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Deconstructing Employment Contract Law

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DECONSTRUCTING EMPLOYMENT CONTRACT LAW

*Rachel Arnow-Richman & J.H. Verkerke**

Abstract

Employment contract law is an antiquated, ill-fitting, incoherent mess. But no one seems inclined to fix this problem. Employment law scholars, skeptical of employees' ability to bargain, tend to disregard contract law and advocate for just-cause and other legislative reforms to eliminate at-will employment. And contracts scholars largely ignore employment cases—viewing them, with some justification, as part of a peculiar, specialized body of law wholly divorced from general contract jurisprudence. As a result of this undesirable employment law exceptionalism, courts lack the tools needed to resolve recurring disputes.

This Article offers a new, comprehensive historical account that exposes the formalistic and anticontractual origins of existing doctrine and shows how to repair the resulting harm. Blinkered by the powerful employment-at-will presumption, judges seized on unilateral contract theory to enforce employer promises of deferred benefits and job security. But this narrow doctrine ignores the complexity of the employment relationship and permits only piecemeal analyses of individual terms. The result is rigid, and frequently inaccurate, judicial reasoning that obscures courts' underlying policy choices and produces technical opinions largely detached from real life. Meanwhile, creative judicial efforts to develop an informal alternative—which would sidestep these doctrinal challenges by enforcing employees' legitimate expectations—have failed to take root.

This Article concludes by identifying a path forward. The problems with existing doctrine flow principally from courts' failure to respect the contractual character of employment and their disregard of widely accepted developments in contract doctrine and theory. Employment is a long-term, fluid relationship governed by an agreement that is necessarily incomplete, dynamic, and usually expressed in indefinite terms. To address these challenges, we outline a new model of a “hyper-relational” employment contract, an approach that reframes the dynamic features of employment agreements in contemporary terms as a form of

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contractually conferred discretion within an enforceable bilateral relationship. This Article considers how the implied duty of good faith and fair dealing and modern approaches to contextual evidence could resolve indefiniteness, supply missing terms, and accommodate modification. This new model would both supply the formal framework that courts demand and build employment contract law on a firm doctrinal foundation at last.

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INTRODUCTION

Employment contract law is an antiquated, ill-fitting, incoherent mess. Consider courts’ shifting rationales for enforcing employer policies containing assurances of job security. Early employee handbook cases, for example, invoked a wide variety of inconsistent doctrinal theories,

including unilateral contract, promissory estoppel, third-party beneficiary, bilateral contract, and an informal approach based on “legitimate expectations.”¹ Even as decisions eventually coalesced to favor the unilateral contract theory, judges sharply disagreed over how that doctrine might constrain employers who wished to modify their preexisting job security policies.² Most confounding, subsequent rulings have enforced employers’ broad disclaimers and confirmations of at-will status and thus profoundly undermined any worker protection that earlier employee handbook cases provided.³ These disparate and shifting decisions begin to show how courts have struggled to articulate a consistent account of employment contract formation, modification, and enforcement.

Of course, we might choose to excuse this inconsistency if it enabled judges to select an appropriate doctrinal theory to fit each distinctive fact pattern. But technical and practical problems afflict all these approaches and make them ill-suited to regulate employment relations. To form a unilateral contract, for example, a promisee must be aware of the promisor’s offer and tender performance in exchange for the promised consideration.⁴ However, most workers pay little attention to the details of their employers’ onboarding documents, which are often presented after the start of employment.⁵ Similarly, promissory estoppel doctrine

1. See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267–68 (N.J. 1985) (invoking the unilateral contract framework as well as promissory estoppel and the third-party beneficiary doctrine); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 891–92 (Mich. 1980) (considering a bilateral contractual account as well as an extra-contractual approach based on employees’ legitimate expectations).

2. Compare *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 113 (Mich. 1989) (asserting that employers can unilaterally rescind their job security policies and reinstitute termination at will), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989), and *Asmus v. Pac. Bell*, 999 P.2d 71, 73 (Cal. 2000) (concluding that an employer may unilaterally terminate a policy as long as reasonable notice is given), with *Demasse v. ITT Corp.*, 984 P.2d 1138, 1153 (Ariz. 1999) (holding that an employer cannot unilaterally modify implied contractual terms absent new consideration and employee assent).

3. See, e.g., *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 277–78 (Mich. 1991).

4. See 1 WILLISTON ON CONTRACTS § 1:17 (4th ed. 2022). For a detailed discussion of unilateral contracts, see *infra* Section II.A.

5. The question of the legitimacy of assent to form documents has been extensively considered in the consumer context. See, e.g., NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 41, 43 (2013) (criticizing the modern tendency to enforce unread click-wrap and browse-wrap contract terms); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12, 15 (2013) (arguing that boilerplate terms go unread and that this fact vitiates consumer consent to those terms). For a classic treatment, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1192 (1983). Fewer scholars have engaged the assent question in the context of employee onboarding and human resource documents. But see Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 651–56 (2007).

only warrants enforcement when a promisee has detrimentally relied on the promise.⁶ But few, if any, employees can produce evidence of substantial detrimental reliance on employer policies.⁷ Leading cases have papered over these shortcomings by adopting legal fictions—presumed knowledge or reliance—to establish the essential elements of unilateral contract and promissory estoppel doctrine.⁸ And these prominent, yet poorly reasoned, cases have spawned hundreds of similar decisions throughout the country.

Unilateral contract theory now dominates the judicial analysis of most employment agreements.⁹ But this doctrine is best adapted to enforcing discrete promises—such as a reward for returning a lost pet or a prize for winning a competition—when it makes no sense to expect the promisee to make a return promise.¹⁰ In contrast, an employment contract ordinarily is formed by an exchange of mutual promises and contemplates an ongoing relationship for an indefinite period.¹¹ Such a contract provides, at best, a vague and incomplete specification of the employee's job duties and prospects for advancement. Thus, unilateral contract doctrine is an extremely poor tool to guide courts' analysis of employment agreements.

But no one seems inclined to fix these problems. Countless employment law scholars have condemned the longstanding presumption that when employment is for an indefinite term, either party may terminate at will.¹² Some have also assailed the array of extraneous

[hereinafter *Standard Form Employment*] (discussing parallels between consumers and workers subject to standardized arbitration and noncompete agreements); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 932 (2015) [hereinafter Verkerke, *Legal Ignorance*] (noting that most individuals do not read contract terms or understand their legal significance).

6. See RESTATEMENT (SECOND) OF CONTS. § 90 (AM. L. INST. 1981).

7. See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 n.10 (N.J. 1985) (acknowledging this limitation). For the rare example where an employee can demonstrate reliance on handbook policies, see *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982) (defendant described handbook termination policy in inducing plaintiff to leave his current job and noted that hiring was subject to handbook personnel policies on his employment application).

8. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) (introducing the idea of presumed reliance); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 (N.J. 1985) (drawing inspiration from *Toussaint* in using the same legal fiction).

9. See *infra* Section I.C & Part II.

10. See 2 WILLISTON ON CONTRACTS § 6:30 (4th ed. 2022). For more detailed discussion of unilateral contracts, see *infra* Section II.A.1.

11. See, e.g., *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 433 (5th Cir. 2001) (“Generally, duration, compensation, and the employee’s duties are essential elements of an employment contract.”).

12. See, e.g., PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 49, 55–56 (1990); see generally Rachel Arnow-Richman, *Just Notice: Re-*

doctrines—including mutuality and additional consideration—that many restrictive courts deployed to transform employment-at-will from a default (and thus rebuttable) presumption into something more akin to a mandatory rule.¹³ However, employment scholars have typically advocated—with little success—for just-cause legislation¹⁴ and other statutory reform.¹⁵ From their perspective, contract law is an inherently limited tool because employers can dictate and draft the terms of the relationship unilaterally.¹⁶

And contracts scholars have been no more likely to propose meaningful corrective measures. Instead, they either deride the reasoning of employment cases or ignore them altogether. Assessing leading

Reforming Employment At Will, 58 UCLA L. REV. 1, 9–16 (2010) [hereinafter Arnow-Richman, *Just Notice*] (summarizing literature). One scholar estimates that there have been over two hundred articles criticizing at-will employment, with some advocating for a just cause alternative. See Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 & n.1 (2004); see also J. H. Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 839–40 [hereinafter Verkerke, *An Empirical Perspective*] (recognizing the “majority of scholars” who would replace the at-will doctrine).

13. See, e.g., Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1097–99 (1984); see also *infra* Section I.A (surveying these and other related doctrines).

14. See, e.g., Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 370 (1994) (acknowledging states’ tepid response to the Uniform Law Commission’s model just-cause legislation). Only one state, Montana, has modified the default rule by statute. Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-904(1)(b) (2021). See generally Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375 (1996) (discussing the Montana Act and judicial interpretation); Recently a few localities have enacted just cause legislation limited to specific industries. See, e.g., N.Y.C., N.Y., ADMIN. CODE § 20-1272 (2023) (fast food workers); PHILA., PA. CODE § 9-4702 (2020) (parking lot attendants). These narrow exceptions arguably prove the rule.

15. See, e.g., Charlotte Alexander et al., *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 6 (2015) (advocating for guaranteed-pay provisions); Nicole Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiving Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 828–35 (2010) (advocating for a “Part-Time Parity Act” to address caregiver discrimination). One example of recent success has been in the area of fair scheduling laws. See, e.g., The Oregon Fair Work Week Act, ORS §§ 653.412–490; Alexander et al., *supra*, at 36 n.206 (noting San Francisco’s “ordinance requiring chain stores to give two weeks’ notice to employees of their schedules”).

16. See, e.g., Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 378–80 (2008). For this reason, some scholars have suggested that relational contract theory could support a more appropriate contractual framework for the employment sector. See, e.g., Robert C. Bird, *Employment as a Relational Contract*, 8 U. PENN. J. LAB. & EMP. L. 149, 200–08 (2005) (arguing for judicial recognition of an “implied covenant of the employment relation”); Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 771–73 (1998) (viewing court decisions finding implied-in-fact contracts of job security as consistent with a relational understanding of assent). We consider employment’s relational qualities, *infra* Section II.B.

decisions enforcing employee handbooks as implied contracts, one prominent contracts scholar quipped that the courts' analysis "would probably garner a first-year Contracts student an F for saying that a contract was formed at all."¹⁷ Other commentators have expressed more forceful criticism of modern reliance on unilateral contract doctrine,¹⁸ but relatively few have devoted close attention to the employment context.¹⁹ Thus, the prevailing attitude among contracts scholars has been to dismiss these cases as part of a peculiar, specialized body of law wholly divorced from general contract jurisprudence.²⁰

The undesirable result is what we term an "employment contract exceptionalism." Employment contract law persists as an isolated, doctrinally aberrant body of law that leaves courts without the tools they need to resolve recurring, real-world disputes. In this Article, we deconstruct²¹ employment contract doctrine and lay the groundwork necessary to reconstruct the law on a firmer foundation. We offer a new, critical, historical account that exposes the formalistic and anti-contractual roots of existing doctrine and reveals what we need to do to repair the harm this approach has caused. Our principal project here is to clear away the confused wreckage of current law. By doing so, we argue it is possible to develop a more coherent version of employment contract law *within* the bounds of accepted employment law. Our approach redeploys contemporary contract law to achieve fairer and more coherent results while acknowledging that judges and legislators have no appetite for abandoning at-will employment.

We ask first how courts managed to get so much so wrong. The answer begins with the employment-at-will presumption itself. Until roughly 1980, courts were overtly hostile to almost all contract claims for protection against discharge without cause.²² They established a nearly "irrebuttable presumption" that any indefinite hiring was terminable at

17. 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).

18. See, e.g., Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85, 90 (2010) (critiquing reliance on unilateral contract theory in the insurance context).

19. See David G. Epstein & Yvette Joy Liebesman, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 302 (2006); Mark Pettit Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 559 (1983); *infra* Section II.A.2.

20. See, e.g., Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 34 (2003).

21. Note that we use the verb "deconstruct" here in its colloquial sense of untangling, dismantling, and scrutinizing. Our project does not draw on the practice of radical "deconstruction" popularized by Jacques Derrida and others. See generally GREGORY JONES-KATZ, *DECONSTRUCTION: AN AMERICAN INSTITUTION* (2021).

22. See J.H. Verkerke, *The Story of Woolley v. Hoffmann-La Roche: Finding a Way to Enforce Employee Handbook Promises*, in *EMPLOYMENT LAW STORIES* 23, 23 (Samuel Estreicher & Gillian Lester eds., 2007) [hereinafter Verkerke, *The Story of Woolley*].

will.²³ Only extraordinary circumstances—such as an employee who sold a competing business or surrendered a workplace injury claim—might sometimes overcome this “super-presumption” as we refer to it.²⁴ Even express contracts for “permanent” or “lifetime” employment were routinely held to instead imply an impermanent at-will relationship.²⁵ Recurring doctrinal errors—such as requiring so-called “additional” consideration or interpreting mutuality as a mandate for symmetrical obligations—allowed employers to escape enforcement even when they expressly offered their employees definitive assurances of job security.²⁶

By contrast, however, courts took a more permissive approach to cases involving benefits and compensation.²⁷ Beginning in the early twentieth century, courts began to enforce employers’ promises of deferred benefits such as pensions or severance pay.²⁸ Even though these promises were embedded in an ongoing employment relationship, judges enforced them as independent unilateral contracts.²⁹ We argue that courts were drawn to this approach because it allowed them to enforce these discrete promises without disrupting the at-will nature of the overall employment relationship. Moreover, unilateral contract doctrine provided at least a superficially plausible framework for deferred benefit cases. Courts confronted a promise to pay a sum of money on the occurrence of a specific event—a situation that roughly resembles offering a prize or reward for some performance.

But judicial reasoning sometimes has unintended consequences. The deferred benefits rulings inspired late-twentieth-century courts to enforce handbook promises and other assurances of job security.³⁰ With that inspiration came a doctrinal legacy. In a development that has gone largely unremarked by scholars, most of the subsequent cases eventually adopted the same unilateral contract model applied in those deferred benefits precedents.³¹ But fundamental features of the typical

23. *Id.*

24. *See* *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 874 (Minn. 1936) (refusing to enforce a contract for job security without additional consideration or an agreement to work for a definite term of years); *Hanson v. Cent. Show Printing*, 130 N.W.2d 654, 655 (Iowa 1964) (same); *see also infra* Section I.A.

25. *See Skagerberg*, 266 N.W. at 873–74, 877 (construing “permanent” employment to be for an indefinite term and therefore terminable at will).

26. *See* *Summers*, *supra* note 13, at 1097 (asserting that courts made the “[at-will] presumption . . . nearly irrebutable by requiring that the parties expressly agree to a definite term”).

27. *See* *Verkerke, The Story of Woolley*, *supra* note 22, at 29–30; *infra* Section I.B.

28. *See, e.g.*, *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762, 763–64 (N.J. Super. Ct. App. Div. 1958).

29. *See, e.g., id.* at 764.

30. *See, e.g., Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1268 (N.J. 1985) (relying on reasoning from an earlier severance case).

31. *See, e.g., id.* at 1267.

employment relationship contrast sharply with what we refer to as the “reward paradigm” of unilateral contract doctrine. Applying the unilateral approach to these complex, relational agreements inevitably makes judicial decisions formalistic and detached from the real-world relationships they purport to regulate. Moreover, courts’ use of legal fictions to establish essential elements of a bargain further distances their formal doctrinal analysis from key facts about employment contracts. Reading employment contract opinions rarely illuminates the parties’ relationship. Instead, judicial reasoning obscures important policy choices and rests on ill-conceived applications of archaic contract law.³²

The law of employee handbook enforcement illustrates just how poorly prevailing doctrine fits fundamental characteristics of the employment relationship. A unilateral contract is formed only when the offeree completes performance, and, prior to that time, the offeree has no legal obligations to the offeror.³³ But most employment contracts are formed prior to any performance—i.e., when a worker accepts a written or oral job offer—and include many mutual legal obligations. An offer of a unilateral contract also typically contemplates a precisely defined performance with no expectation of continued interaction between the parties.³⁴ In contrast, employers and employees anticipate a working relationship that will continue for an indefinite period, and both parties recognize that the nature of their required performance will evolve over time. It is also notable that the unilateral framework has not fared much better outside of the employment context. Prominent contracts scholars and legal authorities have suggested that unilateral contracts are, and should be, an unusual exception to the bilateral rule.³⁵ Thus, this doctrine makes little sense as a vehicle for analyzing employment promises.

Considering all this confusion, it may be tempting to abandon formal doctrine and rely instead on a direct appeal to public policy to determine employment rights. However, creative judicial efforts to develop an informal alternative approach that enforces employees’ expectations of

32. See *infra* Part II.

33. 1 WILLISTON ON CONTRACTS § 1:18 (4th ed. 2022). In such cases, mainstream contract law, as expressed in Section 45 of the Second Restatement of Contracts, protects the reliance of an offeree who has begun to perform by holding the offer open as an option contract. See RESTATEMENT (SECOND) OF CONTRS. § 45 (AM. L. INST. 1981). Employment contract law has largely ignored this mitigating doctrine.

34. See 1 WILLISTON ON CONTRACTS § 1:18 (4th ed. 2022).

35. Professor Karl Llewellyn, principal drafter of the Uniform Commercial Code (UCC), condemned doctrines such as unilateral contracts that invite “superb classroom theatrics” but “[do] not well fit the fact-conditions” of actual business deals. K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 780, 787 (1939). As we will see both the UCC and Second Restatement retreated from the distinction between bilateral and unilateral contracts. See U.C.C. § 2-206(1)(a) (AM. L. INST. & UNIF. COMM’N 1951); RESTATEMENT (FIRST) OF CONTRS. § 31 (AM. L. INST. 1932); *infra* Section II.A.

job security have failed to take root. In an influential early decision concerning employee handbooks, the Michigan Supreme Court said that an employer's written policy would be enforceable as an implied contract if it created "legitimate expectations" of job security.³⁶ We explore this intriguing alternative theory in part because it avoids many problems that plague the unilateral contract framework. Under this approach, plaintiffs would no longer need to shoehorn their claims into conventional allegations of offer and acceptance supported by adequate consideration. Strikingly, however, the court's informal approach has attracted no followers.³⁷ Even in Michigan, subsequent cases have curtailed the scope of protected legitimate expectations by assessing employee claims more skeptically.³⁸ And courts in other jurisdictions appear determined to keep handbook claims (as well as other employment contract cases) firmly tethered to formal contract doctrine.³⁹ The lesson we draw from this history—and states' failure to enact just-cause protection for employees—is that the employment-at-will rule and formal contract doctrine will continue to govern employment contracts for the foreseeable future.

We conclude by identifying a path forward. We describe a new bilateral, "hyper-relational" framework for employment contracts. Employment is a long-term, fluid, and reciprocal undertaking governed by an agreement that is necessarily incomplete, usually expressed in indefinite terms, and constantly evolving. The problems with existing doctrine flow principally from courts' failure to respect the contractual character of this arrangement. In analogous commercial contracting situations, however, courts have often confronted agreements with similar features. Many commercial contracts (1) omit important terms or specify the parties' long-term obligations in indefinite terms; (2) are subject to frequent adjustments in light of the parties' experience performing the contract; and (3) confer a right on one or both parties to terminate the relationship without cause.

Contemporary commercial law has developed workable doctrinal approaches to each of these common contracting challenges. Under both the Uniform Commercial Code (UCC) and the Restatement, open terms and indefiniteness are no longer insurmountable obstacles to contract formation so long as the parties intend to make binding commitments.⁴⁰

36. See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 885 (Mich. 1980).

37. See *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 269 (Mich. 1991) (calling for "a resolution [of handbook claims] which is consistent with contract law"); *infra* Section III.C.

38. See, e.g., *Bodnar v. St. John Providence, Inc.*, 933 N.W.2d 263, 370–71 (Mich. Ct. App. 2019) (discussing the limitations of the "legitimate-expectations theory" in Michigan).

39. See *infra* Section III.C.

40. See U.C.C. § 2-204(3); RESTATEMENT (SECOND) OF CONTRS. § 33(1) (AM. L. INST. 1981); *infra* Section IV.B.2.

Courts routinely fill contractual “gaps” and admit contextual evidence for the purpose of interpreting or supplementing written agreements.⁴¹ Similarly, formal requirements for contract modification have loosened. Mainstream contract law now includes flexible doctrines that enforce modifications made in good faith.⁴² Finally, cases have held that the duty of good faith and fair dealing constrains the exercise of contractually conferred discretion, including the power to terminate an agreement at will.⁴³ Under the UCC, for instance, good faith requires parties to provide reasonable notice before an at-will termination.⁴⁴

We readily acknowledge that better ways exist to regulate employment relationships than at-will contracts. But despite trenchant criticisms, the rule has remained remarkably resilient. Courts regularly invoke the presumption,⁴⁵ and it recently received the imprimatur of the first Restatement of Employment Law.⁴⁶ We therefore put to one side debates about the merits and legitimacy of the employment-at-will doctrine. Rather than reinvigorate a futile quest for just-cause legislation,⁴⁷ we advocate for a more achievable goal. Under the doctrinal reforms we propose, employers undoubtedly will continue to have considerable discretion to define the nature of performance and to establish workplace policies. But legal regulation of the employment relationship will be much more coherent and effective once courts recognize that employment contracts resemble bilateral, relational, commercial contracts rather than unilateral contracts for rewards or prizes. Our new approach would supply the formal doctrinal framework

41. On the concept of using default rules to fill contractual gaps, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). Of course, questions about *how* to fill gaps and select background defaults still create controversy. See generally David Charny, *The New Formalism in Contracts*, 66 U. CHI. L. REV. 842 (1999) (addressing the issues associated with applying local custom and practices to contracts and commercial law); CORBIN ON CONTRACTS § 26.4[A], at 430–41 (Joseph M. Perillo ed., 2010) (summarizing key contract theories addressing these questions). But the idea that courts must fill gaps in interpreting contracts is largely uncontested. Indeed the UCC contains a series of gap filling defaults to be applied to open-term sale of goods contracts.

