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Deconstructing Employment Contract Law

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DECONSTRUCTING EMPLOYMENT CONTRACT LAW

forthcoming in FLA. L. REV. (2023)

Rachel Arnow-Richman and 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 reform. 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 they need to resolve recurring, real-world disputes.

This article offers a new, comprehensive historical account that exposes the formalistic and anti-contractual origins of existing doctrine and shows how to repair the 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 analysis 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.

We conclude 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

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Deconstructing Employment Contract Law

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accepted developments in contract doctrine and theory. Employment is a long-term, fluid relationship governed by an agreement that is necessarily incomplete, usually expressed in indefinite terms, and constantly evolving. To address these challenges, we briefly outline a new model of a “hyper-relational” bilateral contract. This approach reframes the dynamic features of employment agreements in contemporary terms as a form of contractually conferred discretion. We explain 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 disagreed sharply over how that doctrine might constrain employers who wished to modify their preexisting job security policies.² Most confounding of all, 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.⁴

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.⁵ 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.⁶ However, most workers pay little attention to the details of their employers' onboarding documents, which are often presented after the start of employment.⁷ Similarly, promissory estoppel doctrine only

¹ See *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1266-68 (N.J. 1985) (unilateral contract, promissory estoppel, and third-party beneficiary doctrine); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 891-92 (Mich. 1980) (bilateral contract and legitimate expectations).

² Compare *Bankey v. Storer Broadcasting*, 443 N.W.2d 112 (Mich. 1987); *Asmus v. Pacific Bell*, 999 P.2d 71 (2000) with *Demasse v. ITT*, 984 P.2d at 1138 (AZ 1999).

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

⁴ We document these and other inconsistencies in Parts I & III *infra*.

⁵ See *infra* Section I.C & Part II.

⁶ See 1 WILLISTON ON CONTRACTS § 1:17 (4th ed. 2022). For detailed discussion of unilateral contracts, see *infra* Section II.A.

⁷ See, e.g., Nancy S. Kim, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 3 (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*

warrants enforcement when a promisee has detrimentally relied on the promise.⁸ But few, if any, employees can produce evidence of substantial detrimental reliance.⁹ 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.¹⁰ And these prominent cases have spawned hundreds of similar decisions throughout the country.

Unilateral contract theory now dominates judicial analysis of most employment agreements.¹¹ 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.¹² In contrast, an employment contract ordinarily is formed by an exchange of mutual promises and contemplates an ongoing relationship for an indefinite period. Such a contract provides, at best, a vague and incomplete specification of the employee’s job duties and prospects for advancement.¹³ 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.¹⁴ Some have also assailed the array of extraneous doctrines—including mutuality and additional consideration—that many restrictive courts deployed to transform employment-at-will from a default (and thus

the Rule of Law 12-14 (2013) (arguing that boilerplate terms go unread and that this fact vitiates consumer consent to those terms); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, (2015).

⁸ See Restatement (Second) of Contracts § 90.

⁹ See, e.g., *Weiner v. McGraw Hill*, 443 N.E.2d 441, 460-67 (N.Y. 1982).

¹⁰ See, e.g., *Toussaint*, 292 N.W.2d 880, (introducing the idea of presumed reliance); *Woolley*, 491 A.2d 1257, (drawing inspiration from *Toussaint* and using the same legal fiction).

¹¹ See *infra* Section I.C & Part II.

¹² See 2 WILLISTON ON CONTRACTS § 6:30 (4th ed. 2022). For more detailed discussion of unilateral contracts, see *infra* text at footnotes ___ - ___.

¹³ See *infra* Section II.B.

¹⁴ See, e.g., PAUL L. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); see generally J. H. Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837. One scholar estimates that there have been over two hundred articles advocating for a just cause alternative to employment at will. See Robert Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 & n.1 (2004).

rebuttable) presumption into something more akin to a mandatory rule.¹⁵ However, employment scholars have typically advocated—with little success¹⁶—for just-cause legislation and other statutory reform.¹⁷ From their perspective, contract law is an inherently limited tool because employers have the power to unilaterally dictate and draft the terms of the relationship.¹⁸

And contracts scholars have been no more likely to propose meaningful corrective measures. Instead, they deride the reasoning of employment cases or ignore them altogether. Assessing leading decisions that enforced employee handbook policies 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."¹⁹ Other commentators have expressed more forceful criticism of modern reliance on unilateral contract doctrine,²⁰ but few have devoted attention to the employment context.²¹ Thus, the

¹⁵ 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).

¹⁶ See, e.g., Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 *WASH. L. REV.* 361, 370 (1994). (acknowledging the tepid state response to the Uniform Law Commission's model just cause legislation). Only one state, Montana, has modified the default rule by statute, see *Montana Wrongful Discharge from Employment Act*, MONT. CODE ANN. § 39-2-904(1)(b) (2009). Recently, however, a few localities have enacted just cause laws limited to specific industries. See N.Y. Admin. Code § 20-1272 (fast food workers); Phila. Code. § 9-4702 (parking lot attendants). These narrow exceptions arguably prove the rule.

¹⁷ One example of recent success has been in the area of fair scheduling laws. See e.g., *Stabilizing Low-Wage Work: Legal Remedies for Unpredictable Work Hours & Income Stability* (with Charlotte Alexander & Dr. Anna Haley-Lock), 50 *HARV. C.R. - C.L. L. REV.* 1 (2015).

¹⁸ See, e.g., Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 *BERKELEY J. EMP. & LAB. L.* 345 (2008). A few scholars have suggested that relational contract theory could support a more employment-appropriate contractual framework. See, e.g., Robert C. Bird, *Employment as a Relational Contract*, 8 *Penn. J. Bus. L.* 149 (2005); Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 *Buff. L. Rev.* 763 (1998).

¹⁹ 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).

²⁰ See, e.g., Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 *CARDOZO L. REV.* 85 (2010) (critiquing reliance on unilateral contract theory in the insurance context).

²¹ See, e.g., David G. Epstein & Yvette Joy Liebesman, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 *ARK. L. REV.* 267 (2006); Mark Pettit, *Modern Unilateral Contracts*, 63 *BOSTON UNIV. L. REV.* 551 (1983).

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.²²

The result, we argue, is an undesirable “employment law 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 deconstruct²³ employment contract doctrine and lay the foundation 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 will be possible to redeploy contract law *within* the bounds of accepted employment law.

We ask first how courts managed to get so much so wrong. Our story 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. They established a nearly irrebuttable presumption that any indefinite hiring was terminable at will.²⁴ Only extraordinary circumstances—such as an employee who sold a competing business or surrendered a workplace injury claim—might sometimes overcome this “super-presumption.”²⁵ Even express contracts for “permanent” or “lifetime” employment were routinely held to imply instead an impermanent at-will relationship.²⁶ Recurring doctrinal errors—such as requiring additional consideration or interpreting mutuality as a

²² See, e.g., Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33 (2003).

²³ Note that we use the verb “deconstruct” here in its colloquial sense of untying, 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* (University of Chicago Press, 2021).

²⁴ See J.H. Verkerke, *The Story of Woolley v. Hoffmann-La Roche: Finding a Way to Enforce Employee Handbook Promises at 23* in *EMPLOYMENT LAW STORIES* (Samuel Estreicher & Gillian Lester eds., 2007).

²⁵ See, e.g., *Skagerberg v. Blandin Paper*, 266 N.W. 872 (Minn. 1936) (refusing to find contract for job security without additional consideration or an agreement to work for a definite term of years); see also *infra* Section I.A.

²⁶ *Id.* (construing “permanent” employment to be for an indefinite term and therefore terminable at will).

mandate for symmetrical obligations—allowed employers to escape enforcement even when they expressly offered their employees definitive assurances of job security.²⁷

By contrast, however, courts took a more permissive approach to cases involving benefits and compensation.²⁸ Beginning in the early twentieth century, courts began to enforce employers' promises of deferred benefits such as pensions or severance pay. 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 subsequently inspired 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 employment relationship contrast sharply with 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

²⁷ See Summers, *Contract of Employment*, *supra* note 15.

²⁸ But see Verkerke, *Story of Woolley*, *supra* note 20, at 29-30; see also *infra* Section I.B.

²⁹ See *Anthony v. Jersey Cent. Pwr.*, 143 A.2d 762 (N.J. Super. 1958).

³⁰ See, e.g., *Woolley*, 491 A.2d 1257 (relying on reasoning of *Anthony*).

³¹ See, e.g., *Woolley*, 491 A.2d 1257 (applying unilateral contract doctrine).

³² See *infra* Part II.

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, when a worker accepts a written or oral job offer, and those contracts 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 fared no better outside of the employment context. Prominent contracts scholars and legal authorities appear to agree 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. However, creative judicial efforts to develop an informal alternative approach that enforces employees' expectations of 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, informal, alternative theory in part because it avoids many problems that plague the unilateral contract framework. Under this approach, plaintiffs would no longer need to

³³ 1 WILLISTON ON CONTRACTS § 1:17 (4th ed. 2022). Note, however, that Restatement Section 45 protects the reliance of an offeree who has begun to perform by holding the offer open as an option contract. See Restatement (Second) of Contracts § 45.

