting that at-will termination may occur without advance notice, that law is neither as prevalent nor as inviolate as one might expect. Only a small minority of states have explicitly articulated a “no notice” rule, and several have done so only in dicta. Where there is case law on point it is not especially well analyzed or supported, and in several states, the relevant cases are old and idiosyncratic. In short, the “no notice” rule, to the extent it exists, is vulnerable to challenge.

B. Reasonable Notice States

In contrast, the law in a small handful of states appears to require employers to provide “reasonable notice” of at-will employment termination.¹⁰⁷ The principal is neither well developed nor consistently cited and applied. However, the existence of this admittedly slim body of law offers a model for how an obligation to provide advance notice of termination can comfortably exist alongside a right to terminate for any or no reason.

In three jurisdictions—California, Maryland, and Florida—there is state case law that either requires an employer to provide advance notice of termination or refers to or assumes such an obligation in dicta.¹⁰⁸ In one of the three, there is no case precisely on point. In California, there are cases that refer to “reasonable notice” of termination, but they do not involve claims that specifically target the employer’s failure to provide advance notice.¹⁰⁹ Such judicial references to reasonable notice are arguably no more reliable as a reflection of extant law than references to the ability to discharge “with or without notice” in cases that similarly involve general challenges to the employer’s reasons for

106. *See id.*

107. *See infra* Appendix A.

108. There are an additional eight states—Louisiana, Massachusetts, Missouri, New York, Pennsylvania, Tennessee, Texas and Virginia—with conflicting case law on this issue. *See infra* Appendix A. The case law in these states includes decisions that either recognize or refer to an obligation to provide reasonable notice of termination, as well as decisions that either explicitly reject a reasonable notice claim or refer to employment at will as the right to terminate “with or without notice.” The law of these jurisdictions is discussed *infra* Section II.C.

109. *See, e.g.,* *Consol. Theatres, Inc. v. Theatrical Stage Emps. Union, Local 16*, 447 P.2d 325, 337 (Cal. 1968) (stating that seven months constituted reasonable notice of termination of union contract between theater and stagehand employees); *Mile v. Cal. Growers Wineries, Inc.*, 114 P.2d 651, 654 (Cal. Dist. Ct. App. 1941) (noting that, in an action by wine salesperson to recover sales commissions, the employment contract was terminable at will upon reasonable notice).

terminating.¹¹⁰

However, the law in the remaining two states is more explicit. Maryland case law includes a pair of turn-of-the-century decisions that articulate and implicitly apply a reasonable notice rule. In *Stubbs v. Vestry of St. John's Church*, the plaintiff had served as a rector for over twenty-two years when he was removed from office by resolution of the vestry.¹¹¹ The resolution was passed in May, effective the end of July.¹¹² The state's highest court held that the rector's appointment contained no fixed term of employment and consequently could be terminated at will upon reasonable notice, which had been received.¹¹³ To a similar effect is *Bartlett v. Hipkins*, also involving a rector, in which the plaintiff received notice of termination on November 15, effective January 1.¹¹⁴ The court reversed an injunction in favor of the rector.¹¹⁵ Although the court relied primarily on statutory law granting vestries the right to choose their ministers,¹¹⁶ the concurring opinion in the case explained the role of notice in tempering the effect of vestry authority:

[W]hile the vestry may have such right to terminate the contract with the rector, the right must always be exercised with due regard to the principles of justice, depending upon the circumstances of the case. Reasonable notice is essential¹¹⁷

The judge went on to note that reasonable notice (approximately six weeks) had been given and was not challenged.¹¹⁸

The same principles can be found in the contemporary state court decisions of Florida. The key case, *Perri v. Byrd*, involved a suit by

110. It is interesting to consider, however, that, the key California case referencing a reasonable notice rule for indefinite employment contracts is a case involving a collective bargaining agreement. *Consol. Theatres, Inc.*, 447 P.2d at 328. In *Consolidated Theaters*, the parties had entered into an agreement requiring, among other things, that the theater employ union stagehands. *Id.* at 329. Subsequently, the theater transitioned from a live performance venue to one showing motion pictures. *Id.* When union employees picketed because of the theater's failure to use stagehands, the court held that the contract was no longer binding and that the union had effectively given "reasonable notice" of termination seven months prior when it threatened to picket. *Id.* at 337. Thus, while there is no individual employment contract case in California that holds that parties must provide reasonable notice of termination, there is such a holding in the labor relations context. *See id.* *But see, supra* note 99 and accompanying text (discussing California's codification of employment at will which refers to termination "on notice to the other" party).

111. 53 A. 917, 917 (Md. 1903).

112. *Id.* at 919.

113. *Id.*

114. 23 A. 1089, 1090 (Md. 1892).

115. *Id.* at 1093.

116. *Id.* at 1092-93.

117. *Id.* at 1093.

118. *Id.*

members of a band against a restaurant that had hired the group to play weekly over the summer.¹¹⁹ After the plaintiffs accepted the offer of employment, but prior to their first performance, the band's former employer threatened to sue the defendant, prompting it to rescind its offer.¹²⁰ The band sued the new employer, seeking damages for the amount it would have earned over the course of the summer.¹²¹ Reviewing a jury verdict in favor of the band, the Florida District Court of Appeal rejected the plaintiff's argument that the offer of employment for the summer created a fixed term, finding the relationship one of indefinite duration and therefore terminable at will.¹²² However, it held that notwithstanding the defendant's right to terminate at any time, it was obligated to provide reasonable notice of termination.¹²³ It went on to conclude that two weeks' notice was reasonable, based on "customary" business practices, and awarded the band two weeks' pay.¹²⁴

This case law support for a reasonable notice rule is not robust. In Florida, courts have cited and relied on *Perri*, but the universe of cases challenging the failure to provide notice is small,¹²⁵ and the issue has

119. 436 So. 2d 359, 360 (Fla. Dist. Ct. App. 1983). Given the nature of the services provided by the band, it would appear questionable whether a true employment—as opposed to independent contractor—relationship was intended. However, this issue was not recognized by the court (and presumably was not raised by the parties). The court opinion explicitly treats the relationship as one of employment. *See id.*

120. *Id.*

121. *Id.*

122. *Id.* at 361.

123. *Id.*

124. *Id.* The court subtracted the amount of money the band had earned at other venues during the notice period from its damages award. *Id.*

125. *See, e.g.,* *Rehman v. ECC Int'l Corp.*, No. 90-425-Civ-Orl-22, 1993 WL 85758, at *1 (M.D. Fla. 1993) (stating that at-will employees may be entitled to payment equivalent to wages earned in a reasonable notice period); *Malver v. Sheffield Indus., Inc.*, 502 So. 2d 75, 76 (Fla. Dist. Ct. App. 1987) (holding that the employer complied with the reasonable notice obligation by providing the employee one week's severance pay); *Crawford v. David Shapiro & Co., P.A.*, 490 So. 2d 993, 996-97 (Fla. Dist. Ct. App. 1986) (holding that a prospective employee who relocated from Britain for a job offer could be awarded damages arising from the accounting firm's failure to provide reasonable notice of termination of the employment offer); *cf. Settle v. Sears, Roebuck & Co.*, No. 91-0028-Civ-Orl-18, 1992 WL 210986, at *5 (M.D. Fla. 1992) (noting that the employer provided four months' advance notice of termination consistent with its obligation to provide reasonable notice in rejecting employee's claim that the employer breached principles of good faith and fair dealing); *Payroll, Inc. v. Elicker*, 668 So. 2d 1035, 1038 (Fla. Dist. Ct. App. 1996) (holding that where the employer terminated immediately without notice, injuries sustained by the employee during the time period that would have constituted reasonable notice of termination were considered to have occurred prior to termination for purposes of workers compensation coverage. *But see* *Motwani v. OcéanCity Inv., Ltd.*, 682 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 1996) (recognizing without explanation that the court's refusal to allow a set-off to the plaintiff in awarding damages to the defendant conflicted with *Perri v. Byrd*).

never reached the state supreme court.¹²⁶ In Maryland, it appears that no state court has revisited the issue since *Stubbs* was decided over a century ago. The point, however, is not that “reasonable notice” is the de facto rule in any particular jurisdiction, but rather that it *could* be. Cases like *Stubbs* and *Perri*, challenge the notion that the privilege to terminate without notice is implicit in the doctrine of employment at will. In each, the court presumes a system that allows parties subjective discretion to terminate, but conditions the exercise of that right on a degree of procedural fairness achieved through the provision of advance notice.

C. Mixed Law States

In eight jurisdictions, the law regarding notice of at-will termination is either unclear or in conflict. Like the law of most of the jurisdictions discussed thus far, the case law in these “mixed law” states is limited and often does not directly address the precise factual question. In two states—Tennessee and Texas—there are decisions referring both to the ability to terminate without notice and the need to provide reasonable or some other form of notice.¹²⁷ However, such language appears exclusively in cases that do not involve actual challenges to the failure to provide notice. Thus, in Texas, there are references to parties’ ability to terminate “without notice or cause,”¹²⁸ “on giving reasonable notice,”¹²⁹ on “reasonably short notice,”¹³⁰ on “giv[ing] actual

126. The Florida Supreme Court acknowledged *Perri*, but deemed it inapplicable to the facts in *City of Homestead v. Beard*, 600 So. 2d 450, 453–54 (Fla. 1992).

127. In Tennessee, compare *Lee v. City of LaVergne*, No. M2001-02098-COA-R3-CV, 2003 WL 1610831, at *1 (Tenn. Ct. App. 2003) (holding that the police department employee was an at-will employee who could therefore “be terminated for good cause, bad cause or no cause at all, without notice”), with *Roberts v. Fed. Express Corp.*, 1991 WL 104203, at *5 (Tenn. Ct. App. 1991) (presuming that at-will employees are entitled to reasonable notice of termination in concluding that a maintenance mechanic accused of stealing customer property would not have been entitled to notice because he was terminated for cause). In Texas, compare *Wornick Co. v. Casas*, 856 S.W.2d 732, 737 (Tex. 1993) (Hecht, J., concurring) (stating that human resources director’s status as an at-will employee who could be terminated without notice or cause did not foreclose the possibility that she may have a viable claim for intentional infliction of emotional distress against her former employer for the way in which she was terminated), with *Island Lake Oil Co. v. Hewitt*, 244 S.W. 193, 194–95 (Tex. Civ. App. 1922) (quoting general rule that “when a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so” in holding that an oil driller’s employment contract for indefinite duration was terminable circumstances implying actual notice of termination).

128. *Wornick Co.*, 856 S.W.2d at 737; *Tex. Emp’rs’ Ins. Ass’n v. Hale*, 237 S.W.2d 769, 772 (Tex. Civ. App. 1950).

129. *Island Lake Oil Co.*, 244 S.W. at 195.

130. *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. 1987).

notice,”¹³¹ and “just by giving notice to the other [party],”¹³² sometimes in the same case and absent any analysis. Such states are arguably no different than “open states” with respect to the prevailing rule of law.

In four states—Massachusetts, Missouri, New York, and Pennsylvania—there is turn-of-the-century case law addressing the issue of notice, but more recent decisions suggesting a different rule.¹³³ The more recent decisions in these jurisdictions, however, either contain references to notice only in dicta or discuss the issue under inapposite facts. In New York, for instance, there is a nineteenth century decision recognizing that an employer owes terminated workers customary notice,¹³⁴ while a twentieth century decision involving employee fiduciary duties concludes that at-will employees need not provide notice prior to voluntarily terminating.¹³⁵ In addition, the contemporary

131. *Island Lake Oil Co.*, 244 S.W. at 194.

132. *Mackey v. U.P. Enters., Inc.*, No. 12-99-00355-CV, 2005 WL 1798408, at *2 (Tex. App. 2005) (quoting, and upholding as proper, the trial court’s instruction on the meaning of at will); *see also McKinney*, 271 S.W. at 249 (holding that employment at will was terminable without the other party’s consent “upon notice to that effect”).

133. In Massachusetts, *compare* *Jackson v. Action for Bos. Cmty. Dev., Inc.*, 525 N.E.2d 411, 412–13 (Mass. 1988) (holding that, because employment center supervisor who had been accused of sexual harassment was an at-will employee, he could be terminated “without notice[] for almost any reason or for no reason at all”), *with* *Harper v. Hassard*, 113 Mass. 187, 187–90 (1873) (holding that, after the contractually fixed term of employment expired, the employer was free to terminate his “color maker” employee upon reasonable notice). In Missouri, *compare* *Boyer v. W. Union Tel. Co.*, 124 F. 246, 247–48 (E.D. Mo. 1903) (rejecting a claim by workers terminated without notice and blacklisted for union activity, concluding that “in a free country like ours every employ[ee] . . . has the legal right to quit the service of his employer without notice, and either with or without cause, . . . [and] any employer may legally discharge his employ[ee], with or without notice, at any time”), *with* *Paisley v. Lucas*, 143 S.W.2d 262, 271 (Mo. 1940) (stating that insurance agent’s employment contract for an indefinite term was terminable upon reasonable notice), *and* *Clarkson v. Standard Brass Mfg. Co.*, 170 S.W.2d 407, 415 (Mo. Ct. App. 1943) (noting, in an action to recover sales commissions, that a contract between manufacturer and salesperson was terminable upon reasonable notice because it included no provision for the intended period of duration). In Pennsylvania, *compare* *Neal v. Altoona Hosp.*, 38 Pa. D. & C. 599, 601 (1985) (reciting as the general rule that parties may terminate at will “upon reasonable notice”), *with* *Cofin v. Landis*, 46 Pa. 426, 434 (1864) (finding that a sales agent could be terminated at will and that “no notice was necessary”). For citations to conflicting decision in New York, see *infra* notes 134–35 and accompanying text. *See also supra* Section I.B (discussing the historical law of these three states).

134. *See Hathaway v. Bennett*, 10 N.Y. 108, 113 (1854) (accepting the principle that customary notice is due to a terminated at-will worker, but finding that the plaintiff–newspaper carrier had not established the custom of providing one month’s notice); *see also Ward v. Ruckman*, 34 Barb. 419, 419 (N.Y. App. Div. 1861) (stating that a vessel owner’s contract with a ship captain “must be considered as subject to be terminated by either party on reasonable notice”).

135. *See Town & Country House & Home Serv., Inc. v. Newbery*, 147 N.E.2d 724, 728 (N.Y. 1958) (holding that where an employer sued its former home cleaning employees who left to start a competing business, notice by the former employees of their intent to leave would have been a “courteous” gesture, but it was not required); *see also Horn v. N.Y. Times*, 790 N.E.2d

cases in these four jurisdictions neither address nor identify the inconsistency with historical precedents. For these reasons, it is difficult to characterize the law of these states as supporting either a “no notice” or a “reasonable notice” rule.

In the remaining two states—Louisiana and Virginia—the contemporary law is ambiguous or in conflict. The situation in Louisiana is idiosyncratic. There the state code provides that contracts of indefinite duration require reasonable notice of termination,¹³⁶ but courts and commentators are unclear as to when and whether this admonition applies to employment relationships.¹³⁷ In Virginia, by contrast, there are contemporary decisions affirmatively recognizing an obligation to provide reasonable notice of termination to at-will employees alongside those specifically rejecting a reasonable notice obligation.¹³⁸

Since at least the early twentieth century, the reported case law in Virginia has consistently defined employment at will as permitting termination at any time and for any reason upon “reasonable notice.” As the state supreme court stated in *Stonega Coke & Coal Co. v. Louisville*

753, 755, 758–59 (N.Y. 2003) (holding that a doctor, employed as Associate Medical Director by a newspaper, was subject to the at-will employment rule and could be terminated “at any time without cause or notice”); *Kotick v. Desai*, 123 A.D.2d 744, 744–45 (N.Y. App. Div. 1986) (holding that an employer’s promise of permanent employment to an orthodontist was merely at-will employment permitting either party to terminate the relationship “without advance notice”); *Grozek v. Ragu Foods, Inc.*, 63 A.D.2d 858, 858 (N.Y. App. Div. 1978) (holding that an employee discharged for fighting with a coworker did not have an employment contract for a specified term and thus he was an at-will employee who could be discharged at any time “without advance notice”).

136. See LA. CIV. CODE ANN. art. 2024 (2013) (providing that a “contract of unspecified duration” may be terminated at will by either party “by giving notice, reasonable in time and form”).

137. Compare *Carlson v. Superior Supply Co.*, 536 So. 2d 444, 446 (La. Ct. App. 1988) (asserting in an employment termination case that “[a] contract for an indefinite period is terminable at the will of either party upon giving reasonable notice”); 6 EMPLOYMENT DISCRIMINATION COORDINATOR § 22:4 (West, updated Apr. 2014) (“Under the Louisiana Civil Code[] . . . oral contracts for employment of indefinite duration are terminable at any time at the will of either party upon reasonable notice.”), available at Westlaw EDC ANAREL § 22:4, with *Finkle v. Majik Mkt.*, 628 So. 2d 259, 260, 262 (La. Ct. App. 1993) (holding that where an assistant manager of a retail store had a “simple, at-will employment” relationship with his former employer and there was “no specific contract between” the parties, Article 2024 did not apply and the manager could be terminated without notice), and *Harrison v. CD Consulting, Inc.*, 2006 WL 1194749 (La. Ct. App. 1st Cir. 2006) (concluding that an at-will employee was not required to provide advance notice of departure in rejecting employer’s breach of fiduciary duty claim). See generally La. Prac. Employment Law § 12:7 (2013-2014 ed.) (“Although Civil Code art. 2024 requires notice ‘reasonable in time and form’ prior to termination, at-will employment contracts generally require no notice of termination.”); *infra* Parts III.A and IV.A (discussing Louisiana law).