42. See U.C.C. § 2-209 (AM. L. INST. & UNIF. L. COMM’N 1977); RESTATEMENT (SECOND) OF CONTS. § 89 (AM. L. INST. 1981).

43. See, e.g., *Fortune v. Nat’l Cash Reg., Co.*, 364 N.E.2d 1251, 1253 (Mass. 1977). Good faith is generally interpreted to preclude termination decisions that deprive the other party of the benefit of the bargain. See 23 WILLISTON ON CONTS. § 63:22 (4th ed. 2022).

44. U.C.C. § 2-309 (AM. L. INST. & UNIF. L. COMM’N 1977). See generally Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1549 (2014) [hereinafter Arnow-Richman, *Mainstreaming*] (discussing the UCC approach and its possible application to employment).

45. See, e.g., *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 271 (Mich. 1991) (invoking the presumption that contracts for an indefinite period of employment are terminable at will).

46. See RESTATEMENT OF EMP. L. § 2.01 (2015).

47. See St. Antoine, *supra* note 14, at 380.

that courts so clearly demand. More importantly, however, our solution would finally place employment contract law on a firm conceptual foundation.

This Article proceeds in four parts. Part I traces the doctrinal history of employment contracts. Part II offers a rigorous critical appraisal of the unilateral contract approach to employment contracts. We show just how ill-suited it is to regulate the complexities of employment relations and the problems it has engendered. Part III then explores an alternative, informal, doctrinal path-not-taken: enforcement based on employees' legitimate expectations. Although this approach would alleviate many of the shortcomings of unilateral contract doctrine, courts have shown a strong preference for more formal theories of enforcement. Part IV concludes by offering an initial description of just such an approach. We show that contemporary contract law provides the tools required to reconstruct employment contract law.

I. AN INTERPRETIVE HISTORY OF EMPLOYMENT CONTRACT LAW

American employment law reflects a deep-rooted ambivalence about the contractual status of the at-will relationship. The initial articulation of at-will employment in the late-nineteenth century reflected the prevailing freedom-of-contract ethos of the times.⁴⁸ Workers in the United States were ostensibly at liberty to sell their labor to whomever they chose for however long they desired. They could also cease or withhold performance at their election. Under a primitive understanding of contract formation, this approach implied that employers and employees had no prospective obligations to one another. In effect, the relationship was noncontractual by its nature.

Yet the personal and societal significance of employment relationships raises policy concerns that demand a workable theory of enforceable obligations. For much of history, courts have been reluctant to recognize employee contract claims for fear of interfering with managerial discretion and opening the proverbial floodgates to individual claims based on scant evidence. At the same time, some have been motivated to rectify certain forms of employer abuse. Especially where employers knowingly or negligently foster expectations of future benefits, these courts have understandably sought ways to remedy the employee's justified reliance.

48. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 129–30 (1976) (discussing the hypothesized connection between the development of the theories of freedom of contract and at-will employment); 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, 454 (2008) (“The prevailing wisdom is that the at-will rule spread because of a judiciary fixated, from about 1890 to 1930, on laissez-faire reasoning and freedom of contract.”).

In pursuit of these competing impulses, courts have relied almost exclusively on classical contract principles. However, they have done so piecemeal and in an idiosyncratic fashion. Against a backdrop of uncertainty about the contractual status of the at-will relationship, courts have assessed the legal significance of isolated statements and documents primarily through technical application of unilateral contracts principles. These decisions effectively “contractualize” specific terms of the relationship without the benefit of a sound contractual account of employment as a whole.⁴⁹ The result is what we refer to as employment contract exceptionalism—a body of case law that is doctrinally intricate, highly aberrational, and woefully undertheorized.

In Part II, we will expose the depth and consequences of employment contract exceptionalism. But first, this Part explains how employment contract law arrived at this juncture. Section I.A unpacks the employment-at-will “super-presumption,” as we refer to it. Early on, courts developed a trifecta of idiosyncratic and anticontractual proof requirements to impede employee claims for breach of contract and preserve at-will employment. Section I.B develops courts’ parallel use of unilateral contract theory as a means of contractualizing discrete employer promises of future benefits and compensation, while preserving at-will employment. Section I.C reveals how courts subsequently conscripted the unilateral contract model to address cases involving employer job security policies. As a result, the conventional wisdom now holds that the entire at-will employment relationship is a species of a unilateral contract.

A. *The Employment-at-Will (Super) Presumption*

The disconnect between employment and mainstream contract law dates nearly to the inception of American employment law. Since the adoption of the infamous employment-at-will doctrine,⁵⁰ courts have treated this so-called “presumption” as something akin to a substantive rule.⁵¹ In the paradigmatic scenario, a terminated employee sues for

49. See Arnow-Richman, *Standard Form Employment* *supra* note at 5, 638–39.

50. It is widely agreed that the at-will doctrine originated with a 19th century treatise by Horace Wood, the accuracy of which has been called into doubt by many scholars. See 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.”); 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).

51. As Arnow-Richman has argued elsewhere, employment-at-will is a doctrine consisting of multiple rules, which include the rule that employment is of an indefinite duration and that it may be terminated without notice. See Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1567. These other aspects of the at-will doctrine will become important as we reframe employment

breach of contract, alleging that the employer promised job security if the employee would accept a job or remain with the employer.⁵² Early courts refused to permit such claims on grounds that starkly violate mainstream contract principles. They held, first, that employees could not rely on general expressions of employer commitment in establishing a job security contract.⁵³ Second, they insisted that employees satisfy a heightened consideration requirement.⁵⁴ Third, they implicitly imposed a mutuality requirement, pointing to the employee's right to quit as a justification for refusing to enforce employer promises not to fire.⁵⁵ These errors reveal a hostility to employee claims and a misunderstanding of the contractual nature of employment.

The Iowa Supreme Court's 1964 decision in *Hanson v. Central Show Printing*⁵⁶ offers a stark example. Hanson, "a skilled pressman," had been employed "for many years" in a job where work was "often slack" over the winter.⁵⁷ In autumn he received an offer of a "steady job" elsewhere and sought a similar assurance from his current employer.⁵⁸ Upon negotiation, Hanson received a letter of commitment, stating: "I will guarantee you [forty] hours work per week thru out [sic] the entire year each year until you retire of your own choosing."⁵⁹ It was signed by the company president.⁶⁰ Yet two years later, when Hanson was fired,

contract law. See *infra* Part IV. For purposes of this discussion, however, we focus on the most prominent aspect of at-will employment—the ability of employers to terminate without reason—which has animated the at-will debate within the scholarly discourse.

52. See, e.g., *Hanson v. Cent. Show Printing*, 130 N.W.2d 654, 655 (Iowa 1964); *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 873 (Minn. 1936); *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967); *Pa. Co. v. Dolan*, 32 N.E. 802, 803 (Ind. App. 1892); *Turner v. Newsom*, 3 So. 3d 913, 915 (Ala. Civ. App. 2008).

53. See, e.g., *Hanson*, 130 N.W.2d at 655–56 (quoting Annotation, *Duration of Contract Purporting To Be for Permanent Employment*, 35 A.L.R. 1432, 1432 (1925)) (reciting the "generally followed" rule that "a contract for permanent employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment, is no more than an indefinite general hiring terminable at the will of either party").

54. See, e.g., *Forrer*, 153 N.W.2d at 589 ("[A] contract for permanent employment . . . where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party."); *Turner*, 3 So. 3d at 917 (stating that, to show employment was permanent and not at-will, one must prove that the employee "provided substantial consideration for the contract separate from the services to be rendered").

55. *Smith v. St. Paul & D. R. Co.*, 62 N.W. 392, 393 (Minn. 1895) (finding that a contract for permanent employment lacked mutuality because "the plaintiff was not bound . . . to continue in defendant's service but could cease work at his pleasure").

56. 130 N.W.2d 654 (Iowa 1964).

57. *Id.* at 655.

58. *Id.*

59. *Id.*

60. *Id.*

allegedly without cause, the court rejected his claim for breach of contract, affirming a directed verdict for the defendant-employer.⁶¹

Describing the question as “a simple one,” the court recited the “generally followed” rule that:

in the absence of additional express or implied stipulation as to the duration of the employment or of a good consideration additional to the services contracted to be rendered, a contract for permanent employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment, is no more than an indefinite general hiring terminable at the will of either party.⁶²

The court found that Hanson’s situation fit squarely within these principles.⁶³ First, it held that the words “until you retire of your own choosing” were equivalent to promises of lifetime or permanent employment deemed an at-will hiring per the general rule.⁶⁴ Second, the court held that Hanson had not supplied any consideration beyond his continued service to the employer.⁶⁵ It disclaimed the significance of Hanson’s competing offer, asserting that the decision to forgo alternate employment is part and parcel with the decision to serve any one employer.⁶⁶ According to the court, Hanson supplied nothing beyond his continued commitment to remain an at-will employee.⁶⁷

It is difficult to offer any legitimate doctrinal explanation of the court’s conclusions, which reflect three related errors. First, the court disregarded the content of the employer’s letter. On its face, it would appear to mean what it said: that the defendant was committed to maintaining Hanson’s employment for as long as he wished to serve. To be sure, there were likely some implied limits on this commitment. The parties probably would have agreed that the company retained the right to terminate Hanson if he ceased to perform or engaged in misconduct justifying termination.⁶⁸ However, it is plain from the letter that the employer relinquished its broader right to terminate at will for any or no

61. *Id.* at 658–59.

62. *Id.* at 655–56 (quoting Annotation, *supra* note 53, at 1432).

63. *Id.* at 656.

64. *Id.*

65. *Id.* at 656, 658.

66. *Id.* at 656–57.

67. *Id.* at 657 (quoting *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 877 (Minn. 1936)) (noting that the “‘abandon[ment of] other activities and interests to enter into the service of defendant—a thing almost every desirable servant does upon entering a new service . . . cannot be regarded as constituting any additional consideration to the master’”).

68. *Cf. Savarese v. Pyrene Mfg. Co.*, 89 A.2d 237, 239–40 (N.J. 1952) (distinguishing between a “life employment” contract and a just-cause contract).

reason, and the court identified nothing in the factual record to suggest otherwise. It simply substituted its own interpretation of the employer's words as a matter of law, a move entirely at odds with contract law's commitment to interpreting contracts consistent with party intent.⁶⁹

Second, the court broke from accepted consideration analysis. The determination that Hanson failed to supply adequate consideration violates the fundamental principle that courts do not inquire into the quality of contractual exchange. Pursuant to the bargain principle of contract law, the role of the court is merely to enforce the parties' terms, so long as they have agreed.⁷⁰ In *Hanson*, the parties reached an agreement whereby Hanson would forego an attractive job offer in exchange for the employer's commitment to providing long-term, full-time employment for as long as Hanson wished to remain.⁷¹ Whatever value a court may assign to Hanson's forbearance, the requisite exchange is obvious. There is no justification consistent with contract law for requiring anything more.⁷²

Hanson's requirement of consideration "in addition to" his continued service suggests a third doctrinal error: reliance on discredited principles of mutuality.⁷³ Early contract cases held that consideration required not just an exchange, but so-called mutuality of obligation—a set of symmetrical commitments that matched one another in substance.⁷⁴ In the case of a contract for job security, this since-discredited doctrine would have insisted on a reciprocal promise by the employee to remain on the job for the duration of the employer's commitment. Courts have long recognized, however, that such an understanding is at odds with the bargain principle.⁷⁵ If there is an agreed-upon exchange, there is no

69. See Feinman, *supra* note 48, at 124–25 ("If 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].").

70. See generally RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

71. 130 N.W.2d at 655.

72. See Summers, *supra* note 13, at 1098–99 (describing additional consideration as a "spurious contractual doctrine" because "[a]s any first semester law student knows . . . one performance can be consideration to support two or even twenty promises [and thus] work performed could be consideration for both the wages paid and the promise of future employment").

73. See *id.* at 1097–99 (discussing mutuality, its flaws, and its relationship to the requirement of additional consideration).

74. See 2 CORBIN ON CONTRACTS § 6.1 (2022); 3 WILLISTON ON CONTRACTS § 7:14 (4th ed. 2022).

75. See 2 CORBIN ON CONTRACTS § 6.1 (2022) ("[T]he [mutuality] doctrine is at best tautological and at worst harmful in that, in the name of symmetry, it defeats the bargain of the parties."); 3 WILLISTON ON CONTRACTS § 7:14 (4th ed. 2022) (observing that to void a contract for lack of mutuality "would directly contradict the majority of cases which hold that adequacy

reason for parties' commitments to be equal in form just as there is no reason for them to be equal in value.⁷⁶

Indeed, *Hanson* recites this very principle.⁷⁷ Yet its rationale for requiring additional consideration is explicitly grounded in the fact that, in contrast to his employer, Hanson retained discretion to terminate at will:

We think the real basis for the . . . rule is that there is in fact no binding contract for life employment when the employee has not agreed to it; that is, when he is free to abandon it at any time. . . . It does not help to say that a contract for life employment, or permanent employment, may be binding if it is fully agreed upon, even though the only consideration furnished by the employee is his agreement to serve. The fact is he has not agreed to serve for life, or permanently; but only so long as he does not elect to "retire of his own choosing."⁷⁸

Thus, despite its purported rejection of mutuality, the court resurrects that very requirement. The anomalous "additional consideration" rule of employment-at-will is its contemporary proxy.

From this trifecta of errors—the requirement of "additional consideration," the resurrection of mutuality principles, and the refusal to interpret assurances of long-term employment consistent with their plain meaning—employment-at-will has evolved into something beyond a mere presumption or a "default rule," as it is sometimes described.⁷⁹ A default rule applies absent an agreement to the contrary, yet *Hanson* rejected the employer's express commitment in favor of reinstituting the supposed default. Employment-at-will is thus better described as a substantive doctrine—a super-presumption—that stands as a near impervious barrier to successful claims of employer breach of contract.

The policy underlying this approach is not difficult to imagine. Courts doubtlessly feared a rush of breach of contract claims based on scant evidence. Testimony that an employee had been assured long-term, secure employment could be highly persuasive but difficult to dispute. Nor are substantiated employer statements necessarily evidence of

of consideration, that is, the equivalence of the value of the parties' exchange, is a matter exclusively for the decision of the parties").

76. See RESTATEMENT (SECOND) OF CONTS. § 79 ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged [or] 'mutuality of obligation.'").

77. 130 N.W.2d at 656 ("[M]ere lack of mutuality in and of itself does not render a contract invalid.") (quoting *Standard Oil Co. v. Veland*, 224 N.W. 467, 469 (Iowa 1929)).

78. *Id.* at 658.

79. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (distinguishing default from mandatory rules).

contractual commitment. An employer's assurance that employment will be long-term or that employees are never terminated without cause may be aspirational. In some cases, one might analogize it to the type of "puffing" that courts routinely disregard in the commercial sales context.⁸⁰

Yet the depth of the *Hanson* court's errors, as well as the facts before it, suggest something more at play. Hanson produced a written document signed by the company president.⁸¹ His was hardly a frivolous claim premised on puffery, and nothing in the opinion doubts the integrity of his evidence. Rather, the court focused on the indeterminate nature of Hanson's promise, treating his commitment as too indefinite to support an enforceable obligation.⁸²

It is possible, then, that the court's imperfectly articulated concern was lack of certainty rather than lack of consideration. In addition to consideration and assent, formal contract law requires a threshold degree of specificity for contract formation.⁸³ That threshold is often described as terms that provide an objective basis for crafting a remedy.⁸⁴ As we will see, over time mainstream contract law became increasingly tolerant of open term agreements consistent with its retreat from other formal principles.⁸⁵ What is important at this juncture, however, is the way that the rhetoric in *Hanson* reflects an inability to recognize at-will employment as the basis for a binding obligation. Throughout its analysis, and in its review of prior cases, *Hanson* describes the hypothetical difficulties of calculating damages for the employer's breach given the uncertainty of Hanson's own commitment.⁸⁶ In its eyes, an agreement in which one or more parties retain the right to terminate at will is simply not a contract at all.⁸⁷

80. See Wayne K. Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 OHIO ST. L.J. 671, 679–80 (1986).

81. *Hanson*, 130 N.W.2d at 655.

82. *Id.* at 658–59.

83. The oft-cited case for this proposition within the contracts canon is, coincidentally, an employment case, albeit involving compensation rather than job security. See *Varney v. Ditmars*, 111 N.E. 822, 824 (N.Y. 1916) (finding employer's promise to provide employee a "fair share" of its profits too indefinite to enforce).

84. *Cf. id.* (stating that contracts "must be certain and explicit" and not "vague nor indefinite").

85. See, e.g., U.C.C. § 2-204 (AM. L. INST. & UNIF. L. COMM'N 1977) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *infra* Section IV.A.

86. *Hanson*, 130 N.W.2d at 659 ("Many difficulties would arise . . . in the way of determining the damages because of uncertainty of type of employment, or rate of pay, or how much [plaintiff's] loss might be mitigated . . .").

87. See *id.* at 656.

In sum, the historical approach to employment-at-will and the nature of the “super-presumption” reveal a great deal about the origin of employment contract exceptionalism. From early on, employment contract law deviated profoundly from mainstream contract law in both explicit and implicit ways. Courts blatantly misapplied principles of consideration and assent at the same time as they purported to rely on those very doctrines. It is possible that these moves were simply instrumental or even disingenuous—a thinly veiled effort to stymie employee claims and protect business interests. Yet courts’ analyses in early cases betrayed genuine uncertainty about the contractual status of the employment relationship as a whole. Absent a reciprocal commitment involving a specified duration or term of employment, courts seemed unable to conceptualize employment as a binding agreement. This fundamental error, and the analytically flawed cases it engendered, created an unstable foundation for future jurisprudential development.

B. *Unilateral Contract Theory and Deferred Benefits*

The previous Section described the at-will super-presumption and revealed how courts misapply doctrine to limit employee breach of contract claims. This Section turns to an important exception. For over a century, courts have held that employer promises of future compensation or benefits—as opposed to promises of job security—may be contractually binding.⁸⁸ These “deferred benefits” cases, as we refer to them, yielded positive outcomes for employees despite employment at-will. However, they also introduced the central error of employment contract exceptionalism: the idea that employment is a unilateral contract. This Section explains how that happened.

The use of unilateral contract theory in employment law began as a way for courts to hold employers to a specific subset of promises despite the employment-at-will doctrine. Since the early 1900s, courts have held that employer promises of additional payments, beyond straight compensation for work performed, could be contractually binding. These cases generally involve assurances of some form of deferred compensation such as bonuses, profit sharing, severance pay, commissions, stock options, or retirement benefits.⁸⁹ Typically, the

88. See, e.g., *Zwolanek v. Baker Mfg. Co.*, 137 N.W. 769, 773 (Wis. 1912); *Scholl v. Hershey Chocolate Co.*, 71 Pa. Super. 244, 246 (Pa. Super. Ct. 1919); *Henderson Land & Lumber Co. v. Barber*, 85 So. 35, 36 (Ala. Ct. App. 1920); *Orton & Steinbrenner Co. v. Miltonberger*, 129 N.E. 47, 49 (Ind. App. 1920); *Roberts v. Mays Mills, Inc.*, 114 S.E. 530, 533 (N.C. 1922); *Scott v. J.F. Duthie & Co.*, 216 P. 853, 854 (Wash. 1923); *Wellington v. Con P. Curran Printing Co.*, 268 S.W. 396, 398 (Mo. Ct. App. 1925).

89. See, e.g., *Henderson Land*, 85 So. at 36 (bonus); *Scott*, 216 P. at 853 (bonus); *Orton*, 129 N.E. at 49 (profit shares); *Wellington*, 268 S.W. at 396 (profit shares); *Wallace v. N. Ohio Traction & Light Co.*, 13 N.E.2d 139, 140 (Ohio Ct. App. 1937) (pension).

employer promises that if the employee remains in service, usually for an identified period of time, the employee will earn the additional pay.⁹⁰

In the most compelling cases, the employee receives a direct and specific assurance from the employer, remains in the job in reliance on the promise, but is denied payment despite working for the requisite period.⁹¹ In such situations, courts understandably sought to redress what appeared to be an obvious injustice.⁹² Unilateral contract theory offered an expedient means of achieving the desired outcome using the type of formal contract analysis courts gravitated to in employment termination disputes.⁹³ A unilateral contract is one that is accepted by the offeree's performance rather than a return promise.⁹⁴ In its classic presentation, an offeree successfully meets a challenge, satisfies a dare, or fulfills the requirements for a posted reward. In these situations, the promisor's solicitation constitutes the offer, and the promisee's completion of the requested performance provides both the consideration and the acceptance.⁹⁵

Many deferred benefits fit comfortably within this "reward paradigm," as we refer to it. *Scott v. J.F. Duthie & Co.*⁹⁶ offers an early example. The plaintiff was a foreman in the defendant's shipyard employed for an "indefinite" period.⁹⁷ The employer issued a statement

90. See, e.g., *Henderson Land*, 85 So. at 36 (seeking four months of continuous work); *Roberts*, 114 S.E. at 533 (requiring continued employment until the end of the year); *Scott*, 216 P. at 853 (seeking continued service until completion of contracted work); *Orton*, 129 N.E. at 48 (seeking 600 work hours over the course of the year); *Wallace*, 18 N.E.2d at 142 (requiring twenty years of continuous service). See generally Pettit, Jr., *supra* note 19, at 560–62 (citing these and other cases).

91. See, e.g., *Henderson Land*, 85 So. at 36; *Orton*, 129 N.E. at 49; *Scott*, 216 P. at 853; *Wellington*, 268 S.W. at 399; *Montgomery Ward & Co. v. Smith*, 12 Ohio Law Abs. 28, 30–31 (1931).

92. See Pettit, Jr., *supra* note 19, at 311 (describing full performance cases as the "strongest case for enforcement of the employer's promise because they are based on benefits actually conferred on the promisor by the promisee by reason of the promise").

93. See *supra* Section I.A. This move was not inevitable. For instance, courts might have brought non-contractual theories like restitution and promissory estoppel to bear in resolving such cases. We will see this diversity of approach in the context of employee handbooks. See *infra* Part III.