³⁴ *Id.*

³⁵ Karl Llewellyn, principal drafter of the Uniform Commercial Code, condemned doctrines such as unilateral contracts that invite "superb classroom theatrics" but "[do] not well fit the fact-conditions" of actual business deals. Under Llewellyn's leadership, the UCC rejected the unilateral/bilateral terminology in favor of a rule that an offer may be accepted in "any manner and by any medium reasonable in the circumstances." Uniform Commercial Code § 2-206(1). Subsequently, the Restatement (Second) of Contracts further diminished the role of unilateral contracts by providing that "[i]n case of doubt it is presumed that an offer invites 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." Restatement (Second) of Contracts § 31.

³⁶ See *Toussaint*, 292 N.W.2d 880.

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. And courts in other jurisdictions appear determined to keep handbook claims (and other employment contract cases) firmly tethered to formal contract doctrine. The lesson we draw from this history—and states' failure to broadly 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 contracting situations, however, courts have often confronted agreements with similar features. Many commercial contracts (1) omit important terms or specify the parties' 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 solutions to each of these problems. Under both the 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.³⁸ Courts routinely fill contractual “gaps” and admit contextual evidence for the purpose of interpreting or supplementing written agreements.³⁹ Similarly, the preexisting duty rule has largely given way to more flexible doctrines that enforce modifications made in good faith.⁴⁰ Finally, many cases have held that the duty of good faith and fair dealing constrains the exercise of contractually conferred discretion,

³⁷ See *infra* Section III.C.

³⁸ See *infra* Section IV.B.2.

³⁹ See *id.* Of course, some issues still create controversy. See generally David Charny, *The New Formalism in Contracts*, 66 U. CHI. L. REV. 842 (1999).

⁴⁰ See UCC § 2-209; RESTATEMENT (SECOND) OF CONTRACTS § 89.

including the power to terminate an agreement at will. Under the UCC, for instance, good faith requires parties to provide reasonable notice before an at-will termination.⁴¹

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,⁴² and it recently received the imprimatur of the first Restatement of Employment Law.⁴³ We therefore put to one side debates about the merits and legitimacy of employment-at-will. Rather than reinvigorate a futile quest for just-cause legislation,⁴⁴ 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 that courts so clearly demand. More importantly, however, our solution would finally place employment contract law on a firm conceptual foundation.

We proceed 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 therefore 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.

⁴¹ See Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513 (2014). Good faith also precludes termination decisions that deprive the other party of the benefit of the bargain. See 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2022).

⁴² See, e.g., *Rowe v. Montgomery Ward*, 473 N.W.2d 268 (Mich. 1991).

⁴³ See RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).

⁴⁴ See St. Antoine, *Making of META*, *supra* note 16.

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 employment at-will doctrine in the late nineteenth century reflected the prevailing freedom-of-contract ethos of the times.⁴⁵ Workers in the U.S. were ostensibly at liberty to sell their labor to whomever they chose for however long they like as well and to 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 non-contractual by its nature.

Yet the personal and societal significance of employment relationships raise 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.⁴⁶ 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.⁴⁷

In pursuit of these competing impulses, courts have relied almost exclusively on classical contract principles. However, they have done so piecemeal and in idiosyncratic fashion. Against a backdrop of uncertainty about the contractual status of the at-will relationships, 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

⁴⁵ Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 130 (1976) discussing this connection); 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 (2007) (“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”).

⁴⁶ See *infra* Part I.A.

⁴⁷ See *infra* Part I.B.

employment as a whole.⁴⁸ The result is what we refer to as employment contract exceptionalism—a body of caselaw 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 A unpacks the employment at-will “super-presumption,” as we refer to it. We reveal a trifecta of idiosyncratic and anti-contractual proof requirements that courts applied to impede employee claims for breach of contract and preserve their at-will status. Section B develops courts’ parallel use of unilateral contract theory as a means of contractualizing discrete employer promises of future benefits and compensation, while preserving employment at will. Section 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 employment at-will 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,⁴⁹ courts have treated this so-called “presumption” as something akin to a substantive rule.⁵⁰ In the paradigmatic scenario, a terminated employee sues for breach of contract, alleging that the employer promised job security if the employee would accept a job or remain with the employer.⁵¹ Early courts

⁴⁸ See Rachel Arnow-Richman, *Cube Wrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638 (2007).

⁴⁹ See *supra* notes ___ and accompanying text.

⁵⁰ 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 37, at 1567. These other aspects of the at-will doctrine will become important as we reframe employment contract law, *infra* Part IV. For purposes of this discussion, however we focus on the most prominent aspect of employment at will—the ability of employers to terminate without reason—which has animated the at-will debate within the scholarly discourse.

⁵¹ See, e.g., *Hanson v. Central Show Printing*, 130 N.W.2d 654 (Iowa 1964); *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 874 (Minn. 1936); *Ferrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967); *Pennsylvania Co. v. Dolan*, 32 N.E. 802 (Ind. App. 1892); *Turner v. Newsom*, 3 So. 3d 913 (Ala. Civ. App. 2008).

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.⁵² Second, they insisted that employees satisfy a heightened consideration requirement.⁵³ 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.⁵⁴ 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* offers a stark example.⁵⁵ Hanson, a skilled pressman, had been employed “for many years” in a job where work was “often slack” over the winter.⁵⁶ In autumn he received an offer of a “steady job” elsewhere and sought a similar assurance from his current employer.⁵⁷ Upon negotiation, Hanson received a letter of commitment, stating: “I guarantee you 40 hours work per week thru out the entire year until you retire at your own choosing.”⁵⁸ It was signed by the company president.⁵⁹ Yet two years later, when Hanson was fired without cause, the court rejected his claim for breach of contract, affirming a directed verdict for the defendant-employer.⁶⁰

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

⁵² See, e.g., *Hanson*, 130 N.W.2d at 655 (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”).

⁵³ See, e.g., *Forrer*, 153 N.W.2d at 589; (“a contract for permanent employment . . . where the employee furnishes no additional consideration . . . amounts to indefinite general hiring terminable at will”). *Turner*, 3 So. 3d at 917 (to prove employment was permanent and not at-will, employee must prove they “provided substantial consideration for the contract separate from the services to be rendered”).

⁵⁴ *Smith v. St. Paul & D. R. Co.*, 62 N.W. 392 (Minn. 1895) (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”).

⁵⁵ 130 N.W.2d 654 (Iowa 1964).

⁵⁶ *Id.* at 655

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 659.

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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.⁶¹

It found that Hanson's situation fit squarely within these principles. 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. Second, the court held that Hanson had not supplied any consideration beyond his continued service to the employer.⁶² It disclaimed the significance of Hanson's competing offer, asserting that the decision to forgo alternate employer is part and parcel with the decision to serve. According to the court, Hanson supplied nothing beyond his continued commitment to remain an at will employee.⁶³

It is difficult to offer any legitimate doctrinal explanation of the court's conclusions. First, the employer's letter, at least on its face, 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.⁶⁴ However, it is plain from the letter that the employer relinquished its broad right to terminate at will for any or no reason, and the court identifies nothing in the factual record to suggest otherwise. It simply substitutes 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.⁶⁵

⁶¹ *Id.* at 655-66 (citing 35 A.L.R. 1432).

⁶² *Id.* at 656, 658.

⁶³ *Id.* at 657 (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, but which, of course, cannot be regarded as constituting any additional consideration to the master'") (citing *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 874 (Minn 1936)).

⁶⁴ *Cf. Savarese v. Pyrene Manufacturing Co.*, 89 A.2d 237 (N.J. 1952) (distinguishing between a "lifetime" employment contract and a "just cause" contract).

⁶⁵ *See generally* Fineman, *supra* note ___, at 125 ("[i]f the law on duration of service contracts had followed the teachings of pure contract theory, the agreement established by the parties would have been enforced [and all evidence of party intent would have been considered]").

Second, the determination that Hanson failed to supply adequate consideration violates the equally fundamental principle that courts do 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.⁶⁶ 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. Whatever value the court may assign to Hanson's forbearance, the requisite exchange is obvious. There is no justification consistent with contract law for requiring anything more.⁶⁷

Hanson's requirement of consideration "in addition to" his continued service suggests a third doctrinal error.⁶⁸ 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.⁶⁹ 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.⁷⁰ If there is an agreed-upon exchange, there is no reason for parties' commitments to be equal in form just as there is no reason for them to be equal in value.

Indeed, *Hanson* recites this very principle.⁷¹ Yet its rationale for requiring additional consideration is explicitly grounded in the Hanson's ability to terminate:

⁶⁶ See generally RESTATEMENT (SECOND) OF CONTRACTS § 71 ("To constitute consideration, a performance or a return promise must be bargained for.").

⁶⁷ See generally Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1098–99 (1984) (describing the concept that "additional consideration" is required to overcome the presumption of employment at will as a "spurious contractual doctrine" and arguing that "[a]s any first semester law student knows . . . one performance can be consideration to support two or even twenty promises" and that "[t]he work performed could be consideration for both the wages paid and the promise of future employment").

⁶⁸ *Id.* at 1227.

⁶⁹ See 2 CORBIN ON CONTRACTS § 6.1 (2022); WILLISTON ON CONTRACTS (4th ed.) § 7:14.

⁷⁰ See *id.*; RESTATEMENT (SECOND) OF CONTRACTS § 79 ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged [or] 'mutuality of obligation.'").