138. For a summary of conflicting cases in Virginia, see *infra*, notes 140–43 and accompanying text.

& Nashville Railroad Co.:

[W]hen a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, *either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so.*¹³⁹

Initially, this formulation of the rule appeared exclusively in cases in which notice was not explicitly at issue.¹⁴⁰ Since the late 1980s, however, the state circuit courts, primarily in unreported decisions, have applied *Stonega* to notice-based claims. These courts find that employees state a claim for breach of the at-will employment contract where the employer terminates immediately without advance warning.¹⁴¹ What constitutes reasonable notice in such cases is usually

139. *Stonega Coke & Coal Co. v. Louisville & Nashville R.R.*, 55 S.E. 551, 552 (Va. 1906) (emphasis added).

140. *See, e.g.*, *Cnty. of Giles v. Wines*, 546 S.E.2d 721, 723 (Va. 2001); *Doss v. Jamco, Inc.*, 492 S.E.2d 441, 443 (Va. 1997); *Progress Printing Co. v. Nichols*, 421 S.E.2d 428, 429 (Va. 1992); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 798 (Va. 1985); *Wards Co. v. Lewis & Dobrow, Inc.*, 173 S.E.2d 861, 865 (Va. 1970); *Stutzman v. C.A. Nash & Son*, 53 S.E.2d 45, 49 (Va. 1949); *Studer v. Hurley*, 82 Va. Cir. 406, at *1 (Va. Cir. Ct. 2011); *Rubin v. Am. Soc’y of Travel Agents, Inc.*, 78 Va. Cir. 1, at *4 (Va. Cir. Ct. 2008); *Brehm v. Mathis*, 59 Va. Cir. 31, at *1 (Va. Cir. Ct. 2002); *Andrews v. Bon Secours-St. Mary’s Hosp. of Richmond, Inc.*, 43 Va. Cir. 486, at *2 (Va. Cir. Ct. 1997); *Wilt v. Water & Wastewater Equip. Mfrs. Ass’n*, 43 Va. Cir. 118, at *2 (Va. Cir. Ct. 1997); *Tingle v. Chasen’s Bus. Interiors, Inc.*, 41 Va. Cir. 451, at *3 (Va. Cir. Ct. 1997); *Parsley v. Jones & Frank Corp.*, 40 Va. Cir. 286, at *1 (Va. Cir. Ct. 1996); *Handley v. Boy Scouts of Am.*, 32 Va. Cir. 524, at *9 (Va. Cir. Ct. 1992); *Bowman v. Rappahannock Elec. Coop.*, 13 Va. Cir. 290, at *1 (Va. Cir. Ct. 1988).

141. *See, e.g.*, *Laudenslager v. Loral*, 39 Va. Cir. 228, 229 (Va. Cir. Ct. 1996) (holding that an employer’s failure to give its at-will employee reasonable notice of termination gave rise to an action for breach of implied contract); *Tingle*, 41 Va. Cir., at *1, *3 (holding that a pregnant employee who was fired without notice after slightly more than seven months of employment could recover damages for her employer’s failure to provide reasonable notice of termination); *Slade v. Cent. Fid. Bank, N.A.*, 12 Va. Cir. 291, at *1 (Va. Cir. Ct. 1988) (holding that a teller who was employed for twenty-four years was entitled to damages arising from the bank’s failure to provide reasonable notice of termination); *Braunfeld v. Forest Home Sys.*, 12 Va. Cir. 163, at *3 (Va. Cir. Ct. 1988) (holding that the jury properly awarded damages to the employee where the employer failed to give reasonable notice of termination). *Cf.* *Person v. Bell Atl.-Va., Inc.*, 993 F. Supp. 958, 962 (E.D. Va. 1998) (holding that because telephone service technician’s employment contract was governed by a collective bargaining agreement, his claim based on the default at-will rule in Virginia requiring employers to provide “reasonable notice of termination” was preempted by the Labor Management Relations Act). It is possible that this trend began long before the late 1980s but became more widely known only upon the advent of electronic research offering access to what are primarily unreported decisions requiring reasonable notice.

left for the jury.¹⁴²

Recent developments have called this law into question. A series of cases applying Virginia law have rejected employee claims for failure to provide reasonable notice, concluding that an obligation to provide notice is antithetical to employment at will.¹⁴³ *Perry v. American Home Products*, a federal district court case, appears to have begun the trend.¹⁴⁴ *American Home* involved a chemist who had been employed for twelve years prior to being terminated in a dispute over pharmaceutical testing procedures.¹⁴⁵ The plaintiff's principal claim was wrongful discharge in violation of public policy; his secondary claim was that the employer was liable for failing to provide notice of termination, or as the court put it, that "the at-will-doctrine does not apply when an employee is discharged without 'reasonable notice.'"¹⁴⁶

The court acknowledged the repeated references in Virginia's case law to reasonable notice of termination, but concluded that such statements were fairly characterized as dicta.¹⁴⁷ It noted that the Supreme Court of Virginia had never applied its reasonable notice rule, and had in fact strongly adhered to the at-will principle, recognizing only limited exceptions to the doctrine.¹⁴⁸ In contrast, the court asserted that sanctioning a notice claim would "eviscerate the at-will doctrine itself."¹⁴⁹ It explained:

No employee-employer relationship in Virginia could truly be "at-will" if an at-will employee has a valid claim, whether for breach of implied contract or in tort, when reasonable notice is not given before termination. The recognition of this new action would permit every discharged employee to sue the employer on the theory that

142. See, e.g., *Tingle*, 41 Va. Cir., at *3 (holding that the length of a reasonable notice period depends on the cause of discharge); *Slade*, 12 Va. Cir., at *1 (holding that "the defendant can by bill of particulars or discovery discern the basis for plaintiff's claim of damages due to lack of reasonable notice"); *Braunfeld*, 12 Va. Cir., at *3 (rejecting defendant's argument that an employee must provide evidence to show what timeframe constitutes reasonable notice in a given trade or industry and holding that the jury was well qualified—based on inferences drawn from evidence, common sense, and collective experience—to determine what constituted a reasonable notice period).

143. See, e.g., *Perry v. Am. Home Prods. Corp.*, No. 3:96CV595, 1997 WL 109658, at *8–9 (E.D. Va. 1997); *Rubin*, 78 Va. Cir., at *3; *Brehm*, 59 Va. Cir., at *2.

144. See *Perry*, 1997 WL 109658, at *8–9 (explaining that "a 'reasonable notice' exception to the employment-at-will doctrine would effectively eviscerate the at-will doctrine itself").

145. *Id.* at *1.

146. *Id.* at *3.

147. *Id.* at *8; see also *Brehm*, 59 Va. Cir., at *2–3 (asserting that prior decisions imposing a reasonable notice requirement "rest upon taking a few words out of the definition of at will employment" in rejecting reasonable notice claim).

148. *Perry*, 1997 WL 109658, at *3.

149. *Id.* at *9.

the employer breached its implied duty to provide reasonable notice. What is “reasonable” is a question of fact, and thus every case filed would have to be decided by the finder of fact.¹⁵⁰

Noting that “serious policy considerations, affecting countless business relationships” would be implicated in such a “substantial alteration” of the rule, it concluded that the notice issue should be left to the state legislature.¹⁵¹

The rationale for the court’s rejection of a reasonable notice rule is revealing. *American Home* posits a fundamental inconsistency between employment at will and notice, but its concerns are functional rather than doctrinal. The supposed incompatibility derives from the risk of litigation over reasonableness that would presumably chill employers’ exercise of substantive discretion. Such concerns are real, but the analysis is incomplete. Courts can temper administrative challenges through careful formulation of doctrine, and to the extent they cannot, that is merely one of many policy considerations at stake in the development of the at-will doctrine. Whatever burdens and costs it might impose, reasonable notice also offers fair warning and a modest income cushion to vulnerable workers. Such considerations, which go unmentioned in *American Home*, may be worth the tradeoff.

For these reasons, it is not unreasonable to suggest, as *American Home* does, that the legislature is the best body to formalize and elaborate on a notice requirement. But such a preference does not permit courts to sit idle. In fact, *American Home*’s reference to judicial role is ironic. Prior to the district court’s decision, all Virginia state court cases that had addressed the issue recognized a reasonable notice claim, and the language on this point in *Stonega*, whatever the scope of the issues in the case, is perfectly clear. The federal court’s choice to take the law in a different direction based on such a limited analysis is surprising at best.¹⁵² The employment at-will doctrine, and the principles of contract law of which it is ostensibly a part, are ultimately common law inventions. It is appropriate for state trial courts to interpret that law to require parties to supply reasonable notice of termination if such a reading is doctrinally justified. Part III argues that it is.

150. *Id.*

151. *Id.* (quoting *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 919 (Va. 1987)).

152. At worst, it is a violation of the *Erie* doctrine, which requires federal courts exercising diversity jurisdiction to apply the substantive law of the state in which they sit. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

III. THE CONTRACT CASE FOR NOTICE

Part II suggested that while the law is clear that employment at will permits parties substantive discretion to determine whether to terminate, the procedural obligations of the parties in executing termination are unsettled. This Part takes the first step in building a common law case for an obligation to provide reasonable notice of at-will employment termination by appealing to general contract law. It identifies three doctrines or legal theories through which courts interpreting nonemployment contracts have imposed a reasonable notice obligation on parties to an indefinite relationship: the use of reasonable gap fillers, the implied duty of good faith, and the doctrine of consideration.

Although each of these approaches has an established doctrinal foundation, they are not equal in terms of their potential to support a robust entitlement to notice of termination in the employment context. As will be seen, the law of contract gap fillers offers the strongest doctrinal support for a right to notice, while arguments based on consideration rely on more creative analysis. At the same time, treating reasonable notice as a gap filler yields only a default obligation to provide notice of termination that parties (and certainly employers) are capable of avoiding through written agreements that restore a “no notice” regime. In contrast, a consideration-based analysis treats notice as a substantive element of the contract necessary for contract formation and enforcement.

A. Reasonable Notice as a Contract Gap Filler

Once upon a time, the law of contracts required a requisite degree of specificity for contract enforcement. Where parties failed to provide sufficient detail, a court would conclude that there had been no meeting of the minds and the claim for breach would fail.¹⁵³ This is no longer the dominant view. Contemporary courts typically supply missing terms in an agreement where the requisite intent to be bound can be discerned.¹⁵⁴ Indeed, mainstream contracts literature recognizes that most contracts are to some degree “incomplete,” in that they often fail to expressly set forth all of the parties’ obligations or anticipate possible contingencies.¹⁵⁵ Whether such “gaps” result from drafting failures or failures of the imagination,¹⁵⁶ courts will attempt to fill them, either by determining the parties’ intent with respect to the particular issue or by

153. See generally 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 4.3, at 569 (rev. ed. 1993).

154. See *id.* § 4.3, at 569–70.

155. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91–93 (1989).

156. See *id.* at 92, 94 (exploring the different ways in which, and reasons why, contracts may be incomplete vis-à-vis a particular future contingency).

applying an accepted default rule.¹⁵⁷

Termination at will is itself a default rule, applied in situations where parties fail to specify the duration of their relationship and possible reasons for termination. In this respect, employment law and general contract law are aligned.¹⁵⁸ In the case of indefinite commercial agreements and other long-term nonemployment contracts, however, courts generally supply a reasonable notice term in the absence of any express provision regarding the process for termination.¹⁵⁹

The clearest authority for this principle is Article 2 of the Uniform Commercial Code, which codifies a series of default rules applicable to commercial agreements. The touchstone for most of these defaults is reasonableness: parties are obligated to pay a “reasonable” price,¹⁶⁰ deliver goods within a “reasonable” time,¹⁶¹ and set reasonable quantities in instances where the governing contract does not provide a more specific rule.¹⁶² The default rules with respect to contract termination are consistent with this approach. Section 2-309 provides that commercial relationships of indefinite duration are terminable at the will of either party.¹⁶³ However, § 2-309(3) “requires that reasonable notification be received by the [non-terminating] party.”¹⁶⁴ In other words, the UCC allows parties to terminate at any point in the relationship for any reason, but requires the terminating party to

157. The problem of how courts select particular gap fillers and set background default rules is the subject of a large body of literature. *See generally* 6 PETER LINZER, CORBIN ON CONTRACTS § 26.4[A], at 430–41 (Joseph M. Perillo ed., 2010) (summarizing key contract theories). I will discuss some of these ideas briefly, *infra* Section IV.A.

158. *See* U.C.C. § 2-309(2) (2012) (“If the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.”).

159. *See, e.g., id.* § 2-309(3) (“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party . . .”).

160. *See id.* § 2-305(1) (“The parties if they so intend may conclude a contract for sale even if the price is not settled. In such a case the price is a reasonable price at the time for delivery . . .”).

161. *See id.* § 2-309(1) (“The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.”).

162. *See, e.g., id.* § 2-306(1). The pertinent portion of the UCC provides:

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Id.

163. *Id.* § 2-309(2).

164. *Id.* § 2-309(3).

mitigate the harm to the other side by giving advance warning of the loss.

Case law in this area illustrates how a notice requirement comfortably coexists with the principle of at-will termination. In *Pharo Distributing v. Stahl*,¹⁶⁵ the parties had worked together for several years pursuant to an oral distributorship agreement when the defendant advised the plaintiff that it had purchased its own distributorship and that the contract would end six days later.¹⁶⁶ The agreement did not contemplate a fixed duration, and the court presumed that the defendant had the right to terminate at any time.¹⁶⁷ Notwithstanding, it permitted the subdistributor to claim damages.¹⁶⁸ While the loss occasioned by the termination of the contract was not itself compensable, the court explained, the losses owing to the failure to give sufficient advance warning were.¹⁶⁹ The failure to notify deprived the terminated party of “an opportunity to make appropriate arrangement[s],” such as finding a replacement supplier, unloading inventory, and making workforce adjustments.¹⁷⁰

Outside the UCC context, where common law applies, the default rule regarding notice is less explicit. However, the dominant approach, to the extent it can be disentangled from the employment law cases,¹⁷¹ appears consistent with the UCC requirement of reasonable advance warning of termination.¹⁷² Thus, courts have frequently implied a common law reasonable notice term to non-UCC distributorship contracts.¹⁷³ In *California Wine Ass’n v. Wisconsin Liquor*, for instance,

165. 782 S.W.2d 635 (Ky. Ct. App. 1989).

166. *Id.* at 636.

167. *Id.* at 638.

168. *Id.* at 639.

169. *Id.* at 638 (“It is not the termination of an at-will contract that constitutes the breach; the right to terminate is inherent in the nature of the contract. . . . Rather, it is the failure to give reasonable notice before termination that constitutes breach.”).

170. *Id.* at 638.

171. The misunderstanding of employment at will has muddied the waters of general contract law in this context. Occasionally, courts have felt compelled to find indefinite, nonemployment contracts terminable at will without notice based on analogy to employment at will. *See, e.g.*, *Cronk v. Vogt’s Ice Cream, Inc.*, 15 N.Y.S.2d 649, 652 (N.Y. Sup. Ct. 1936); *infra* Section IV.A. Other courts have made a point to distinguish contrary employment cases in implying a reasonable notice requirement in nonemployment cases. *See, e.g.*, *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484, 492 (N.D. Cal. 1954) (finding cases involving indefinite employment contracts “not controlling” in a pre-UCC distributorship contract termination dispute because the latter involved both professional services and sales of goods).

172. *See Teitelbaum v. Hallmark Cards Inc.*, 520 N.E.2d 1333, 1336 (1988) (noting that UCC § 2-309 “codif[ies] common law principles that existed before the adoption of the Uniform Commercial Code”).

173. *See, e.g.*, *Cal. Wine Ass’n v. Wis. Liquor Co. of Oshkosh*, 121 N.W.2d 308, 315–17 (Wis. 1963) (attaching a reasonable notice requirement to an implied contract for exclusive liquor distributorship); *Aronowicz v. Nalley’s Inc.*, 30 Cal. App. 3d 27, 35, 51 (Cal. Ct. App.

the Wisconsin Supreme Court held that a wine and brandy producer breached its exclusive distributorship contract by appointing a dual distributor without advance notice to the original distributor.¹⁷⁴ The court held that in the face of contractual silence, “either party may terminate [the contract] at pleasure by giving reasonable notice . . . of his intention,” and upheld the trial court’s conclusion that sixty days’ notice would have been reasonable under the circumstances.¹⁷⁵

The same can be said, albeit with somewhat less consistency, of other types of indefinite agreements. Louisiana, owing to its civil law history, offers an easy illustration. That state’s general code of civil obligations, Article 2024, explicitly provides that a “contract of unspecified duration” may be terminated at will by either party “by giving notice, reasonable in time and form.”¹⁷⁶ This rule has been applied to personal and small business relationships, some of which resemble employment relationships. In *Caston v. Woman’s Hospital Foundation*,¹⁷⁷ for instance, the plaintiff was a photographer who received permission from the chairman of the defendant–hospital’s board of directors to photograph all infants born in the hospital in exchange for thirty percent of his sales proceeds.¹⁷⁸ Within days of setting up in the ward and beginning to photograph, the head of the pediatric department asked him to remove his equipment and the hospital terminated the arrangement shortly after.¹⁷⁹ In the photographer’s subsequent suit for breach, the Louisiana Court of Appeals, relying on a case involving a radio advertising contract, held that the plaintiff’s contract with the hospital was “one terminable upon the giving of reasonable notice.”¹⁸⁰ The court went on to conclude, without any factual explanation, that “six months[’] notice would have been reasonable” and awarded the photographer the amount he would have made during a six-month period.¹⁸¹

1972) (applying a reasonable notice requirement to an oral meat distributorship contract); *cf.* *Boland Inc. v. Rolf C. Hagen (USA) Corp.*, 685 F. Supp. 2d 1094, 1107 (E.D. Cal. 2010) (finding a material question of fact whether a pet shop supply distributor had expended significant sums or substantially arranged its business such that the manufacturer could not terminate its nonexclusive contract without reasonable notice).

174. 121 N.W.2d 308, 317 (Wis. 1963)

175. *Id.* at 316. The court affirmed the trial court’s award to the distributor of its prospective margin on sales for the sixty-day period following breach of the exclusive arrangement. *Id.* at 318.