94. See 2 WILLISTON ON CONTRACTS § 6:2 (4th ed. 2022).

95. See *id.*

96. 216 P. 853 (Wash. 1923).

97. *Id.* at 853. Scott's wages and basic terms of employment were in a writing and required advance notice of termination. *Id.* A commitment to provide advance notice of termination is effectively a contract for a term that endures at least as long as the notice period. Cf. Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1566–67 (suggesting that a mutual obligation to provide advance notice of termination constitutes consideration for a bilateral, at-will employment contract). However, the fact that Scott was entitled to notice of termination does not appear to have changed the court's perception that Scott's employment was at will. *Id.* It refers to his employment as being for an "indefinite term." *Id.*

promising a bonus of half a million dollars to be split among all foremen who continued employment through the company's completion of its pending shipbuilding contracts with the U.S. government.⁹⁸ The plaintiff obliged, remaining on the job for an additional two years, but he did not receive the bonus.⁹⁹

On appeal from the dismissal of the plaintiff's complaint, the Washington Supreme Court found that the plaintiff had pleaded all of the elements of a unilateral contract.¹⁰⁰ It rejected the employer's argument that the contract lacked or required mutuality, as well as the argument that the plaintiff had provided only his labor as consideration.¹⁰¹ In contrast to the job security cases, where such assertions swayed courts, *Scott* correctly observed that the employer's promise neither sought nor required a reciprocal commitment.¹⁰² The court drew explicitly on the unilateral contract canon, referring to the disputed bonus as a "reward."¹⁰³ It held that defendant's promise could constitute an offer that the employee properly accepted and fulfilled by remaining in the defendant's company for the desired period.¹⁰⁴

In this way, courts' appeal to unilateral contract doctrine in deferred benefits cases could be seen as partially corrective. It allowed courts to avoid some of the doctrinal errors that plague job security cases.¹⁰⁵ Notably, it also reinforced at-will employment in ways that protected the *employee*. The existence of a valid contract within the unilateral model depends entirely on the employee's freedom to terminate. It is only because the employee forebears from exercising that right that the employee's continued performance for the specified time constitutes consideration.¹⁰⁶ Judged in this light, the unilateral contract frame doubly

98. *Id.* The statement appears to have been in writing, but the facts do not reveal how the defendant disseminated it. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 854.

102. *Id.* at 854–55.

103. *Id.* at 853.

104. *Id.*

105. See, e.g., *Chinn v. China Nat'l Aviation Corp.*, 291 P.2d 91, 94 (Cal. Dist. Ct. App. 1955) (finding a unilateral contract for promised severance pay in addition to his wages, noting that a "single consideration may support the several counter promises made by the other party" (quoting *Vogel v. Bankers Bldg. Corp.*, 245 P.2d 1069, 1074 (Cal. Dist. Ct. App. 1952)); *Henderson Land & Lumber Co. v. Barber*, 85 So. 35, 36 (Ala. Ct. App. 1920) ("When . . . one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality . . . for upon performance of the conditions by the promisee the contract becomes clothed with a valid consideration . . ."); Fineman, *supra* note 16, at 382, n.180 (explaining the corrective features of unilateral contract analysis).

106. *Scott*, 216 P. at 853 ("[The employee] was free to quit his work at any time, and therefore was under no obligation to do the thing which the respondent was seeking The compliance with the terms of the offer created a contract . . .").

protects workers, preserving their discretion to leave, while enforcing the employer's promise should they remain.¹⁰⁷

Yet these advantages came at the cost of further degradation of employment contract law. The unilateral contract framework describes promises akin to “work rewards” reasonably well, but only by artificially isolating that single term of employment. This fragmented treatment of contract terms is at odds with general contract law. Ordinarily contract law takes the entirety of the parties' exchange as comprising a single contract consisting of multiple terms.¹⁰⁸ By contrast, the deferred benefits cases, either explicitly or implicitly, treat the unilateral contract as a stand-alone agreement. In *Scott*, the court referred to the bonus as a “supplementary” contract, one that binds in addition to the employee's basic terms of hire.¹⁰⁹ In other cases, courts seem to consider the promised benefit to be the only contractual component of the parties' relationship.¹¹⁰ These cases, like the previously described job security cases, seem to view a basic “reward-free” at-will relationship as noncontractual.

A more authentic contractual treatment would begin from the employment relationship as a whole, absorbing the promise of a work reward as one term of a larger, and necessarily bilateral, agreement. We will explore this idea further in the Parts that follow.¹¹¹ What is important from a historical perspective is that employment contract law, in yet another exceptionalist move, evolved in precisely the opposite direction. At some point in the mid-twentieth century, even as courts continued to analyze work rewards as fragmented agreements, cases began to describe the entire employment relationship as a species of unilateral contract.¹¹²

Oddly, this development appears to have come about while mainstream contract law was distancing itself from the distinction between bilateral and unilateral contracts. As we will see, over the course of the twentieth century courts relaxed many classical contracts principles

107. Cf. Pettit, Jr., *supra* note 19, at 553 (suggesting that courts in such cases embraced the unilateral contract doctrine because it would have been both inaccurate and undesirable either to require or infer a return promise by the employee).

108. This idea is a corollary to the bargain principle, which embraces contracts in which one party makes many commitments in exchange for a single return commitment. RESTATEMENT (SECOND) OF CONTS. § 80 (AM. L. INST. 1981). It is also the reason why the courts' requirement of “additional consideration” to support an employer's job requirement is anti-contractual as previously discussed. See *supra* Section I.A.

109. *Scott*, 216 P. at 853; see also *Chinn*, 291 P.2d at 92 (discussing how courts “consider [certain] regulations . . . which offer additional advantages to employees [to be] in effect offers of a unilateral contract”).

110. See, e.g., *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762, 764–66 (N.J. Super. Ct. App. Div. 1958).

111. See *infra* Part IV.

112. See, e.g., *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 838 (7th Cir. 1980); *Langdon v. Saga Corp.*, 569 P.2d 524, 527 (Okla. Civ. App. 1976).

in favor of more liberal rules of contract formation and interpretation.¹¹³ What accounts for the employment contract anomaly is unclear. It appears to have been driven at least in part by Professor Arthur Corbin's well-known treatise. In what proved a highly influential section, Professor Corbin described at-will employment as "not a contract at all" but rather "an expression in which the promises are illusory."¹¹⁴ He continues:

In many cases, such an agreement is an operative offer that can be accepted by rendering all, or some indicated portion, of the service . . . agreed upon. Such rendition of performance . . . binds the other party to pay the specified compensation. If the party rendering performance has made no promise of any other performances, either expressly or tacitly, the contract now created is a unilateral contract.¹¹⁵

Professor Corbin observed that an employee *might* make an explicit or implicit return promise.¹¹⁶ Yet his treatise did not explore that possibility or its implications. What courts took away was the idea that employment should be contractually analyzed exclusively under unilateral principles.¹¹⁷

In sum, unilateral contract theory offered courts an expedient way of achieving a desired result but at the cost of further employment contract exceptionalism. It introduced a fragmented model of employment contract law and increased confusion about the contractual nature of the employment relationship as a whole.

C. Employer Policies and the Use of Legal Fictions

Such was the state of affairs when the era of common law "exceptions" to at-will employment arrived. During the 1980s, a wave of more employee-friendly judicial decisions dialed back the super-presumption and created new paths to employer liability for wrongful

113. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 3.9 (Joseph M. Perillo ed., West Publ'g Co. 1993) (discussing, for example, how the rigid mode of acceptance by promise has shifted to one based on reasonability); *infra* Section II.A.1.

114. 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 96 (1963).

115. *Id.* Notably the contemporary edition of Corbin's treatise still describes employment principally in unilateral contract terms, see 1 CORBIN, *supra* note 113, at § 6.2, despite disclaiming the importance of the distinction elsewhere. See *id.* at § 3.9.

116. See 1 CORBIN, *supra* note 114, at § 96 (suggesting that a return promise on the part of an employee is "[o]ften" reasonably found).

117. See, e.g., *Langdon v. Saga Corp.*, 569 P.2d 524, 527–28 (Okla. Civ. App. 1976); *Wagner v. City of Globe*, 722 P.2d 250, 253 (Ariz. 1986) (en banc); *Demasse v. ITT Corp.*, 984 P.2d 1138, 1142–43 (Ariz. 1999) (en banc) (citing *Wagner*, 722 P.2d at 253); *Asmus v. Pac. Bell*, 999 P.2d 71, 75 n.4 (Cal. 2000).

discharge.¹¹⁸ For this short period of time, courts took a more permissive approach to employee claims of termination in breach of contract. In contrast to prior cases, these decisions permitted claims based on oral promises of continued employment,¹¹⁹ recognized that employer promises might be derived from the circumstances,¹²⁰ and most importantly for present purposes, held that an employer's written policies could be the source of a binding commitment to job security.¹²¹

Courts did not rely on one theory of contract law in recognizing these types of claims, but followed different, sometimes competing, doctrinal threads depending on the jurisdiction and factual circumstances. Yet in the context of employer job security policies, the deferred benefits jurisprudence provided a robust and closely analogous body of precedent.¹²² Courts drew explicitly, though not exclusively, on the unilateral contract principles described in those cases.¹²³ In an early example, the Minnesota Supreme Court in *Pine River State Bank v. Mettille*¹²⁴ held that an employer's written termination policies could be enforceable "if they meet the requirements for formation of a unilateral contract."¹²⁵ Since an offer of employment for an indefinite duration can constitute a valid offer to contract, the court reasoned, so too could promises contained in a personnel manual.¹²⁶ Applying those principles, the *Pine River* court concluded that the employer's disciplinary policy "set out in definite language an offer of a unilateral contract," that the offer was "communicated to the employees," and that the plaintiff's "continued performance of his duties despite his freedom to quit"

118. Many scholars have explored the jurisprudence of this era, its underlying policies, and its limitations and implications. *See, e.g.*, Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1656–57 (1996); Fineman, *supra* note 16 at, 346 (2008); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 26–27 (1993).

119. *See, e.g.*, Shebar v. Sanyo Bus. Sys. Corp., 544 A.2d 377, 383 (N.J. 1988).

120. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 313 (Cal. Ct. App. 1981).

121. *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980).

122. *See* Verkerke, *The Story of Woolley*, *supra* note 22, at 29–30 (describing how a severance case formed the basis for plaintiff's counsel's litigation strategy in *Woolley v. Hoffman-La Roche*, the seminal job security policy case).

123. *See, e.g.*, *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (finding an enforceable unilateral contract for job security by relying on mid-century cases enforcing employer promises of bonus pay).

124. 333 N.W.2d 662 (Minn. 1983).

125. *Id.* at 627.

126. *Id.* at 626–27 ("If the handbook language constitutes an offer, . . . [t]he employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration . . .").

constituted an acceptance of the offer and the consideration needed to enforce it.¹²⁷

The analysis in *Pine River* is notably formulaic. The court did not ask hard questions about the employee's awareness of the employer's policy or whether he acted because of its terms. Such aspects of contract formation are likely to be difficult to prove with respect to any particular plaintiff. Neither did the court meaningfully inquire into the employer's contractual intent. It noted the inherent benefits to the employer of such a policy in the form of "a more stable and, presumably, more productive work force."¹²⁸ But this observation provided a policy justification rather than a legal basis for enforcement.

As we will explore more fully in Part III, the Michigan Supreme Court went in a very different direction when confronted with the same question. In *Toussaint v. Blue Cross & Blue Shield of Michigan*,¹²⁹ the court dispensed with contract formalities outright, holding that written policies can become binding based on workers' "legitimate expectations."¹³⁰ Yet while many courts subsequently cited *Toussaint*, none were willing to rely solely on its new, informal grounds for enforcement of employer policies.¹³¹ Unilateral contract theory remained the coin of the realm.

The New Jersey Supreme Court's seminal treatment of the issue in *Woolley v. Hoffman-La Roche, Inc.* is illustrative.¹³² In a decision openly skeptical of at-will employment, and heavily reliant on *Toussaint*, the court observed that the enforcement of employer handbooks makes sense as a matter of employees' legitimate expectations.¹³³ The court cited the official nature of the employee handbook, its widespread distribution, the absence of individual contracts in the employer's workplace, and the company's reputation as an employer of choice.¹³⁴ Together these facts created an environment in which employees would almost certainly view the contents of the employer's policy manual as a binding commitment.¹³⁵

Even so, *Woolley* did not rely merely on these factual realities in reaching a decision. Rather it cloaked its analysis in unilateral contract doctrine. The court held that a jury could find "in strict contract terms" that Hoffmann-La Roche's handbook "constituted an offer,"¹³⁶ and that

127. *Id.* at 630.

128. *Id.*

129. 292 N.W.2d 880 (Mich. 1980).

130. *Id.* at 885.

131. *See infra* Part III.

132. 491 A.2d 1257 (N.J. 1985), *modified by* 499 A.2d 515 (N.J. 1985).

133. *Id.* at 1267-68.

134. *Id.* at 1265.

135. *See id.*

136. *Id.*

the employee's continued employment provided the requisite consideration for the formation of a unilateral contract:

In most of the cases involving an employer's personnel policy manual, the document . . . seeks no return promise from the employees. It is reasonable to interpret it as seeking continued work from the employees, who, in most cases, are free to quit Thus analyzed, the manual is 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.¹³⁷

As this analysis suggests, the use of unilateral contract law allowed the court to sidestep the problem of finding a return promise by the employee, just as it had in the deferred benefits cases. But it raised other challenges that earlier courts had not fully reconciled. The earliest (and easiest) deferred benefits cases alleged that the employer's work-reward promise was made after the employee had begun employment and that the plaintiff knew of and relied on it in continuing work.¹³⁸ But this is not typically the case with employee handbooks. The *Woolley* court obliquely acknowledged the limitations of its analysis in situations where the employee could prove neither element.¹³⁹ But rather than fully dispense with the requirements of the contractual framework as Michigan did, *Woolley* concluded that such elements could be "presumed."¹⁴⁰

This is not to suggest that *Woolley* was without support. At least some deferred benefits cases took a loose view of the requisite knowledge and intent necessary to establish the employee's contractual assent.¹⁴¹ The point is that the job security policy cases fully revealed the limits of the unilateral framework in cases where much more than an isolated promise was at stake. In light of the challenges, courts might have elected a more informal approach to employer policy enforcement; instead they doubled down on the unilateral framework. Unilateral contract became the means for enforcing not only work rewards, but also employment security; or as *Woolley* describes it: "the single most important" term of the relationship, the one on which all others depend.¹⁴²

137. *Id.* at 1267.

138. *Chinn v. China Nat'l Aviation Corp.*, 291 P.2d 91, 92 (Cal. Dist. Ct. App. 1955); *Scott v. J.F. Duthie & Co.*, 216 P. 853, 853 (Wash. 1923).

139. *Woolley*, 491 A.2d at 1268 n.10.

140. *Id.* at 1268 (citing *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762, 765 (N.J. Super. Ct. App. Div. 1958)).

141. *See, e.g., Anthony*, 143 A.2d at 765 (presuming reliance on promise of severance pay).

142. *Woolley*, 491 A.2d at 1266 ("Wages, promotions, conditions of work, hours of work, all of those take second place to job security, for without that all other benefits are vulnerable.").

II. THE MISAPPLICATION OF UNILATERAL CONTRACT LAW

The previous Part explained the roots of employment contract exceptionalism and traced the rise of unilateral contract theory as the dominant framework for judicial analysis of employer promises. This Part unpacks the legacy of that jurisprudence.

We begin by situating judicial reliance on unilateral contract theory within mainstream contract law. Throughout the twentieth century, the distinction between bilateral and unilateral contracts eroded, with the unilateral moniker retaining significance primarily in a narrow subset of highly discrete transactions.¹⁴³ Employment, however, is anything but discrete. It is a fluid, indefinite, and long-term relationship—what we term a “hyper-relational” contract. It is impossible to describe a particular “performance” that an employee must “complete” in order to bind the employer within the unilateral framework.

Yet this has not stopped judges from trying. Through the lens of handbook modification jurisprudence, we expose how courts contort contract doctrine, producing a confused and unhelpful body of law. Technical reasoning obscures the underlying motivation for judicial results and clashes against the real-life conditions under which employment relationships form and develop. We begin with the role of unilateral contract analysis within mainstream contract doctrine, then turn to how courts resurrected that archaic concept in employment cases. The result is that employment law lacks a coherent basis for understanding binding obligations within this important relationship.

A. *The Law & Scholarship of Unilateral Contracts*

If it were up to some contracts scholars, there would be no such thing as unilateral contracts. Since the mid-twentieth century, the law has moved away from that concept along with other formal principles of classical doctrine. This Section explores that history, situating employment law’s rather anomalous reliance on unilateral contract theory within the development of mainstream contract law.

1. The Doctrine and Its Discontents

A typical contract is a bilateral affair: two parties make reciprocal commitments to do something in the future. At the moment of agreement—that is, upon their exchange of promises—a contract is

143. See 2 WILLISTON ON CONTS. § 6:30 (4th ed. 2022).

born.¹⁴⁴ If either party reneges or fails to perform, the other may sue for breach.¹⁴⁵

Yet contract law has long recognized a supposedly different species of voluntary obligation under which only one party makes any future commitment. As discussed in Part I, the prototype for these so-called unilateral contracts¹⁴⁶ is the promise of a reward that seeks to induce completion of a difficult or uncertain task.¹⁴⁷ The difference between the two contracts lies in the moment at which legal obligation arises. In a bilateral contract the offeree promises to perform, thereby making a commitment and immediately binding the offeror to the resulting contract.¹⁴⁸ As originally theorized, however, under the unilateral framework the offeree makes no commitment and may or may not perform at their pleasure.¹⁴⁹ Absent performance, there is no contract at all, merely an offer that has not been accepted.¹⁵⁰ In this way, the concept of a unilateral (i.e., “one-sided”) contract offers a double advantage to offerees in cases when making a reciprocal commitment would be risky or undesirable. Offerees know they will not be held contractually liable for a performance they cannot control or guarantee; yet, they can rely on

144. *See id.*

145. The idea of enforceable, fully executory contracts in which no party has incurred any loss dates to Professor Lon Fuller and William Perdue’s seminal article, asserting the ability to rely on eventual fulfillment of a present bargain is essential to a functioning market. L.L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936); *see also* Samuel J. Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515, 519 (1955) (asserting that “the true reason for enforcing bilateral contracts lies in the necessity of protecting the parties’ mutual trust and credit simply because without this protection a modern credit-economy could not possibly function”).

146. The original invocation of the distinction and use of the unilateral/bilateral terminology is generally attributed to Professor Christopher Langdell. *See* Epstein & Liebesman, *supra* note 19, at 271–75 (discussing Langdell’s early use of the concept and its adoption by courts and treatise writers); *see also* Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 6 (1992) (describing the traditional understanding of the nature and consequences of unilateral offers as “Langdell’s rule”). This distinction was supported and memorialized by Professor Samuel Williston in his iconic treatise. *See* Stoljar, *supra* note 145, at 523.

147. Classic examples from chestnut cases and law school hypos include finding a wayward pet, returning a lost object, scaling a greased flagpole, and entering a contest or sweepstakes, deploying a Victorian-era flu remedy, or (perhaps most famously of all) crossing the Brooklyn Bridge.

148. *See* RESTATEMENT (FIRST) OF CONTS. § 12 (AM. L. INST. 1932).

149. *See id.* (defining a “unilateral contract” as “one in which no promisor receives a promise as consideration for his promise”). For discussions of the unilateral/bilateral distinction, *see* Epstein & Liebesman, *supra* note 19, at 271–74; Pettit, Jr., *supra* note 19, at 299–303; Stoljar, *supra* note 145, at 516–18; Tiersma, *supra* note 146, at 1–2.

150. Tiersma, *supra* note 146, at 38–39 (explaining the conventionally understood distinction).

the offeror following through on the promise to pay should they succeed.¹⁵¹

At the same time, the unilateral framework gives rise to unique perils, such as the familiar problem in every first-year contracts course: mid-performance revocation. Because a unilateral contract is not consummated until the offeree tenders full performance, the offeror could, in theory, revoke in the midst of the offeree's performance and walk away free of liability.¹⁵² Much scholarly ink was spilt in the early-twentieth century over this problematic implication and unjust outcome.¹⁵³ This "first-generation critique," as we refer to it, led to Section 45 of the Restatement of Contracts. Section 45 deems the offeree's partial performance the acceptance of an option or conditional contract that binds the offeror subject to the offeree's completion of the performance in full.¹⁵⁴ Thus, under contemporary law, if an offeror promises a certain sum to an offeree for climbing a flagpole, once the offeree starts to climb, the offeror must allow a reasonable time for the offeree to reach the top and pay if the offeree succeeds.

In addition to circumscribing the offeror's revocation rights, the First Restatement sought to reduce reliance on the unilateral framework altogether. Section 31 provided that: "In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting . . . to a promise . . . rather than the formation of one or more unilateral contracts by actual performance . . ."¹⁵⁵ The effect was to push more offers into the bilateral category, permitting the offeree to immediately close the deal by promissory acceptance and reducing the number of cases in which an offeror could plausibly claim to have lawfully revoked in the first place.¹⁵⁶

151. A recurring example where the unilateral contract model remains apt is the broker contract under which the agent will be paid if a sale is completed. *See, e.g.,* Marchiando v. Scheck, 432 P.2d 405, 406 (N.M. 1967). Neither party would expect the agent to incur liability in the event no sale is effected. *Id.* This is true, however, only where the agency is non-exclusive. *Id.* at 407. An exclusive listing agreement is usually interpreted as imposing mutual obligations on both parties. *Id.* This owes in large part to the evolution of the implied duty of good faith, which we will turn to in Part IV.

152. *See* Tiersma, *supra* note 146, at 1 (calling this "[o]ne of the most notorious rules of traditional contract law"); Stoljar, *supra* note 145, at 520. This result is often depicted through the well-known "Brooklyn Bridge" hypothetical coined by Professor I. Maurice Wormser. *See* Tiersma, *supra* note 146, at 2; Epstein & Liebesman, *supra* note 19, at 276–77.