⁷¹ 130 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).

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.'⁷²

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.⁷³ A default rule applies absent an agreement to the contrary, yet *Hanson* rejects the employer’s express commitment in favor of reinstating the supposed default. Employment at will is 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. An employee’s testimony that he or she had been assured long-term, secure employment could be highly persuasive but difficult to dispute. Nor are substantiated statements necessarily evidence of 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.⁷⁴

Yet the depth of the 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. His was hardly a frivolous claim premised on puffery, and nothing in the opinion doubts the integrity of his

⁷² *Id.* at 658.

⁷³ See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1990) (distinguishing default from mandatory rules).

⁷⁴ See generally Wayne K. Lewis, *Toward a Theory of Strict “Claim” Liability: Warranty Relief for Advertising Representations*, 47 *OHIO ST. L.J.* 671 (1986).

evidence. Rather the court focuses on the indeterminate nature of Hanson's promise, treating his commitment as too indefinite to constitute an enforceable obligation. In addition to consideration and assent, formal contract law requires a threshold degree of specificity for contract formation.⁷⁵ That threshold is often described as terms that providing an objective basis for crafting a remedy.⁷⁶ As we will see, contract law became increasingly tolerant of open term agreements over time consistent with its retreat from other formal principles.⁷⁷ At this juncture what is important, however, is the way in which 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.⁷⁸ 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.

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. These moves were perhaps instrumental at best, disingenuous at worse. At the same time, courts' analysis in early cases betrays 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 seem unable to conceptualize employment as a binding agreement. This fundamental error, and the analytically flawed cases it engendered, comprised an unstable foundation for future jurisprudential development.

⁷⁵ 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).

⁷⁶ *Cf. id.*

⁷⁷ *See infra* Part IV.A.

⁷⁸ *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 his loss might be mitigated").

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.⁷⁹ These deferred benefits cases, as we refer to them, yielded positive outcomes for employees. 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 at-will employment 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.⁸⁰ Typically, the employer promises that if the employee remains in service, usually for an identified period of time, the employee will earn the additional pay.⁸¹

In the most compelling cases, the employee receives a direct and specific assurance from the employer, remains in the job in reliance on the

⁷⁹ See, e.g., *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517 (1912); *Scholl v. Hershey Chocolate Co.*, 71 Pa. Super. 244 (1919); *Henderson Land & Lumber Co. v. Barber*, 17 Ala. App. 337 (1920); *Orton & Steinbrenner Co. v. Miltonberger*, 74 Ind. App. 462 (1920); *Roberts v. Mays Mills*, 184 N.C. 406 (1922); *Scott v. J.F. Duthie & Co.*, 125 Wash. 470 (1923); *Wellington v. Con P. Curran Printing Co.*, 216 Mo. App. 358 (1925).

⁸⁰ See, e.g., *Henderson Land & Lumber Co. v. Barber*, 17 Ala. App. 337 (1920) (bonus); *Scott v. J.F. Duthie & Co.*, 125 Wash. 470 (1923) (bonus); *Orton & Steinbrenner Co. v. Miltonberger*, 74 Ind. App. 462 (1920) (profit share); *Wellington v. Con P. Curran Printing Co.*, 216 Mo. App. 358 (profit share); *Wallace v. Northern Ohio Traction & Light Co.*, 57 Ohio App. 203 (1937) (pension plan).

⁸¹ *Henderson Land & Lumber Co. v. Barber*, 17 Ala. App. 337 (1920) (four months of continuous work); *Roberts v. Mays Mills*, 184 N.C. 406 (1922) (remain employed until end of year); *Scott v. J.F. Duthie & Co.*, 125 Wash. 470 (1923) (continue in service until completion of contracted work); *Orton & Steinbrenner Co. v. Miltonberger*, 74 Ind. App. 462 (1920) (600 hours work over course of the year); *Wallace v. Northern Ohio Traction & Light Co.*, 57 Ohio App. 203 (1937) (20 years continuous service).

promise, but is denied payment despite working for the requisite period.⁸² In such situations, courts understandably sought to redress what appeared to be an obvious injustice.⁸³ 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.⁸⁴ As classically formulated, unilateral contract is one that is accepted by the offeree's performance rather than a return promise.⁸⁵ 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.⁸⁶

Many deferred benefits fit comfortably within this "reward paradigm," as we refer to it. *Scott v. J.F. Duthie* offers an early example.⁸⁷ The plaintiff was a foreman in the defendant's shipyard employed for an "indefinite" period.⁸⁸ The employer issued a statement promising a bonus of one million dollars to be split among all foremen who continued in its employ through the company's completion of its pending ship building contracts with the U.S. government.⁸⁹ The plaintiff obliged, remaining on the job for an additional two years, but did not receive the bonus.⁹⁰

On appeal from the dismissal of the plaintiff's complaint, the Washington Supreme Court found that the plaintiff had pleaded all of the

⁸² See, e.g., *Henderson Land & Labor Co. v. Barber*, 17 Ala. App. 337 (1920); *Orton & Steinbrenner Co. v. Miltonberger*, 74 Ind. App. 462 (1920); *Scott v. J.F. Duthie & Co.*, 125 Wash. 470, 470-71 (1923); *Wellington v. Con. P. Curran Printing Co.*, 216 Mo. App. 358 (1925); *Montgomery Ward & Co. v. Smith*, 36 Ohio L. Rep. 359 (1931).

⁸³ See Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 564 (1983) (describing full performance cases as the "strongest case for enforcement for the employer's promise because they are based on benefits actually conferred on the promisor by the promisee by reason of the promise").

⁸⁴ See *supra* Part I.A. For instance, courts might have brought non-contractual theories like restitution and promissory estoppel to bear in resolving such cases.

⁸⁵ See WILLISTON ON CONTRACTS (2022) § 6:2 (explaining the "traditional" contract doctrine).

⁸⁶ See *id.*

⁸⁷ 216 P. 853 (Wash. 1923).

⁸⁸ *Id.* at 853. Scott's wages and basic terms of employment were in a writing and required advance notice of termination. *Id.* However, that fact does not appear to have changed the court's perception that Scott's employment was at will. It refers to his employment as being for an "indefinite duration." *Id.*

⁸⁹ The statement appears to have been in writing, but the facts do not reveal how the defendant disseminated it. *Id.* at 853.

⁹⁰ *Id.*

elements of a unilateral contract.⁹¹ 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.⁹² 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.⁹³ The court drew explicitly on the unilateral contract canon, referring to the disputed bonus as a "reward."⁹⁴ It held that defendant's promise could constitute an offer that the employee properly accepted and fulfilled by remaining in the defendant's employ for the desired period.⁹⁵

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.⁹⁶ Notably, it also reinforced employment at will 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.⁹⁷ Judged in this light, the unilateral contract frame doubly protects workers, preserving their discretion to leave, while enforcing the employer's promise should they remain.⁹⁸

Yet these advantages came at the cost of further degradation of employment contract law. The unilateral contract framework describes promises of "work rewards" reasonably well, but only by artificially

⁹¹ *Id.*

⁹² *Id.* at 854.

⁹³ *Id.* at 854.

⁹⁴ *Id.* at 853.

⁹⁵ *Id.*

⁹⁶ *See e.g.*, *Chinn v. China Aviation*, 291 P.2d 91, 103 (finding employee was entitled to alleged unilateral contract for promised severance pay in addition to his wages, noting that a "single consideration may support the several counterpromises made by the other party"); *Henderson Land*, 85 So. At 36 ("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.").

⁹⁷ *See id.* 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 [. C]ompliance with the terms of the offer created a contract.").

⁹⁸ *Pettit*, *supra* note ___ at , 553 (suggesting that courts in such cases embraced unilateral contract doctrine because it would have been both inaccurate and undesirable either to require or infer a return promise by the employee).

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.⁹⁹ By contrast the deferred benefits cases, either explicitly or implicitly, treat the unilateral contract as a stand-alone agreement. In *Scott*, the court refers to the bonus as a "supplementary" contract, one that binds in addition to the employee's basic terms of hire.¹⁰⁰ In other cases, courts seem to consider the promised benefit to be the only contractual component of the parties' relationship. These cases, like the previously described job security cases, seem to view a basic "reward-free" at-will relationship as non-contractual.

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.¹⁰¹ What is important from an 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.¹⁰²

Oddly, this development appears to have come about at the same time as 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 in favor of more liberal rules of contract formation and interpretation.¹⁰³ What accounts for the employment contract anomaly is unclear. It appears to have been driven at least part by Professor Arthur Corbin's well-known treatise. In what proved a highly influential section, Corbin described

⁹⁹ 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 CONTRACTS § 80 (1981). It is also the reason why courts' the requirement of "additional consideration" to support an employer's job requirement is anti-contractual as previously discussed. *See supra* Part I.A.

¹⁰⁰ *Scott*, 216 P. at 853; *see also* Chinn, 291 P.2d at 100.

¹⁰¹ *See infra* Part IV.

¹⁰² *See, e.g.,* Ryan v. Upchurch, 627 F.2d 836 (7th Cir. 1980); Langdon v. Saga Corp., 569 P.2d 524, 527 (1976).