176. LA. CIV. CODE ANN. art. 2024 (2013).

177. 262 So. 2d 62 (La. Ct. App. 1972).

178. *Id.* at 63.

179. *Id.* at 64.

180. *Id.* at 65 (quoting *Daily States Pub. Co v. Uhalt*, 126 So. 228, 232 (1930)).

181. *Id.*

B. Reasonable Notice as a Good Faith Duty

The preceding analysis offers one possible foundation for a default rule requiring reasonable notice of employment termination consistent with mainstream contract law. However, that is as far as it goes. By definition, default rules (and contract gap fillers more generally) apply only in the event that parties fail to directly address a particular issue in their contract. Were a comparable rule adopted in the employment context, employers could reinstitute the current “no notice” system by insisting that their employees sign written agreements to that effect.¹⁸²

Under the UCC, however, the ability to alter default terms must be understood in relationship to broader contractual obligations of good faith. As the comment to § 2-309 explains, the reasonable notice default recognizes that “the application of principles of good faith and sound commercial practice normally call for such notification . . . as will give the other party reasonable time to seek a substitute arrangement.”¹⁸³ Since parties have only limited ability to contract out of good faith, their ability to avoid reasonable notice obligations is similarly constrained. Indeed, § 2-309 states that an agreement limiting or dispensing with notice is unenforceable “if its operation would be unconscionable.”¹⁸⁴ This language could be interpreted to disallow immediate termination based on extreme hardship to the losing party, notwithstanding a contract provision purporting to grant that right.

For a reasonable notice rule to provide a modicum of protection to workers, it is important to similarly moor the doctrinal arguments in favor of such an approach to deeper components of contractual obligation within the employment relationship. As in the UCC context, the universally implied contractual duty of good faith can provide that anchor. Good faith is an obligation inherent in every contract, including, according to most courts, employment contracts.¹⁸⁵ Its purpose is to

182. See generally Arnow-Richman, *Just Notice*, *supra* note 8, at 66–67 (discussing this risk); Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 174 (2006) (expressing skepticism about a waivable notice right, observing that “[t]he reality . . . is that employees will agree to just about anything an employer wants. Whether this is due to employee desperation, inequality of bargaining power, signaling concerns, or lack of information, permitting employers and employees to bargain around the mandatory notice requirement would likely make it worthless”).

183. U.C.C. § 2-309 cmt. 8 (2012).

184. See *id.* § 2-309(3). Section 1-302(b) specifies that when the UCC provides for an action “to be taken within a reasonable time,” parties may fix a particular timeframe that is not “manifestly unreasonable.” *Id.* § 1-302(b).

185. See *id.* § 1-304; RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.07 (2009) (“Each party to an employment contract, including at-will employment, owes a non-waivable duty of good faith and fair dealing to each other party.”). For an example of the application of the implied duty of good faith in the employment

limit unbridled use of discretion. Its effect is to preclude behavior that otherwise would be permitted under a strict reading of the parties' express contract.

Two well-developed theoretical approaches to good faith have framed the contemporary understanding of the scope of the duty within the mainstream contracts literature: Professor Robert Summers's "excluder" approach¹⁸⁶ and Professor Steven Burton's "forgone benefit approach."¹⁸⁷ The excluder approach embraces a broad notion of good faith, incapable of specific definition, that prohibits a variety of behaviors that may occur during performance—evasion and delay, willful underperformance, obstructing performance, and similar conduct.¹⁸⁸ In contrast, the foregone benefit approach finds a breach of the duty only where a party abuses contractually conferred discretion to recapture opportunities sacrificed at contract formation.¹⁸⁹ Under such an approach, the implied duty applies principally to situations in which a party attempts to withhold or obstruct the flow of benefits rightfully allocated by the contract to his or her opponent.

As a matter of general contract doctrine, the broad excluder approach has won the day. The Restatement (Second) of Contracts explicitly adopts an expansive view of good faith, one that "emphasizes . . . consistency with the justified expectations of the other party" and excludes conduct that "violate[s] community standards of decency, fairness or reasonableness."¹⁹⁰ The UCC draws on this approach in setting forth its previously described gap filler provisions, which amount to specific elaborations on the doctrine. These principles all impose an obligation to act "reasonably" and "in good faith" with respect to matters on which the contract is vague or silent or permits significant latitude to one party.¹⁹¹ Thus, for instance, a party must act reasonably and in good faith in setting an open quantity term tied to its

context, see *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977). As will be discussed, however, the contours of the duty are limited in the employment context. See *infra* Section IV.B.

186. See Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 207 (1968) [hereinafter Summers, *Good Faith*]; Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818–21, 825–30 (1982) [hereinafter Summers, *General Duty*].

187. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 372–73 (1980).

188. See Summers, *Good Faith*, *supra* note 186, at 204.

189. See Burton, *supra* note 187, at 387–88. For an excellent summary of these two theories, see Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1033–49 (2003).

190. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

191. See, e.g., U.C.C. § 2-305(2) (2012) ("A price to be fixed by the seller or by the buyer means a price to be fixed in good faith.").

output, production requirements, or other fluctuating benchmarks.¹⁹² In this way the doctrine ensures that parties abide by an implicit code of business ethics during the life of their agreement.

While good faith serves largely to moderate party performance and preserve contractual relationships, § 2-309 makes clear that it also resonates at the point of termination, particularly in the context of long-term contracts.¹⁹³ As the court in *Pharo* puts it, it is an obligation that is grounded in “fairness and equity” and designed to grant the losing party time to “‘get[] his house in order’ to proceed in absence of the former relationship.”¹⁹⁴

C. Reasonable Notice as Consideration

The duty of good faith offers a well-grounded doctrinal basis for implying a reasonable notice obligation, and one that is more robust than a mere default rule. Understanding reasonable notice as an aspect of good faith ties that obligation to a larger and broader implied duty that may not be fully waived. That said, contract law is unclear as to the degree to which a party can contract around good faith by expressly permitting that which the duty would otherwise preclude.¹⁹⁵ Under the UCC, unconscionability serves as an overall limit on contracting practices and is specifically mentioned with respect to waivers of notice of termination.¹⁹⁶ For this reason, this Article contends, *infra*, that the unconscionability doctrine should be understood to void such waivers, at least in the employment context. At this juncture it is fair to note, however, that unconscionability, particularly in the case of sophisticated commercial transactions, is an extremely high standard. A true mandatory obligation—one that may not be waived by the parties—

192. *See id.* § 2-306(1).

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Id.

193. *See id.* § 2-309 cmt. 8. The same relationship has been recognized by courts applying the common law. *See, e.g.,* *Misco, Inc. v. U.S. Steel Corp.*, 784 F.2d 198, 203 (6th Cir. 1986) (“Reasonable notice of termination flows from and must be determined in accordance with the standards of good faith and fair dealing implied in every contract.”).

194. *Pharo Distrib. Co. v. Stahl*, 782 S.W.2d 635, 638 (Ky. Ct. App. 1989).

195. *See, e.g.,* *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 804 (Cal. Ct. App. 1995) (reviewing competing decisions on the relationship between the duty of good faith and express reservations of contractual discretion).

196. *See* U.C.C. § 2-309(3).

must therefore rely on a different doctrinal theory.

The doctrine of consideration can do this work. A clear backstop to the enforceability of clauses that implicate the duty of good faith is the point at which the contract would be so discretionary as to make it illusory on one or both sides.¹⁹⁷ While the notion of mutuality of obligation has long been discredited, at a minimum both parties must have made a promise or engaged in a solicited performance in order for a contract to exist.¹⁹⁸ Where parties do not have this modicum of consideration, their promises are said to be illusory.¹⁹⁹

The effect of labeling a contract illusory is to declare it nonbinding, and indeed one judicial approach to illusory contracts is to refuse enforcement. However, courts have at times inferred or implied an obligation on the part of one or both parties to make the contract enforceable if there is an intent to be bound. The classic example is *Wood v. Lucy, Lady Duff-Gordon*,²⁰⁰ in which Lady Duff-Gordon, a fashion designer, awarded Wood an exclusive license to market her creations.²⁰¹ Wood, however, made no promises in the contract other than to pay Lady Duff-Gordon half the profits if her creations sold.²⁰² Rather than declare the contract unenforceable, then-Judge Cardozo, writing on behalf of the New York Court of Appeals, implied an obligation on Wood's part to use "reasonable efforts to bring profits and revenues into existence."²⁰³

While implying reasonable (or good faith) efforts is perhaps the dominant judicial response to such omissions, implying a reasonable notice obligation is another way to save a contract that would otherwise be lacking consideration. *Sylvan Crest Sand & Gravel Co. v. United States*,²⁰⁴ a case involving government purchase of trap rock, illustrates this approach.²⁰⁵ The plaintiff was a quarry who won four bids to supply the defendant's requirements of different sizes of rock for an airport construction project.²⁰⁶ The contracts were government-drafted forms containing no delivery terms, which included the following language:

197. See *Third Story Music*, 48 Cal. App. 4th at 808 ("[C]ourts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement.").

198. See 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 6.1, at 204 (rev. ed. 1995).

199. See *id.* at 207.

200. 118 N.E. 214 (N.Y. 1917).

201. *Id.* at 214.

202. See *id.*

203. *Id.* at 215.

204. 150 F.2d 642 (2d Cir. 1945).

205. *Id.* at 644.

206. *Id.* at 642-43.

“Cancellation by the Procurement Division may be effected at any time.”²⁰⁷ The facts giving rise to the parties’ dispute are not reported, but the defendant allegedly refused to “request or accept delivery” and the issue, as framed by the court was “whether [the defendant had] made any promise that has been broken” in light of the broad cancellation clause in the contracts.²⁰⁸

The Second Circuit found that it had. The court concluded that, despite what the contracts said, the cancellation clause could not be read to grant the government the power to terminate at any time without warning.²⁰⁹ Such an interpretation would have been unreasonable, as it would have allowed the government to request a delivery and then refuse to accept it.²¹⁰ Moreover, by giving one party absolute discretion as to whether to perform, such a reading would have “ma[d]e nugatory the entire contract.”²¹¹ Rather, the court held that the clause should be understood to require the government to accept and pay for the rock unless and until it provided “notice of cancellation [to the plaintiff] within a reasonable time.”²¹² The court explained:

[I]f it be assumed that the United States was acting in good faith in accepting the plaintiff’s bid[, t]he words should be so construed as to support the contract and not render illusory the promises of both parties. . . . [T]he agreement obligated the defendant to give delivery instructions or notice of cancellation within a reasonable time after the date of its “acceptance.” This constituted consideration for the plaintiff’s promise to deliver in accordance with delivery instructions, and made the agreement a valid contract.²¹³

Such a reading, the court recognized, still gave the government a significant advantage in the contracting relationship, allowing it to preserve its option not to perform at all subject only to the notice requirement.²¹⁴ That said, this obligation was “a sufficient consideration to support the contract.”²¹⁵

Sylvan stands for the proposition that a pure at-will contract—one

207. *Id.* at 643.

208. *Id.* at 642–44.

209. *Id.* at 644–45.

210. *Id.* at 644 (“[The government’s] ‘acceptance’ [of the plaintiff’s bids] should be interpreted as a reasonable business man would have understood it. Surely it would not have been understood thus: ‘We accept your offer and bind you to your promise to deliver, but we do not promise either to take the rock or pay the price.’”).

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.* at 645.

215. *Id.*

that is at will in both the substantive and procedural sense—is not a contract at all, although the parties may so intend. In such cases, implying an obligation to provide advance notice of termination is one way to preserve the contract while respecting the clear intent of the drafting party to retain broad discretion to terminate for any or no reason.

IV. CLAIMING CONTRACT LAW FOR EMPLOYMENT LAW

The previous Part demonstrated that contract law, using a variety of theories, ordinarily imputes an obligation to provide reasonable notice of termination in the case of indefinite contracts otherwise terminable at will. The question then is whether and why employment law might deviate from these rules of general applicability. If anything, there appears to be even stronger arguments in favor of advance notice of termination in the employment context, particularly where the employer initiates the termination. Unlike business entities, most workers are unable to diversify their investments across multiple contracts and generally lack the liquidity necessary to withstand the loss of such an important relationship. Advance warning is therefore necessary as a policy matter to give the worker time to find replacement employment and avoid a sudden disruption in income.²¹⁶

This Part examines the use of the previously described contract doctrines and theories—the use of reasonable gap fillers, the implied duty of good faith, and the doctrine of consideration—in the employment context. In contrast to how these concepts are deployed in other contractual settings, courts examining employment relationships generally do not imply or impose reasonable notice obligations on the parties. In fact, they often do not consider these contractual principles as part of the governing law. Rather, courts analyze employment relationships exclusively through the lens of employment at will, often treating the relationship as somehow less than contractual owing to the parties' freedom to terminate. This Part critiques this deviant treatment of employment contracts, arguing that courts should follow the same notice rules applied to other contracting parties and demonstrating how this can be accomplished consistent with employment at will.

A. Reasonable Notice as the “Other” Employment Law Default

In interpreting employment contracts, courts do not use the terminology of gap filling, but that is in fact what they do. The power to terminate at will is a default term that courts apply in the face of party

216. I have explored such considerations extensively in other works. *See, e.g.*, Arnow-Richman, *Just Notice*, *supra* note 8 *passim*; Arnow-Richman, *From Just Cause*, *supra* note 8 *passim*.

silence as to contract duration, just as they do in the case of other indefinite agreements. But while courts interpreting nonemployment contracts will also supply a reasonable notice term, courts treat employment at will as both a comprehensive and exclusive presumption. Courts seem unable to conceive of an employment relationship being terminable at any time for any reason, while simultaneously being subject to an advance notice requirement. The latter obligation is deemed antithetical to employment at will, and employment at will is itself seen as antithetical to contract.

This disconnect is clearest in the case law of Louisiana where, as previously noted, a general rule requiring reasonable notice to terminate an indefinite contract has been codified.²¹⁷ Some courts have asserted that this provision applies equally to employment relationships.²¹⁸ Others have declined to apply the rule to employment at will, though they are at pains to explain why. The analysis in *Finkle v. Majik Market*,²¹⁹ a case involving the termination of a store manager, is telling.²²⁰ The plaintiff alleged breach of promises of training and promotion and the failure to provide notice of termination.²²¹ Regarding the latter claim, the court quoted the reasonable notice provision of Article 2024 and acknowledged its applicability to “any type of contract,” including employment.²²² It went on however to qualify this statement, adding that “[w]here there is no specific contract between [the parties], the employee is at-will and may be terminated . . . without the notice requirement.”²²³ The court did not explain what it meant by a “specific” contract, but concluded that the plaintiff did not have one:

In this case, defendant has provided ample evidence to show that the relationship between it and plaintiff was simple, at-will employment. The affidavits of the company personnel state that plaintiff was not hired under a contract for an indefinite or definite term. Further, the employment application, signed by plaintiff, specifically states that he is

217. LA. CIV. CODE ANN. art. 2024 (2013).

218. *See, e.g.*, *Carlson v. Superior Supply Co.*, 536 So. 2d 444, 446 (La. Ct. App. 1988) (asserting in employment termination case that “[a] contract for an indefinite period is terminable at the will of either party upon giving reasonable notice”); 6 EMPLOYMENT DISCRIMINATION COORDINATOR § 22:4 (West, updated Apr. 2014) (“Under the Louisiana Civil Code[] . . . oral contracts for employment of indefinite duration are terminable at any time at the will of either party upon reasonable notice.”), available at Westlaw EDC ANAREL § 22:4.

219. 628 So. 2d 259 (La. Ct. App. 1993).

220. *See id.* at 261–62.

221. *Id.* at 261.

222. *See id.* at 261–62.

223. *Id.* at 262; *see also* LOUISIANA PRACTICE: EMPLOYMENT LAW § 12:7 (2013–2014) (“Although Civil Code art. 2024 requires notice ‘reasonable in time and form’ prior to termination, at-will employment contracts generally require no notice of termination.”).

not being offered a position with a contract of employment.²²⁴

The reasoning here is opaque, but it appears that the court misapprehends the basic notion of contract, conflating the presence of express terms with the existence of an enforceable agreement. The court seems to think that absent an explicit statement as to duration (whether specific or indefinite) there is no contract between the parties. If that were true, there would be no need for Article 2024. “[S]imple, at-will employment” is a contract for an indefinite term—an agreement to exchange labor for remuneration albeit for an unspecified time.²²⁵ Thus, while the court claims to base its conclusion on a technical application of contract law, there appears to be no doctrinal reason for the distinction in treatment.

Admittedly, the common law rule with respect to notice of termination is not uncontested. Some courts have rejected the idea even outside the employment context.²²⁶ However, that may owe more to the pervasiveness of the strict interpretation of employment at will than to any uncertainty as to how “mainstream” contract principles would otherwise play out. A pre-UCC case for the sale of milk in New York is illustrative. In *Cronk v. Vogt’s Ice Cream*, an ice cream company agreed to buy its requirements of milk and cream from the defendant supplier

224. *Finkle*, 628 So. 2d at 262.

225. Indeed, it is hard to imagine what kind of employment contract would be subject to Article 2024 if not the one in *Finkle*. Had the parties agreed to a fixed term, they would not have had a “contract of unspecified duration.” It is possible that the court had in mind a written agreement containing a provision that the duration of employment was “indefinite,” but distinctions based on the form of the agreement (oral versus written, implied versus express) are anathema to contracts. Moreover, it is likely that the plaintiff signed a statement to the same effect. According to the court, the plaintiff’s job application stated that he was not “being offered a position with a contract of employment.” *Id.* Such language frequently accompanies boilerplate acknowledgements of “at-will” status that employees are asked to sign upon applying for or commencing employment. I have described this trend in several earlier articles. See generally Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) [hereinafter Arnow-Richman, *Rise of Delayed Term*] (discussing this practice); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 [hereinafter Arnow-Richman, *Cubewrap Contracts and Worker Mobility*] (same).