153. *See* Tiersma, *supra* note 146, at 6–7 (discussing early-twentieth-century academic debate over how to mitigate the harsh effects of offers for a unilateral contract).

154. *See* RESTATEMENT (FIRST) OF CONTS. § 45 (AM. L. INST. 1932). The adoption of Section 45 put to rest a vigorous academic debate of the early-twentieth century over the consequences of part performance. *See* Epstein & Liebesman, *supra* note 19, at 281–82 (discussing the evolution of Restatement Section 45 and the need for a mitigating doctrine).

155. RESTATEMENT (FIRST) OF CONTS. § 31 (AM. L. INST. 1932).

156. *See* Epstein & Liebesman, *supra* note 19, at 286 (explaining this intention and result).

Adopting these two sections, however, did not eradicate unilateral contract offers, nor did it signal an end to debates over the unilateral/bilateral distinction. First, Section 31, while favoring bilateral formation, still allowed room for an offeror to explicitly designate an offer as unilateral, permitting only a performance-based acceptance.¹⁵⁷ Second, even with the protections of Section 45, characterizing an offer as unilateral left the offeree at risk of loss due to reliance prior to the start of the requested performance.¹⁵⁸ This could occur for instance, where performance requires advance planning or an outlay of funds. If the offeror revokes after reliance occurs, but before the offeree starts performance, the offeree may suffer an uncompensated loss.¹⁵⁹ In effect then, the continued availability of the unilateral contract framework allows the offeror to push back the moment of acceptance, preserving additional time in which to speculate on the value of the solicited performance.

This potential for continued harsh effects seems especially problematic when judged against the “fact-conditions” under which real life contracting occurs.¹⁶⁰ Toward the mid-twentieth century, Professor Karl Llewellyn, the principal drafter of the UCC, took aim at the “Great Dichotomy” between bilateral and unilateral contracts, challenging the core belief that offers must fall into either one category or the other.¹⁶¹ Professor Llewellyn’s attack was part of his broader disenchantment with what he described as the “orthodox” view of contract formation.¹⁶² He argued that commercial actors engaged in business transactions generally do not think about offer and acceptance let alone about how the latter should be effected.¹⁶³ It therefore makes little sense to assign legal

157. See RESTATEMENT (FIRST) OF CONTS. § 31 (AM. L. INST. 1932) (stating that formation of a bilateral contract is presumed “[i]n case of doubt”).

158. See RESTATEMENT (SECOND) OF CONTS. § 45 cmt. f (AM. L. INST. 1981) (distinguishing between performance and preparation for performance). This might occur where the employee makes tangible investments into equipment, training, or supplies in order to be in a position to perform, or where planning to perform involves opportunity costs such as foregoing other endeavors.

159. Possibly this concern could be redressed under promissory estoppel but only if and to the extent that injustice is otherwise unavoidable. See Epstein & Liebesman, *supra* note 19, at 282; RESTATEMENT (FIRST) OF CONTS. § 90 (AM. L. INST. 1932).

160. K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 779–80 (1939) [hereinafter Llewellyn, *II*].

161. *Id.* at 787.

162. *Id.* at 780 (using the term to refer to “taught doctrine” generally “conceive[d] as true and wise” but which “does not well fit the fact-conditions” of actual business deals); see also K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, I*, 48 YALE L.J. 1, 36 (1938) [hereinafter Llewellyn, *I*] (arguing that the “[unilateral/bilateral] dichotomy represents doctrine divorced from life [which] therefore is misleading and . . . spawns unnecessary difficulties”).

163. Llewellyn, *II*, *supra* note 160, at 800.

consequences based on such esoteric concepts.¹⁶⁴ He allowed that certain unique factual contexts could give rise to deals fairly described as binding only one party.¹⁶⁵ Such “true” unilateral contracts, however, were to his mind so rare and distinct as to be unworthy of a special category.¹⁶⁶ Outside that context, whether a contract forms by performance or promise is an academic question offering an opportunity for “superb classroom theatrics” but little else.¹⁶⁷

This “second-generation” critique of unilateral contracts, as we refer to it, proved similarly influential in the academic establishment. Both the UCC, under Professor Llewellyn’s stewardship, and later, the Second Restatement abandoned the unilateral/bilateral terminology.¹⁶⁸ They also rejected the idea that every offer by its nature is either unilateral or bilateral—that it requires a particular and exclusive manner of acceptance. Both the UCC and the Second Restatement provide that an offer may be accepted in “any manner and by any medium reasonable in the circumstances,” giving the offeree maximum flexibility to bind the offeror.¹⁶⁹ This rule allows an offeree to accept what would previously have been described as a bilateral contract through performance. According to the Second Restatement, such conduct “operates as a promise” to complete whatever performance is required.¹⁷⁰

Still, as with the First Restatement, these reforms did not fully eliminate the unilateral contract or prevent continued controversy about its use. Neither the words “unilateral” and “bilateral,” nor the conceptual distinctions they embody, fully disappeared from the common law lexicon. First, the Second Restatement reiterated the idea that there are two forms of acceptance, either through promise or performance, albeit without employing the unilateral/bilateral terminology or tying them to a distinct type of contract.¹⁷¹ Second, the Second Restatement and the UCC recognize the possibility that a particular offer may, by virtue of precise

164. *Id.* at 802.

165. *Id.* at 813.

166. *Id.* at 813, 816.

167. *Id.* at 787.

168. See Epstein & Liebesman, *supra* note 19, at 287–88 (discussing these developments).

169. U.C.C. § 2-206(1)(a) (AM. L. INST. & UNIF. L. COMM’N 1977); RESTATEMENT (SECOND) OF CONTS. § 30(2) (AM. L. INST. 1981).

170. RESTATEMENT (SECOND) OF CONTS. § 50(2) (AM. L. INST. 1981).

171. See Epstein & Liebesman, *supra* note 19, at 270. Some have suggested for this reason that the change in the Second Restatement is merely cosmetic. See *id.* at 289–90 (describing the Second Restatement’s approach as a change in name only akin to substituting politically correct language for an outdated sounding concept).

language or unique circumstances, require that acceptance be effected only through full performance.¹⁷²

Finally, and most importantly, courts have continued to use the language of bilateral and unilateral contracts in deciding cases despite the scholarly consensus.¹⁷³ Liberalized principles of acceptance granting discretion to the offeree allow almost any contract to be formed bilaterally. Thus, unilateral contract theory ought to be limited to the small subset of cases that align with the classic reward paradigm—situations in which neither party desires nor expects the offeree to commit *ex ante*. Yet courts have deployed the concept in an idiosyncratic collection of contexts that bear no resemblance to the reward paradigm, including insurance contracts, contracts between citizens and the government, and, most relevant to this Article, employment.¹⁷⁴ Although it gets little respect from contracts scholars, unilateral contract theory has persisted in the face of relentless criticism.

2. In Praise of Unilateral Employment Contracts?

As demonstrated in Part I, unilateral contract theory has come particularly to dominate judicial analysis of employee handbooks and informal employer assurances of job security. And yet, only a few scholars have meaningfully interrogated the judicial extension of unilateral contract theory to the employment relationship or to other factual contexts that fall outside the classic reward paradigm.¹⁷⁵ Indeed much of employment law scholarship takes the unilateral frame as a given.¹⁷⁶ As we will see, those scholars that consider the question generally praise the approach as an innovative, if contractually dubious, means of achieving justice for employees within the confines of existing doctrine.

172. See U.C.C. § 2-206(1) (AM. L. INST. & UNIF. L. COMM'N 1977) (permitting acceptance by any reasonable medium “[u]nless otherwise unambiguously indicated by the language or circumstances”); RESTATEMENT (SECOND) OF CONTS. § 32 (AM. L. INST. 1981) (giving the offeree leeway in choosing the manner of acceptance in “case of doubt” about the offeror’s intention).

173. Beh & Stempel, *supra* note 18, at 98–99.

174. See *generally id.* (discussing insurance contracts); Pettit, Jr., *supra* note 19 (discussing employment and citizen-state contracts).

175. See *generally, e.g.*, Beh & Stempel, *supra* note 18 (discussing insurance contracts); Epstein & Liebesman, *supra* note 19 (discussing government and employment contracts); Pettit, Jr., *supra* note 19 (discussing employment and citizen-state contracts); Tiersma, *supra* note 146 (discussing employment contracts).

176. This position is notable in the relatively deep literature on employee handbook modification. See, e.g., W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 10–11 (2003). But cf. Katherine M. Apps, *Good Faith Performance in Employment Contracts: A “Comparative Conversation” Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883, 903 (2006) (comparing the English approach to the question as “distinctly bilateral”). We explore this topic *infra* Section II.B.2.

The phenomenon was for the most part ignored until the late 1980s when Professor Mark Pettit wrote an article approving the approach as a creative way of ensuring institutional accountability to individuals.¹⁷⁷ Examining the employment context, Professor Pettit suggested that by using the unilateral contract framework courts did justice to employees' reliance interest while also protecting employees from the implication of improvident promises.¹⁷⁸ It allowed a court to prohibit an employer from renegeing on its promise to pay a bonus to those who completed a certain period of service without also requiring employees to bind themselves to serve for the same term.¹⁷⁹

Writing just a few years later, Professor Peter Tiersma sought to retheorize the unilateral contract model and in particular the Restatement doctrine limiting the right to revoke unilateral offers.¹⁸⁰ Using employment as an example, he asserted that an employer's commitment to pay a bonus or benefit is best understood as a conditional promise, binding upon utterance, rather than as an offer seeking any form of acceptance, through performance or otherwise.¹⁸¹ According to Professor Tiersma, such an approach would allow courts to infer conditions that would protect the employer—for instance by partially excusing the company in the event of poor economic conditions—and offer courts a way to tailor employee remedies in such circumstances.¹⁸²

Both Professor Pettit's and Professor Tiersma's contributions recognize some of the limitations of unilateral contract analysis, as conventionally applied, to employment cases.¹⁸³ Yet their work accepts, and to some extent reinvigorates, unilateral contract theory. Professor Pettit sees the employment cases as renewing and revitalizing an otherwise discarded concept.¹⁸⁴ Professor Tiersma embraces them in support of a promissory theory of contract liability.¹⁸⁵ However, both scholars focus exclusively on promises of future benefits, the type of commitments that hew most closely to the traditional reward paradigm.¹⁸⁶

177. Pettit, Jr., *supra* note 19, at 552.

178. *See id.* at 565.

179. *See id.* ("Few legal principles are more widely shared than the notion that, unless he explicitly agrees to work for a fixed term, an employee makes no promise of continued service to his employer.").

180. Tiersma, *supra* note 146, at 62–63.

181. *Id.*

182. *See id.* at 65. Thus, for instance, a court could deem an employer's promise to provide a bonus conditional on the company's financial performance, allowing for an employee who was laid off prior to completing performance to obtain a pro-rata expectation remedy. *Id.* at 64–65.

183. Pettit acknowledges, for instance, that several of the elements of contract formation are implied in the employment context. *See* Pettit, Jr., *supra* note 19, at 552.

184. *Id.* at 559–60.

185. Tiersma, *supra* note 146, at 50.

186. As previously noted, use of unilateral contract analysis is on its surest footing when applied to such cases. *See supra* Section I.B.

Neither scholar considers courts' application of the unilateral framework to job security promises. Indeed, Professor Tiersma imagines the right to terminate at will to be one of the possible "conditions" limiting the enforceability of an employer's promise.¹⁸⁷

Scholarship examining the use of unilateral contract theory in cases of handbook promises to job security has been more skeptical of the analysis. Professor Stephen Befort, in an article focused on the legal significance of handbook disclaimers, is frank about the uneasy fit between the two.¹⁸⁸ As he explains:

[Almost all of the] unilateral contract elements are [presumed] by the court rather than intended by the parties. . . . [E]mployers have no intention of extending a contractual offer when issuing an employee handbook. Similarly, the court infers the employee's acceptance and consideration from conduct that, in reality, could occur regardless of the handbook's existence. The notion of a bargained-for exchange in this setting is a fiction, but the fiction is convenient and understandable. These advantages have induced courts to stretch unilateral contract theory in order to achieve a desirable policy result: the enforcement of handbook promises that benefit employers by creating legitimate expectations among the workforce.¹⁸⁹

Thus, Professor Befort forthrightly acknowledges the doctrinal shortcomings of handbook cases, viewing judicial invocation of the unilateral contract framework as a desirable instrumentalist move that protects employees. Writing in the early 1990s, Professor Befort imagined the possibility of a "revised theoretical framework," one grounded in the economic advantages employers achieve by inculcating expectations of job security among their workforce.¹⁹⁰ As we will soon see, however, that prediction did not come to pass.¹⁹¹

In 2006, Professors David Epstein and Yvette Liebesman briefly revisited the so-called "expand[ed]" use of unilateral contract theory that Professor Pettit identified some twenty years prior.¹⁹² Focusing on the historical rise and fall of the unilateral contract framework, they express skepticism about the utility of the concept in *any* contractual context

187. Tiersma, *supra* note 146, at 62–63.

188. Stephen F. Befort, *Employee Handbooks and the Legal Effects of Disclaimers*, 13 INDUS. REL. L.J. 326, 343 (1991).

189. *Id.*

190. *Id.* at 373.

191. *See infra* Section III.C.

192. Epstein & Liebesman, *supra* note 19, at 296.

outside the reward paradigm.¹⁹³ In employment and elsewhere, they urge courts to ask the underlying question—whether there is or ought to be a legal obligation.¹⁹⁴ Notably, however, they decline to answer that question themselves.

In sum, the few scholars who have engaged this subject in the employment context are mindful, to varying extents, of the lack of fit between the unilateral contract framework and employment relationships. Yet they also avoid looking too closely. Nearly all of them express a willingness to sacrifice doctrine for policy. Professors Epstein and Liebesman are more critical of modern reliance on the unilateral contract framework, but their chief concern is the integrity of contract formation law. Employment contracts figure only briefly in their analysis as an example of why the unilateral framework is often unhelpful in determining the extent of legal obligation.¹⁹⁵ Thus, no one has offered a rigorous treatment of the relationship between the unilateral contract theory and employment. The next Section provides that account.

B. *The Unilateral Employment Contract Fallacy*

The previous Section revealed how general contract law disfavors the unilateral contract frame. Yet scholars have largely accepted its application to employment, considering it a creative or at least innocuous judicial innovation. We take a different view.

This Section demonstrates how unilateral contract theory has distorted employment contract doctrine. First, the unilateral contract framework fails as a descriptive matter. Employees almost always accept employment through a promise rather than performance. In so doing, they make—and employers solicit—a meaningful commitment to future performance, albeit an indefinite one. Second, the unilateral contract framework presumes a discrete performance. It provides no doctrinal tools for determining how terms of employment are supplied and modified in this hyper-relational context. As a consequence, judicial efforts to apply unilateral contract doctrine ignore these important dimensions of employment, obscure fundamental policy choices, and severely distort existing contract doctrine.

193. *Id.* at 270 (asserting that the use of unilateral contract theory in most modern cases is “obiter dictum,” and that where courts purport to rely on a contractual distinction between unilateral and bilateral, “there is generally a more sound basis for the holding”).

194. *See id.* at 303.

195. *Id.* at 306 (concluding that in the employment context “the use of the phrase ‘unilateral contract’ at best describes a result; it does not cause or even help reach the result”).

1. A “Square Peg in a Round Hole”¹⁹⁶

We have seen that the unilateral contract model is both limited and disfavored. A unilateral contract forms only in situations where, owing to uncertainty about performance, the offeree makes no return promise, and it would be unreasonable to infer one.¹⁹⁷ Common experience teaches that few if any employment relationships fit that description.

First, employment relationships almost always begin with an oral or written acceptance. That is, a promise, not a performance. Typically, the process begins with an offer by the employer: a company expresses a desire to hire an applicant for a position at a specified wage or salary. The degree of detail provided varies, as does the extent of any negotiation that follows. In some cases, the job offer is extended on a take-it-or-leave-it basis; in others, the candidate scrutinizes the details and may counteroffer on salient terms like pay. Either way, the deal closes with the candidate eventually indicating, either orally or in writing, that he or she “accepts” the job, often as not using that precise word. Indeed, it is one of the relatively few business transactions that follow what contemporary contracts theorists concede is a highly stylized model of contract formation.¹⁹⁸

This is not merely a description, but a reflection of employer preference. Employers require a promissory acceptance to ensure performance and avoid the legal risk of extending multiple offers. Were an employer to seek formation of a unilateral contract—one that could be accepted only by performance—the company would not know whether the job had been filled until the candidate actually showed up on the designated start date. This situation would leave the company uncertain whether to invest time in considering other applicants. Should more than one candidate accept, whether by promise or performance, the employer could in theory be held liable to whomever it rejects.¹⁹⁹ Thus, requiring a

196. *Demasse v. ITT Corp.*, 984 P.2d 1138, 1156 (Ariz. 1999) (Jones, J., dissenting).

197. *See supra* Section II.A.

198. *See* Shawn J. Bayern, *Offer and Acceptance in Modern Contract Law: A Needless Concept*, 103 CALIF. L. REV. 67, 68 (2015).

199. Under the current understanding of at-will employment, the employer is, in theory, permitted to terminate without liability even after workers have accepted the job and before they begin performance. *See, e.g., Meerman v. Murco, Inc.*, 517 N.W.2d 832, 833 (Mich. Ct. App. 1994) (per curiam); *Rosatone v. GTE Sprint Commc'ns*, 761 S.W.2d 670, 672 (Mo. Ct. App. 1988); *Bakotich v. Swanson*, 957 P.2d 275, 278–80 (Wash. Ct. App. 1998). But a minority courts have imposed liability under promissory estoppel in these situations, particularly where the employee incurs a loss in reliance on the job offer, such as where the employee turns down other offers. *See, e.g., Grouse v. Grp. Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). As we will argue, there is a contractual basis for that liability under the bilateral framework we propose in Part IV. *See infra* Section IV.A.

promissory acceptance allows employers to better manage their workflow and anticipate their hiring needs.²⁰⁰

Second, the terms of employment are incomplete and develop over time. A key characteristic of offers for unilateral contracts is that they fully identify the desired performance, enabling the offeree to simultaneously accept and render complete performance.²⁰¹ In contrast, an employee who accepts a new job will receive further information about the terms of the relationship and the employer's performance expectations. This supplementation of the parties' agreement begins in the elaborate onboarding process that many companies undertake with new hires. During that period, employees receive additional terms of employment, including important employer promises (e.g., the precise cost and coverage of the employer's benefits plan) and more precise specification of employee obligations (e.g., the policies and procedures with which the employee is expected to comply). This information is too extensive and complex to be presented in the initial offer of employment.²⁰²

Such formal onboarding is by no means universal but merely one illustration of the hyper-relational nature of employment terms. Much of the information and instruction that are essential to employees' ability to perform—including shift assignments, assigned tasks, methods for completing those tasks, and how their work will be evaluated—are provided serially, in multiple communications, and evolve over time.²⁰³ This feature of employment precludes any possibility of a performance-based acceptance because the employer's initial offer does not, and indeed cannot, fully specify what is required of the employee to perform.

Third, and relatedly, most employment relationships have no fixed endpoint. Under the prevailing understanding of at-will employment, either party may decide to terminate the relationship at any point.²⁰⁴ As

200. Surprisingly, some contracts scholars think otherwise. See E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 3.12 (3d ed. 2004) (describing handbooks as “situations in which an offeror has no interest in a bilateral contract” because “a commitment by the offeree would be of so little value to the offeror that the offeror has no interest in being bound in return for a promise”). That view seems to disregard important managerial and relational interests of employers.

201. See *supra* Section II.A.1.

202. See Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 435–36 (2016) [hereinafter Arnow-Richman, *Modifying*] (“It is impossible to imagine a contract that sets out all of the terms and expectations of what is likely to be an evolving and potentially long-term work relationship.”).

203. *Id.* at 437 (describing “informal ‘changes’ in employment ‘terms’—staffing decisions, work instructions, personnel actions, etc.—that parties likely anticipate as part of the natural ebb and flow of a dynamic work relationship”).

204. But see Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1558–59 (challenging this assumption and suggesting that an advance notice requirement is more consistent with background law).

previously discussed, this aspect of the relationship has led some commentators to describe at-will employment as noncontractual or illusory.²⁰⁵ Yet employment is clearly an exchange relationship—a trade of money for labor—with the consent of both parties.²⁰⁶ A more accurate description, therefore, is that the employment relationship is contractual, but indefinite. Long-term commercial contracts may be structured in an identical way—with parties committed to continuing performance until one party chooses to terminate—and are plainly treated as such.²⁰⁷ The confusion lies not in defining the relationship as contractual, but in attempts to shoehorn it into the unilateral model of contract formation. Some courts and commentators have sought to circumvent this problem by characterizing each day of employment as the start of a new unilateral contract.²⁰⁸ This description, however, does not accord with the intentions or beliefs of the parties.²⁰⁹ They view themselves as continuing an ongoing relationship rather than contracting anew each workday.²¹⁰

Fourth, the unilateral reward paradigm presumes that employees are free from any reciprocal obligation to their employer. But well-settled principles of agency law impose significant implied duties that arise automatically from the employment relationship. For instance, employees owe a general duty to act loyally for their employer's benefit in all matters connected with their employment.²¹¹ This duty of loyalty prohibits employees from: (1) using their position to obtain material benefits from third parties; (2) acting as (or on behalf of) an adverse party; (3) competing with the employer; or (4) using or disclosing the employer's confidential information for the employee's benefit.²¹² The Restatement (Third) of Agency also imposes several affirmative duties of performance. Employees must act with "care, competence, and diligence," comply with all lawful instructions, refrain from conduct that

205. See 1 CORBIN, *supra* note 114, at § 96 (describing employment at will as "not a contract at all" but rather "an expression in which the promises are illusory"); 1 FARNSWORTH, *supra* note 201, at § 7.17 n.66 ("It might be better to think of at-will employment as involving an 'agreement' rather than a 'contract.'").