¹⁰³ *See generally* 1 CORBIN ON CONTRACTS § 3.9; *infra* Part II.A.1.

employment-at-will as “not a contract at all” but rather “an expression in which the promises are illusory.”¹⁰⁴ 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.¹⁰⁵

Corbin acknowledged that an employee might make an explicit or implicit return promise.¹⁰⁶ 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.¹⁰⁷

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 employment-at-will 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 discharge.¹⁰⁸ 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

¹⁰⁴ ARTHUR L. CORBIN, CORBIN ON CONTRACTS Sec. 96 (1960)

¹⁰⁵ *Id.* It should be noted that the contemporary edition of Corbin’s treatise still describes employment principally in unilateral contract terms, *see* 1 CORBIN ON CONTRACTS § 152, despite disclaiming the importance of the distinction elsewhere. *Id.* at § 3.9.

¹⁰⁶ *See id.* (suggesting that this is “often” the case).

¹⁰⁷ *See, e.g.,* Langdon v. Saga Corp., 569 P.2d 524, 527 (1976); Wagner v. City of Globe, 150 Ariz. 82, 85 (1986); Demasse v. ITT Corp., 194 Ariz. 500, 504-05 (1999) (citing *Wagner*); Asmus v. Pacific Bell, 999 P.2d 71, 75 n. 4 (2000).

¹⁰⁸ Many scholars have explored the jurisprudence of this era, its underlying policies, and its limitations and implications. *See, e.g.,* *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1656–57 (1996); Jonathan Fineman, *The Inevitable Demise of Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345 (2008); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 26-27 (1993)

promises of continued employment,¹⁰⁹ recognized that employer promises might be derived from the circumstances,¹¹⁰ and most importantly for present purposes, held that an employer's written policies could be the source of a binding commitment to job security.¹¹¹

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.¹¹² Courts drew explicitly, though not exclusively, on the unilateral contract principles described in those cases, often citing Corbin's formulation of the unilateral nature of employment.¹¹³ In an early example, the Supreme Court of Minnesota in *Pine River State Bank v. Mettille* held that an employer's written termination policies could be enforceable "if they meet the requirements for formation of a unilateral contract."¹¹⁴ 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.¹¹⁵ 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" constituted an acceptance of the offer and the consideration needed to enforce it.¹¹⁶

¹⁰⁹ See, e.g., *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377 (N.J. 1988).

¹¹⁰ See, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981)

¹¹¹ See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980)

¹¹² See J.H. Verkerke, *The Story of Woolley v. Hoffmann-La Roche: Finding a Way to Enforce Employee Handbook Promises*, in *EMPLOYMENT LAW STORIES* (Samuel Estreicher & Gillian Lester eds., 2007). (describing how a severance case formed the basis for plaintiff's counsel's litigation strategy in the seminal job security policy case).

¹¹³ See, e.g., *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (finding enforceable unilateral contract for job security relying on mid-century cases enforcing employer promises of bonus pay).

¹¹⁴ *Id.* at 627.

¹¹⁵ *Id.* at 626-27 ("If the handbook language constitutes an offer, ... The 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.").

¹¹⁶ *Id.* at 630.

The analysis in *Pine River* is notably formulaic, proceeding in lockstep with earlier precedent. The court does not ask hard questions about the employee's awareness of the employer's policy or reliance on its terms. Such aspects of contract formation are likely to be difficult to prove with respect to any particular plaintiff. Neither does the court meaningfully inquire into the employer's contractual intent. It notes the inherent benefits to the employer of such a policy in the form of "a more stable and, presumably, more productive work force."¹¹⁷ But this observation provides 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.¹¹⁸ In *Toussaint v. Blue Cross & Blue Shield*, the court dispensed with contract formalities outright, holding that written policies can become binding based on workers' "legitimate expectations."¹¹⁹ Yet while many courts subsequently cited *Toussaint*, none were willing to rely solely on new, informal grounds for enforcement or employer policies.¹²⁰ 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* is illustrative.¹²¹ In a decision openly skeptical of employment at-will, and relying heavily on *Toussaint*, the court observed that the enforcement of employer handbooks makes sense as a matter of employees' legitimate expectations. The court cited the official nature of the employee handbook, its widespread distribution, the absence of individual contracts in the workplace, and the company's reputation as an employer of choice.¹²² 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.

Even so, *Woolley* did not rely 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-

¹¹⁷ *Id.* at 631.

¹¹⁸ 292 N.W.2d 880 (Mich. 1980)

¹¹⁹ *Id.* at 885.

¹²⁰ See *infra* Part III.

¹²¹ 491 A.2d 1257 (NJ 1983).

¹²² *Id.* at 1265.

La Roche's handbook "constituted an offer,"¹²³ and that 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.¹²⁴

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.¹²⁵ The *Woolley* court obliquely acknowledged the limitations of its analysis in situations where the employee could prove neither. But rather than fully dispense with the requirements of the contractual framework as Michigan did, *Woolley* concluded that such elements could be "presumed."¹²⁶

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.¹²⁷ 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 employee rewards but employment security, or as

¹²³ *Id.* at 1265.

¹²⁴ *Id.* at 1267.

¹²⁵ *Chinn v. China Aviation*, 291 P.2d 91; (*CA*) *Scott v. J.F. Duthie*, 216 P. 853 (WA 1923).

¹²⁶ *Woolley*, 491 A.2d at 1169 (citing *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762 (N.J. Super. 1958)).

¹²⁷ *See, e.g., Anthony v. Jersey Cent. Pwr.*, 143 A.2d 762 (N.J. Super. 1958) (presuming reliance on promise of deferred benefits).

Woolley describes it: “the single most important” term of the relationship, the one on which all others depend.¹²⁸

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. Contract scholars have long considered unilateral contract doctrine a fringe framework, useful for describing only a narrow subset of highly discrete transactions. Employment 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. The result is that employment law lacks a coherent basis for understanding binding obligation within this important relationship.

A. The Law & Scholarship of Unilateral Contracts

If it were up to 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 contract’s anomalous reliance on unilateral contract theory within the development of mainstream contract law.

¹²⁸ *Id.* at _____. As the court notes “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.”

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 born. If either party reneges or fails to perform, the other may sue for breach.¹²⁹

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 contracts¹³⁰ is the promise of a reward that seeks to induce completion of a difficult or uncertain task.¹³¹ 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. As originally theorized, however, under the unilateral framework the offeree makes no commitment and may perform or not at their pleasure.¹³² Absent performance, there is no contract at all, merely an offer that has

¹²⁹ The idea of enforceable fully executory contracts, i.e., one in which no party has incurred any loss, dates to Lon Fuller & Purdue's seminal article, articulating the "expectation interest" of contract parties—the need to be able to rely on eventual fulfillment of a present bargain—essential to a functioning market. Fuller & Purdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936-37); 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").

¹³⁰ The original invocation of the distinction and use of the terminology unilateral/bilateral terminology is generally attributed to Christopher Langdell. See David G. Epstein & Yvette Joy Liebesman, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 *ARK. L. REV.* 267, 271-75 (2006) (discussing Langdell's early use of concept and its adoption by courts and treatise writers); Peter Meiges Tiersma *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 *U.C. DAVIS L. REV.* 1, 6 (1992-1993) (describing the traditional understanding of the nature and consequences of unilateral offers as "Langdell's rule"); and was supported and memorialized by Williston in his iconic treatise. Stoljar, *supra* note ___, at 523.

¹³¹ Classic examples from the chestnut cases/law school hypos include finding a wayward pet or returning a lost object, scaling a greased flagpole, entering a contest or sweepstakes, deploying a Victorian era flu remedy, or (perhaps most famously of all) crossing the Brooklyn Bridge.

¹³² See *RESTATEMENT OF CONTRACTS* § 12 (defining "unilateral" contract as "one in which no promisor receives a promise as consideration for his promise"). For discussions of the unilateral/bilateral distinction see generally Epstein, *supra* note ___, at ___; Pettit, *supra* note ___, at ___; Stoljar, *supra* note ___, at ___; Tiersma *supra* note ___, at ___.

not been accepted.¹³³ 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. The offeree knows they will not be held contractually liable for a performance they cannot control or guarantee; yet they can rely on the offeror following through on the promise to pay should they succeed.¹³⁴

At the same time, the unilateral framework gives rise to unique perils, such as the familiar problem of 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 liability free.¹³⁵ Much scholarly ink was spilt in the early twentieth century over this problematic implication and unjust outcome.¹³⁶ 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.¹³⁷ Thus, under contemporary law, the offeror who challenges an offeree to climb a flagpole for a certain sum must, once the offeree begins, allow reasonable time for the offeree to reach the top or be held liable for breach.

In addition to circumscribing the offeror’s revocation rights, the First Restatement sought to reduce reliance on the unilateral framework

¹³³ Tiersma, *supra* note ___, at 38-39 (explaining the conventionally understood distinction).

¹³⁴ 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. Neither party would expect the agent to incur liability in the event no sale is effected. *See, e.g.*, *Marchiando v. Scheck*, 432 P.2d 404 (NM 1967). This is true, however, only where the agency is non-exclusive. An exclusive listing agreement is usually interpreted as imposing mutual obligations on both parties. This owes in large part to the implied duty of good faith, which we will turn to in Part IV.

¹³⁵ *See* Tiersema, *supra* note ___ at 1 (calling this “[o]ne of the most notorious rules of traditional contract law”). *Stoljar* at 520. This result is often depicted through the well-known “Brooklyn Bridge hypothetical” coined by Professor Wormser. *See id.*; Epstein, *supra*, note ___ at 276.