226. See, e.g., *City Stores Co. v. Henderson*, 156 S.E.2d 818, 823 (Ga. Ct. App. 1967) (concluding in credit card cancellation dispute that “[a]s a rule there is no requirement of prior notice for termination by the issuer”); *Cronk v. Vogt’s Ice Cream, Inc.*, 15 N.Y.S.2d 649, 652 (N.Y. Sup. Ct. 1936) (concluding that buyer was not obligated to provide advance notice of termination of indefinite requirements contract); *Simon Bros. Co., Inc. v. Miller Brewing Co.*, 83 Wis. 2d 701, 710 (1978) (concluding that supplier–brewer was not liable to distributor for termination of an indefinite contract without notice).

for an unspecified period of time.²²⁷ The relationship continued for approximately nineteen months, at which point the defendant stopped buying from the plaintiff.²²⁸ The court found no breach in the defendant–buyer’s cessation of performance, noting the general rule applicable to “agency and employment” contracts that, absent a specific duration, a contract is ordinarily terminable at will.²²⁹ It went on to conclude that, similarly, there was no obligation on the part of the defendant–buyer to provide any advance notice of its decision to terminate, again drawing on employment law:

No notice is required in this state to terminate employment contracts at will, and the logic for the distinction claimed [between employment contracts and non-employment contracts] is not apparent. Significantly enough, other jurisdictions in which notice is said to be necessary, treat all agreements of a continuing nature alike in that respect.²³⁰

The court did not cite any case law directly supporting the proposition that employment termination can be effected without notice, and it dismissed as “loose statements” language in several older New York decisions to the contrary.²³¹ Oddly, in support of its assertion that a universal rule should govern all contracts, it cited cases from other jurisdictions applying a reasonable notice rule.²³² Thus, the court appears to have followed its reasoning to precisely the wrong conclusion. Rather than arrest an unjustified divergence between employment and contract law, it elevated an arguably aberrational reading of the law of termination in the employment context to the level of a universal principle of contracts.²³³

227. 15 N.Y.S.2d at 652.

228. *Id.*

229. *Id.*

230. *Id.* at 654.

231. *Id.*

232. *See id.* at 654–55 (citing *Hess v. Iowa Light, Heat & Power Co.*, 221 N.W. 194, 196–97 (Iowa 1928), *Bastian v. Marienville Glass Co.*, 126 A. 798, 799 (Pa. 1924), and *City of Milwaukee v. City of West Allis*, 258 N.W. 851, 852 (Wis. 1935)).

233. Another context in which courts have rejected a reasonable notice rule is consumer contracts with credit card companies. *See, e.g.*, *Gray v. Am. Exp. Co.*, 743 F.2d 10 (D.C. Cir. 1984); *City Stores Co. v. Henderson*, 156 S.E.2d 818, 823 (Ga. Ct. App. 1967). This distinction may be explained by the fact that courts treat such contracts as unilateral. *See, e.g.*, *City Stores Co.*, 156 S.E.2d at 824. Employment has historically been viewed as a unilateral contract as well, but as I will discuss, *infra*, this is a mischaracterization. *See infra* Section IV.C. Regardless, the more contemporary credit card cases (such as those involving a unilateral change in terms by the credit card company, such as the adoption of an arbitration policy), generally involve notice to the cardholder, a practice presumably adopted by issuers as a risk

The one thing *Cronk* did correctly was identify the operative question—whether there is a reason to treat employment differently from other indefinite relationships. As the court suggests, contract law has long proceeded under the assumption that a universal set of rules and principles applies to all voluntary agreements.²³⁴ To the extent courts (and contract theorists) have deviated from this assumption, they have been motivated at least in part by a desire to achieve more just results, suitable to particular contexts.²³⁵ Yet such considerations would suggest that employees are more, not less, in need of a reasonable notice default than other contracting parties. Business entities are well positioned to negotiate express contractual provisions protecting themselves in anticipation of termination. They are also more likely to know and take account of background rules in the process.²³⁶

In this way, a reasonable notice rule is consistent with a variety of theories as to how courts should create and apply contract default rules. One of the most prominent accounts proposes the adoption of “penalty defaults” that force the party with superior information to reveal its contractual preference to the less informed.²³⁷ A reasonable notice

management strategy. *E.g.*, *Providian Nat’l Bank v. Screws*, 894 So. 2d 625, 627–28 (Ala. 2003).

234. Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 916 (2012) (describing the predominance during the last thirty years of “unification theories” of contracts which “present[] a single justificatory principle as the core around which the entire law of contract should be understood”).

235. Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 82–85 (2009) (articulating three critiques of the notion of a “General Contract Law,” including the claim that it yields unjust results in cases that deviate from an “idealized vision of contracting parties”).

236. Workers’ limited understanding of the employment at-will default has been both documented empirically and much discussed by workplace law scholars. *See, e.g.*, Guy Davidov, *In Defence of (Efficiently Administered) ‘Just Cause’ Dismissal Laws*, 23 INT’L J. COMP. LAB. L. & INDUS. REL. 117, 122 (2007) (pointing out that “employees tend to believe that the law provides more job security for them than it actually does”); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 9–10 (2002) (citing studies showing that “most employees believe that they enjoy something like ‘just cause’ protection even in the absence of any express contractual protection”); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (demonstrating through survey data that workers believe “that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract”); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 479–80 (hypothesizing that employees overestimate their rights because they “confuse law and norms” and thereby wrongly think “that the law prohibits what fairness forbids,” particularly with regard to discharge); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 119–20 (2002) (contending that workers “have a false and exaggerated understanding of their legal rights”).

237. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

default would have this effect, prodding the employer to express its preference for a “no notice” term in writing and preventing the employer from reaping the benefit of a favorable background rule without paying for it.²³⁸ The rule is also consistent with more relational accounts of default rules such as those that apply basic notions of fairness or seek to account for the norms of the relationship.²³⁹ Finally, a reasonable notice rule can be justified as a “conventionalist default rule,” one that reflects the common assumptions of laypeople, which would presumably include the adage that termination of employment requires the proverbial two weeks’ notice.²⁴⁰

A full account of the theory of default rules is beyond the scope of this Article.²⁴¹ The point, however, is that mainstream contract law generally presumes a reasonable notice default, and there is no theoretical obstacle to extending that rule to employment relationships. To the contrary, the practical and theoretical justifications for a reasonable notice rule are greater in the context of employment than in commercial relationships. It makes little sense to grant a business entity on the losing side of a failed contract a period of continued profits while denying an individual worker any advance warning or recourse against his or her employer.

B. *Procedural Good Faith Consistent with Employment At Will*

Employment law has similarly veered from the basic contract understanding of the duty of good faith. Although both the UCC and the common law treat the duty of good faith as an inherent feature of every contract, some courts have refused to recognize it in the employment context.²⁴² Those that have recognized the duty have adopted the narrow “foregone benefit” definition of the duty rather than the more widely accepted “excluder” definition.²⁴³ The only factual context in which good faith claims by employees have enjoyed a modicum of success has been where the plaintiff’s termination results in the deprivation of a

238. A similar argument has been made with in support of replacing employment at will with a just cause default. *See* Sunstein, *supra* note 236, at 121.

239. *See, e.g.*, Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43, 54–56 (1993); Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L.J. 19, 27–28 (1993).

240. *See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 432 (1993).

241. For an excellent summary of some of the seminal papers in this area, see 6 PETER LINZER, CORBIN ON CONTRACTS § 26.4[A] (Joseph M. Perillo ed., 2010).

242. *See, e.g.*, *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) (finding the implication of a duty of good faith “incongruous” with the employer’s “unfettered right to terminate the [plaintiff’s] employment at any time”).

243. *See supra* notes 186–87 and accompanying text.

promised benefit.²⁴⁴ Thus, courts have recognized a limited cause of action for deferred payments, such as commissions or bonuses, or the value of a vested benefit where the termination was motivated by a desire to avoid payment.²⁴⁵

Even in those cases that fit this factual paradigm, courts have not permitted recovery absent a demonstration of actual bad faith in the form of an intent to deprive the worker of the lost benefit, a standard not applicable in commercial law relationships.²⁴⁶ In addition, courts have refused even in successful cases to award damages for lost employment generally, as in lost wages.²⁴⁷

This rigid treatment of the duty of good faith reflects a vaulted and doctrinally problematic understanding of employment at will. The conclusion that at-will employment somehow trumps other implied duties relies on the misapplication of a rule of interpretation that pertains to express contract language. Contract law permits parties to limit the scope of the good faith duty by expressly granting or reserving areas of contractual discretion in their agreement.²⁴⁸ But most employees do not have written contracts. Where there is no written agreement between the parties, employment at will is an implied term just like good faith—a provision supplied by law.²⁴⁹ Courts rejecting employee good faith based on the “conflict” between the implied duty and employment at will err in elevating what is merely a default principle to the status of an explicit reservation of discretion.

More importantly, the inherent inconsistency between the implied duty of good faith and such a written reservation of discretion arises only when good faith is equated with a substantive limitation on the power to terminate. Employment plaintiffs bringing implied duty claims tend to frame their cases around allegations that their employer had a

244. See, e.g., *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977).

245. See *id.* at 1253.

246. See *id.* at 1255–56 (holding that a cause of action for breach of duty of good faith is available where the plaintiff can demonstrate that the termination was for the purpose of depriving him of earned commissions).

247. For this reason, some scholars have eschewed the doctrine altogether in favor of relying on other common law theories in seeking to expand workers' termination rights. See, e.g., Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1233–34 (1992).

248. See *VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 778 (S.D.N.Y. 1969) (“The general rule [regarding the implied duty of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . . [I]f defendants were given the right to do what they did by the express provisions of the contract there can be no breach.”); *supra* Section III.B.

249. In fact, good faith is the more robust of the two implied terms—a mandatory and universally implied term that, per U.C.C. § 1-302 (2012), may not be waived, rather than an ordinary default term that parties are free to replace.

bad faith reason for terminating them—what may be described as a “substantive good faith” claim.²⁵⁰ This type of claim falls in neatly with the broader common law wrongful discharge jurisprudence, which has recognized various paths to overcoming the at-will presumption in situations involving wrongful or arbitrary employer motivation.²⁵¹ Yet such inquiries into why the employer acted are in direct tension with the most entrenched component of employment at-will—the substantive discretion rule. For this reason, it may be more fitting—and more useful to employee litigants—to think of the duty of good faith as a procedural obligation, one that requires parties to act fairly in carrying out discretionary decisions that are otherwise immune from substantive review.

Although no court has taken this “procedural good faith” approach to notice of employment termination, there are a handful of cases involving other types of employment disputes that suggest judicial amenability to such a development. One example derives from the unlikely context of employee drug testing. In *Luedtke v. Nabors Alaska Drilling, Inc.*,²⁵² the Alaska Supreme Court held that as a matter of good faith, an employer had to provide advance notice to its workers of its decision to institute a drug testing protocol.²⁵³ There, the worker was suspended for testing positive for drugs and terminated when he failed to appear for a retest.²⁵⁴ The court found nothing against public policy in the termination, concluding that the employer’s interest in safety outweighed the employee’s interest in privacy.²⁵⁵ It held, however, that the initial suspension violated the duty of good faith because the employer had failed to provide the worker advance notice of its drug testing policy.²⁵⁶ The duty of good faith, the court explained, not only has substantive content but also requires that the employer act in “a manner which a reasonable person would regard as fair.”²⁵⁷

The recognition of promissory estoppel claims by neophyte

250. See, e.g., *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) (plaintiff accountant asserted that his employer had wrongfully terminated him for flagging accounting improprieties in accordance with his job duties).

251. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657–62 (1996) (describing the development of “bad motive” exceptions to employment at will through antiretaliation statutes and public policy jurisprudence); Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1491–93 (1996) (same).

252. 834 P.2d 1220 (Alaska 1992) [*Luedtke II*].

253. *Id.* at 1225–26.

254. *Luedtke v. Nabors Alaska Drilling, Inc.* [*Luedtke I*], 768 P.2d 1123, 1126 (Alaska 1989).

255. *Id.* at 1133–37.

256. *Luedtke II*, 834 P.2d at 1225–26.

257. *Id.* at 1224.

employees offers another example. Courts have held that employees terminated immediately upon or prior to starting a new job have a limited cause of action where they made investments or incurred losses based on the employer's offer. In the seminal case, *Grouse v. Group Health Plan, Inc.*,²⁵⁸ a pharmacist resigned from his current employment and turned down a job in reliance on the defendant's offer of employment, only to be fired prior to starting his new position.²⁵⁹ The court recognized a claim under the Restatement of Contracts § 90, treating the plaintiff's foregone job opportunities as a form of detrimental reliance.²⁶⁰ Its rationale, however, was informed by good faith notions. Attempting to delineate the scope of the cause of action, the court distinguished the plaintiff's situation from that of ordinary at-will employees, noting that under the facts presented the employee "had a right to assume he would be given a good faith opportunity to perform . . . once he was on the job."²⁶¹ The result is equivalent to a minimum period of employment, much like what would be required under a reasonable notice rule.²⁶²

Of course, analogies to drug testing and promissory estoppel cases are attenuated, but they lend some support to a theory that has much to commend itself as a policy matter. Indeed, it would be surprising for a court to dismiss entirely the possibility of a procedural good faith claim given the underlying rationale for reasonable notice under the UCC and nonemployment contract law. Almost invariably the employee will have made a significant financial and personal investment in the job and will need time to wind up the relationship and find an alternative "buyer" for his or her services.

258. 306 N.W.2d 114 (Minn. 1981).

259. *Id.* at 115–16.

260. *See id.*

261. *Id.* at 116. In many ways the implied duty of good faith provides a better rationale for these cases than promissory estoppel, which poses a more direct conflict with substantive employment at will. While disappointed employees can generally show reliance in retracted offer cases, they are often at pains to meet the other elements of the promissory estoppel claim. Courts struggle to explain how it is reasonable for an employee to rely on a promise of at-will employment or why it is unjust for the employee to suffer the consequence of such reliance. *See, e.g.,* *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 147 (La. Ct. App. 2005) (noting, in rejecting *Grouse*, that it is "patently unreasonable" for an employee to rely on an offer of at-will employment). In such cases, promissory estoppel is not substituting for the absence of an enforceable contract or even for a failed contract, but is arguably enlisted to replace the contract to which the parties ostensibly agreed.

262. A case involving a retracted offer arising under Florida's reasonable notice rule reveals the overlap between the two claims. In *Crawford v. David Shapiro & Co.*, the plaintiff was a resident of England who relocated to Florida for a job with the defendant. 490 So. 2d 993 (Fla. Dist. Ct. App. 1986). Upon arriving in Florida, however, he learned that he would not be employed. The court found actionable the defendant's failure to provide reasonable notice of its retraction and awarded the plaintiff damages for the expenses incurred in relocating to the United States in reliance on the offer. *Id.* at 996.

In fact, the current state of the duty of good faith in employment relationships is puzzling. One would expect the law of good faith to resonate most strongly in those contexts, such as employment, that involve relationships of dependence and the risks associated with nondiversifiable investments. Instead, commercial parties in arms' length transactions appear to have greater good faith obligations to one another than companies do in dealing with workers. Recognizing a procedural good faith claim entitling employees to reasonable notice of termination would be a convenient and doctrinally honest vehicle for mitigating the harsh effects of employment at will without defeating the substantive discretion aspect of the rule.

C. Reasonable Notice and the Bilateral Employment Contract

Finally, courts are highly idiosyncratic in their application of contract formation principles to employment relationships. Whereas contract law generally favors finding a mutually enforceable relationship, courts invariably treat employment as a unilateral contract, one in which the parties have no reciprocal obligations to each other.²⁶³

This peculiar treatment of employment contracts conflates the ability to terminate at will with the absence of a binding obligation. Up until the mid-twentieth century, courts frequently cited lack of mutuality as a reason to refuse the enforcement of employer promises of long-term employment in situations where the employee was not similarly bound.²⁶⁴ Such thinking mistook mutuality of obligation for an equivalency requirement and violated the bedrock principle that courts do not inquire into the adequacy of consideration.²⁶⁵

The majority of courts now recognize the error in that rationale, and mutuality no longer figures prominently in employment contract analysis. However, courts have not provided a more cogent theory of consideration that explains how and to what extent parties to an employment relationship are contractually obligated to one another

263. PERILLO & BENDER, *supra* note 198, § 6.2, at 213; Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 551–52 (1983).

264. Even courts disclaiming the applicability of mutuality of obligation often proceeded to refuse enforcement based on a lack of equivalence in the parties' ability to enforce the agreement. Thus, some courts have insisted that the employee show "additional consideration" to support an employer's promise of job security beyond simple agreement to accept the job or turn down another offer. *See, e.g.,* *Hanson v. Cent. Show Printing Co.*, 130 N.W.2d 654, 658 (Iowa 1964) (asserting that "the real basis for the majority rule" requiring additional consideration is that "there is in fact no binding contract . . . when the employee has not agreed to it; that is, when he is free to abandon it at any time").

265. *See* PERILLO & BENDER, *supra* note 198, § 6.1; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.10 (5th ed. 2003); *id.* § 4.12, at 205 ("The doctrine is not one of mutuality of obligation but rather one of mutuality of consideration. . . . The concept of 'mutuality of obligation' has been thoroughly discredited.").

given that one or both remain free to terminate at will.²⁶⁶ Treating employment as a unilateral contract sidesteps the issue. Under this construction, a job offer (or any terms of employment) is viewed as an offer for a unilateral contract that the employee may accept by performance.²⁶⁷ If he or she accepts, the employer is obligated to pay for the work performed, but neither has an obligation to continue. By definition, only one side (the employer) has made any promise at all, and that promise is a conditional one, contingent on the employee's choice to perform.