206. Yonathan A. Arbel, *Payday*, 98 WASH U. L. REV. 1, 5 (2020).

207. The UCC contemplates this arrangement in its default terms for contracts that do not specify a duration. See U.C.C. § 2-309(2) (AM. L. INST. & UNIF. L. COMM'N 1977) ("Where 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."); see also Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1546 (discussing the UCC approach).

208. See *Bankey v. Storer Broad Co.*, 443 N.W.2d 112, 116 (Mich. 1989) (discussing and critiquing this understanding), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989).

209. *Id.*

210. *Id.* (describing this characterization as "strikingly artificial" because "[f]ew employers and employees begin each day contemplating whether to renew or modify the employment contract in effect at the close of work on the previous day").

211. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

212. *Id.* at §§ 8.02, 8.03, 8.04, 8.05.

is likely to damage the employer's business, and share relevant information with the employer.²¹³ This complex web of legal obligations directly contradicts the premise of the unilateral model. Contrary to that model, both employers and employees have many mutual, enforceable obligations.

Finally, even when the employment relationship is terminable at will, employers often require workers to sign restrictive agreements regarding such matters as information confidentiality, non-competition, and dispute resolution. These types of agreements are quite common and exist across a variety of industries and positions. Representative studies show that more than half of the private-sector non-unionized workforce is subject to a pre-dispute arbitration clause²¹⁴ and nearly forty percent of surveyed workers have signed a noncompete at some point in their career.²¹⁵ Other common restrictive agreements may require employees to protect proprietary information, forgo client and co-worker relationships, and refrain from disparaging the employer.²¹⁶

To be sure, employees sometimes have cause to contest the scope of these agreements and their enforceability. For example, courts will refuse to compel arbitration if they deem the employer's procedure unconscionable,²¹⁷ and they will refuse to issue an injunction against a competing employee if the scope of the restraint is unreasonable²¹⁸ or

213. *Id.* at §§ 8.08, 8.09, 8.10, 8.11 (2006).

214. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/3TMJ-XRC8>] (finding over fifty six percent of surveyed employees were subject to mandatory arbitration procedures corresponding to over sixty million workers).

215. Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 60 (2021) ("Overall, our weighted estimates indicate that 38.1 percent of US labor force participants have agreed to a noncompete at some point in their lives and that 18.1 percent, or roughly 28 million individuals, currently work under one.").

216. See Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 884 (2021) (describing the way in which employers deploy such agreements in concert, creating a "contract thicket" that overly constrains worker mobility); see also Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* 1–2 (Jan. 2023) (unpublished manuscript) (on file with authors) (observing the incidence of various restrictive agreements and finding that noncompetes and non-solicitation and recruitment agreements are usually bundled with other pro-employer agreements).

217. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689–90 (Cal. 2000) ("Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement. . .").

218. See RESTATEMENT (SECOND) OF CONTS. § 188 (AM. L. INST. 1981) (providing that a restraint on competition is unenforceable if it "is greater than is needed to protect the [employer's] legitimate interest, or . . . is outweighed by the hardship to the [employee]").

violates state statutory restrictions.²¹⁹ But the parties unquestionably *intend* these promises to be contractually binding despite the “at-will” nature of the relationship. Thus, a fifth and final reason why the unilateral framework is inapt is that employees in at-will relationships often make explicit and enforceable return promises notwithstanding the indefinite nature of the position. These are prospective and intended to survive the termination of the employment relationship. These commitments contradict any possible characterization of the relationship as unilateral.

In short, the unilateral contract model is incompatible with the hyper-relational nature of employment. Employers and employees begin their relationship with promises, and they expect to be bound by and benefit from mutual future obligations. Thus, this approach to employment contracts distorts contract doctrine and misdescribes the reality of employment relationships.

2. A Doctrinal House of Cards²²⁰

The previous Subsection showed how poorly the unilateral contract framework suits the employment context. This Subsection reveals the fragile doctrinal edifice courts have built on that fundamentally flawed foundation. The unilateral reward paradigm requires a discrete promise that remains fixed throughout the period of performance. But in the hyper-relational employment contract, the period of performance is indefinite, and the promise is subject to change.²²¹ Forcing unilateral contract doctrine onto employment has led courts awkwardly to interject bilateral principles into their unilateral analysis and to invent novel rules of so-called unilateral contract modification. The resulting body of law compounds the errors we have already described and obscures crucial judicial policy choices.

This is nowhere more apparent than in the law of employee handbook modification. Before the ink was dry on decisions like *Woolley* and *Toussaint*, questions arose as to whether and how employers might modify binding personnel documents. As we discuss in more detail in

219. A number of states have passed or amended legislation in recent years to impose additional restrictions on employers’ use of noncompetes, in particular with low-wage workers. See generally Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223 (2020) [hereinafter Arnow-Richman, *The New Enforcement Regime*] (cataloguing recent legislative changes).

220. See Rachel Arnow-Richman, *Asmus v. Pacific Bell and the “Unilateral” Employment Contract: Building the House of Cards Higher*, in *The Best and Worst of Contracts Decisions: An Anthology*, 45 FLA. ST. U. L. REV. 887, 952 (2018) [hereinafter Arnow-Richman, *House of Cards*].

221. See *Bankey v. Storer Broad Co.*, 443 N.W.2d 112, 116 (Mich. 1989), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989) (“[W]here employment is for an indefinite duration, the unilateral contract framework provides no answer to the question: When will the act bargained for by the employer be fully performed?”).

Part III, employers responded to the enforcement of employee handbook policies by redrafting provisions that could be read to promise job security or other benefits.²²² They added language disclaiming the legal significance of their policies and affirmatively asserting that such materials were noncontractual.²²³ To the consternation of employee rights advocates and scholars, these risk management strategies ultimately proved successful for employers. Most courts today hold that boilerplate disclaimers preclude employee claims as a matter of law.²²⁴ But these same courts first had to decide whether employers should be permitted to modify newly enforceable job security policies. Could handbook revisions, unilaterally initiated by the employer, eliminate previously conferred contractual rights?

Critical and competing stakes underlie this question. An employer's written policies are the official word of the company.²²⁵ Consequently, employees have a strong expectation that they will be followed.²²⁶ Yet it would be problematic to bind employers to their current policies for all time. Companies need flexibility to fulfill their prospective business plans and respond to changing product and labor market conditions. They also cannot, as a practical matter, maintain and administer different policies for different workers based on their individual hire date. Consequently, modification of employer policies poses a recurring and fundamental question about the role of employer discretion and employee expectations in the private ordering of the workplace.

Yet for the reasons just discussed, unilateral contract doctrine offers no framework for resolving this important issue. By definition, unilateral contracts form and are performed simultaneously, thus foreclosing the possibility of modification during the course of the relationship.²²⁷ This

222. See Verkerke, *An Empirical Perspective*, *supra* note 12, at 841; *infra* Section III.B. See generally Fineman, *supra* note 16 (arguing that courts' decisions to apply implied contract doctrine to employment relationships led to employer avoidance of liability through careful drafting of personnel documents).

223. Fineman, *supra* note 16, at 368.

224. See, e.g., *Rowe v. Montgomery Ward*, 473 N.W.2d 268, 277 (Mich. 1991); *Orr v. Westminster Village N., Inc.*, 689 N.E.2d 712, 721 (Ind. 1997); *Wing v. Anchor Media, Ltd. of Texas*, 570 N.E.2d 1095, 1098 (Ohio 1991). See generally Rachel Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 450 (2009) (describing how courts treat disclaimers of an employee's at-will status as dispositive); Fineman, *supra* note 16, at 365–70 (discussing evolution of this judicial response).

225. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1265 (N.J. 1985) (“As every employee knows, when superiors tell you ‘it’s company policy,’ they mean business.”), *modified* by 499 A.2d 515 (N.J. 1985).

226. *Id.* (noting that “it would be almost inevitable for an employee to regard [the employer’s policy manual] as a binding commitment”).

227. Rather, the recurring question with regard to unilateral contracts is, as previously discussed, whether and when the initial offer may be revoked. See *supra* Section II.A.1. That

glaring conflict between unilateral theory and real-world practice might have led some judges to abandon the ill-fitting unilateral contract framework and explicitly recognize the long-term, reciprocal, and consequently bilateral nature of the employment relationship. However, courts instead doubled down on the unilateral characterization and issued a befuddling series of opinions even more poorly reasoned than their ancestors.

Two contrasting approaches emerged.²²⁸ The majority approach, which we refer to as “reasonable notice,” permits employers to modify their policies merely by notifying the workforce of the prospective change.²²⁹ *Asmus v. Pacific Bell*²³⁰ is a leading example. Pacific Bell initially adopted a policy promising managers retraining and reassignment in the event of job elimination.²³¹ It later replaced it with a new policy designed to decrease managerial staffing through severance and benefit incentives.²³² In a breach of contract suit brought by a group of managers affected by the change, the California Supreme Court held for the employer.²³³ The court rejected the employees’ claims that the employer had to obtain their explicit assent and provide fresh consideration to modify the previous policy.²³⁴

In reaching this conclusion, the court reaffirmed the unilateral nature of the employment contract, ostensibly analyzing the modification question pursuant to that body of law. According to the court: “The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with

question presupposes that a binding acceptance has yet to occur. It is possible, if awkward, to conceptualize an employer’s modification of an existing policy as an attempted revocation within the unilateral framework. This would bring to bear the previously discussed partial performance doctrine adopted in Restatement Section 45. However, courts have given scant attention to that provision. See *Demasse v. ITT Corp.*, 984 P.2d 1138, 1144 n.3 (Ariz. 1999). We will return to this idea later in this Section.

228. Arguably there is a third approach, illustrated by the Michigan Supreme Court’s decision in *Bankey v. Storer Broadcasting Co.*, which rejected the contractual framework altogether. 443 N.W.2d 112, 112 (Mich. 1987), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989). We will explore the Michigan line of cases in detail in Part III. For now, what is important is that no jurisdiction adopted the *Bankey* approach, and Michigan law ultimately retrenched in favor of a contract analysis. See *infra* Part III.

229. See RESTATEMENT OF EMP. L. §§ 2.05, 2.06 (2015) (adopting reasonable notice approach). In an earlier work, Arnow-Richman refers to this as the “unilateral modification” approach. See Arnow-Richman, *Modifying*, *supra* note 203, at 450. We use “reasonable notice” here for greater clarity.

230. 999 P.2d 71 (Cal. 2000).

231. *Id.* at 73.

232. *Id.* at 74.

233. *Id.* at 74, 78.

234. *Id.* at 78.

reasonable notice of the change, additional consideration is not required.”²³⁵ The court went on to dispense with proof of both consideration and assent.²³⁶ In a highly technical and notably dispassionate analysis, *Asmus* re-invoked the legal fiction that these elements of contract formation could be inferred from employees’ continued employment.²³⁷

This analysis is deeply flawed. There is no “general rule” regarding the “proper termination of unilateral contracts.”²³⁸ The court’s assertion is not only a pure invention but also contrary to any plausible understanding of unilateral contract law. If, as the court assumed, Pacific Bell’s original policy was an “offer” for a unilateral contract, and the employees “accepted” by continuing employment in response to the original management security policy, then it was too late for the employer to terminate or modify. The employees had already performed by remaining on the job, and thus the employer was bound by its promise.²³⁹

The closest one could come to applying valid unilateral contract doctrine in this context would be to invoke the previously discussed partial performance rule.²⁴⁰ Using the unilateral framework, it is possible, though awkward, to understand an employer’s modification of an existing policy as an attempt to revoke the original offer. However, the contemporary revocation rule contradicts the California Supreme Court’s conclusion. Under Restatement Section 45, once a promisee has begun performance, the promisor must hold the offer open for a reasonable time to allow the promisee to complete the requested performance.²⁴¹ This rule would require Pacific Bell to maintain its layoff policy for long enough to allow covered employees to receive the full benefit of the continued employment sought by Pacific Bell’s promise.²⁴² Of course, the employer never defined that period of time but simply encouraged its workforce to

235. *Id.*

236. *Id.*

237. *See id.*

238. Arnow-Richman has critiqued this aspect of the *Asmus* decision in detail elsewhere. *See* Arnow-Richman, *House of Cards*, *supra* note 221, at 953. We rely on that work throughout this Section.

239. *See id.*; *see also* Arnow-Richman, *Modifying*, *supra* note 203, at 451 (“If the employer’s original handbook altered the at-will nature of the relationship, then the employer is no longer in a position to lawfully terminate the employee and rehire on new terms.”).

240. *See supra* Section II.A.1.

241. *See* RESTATEMENT (SECOND) OF CONTRS. § 45 (AM. L. INST. 1981); *supra* Section II.A.

242. The *Asmus* majority’s only mention of Restatement Section 45 is in a footnote. 999 P.2d at 75 n.4.

stay.²⁴³ These intractable contradictions show why the court erred by framing the contract as unilateral in the first place.²⁴⁴

To be clear, our critique here concerns the *Asmus* court's reasoning rather than the court's policy motivations or the reasonable notice rule itself. Although unilateral contract analysis offers no insight into this fact pattern, there are other, more coherent ways to reach the same outcome. For example, depending on the scope of the original rights, permitting policy modification upon reasonable notice might strike a sensible balance between the employees' justified expectations and the employers' need for flexibility.²⁴⁵ Alternatively, a reasonable notice standard may reflect judicial skepticism about the legitimacy of the employees' underlying rights.²⁴⁶ Courts stretched conventional contract doctrine to find handbook policies enforceable.²⁴⁷ So, perhaps the resulting rights are less than fully contractual.²⁴⁸

Finally, and most importantly for our purpose, *bilateral* contract analysis could also justify a reasonable notice rule, but only if the rescinded policy provided something less than unqualified job security. We have described this possibility elsewhere and will return to the idea in Part IV.²⁴⁹ For now, however, we only intend to show how the California Supreme Court, in deciding *Asmus*, neither explained its motivations nor offered a defensible doctrinal basis for its ruling. Instead, the court invoked a nonexistent set of "traditional" unilateral contract modification principles.²⁵⁰ Thus, this influential case by a highly respected court built the majority rule on a confused premise, using

243. *Id.* at 74.

244. See Arnow-Richman, *House of Cards*, *supra* note 221, at 954 (opining that such irreconcilable problems with *Asmus*' reasoning "bring[] down the curtain on the unilateral contract charade").

245. See Fleming v. Borden, Inc., 450 S.E.2d 589, 595 (S.C. 1994) ("[T]he employer-employee relationship is not static. Employers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees."); cf. Demasse v. ITT Corp., 984 P.2d 1138, 1155 (Ariz. 1999) (Jones, J., dissenting) (suggesting that permitting modification upon reasonable notice is preferable to "employers [being] unilaterally forced by economic circumstance to curtail or shut down an operation, something employers have the absolute right to do"). This rationale would make the most sense in situations where the underlying promise was something other than a full-fledged commitment to job security.

246. See Arnow-Richman, *Modifying*, *supra* note 203, at 453 (offering this explanation). For purposes of the litigation, Pacific Bell conceded that the original management retention policy was enforceable. *Asmus*, 999 P.2d at 73–74.

247. See Arnow-Richman, *Modifying*, *supra* note 203, at 453.

248. See Bankey v. Storer Broad. Co., 443 N.W.2d 112, 119 (Mich. 1987) (adopting this view), certifying a question to, 882 F.2d 208 (6th Cir. 1989); cf. RESTATEMENT OF EMP. L. § 2.05 cmt. b. (AM. L. INST. 2015) (endorsing *Asmus*' reasonable notice rule by analogy to administrative rulemaking); *infra* Section III.B.

249. See Arnow-Richman, *Modifying*, *supra* note 203, at 481–82; *infra* Part IV.

250. See *Asmus*, 999 P.2d at 81.

flawed reasoning and concealing whatever policy objectives animated the decision.

The minority approach to midterm modification of employee handbooks is equally problematic. Courts following the “formal modification” approach, as we refer to it, reject the idea that employers have a legal right to replace enforceable policies after simply providing reasonable notice. Instead, cases like *Demasse v. ITT Corp.*²⁵¹ purport to apply conventional principles of contract modification.²⁵² In *Demasse*, an employer replaced its policy of conducting layoffs in reverse order of seniority with one that selected employees for layoff based on their job performance.²⁵³ A group of laid-off employees hired under the original seniority policy subsequently alleged that the employer had no legal right to modify that enforceable agreement.²⁵⁴ The Arizona Supreme Court agreed.²⁵⁵ Like the California court in *Asmus*, the *Demasse* court began by reaffirming that employer policies may become binding as a unilateral contract.²⁵⁶ Then, the court reasoned that once a contract forms, regardless of how it arises, general rules of modification apply.²⁵⁷ Thus, *Demasse* held that the employer must secure employees’ assent²⁵⁸ to the new policy and provide “separate” consideration—continued employment alone would not suffice.²⁵⁹

The *Demasse* court deserves some praise for recognizing that, once formed and until its termination, a contract can only be modified by mutual assent of the parties. In that respect, the court implicitly treats the plaintiffs’ relationship with their employer as *bilateral*. These classical common law principles of contract modification—requiring fresh consideration and mutual assent—by their nature can only apply to an executory bilateral agreement.²⁶⁰ Ironically the dissent chastised the

251. 984 P.2d 1138 (Ariz. 1999).

252. *Id.* at 1143–46.

253. *Id.* at 1141.

254. *Id.*

255. *Id.*

256. *Asmus v. Pacific Bell*, 999 P.2d 71, 75 (Cal. 2000); *Demasse*, 984 P.2d at 1142–43.

257. *Demasse*, 984 P.2d at 1144 (“Once an employment contract is formed—whether the method of formation was unilateral, bilateral, express, or implied—a party may no longer unilaterally modify the terms of that relationship.”).

258. *Id.* at 1145 (“[T]he employee does not manifest consent to an offer modifying an existing contract without taking affirmative steps, beyond continued performance, to accept.”).

259. *See id.* (“[Anything else] brings us to an absurdity: the employer’s threat to breach its promise of job security provides consideration for its rescission of that promise.”).

260. For a discussion of the classical rules of contract modification, including the requirement of “new or additional consideration,” see Arnow-Richman, *Modifying*, *supra* note 203, at 458–60.

majority for this very move.²⁶¹ According to the dissent, applying formal modification principles to an at-will employment relationship is akin to forcing a “square peg in[to] a round hole.”²⁶² But, as we have shown, the reality is precisely the opposite. Unilateral contract doctrine is the square peg in the round hole of employment law—much as it is in contract law itself.

Unfortunately, however, the court’s implicit step toward the bilateral model was a missed opportunity to clarify the nature of employment contracts. The *Demasse* majority’s reasoning instead sews further doctrinal confusion. As we have noted, the court reinforced the mistaken idea that unilateral contract doctrine should govern employment contract formation. But since parties form and fully perform a unilateral contract at the same moment, that doctrinal framework offers no insight into the enforceability of a midterm contract modification—the issue the *Demasse* court confronted.

Compounding this initial error, the majority invokes formalistic, outdated principles of contract modification. The court asserts that any enforceable modification requires not only mutual assent but also fresh consideration, in this case, from the employer.²⁶³ Although not mentioned by name, this is effectively an application of the preexisting duty rule.²⁶⁴ This highly technical and comparatively strict doctrine was the exclusive approach to contract modification until the middle of the twentieth century.²⁶⁵ But the rigid preexisting duty rule fell out of favor with both courts and scholars outside the employment context. Commentators argued that contracting parties need flexibility to adjust their relationship in the face of changed circumstances.²⁶⁶ And when disputed

261. *Demasse*, 984 P.2d at 1153 (Jones, J., dissenting) (“[The majority] transforms the conventional employer-employee contract from one that is *unilateral* (performance of an act in exchange for a promise to pay) to one that is *bilateral* (a promise for a promise).”).

262. *Id.* at 1156.

263. *Id.* at 1145.

264. See RESTATEMENT (SECOND) OF CONTS. § 73 (AM. L. INST. 1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”). The aim of this rule was to prevent a coerced modification—and protect the conceptual integrity of the consideration doctrine—by ensuring that some reciprocal benefit flowed to whichever party gave up a contractual right or assumed an increased burden under the new arrangement. See generally 2 CORBIN ON CONTRACTS § 7.1 (2022) (attributing the preexisting legal duty rule (PELDR) to “tough cases in which one contracting party has been subjected to a holdup game, so that the promisor [agreed to the modification] under some degree of economic duress”).

265. See Arnow-Richman, *Modifying*, *supra* note 203, at 458–59 (discussing this doctrinal history).

266. See, e.g., Robert A. Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 852 [hereinafter Hillman, *Policing*] (describing the PELDR as “a roadblock to the free adjustment of contracts”); see also 2 CORBIN ON CONTRACTS § 7.1 (discussing this position).

modifications appeared fair and necessary, courts usually found ways to circumvent the preexisting legal duty rule.²⁶⁷

These realist impulses came to full flower with the passage of the UCC, which flatly rejected the notion that contract modifications require any form of consideration to be binding. Under Article 2, a modification need only meet the general standard of good faith applicable to all contracts.²⁶⁸ Similarly, common law courts increasingly made exceptions to the preexisting duty rule. According to the Second Restatement, modifications that are “fair and equitable in view of circumstances not anticipated by the parties when the contract was made” require no additional consideration.²⁶⁹ Rather than focusing on the formality of consideration, courts sought to enforce voluntary, mutually beneficial modifications and refuse enforcement of coerced and extortionary modifications.²⁷⁰ These more permissive rules reflect broader developments in contemporary contract law that we will further explore in Part IV. For the moment our point is that the current approach to contract modification outside of employment generally eschews formalistic devices like consideration in favor of an approach that emphasizes instead the real-life circumstances of the parties.

In contrast, the *Demasse* majority hewed closely to the traditional preexisting duty rule. Rather than asking whether the employer’s proposed modification was a fair and equitable response to unanticipated circumstances, the opinion focused narrowly on the absence of new consideration. This approach oddly mirrors earlier courts’ insistence that only employees who provide so-called additional consideration could escape the employment-at-will super-presumption and enforce employer promises of job security.²⁷¹ Part IV will outline a better way to analyze employer policy modifications using contemporary contract principles. For now, however, we wish only to highlight how current caselaw embodies the employment contract exceptionalism that we have been criticizing.