¹³⁶ *See* Tiersma, *supra* note ___, at 6-7 (discussing early twentieth century academic debate over how to mitigate the effects of a unilateral offer).

¹³⁷ *See* RESTATEMENT OF CONTRACTS § 45; The adoption of Section 45 put to rest a vigorous academic debate of the early twentieth century over the consequences of part performance. Epstein, *supra*, note ___ at 281 (discussing the evolution of Restatement Section 45 and these mitigating doctrines).

altogether. Section 31 provided that “[i]n 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.”¹³⁸ 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.¹³⁹

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 either to explicitly designate an offer as unilateral permitting only a performance-based acceptance. 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.¹⁴⁰ If the offeror revokes after reliance occurs, but before the offeree starts performance, the offeree will suffer an uncompensated loss.¹⁴¹ In effect then, the continued availability of the unilateral contract framework allowed 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.¹⁴² Toward the mid-twentieth century, Karl Llewellyn, the principal drafter of the Uniform Commercial Code, 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. Llewellyn’s attack was part of his broader disenchantment with

¹³⁸ RESTATEMENT OF CONTRACTS § 31.

¹³⁹ See Epstein, *supra* note ___, at 284-85 (explaining this intention and result).

¹⁴⁰ See RESTATEMENT OF CONTRACTS § 45, comment f (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.

¹⁴¹ Possibly redressed under promissory estoppel but only if and to the extent that injustice is otherwise unavoidable. (Epstein notes the distinction.)

¹⁴² K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 *YALE L.J.* 779, 779 (1939)

what he described as the “orthodox” view of contract formation.¹⁴³ 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.¹⁴⁴ It therefore made little sense to assign legal consequences based on such esoteric concepts. He allowed that certain unique factual contexts could give rise to deals fairly described as binding only one party. Such “true” unilateral contracts, however, were to his mind so rare and distinct as to be unworthy of a special category.¹⁴⁵ 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.¹⁴⁶

This “second-generation” critique of unilateral contracts, like the one before it, proved influential in the academic establishment. Both the UCC, under Llewellyn’s stewardship, and later, the Second Restatement abandoned the unilateral/bilateral terminology. 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.¹⁴⁷

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 distinction they embody, fully disappeared from the common law lexicon. First, the Second Restatement carried forth the distinction, referring to acceptances effected either through promise or performance, albeit without employing the unilateral/bilateral terminology.¹⁴⁸ Second, the

¹⁴³ K.N. Llewellyn, *supra* note 143, at 780 (1939) (using the term “orthodox” 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* Llewellyn, *Case-Law II*, at 800; K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 *YALE L.J.* 1, 36 (1938).

¹⁴⁴ Llewellyn, *Case-Law II*, *supra*, note ___, at 800.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 801.

¹⁴⁷ U.C.C. § 2-206(1)(a); RESTATEMENT (SECOND) OF CONTRACTS § 30(2).

¹⁴⁸ Some have suggested for this reason that the change in the second Restatement is merely cosmetic. *See* Epstein & Libeson, *supra* note ___ at 284 (describing the Second Restatement’s approach as a change in name only akin to substituting politically correct language for an outdated sounding concept).

Second Restatement and the U.C.C. recognize the possibility that a particular offer may, by virtue of precise language or unique circumstances, require acceptance by performance.¹⁴⁹

Finally, and most importantly, courts have continued to use the language of bilateral and unilateral contracts in deciding cases despite the scholarly consensus. 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.¹⁵⁰ Although it gets no respect from contracts scholars, unilateral contract theory has persisted in the face of relentless criticism.

2. In Praise of Unilateral Employment Contracts?

As we showed in Part I, the theory has particularly come 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.¹⁵¹ Indeed much of employment law scholarship takes the unilateral frame as a given.¹⁵² As we will see, those scholars that

¹⁴⁹ See UNIFORM COMMERCIAL CODE (“U.C.C.”) § 2-206 (permitting acceptance by any reasonable medium “[u]nless otherwise unambiguously indicated by the language or circumstances”); RESTATEMENT OF CONTRACTS § 32 (giving the offeree leeway in choosing manner of acceptance in “case of doubt” about offeror’s intention).

¹⁵⁰ See generally Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85 (2010) (discussing insurance contracts); Pettit, *supra* note ___, at 545-50 (discussing employment and citizen-state contracts).

¹⁵¹ See Beh & Stempel *supra* note ___; Epstein & Libeson *supra* note ___; Pettit *supra* note ___; Tiersma, *supra* note __.

¹⁵² This 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, 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, 901

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.

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.¹⁵³ Examining the employment context, Pettit suggested that by using the framework courts did justice to employees' reliance interest while also protecting employees from the implication of improvident promises.¹⁵⁴ The unilateral theory 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.¹⁵⁵

Writing just a few years later, Professor Peter Tiersma, sought to retheorize the unilateral contract model, and in particular the Restatement doctrines limiting the right to revoke unilateral offers.¹⁵⁶ 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.¹⁵⁷ According to 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.¹⁵⁸

Both Tiersma's and Pettit's contributions recognize some of the limitations of unilateral contract analysis, as conventionally applied, to

(2006) (comparing the English approach to the question as “distinctly bilateral”). We explore this topic in the next section. *See infra* Part II.B.2.

¹⁵³ Pettit, *supra* note ___, at 552.

¹⁵⁴ Pettit, *supra* note ___, at 565

¹⁵⁵ Pettit, *supra* note ___, at 565 (“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.”)

¹⁵⁶ Tiersma, *supra* note ___, at 62.

¹⁵⁷ Tiersma, *supra* note ___, at 62-63.

¹⁵⁸ 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 65.

employment cases.¹⁵⁹ Yet their work accepts, and to some extent reinvigorates, unilateral contract theory. Pettit sees the employment cases as renewing and revitalizing an otherwise discarded concept. Tiersma embraces them in support of a promissory theory of contract liability. However, both scholars focus exclusively on promises of future benefits, the type of commitments that hew most closely to the traditional reward paradigm.¹⁶⁰ Neither scholar considers courts' application of the unilateral framework to job security promises. Indeed, Tiersma imagines the right to terminate at will to be one of the possible "conditions" limiting the enforceability of an employer's promise.

Scholarship examining the use of unilateral contract theory in cases of handbook promises to job security have 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. 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 work force.¹⁶¹

Thus, 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, Befort imagines the possibility of a "new theoretical framework," one grounded in the economic advantages employers achieve by inculcating expectations of job security among their workforce.

¹⁵⁹ Pettit acknowledges, for instance, that several of the elements of contract formation are implied in the employment context. *See* Pettit, *supra* note ____, at 553.

¹⁶⁰ As previously noted, use of unilateral contract analysis is on its surest footing when applied to such cases. *See supra* Part I.B..

¹⁶¹ Befort, *supra* note ____, at 342-43.

As we will soon see, however, that prediction did not come to pass.¹⁶² Most courts continued to rely on unilateral contract doctrine, not only in handbook policy cases, but also in theorizing various *employee* commitments. In 2006, Professor David Epstein and Yvette Liebson briefly revisited the so-called “expand[ed]” use of unilateral contract theory that Pettit identified some twenty years prior. Focused on the historical rise and fall of the unilateral contract framework, they express skepticism about the utility of the concept in *any* contractual context outside the reward paradigm.¹⁶³ In employment and elsewhere, they urge courts to ask the underlying question—whether there is or ought to be a legal obligation, an issue on which they profess agnosticism.¹⁶⁴ Notably, however, they decline to answer that questions 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. Epstein and Liebson 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 within that scheme.¹⁶⁵ 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

¹⁶² See *infra* Section III.C.

¹⁶³ Epstein & Liebson, *supra* note ___, 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 distinction between unilateral and bilateral, “there is generally a more sound basis for the holding.”).

¹⁶⁴ Epstein & Liebson, *supra* note ___, at 302.

¹⁶⁵ Epstein, *supra* note ___, 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”).

application to employment, considering it a creative or at least innocuous judicial innovation. We take a very 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.

1. A “Square Peg in a Round Hole”¹⁶⁶

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.¹⁶⁷ Common experience teaches that few if any employment relationships fit that description.

First, employment relationships almost always begin with a verbal 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

¹⁶⁶ Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999) (J. Jones dissenting).

¹⁶⁷ See *supra* Part II.A.

contracts theorists concede is a highly stylized model of contract formation.¹⁶⁸

This is not merely a description, but a reflection of employer preference consistent with the basic law of acceptance. Employers “require” a promissory acceptance to ensure performance and avoid the legal risk of extending multiple offers.¹⁶⁹ 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.¹⁷⁰ Thus, requiring a promissory acceptance allows employers to better manage their workflow and anticipate their hiring needs.¹⁷¹

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.¹⁷² 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

¹⁶⁸ Shawn J. Bayern, *Offer and Acceptance in Modern Contract Law: A Needless Concept*, 103 CAL. L. REV. 67 (2015).

¹⁶⁹ RESTATEMENT OF CONTRACTS § 30.