But unilateral contract analysis is an awkward vehicle for theorizing the employment relationship.²⁶⁸ To begin, unilateral contract analysis has an idiosyncratic and increasingly limited role within general contract theory. The Second Restatement of Contracts famously rejected the terminology of “unilateral/bilateral” and moved away from distinctions that link contract formation to the manner of acceptance—either promise or performance.²⁶⁹ According to the Restatement, offerees are free to accept in any reasonable manner, unless the offeror or the circumstances clearly specify.²⁷⁰ This relegates unilateral contract analysis to a narrow universe of transactions in which the promisor does not want to be bound until the performance is fully completed and the

266. See Lord, *supra* note 22, at 714 (recognizing that “[b]ecause the traditional rule allows either party to an at-will relationship to put an end to it at any time, a promise by either the employer or the employee to continue an existing at-will relationship is by its nature illusory” and faulting courts for failing to treat promises premised on continued employment accordingly).

267. See, e.g., *Asmus v. Pac. Bell*, 999 P.2d 71, 81 (Cal. 2000) (describing a company's management security policy as an “implied in-fact unilateral contract,” the modification of which was accepted by employees via their continued employment); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 96 (Conn. 1995) (“To determine the contents of any particular implied contract of employment, the factual circumstances of the parties' relationship must be examined in light of legal rules governing unilateral contracts.”); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 630 (Minn. 1983) (describing employer's personnel manual as a “unilateral offer” that the employee accepted through “continued performance of his duties despite his freedom to quit”); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J. 1985) (describing an employer's personnel manual as “an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue”); PERILLO & BENDER, *supra* note 198, § 6.2; Bryce Yoder, *How Reasonable is “Reasonable”? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1523 (2008).

268. Professors Hazel Beh and Jeffrey Stempel have argued against the characterization of insurance contracts as unilateral for some of the same reasons. See Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85, 86, 89 (2010).

269. See RESTATEMENT (SECOND) OF CONTRACTS §§ 53–54 (1981).

270. See *id.* at § 50, cmt. a (“Offers commonly invite acceptance in any reasonable manner In case of doubt, the offeree may choose to accept either by promising or by rendering the requested performance.”).

promisee is unable to promise complete performance.²⁷¹ These include offers of rewards or other promises that might be fairly characterized as a challenge or dare, such as paying someone to walk across the Brooklyn Bridge.²⁷²

Employment does not fit this paradigm. As a practical matter, employment is often offered with the expectation of a promissory acceptance. The employer offers the job and the employee accepts with the expectation that performance will begin at a subsequent time, which may or may not be proximate to the time of acceptance. In the interim, both parties are bound and wish to be bound so that the employee can confidently suspend his or her job search and the employer conclude its recruitment effort.

More importantly, such employment cannot be characterized as a discrete transaction. No doubt some types of work lend themselves to spot assignments—a contractor, for instance, may offer a laborer \$100 to tear down a fence. In such cases it is possible to describe the relationship as unilateral, though the better understanding is probably that the laborer’s commencement of the work indicates a promise to finish the job.²⁷³ The presumption of employment at will, however, applies, by definition, to contracts of “indefinite” duration. The parties commence performance with the idea that the work will be ongoing unless and until one of them wishes to end the relationship for a particular reason (whether good or bad), and with the understanding that the performance itself will develop and change over time.²⁷⁴ Such situations are antithetical to unilateral contract theory, which is premised on the idea that the promisor’s obligation (usually simple payment) will be triggered by the promisee’s total completion of a discrete, identifiable action.²⁷⁵

Finally, characterizing employment as a unilateral contract does not accord with party expectations and their explicit and implicit

271. See Pettit, *supra* note 263, at 560–65 (describing the typical application of unilateral contract theory prior to its contemporary expansion into employment law).

272. This classic example is generally attributed to Professor I. Maurice Wormser’s article, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136 (1916). See Beh & Stempel, *supra* note 268, at 93.

273. See RESTATEMENT (SECOND) OF CONTRACTS § 54, cmt. b. Certainly the builder is not “indifferent” as to whether the fence is fully removed.

274. Cf. Beh & Stempel, *supra* note 268, at 112–13 (rejecting the idea that the insured’s premium payment is a “complete performance” and suggesting that it is the first step in a long-term, relational contract involving continued payment for continued performance).

275. Modern contract law has itself retreated from the idea that the promisor is not bound until performance is fully complete. Under § 45 of the Restatement, once performance has begun, a promisor is prohibited from revoking his or her promise for a reasonable amount of time sufficient to allow the promisee to complete performance. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981). This doctrine, which is rarely invoked in the employment context, further evidences the lack of fit between employment and unilateral contract theory.

commitments. The hallmark of a unilateral contract is that only one side is bound. Employment can be unilateral only if we accept the premise that only the employer has made a promise (to pay for performance rendered), and that the employee has committed to nothing. But this is patently not the case. Employees make numerous explicit and implicit promises when they accept a job—to show up to work (the first day and thereafter), to be on time and ready to work, to perform diligently and make reasonable efforts with respect to the work itself, to follow supervisor instructions and employer policies, to refrain from misconduct and other destructive behaviors, and in general to act in the interest of the employer and in furtherance of its business. While many such promises are implied rather than explicit, contemporary employers frequently go further and solicit formal written promises from workers—promises to refrain from postemployment competition, promises to maintain confidentiality of employer information, promises to abide by a dispute resolution policy—with every intention that they are to contractually bind the worker in the future.²⁷⁶ That the employee has the ability to terminate the relationship does not change the reality that promises have been made on both sides.²⁷⁷

The idea that employment at will is a bilateral contract terminable upon reasonable notice has not been explored in the termination context.²⁷⁸ However, common law developments in the area of handbook modification lend support to the analysis. Although the law in this area remains unsettled, an emerging majority rule suggests that an employer may alter its policies at will so long as it provides advance notice of the change.²⁷⁹ While courts adopting this view persist in

276. I have discussed this trend in a number of earlier articles, as have others. *See, e.g.*, Arnow-Richman, *Rise of Delayed Term*, *supra* note 225, at 638–39; Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 225, at 963–66; Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380–82 (2006).

277. *See* Beh & Stempel, *supra* note 268, at 113 (rejecting the idea that a policyholder’s ability to cancel renders an insurance contract unilateral, noting that “the same might be said of magazine subscriptions, record clubs, yard service, pool service, or countless other contractual arrangements that are generally regarded as bilateral”).

278. A Florida case involving the enforcement of a covenant not to compete comes close. In *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. Dist. Ct. App. 1982), the court described the parties’ fixed-term contract, which contained a clause permitting the employer to terminate at will upon written notice, as “a bilateral contract containing mutual executory promises.” The court found that the noncompete was not void for lack of mutuality, concluding that the employer’s promise to provide written notice supplied the requisite consideration. *Id.*

279. *See, e.g.*, *Asmus v. Pac. Bell*, 999 P.2d 71, 81 (Cal. 2000); *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120 (Mich. 1989); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04(a) (Preliminary Draft No. 8 2011). For a good summary of the state of the law on this issue, see W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 10–11 (2003).

calling the parties' contract unilateral, their approach better accords with bilateral contract analysis.²⁸⁰ Modern contract law prohibits the promisor in a unilateral agreement from withdrawing or altering the terms of its offer once the promisee has begun performance.²⁸¹ However, in a bilateral, at-will relationship, parties who are already free to terminate on reasonable notice could similarly alter terms on reasonable notice, the notice serving as notice of termination under the old terms and the new terms serving as a new offer. In this way, the bilateral contract analysis proposed here lends a much-needed doctrinal underpinning for the emerging handbook modification rule.²⁸²

There is much more that can be said both about the limitations of unilateral contract analysis in theorizing employment and about the merits of bilateral contract analysis as the alternative. For purposes of this Article, however, the point is merely that employment looks much more like a long-term commercial relationship than daring someone to climb a flagpole or offering a reward for the return of a lost cat. The better understanding of the employment relationship is that it is a bilateral contract much like a long-term commercial contract in which both parties are committed—the buyer to buy and the seller to sell—even if they are free to terminate at will. In both contexts, where the parties retain absolute discretion to terminate at will, reasonable notice supplies the requisite consideration for what might otherwise be

280. See *Asmus*, 999 P.2d at 77; *Bankey*, 443 N.W.2d at 116.

281. Indeed, the very fact that employers often seek to modify their policies, and thus the terms of the employment relationship, indicates that the relationship is bilateral rather than unilateral. In a unilateral contract situation, the performance is acceptance that both binds and completes the deal; there is no opportunity for a subsequent modification. As Professors Beh and Stempel explain in their critique of unilateral contract theory in the insurance context:

[A]s a theoretical matter, unilateral amendment of the terms should have no rule in unilateral contracts because, by definition, there has been no contract formed or the contract is formed and fully executed at the same moment. Logically, then, the mere presence of unilateral amendment of contract terms suggests that the contract in question is not unilateral.

Beh and Stempel, *supra* note 268, at 119.

282. Interestingly, the Restatement of Employment supplies no doctrinal explanation for its adoption of the majority rule on handbook modification. Rather it suggests that employers' right to modify handbooks unilaterally upon notice to the workforce is analogous to the type of notice provided by administrative agencies in advance of changes in regulations. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04 cmt. b. This rationale, and the Restatement's choice to adopt a unilateral modification approach, has been subject to significant scholarly critique. See Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 132 (2009) (noting that "no jurisdiction has adopted administrative agency estoppel as the underlying rationale for enforcing employer policy statements" and questioning the analogy between agency guidance and an employer promise which "directly establishes the substantive rules governing that relationship").

considered an illusory undertaking.²⁸³

V. THE LIMITS OF COMMON LAW REASONABLE NOTICE

The previous Part argued that basic contract law principles of general application suggest that every employment at-will contract should be understood to include an implied reasonable notice term. It is a separate question whether such an approach would in fact benefit employees. If employers are able to easily contract around the rule, or if the rule imposes significant reciprocal obligations, employees may be no better off (and possibly worse off) than under a strong at-will rule. Additionally, a reasonable notice rule is likely to pose administrative challenges. Adopting a reasonableness standard could spur litigation and introduce costs and uncertainty into the current wrongful discharge system.

This Part does not aim to fully vet all of the possible economic and administrative implications of a reasonable notice system.²⁸⁴ To the extent that sophisticated parties to indefinite commercial contracts have long operated under this rule, despite its limitations, the burden ought to be on those who wish to except workers from the general scheme of contract law to justify the differential treatment. This Part, however, will touch on some of the key practical questions about how a common law reasonable notice system might operate, focusing in particular on the ways that employers might seek to avoid the administrative burdens

283. For an excellent discussion of the illusory nature of employment at will and the difficulties posed by consideration analysis, see generally Lord, *supra* note 22, at 726–30, 746–50, 764–66 (demonstrating how courts have mistakenly applied the doctrine of consideration in enforcing promises not to compete by at-will employees). Professor Lord’s article focuses on the particular context of covenants not to compete rather than at-will termination generally, and he offers a different solution to the illusory contract problem than that which is proposed here. Professor Lord advocates that courts either abandon the doctrine of consideration in favor of a totality of the circumstances test or adopt the “Texas Position” under which noncompetes are enforceable against at-will employees only if the employer provides actual consideration that is not contingent on continued employment. *Id.* at 717, 766. Professor Lord’s work implicitly recognizes, however, that an implied reasonable notice period would similarly supply the requisite consideration for an enforceable agreement insofar as it effectively grants the employee a period of guaranteed employment for whatever time period is reasonable. *See id.* at 750–53 (suggesting that a promise of at-will employment that is understood to include a good faith opportunity for the employee to perform would constitute consideration for a noncompete and that the immediate termination of the employee would be a failure of consideration possibly amounting to a breach).

284. I have discussed several of these issues at greater length in previous work. *See generally* Arnow-Richman, *From Just Cause*, *supra* note 8, at 320–22 (exploring possible cost savings effects of a reasonable notice statute that could partially offset increased employer payments to workers during the required notice period); Arnow-Richman, *Just Notice*, *supra* note 8, at 61–64, 69–71 (considering the possible impact of a reasonable notice rule on employee wages and the demand for labor).

of such a rule through drafting and what that might mean for employees. Ultimately, it concludes that legislative codification may be the best way to achieve a predictable and effective reasonable notice system. In the meantime, common law notice can serve as a modest, if inconsistent, source of protection for at-will employees.

A. Reasonableness and the Burdens of a Flexible Standard

Perhaps the most important and most troublesome question concerning a common law reasonable notice rule is what constitutes reasonable notice. The amount of notice required under such a rule will determine how valuable the right is to workers, who stand to be its principal beneficiaries, as well as the cost to be borne by employers, who will have to pay additional wages to workers who might otherwise have been fired immediately. The manner in which reasonable notice is assessed will also determine the extent to which the rule burdens the judicial system. Because reasonableness is a fluid and fact-specific inquiry, one can expect litigation testing its contours.²⁸⁵

Concerns about the administerability of an open-ended reasonableness test clearly underlie the expressed resistance to a reasonable notice rule by those courts that have grappled with and rejected the approach. The previously described retreat from Virginia's common law notice rule is an example. Speculating on the implications of a reasonable notice rule, the federal district court in *American Home* presaged a world in which this "new" cause of action "would permit every discharged employee to sue the employer," and because of the fact-sensitive nature of the reasonableness inquiry, "every case filed would have to be decided by the finder of fact."²⁸⁶ The result, warned the court in rejecting reasonable notice, would be the "eviscerat[ion]" of employment at will.²⁸⁷

Given the limited extent to which reasonable notice has been explored in the employment law jurisprudence, such concerns are not unfounded. Employment cases requiring notice of at-will termination are scarce, and most do not elaborate on the rule. Several courts simply conclude that the notice provided by the employer was or was not

285. See Arnow-Richman, *Just Notice*, *supra* note 8, at 53 (recognizing that American litigiousness combined with the absence of any domestic custom regarding reasonable notice may make adoption of a context-dependent reasonable notice of employment termination rule unworkable); Libenson, *supra* note 182, at 165–66 (rejecting Canada's individual assessment of reasonableness in proposing an American notice of employment termination rule).

286. *Perry v. Am. Home Prods. Corp.*, No. 3:96CV595, 1997 WL 109658, at *8–9 (E.D. Va. 1997).

287. *Id.* at *9.

reasonable.²⁸⁸ Others direct the claim to the fact finder without providing guidance.²⁸⁹ Those that do allude to the meaning of reasonableness are inconsistent and do not rely on any articulated policy or theory. The key Florida case on this subject bases reasonableness on the practices of the industry, perhaps out of fealty to historical cases enforcing customary notice.²⁹⁰ Still another decision asserts that reasonableness “depend[s] on the cause of the employee’s discharge.”²⁹¹ However, precedent and experience from outside the employment context, and outside of the United States, suggest that fears about the erosion of employment at will are overstated. In contrast to employment law, commercial law offers an explicit and consistent standard for reasonable notice: the amount of time necessary for the terminated party to replace the lost contract or otherwise mitigate the resulting loss.²⁹² This might include finding a replacement supplier, unloading inventory, and making workforce adjustments—whatever the terminated party must do “to proceed in absence of the former relationship.”²⁹³

288. See, e.g., *Settle v. Sears, Roebuck and Co.*, No. 91-0028-CIV-ORI-18, 1992 WL 210986, at *5 (M.D. Fla. 1992) (concluding without analysis that four months was reasonable); *Malver v. Sheffield Indus., Inc.*, 462 So. 2d 567, 568 (Fla. Dist. Ct. App. 1985) (concluding without analysis that one week was reasonable); *Stubbs v. Vestry of St. John’s Church*, 53 A. 917, 919 (Md. 1903) (concluding without analysis that two months was reasonable); *Slade v. Cent. Fid. Bank*, 12 Va. Cir. 291, 291 (Va. Cir. Ct. 1988) (concluding that “no notice to an employee of twenty-four years is *prima facie* unreasonable”).

289. See, e.g., *Torres v. Consol. Bank, N.A.*, 653 So. 2d 492, 493 (Fla. Dist. Ct. App. 1995). Other cases offer a mixed bag of possible standards. See, e.g., *Rehman v. ECC Int’l Corp.*, No. 90-425-Civ-Orl-22, 1993 WL 85758, at *1 (M.D. Fla. 1993) (referring to the length of the pay period and evidence of custom, and concluding that reasonableness “requires the trier of fact to consider all the circumstances of Plaintiff’s employment”). At least one court asserts that no guidance (beyond reasonableness) is required, rejecting any requirement for expert testimony regarding customs in the industry. See *Braunfeld v. Forest Home Sys.*, 12 Va. Cir. 163, 1988 WL 619159, at *3 (Va. Cir. Ct. 1988) (concluding that the jury was competent to reach its own conclusion on reasonableness of notice based on “common sense and collective human experience”).

290. *Perri v. Byrd*, 436 So. 2d 359, 361 (Fla. Dist. Ct. App. 1983) (concluding that the defendant–employer owed two weeks’ pay based on “testimony of the parties indicat[ing] that two weeks’ notice prior to termination is customary in the business”); see also *Rehman*, 1993 WL 85758, at *1 (denying summary judgment based on “genuine issues of fact regarding customs in this industry . . . tending to show that no extended pay is available”). *But cf. Braunfeld*, 1988 WL 619159, at *3 (rejecting the argument that testimony regarding industry practices was necessary to determine reasonable notice).

291. *Tingle v. Chasen’s Bus. Interiors, Inc.*, 41 Va. Cir. 451, 1997 WL 33623611, at *3 (Va. Cir. Ct. 1997).

292. U.C.C. § 2-309(3) cmt. 8 (2012) (calling for “such notification . . . as will give the other party reasonable time to seek a substitute arrangement”); *Pharo Distrib. Co. v. Stahl*, 782 S.W.2d 635, 638 (Ky. Ct. App. 1989) (“[T]he obvious object of the reasonable notice requirement is to afford the party losing the contract an opportunity to make appropriate arrangement in lieu thereof.”).

293. *Pharo Distrib.*, 782 S.W.2d at 638.