Whether they adopt the “reasonable notice” or “formal modification” approach, decisions addressing handbook modification are equally laden with technical discussions of formal contract doctrine that offer a thin veneer of legitimacy. But closer analysis reveals only outdated rules like the rigid preexisting duty rule or utterly fabricated concepts like

267. See Arnow-Richman, *Modifying*, *supra* note 203, at 459 (discussing how courts “leverag[ed] legal fictions” to avoid the PELDR when confronted with “seemingly fair” modifications); Hillman, *Policing*, *supra* note 267, at 852 (describing resistance to the PELDR by courts).

268. See U.C.C. § 2-209(1) (AM. L. INST. & UNIF. COMM’N 1977).

269. RESTATEMENT (SECOND) OF CONTRS. § 89 (AM. L. INST. 1981).

270. See Robert Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982).

271. See *supra* Section I.A.

modification of unilateral contracts. Unsurprisingly, these opinions offer only a sterile treatment of crucial policy questions. These courts' reasoning conflicts with mainstream contract law and misrepresents the real-world experiences of both employers and employees.

III. EMPLOYMENT CONTRACTS WITHOUT CONTRACT DOCTRINE?

As we saw in Part II, judges misapply unilateral contract doctrine in assessing employees' implied contract rights. The unilateral framework initially allowed courts to enforce deferred benefit promises without disturbing the powerful presumption that an indefinite-term employment relationship is terminable at will. This framework makes much less sense, however, as a formal doctrinal basis for enforcing assurances of job security. Employment is, fundamentally, a reciprocal relationship. The doctrine used to enforce these assurances thus should reflect the mutual exchange of promises at the core of any employment contract.

Since courts have, so far, utterly failed to develop a coherent formal doctrinal account of the employment relationship, it is tempting to ask whether a less formal approach might be preferable. Perhaps judges could simply abandon the strictures of formal contract doctrine. They might instead enforce employers' assurances of job security whenever compelling public policy reasons support enforcement. And they could use the same public policy considerations to establish procedures for employers to modify or rescind those assurances.

As we will explain in this Part, a revolutionary line of cases from Michigan did precisely that. These decisions candidly acknowledged that formal doctrine made it difficult to enforce employers' policy statements concerning progressive discipline and grounds for termination. They offered instead what we refer to as the "informal public policy approach" that protected workers' legitimate expectations of job security. Subsequently, many courts in other jurisdictions quoted and cited these Michigan cases in support of their own decisions that enforced employers' assurances.

Tellingly, however, none of those courts fully embraced the informal public policy approach to enforcement. Instead, they resorted to the tortured formal doctrinal arguments we described in Part I and Part II. And even Michigan ultimately weakened its reliance on employees' "legitimate expectations" in this branch of its employment contract jurisprudence. This little-known legal history teaches us that only with a new formal doctrinal approach can we hope to untangle the current employment contract chaos. In Part IV, we sketch that new approach after first showing how courts continue to insist on formal doctrinal reasoning. And thus, we conclude that an informal public policy approach will not overcome judges' tendency to use inapposite doctrines such as unilateral contracts.

A. Enforcing Employees' Legitimate Expectations

In the first half of the twentieth century, Michigan courts, like those in many other jurisdictions, established a strong presumption that employment for an indefinite term is terminable at will.²⁷² As a result, plaintiffs seeking to enforce employers' assurances of job security had to give "consideration in addition to the services to be rendered" or prove "distinguishing features or provisions" sufficient to overcome the at-will presumption.²⁷³ In practice, this approach ordinarily made employee handbook promises or other policy statements concerning job security legally unenforceable.²⁷⁴

In *Toussaint v. Blue Cross & Blue Shield of Michigan*,²⁷⁵ however, the Michigan Supreme Court departed dramatically from existing doctrine in two ways.²⁷⁶ First, the court signaled far greater willingness to enforce oral assurances of job security.²⁷⁷ Although prior decisions often viewed these alleged promises skeptically, the *Toussaint* majority adopted a much more sympathetic perspective towards such claims.²⁷⁸ The court reviewed two cases consolidated for appeal.²⁷⁹ In one case, the plaintiff Ebling testified that, during the job interview leading to his hiring, he expressed concern about the possibility that philosophical differences with his prospective supervisor at Masco Corporation could get him fired.²⁸⁰ Masco's Executive Vice President allegedly told Ebling:

I would personally assure you that if anything comes up between you and [the supervisor] that is detrimental relative to your performance that you will be reviewed by myself before anything happens and given a chance to correct these things, and, if you are doing the job, you can be assured that you will not be discharged.²⁸¹

272. See, e.g., *Lynas v. Maxwell Farms*, 273 N.W. 315, 316 (Mich. 1937) ("Contracts for permanent employment or for life have been construed by the courts on many occasions. In general, it may be said that in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, such contracts are indefinite hirings, terminable at the will of either party.").

273. *Lynas*, 273 N.W. at 316–17.

274. See, e.g., *id.* at 317.

275. 292 N.W.2d 880 (Mich. 1980).

276. See *id.* at 884–85.

277. See *id.*

278. See *id.* at 884.

279. *Id.* at 883.

280. *Id.* at 898.

281. *Id.*

Finding sufficient evidence of an express oral contract allowing termination only for cause, the court unanimously upheld the jury's \$300,000 verdict for breach of that employment contract.²⁸²

In the other case, the plaintiff Toussaint similarly testified that Blue Cross representatives offered oral assurances of job security during his pre-employment interviews:

Mr. Schaedel had indicated to me that as long as I did my job, that I would be with the company [until mandatory retirement at age sixty-five]; showed me a number of documents—I had asked the question about how secure a job it was and he said that if I came to Blue Cross, I wouldn't have to look for another job because he knew of no one ever being discharged.²⁸³

The court majority found these statements sufficient evidence to sustain the jury's verdict for Toussaint.²⁸⁴ It reasoned that, like Ebling, Toussaint inquired about job security when he was hired.²⁸⁵ A reasonable juror could interpret the assurance that he “would be with the company ‘as long as [he] did [his] job’” as agreement to a “contract of employment terminable only for cause.”²⁸⁶

However, three dissenters disagreed that such a statement was sufficient to sustain the jury's verdict for Toussaint.²⁸⁷ Instead, they distinguished *Ebling* on the ground that, in that case, “the parties negotiated over, and agreed to, certain qualifications concerning [termination].”²⁸⁸ As we will soon see, the dissenters' reservations foreshadowed a later shift in Michigan toward a comparatively restrictive approach to the enforceability of oral assurances of job security.²⁸⁹

The court's second and far more significant innovation came in response to Toussaint's allegation that written company policies also committed Blue Cross to terminate his employment only for cause.²⁹⁰ In response to Toussaint's inquiries about job security, hiring officials handed him the Blue Cross “SUPERVISORY MANUAL—Personnel

282. *Id.* at 883; *id.* at 902 (Ryan, J., concurring). The four judges joining the majority opinion construed the contract as requiring good cause. *Id.* at 890 (majority opinion). Meanwhile, the three concurring judges found a so-called “‘satisfaction’ contract” prohibiting termination only for a reason that is “insincere, in bad faith, dishonest or fraudulently claimed as a subterfuge.” *Id.* at 902 (quoting *Isbell v. Anderson Carriage Co.*, 136 N.W. 457, 461 (Mich. 1912)).

283. *Id.* at 904.

284. *Id.* at 892 (majority opinion).

285. *Id.*

286. *Id.* at 884.

287. *Id.* at 904 (Ryan, J., concurring).

288. *Id.* at 904 n.4.

289. *See infra* Section III.C.

290. *Toussaint*, 292 N.W.2d at 895.

Practices and Procedures.”²⁹¹ The section on “Terminations” provided: “It is the policy of the company to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only.”²⁹² The manual also established a detailed “DISCIPLINARY PROCEDURE,” which stated that:

a series of progressive, corrective measures will be applied. . . . [B]efore [imposing any disciplinary measures,] the employee should be counselled about (1) what the standard of performance or behavior is, (2) how he or she is not meeting that standard, (3) what he or she should do to correct the performance or behavior, and (4) what action the supervisor will take if the performance or behavior is not corrected.²⁹³

And finally, according to the manual, “discipline will be given only for cause.”²⁹⁴

The *Toussaint* majority held that these written policy statements became part of Toussaint’s employment contract because he had “legitimate expectations” that Blue Cross would provide progressive discipline and discharge him only for just cause.²⁹⁵ The court reasoned first that companies adopt such policies to attract more productive employees and to improve workplace morale:

While an employer need not establish personnel policies or practices, where an employer chooses to . . . and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.²⁹⁶

If employers derive such an obvious benefit from making assurances of job security, then justice demands that employees should be able to enforce such promises.

Second, the opinion alluded to the risk of “misunderstandings” about the terms of employment.²⁹⁷ An employer like Blue Cross could avoid

291. *Id.* at 903, 905 (Ryan, J., concurring). Toussaint also received a pamphlet entitled “Guidelines for Michigan Blue Cross Employees” that summarized company policies using simple language and “caricature-like drawings on nearly every page as an aid to understanding the text.” *Id.* at 903, 905.

292. *Id.* at 911.

293. *Id.* at 909.

294. *Id.*

295. *Id.* at 885 (majority opinion).

296. *Id.* at 892.

297. *Id.* at 891.

misleading employees by “requiring prospective employees to acknowledge that they served at the will or the pleasure of the company.”²⁹⁸ The *Toussaint* majority thus identified two distinct public policies—benefits to employers and the risk of employee misunderstanding—that supported enforcing employer statements concerning job security.

In contrast to the cases discussed in Section II.B, the court forcefully disclaimed the importance of contract formalities.

No pre-employment negotiations need take place and the parties’ minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer’s policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “instinct with an obligation.”²⁹⁹

In this widely quoted passage, the *Toussaint* majority embraced what we can justly describe as an “informal public policy approach” to enforcement. The court identified persuasive policy reasons to enforce any handbook assurances that could lead reasonable employees to believe they have job security. But rather than torturing contract doctrine into submission, the court candidly admitted that those public policy concerns—rather than conventional doctrinal principles—compelled their decision to enforce.

B. Portents of a More Restrictive Approach

The *Toussaint* court’s ruling protected employees’ “legitimate expectations” of job security.³⁰⁰ But it also upended Michigan employers’ expectation that a strong at-will presumption would protect them from most potential employment contract claims.³⁰¹ The court held that unqualified employer statements establishing procedures for progressive discipline or requiring just cause for termination would be legally enforceable. It also rejected employer arguments based on lack of assent

298. *Id.*

299. *Id.* at 892 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (1917)); see also Verkerke, *The Story of Woolley*, *supra* note 22, at 29 (observing that *Toussaint* “swept aside all formal doctrinal barriers” to handbook enforcement in favor of a standard based on employee expectations).

300. See Verkerke, *The Story of Woolley*, *supra* note 22, at 29.

301. See *Lynas v. Maxwell Farms*, 273 N.W. 315, 316 (Mich. 1937) (demonstrating the pre-*Toussaint* approach).

or consideration and instead based enforcement on broad notions of public policy. As a result, employers found themselves desperate for a strategy to ward off such claims and restore their preferred at-will relationship with employees.

In response to the decision, management-side employment attorneys predictably counseled their clients to update their employee handbooks and policy statements.³⁰² These employment lawyers promptly drafted an evolving array of what we refer to as “exculpatory boilerplate,” formulaic statements in employer documents designed to negate any employee expectations of job security or other rights.³⁰³ Over the ensuing decade, employee handbooks and hiring documents incorporated progressively more restrictive language to prevent workers from successfully suing for breach of an employment contract.

The earliest forms of exculpatory boilerplate simply recited that the handbook did not create any contractual rights and specifically disclaimed any intention to guarantee employment for a definite time.³⁰⁴ Soon, however, companies began to include an affirmative confirmation of an employee’s at-will status—stating that both the employee and the employer remain free to terminate the employment at any time, for any reason, or for no reason at all.³⁰⁵ Later iterations of exculpatory boilerplate commonly added something akin to a merger clause—to guard against prior or contemporaneous oral agreements—and a “no oral modification” clause barring enforcement of any modification unless it was communicated in writing and signed by a designated corporate officer.³⁰⁶ Employers also needed proof that workers had agreed to these exculpatory terms. In response, employers eventually developed the now-standard practice of requiring employees to sign a separate document that acknowledges receipt of the employee handbook and reinforces the

302. See Verkerke, *An Empirical Perspective*, *supra* note 12, at 842; Fineman, *supra* note 16, at 370.

303. Verkerke, *Legal Ignorance*, *supra* note 5, at 952–58; see also Verkerke, *The Story of Woolley*, *supra* note 22, at 60.

304. See Verkerke, *The Story of Woolley*, *supra* note 22, at 58; Fineman, *supra* note 16, at 366; Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge - A Quadrennial Assessment of the Labor Law Issue of the 80s*, *BUS. LAW.*, Nov. 1984, at 1; Thomas J. Condon and Richard H. Wolff, *Procedures That Safeguard Your Right to Fire*, *HARV. BUS. REV.*, Nov.–Dec. 1985, at 16.

305. See Verkerke, *The Story of Woolley*, *supra* note 22, at 24, 58; Fineman, *supra* note 16, at 366; Pamela R. Johnson & Susan Gardner, *Legal Pitfalls of Employee Handbooks*, *SAM ADVANCED MGMT. J.*, Spring 1989, at 42; Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 *HOFSTRA L. REV.* 365 (1989).

306. See Fineman, *supra* note 16, at 370; Kurt H. Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment - Employer Beware*, 5 *J.L. & COM.* 207 (1985); Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 *HOFSTRA L. REV.* 365 (1989).

exculpatory boilerplate contained elsewhere in the employer's policies.³⁰⁷

Of course, courts in Michigan and other jurisdictions had expressly invited this employer response.³⁰⁸ In their decisions enforcing assurances of job security, they repeatedly observed that employers could avoid enforcement.³⁰⁹ "All that need be done," they said, was to include language that clearly disclaimed any intention to provide contractual protection against discharge.³¹⁰ A mere contract formality could override employees' contrary expectations. Thus, even in Michigan, we see that formal contract language trumps employee expectations.

As discussed in Part II, the widespread introduction of exculpatory boilerplate into employee handbooks also soon forced courts to decide how such clauses affected previously established contractual rights. Nearly ten years after *Toussaint*, this issue finally reached the Michigan Supreme Court in *Bankey v. Storer Broadcasting Co.*³¹¹ As framed by the U.S. Court of Appeals for the Sixth Circuit, the certified question assumed that a requirement of good cause for termination had become legally enforceable under the rule of *Toussaint* "as a result of an employee's legitimate expectations grounded in the employer's written policy statements."³¹² The question then asked whether an employer may unilaterally modify an incumbent employee's for-cause contract to permit termination at-will, even if the employer's original policy failed to reserve the right to modify.³¹³

The *Bankey* court took something of a middle position allowing employers to alter policies within certain limitations. It held that such a change is permissible so long as the employer "gives affected employees

307. See *Fineman*, *supra* note 16, at 368.

308. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 894–95 (Mich. 1980) (suggesting that employers could avoid liability by making known to employees that personnel policies are subject to unilateral change by their employer); *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1270–71 (1983), *modified by* 491 A.2d 515 (N.J. 1985) (confirming that "there are simple ways" for employers to avoid liability); see also Rachel Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 484 (2009) (asserting that despite its pro-employee holding, *Woolley* offered employers a "blueprint for avoiding liability"); Verkerke, *The Story of Woolley*, *supra* note 22, at 24, 58 (noting that the *Woolley* court began and ended its opinion with an invitation for employers to use disclaimers to clarify employees' at-will status); Verkerke, *Legal Ignorance*, *supra* note 5, at 916, 917 & n.58 (discussing that requiring an employer response is a form of "forc[ing] a legally sophisticated party to inform unsophisticated parties about the prevailing legal standard").

309. *Toussaint*, 292 N.W. 2d at 894–95.

310. *Id.*

311. 443 N.W.2d 112, 113 (Mich. 1989), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989). The case was argued in March 1987 but not decided until June 1989. *Id.*

312. *Id.* at 113.

313. *Id.*

reasonable notice of the policy change.”³¹⁴ More colorfully, the court opined that “a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight.”³¹⁵ An employer must choose a method of notification that alerts all affected employees of any change and gives them a reasonable opportunity to understand the new policy.³¹⁶

In addition to this requirement of reasonable notice, the court insisted that its rule would preclude changes “made in bad faith—for example, the temporary suspension of a discharge-for-cause policy to facilitate the firing of a particular employee in contravention of that policy.”³¹⁷ The *Bankey* standard thus permits only bona fide policy changes applicable to the entire workforce or to some recognized subgroup of employees and prohibits changes that single out any individual employee the employer may wish to discharge. Finally, the court clarified that no policy change can deprive employees of already accrued or vested employee benefits.³¹⁸

Although the lead opinion garnered unanimous support,³¹⁹ its reasoning revealed several doctrinal fault lines that ultimately derailed the potentially expansive “informal public policy” approach. First, *Bankey* recognized what very few judicial opinions have considered: that most employment contracts are fundamentally ambiguous about the duration of any commitments they contain. Of course, many courts and commentators speak of “indefinite” term just-cause contracts.³²⁰ And modern cases including *Toussaint* and *Woolley* embrace the idea that an employer’s assurances of job security are legally enforceable even though

314. *Id.*

315. *Id.* at 120.

316. *Id.*

317. *Id.*

318. *Id.* at 121 n.17. This aspect of the decision resembles the current focus of good faith protections on situations involving already-earned compensation. *See, e.g.,* *Fortune v. Nat’l Cash Reg., Co.*, 364 N.E.2d 1251, 1253 (Mass. 1977).

319. Although Justice Charles Levin, who wrote the majority opinion in *Toussaint*, filed a separate opinion in *Bankey*, he too expressed “substantial agreement with the conclusion and the views stated in the majority opinion.” *Bankey*, 443 N.W.2d at 121 (Levin, J., separate opinion). Justice Levin’s opinion also offered a somewhat cryptic suggestion that employees who have served under a discharge-for-cause policy may be entitled to “some other relief or remedy” beyond reasonable notice. *Id.* at 122 n.3. But he devoted five of seven pages to explaining his doubts about whether the court had subject-matter jurisdiction to respond to certified questions from a federal court. *Id.* at 123–27. Justice Patricia Boyle joined the *Bankey* majority but wrote a short concurring opinion solely to emphasize her view that “the pure legitimate expectations leg of *Toussaint* was founded on the Court’s common-law authority to recognize the enforceability of obligations that were *not contractual*.” *Id.* at 121 (Boyle, J., concurring) (emphasis added). Thus, Justice Robert P. Griffin’s majority opinion effectively spoke for a unanimous court.

320. *See, e.g.,* *Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1410–11 (9th Cir. 1991).

the duration of that promise is unspecified.³²¹ But these cases ordinarily fail to consider how long the parties intended the job security promise to remain in effect.

The formal doctrinal analysis thus masks a more fundamental policy choice that every court must make in analyzing employers' assurances. It is helpful to envision judicial motivations for enforcing these commitments arrayed along a continuum. At one extreme, a judge might wish to protect workers who take a job and remain loyal to their employer for many years, precisely because those workers have relied on the employer's policy statements concerning job security. In these circumstances, unilateral policy changes unsettle worker expectations and deprive them of the long-term protection that was an essential part of their initial employment contract. We can call this concern a desire to protect "long-term reliance." At the opposite end of the continuum, a judge more protective of business interests might focus only on whether workers know what contract terms currently govern their employment. On this understanding, each day is a new contract under the terms currently in effect. This approach focuses solely on preventing misunderstanding, and thus it protects only extremely "short-term reliance" on any assurances of job security.

Although the "reasonable notice" approach adopted in *Bankey* falls somewhere between these extremes, it lies far closer to the "short-term" than the "long-term" end of the spectrum. Under *Bankey*, employers have no contractual obligation to maintain protective policies.³²² And employees have no right to rely on the continuation of those policies throughout their careers.³²³ As a result, some courts and commentators have condemned such limited protection on the ground that it allows employers to deceive workers with legally unenforceable illusory promises.³²⁴

The *Bankey* court, however, rejected this criticism. It noted that the rule of *Toussaint* holds employers accountable by requiring the personnel policies "that 'are established . . . at any given time'" to be "applied consistently and uniformly to each employee."³²⁵ Even so, the everyday understanding of a "policy" envisions "a flexible framework for operational guidance, not a perpetually binding contractual obligation."³²⁶ Thus, the court saw no reason to prevent employers from

321. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329–30 (Cal. Ct. App. 1981); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 890–91; *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985), *modified by* 499 A.2d 515 (N.J. 1985).

322. *Bankey*, 443 N.W.2d at 113.

323. *Id.*

324. *See, e.g., Demasse v. ITT Corp.*, 984 P.2d 1138, 1147–48 (Ariz. 1999).

325. *Bankey*, 443 N.W.2d at 120 (quoting *Toussaint*, 292 N.W.2d at 613).

326. *Id.*

unilaterally amending their policy statements.³²⁷ Moreover, *Toussaint* stressed the managerial value of maintaining uniform personnel policies for all employees.³²⁸ A rule requiring individual renegotiation to modify a policy would risk either imposing on the entire workplace whatever policies existed when the longest tenured employee was hired or forcing employers to honor a multiplicity of outmoded policies for any employees who reject a policy amendment.