¹⁷⁰ Under the current understanding of employment is at will, 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 (Mich. App.1994); *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670 (Mo. App. 1988); *Bakotich v. Swanson*, 957 P.2d 275 (Wash. App. 1998). But several 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. *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (MN 1981). As we will argue, there is a contractual basis for that liability under the bilateral framework we propose in Part IV. *See infra* Part IV.A.

¹⁷¹ Surprisingly some contracts scholars think otherwise. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.15 (3d 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.”).

¹⁷² *See supra* Part II.A.1.

onboarding process that many companies undertake with new hires. During that period, employees receive additional terms of employment, including what 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.¹⁷³

Such formal onboarding is by no means universal, but it is 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.¹⁷⁴ 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 to perform.

Third, and relatedly, most employment relationships have no fixed endpoint. Under the prevailing understanding of employment-at-will, either party may decide to terminate at any point. As previously discussed, this aspect of the relationship has led some commentators to describe at-will employment as non-contractual or illusory.¹⁷⁵ Yet employment is clearly an exchange relationship—a trade of money for labor—with the consent of both parties. 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

¹⁷³ See Arnow-Richman, *Modifying, supra* note ___ at 435-36 (“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”).

¹⁷⁴ Arnow-Richman, *Modifying, supra* note ___ at 437 (describing “informal ‘changes’ in employment ‘terms’ [such as staffing decisions, work instructions, personnel actions, etc.]—that parties likely anticipate as part of the natural ebb and flow of a dynamic work relationship”).

¹⁷⁵ See ARTHUR L. CORBIN, CORBIN ON CONTRACTS Sec. 96 (1960) (describing employment as described employment at will as “not a contract at all” but rather “an expression in which the promises are illusory”); FARNSWORTH § 7.20 (“It might be better to think of at-will employment as involving an “agreement” rather than a “contract”).

terminate—and are plainly treated as such.¹⁷⁶ 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.¹⁷⁷ This description, however, does not accord with the intentions or beliefs of the parties. They view themselves as continuing an ongoing relationship rather than contracting anew each workday.¹⁷⁸

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 position. A representative study found that nearly one in five participants was bound by a noncompete at the time of response, and nearly forty percent had signed a noncompete at some point in their career.¹⁷⁹ Other common restrictive agreements may require employees to protect proprietary information, forgo client and co-worker relationships, and refrain from disparaging the employer.¹⁸⁰

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 the employer's procedure is deemed

¹⁷⁶ The Uniform Commercial Code contemplates this arrangement in its default terms for contracts that do not specify a duration. *See* U.C.C. § 2-309(2) (“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 generally* Arnow-Richman, *Mainstreaming*, *supra* note ___ at 1546 (discussing these provisions).

¹⁷⁷ *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 116 (Mich. 1987) (discussing and critiquing this understanding).

¹⁷⁸ *Id.* (describing this characterization as “strikingly artificial” because “[f]ew employers and employees begin each day con-templating whether to renew or modify the employment contract in effect at the close of work on the previous day”).

¹⁷⁹ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, 64 J.L. & ECON. (2021).

¹⁸⁰ *See* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877 (2021) (describing the way in which employers deploy such agreements in concert, creating an “contract thicket” that overly constrains worker mobility); Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) (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).

unconscionable¹⁸¹ or enforce an injunction against a competing employee if the scope of the restraint is unreasonable¹⁸² or violates state statutory restrictions.¹⁸³ But the parties unquestionably *intend* these promises to be contractually binding despite the “at-will” nature of the relationship. Thus, a fourth 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. They both 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 Cards¹⁸⁴

The previous section showed how poorly the unilateral contract framework suits the employment context. This section reveals the fragile doctrinal edifice courts have built on that fundamentally flawed foundation. The unilateral reward paradigm requires a discrete promises that remains fixed throughout the period of performance. But in the hyper-relational employment contract, the period of performance is

¹⁸¹ See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* 6 P.3d 669 (Cal. 2000).

¹⁸² See generally RESTATEMENT (SECOND) OF CONTRACTS § 188 (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]”).

¹⁸³ An increasing 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) (cataloguing recent legislative changes).

¹⁸⁴ 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 (2017-2018).

indefinite and the promise is subject to change.¹⁸⁵ Forcing unilateral contract doctrine onto employment has led courts to awkwardly 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 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.¹⁸⁶ They added language disclaiming the legal significance of their policies and affirmatively asserting that such materials were noncontractual.¹⁸⁷ 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.¹⁸⁸ But these same courts soon 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.¹⁸⁹ Consequently, employees have a strong expectation that they will be followed.¹⁹⁰ Yet it would be problematic to bind employers to their current policies for all

¹⁸⁵ See Bankey, 443 N.W.2d at 116 (“[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?”).

¹⁸⁶ See generally Jonathan Fineman, *The Inevitable Demise of Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345 (2008); Verkerke, *Empirical Perspective*, *supra* note __; *infra* Part III.B.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Rowe v. Montgomery Ward*, 473 N.W.2d 268 (Mich. 1991); see generally Rachel Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447 (2009); Fineman, *supra* note __, at 365-70

¹⁸⁹ *Woolley*, 491 A.2d at 1265 (“As every employee knows, when superiors tell you “it’s company policy,” they mean business.”).

¹⁹⁰ *Id.* (noting that for this reason “it would be almost inevitable for an employee to regard [the employer’s personnel manual] as a binding commitment”).

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.¹⁹¹ This glaring conflict between unilateral theory and real-world contract 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 doubled down on the unilateral characterization and issued a befuddling series of opinions even more poorly reasoned than their ancestors.

Two contrasting approaches emerged.¹⁹² 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.¹⁹³ *Asmus v. Pacific Bell* is a leading case.¹⁹⁴ Pacific Bell initially adopted a policy promising managers retraining and reassignment in the event of job elimination.¹⁹⁵ It later replaced it with a new policy designed

¹⁹¹ Rather the recurring question with regard to unilateral contracts is, as previously discussed, whether and when the initial offer may be revoked. *See supra* Part II.A.1. That 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 § 45. However, courts have given scant attention to that Section. *See Demasse v. ITT*, 984 P.2d at 1140, 1144, n.3 (AZ 1999). We return to this idea *infra*.

¹⁹² Arguably there is a third approach, illustrated by the Michigan Supreme Court’s decision in *Bankey v. Storer Broadcasting*, 443 N.W.2d 112 (Mich. 1987), which rejects the contractual framework altogether. 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 retreated in favor of a contract analysis. *See infra* Part III.

¹⁹³ In earlier work, Arnow-Richman refers to this as the “unilateral modification” approach. *See, e.g., Arnow-Richman, Modifying, supra* note ___ at 450.

¹⁹⁴ 999 P.2d 71 (Cal. 2000).

¹⁹⁵ *Id.* at 73.

to decrease managerial staffing through severance and benefit incentives.¹⁹⁶ In a breach of contract suit brought by a group of managers affected by the change, the California Supreme Court held for the employer. The court rejected the employees' claims that the employer had to obtain their explicit assent and provide fresh consideration to modify the previous policy.¹⁹⁷

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 reasonable notice of the change, additional consideration is not required.¹⁹⁸

In a highly technical and notably dispassionate analysis, it went on to dispense with proof of both consideration and assent.¹⁹⁹ Instead, the *Asmus* opinion re-invoked the legal fiction that these elements of contract formation could be inferred from employees' continued employment.²⁰⁰

This analysis is deeply flawed. There is no "general rule" regarding the "proper termination of unilateral contracts."²⁰¹ The court's assertion is not only a pure invention, it is 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

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 81.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 80.

²⁰¹ Arnow-Richman has critiqued this aspect of the *Asmus* decision in detail elsewhere. 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 (2017-2018). We rely on that work throughout this section.

terminate or modify. The employees had already performed by remaining on the job, and thus the employer was bound by its promise.²⁰²

The closest one could come to applying valid unilateral contract doctrine in this context would be to invoke the previously discussed partial performance rule.²⁰³ 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 § 45, once a promisee has begun performance, the promisor must hold the offer open for a reasonable to time to allow the promisee to complete the requested performance.²⁰⁴ 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 its promise.²⁰⁵ Of course, the employer never defined that period of time, but simply encouraged its workforce to stay. These intractable contradictions show why the court erred by framing the contract as unilateral in the first place.²⁰⁶

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.²⁰⁷ Alternatively, a reasonable notice standard may reflect

²⁰² See *id.* at 888; Arnow-Richman, *Modifying*, *supra* note — 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.”)

²⁰³ See *infra* Section II.A.1.

²⁰⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 45; *supra* Part II.A..

²⁰⁵ The *Asmus* majority makes no mention of Restatement § 45.

²⁰⁶ See Arnow-Richman, *House of Cards*, *supra* note ___ at 956 (opining that such irreconcilable problems with *Asmus*’ reasoning “bring[] down the curtain on the unilateral contract charade”).

²⁰⁷ 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, 984 P.2d at 1155 (J. Jones, dissenting) (suggesting that permitting modification upon reasonable notice is preferable to “employers [being]

judicial skepticism about the legitimacy of the employees' underlying rights.²⁰⁸ Courts stretched conventional contract doctrine to find handbook policies enforceable. So, perhaps the resulting rights are less than fully contractual.²⁰⁹

Finally, and most importantly for our purpose, a reasonable notice rule could also be justified under *bilateral* contract analysis, 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.²¹⁰ 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 non-existent set of "traditional" unilateral contract modification principles. Thus, this leading case built the majority rule on a confused premise, using flawed reasoning and concealing whatever policy objectives animated the decision.