The viability of importing this standard to the employment context is evidenced by Canadian employment law, which follows a substantially similar rule. Under the Canadian common law notice rule, reasonable notice of termination is based on the totality of circumstances, with an emphasis on the employee's ability to find replacement work.²⁹⁴ Courts consider such factors as the worker's age, duration of employment, and the value of the worker's skills.²⁹⁵ The length of the notice period (or pay provided in lieu of notice) generally increases with the employee's age and length of service, factors that are likely to correlate inversely with the degree of flexibility in the employee's skills and the transferability of his or her work experience.²⁹⁶ Notice periods are also longer where the manner of termination reduces the worker's chances of reemployment.²⁹⁷ At the same time, courts consider factors that bear on the overall fairness of the notice period with reference to the relationship, including such things as the reason for the termination and the financial situation of the employer.²⁹⁸ For this reason, no notice is required in Canada where the employee is dismissed for misconduct, notwithstanding the hardship of finding reemployment,²⁹⁹ and notice may be reduced where the employer faces economic exigencies.³⁰⁰

Notwithstanding its fact-specific nature, an examination of the Canadian rule in operation does not bear out the parade of horrors envisioned in *American Home*. Rather, it appears that a developed body of case law has yielded adequate guidance to Canadian employers and

294. See generally ENGLAND, *supra* note 84, at 311 ("In determining the period of reasonable notice, [Canadian] courts have always placed paramount weight on whether or not the employee can reasonably be expected to find replacement work, recognizing that employees need a financial cushion to support them while they conduct a job search."); Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 AM. BUS. L.J. 205, 208 (2004) ("The basic premise underlying common law reasonable notice [in Canada] is that the period should approximate the period of time that the employee would need to find a new position.").

295. See *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. 2d 140, paras. 13–19 (Can. Ont. High Ct. J.) (enumerating factors to be considered in determining reasonableness).

296. See *id.*; ENGLAND, *supra* note 84, at 311–17.

297. For a time, an award could include punitive amounts based purely on an employer's bad faith conduct. See *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 745–46 (Can.); Bird & Charters, *supra* note 295, at 213–19 (surveying judicial application of *Wallace*). But the Canadian Supreme Court subsequently clarified that such additional sums are allowable only when the employee suffers actual harm or distress as a result of the bad faith treatment and when such an injury was in the contemplation of the parties. See *Honda Can. Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, 391–92 (Can.).

298. See G. England, *Determining Reasonable Notice of Termination at Common Law: The Implications of Cronk v. Canadian General Insurance Co.*, 4 CAN. LAB. & EMP. L.J. 115, 127–28 (1996) [hereinafter England, *Determining Reasonable Notice*]; ENGLAND, *supra* note 84, at 312–14; Bird & Charters, *supra* note 295, at 208.

299. See ENGLAND, *supra* note 84, at 324–43.

300. See England, *Determining Reasonable Notice*, *supra* note 299, at 127.

their attorneys about the appropriate duration of notice in particular cases. Litigation over common law notice is the exception rather than the rule.³⁰¹ Indeed, research suggests that American workers, subject though they are to a strict employment at-will presumption, are more likely to pursue legal claims post-termination than their Canadian counterparts.³⁰²

Canadian employment law and American commercial law thus offer established standards for reasonable notice. These standards are consistent with the limited scope of the implied duty of good faith, which can be invoked to limit contractual discretion but not to alter it. Reasonable notice is defined with reference to replacement costs, not the loss of the relationship itself. The rule's flexibility ensures that the amount of notice is tailored to the particular situation, giving the worker adequate lead time while not overcompensating workers whose skills are in high demand. It also attempts to balance the business interests of the employer by accounting for the employee's performance record and the economic demands on the company.

While this flexibility is important in gauging the rights of employees, it is even more critical in situations where the rule is brought to bear on employee-initiated terminations. Any obligation to provide notice based on the previously described contract theories would necessarily be reciprocal. Implied terms, such as reasonable gap fillers and the duty of good faith, apply to all parties, and bilateral contract analysis requires the implication of a modicum of consideration on both sides of the transaction. This means that employees, as well as employers, would be obligated to supply reasonable notice prior to exercising the right to terminate at will. Reasonable notice to an *employer*, however, is likely to differ from reasonable notice to an employee, particular if the key factor is the ability to replace the loss. Employers are generally able to find substitute workers more easily than

301. See Bird & Charters, *supra* note 295, at 209 (“Typically, [a Canadian] employer can determine an acceptable continuum of notice prior to termination and provide the employee with notice or payment in lieu of notice that is within the acceptable range.”); England, *Determining Reasonable Notice*, *supra* note 299, at 122 (noting that the majority of wrongful dismissal suits are settled in negotiations before trial). A number of practitioners’ resources routinely summarize judicial rulings on notice and a number of rubrics and guidelines are used for making *ex ante* assessments. See, e.g., WRONGFUL DISMISSAL DATABASE ONLINE, available at <http://www.wrongfuldismissaldatabase.com> (last visited Aug. 29, 2014) (offering a searchable index of Canadian notice cases “designed to provide [attorneys] with a summary of the fair severance details of the cases most relevant to [their client’s] situation”).

302. See Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 LAW & POL’Y 247, 274 (1999). Of course, it is impossible to know for certain whether Canada’s experience with reasonable notice could be replicated in the United States. The difference in litigation rates documented in Nielsen’s research may owe in part to systemic differences in the country’s legal system (such as the lesser availability of jury trials, differences in recoverable damages, etc.) or to broader cultural differences.

an employee can find new work. At the same time, those factors under Canada's reasonable notice rule that consider the fairness of the notice period in light of the parties' relationship would allow for adjustments based on specific circumstances. For instance, general considerations of fairness would countenance an immediate quit in situations involving serious employer mistreatment. Similarly, reduced notice would be appropriate in the case of compelling personal circumstances necessitating an employee's sudden departure.

B. *The Enforceability of Express Limitations on Notice Rights*

A second, and perhaps more significant, concern regarding the efficacy of a common law notice rule is the degree to which parties can contract around their implied notice obligations. A reasonable notice system will likely impose some costs on employers, who might be forced in particular situations to provide notice where they might otherwise have terminated immediately.³⁰³ Moreover, the flexibility of a reasonableness rule, even with judicial adoption of an articulable standard, is likely to create a degree of uncertainty regarding the propriety of any particular termination. One would expect some, if not many, employers to try to avoid these problems through written agreements. The enforceability of such contracts at common law will therefore be an important determinant of the value of any judicially recognized reasonable notice right.

1. "Contracting Out" of Reasonable Notice

Efforts to control the economic and administrative consequences of a reasonable notice rule could take several forms, not all of which will necessarily be in derogation of employee rights. One possibility is that employers will seek to resolve questions of reasonableness at the point of exit through severance and release agreements. In Canada, it is standard practice for an employer to provide a lump sum payment in fulfillment of its advance notice obligation and obtain a release from further liability.³⁰⁴ Although a conventional reading of American

303. One might suppose that in such situations the salary paid to the employee, either during the notice period or in the form of severance pay, will represent a net loss to the employer. In reality, however, there are many ways in which a notice regime might produce cost savings to employers. For instance, advance notice may give an employee a funded opportunity to find alternate employment, thereby reducing the employer's unemployment insurance premiums, or it may reduce the likelihood that the employee will seek to dispute the termination, thereby reducing litigation costs. I have explored the possible cost-savings effects of a reasonable notice rule at length elsewhere. See Arnow-Richman, *From Just Cause, supra* note 8, at 320–22. For purposes of this Article, I will assume that employers will incur at least some costs in the context of some terminations.

304. Nielsen, *supra* note 303, at 273.

common law does not so require, U.S. employers frequently choose to provide severance pay to terminated workers, generally in exchange for releases of other types of claims.³⁰⁵ Employers could simply fold notice claims into those agreements, which would be enforceable provided the requisite contract formalities are met.³⁰⁶

A more troubling possibility is that employers might seek to limit or even eliminate their reasonable notice obligations at the outset of the relationship. The preference for express notice provisions likely explains, at least in part, the relative dearth of cases disputing the reasonableness of notice in indefinite business and commercial contracts. Sophisticated parties presumably place a premium on the certainty they can achieve by negotiating their termination rights in advance, and doing so may not be especially costly if they intend to produce a written contract regardless. In the employment context, however, advance planning of this variety is likely to take the form of standardized, employer-drafted agreements providing that workers will receive little or no notice upon termination.³⁰⁷

305. See LEE HECHT HARRISON, SEVERANCE & SEPARATION PRACTICES: BENCHMARK STUDY 2008–2009 1, 4–5 (2008), available at http://www.lhhitalia.com/it/Documents/LHH_SevStudy08.pdf.

306. Of course, employers seeking simultaneous waivers of age discrimination claims would have to go beyond contract formalities to comply with the heightened duties mandated by the Older Workers' Benefits Protection Act. See 29 U.S.C. § 626(f)(1), (1)(H) (2006) (requiring that employee waivers of Age Discrimination in Employment Act claims be "knowing and voluntary" and obliging employers to provide statistical information enabling employees to assess the viability of possible claims). It is also possible that employers would want to provide a severance premium beyond the amount of pay associated with the reasonable notice period in order to ensure consideration for waivers of additional claims extracted from the worker, although the provision of a lump sum payment in lieu of future wages could arguably serve that purpose.

307. This risk is not limited to the notice context. I have written elsewhere about employers' use of standard forms to impose covenants not to compete and predispute arbitration agreements, as have others. See, e.g., Arnow-Richman, *Rise of Delayed Term*, *supra* note 225, at 638–39; Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 225, at 963–66; Estlund, *Between Rights and Contract*, *supra* note 225, at 380–82; Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace After Wright v. Universal Maritime Service Corp.*, 74 IND. L.J. 1347, 1359–60 (1999); Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114, 125–27 (2012); Jon H. Sylvester, *Validity of Post-Employment Non-Compete Covenants in Broadcast News Employment Contracts*, 11 HASTINGS COMM. & ENT L.J. 423, 454 (1989). That said, it is possible that commentators overstate the likelihood that employers will draft around their legal obligations. Large employers who are knowledgeable in the law and already maintain an infrastructure for producing and administering form employment agreements may be likely to add "no notice" provisions to their documents. But less sophisticated employers with informal personnel practices may not. In addition, all employers will have to weigh the reputational effects, if any, of insisting on a complete relinquishment of this right. Ultimately, the question of how employers respond to adverse law is, of course, an empirical one that is contextually dependent. For purposes of this section, I will assume that a subset of employers will seek to obtain a complete waiver of employee notice rights.

The effectiveness of an employer-drafted provision eliminating or constraining employee notice rights depends in part on the contractual theory through which a reasonable notice rule is adopted. As previously discussed, the various doctrinal pathways through which courts might imply reasonable notice are not equal in terms of the strength of the resulting rule. A straight gap filler analysis yields a simple default that by definition can be altered through drafting, while a good faith analysis results in a more robust rule, though one that is in theory still subservient to the express terms of the parties' contract.³⁰⁸ The implied consideration theory therefore offers the only doctrinal hook for voiding some forms of employer opt out. In the face of a "no notice" provision, a court applying the illusory contract theory might find it necessary to "save" the employment contract by implying some form of reasonable obligation notwithstanding the "no notice" language.

On the other hand, the argument for such a move in the face of a limited notice contract is far less sound. A promise to provide even the most modest amount of notice would presumably supply the requisite consideration for a binding contract. In the case of a contract specifying a truly nominal amount of consideration—one hour, one minute, or even one second—there might be a basis for treating the consideration as nominal, consistent with the idea that sham consideration does not represent a true bargained-for exchange.³⁰⁹ Courts, however, are well versed in the familiar interdiction against evaluating the adequacy of consideration and may be unwilling to take this route.³¹⁰ Thus, while the

308. *See supra* Part III.

309. RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. d (1981) ("Disparity in value . . . sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense. Such a sham or 'nominal' consideration does not satisfy the requirement of § 71."); *Sfreddo v. Sfreddo*, 720 S.E.2d 145, 154 (Va. Ct. App. 2012) ("[I]t has been recognized that where no bargain actually occurred as evidenced by nominal or sham consideration and the surrounding circumstances, *the purported consideration is not in fact consideration.*").

310. RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c ("Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions. . . . Ordinarily, therefore, courts do not inquire into the adequacy of consideration."); *id.* § 71 cmt. c ("Ordinarily . . . courts do not inquire into the adequacy of consideration, particularly where one or both of the values exchanged are difficult to measure."); *Sirius LC v. Erickson*, 244 P.3d 224, 229 (Idaho 2010) (stating that the Court would not inquire into the adequacy of consideration "so long as some consideration is provided"); *Tanton v. Grochow*, 707 N.E.2d 1010, 1013 (Ind. Ct. App. 1999) (declining to inquire into the adequacy of consideration and deferring to the judgment of the parties where the consideration was "of an indeterminate value . . . agreed upon by the parties"); *Horace Mann Ins. Co. v. Gov't Emps. Ins. Co.*, 344 S.E.2d 906, 908 (Va. 1986) ("[P]arties to a contract are at liberty to determine their own valuations, and courts generally will not inquire into the adequacy of consideration."). The notion of a written contract requiring negligible notice recalls the "minute" contracts frequently imposed on workers during the nineteenth century as a means of preventing them from engaging in sudden work stoppages. *See* Feinman, *Employment At Will*,

contention of this Article is that reasonable notice may not be fully waived, litigants must anticipate that many courts will defer to employers' standard clauses on this issue.

2. Unconscionability and "No Notice" Provisions

If employers attempt to contract out of reasonable notice, and if courts are willing to defer to such provisions, the enforceability of employers' written terms will turn on the worker's ability to demonstrate a contractual defense such as unconscionability. Generally speaking, unconscionability imposes a high bar on those seeking to avoid enforcement of express contract terms. A party must show that the term in question is substantively unfair in that it is oppressive and overreaching, and that the contract was procedurally defective, that is, that there was a lack of knowing consent in the bargaining process.³¹¹ Most courts require a party to establish both prongs of the defense,³¹² and although unconscionability is frequently asserted, it is rarely successful.³¹³

supra note 17, at 121–22; Jacoby, *supra* note 28, at 98. It does not appear that such contracts were ever challenged from a consideration perspective, but courts did assume them to be binding.

311. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 194 (Cal. 2013) (“[T]he doctrine of unconscionability has both a procedural and a substantive element . . .”); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”); 7 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 29.4 (rev. ed. 2002); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (defining unconscionability as defects in the bargaining process, or “procedural unconscionability,” and defects in the resulting bargain, or “substantive unconscionability”).

312. See Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 155 (2005) (noting that courts have been reluctant to find unconscionability where only procedural unconscionability is present); Steven Goldberg, *Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors*, 58 WASH. L. REV. 343, 349 (1983) (“Courts generally will not void a clause unless they find both substantive unconscionability—a bargain that appears dramatically uneven—and procedural unconscionability—a defect in how a bargain is reached.”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1256–57 (2003) (“[M]ost courts have held that the doctrine may be invoked only on a finding of both imperfections in the bargaining process, known as ‘procedural unconscionability,’ and an unfairly one-sided term, referred to as ‘substantive unconscionability.’”).

313. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097 (2006) (finding that the unconscionability defense succeeded in only 37.8% of sampled cases); see also James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 119 (2003) (stating that a party only needs to show that the other party was aware of a term to overcome an unconscionability defense, and that unconscionability was intended to impose “a hurdle higher than unfairness”); Amy J. Schmitz, *Embracing*

Even so, there is reason to expect that at least some courts will be receptive to an unconscionability challenge in cases involving a unilaterally drafted provision that eliminates or deeply constrains the employee's right to notice. Such an analysis is specifically contemplated under the UCC. Section 2-309 constrains parties' ability to contract out of the default reasonable notice term by providing that "an agreement dispensing with notification is invalid if its operation would be unconscionable."³¹⁴ This reference to unconscionability in the text of a provision setting forth a particular contract term is notable given that the UCC already establishes unconscionability as a universal defense applicable to any agreement. Section 2-302 provides that a court may refuse to enforce a contract or any part of a contract if "as a matter of law [it] finds the contract or any clause of the contract to have been unconscionable at the time it was made."³¹⁵ Thus, there is no need to restate the availability of the unconscionability defense in § 2-309, unless the drafters intended such clauses to receive special scrutiny. Indeed, § 2-309 appears to impose a lower threshold for unconscionability than § 2-302, referring to written provisions that are unconscionable in "operation."³¹⁶ Whereas the standard unconscionability inquiry examines the situation of the parties at the time of contracting, § 2-309 looks at the consequences of the clause to the adversely affected party.³¹⁷ The operative question is whether the failure to provide reasonable notice consistent with the parties' express terms created an "unconscionable state of affairs."³¹⁸ This may be the case even where an objective assessment of the parties' situation at the time of drafting indicates that a party was adequately compensated for assuming the risk of an immediate termination.

Unconscionability's Safety Net Function, 58 ALA. L. REV. 73, 75 (2006) (observing that courts have become "increasingly rigid in their application of a two-prong unconscionability test"); Rebecca Schonberg, *Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401, 1415 (2012) ("[C]ourts have generally applied the unconscionability doctrine narrowly.").

314. U.C.C. § 2-309(3) (2012).

315. U.C.C. § 2-302.

316. U.C.C. § 2-309(3).

317. *See generally* PERILLO, *supra* note 312, § 29.6. The only other section of Article 2 that specifically refers to the availability of an unconscionability defense is § 2-719 regarding liquidated damages provisions. U.C.C. § 2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."). There too, the drafters of the UCC appear to sanction a lesser showing than that typically required to establish an unconscionability defense. *See generally* PERILLO, *supra* note 312, § 29.5.

318. U.C.C. § 2-309 cmt. 8; *see* PERILLO, *supra* note 312, § 29.6 ("Subsection [2-309](3) addresses the conscionability of a termination. It does not address the conscionability of a termination clause." (emphasis omitted)).