In contrast, employee advocates understood *Toussaint* to protect workers who justifiably expect employers to live up to the promises implied by their written policy statements concerning job security.³²⁹ In the court's memorable invocation of a well-known phrase, employers' assurances create "a situation 'instinct with an obligation.'"³³⁰ It takes just a small step from that understanding to infer that the court might have wished to protect employees' long-term reliance on those assurances. As we have just seen, however, *Bankey* unequivocally quashed those hopes. Instead, the decision firmly aligned Michigan with the majority of jurisdictions that offer only short-term protection during a reasonable notice period.³³¹

But the *Bankey* decision went further. It also sought to weaken the legal rationale for protecting legitimate expectations at all. According to the court, employer policies are "not enforceable because they have been 'offered and accepted' as a unilateral contract" but only because they benefit employers.³³² When an employer announces a new policy of at-will employment, this benefit "is correspondingly extinguished, as is the rationale for the court's enforcement of the discharge-for-cause policy."³³³ More broadly, the court's opinion took pains to distinguish the legitimate expectations prong of *Toussaint* from more traditional doctrinal paths to enforcing employer policies. It noted that "[u]nder circumstances where 'contractual rights' have arisen *outside of the operation of normal contract principles*, the application of strict rules of contractual modification may not be appropriate."³³⁴ In a five-sentence-long concurrence, Justice Patricia Boyle exuded a thinly veiled contempt

327. *Id.* at 120–21.

328. *Id.*

329. See Verkerke, *The Story of Wolley*, *supra* note 22, at 29.

330. *Toussaint*, 292 N.W.2d at 892 (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

331. See *Asmus v. Pac. Bell*, 999 P.2d 71, 90 (Cal. 2000) (noting courts' reliance on *Bankey* for the "so called majority approach") (J. Mosk, dissenting); see also Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1566 & n.279 (justifying *Bankey*'s holding in the handbook context as an extension of proposed reasonable notice of termination rule).

332. *Bankey*, 443 N.W.2d at 119.

333. *Id.*

334. *Id.* at 116 (emphasis added).

for the “pure legitimate expectations leg of *Toussaint*.”³³⁵ She opened the door to reexamine in the future whether the court’s use of its “common-law authority to recognize the enforceability” of these *noncontractual* obligations was ill advised.³³⁶ We see in these passages a battle over whether *Toussaint*’s principal innovation is doctrinally legitimate.

In *Bullock v. Automobile Club of Michigan*, decided the same day as *Bankey*, the tide continued to turn against *Toussaint*’s legitimate expectations theory.³³⁷ The case involved a commissioned salesperson who alleged that his employer promised at hiring that “nobody gets fired unless they steal.”³³⁸ His complaint also included much more vague references to “reasonable expectations” based on unidentified “policy statements” of the employer.³³⁹ Justice Boyle’s majority opinion in favor of the employee cleverly deflected attention from the legitimate expectations analysis that she clearly disfavored. Instead, she emphasized a procedural peculiarity and rested the court’s ruling on far more conventional grounds for enforcing the employer’s express oral assurances.³⁴⁰

Justice Robert P. Griffin, on the other hand, wrote an impassioned dissent that bemoaned the pernicious effects of *Toussaint* and called for the court to impose new limits on “what has come to be known as the *Toussaint* doctrine.”³⁴¹ The opinion complained that the “general rule”—that indefinite-term employment relationships are terminable at will—was “in danger of being swallowed up by the ‘narrow exception’ carved out and announced . . . in *Toussaint*.”³⁴² Concerning the “legitimate expectations” analysis, the dissent said “it cannot be denied that *Toussaint* pushed heavily against and through the boundaries of employment contract law.”³⁴³ According to the opinion, “[w]hen mutual assent is replaced by the ‘expectations’ of one party as the measure of

335. *Id.* at 121 (Boyle, J., concurring).

336. *See id.*; *see also infra* Section III.C (discussing Justice Boyle’s concurring opinion in *Rowe*).

337. 444 N.W.2d 114 (Mich. 1989).

338. *Id.* at 116–17.

339. *Id.* at 116.

340. The case involved denial of a motion for summary judgment that the employer filed even before answering *Bullock*’s complaint. *Id.* at 115. At such an early stage of the litigation, Justice Boyle was able to focus attention on an alleged oral agreement and conclude that the employer’s written policy was at best “an [unaccepted] *offer* to modify the discharge-for-cause provision of *Bullock*’s alleged express contract.” *Id.* at 119.

341. *Id.* at 133 (Griffin, J., concurring in part and dissenting in part). Note that Justice Griffin—the author of the *Bankey* majority opinion—and Justice Boyle exchanged roles in *Bullock*. The cumulative effect of these two decisions was to establish a strong voting block casting doubt on the continued vitality of the legitimate expectations theory of enforcement.

342. *Id.* at 131–32.

343. *Id.* at 132.

contract viability, an invitation to litigate is heralded, loud and clear.”³⁴⁴ Justice Griffin would stem the tide of litigation principally by taking a more skeptical view of express oral assurances of job security.³⁴⁵ He faults *Toussaint* for recognizing “a breach of contract action based solely on an alleged oral representation recalled with remarkable specificity long years after the time of hiring.”³⁴⁶ Thus, he concluded the court or the legislature should limit the ability of plaintiffs to enforce these oral promises.³⁴⁷ As we will see, a majority of the court would soon share Justice Griffin’s skepticism.

C. The Resurgence of Formalism

The gathering clouds of opposition to *Toussaint* burst with a torrent of critical analysis and contrary conclusions two years later in *Rowe v. Montgomery Ward & Co.*³⁴⁸ The Michigan Supreme Court reviewed and reversed an \$86,500 jury award to Mary Rowe, a highly successful commissioned salesperson for Wards.³⁴⁹ At hiring, “she was told that as long as she sold she would have a job at Montgomery Ward,” and trial testimony from the company employee who hired her corroborated that specific statement.³⁵⁰ Rowe also signed a sheet of “Rules of Personal Conduct” that enumerated other permissible grounds for termination.³⁵¹ More than five years later, in 1982 and 1983, Wards issued a series of revised handbooks that included a “New Employee Sign-Off Sheet” confirming employees’ at-will status and expressly reserving the right to change the conditions of employment.³⁵² Despite repeated requests from the company’s personnel office, Rowe refused to sign this sheet.³⁵³ She

344. *Id.* at 133.

345. *Id.* at 136. More specifically, he called for courts and legislatures to reconsider decisions that exempt from the normal Statute of Frauds writing requirement those oral promises that are “capable of performance [within one year].” *Id.* at 136–38 (emphasis added).

346. *Id.* at 134. He observes that other courts have wisely “distinguished between ‘puffery and promise.’” *Id.* at 133 (quoting *Broussard v. Caci, Inc.*, 780 F.2d 162, 163 (1st Cir. 1986)); see also *supra* Section I.A (discussing puffery and indefiniteness). Justice Griffin also would have held that by continuing his employment after receiving notice of new employer policies, Bullock consented to those modified terms of employment. *Bullock*, 444 N.W.2d at 135 (“Surely, where an employee continues to work under a revised compensation system for nearly four years, as in the case at bar, acceptance by the employee should be implied as a matter of law.”).

347. *Id.* at 136.

348. 473 N.W.2d 268 (Mich. 1991).

349. *Id.* at 271, 281.

350. *Id.* at 294–95 (Levin, J., dissenting).

351. *Id.* at 270.

352. *Id.*

353. She objected that it was directed at new employees and inconsistent with her terms and conditions of employment. Wards personnel administrators ultimately settled for a signature on the back of the sign-off sheet over a handwritten statement that she “[r]ead & [did] not wish to sign.” *Id.* at 293 n.19.

was subsequently terminated, allegedly for leaving work without permission. Although the court's lead opinion offered an unflattering portrayal that suggested Rowe was irresponsible and insubordinate, the dissent described additional evidence that cast her absence in a far more sympathetic light.³⁵⁴ Nevertheless, the store manager decided to fire her.³⁵⁵

The lead opinion, by Justice Dorothy Riley, began candidly enough with what reads as a stinging repudiation of *Toussaint*. Echoing the *Bullock* dissent, the opinion condemned the "legitimate expectations" approach as lawless:

[In *Toussaint*,] this Court joined the forefront of a nationwide experiment in which, under varying theories, courts extended job security to nonunionized employees. In the vast outpouring of ensuing cases, there are indeed situations in which employers have in reality agreed to limit managerial discretion. However, the theory remains troubling because of those instances in which application of contract law is a transparent invitation to the factfinder to decide *not* what the "contract" was, but what "fairness" requires. . . . But unless the theory has some relation to reality, calling something a contract that is in no sense a contract cannot advance respect for the law. Thus, we seek a resolution which is consistent with contract law relative to the employment setting while minimizing the possibility of abuse by either party to the employment relationship.³⁵⁶

In what followed, the lead opinion and a concurrence developed arguments both for limiting the legitimate expectations prong of *Toussaint* and for curtailing the enforcement of express oral promises.³⁵⁷ Concerning legitimate expectations, Justice Riley continued a rhetorical battle begun in *Bankey* and *Bullock*. According to her lead opinion, those cases "distinguished between a promise *implied in law* arising from the

354. *Id.* at 271, 291–92 n.13. It was undisputed that Rowe was an outstanding salesperson who routinely garnered awards for leading the store in sales. *Id.* at 292 n.13. She was covering a shift for another Wards employee when she alerted a co-employee that she had to attend to some personal business. *Id.* at 291–92 n.13. Rowe conceded that she failed to clock out when she left, however, her hours worked played no role in determining her compensation as a commissioned salesperson. *Id.* She also testified that the department was adequately covered in her absence. *Id.*

355. *Id.* at 271.

356. *Id.* at 269 (majority opinion).

357. Justice Boyle concurred separately but expressed agreement with all three of the main parts of Justice Riley's lead opinion, which was joined by Justice James Brickley and Justice Griffin. *Id.* at 268, 281 (majority opinion); *id.* at 282 (Boyle, J., concurring). Justice Conrad Mallett recused himself, and Justice Michael Cavanagh and Justice Levin dissented. *Id.* at 281 (majority opinion); *id.* at 289 (Levin, J., dissenting); *id.* at 308 (Cavanagh, C.J., dissenting). Thus, the final vote was 4-2 for reversal.

employer's creation of legitimate expectations and an oral contract . . . formed on the basis of an express promise of job security or a promise implied in fact."³⁵⁸ Similarly, Justice Boyle's concurrence noted that "the [employer's] Rules of Personal Conduct also may be analyzed under the policy prong of *Toussaint* to determine whether it gives rise to legitimate expectations, an obligation *implied in law*."³⁵⁹ We also should recall Justice Griffin's concurrence in *Bullock* where he gave vent to his frustration "that *Toussaint* pushed . . . through the boundaries of employment contract law."³⁶⁰ Justices Riley, Griffin, and Boyle all appear to use the "noncontractual" label as part of a concerted strategy to delegitimize the "legitimate expectations" branch of the *Toussaint* holding.

When the lead opinion finally turned to Wards's personnel policies, it concluded that the at-will policy in the new handbooks superseded the prior assurances:

[T]he 1983 manual clearly and unambiguously notified plaintiff of the company's termination-at-will policy. We are persuaded therefore that the 1983 manual would have succeeded in modifying any prior expectations of termination only for cause. . . . The last handbook distributed to plaintiff was sent out at least nine months before her discharge. Therefore, *as a matter of law*, we find that the existence of three handbooks clearly providing for termination at will . . . constituted reasonable notice of defendant's policy.³⁶¹

Although framed simply as an application of the rule of *Bankey*, this analysis made a notable leap beyond the principle of that case. The certified question in *Bankey* addressed only employer policy statements that had become enforceable under the legitimate expectations branch of *Toussaint*. The lead opinion in *Rowe* also deployed *Bankey*'s reasonable notice rule as a tool against Rowe's allegation that the Rules of Personal Conduct created a contract to terminate only for cause. But rather than assessing as a matter of fact whether subsequent handbooks were sufficient to overcome any reasonable expectations Rowe may have had about her employment, the opinion decided this issue as a matter of law. Surely, *Toussaint* would have required more. Thus, the lead opinion's approach confirmed what the court's treatment of the comparatively abstract certified question in *Bankey* had hinted. The new court majority

358. *Id.* at 272 n.4 (emphasis added).

359. *Id.* at 285 n.8 (Boyle, J., concurring) (emphasis added).

360. *Bullock v. Auto. Club of Mich.*, 44 N.W.2d 114, 132 (Mich. 1989) (Griffin, J., concurring in part and dissenting in part).

361. *Rowe*, 473 N.W.2d at 277 (emphasis added).

was determined to rein in what most justices saw as the excesses of *Toussaint*.

Moving on from these efforts to rein in legitimate expectations, both Justice Riley and Justice Boyle rejected Rowe's claim that she had an express oral contract with Wards. Tellingly, their analysis reintroduced a version of the at-will super-presumption that we described in Section I.A. Justice Riley's lead opinion saw no "distinguishing features or provisions" or "special circumstances" that might limit the employer's right to discharge Rowe.³⁶² Without evidence of additional consideration or some comparable validation device, the historically strong at-will presumption must prevail. Justice Riley also expressed profound skepticism about oral promises of job security—or what her opinion somewhat disparagingly (and inaccurately) called promises of "permanent employment."³⁶³ Echoing the concerns in *Bullock*,³⁶⁴ she emphasized "the difficulty [of] verifying oral promises."³⁶⁵ Finally, Justice Riley asserted that Rowe's contract claim must fail because of "omitted term[s]" and indefiniteness.³⁶⁶ Thus, we see in the *Rowe* decision a resurgence of precisely the sort of hostile and formalistic reasoning that previously barred nearly all employee contract claims.³⁶⁷

We have seen that Michigan courts ultimately defanged *Toussaint*'s legitimate expectations theory. Although judges in other jurisdictions have often quoted and cited the decision approvingly, none have embraced the case's informal public policy approach to enforcement. As we discussed in Part II, the New Jersey Supreme Court, in *Woolley v. Hoffmann-La Roche*, recognized a new contract claim based on handbook assurances of job security.³⁶⁸ The court repeatedly quoted long passages from *Toussaint* and relied heavily on that court's reasoning.³⁶⁹ But rather than endorsing an informal public policy approach based on legitimate expectations, the court instead offered multiple formal doctrinal theories of the case—including both unilateral contracts and promissory estoppel.³⁷⁰ Other courts similarly drew inspiration from *Toussaint* but

362. *Id.* at 272 (quoting *Lynas v. Maxwell Farms*, 273 N.W. 315, 316 (Mich. 1937)).

363. *Id.*

364. *See supra* Section III.B and text accompanying notes 337–50.

365. *Rowe*, 473 N.W.2d at 273.

366. *Id.* at 272, 275, 280–81.

367. In a subsequent decision, *Rood v. General Dynamics*, the court rejected an alleged oral promise but allowed the plaintiff to proceed with a legitimate expectations claim based on the employer's written policies. 507 N.W.2d 591, 604, 608 (Mich. 1993). However, the reasoning of *Rood* demands definite and specific written assurances and abandons *Toussaint*'s willingness to enforce oral assurances. Thus, the decision confirms that the court has curtailed the expansiveness of *Toussaint* and brought Michigan back into line with centrist jurisdictions.

368. 491 A.2d 1257, 1266–68 (N.J. 1985).

369. *Id.* at 1263, 1268 & n.10.

370. *See id.* at 1267 & n.9.

recoiled from its most novel innovation. Instead, decisions liberalized enforcement of employer assurances of job security while hewing closely to familiar formal doctrinal categories.³⁷¹

And thus, *Toussaint* proved an outlier. Perhaps its legitimate expectations analysis would have been a more transparent and coherent basis for enforcing assurances of job security. But, even as the case accumulated favorable citations, the informal public policy approach never gained a foothold. Courts instead insisted on forcing formal doctrinal rules to yield their desired outcome.

IV. AT-WILL EMPLOYMENT AS A BILATERAL CONTRACT

In Part III, we explored an informal approach that uses public policy rather than formal doctrinal principles to enforce employer assurances of job security. Although this alternative theory would sidestep doctrinal problems that afflict the unilateral contract framework, it has failed to attract judicial support. Courts instead insist on resolving employment contract disputes by appealing to formal contract doctrine. If so, they ought to do a better job of it.

This Part shows how. We sketch a new conceptual framework for at-will employment relationships built on contemporary contract principles. We understand employment as a bilateral contract of indefinite duration.³⁷² Both parties retain the right to terminate this relationship, and the employer has discretion to set future terms. But the employer and employee may only exercise these powers subject to the implied duty of good faith and fair dealing that applies to all contracts. We outline the basic features of this model and show how it reframes the at-will termination privilege and the recurring challenges of open terms, indefiniteness, and modification. Our bilateral approach increases transparency, more faithfully reflects the employment relationships courts are regulating, and provides doctrinal legitimacy for their decisions.

A. *Understanding At-Will Employment as a Contract*

We begin with the question of whether an at-will employment relationship is a contract at all. In Part II, we characterized employment as a hyper-relational setting. Thus, workers and firms anticipate an

371. In contrast, one commentator has suggested that *Toussaint* lives on in the narrow context of faculty claims for violations of procedural protections set forth in faculty handbooks and university policies. See Karen Halverson Cross, *Faculty Handbook as Contract*, 45 CARDOZO L. REV. (forthcoming 2024). Notably, however, most faculty, regardless of their tenure status, have express contracts for some form of job security.

372. Arnow-Richman has explored this idea in her earlier works, which we draw on throughout this part. See, e.g., Arnow-Richman, *Modifying*, *supra* note 203, at 480–81; Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1565–68.

engagement for an indefinite period, subject to termination by either party. They are governed by a broad array of written and oral policies, set largely by the employer, who retains broad discretion to introduce new terms and modify existing ones. These features of employment have long troubled courts committed to classical contract theory. Under traditional doctrinal principles, an agreement terminable at will arguably lacks consideration because the parties' discretion to end the relationship renders their promises to employ and to serve illusory.³⁷³ Similarly, such an agreement might be deemed too indefinite to enforce because it omits a key term: how long the relationship will continue.³⁷⁴ It might also leave out other seemingly critical terms, specify them imprecisely, or defer their elaboration to a later time, such as when the employee begins work or achieves a particular milestone.³⁷⁵

Our critique of existing law has shown how courts historically responded to these doctrinal problems by taking a piecemeal approach to enforcement. When evaluating oral assurances of job security, promises of deferred benefits, or the enforceability of handbook policies, judges customarily ask whether that specific promise formed a contract.³⁷⁶ Rather than viewing employer statements as part of an ongoing contractual relationship, courts engage in an artificial search for a technical offer and corresponding consideration that supports that isolated part of the larger exchange.³⁷⁷ This fragmented analysis betrays a distorted judicial understanding of employment. Notably, it also presumes that the broader employment relationship is non-contractual.

Contemporary contract principles, however, support a more holistic inquiry and a more permissive view of contractual obligation generally. Starting in the mid-twentieth century, reform-minded thinkers like Professor Karl Llewellyn began reexamining the formalities of classical contract law, including doctrinal obstacles to enforcing incomplete and indefinite agreements.³⁷⁸ These reformers wished to bring contract law more in line with developing commercial practices in a post-industrial

373. See 1 CORBIN, *supra* note 114, at § 96.

374. See Arnow-Richman, *Modifying*, *supra* note 203, at 504.

375. See *Varney v. Ditmars*, 111 N.E. 822, 823–24 (N.Y. 1916) (finding employer's promise to provide plaintiff a "fair" share of profits too indefinite to constitute an enforceable obligation); see also *supra* Section I.A (discussing judicial inability to "conceptualize employment as a binding agreement").

376. See *supra* Section I.B.

377. *Id.*

378. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, 35–36 (1992); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code 1940–1949*, 51 SMU L. REV. 275, 276, 278, 340 (1998).

economy.³⁷⁹ The classical model of a discrete exchange proved inadequate to describe the type of long-range indefinite arrangements that commercial actors used to balance security and flexibility in a dynamic national market.³⁸⁰ Such realities required recognition of contractual intent and consequent obligation despite the evolving and indeterminate nature of many commercial deals.³⁸¹

Four innovations of contemporary contract doctrine emerged to address these challenges. First, many courts have relaxed formerly stringent rules of contract formation. Instead of insisting on an identifiable offer and acceptance to establish definitive terms of performance, judges now treat the parties' intent to be bound as the primary indicator of a contractual commitment.³⁸² As a result, promissory indefiniteness will less often bar enforcement of an apparent agreement.³⁸³

Second, contemporary courts more readily admit contextual evidence, such as past practices and industry norms, both to interpret and to supplement written agreements.³⁸⁴ Default rules fill open terms,³⁸⁵ and a

379. See Allen Blair, "You don't have to be Ludwig Wittgenstein": How Llewellyn's Concept of Agreement Should Change the Law of Open-Quantity Contracts, 37 SETON HALL L. REV. 67, 76-78 (2006) (discussing the transition from an agrarian to an industrial American economy in tracing the rise of neoclassical contract law).

380. *Id.* at 78.

381. *Id.* at 77 ("The . . . long-range planning and commercial commitments necessary to support the new mass-production economy required a less rigid commercial law.").

382. See U.C.C. § 2-204(3) (AM. L. INST. & UNIF. L. COMM'N 1977) ("[A] contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *Baybutt Constr. Corp. v. Com. Union Ins., Co.*, 455 A.2d 914, 919 (Me. 1983) ("[T]he paramount principle in the construction of contracts is to give effect to the intentions of the parties as gathered from the language of the agreement viewed in the light of all the circumstances under which it was made."'). See generally Daniel O'Gorman, *The Restatement (Second) of Contracts Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency*, 36 HAWAII L. REV. 169, 202-08 (2014) (describing liberalization of the indefiniteness doctrine and evolution of Second Restatement of Contracts' "reasonably certain terms" requirement).

383. See, e.g., *Hodgkins v. New Eng. Tel.*, 82 F.3d 1226, 1230 (1st Cir. 1996) (recognizing contract claim for breach of employee reward program despite lack of specificity regarding program's structure and criteria, which were to be set by the employer).

384. See generally U.C.C. § 1-303 (AM. L. INST. & UNIF. L. COMM'N 1977) (defining course of performance, course of dealing and usage of trade). The UCC treats this type of contextual evidence as part of the parties' "bargain in fact." U.C.C. § 1-201(b)(3); see also *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 796 (9th Cir. 1981); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 (4th Cir. 1971).