The minority approach to midterm modification of employee handbooks is equally problematic. These courts 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* purport to apply conventional principles of contract modification.²¹¹ In *Demasse*, the employer replaced its policy of conducting layoffs in reverse order of seniority with one that selected employees for layoff based on their job performance.²¹² 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.²¹³ The Arizona Supreme

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.

²⁰⁸ See Arnov-Richman, *Modifying*, *supra* note __ 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 74.

²⁰⁹ See Bankey, 443 N.W.2d at 119 (adopting this view); RESTATEMENT OF EMP'T LAW § 2.05 cmt. b. (endorsing *Asmus*' reasonable notice rule by analogy to administrative rulemaking); *infra* Part III.B.

²¹⁰ See Arnov-Richman, *Modifying*, *supra* note __, at 481-82; *infra* Part IV.

²¹¹ 984 P.2d at 1140 (Ariz. 1999).

²¹² *Id.* at 1140.

²¹³ *Id.*

Court agreed.²¹⁴ Like the California court in *Asmus*, the *Demasse* court began by reaffirming that employer policies may become binding as a unilateral contract.²¹⁵ Then, the court reasoned that once a contract forms, regardless of how it arises, general rules of modification apply.²¹⁶ Thus, *Demasse* held that the employer must secure employees' assent²¹⁷ to the new policy and provide "separate" consideration—continued employment alone would not suffice.²¹⁸

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.²¹⁹ Ironically, however, the dissent chastised the majority for this very move.²²⁰ According to the dissent, applying formal modification principles to an at-will employment relationship is akin to forcing a square peg into a round hole.²²¹ 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—just as it is in contract law itself.

Unfortunately, however, the court's implicit step towards 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

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* 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.").

²¹⁷ *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.").

²¹⁸ *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.").

²¹⁹ For a discussion of the classical rules of contract modification, including the requirement of "new or additional consideration," see Arnow-Richman, *Modifying, supra* note ___, at 458-60.

²²⁰ *Demasse*, 984 P.2d at 1153 (J. Jones 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)").

²²¹ *Id.* at 1156.

idea that unilateral contract doctrine should govern employment contract formation. But since a unilateral contract is formed and fully performed 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. Without mentioning it by name, the court applies the preexisting duty rule.²²² This highly technical and comparatively strict rule was the prevailing approach to contract modification until the middle of the twentieth century. But the rigid preexisting duty rule fell out of favor with both courts and scholars long ago. Commentators argued that contracting parties need flexibility to adjust their relationship in the face of changed circumstances.²²³ And when disputed modifications appeared fair and necessary, courts usually found ways to circumvent the pre-existing legal duty rule.²²⁴

These realist impulses came to full flower with the passage of the Uniform Commercial Code, which flatly rejects 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.²²⁵ Similarly, common law courts increasingly made exceptions to the preexisting duty rule. According to the Second

²²² See RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW 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 or the 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 2-7 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 7.1 (2022), LexisNexis (attributing the 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”).

²²³ 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 (describing the PELDR as “a roadblock to the free adjustment of contracts”); CORBIN, *supra* note ___, at § 7.1 (discussing this position).

²²⁴ See Arnow-Richman, *Modifying*, *supra* note ___, at 459 (discussing how courts “leverage[d] legal fictions” to avoid the PELDR when confronted with “seemingly fair” modifications). Hillman, *Policing*, *supra* note ___, at 852 (1979) (describing courts’ resistance to the PELDR).

²²⁵ See U.C.C. § 2-209(1).

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.²²⁶ Rather than focusing on the formality of consideration, courts sought to enforce voluntary, mutually beneficial modifications and refuse enforcement of coerced and extortionary modifications.²²⁷ These more permissive rules reflect broader developments in contemporary contract law. Thus, the current approach to contract modification 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 focuses 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.²²⁸ Part IV will outline 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.

Decisions expanding or contracting worker protections 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 modification of unilateral contracts. Unsurprisingly, these opinions offer only a sterile treatment of crucial policy questions. Courts’ reasoning conflicts with mainstream contract law and misrepresents the real-world experiences of both employers and employees.

²²⁶ RESTATEMENT (SECOND) OF CONTRACTS § 89.

²²⁷ See Robert Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982).

²²⁸ See, *supra*, Part I.A.

III. EMPLOYMENT CONTRACTS WITHOUT CONTRACT DOCTRINE?

As we saw in Part II, judges misapply unilateral contract doctrine. The unilateral framework initially allowed courts to enforce employee benefit promises without disturbing the powerful presumption that an indefinite-term employment relationship is terminable at will. It makes much less sense, however, as a formal doctrinal basis for enforcing assurances of job security. Employment is, fundamentally, a bilateral 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 an informal public policy approach that protected workers' "legitimate expectations" of job security. Subsequently, many courts in other jurisdictions have quoted and cited these Michigan cases in support of their own decisions that enforced employers' assurances.

Tellingly, however, none of those courts fully embraced this informal approach to enforcement. Instead, they resorted to the tortured formal doctrinal arguments we describe in Part I and Part II. And even Michigan courts ultimately weakened the "legitimate expectations" 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. Courts continue to insist on formal doctrinal reasoning. And thus, we conclude that a more informal approach based in public policy will not overcome judges' tendency to use inapposite doctrines such as unilateral contracts.

A. Enforcing Employees' Legitimate Expectations

In the first half of the 20th century, Michigan courts, like those in many other jurisdictions, established a strong presumption that employment for an indefinite term is terminable at will.²²⁹ 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.²³⁰ In practice, this approach ordinarily made employee handbook promises or other policy statements concerning job security legally unenforceable.

In *Toussaint v. Blue Cross & Blue Shield*, however, the Michigan Supreme Court departed dramatically from existing doctrine.²³¹ First, the court signaled far greater willingness to enforce oral assurances of job security. Although prior decisions often viewed these alleged promises skeptically, the *Toussaint* majority adopted a much more sympathetic perspective towards such claims. The court reviewed two cases consolidated for appeal. 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. 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.²³²

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.²³³

²²⁹ *Lynas v. Maxwell Farms*, 273 N.W. 315 (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.") See generally Section I.A.1 *supra*.

²³⁰ *Id.* at 316-17.

²³¹ 292 N.W.2d 880 (Mich. 1980)

²³² *Id.* at 898.

²³³ The four judges joining the majority opinion construed the contract as requiring good cause, *Id.* at 896, while three concurring judges found a so-called "satisfaction

In the other case, the plaintiff Toussaint similarly testified that Blue Cross representatives offered oral assurances of job security during his preemployment 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 65]; 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.²³⁴

The court majority found these statements sufficient evidence to sustain the jury's verdict for Toussaint. They reasoned that, like Ebling, Toussaint inquired about job security when he was hired. A reasonable juror thus could interpret the assurance that he would be with the company "as long as I did my job" as agreement to a "contract of employment terminable only for cause."²³⁵ However, three dissenters disagreed that such a statement was sufficient to sustain the jury's verdict for Toussaint. Instead, they distinguished *Ebling* on the ground that, in that case, "the parties negotiated over, and agreed to, certain qualifications concerning [termination]."²³⁶ As we will soon see, the dissenters' reservations foreshadowed a later shift in Michigan towards a comparatively restrictive approach to the enforceability of oral assurances of job security.²³⁷

The court's far more significant innovation, however, came in response to Toussaint's allegation that written company policies also committed Blue Cross to terminate his employment only for cause. In response to Toussaint's inquiries about job security, hiring officials handed him the Blue Cross "Supervisory Manual—Personnel Policies and Procedures."²³⁸ The section on "Terminations" provided:

contract" prohibiting termination only for a reason that is "insincere, in bad faith, dishonest or fraudulently claimed as a subterfuge." *Id.* at 902 (quoting *Isabel v. Anderson Carriage Co.*).

²³⁴ *Id.* at 904.

²³⁵ *Id.* at 884.

²³⁶ *Id.* at 904 n.4.

²³⁷ *See infra* Section I.C.3.

²³⁸ *Id.* at 903. He 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 905.

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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.²³⁹

The Manual also established a detailed “Disciplinary Procedure,” which stated that:

a series of progressive, corrective measures will be applied. [Before 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.²⁴⁰

And finally, according to the Manual, “discipline will be given only for cause.”²⁴¹

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. 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.²⁴²

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. The opinion also alluded to the risk of “misunderstandings” about the terms of employment.²⁴³ An employer like Blue Cross could avoid misleading employees by “requiring prospective employees to acknowledge that they served at the will or the pleasure of the company.”²⁴⁴ The *Toussaint* majority thus identified two distinct public policies—benefits to employers and the risk of employee

²³⁹ *Id.* at 911.

²⁴⁰ *Id.* at 909-10.

²⁴¹ *Id.* at 909.

²⁴² *Id.* at 892.

²⁴³ *Id.* at 891.

²⁴⁴ *Id.* at 891.

misunderstanding—that supported enforcing employer statements concerning job security.