There is almost no reported case law examining the applicability of UCC § 2-309 in the context of a written waiver of the reasonable notice obligation. However, a federal district court case involving a patent dispute provides an example of why such clauses might be considered unconscionable in a business relationship, and *a fortiori*, in an employment situation. In *Intergraph Corp. v. Intel Corp.*,³¹⁹ chip-maker Intel was found to have breached its contract with Intergraph, a manufacturer of computer workstations, by terminating the relationship despite a provision in the parties agreement, which the court interpreted as permitting termination without notice.³²⁰ The court based its decision on the investment Intergraph had made in configuring its machines to accept Intel chips, a production choice that had involved years of research and development time.³²¹ The combination of Intergraph's sunk costs and Intel's market share meant that it was virtually impossible for Intergraph to stay in business without continued access to Intel products and the proprietary information necessary to work with them.³²² Thus, allowing Intel to exercise the termination clause without significant advance warning to Intergraph would have created an unconscionable state of affairs.³²³

Not every court would necessarily take this approach with respect to notice, at least not in the commercial context. Indeed, the district court's opinion in *Intergraph* was ultimately vacated by the Federal Circuit, which heard the case on appeal pursuant to its patent law jurisdiction.³²⁴ In a decision based almost entirely on antitrust law, the court rejected the district court's conclusion that Intel's behavior had been in restraint of trade and took issue with its authority to compel continued performance of the contract.³²⁵ In its brief consideration of contract principles, the circuit court characterized unconscionability as an "extraordinary remedy," designed to protect consumers and other "uneducated" parties, with limited relevance to the commercial

319. 3 F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

320. *Id.* at 1287. The contract provided for termination "at any time without cause upon notice to the other party," but did not explicitly state that termination could occur "without notice." *Id.* at 1266. However, the court subjected this language to the unconscionability test applicable to "agreement[s] dispensing with notification" under § 2-309, implicitly interpreting the parties' contract as permitting termination without notice. *Id.* at 1285.

321. *See id.* at 1261–62.

322. *See id.* at 1263.

323. The court also noted that in addition to its powerful position in the industry generally, Intel had unilaterally drafted the parties' agreements. *See id.* at 1271 ("These NDAs are documents drafted by Intel and presented to Intergraph and other customers on a take-it-or-leave-it basis. Intel simply dictates the terms under which it provides its products . . .").

324. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999).

325. *Id.* at 1354–55.

context.³²⁶ It made no mention of UCC § 2-309's explicit reference to unconscionability as a backstop to parties' ability to limit notice, or even § 2-302, the UCC's umbrella unconscionability provision that governs all aspects of commercial contracts. Indeed, the court did not mention the UCC at all.

Whatever the merits of the Federal Circuit's ultimate conclusions regarding Intel, the district court's analysis provides some indication of how courts might respond to a "no notice" provision in an employment contract. Employment is a paradigmatic example of an unequal bargaining relationship in which one party has limited choice with regard to the terms of the relationship. That is generally not enough for unconscionability: employees can choose not to deal on terms they find objectionable by refusing employment that includes a "no notice" provision. But UCC § 2-309 pushes the relevant inquiry to the moment in time at which termination is effected. The question is not the constraints that existed at the time of contract formation, but rather the effect of the contract provision, a nuance that the Federal Circuit failed to consider. In the context of employment, a "no notice" provision, which would allow a company to immediately cut off an individual worker's only stream of income without any advance warning or continuing obligations, presents a stark example of what the UCC would likely conceive of as "an unconscionable state of affairs."³²⁷

326. *Id.* at 1365 (quoting *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 717 (Ala. 1989)).

327. U.C.C. § 2-309 cmt. 8 (2012). By way of comparison, Canadian employers have at times made efforts to reduce or eliminate notice obligations by contract and have been met with limited success. *See Etherington, supra* note 29, at 461–69 (reviewing Canadian case law involving challenges to written waivers of notice). However, in Canada, provincial statutes provide for minimum notice periods which may not be waived. *See, e.g.*, Ontario Employment Standards Act, S.O. 2000, c. 41, § 5(1) (Can.) (“[N]o employer . . . shall contract out of or waive an employment standard and any such contracting out or waiver is void.”), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm#BK7. Where waiver is attempted, courts will treat the provision as void and apply the common law reasonable notice rule. *See Machtiger v. HOJ Indus.*, [1992] S.C.R. 1001 (Can.); *Christensen v. Family Counseling Ctr. of Sault Ste. Marie and Dist.*, [2001] 151 O.A.C. para. 8 (Can. Ont. C.A.); *MacDonald v. ADGA Sys. Int'l Ltd.*, [1999] O.A.C. para. 17 (Can. Ont. C.A.). Because of this statutory overlay, Canadian cases do not present the precise question of the enforceability of an absolute waiver of common law notice rights resulting in a termination without notice. However, a fair reading appears to be that total waivers of the common law right, to the extent that they can be disentangled from statutory waivers, are unenforceable or at least narrowly construed. *See Marchen v. Dams Ford Lincoln Sales Ltd.*, [2010] BCCA 29, para. 39 (B.C.C.A.) (“[T]he provision [allowing termination without consent] confirms the common law right to terminate a non-fixed term contract, but it does not obviate the need to give reasonable notice.”); *Ceccol v. Ont. Gymnastic Fed’n*, [2001] O.A.C. 315, paras. 2, 44–45 (Can. Ont. C.A.) (finding that an employment contract stating that the Employment Standards Act governed certain terminations was not clear enough to “successfully rebut[] the common law presumption of reasonable notice”). *But see MacDonald*, [1999] O.A.C. at para. 24 (finding that because a

C. A Legislative Solution?

The previous sections offer preliminary strategies for addressing two potentially problematic implications of a common law reasonable notice regime. Whether such strategies prove successful remains to be seen. It will take years for courts to develop an understanding of what constitutes reasonable notice in particular circumstances, and issues of waiver and unconscionability will have to be litigated and tested. At best, there will be some period of uncertainty, during which it will be difficult for parties to predict how best to handle termination decisions. And, of course, there is no guarantee that courts will be willing to accept a robust theory of reasonable notice rights. If employers choose to use waivers aggressively and courts ultimately prove hostile to employee unconscionability claims, it is possible that the power imbalance created and perpetuated by the current employment at-will rule will play out to the same effect within a reasonable notice regime.

Given these concerns, legislation that codifies and clarifies parties' reasonable notice obligations may be desirable. Examples are easy to discover. Laws requiring employers to provide advance notice of termination (or its equivalent in pay) abound in Europe, where they comprise part of the larger scheme of employment protection regulation within individual nations.³²⁸ Mandatory notice statutes also exist in the Canadian provinces and federal jurisdiction, where they operate in tandem with that country's common law reasonable notice rule, requiring a base amount of notice or pay that may be supplemented under the common law based on the peculiarities of the particular case.³²⁹

Adopting a statutory notice law will obviate many of the administrative challenges posed by a common law reasonable notice rule. The fixed periods contained in such laws will provide clear guidance to employers and are unlikely to give rise to additional wrongful discharge litigation.³³⁰ At the same time, fixed notice periods

contract provision limiting notice to not less than one month did not violate the statutory minimum, the written provision could displace common law reasonable notice).

328. See, e.g., Employment Rights Act, 1996, c. 18, § 86 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/18/section/86>; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL.] I, § 622 (Ger.), available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2546. For a summary of the notice rights created by some of these laws, see Arnow-Richman, *Just Notice*, *supra* note 8, at 54–57.

329. See, e.g., Ontario Employment Standards Act, S.O. 2000, c. 41, § 57 (Can.). See generally ENGLAND, *supra* note 84, at 289–324 (describing the relationship between these sources of obligations).

330. In fact, such laws may reduce litigation. Workers who receive advance notice (or severance pay) may be less likely to invoke wrongful discharge claims as a means of addressing the sudden loss of income occasioned by an immediate termination. They may also feel more

are likely in many cases to lead to results similar to what would be achieved under a fact-specific reasonableness standard. The statutory notice laws of most nations use length of service as the benchmark for determining the amount of required notice. This measure is likely to reasonably approximate the loss to the employee under the theory that long-standing employees have a stronger property interest in their jobs or suffer a greater wrong than their more junior counterparts. Length of service may also serve as a proxy for employability, given that employees who over time gain firm specific skills are likely to be more valuable to their current employer than to the general market.³³¹ Thus, what statutory periods sacrifice in terms of the close fit between the requisite notice and particular factual circumstances may well be worth the gain in administerability and certainty of outcome.

At the same time, a legislative approach would allow policy makers to impose additional obligations or constraints to ensure the effectiveness of its notice regime. Any legislation requiring pretermination notice could also prevent employers from contracting out of that obligation, either by making the right to notice nonwaivable or by imposing meaningful procedural or substantive limitations on such efforts.³³² Notice legislation could also clarify the obligations of voluntarily separated workers. Under such a statute, the legislature could mandate more modest notice periods for departing workers and delineate exceptions under which such obligations would be excused. Alternatively, the legislature could supersede the common law and provide that departing workers have no obligation to provide any notice to employers.

The project of developing and vetting possible statutory proposals is one I have pursued elsewhere, and it will not be further considered in this Article.³³³ It should be noted, however, that the recognition of a

fairly treated and consequently less likely to sue. See Arnow-Richman, *From Just Cause*, *supra* note 8, at 321 (suggesting that some workers may use wrongful discharge litigation as a way “to address the legitimate hardship and perceived unfairness of at-will termination”).

331. See ENGLAND, *supra* note 84, at 311 (describing factors examined under the Canadian reasonable notice rule, including “age and the degree to which skills and experience are firm specific,” which courts consider indicative of “whether or not the employee can reasonably be expected to find replacement work”); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 13 (1993) (describing the “basic human-capital model” under which workers invest in learning the ways of the firm, becoming more productive as their employment tenure increases). To the extent years of service correlates with age, it also implicitly addresses the possibility that bias will impact the ability of older workers to find new work.

332. I elaborate on the possible means by which legislators can restrict employers’ ability to contract out of a statutory notice obligation in prior articles. See Arnow-Richman, *Just Notice*, *supra* note 8, at 66–69.

333. See Arnow-Richman, *From Just Cause*, *supra* note 8, *passim*; Arnow-Richman, *Just Notice*, *supra* note 8, *passim*.

common law cause of action may be a necessary first-step toward securing support for legislative reform. Ad hoc adoption of a common law notice obligation tied to a fact-specific reasonableness standard could produce a state of uncertainty sufficient to inspire interest in a statutory mandate among employers. Such an alignment between management and labor in favor of employee-protective legislation occurred briefly during the 1980s in response to judicial innovations in the area of wrongful discharge law.³³⁴ Fear of a flood of employee-initiated litigation prompted employers to briefly support compromise legislation establishing a just cause termination standard in exchange for limited remedies and preemption of other common law claims.³³⁵ Ultimately, such coalitions proved unsuccessful in most states,³³⁶ but their existence illustrates the potential for statutory reform achieved through shared interest and compromise. If the chaos of a common law reasonable notice claim inspires a bipartisan move toward a statutory mandate, it will have served a valuable purpose.

CONCLUSION

This Article has exposed a fundamental mistake in employment doctrine, as well as a paradox in contract law jurisprudence. Contemporary employment law has developed under the assumption that at-will parties may terminate their relationship both without reason and without notice. This Article has demonstrated that the latter component of the rule—the idea that parties enjoy absolute procedural as well as substantive discretion to terminate—is neither legally correct nor historically supported. An examination of general contract law reveals precisely the opposite. In a variety of nonemployment contexts, and using a number of different contract theories, courts imply or impose on parties to an indefinite relationship a duty to provide reasonable notice of termination. Such an obligation serves not only as a gap filler in the face of contractual silence, but as a good faith limitation

334. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 367, 370 (1994) (discussing the development of the Model Employment Termination Act, which proposes a just cause dismissal standard coupled with streamlined procedures and limited remedies, and which was designed as compromise legislation in response to judicial decisions recognizing employee implied contract claims).

335. In retrospect it appears that such concerns by employers were unfounded, see Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 67 (1992) (describing the degree to which management overemphasized the risk of implied contract liability relative to employee success rates in bringing such claims), which may explain in part why the model statute was ultimately unsuccessful.

336. See St. Antoine, *supra* note 335, at 380–81 (discussing limited prospects for META's enactment). The only state where just cause legislation ultimately succeeded was Montana. See Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 to -915 (West 2013).

on parties' exercise of substantive discretion, one that may not be waived without sacrificing the modicum of consideration necessary to create a binding relationship.

In the face of this divergence, this Article lays the groundwork for a more unified body of contract law and a more generous system of common law protection for workers. The notion of a uniform contract law is a contested one; the numerous situations where principles of voluntary exchange must operate are arguably too diverse and context-specific to be mediated by a single set of abstract rules. But deviations, where necessary, are best justified as a means of counteracting power imbalances by fulfilling the reasonable expectations of the party in the weaker bargaining position. Employment-specific contract rules, as they currently stand, do precisely the opposite. The result is that workers are treated worse than commercial parties dealing at arms' length in sophisticated transactions.

Ultimately, this Article seeks to leverage contract law to fashion an obligation to supply advance notice of employment termination, one that, while reciprocal, will inure primarily to the benefit of employees. While employees would still be subject to termination at the whim of the employer, they would at least receive advance warning and some income continuation to ease their transition. The arguments laid out here are the first step; it remains for lawyers and judges to do the rest.

APPENDIX A: SUMMARY OF STATE NOTICE LAW

This appendix categorizes each state according to its treatment of advance notice of termination in the context of at-will employment. States listed as “no notice” states are those in which one or more decisions either hold or support the conclusion that parties to at-will employment relationships may terminate without notice. This category also includes states in which a state statute supports the inference that at-will employment relationships may be terminated without notice. States listed as “reasonable notice” states are those in which one or more decisions either hold or support the conclusion that parties to at-will employment relationships must provide advance notice of termination. States listed as “open” states are those in which there appear to be no cases addressing the issue of notice of termination in at-will relationships, nor any cases from which a particular notice rule may be inferred. States listed as “mixed law” states are those in which there are one or more decisions that support the conclusion that employment at will may be terminated without notice, as well as one or more decisions that support the conclusion that advance notice of termination is required.

“No Notice” States (9)

Alabama
 Colorado
 Hawaii
 Montana
 Michigan
 North Dakota
 Ohio
 Oregon
 South Dakota

“Reasonable Notice” States (3)

California
 Florida
 Maryland

“Open” States (30)

Alaska
 Arizona
 Arkansas

Connecticut³³⁷
 Delaware
 Georgia
 Idaho³³⁸
 Illinois
 Indiana
 Iowa
 Kansas
 Kentucky
 Maine
 Minnesota
 Mississippi
 Nebraska
 Nevada
 New Hampshire
 New Jersey³³⁹
 New Mexico
 North Carolina
 Oklahoma
 Rhode Island
 South Carolina
 Utah
 Vermont
 Washington
 West Virginia
 Wisconsin
 Wyoming

337. There is a Superior Court case in Connecticut rejecting an at-will employee's claim for negligent infliction of emotional distress in which the court observed that "lack of advance warning or written notification is insufficient evidence that an employer acted unreasonably in terminating an employee-at-will." *Thompson v. Bridgeport Hosp.*, 1999 WL 1212310 (Conn. Super.). However, the decision, which ruled on defendant's motion to strike, addressed only the plaintiff's negligence claim and not her contract claims. In addition, the plaintiff had received both advance warning that her department was closing and one month's oral notice of her date of termination.

338. There is a State Supreme Court case in Idaho stating that employment at will permits termination "without cause at any time, assuming any notice requirements are met." *Thomas v. Ballou-Latimer Drug Co.*, 442 P.2d 747, 751 (Idaho 1968). Most likely the court is referring to express contractual notice obligations.

339. There is one early twentieth century decision in New Jersey that rejects a claim based on the failure to provide notice of termination, but while the court refers to the termination as "at will" it appears that the employee was terminated pursuant to a satisfaction clause in the contract permitting immediate termination upon his unreasonable delay. *See Miller v. Atlantic City*, 74 N.J.L. 345, 347 (N.J. 1907). There appears to be no other articulation of the employment at-will rule by a New Jersey state court that refers to the right to terminate without notice.

“Mixed Law” States (8)

Louisiana³⁴⁰
 Massachusetts³⁴¹
 Missouri³⁴²
 New York³⁴³
 Pennsylvania³⁴⁴
 Tennessee³⁴⁵

340. Louisiana’s code provides that indefinite contracts may be terminated at will upon reasonable notice. *See* LA. CIV. CODE ANN. art. 2024 (2013). Courts and commentators, however, have offered different views as to whether this provision of general contract law applies to employment relationships. *Compare* *Carlson v. Superior Supply Co.*, 536 So. 2d 444, 446 (La. Ct. App. 1988), *and* 6 EMPLOYMENT DISCRIMINATION COORDINATOR § 22:4 (West, updated Apr. 2014), *available at* Westlaw EDC ANAREL § 22:4, *with* *Finkle v. Majik Mkt.*, 628 So. 2d 259, 260, 262 (La. Ct. App. 1993), *Harrison v. CD Consulting, Inc.* 2006 WL 1194749 (La. Ct. App. 1st Cir.), *and* LOUISIANA PRACTICE: EMPLOYMENT LAW § 12:7 (2013–14). *See generally supra* Section II.C.

341. There are several contemporary cases in Massachusetts that characterize at-will employment as the right to terminate without notice; there is also older case law in the state that refers to a “reasonable notice” requirement. *Compare* *Jackson v. Action for Bos. Cmty. Dev., Inc.*, 525 N.E.2d 411, 412–13 (Mass. 1988), *with* *Harper v. Hassard*, 113 Mass. 187, 187–90 (1873).

342. In Missouri, there are at least two twentieth century cases stating that employment contracts of indefinite duration are terminable upon “reasonable notice.” *See* *Paisley v. Lucas*, 143 S.W.2d 262, 271 (Mo. 1940); *Clarkson v. Standard Brass Mfg. Co.*, 170 S.W.2d 407, 415 (Mo. Ct. App. 1943). However, a turn-of-the-century decision, rejecting a claim by workers terminated without notice and blacklisted for union activity, asserts that “in a free country like ours every employ[ee] . . . has the legal right to quit the service of his employer without notice, and either with or without cause, . . . [and] any employer may legally discharge his employ[ee], with or without notice, at any time.” *Boyer v. W. Union Tel. Co.*, 124 F. 246, 247–48 (E.D. Mo. 1903).