385. See, e.g., U.C.C. §§ 2-305, 2-308, 2-309, 2-310 (AM. L. INST. & UNIF. L. COMM'N 1977) (setting default rules for open price, duration, timing and delivery terms).

more permissive parol evidence rule lowers barriers to enforcing oral promises.³⁸⁶

Third, contract law has embraced a duty of good faith and fair dealing that acts as a constraint on the exercise of contractually conferred discretion.³⁸⁷ This means that promises that would have once been deemed illusory can now be construed as commitments to act honestly and in accordance with accepted commercial practices.³⁸⁸

Finally, contemporary contract law allows parties greater flexibility to alter terms. The UCC rejects the traditional rule that “new” consideration is necessary to modify a contract.³⁸⁹ And under common law, modifications made in good faith due to changed circumstances are generally enforceable as an exception to the pre-existing legal duty rule.³⁹⁰

These doctrinal innovations reflect the jurisprudential influence of the Legal Realist movement and find full expression in provisions of the UCC and the Second Restatement. Importantly, they have led courts to recognize the enforceability of indefinite commercial contracts that share common features with employment relationships. Courts now readily enforce output and requirements contracts to purchase or sell an indefinite quantity of goods to be determined by one party.³⁹¹ They also allow exclusive dealing contracts that lock in the grantor of exclusive rights without defining the duty of the grantee.³⁹² Like employment, these arrangements omit seemingly critical terms and grant one party expansive discretion to define the extent of its own performance.

Yet in the same way they are also “instinct with an obligation.”³⁹³ For this reason, contemporary common law and the UCC direct courts to interpret them in favor of enforcement. The UCC provides that parties to open quantity contracts may demand (or supply) only a quantity required (or produced) in good faith and in accordance with prior practices.³⁹⁴

386. See, e.g., *Masterson v. Sine*, 436 P.2d 561, 564–67 (Cal. 1968). See generally RESTATEMENT (SECOND) OF CONTS. § 214 (AM. L. INST. 1981) (permitting the introduction of parol evidence to determine the existence and degree of integration in a written contract).

387. U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM’N 1977); RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981).

388. See, e.g., *Hodgkins*, 82 F.3d at 1229–30; *Carrico v. Delp*, 490 N.E.2d 972, 976 (Ill. App. 1986); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

389. U.C.C. § 2-209(1) (AM. L. INST. & UNIF. L. COMM’N 1977).

390. See *Angel v. Murray*, 322 A.2d 630, 636–38 (R.I. 1974); RESTATEMENT (SECOND) OF CONTS. § 89 (AM. L. INST. 1981).

391. See U.C.C. § 2-306(1) (AM. L. INST. & UNIF. L. COMM’N 1977). See generally Blair, *supra* note 380 (chronicling the history of courts’ recognition of enforceability of open quantity contracts).

392. See U.C.C. § 2-306(2) (AM. L. INST. & UNIF. L. COMM’N 1977).

393. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)); see *supra* Section III.A.

394. See U.C.C. § 2-306(1) (AM. L. INST. & UNIF. L. COMM’N 1977).

Similarly, the UCC provides, and courts have held, that exclusive dealing contracts impose on the grantee of exclusive rights an implied duty to use “best efforts” to promote the good or service.³⁹⁵ Thus, by using a variety of interpretive tools—including both contextual evidence and the implied duty of good faith—courts plug gaps and check contractually reserved discretion to find an enforceable agreement consistent with the parties’ intentions.

Such dramatic changes imply that existing employment contract doctrine is woefully out of date. They invite us to reconsider the employment relationship under prevailing, and more permissive, rules of enforcement. Modern understandings of contract formation and interpretation can comfortably accommodate the hyper-relational features of employment relationships. Indeed, those characteristics make employment uniquely well suited for a less rigid approach. Commercial parties are usually sophisticated repeat players and often represented by counsel.³⁹⁶ In contrast, workers are comparatively unsophisticated, make few employment contracts in their lifetime, and rarely enjoy legal representation during the negotiation or the performance of those contracts.³⁹⁷ Thus, courts that have liberalized commercial contract law should be even more willing to apply those same principles in the employment context. And courts that have resisted those changes should be willing to consider them here.

B. *Toward a Bilateral Model of Employment Contracts*

Our discussion in Part III showed that courts remain strongly wedded to formal doctrinal reasoning. They have shown no appetite for an informal approach grounded in public policy. Yet in the preceding Section we showed that the contract tools courts have relied on outside the employment context have evolved toward a contextual, more permissive version of contract law. In this Section, we offer a preliminary vision of a doctrinal approach to employment that replaces antiquated reasoning with the contemporary contract principles and terminology discussed above. As we show, this approach can ironically achieve some of the same goals as the informal public policy approach rejected by Michigan courts. It can also supply a valid doctrinal basis for some emerging common law employment rules that appear to lack a contractual justification. We conclude by describing some implications of our approach and identifying areas for further research.

395. See U.C.C. § 2-306(2) (AM. L. INST. & UNIF. L. COMM’N 1977).

396. See Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 501–18 (2010).

397. See Verkerke, *Legal Ignorance*, *supra* note 5, at 941.

1. Contract Duration and Termination Rights

As we have seen, the super-presumption led some courts to treat at-will employment relationships as noncontractual. These courts found that a contract exists only if an employer's written or oral assurances of job security are exceptionally specific and can be tied to a reciprocal or unique consideration from the employee.³⁹⁸ From the perspective of contemporary contract law, however, this approach makes no sense. The at-will rule—no matter how strong the presumption—is nothing more than a termination provision. It is merely a single term of the parties' contract that will apply only when (if ever) one of them chooses to exit the relationship. However, a wide array of other terms and conditions govern the parties' day-to-day performance of their contractual obligations. By ignoring these provisions to consider only termination, courts distort the issue of contract formation and narrow the scope of any resulting obligations.

Contemporary contract law instead focuses our attention on the exchange relationship. An at-will employment contract, like any employment contract, is a voluntary exchange of money for labor. For that reason, it is necessarily contractual. Both parties manifest a commitment in the form of mutual promises—the employer to provide employment and pay for services rendered and the employee to serve.³⁹⁹ At its outset, the duration of the parties' commitment is unspecified. But from a contemporary perspective, this fact means only that the term of the contract is indefinite. It does not impugn its contractual status. Indeed, in the world of commercial contracts, there is nothing problematic or even remarkable about such an arrangement. Under the UCC, for example, when parties do not specify a duration, their contract continues for a "reasonable time" and may be terminated at will upon "reasonable" notice.⁴⁰⁰ Outside of the employment context, some common law cases similarly hold that a service contract exists despite its indefinite duration.⁴⁰¹ There is even authority to suggest that good faith may limit the ability to terminate despite an express at-will termination provision.⁴⁰²

398. See Verkerke, *An Empirical Perspective*, *supra* note 12, at 846; *supra* Section I.A.

399. See *supra* Section II.B.1.

400. See U.C.C. § 2-309 (AM. L. INST. & UNIF. L. COMM'N 1977). To somewhat similar effect, common law courts have found implied duties that arise from the nature of the parties' relationship and that even supply the mutual promise required to establish an enforceable bargain. See, e.g., *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

401. See, e.g., *Long Beach Drug Co. v. United Drug Co.*, 88 P.2d 698, 701–02 (Cal. 1939).

402. See, e.g., *Carrico v. Delp*, 490 N.E.2d 972, 976 (Ill. App. 1986); *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 644–45 (2d Cir. 1945); see also *Arnow-Richman, Mainstreaming*, *supra* note 44, at 1549 (recognizing the application of good faith principles and the prohibition on "immediate termination . . . notwithstanding a contract provision purporting to grant that right").

We contend that courts should reconsider these issues with fresh eyes, abandoning the employment law exceptionalism that has so distorted their analysis for many years. The principles we propose here imply that every employment engagement forms a contract. That contract forms when the parties make a definite manifestation of their intent to create a working relationship. Although we expect that most courts would still presume that such a contract is terminable at will, they should likewise impose the meaningful constraints of reasonable duration and reasonable notice for termination. These terms both fill gaps when the contract is silent and implement a modern understanding of good faith in contractual relations that tolerates the conferral of wide discretion on one party.⁴⁰³

The full implications of requiring reasonable duration and reasonable notice of termination are beyond the scope of this Article.⁴⁰⁴ Our point here is that these concepts clarify issues obscured by decades of employment contract exceptionalism. For example, the question of whether continued at-will employment constitutes consideration for a return promise is a recurring issue that has provoked considerable controversy.⁴⁰⁵ The reciprocal obligation to continue at-will employment for a reasonable duration would provide consideration for other mutual promises, such as an employer's job security guarantees or an employee's promise not to compete.⁴⁰⁶ That obligation also would provide new support for what is currently a minority view concerning the rights of new employees who have been hired and then terminated before reporting to

403. As we have already described, well-counseled firms routinely include in their employment documents an express confirmation that both parties may terminate the agreement at will. *See supra* Section III.B. We anticipate that they would respond to a reasonable notice requirement by attempting to disclaim that limitation. Although analyzing such disclaimers is beyond the scope of this Article, the doctrinal principles we advocate support recognizing constraints on this type of exculpatory language and providing remedies for contractual overreaching. We consider these issues in a forthcoming paper. *See* Rachel Arnow-Richman and J.H. Verkerke, *Domesticating Disclaimers* (unpublished manuscript on file with authors).

404. One of us has explored the implications of reasonable notice elsewhere. *See* Arnow-Richman, *Mainstreaming*, *supra* note 44, at 1554–59.

405. *See, e.g.,* *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997) (considering competing rules in determining that a noncompete signed post-hire was binding on employee). *See generally* Arnow-Richman, *Modifying*, *supra* note 203, at 438–54 (surveying conflicting judicial approaches to continued employment in the context of noncompetes, arbitration agreements, and handbooks).

406. *See* Arnow-Richman, *Modifying*, *supra* note 203, at 478–85. Of course, the noncompete may well be unenforceable for other reasons. As previously noted, such agreements are subject to an array of common law and state statutory limits owing to their harmfulness to individual employees and to broader anticompetitive effects. *See generally* Arnow-Richman, *The New Enforcement Regime*, *supra* note 220, at 1227–41 (discussing historical and contemporary limits on enforcement). Our point here is to illuminate why any inquiry into the existence of consideration for the noncompete within the course of that analysis is misdirected.

work.⁴⁰⁷ Among jurisdictions that have considered this issue, most have held that an at-will termination provision absolutely precludes such an employee's contract claim.⁴⁰⁸ But if the parties have formed a bilateral contract through an offer and acceptance, then the employee should be entitled to compensation for a reasonable duration of employment and a reasonable notice period. Thus, the contemporary approach we describe not only better aligns employment contract law with mainstream contract law, but it can also potentially unify and explain undertheorized aspects of employment law.

2. Open Terms, Conferred Discretion, and Modification

Of course, employment duration is not the only indefinite aspect of an at-will relationship. Many other terms remain open at hiring. For example, new hires are often unaware of the precise scope and content of their employer's benefit plans and workplace rules. Both parties also expect that the employer will assign work and issue daily instructions that the employee must follow. The full terms of the relationship are simply too complex and variable to specify comprehensively in advance. Instead, both parties understand that these details will be supplied incrementally, primarily by the employer. In other words, the at-will employment contract is highly incomplete and obligations evolve over time.⁴⁰⁹ Its terms are not found in a single integrated writing. Instead, they must be culled from a variety of sources—written, oral, and implied.

This multiplicity of sources, however, does not change the fact that those sources comprise a single agreement. As we have seen, courts have analyzed employee contract claims by isolating the individual term of employment subject to dispute. Then they ask incorrectly whether that term alone could constitute an offer that might ripen into a binding

407. See, e.g., *Grouse v. Grp. Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (permitting claim where at-will employee quit work in reliance on defendant's subsequently revoked offer under the theory that the new hire was entitled to a good faith opportunity to perform).

408. See *Petitte v. DSL.net, Inc.*, 925 A.2d 457, 461 (Conn. App. Ct. 2007); *Sartin v. Mazur*, 375 S.E.2d 741, 743 (Va. 1989); *Slate v. Saxon, Marquoit, Bertoni & Todd*, 999 P.2d 1152, 1154 (Or. Ct. App. 2000).

409. See Ayres & Gertner, *supra* note 79, at 119. There is a rich literature addressing why such gaps exist and how courts should fill them. See, e.g., *id.* at 119–21; Omri Ben-Shahar, "Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts, 2004 WIS. L. REV. 389, 389 (2004). For present purposes, what is important is merely that these "gaps" do not diminish the binding nature of the parties' agreement. We engage this literature in a forthcoming paper that explores the implications of the bilateral model we propose here. See Rachel Arnow-Richman & J.H. Verkerke, *Reconstructing Employment Contract Law* (unpublished manuscript) (on file with the authors).

contract.⁴¹⁰ But contemporary contract law rejects this approach.⁴¹¹ It requires courts to harmonize and reconcile the available evidence of the parties' intent to understand the entirety of the contractual relationship.⁴¹² Adopting this more modern framework would reorient the analysis in most employment contract cases. Rather than pursuing a largely fictitious inquiry into contract formation, courts should engage in a more fruitful quest for a harmonious interpretation of the parties' undeniable contract. This approach also would cast doubt on the widespread practice of treating employers' exculpatory boilerplate as conclusive proof of the parties' intent. To the extent that such language contradicts the employer's consistent practice and oral assurances or deprives employees of the benefit of their bargain, a court might construe it narrowly or disregard it altogether in favor of other sources of contract terms.⁴¹³

Yet another important feature of the hyper-relational employment contract is that the employer has broad discretion to supply many of its terms, and most of those terms are subject to change. That reality, however, does not determine the terms' contractual status, nor does it undermine the legitimacy of the overall agreement.⁴¹⁴ It merely suggests that the parties' contract includes wide areas of contractually conferred discretion similar to other open-term commercial agreements. This is not merely a doctrinal characterization but a description that aligns with the real-life experiences and expectations of most workers. Employees generally anticipate that the employer will assign and adjust their work duties, establish and modify workplace rules and procedures, and update leave policies and employee benefits—guided by organizational needs and business judgment.⁴¹⁵

410. See, e.g., *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762, 764 (N.J. Super. Ct. App. Div. 1958) (severance pay); *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1258 (N.J. 1983), modified by 499 A.2d 515 (N.J. 1985) (policy manual terms). See generally *supra* Section I.B.

411. See, e.g., *Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482, 490–91 (2023) (relying on a general principle that multiple documents signed at the same time comprise a single transaction when examining an employee's arbitration and confidentiality agreement to determine whether the former was unconscionable) (citing CAL. CIV. CODE. § 1642).

412. See, e.g., *Byrne, Inc. v. Ivy*, 241 S.W.3d 229, 236–40 (Ark. 2006).

413. See, e.g., *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 775 (Ohio App. 1984).

414. Although detailed analysis of arbitration clauses is beyond the scope of this Article, several decisions have held that employer discretion to modify or terminate arbitration procedures renders a contract "illusory." See, e.g., *Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 661–64 (Md. 2003). A contemporary approach to these cases might still find the reserved discretion unconscionable and thus unenforceable, but it surely would not view a promise to arbitrate as illusory. Indeed, it would not consider the arbitration agreement in isolation from the rest of the employment relationship, which, as we contend, includes reciprocal binding commitments sufficient to satisfy the minimal requirements of consideration doctrine.

415. See *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120 (Mich. 1987) ("The very definition of 'policy' negates a legitimate expectation of permanence.").

Yet employees also expect the employer to abide by implicit standards of decency and fairness. Under mainstream contract law, a party may only exercise contractually conferred discretion consistently with a duty of good faith and fair dealing.⁴¹⁶ This implied obligation places modest, but legally significant, limits on the exercise of contractual rights by commercial actors. Good faith should similarly constrain an employer's reserved discretion to modify handbook and other personnel policies. Just as this duty should be understood as requiring reasonable notice of termination decisions, so it should require similar notice when an employer alters an enforceable term of the employment relationship.⁴¹⁷

Good faith might also serve as a soft check on certain substantive changes to binding terms of employment. Under an open quantity contract, for example, one party has the right to determine the quantity of goods for sale or purchase.⁴¹⁸ But that quantity must be reasonable in relation to the party's needs or capabilities.⁴¹⁹ And a party may not select a quantity with the intention of harming the other party's business or undermining their interest in the contract.⁴²⁰ In the case of employment, as with open quantity contracts, good faith should also preclude changes that are intended to harm an employee, upend vested expectations, or in other ways lack a business justification.

In these ways, the application of contemporary contract principles again serves both a legitimizing and explanatory function. It justifies the "reasonable notice" approach that most courts have adopted in determining whether a revised employment policy effectively supersedes a prior commitment.⁴²¹ In addition, such courts often articulate exceptions for employer changes that would vitiate benefits already accrued or otherwise suggest unfair dealing.⁴²² Yet, as previously discussed, this line of decisions has not located either the reasonable notice rule or its presumed limitations in proper contract doctrine.⁴²³ Our

416. See 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2022).

417. This is much like the approach adopted by British courts. See Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883, 903 (2006); see also Arnow-Richman, *Modifying*, *supra* note 203, at 481 (proposing this interpretation of the majority rule permitting modification of employer policies on reasonable notice).

418. See U.C.C. § 2-306(1) (AM. L. INST. & UNIF. L. COMM'N 1977).

419. 3 WILLISTON ON CONTRACTS § 7:12 (4th ed. 2022).

420. See *id.*

421. See, e.g., *Asmus v. Pac. Bell*, 999 P.2d 71, 73 (Cal. 2000) (permitting employer to unilaterally terminate a policy on reasonable notice); see also *supra* Section II.B.2.

422. See *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120–21 (Mich. 1989), *certifying a question to*, 882 F.2d 208 (6th Cir. 1989).

423. See generally Arnow-Richman, *House of Cards*, *supra* note 221 (critiquing the Supreme Court of California's analysis in *Asmus*); *supra* Section II.B.2; cf. RESTATEMENT OF EMP. L. § 2.05 cmt. b (2015) (disavowing contract basis for enforcing employer policies and justifying enforcement of employer policies by analogy to "administrative agency estoppel").

approach supplies that necessary foundation, offering a correct and legitimate doctrinal basis for courts' policy-driven result.

CONCLUSION

As scholars of both employment law *and* contract law, we have long been frustrated by the disjunction between our two fields of study. Teaching employment law students about employment contracts always requires us to begin with an apology. These cases will not make any sense if you paid attention in your 1L Contracts class, we say. And although scholars periodically bemoan the disordered state of employment contract doctrine, they focus mostly on advocating for legislative reform rather than clarifying the role of private ordering. Our goal is to inspire both courts and scholars to reconsider how the tools of contemporary contract law could transform current thinking about at-will employment relationships.

In this Article, we have deconstructed employment contract law. What we term employment law exceptionalism began inauspiciously with the powerful employment-at-will super-presumption and resulting doctrinal absurdities, such as requiring additional consideration or symmetrical obligations. Courts chose unilateral contract theory to enforce employer promises of deferred benefits precisely because that approach did nothing to disrupt the underlying at-will presumption. When some courts decided that employers' assurances of job security also should be enforceable, they uncritically adopted the same unilateral framework.

As we have demonstrated, this doctrinal choice has prevented courts from developing a coherent employment contract jurisprudence. The depth and richness of employment's hyper-relational features confound the simplistic reward paradigm of unilateral contracts. To force the square peg of unilateral theory into the round hole of employment relationships, courts deploy nonsensical legal fictions and erroneous doctrinal reasoning. Their fragmented analysis of isolated terms obscures important policy choices and reinforces employment law's undesirable divergence from mainstream contract principles. And a creative judicial effort to develop an informal alternative based on legitimate expectations has attracted no adherents. Instead, courts insistently offer dubious formal doctrinal justifications for their rulings. Thus, the current mess will persist until courts have a better formal doctrinal framework for analyzing employment contracts.

Unlike the antiquated doctrine that currently dominates employment contract jurisprudence, contemporary contract law can comfortably accommodate the hyper-relational nature of employment agreements. We have sketched a model anchored in the Legal Realist revolution that transformed contract law beginning in the mid-twentieth century and that continues to develop today. Employment is a single, bilateral contract of

indefinite duration, in which both parties retain the right to terminate at will and understand that the employer has discretion to establish and modify future terms. However, the parties may only exercise these powers subject to the implied duty of good faith and fair dealing that applies to all contracts. Moreover, the terms of the employment contract are found not in a single integrated writing but require a court to find a harmonious interpretation of a variety of sources—written, oral, and implied. This approach fundamentally reframes the at-will termination privilege and the recurring challenges of open terms, indefiniteness, and modification. Our contemporary bilateral approach increases transparency and gives courts new insight into the employment relationships they are regulating.

Mapping the precise contours of a duty of good faith and developing rules for interpreting employment contracts are beyond the scope of this Article.⁴²⁴ To fully elaborate such a doctrinal framework will require careful attention to the fact that, unlike most commercial contracts, employment is a hierarchical relationship. Managers must be able to make day-to-day decisions without consulting counsel. Many minor policies and decisions surely should be governed by informal relational norms rather than legally enforceable contractual obligations. Indeed, courts adopted the at-will super-presumption principally to protect employers from lawsuits that they feared would unduly constrain firms' discretion to manage the workplace.⁴²⁵ Thus, any newly recognized contract claims must be carefully targeted and easy to administer. At the same time, however, courts should recognize that workers' comparative lack of legal sophistication further undermines the already shaky case for rigid enforcement of exculpatory boilerplate.⁴²⁶

In this Article, we have laid the groundwork for answering such questions. The doctrinal nonsense we document in Part I and Part II currently obscures all these crucial issues. Reframing at-will employment as a bilateral contract will clear away the confused wreckage of current law and finally give courts a firm doctrinal framework for understanding the employment relationship. If courts insist on using formal contract doctrine to resolve employment contract disputes, at the very least they should abandon antiquated, ill-fitting rules and instead embrace contemporary contract theory and doctrine.

424. We intend to develop and defend such an alternative framework in future work. See Arnow-Richman & Verkerke, *Reconstructing Employment Contract Law*, *supra* note 410.

425. See *Magnan v. Anaconda Indus.*, 479 A.2d 781, 786–87 (Conn. 1984).

426. Cf. U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 1977) (restricting exclusion or modification of warranties).