343. In New York, there is at least one nineteenth-century case accepting the principle that customary notice is due to a terminated at-will worker where the custom can be factually established. *See* *Hathaway v. Bennett*, 6 Seld. 108, 113 (NY 1854). There is also at least one contemporary case holding that advance notice of at-will termination is not required, albeit in a case involving employer breach of loyalty claims against departing employees. *See* *Town & Country House & Home Serv. v. Newbery*, 147 N.E.2d 724, 728 (N.Y. 1958). There are several other New York cases referring to the ability to terminate without notice in dicta. *Horn v. N.Y. Times*, 790 N.E.2d 753, 755, 758–59 (N.Y. 2003); *Kotick v. Desai*, 123 A.D.2d 744, 744–45 (N.Y. App. Div. 1986); *Grozek v. Ragu Foods, Inc.*, 63 A.D.2d 858, 858 (N.Y. App. Div. 1978). *See generally supra* Section II.C.

344. In Pennsylvania, there is a nineteenth-century state supreme court case rejecting a claim based on failure to provide notice, *see* *Cofin v. Landis*, 46 Pa. 426, 434; 1864 WL 4617 (1864); *supra* Section I.B, as well as a contemporary trial court case reciting as the general rule that parties may terminate at will “upon reasonable notice,” *see* *Neal v. Altoona Hosp.*, 38 Pa. D & C 599, 601 (1985).

345. In Tennessee, there is one case purporting to define employment at will as including the right to terminate without notice, and at least one case in which the court “assumes” that “reasonable notice” is a prerequisite to terminating an at-will employee. *Compare* *Lee v. City*

Texas³⁴⁶
Virginia³⁴⁷

of LaVergne, No. M2001-02098-COA-R3-CV, 2003 WL 1610831, at *1 (Tenn. Ct. App. 2003), with Roberts v. Fed. Express Corp., 1991 WL 104203, at *5 (Tenn. Ct. App. 1991).

346. At least one older Texas case cites the general contract principal that termination must occur on “reasonable notice”; however, in the case itself the issue was whether the employee had actual knowledge of termination, not advance knowledge. *See* Island Lake Oil Co. v. Hewitt, 244 S.W. 193, 194–95 (Tex. Civ. App. 1922). Other Texas cases refer to termination “on notice” and the ability to terminate “by giving notice,” both of which suggest the law merely requires actual notice. *See, e.g.,* McKinney v. Smith, 271 S.W. 247, 247–49 (Tex. Civ. App. 1925). Still, other cases refer to termination with “no notice” and termination on “reasonably short notice.” *Compare* Wornick Co. v. Casas, 856 S.W.2d 732, 737 (Tex. 1993) (Hecht, J., concurring), with Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 406 (Tex. App. 1987).

347. Virginia has several cases that apply or refer to a “reasonable notice” requirement, but also cases that explicitly reject the theory that there is an independent cause of action for failure to provide advance notice. *Compare* Stonega Coke & Coal Co. v. Louisville & Nashville R.R., 55 S.E. 551, 552 (Va. 1906), with Perry v. Am. Home Prods. Corp., No. 3:96CV595, 1997 WL 109658, at *8–9 (E.D. Va. 1997).

APPENDIX B: NOTICE OF TERMINATION CASES

This appendix contains select cases that discuss or refer to notice of termination in the context of at-will employment. Cases listed as “reasonable notice” cases either hold that reasonable notice of at-will termination is required or support such a conclusion by inference or in dicta. Those cases listed as “no notice” cases either hold that at-will employment may be terminated without notice or support such a conclusion by inference or in dicta. “Contemporary cases” are those dating from 1960 to the present. “Historical cases” are those decided prior to 1960.

1. “REASONABLE NOTICE” CASES

a. *Cases Recognizing or Presuming a Right to Reasonable Notice of Termination of At-Will Employment*

i. Contemporary Cases

Florida

Rehman v. ECC Int’l Corp., 1993 WL 85758, at *1 (M.D. Fla. 1993) (concluding that issues of fact regarding industry custom precluded summary judgment on plaintiff’s claim based on failure to provide reasonable notice or continued pay).

Roebuck & Co., No. 91-0028-Civ-Orl-18, 1992 WL 210986, at *5 (M.D. Fla. 1992) (noting that the employer provided four months’ advance notice of termination consistent with its obligation to provide reasonable notice in rejecting employee’s claim of breach of the covenant of good faith and fair dealing).

Malver v. Sheffield Industries, Inc., 502 So. 2d 75, 76 (Fla. Dist. Ct. App. 1987) (upholding trial court’s decision that employer complied with reasonable notice obligation by providing employee one-week’s severance pay).

Crawford v. David Shapiro & Co., P.A., 490 So. 2d 993, 996–97 (Fla. Dist. Ct. App. 1986) (holding that a prospective employee who relocated from Britain for a job offer could be awarded damages arising from the defendant-accounting firm’s failure to provide reasonable notice of termination of the employment offer); *cf. Settle v. Sears*, 990 F.2d 1267 (11th Cir. 1993).

Perri v. Byrd, 436 So. 2d 359, 361 (Fla. Dist. Ct. App. 1983) (holding that restaurant was required to provide two-week's notice to terminated musicians and awarding damages equaling two-weeks' salary).

Tennessee

Roberts v. Federal Exp. Corp., 1991 WL 104203, at *5 (Tenn. Ct. App. 1991) (presuming that at-will employees are entitled to reasonable notice of termination in concluding that maintenance mechanic accused of stealing customer property would not have been entitled to notice because he was terminated for cause).

Virginia

Studer v. Hurley, 82 Va. Cir. 406, 407 (2011) (“One of the incidents of employment at will is the ability of either party to terminate the relationship with or without cause at any time, upon giving reasonable notice.”).

Rubin v. Maloney, 75 Va. Cir. 452, 453 (Va. Cir. Ct. 2007) (“Virginia has long adhered to the common law doctrine of employment ‘at will’ where when a term of employment cannot be determined from the contract, either party is at liberty to terminate the contract at any time for any reason, upon reasonable notice.”).

Tingle v. Chasen’s Bus. Interiors, Inc., 41 Va. Cir. 451, at *3 (Va. Cir. Ct. 1997) (permitting plaintiff’s claim based on employer’s failure to provide reasonable notice of at-will termination; reasonableness to be determined based on the cause for discharge).

Laudenslager v. Loral, 39 Va. Cir. 228, 229, 1996 Va. Cir. LEXIS 140 (Va. Cir. Ct. 1996) (noting that Virginia law requires “each party to an employment relationship to give the other reasonable notice of termination unless there is an agreement or understanding to the contrary” in recognizing action for breach of an implied contract).

Braunfeld v. Forest Home Sys., 12 Va. Cir. 163, at *3 (Va. Cir. Ct. 1988) (holding that the jury properly awarded \$3,731.41 in damages to the employee for unpaid expenses, outstanding commissions, and the employer’s failure to give reasonable notice of termination).

Slade v. Cent. Fid. Bank, N.A., 12 Va. Cir. 291 (Va. Cir. Ct. 1988) (concluding that “no notice to an employee of twenty-four years is prima facie unreasonable” in permitting teller’s claim for bank’s failure to provide reasonable notice of at-will termination).

ii. Historical Cases

Illinois

Gray v. Wulff, 68 Ill. App. 376, 377–78 (Ill. App. Ct. 1896) (permitting termination of orchestra leader on one week’s notice, concluding that employer “had the right to discharge [the plaintiff] on giving him the usual and customary notice . . . independent of the question whether he was competent” to remain employed).

Maryland

Stubbs v. Vestry of St. John’s Church, 96 Md. 267 (Md. App. 1903) (finding that rector’s appointment contract contained no fixed term of employment and could therefore be terminated at will upon reasonable notice, which had been received).

Bartlett v. Hipkins, 24 A. 532, 532 (1892) (concurrency) (noting that while statutory law permitted vestry to terminate its minister, “the right must always be exercised with due regard to the principles of justice, depending upon the circumstances of the case. Reasonable notice is essential.”).

Massachusetts

Harper v. Hassard, 113 Mass. 187 (Mass. 1873) (rejecting claim by paint maker that he had been hired for a fixed term and concluding that the defendants could terminate the employment agreement “at any time by reasonable notice”).

New York

Hathaway v. Bennett, 10 N.Y. 108, 113 (1854) (accepting the principle that customary notice is due to a terminated at-will worker, but finding that the plaintiff–newspaper carrier had not established a custom of providing one month’s notice).

b. *Cases Reciting that At-Will Employment Permits Termination “Upon Reasonable Notice”*

i. Contemporary Cases

Louisiana

Carlson v. Superior Supply Co., 536 So. 2d 444, 446 (La. Ct. App. 1988) (asserting in an employment termination case that “[a] contract for an indefinite period is terminable at the will of either party upon giving reasonable notice”).

Pennsylvania

Neal v. Altoona Hosp., 38 Pa. D. & C.3d 599, 601 (Pa. Ct. Com. Pl. 1985) (“An employment contract which has no definite duration is a hiring at-will, and may be terminated upon reasonable notice by either party at any time.”).

Tennessee

Hutchings v. Jobe, Hastings & Assocs., 2011 WL 3566972, at *1 (Tenn. Ct. App. 2011) (“It has been well-established that Tennessee is an at-will employment state, meaning that the Employer or the Employee may terminate the working relationship at any time without incurring any liability provided reasonable notice is given.”).

Texas

Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 406 (Tex. App. 1987) (rejecting employee’s claim that he was a permanent employee rather than an employee at-will, noting that he was entitled to quit at any time upon giving “reasonably short notice”).

Virginia

Cnty. of Giles v. Wines, 546 S.E.2d 721, 723 (Va. 2001) (“In Virginia, an employment relationship is presumed to be at-will, which means that the employment term extends for an indefinite period and may be terminated by the employer or employee for any reason upon reasonable notice.”).

ii. Historical Cases

California

Mile v. Cal. Growers Wineries, 114 P.2d 651, 679–80 (Cal. Dist. Ct. App. 1941) (noting in action by at-will wine salesman to recover commissions that “[personal services] contracts may be terminated by either party at will, upon giving the adverse party reasonable notice thereof”).

Missouri

Paisley v. Lucas, 143 S.W.2d 262, 271 (Mo. 1940) (“[A]ppellant’s contract . . . was a contract for employment as general insurance agent and manager for an indefinite term and it could, therefore, be cancelled by either party upon reasonable notice to the other.”).

Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 415 (Mo. Ct. App. 1943) (“[When an employment contract is] executed for an indefinite period, and by its nature it is not deemed to be perpetual, it may be terminated at will upon reasonable notice.”).

New York

Ward v. Ruckman, 34 Barb. 419 (N.Y. Gen. Term. 1861) (“[An employment] contract cannot be unlimited in respect to duration; and when no time is fixed for its continuance, it must be considered as subject to be terminated by either party on reasonable notice, if the interest of either requires a change.”).

Texas

Island Lake Oil Co. v. Hewitt, 244 S.W. 193, 194–95 (Tex. Civ. App. 1922) (noting that “when a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so” in holding that indefinite employment contract was terminable upon circumstances implying actual notice).

Virginia

Stonega Coke & Coal Co. v. Louisville & Nashville R.R., 55 S.E. 551, 552 (Va. 1906) (“[W]hen a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot

be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so”).

2. “NO NOTICE” CASES

a. *Cases Holding or Presuming that At-Will Employment May be Terminated Without Notice*

i. Contemporary Cases

Alabama

Allied Supply Co., Inc. v. Brown, 585 So. 2d 33, 34–35 (Ala. 1991) (holding that managers at an industrial supply company who conspired to quit simultaneously without warning were not liable for breach of fiduciary duty because “implicit in the ‘employment-at-will’ doctrine is the concept that an employee at will can be discharged, or, conversely, can terminate his employment, without prior notice”).

Louisiana

Harrison v. CD Consulting, Inc., 2006 WL 1194749 (La. Ct. App. 2006) (concluding that an at-will employee was not required to provide advance notice of departure in rejecting employer’s breach of fiduciary duty claim).

Finkle v. Majik Mkt., 628 So. 2d 259, 260, 262 (La. Ct. App. 1993) (holding that assistant manager of a retail store who had a “simple, at-will employment” relationship and “no specific contract” could be terminated without notice).

Michigan

Garavaglia v. Centra, Inc., 1998 WL 1991630, at *4 (Mich. Ct. App. 1998) (concluding that “[w]hile defendants were not required to give advance notice of their intentions to terminate the parties’ agreement, defendants should have notified plaintiff that the contract was terminated” in awarding plaintiff retainer fees for period in which he was unaware of termination).

Missouri

Boyer v. W. Union Tel. Co., 124 F. 246, 247–48 (E.D. Mo. 1903) (rejecting a claim by workers terminated without notice and blacklisted

for union activity, concluding that “in a free country like ours every employ[ee] . . . has the legal right to quit the service of his employer without notice, and either with or without cause, . . . [and] any employer may legally discharge his employ[ee], with or without notice, at any time”).

Virginia

Calquin v. Doodycalls Fairfax, 2009 WL 2947367, at *3 (E.D. Va. Sept. 11, 2009) (rejecting plaintiff’s claim against waste removal company for immediate termination as “there is no advance notice requirement for a termination of an at-will employee”).

Perry v. American Home Products, 1997 WL 109658, at *8–9 (E.D. Va. 1997) (rejecting chemist’s claim for pharmaceutical company’s failure to provide notice of termination concluding that requiring reasonable notice would “eviscerate the at-will doctrine”).

ii. Historical Cases

Hawaii

Crawford v. Stewart, 25 Haw. 300, 301 (1920) (rejecting employee’s claim for failure to provide notice of termination, concluding that “the requirement of such notice would abrogate entirely [the principle] that a hiring for a stipulated sum per month without anything further being agreed upon to fix the term of hiring constitutes an indefinite hiring and is terminable at the will of either party”).

New York

Town & Country House & Home Serv. v. Newbery, 147 N.E.2d 724, 728 (N.Y. 1958) (noting in rejecting employer’s claim against former home cleaning workers that “[i]t would have been courteous of [employees] to have given [their employer] advance notice that they were going to leave. . . , but their employment was at will, which legally required no notice to be given”).

Pennsylvania

Coffin v. Landis, 46 Pa. 426, 434 (1864) (sanctioning immediate termination of exclusive agency contract between landowner and his hired sales agent, holding that the employment was not subject to the one-year presumption, but was terminable at the defendant’s pleasure and that “no notice was necessary”).

b. *Cases Reciting that At-Will Employment Permits Termination “Without Notice”*

i. Contemporary Cases

Colorado

Cont’l Air Lines, Inc. v. Keenan, 731 P.2d 708, 711 (Colo. 1987) (en banc) (“An employee who is hired in Colorado for an indefinite period of time is an ‘at will employee,’ whose employment may be terminated by either party without cause and without notice, and whose termination does not give rise to a cause of action.”).

Massachusetts

Jackson v. Action for Boston Cmty. Dev., Inc., 525 N.E.2d 411, 412 (Mass. 1988) (“Employment at will is terminable by either the employee or the employer without notice, for almost any reason or for no reason at all.”).

Welgoss v. Dep’t of Transp., No. 2012-1549-C, 2013 WL 4007929, at *4 (Mass. Super. 2013) (“The essence of at-will employment is a mutual understanding between employer and employee that the relationship is of indefinite duration, and that either party may terminate it at any time without notice, cause or financial consequence.”).

New York

Horn v. N.Y. Times, 790 N.E.2d 753, 755 (N.Y. 2003) (“The traditional American common-law rule undergirding employment relationships . . . is the presumption that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice.”).

Kotick v. Desai, 507 N.Y.S.2d 217, 218 (N.Y. App. Div. 1986) (“At will employment permits either party to terminate the employment relation without advance notice . . .”).

Grozek v. Ragu Foods, Inc., 406 N.Y.S.2d 213, 213 (N.Y. App. Div. 1978) (“It is well-settled that unless there is a definite period of service specified in a contract, the hiring is at will and the employer has the right to discharge and the employee to leave at any time, without advance notice, and neither has any cause of action against the other.”).

Ohio

Bauserman v. Katy Steel & Aluminum Co., 1986 WL 1689, at *2 (Ohio Ct. App. 1986) (“Appellee, therefore, remained an at-will employee even after signing the agreement, and his employment could be terminated without notice and for any reason.”).

Oregon

Handam v. Wilsonville Holiday Partners, LLC., 201 P.3d 920, 923 (Or. Ct. App. 2009) (“The general rule in Oregon is that employment is ‘at will.’ That means that, except as otherwise provided by statute or employment agreement, employees may be terminated without notice and for any reason.”).

Tennessee

Lee v. City of LaVergne, 2003 WL 1610831, at *1 (Tenn. Ct. App. 2003) (“The law is well settled in Tennessee that an at-will employee may be terminated for good cause, bad cause or no cause at all, without notice.”).

Texas

Wornick Co. v. Casas, 856 S.W.2d 732, 737 (Tex. 1993) (“[Plaintiff] was an employee at will and subject to termination without notice or cause.”).

Alvarado v. Sprint/United Mgmt. Co., 2013 WL 4603394, at *1 (N.D. Tex. Aug. 28, 2013) (“Most of [defendant’s] employees are employed on an ‘at will’ basis, meaning that either the employee or [the defendant] can terminate the employment relationship with or without cause and with or without notice.”).

ii. Historical Cases

Michigan

O'Connor v. Hayes Body Corp., 242 N.W. 233, 234 (Mich. 1932) (“The contract of employment, being for no definite period, was a hiring at will and could have been terminated, at any time, by either party without notice.”).