Although, as we saw in Section II.B, many courts have misapplied unilateral contract doctrine to enforce handbook promises, 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."²⁴⁵

The *Toussaint* majority thus 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 court's ruling in *Toussaint* protected employees' "legitimate expectations" of job security. But it also upended Michigan employers' expectation that a strong at-will presumption would protect them from most potential employment contract claims.²⁴⁶ The case held that unqualified employer statements establishing procedures for progressive discipline or requiring just cause for termination would be legally enforceable. The court also rejected conventional contract defenses 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.

²⁴⁵ *Id.* at 892 (citing *inter alia* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (1917)); see J.H. Verkerke, *Story of Woolley*, *supra* note ___ (observing that *Toussaint* "swept aside all formal doctrinal barriers" to handbook enforcement in favor of a standard based on employee expectations).

²⁴⁶ See *Lynas v. Maxwell Farms*, 273 N.W. 315 (Mich. 1937).

In response to the decision, management-side employment attorneys predictably counseled their clients to update their employee handbooks and policy statements.²⁴⁷ These employment lawyers promptly drafted an evolving array of exculpatory statements and practices designed to negate any employee expectations of job security. Over the ensuing decade, employee handbooks and hiring documents incorporated progressively more restrictive language to prevent workers from suing for breach of an employment contract.

The earliest clauses simply recited that the handbook did not create any contractual rights and specifically disclaimed any intention to guarantee employment for a definite time. Soon, however, companies began to include an affirmative confirmation of 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. Later iterations of these protective amendments commonly added both a merger clause—to guard against prior or contemporaneous oral agreements—and a clause barring enforcement of any modification unless it was communicated in writing and signed by a designated corporate officer. Employers also needed proof that workers had agreed to these exculpatory terms. In response, they eventually developed the now-standard practice of requiring employees to sign a separate document that acknowledges receipt of the employee handbook and reinforces the disclaimers contained elsewhere in the employer’s policies.²⁴⁸

Of course, courts in Michigan and other jurisdictions had expressly invited this employer response.²⁴⁹ In their decisions enforcing assurances of job security, they repeatedly observed that employers could avoid enforcement. All that was required, they said, was to include language that clearly disclaimed any intention to provide contractual protection against discharge.²⁵⁰ A mere contract formality could override employees’ contrary expectations. Thus, even in Michigan, we see that the formal contract language trumps employee expectations.

The widespread introduction of these exculpatory clauses into employee handbooks also soon forced courts to decide how such clauses

²⁴⁷ See Verkerke, *Empirical Perspective*, *supra* note 42, at 842.

²⁴⁸ See generally Stephen F. Befort, *Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again* 21 *EMPLOYEE RTS. & EMP. POL’Y J.* 307 (2017).

²⁴⁹ See, e.g., *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1258, 1271 (1983).

²⁵⁰ *Id.*

affected previously established contractual rights. This issue finally reached the Michigan Supreme Court in *In re Certified Question (Bankey v. Storer Broadcasting)*.²⁵¹ As framed by 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.”²⁵² 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.

The *Bankey* court held that such a policy change is permissible so long as the employer “gives affected employees reasonable notice of the policy change.”²⁵³ 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.”²⁵⁴ 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. 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.”²⁵⁵ 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.²⁵⁶

²⁵¹ 443 N.W.2d 112 (Mich. 1989). The case was argued in March 1987 but not decided until June 1989.

²⁵² *Id.* at 113.

²⁵³ *Id.* at 113.

²⁵⁴ *Id.* at 120.

²⁵⁵ *Id.* at 120.

²⁵⁶ *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. National Cash Register*, 364 N.E.2d 1251 (Mass. 1977).

Although the lead opinion garnered unanimous support,²⁵⁷ its reasoning revealed several doctrinal fault lines that ultimately derailed the potentially expansive “legitimate expectations” theory. First, *Bankey* remains one of very few judicial opinions to recognize 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.²⁵⁸ And modern cases such as *Pugh*, *Toussaint*, and *Woolley* embrace the idea that an employer’s assurances of job security are legally enforceable even though the duration of that promise is unspecified.²⁵⁹ But these cases ordinarily fail to consider how long the parties intended the job security promise to remain in effect.

This formal doctrinal indeterminacy often 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, imagine a judge trying 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, imagine a judge concerned only that workers should 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

²⁵⁷ Although Justice Levin, who wrote the majority opinion in *Toussaint*, filed a separate opinion in *Bankey*, he too expressed “substantial agreement with the conclusion and views stated in the majority opinion.” *Id.* at 121. 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. Justice 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 (emphasis added) Thus, Justice Griffin’s majority opinion effectively spoke for a unanimous court.

²⁵⁸ See, e.g., *Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1410-11 (1991).

²⁵⁹ See *Pugh v. Sees Candies*, 116 Cal. App. 3d 311, 329-30 (1981); *Toussaint*, 292 N.W.2d 880, 890-91; *Woolley*, 491 A.2d 1257, 1258 (1985).

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. And employees have no right to rely on the continuation of those policies throughout their careers. 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.²⁶⁰

The *Bankey* court, however, rejected this criticism. They noted that the rule of *Toussaint* holds employers accountable by requiring the personnel policies “in force at any given time” to be “applied consistently and uniformly to each employee.”²⁶¹ Even so, the everyday understanding of a “policy” envisions “a flexible framework for operational guidance, not a perpetually binding contractual obligation.”²⁶² Thus, the court saw no reason to prevent employers from unilaterally amending their policy statements. Moreover, *Toussaint* stressed the value of maintaining uniform personnel policies for all employees. 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. In the court’s memorable invocation of a well-known phrase, employers’ assurances create “a situation ‘instinct with an obligation.’”²⁶³ It takes just a small step from that understanding to infer that the court might wish to protect employees’ long-term reliance on those assurances. As we have just seen, however, *Bankey* unequivocally quashed those hopes. Instead,

²⁶⁰ See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138, 1147-48 (1999).

²⁶¹ *Bankey*, 443 N.W.2d at 120.

²⁶² *Id.* at 120.

²⁶³ *Toussaint*, 292 N.W.2d at 892 (quoting *Wood v. Lucy, Lady Duff-Gordon*).

the decision firmly aligned Michigan with the majority of jurisdictions that offer only short-term protection during a reasonable notice period.²⁶⁴

But the *Bankey* decision 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.²⁶⁵ 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.”²⁶⁶ 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. They 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.”²⁶⁷ Although she endorsed the court’s answer to the certified question, Justice Boyle’s five-sentence-long concurrence exuded a thinly veiled contempt for the earlier decision and took pains to distance herself from the “pure legitimate expectations leg of *Toussaint*.” 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 *non-contractual* obligations was ill advised.²⁶⁸ We see in these passages a battle over whether *Toussaint*’s principal innovation is doctrinally legitimate.

In *Bullock v. Automobile Club of Michigan*,²⁶⁹ decided the same day as *Bankey*, Justice Griffin—the author of the *Bankey* majority opinion—and Justice Boyle exchanged roles. The case involved a commissioned salesperson who alleged that his employer promised at hiring that “nobody gets fired unless they steal.” His complaint also included much more vague references to “reasonable expectations” based on unidentified “policy statements” of the employer.²⁷⁰ Justice Boyle’s majority opinion cleverly deflected attention from the legitimate expectations analysis that she

²⁶⁴ See *Asmus v. Pacific Bell*, 999 P.2d 71 (Cal. 2000). See generally Arnow-Richman, *Reasonable Notice*.

²⁶⁵ *Id.* at 119. Cue everyone’s favorite “instinct with an obligation” quote from *Toussaint*.

²⁶⁶ *Id.* at 119.

²⁶⁷ *Id.* at 116.

²⁶⁸ See *infra* our discussion of Justice Boyle’s concurring opinion in *Rowe*.

²⁶⁹ 444 N.W.2d 114 (Mich. 1989).

²⁷⁰ *Id.* at 117.

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.²⁷¹ Justice 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."²⁷²

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' announced ... in *Toussaint*."²⁷³ Concerning "legitimate expectations" analysis, the dissent said "it cannot be denied that *Toussaint* pushed heavily against and through the boundaries of employment contract law."²⁷⁴ According to the opinion, "[w]hen mutual assent is replaced by the 'expectations' of one party as the measure of contract viability, an invitation to litigate is heralded, loud and clear."²⁷⁵ Justice Griffin would stem the tide of litigation principally by taking a more skeptical view of express oral assurances of job security.²⁷⁶ Although other courts have wisely "distinguished between 'puffery and promise,'"²⁷⁷ he expressed skepticism about "a breach of contract action based solely on an alleged oral representation recalled with remarkable specificity long years after the time of hiring."²⁷⁸ Thus, he concluded the court or the legislature should limit the ability of plaintiffs to enforce these

²⁷¹ The case involved denial of a motion for summary judgment that the employer filed even before answering Bullock's complaint. 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.

²⁷² *Id.* at 133.

²⁷³ *Id.* at 132.

²⁷⁴ *Id.* (quoting "instinct with an obligation" language).

²⁷⁵ *Id.* at 133.

²⁷⁶ 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).

²⁷⁷ *Id.* at 133 (quoting *Carpenter*).

²⁷⁸ *Id.* at 134. 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. ("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 [sic] as a matter of law.")

oral promises. As we will see, a majority of the court would soon share Justice Griffin's skepticism.²⁷⁹

C. *The Resurgence of Formalism*

The gathering clouds of opposition to *Toussaint* burst with a torrent of critical analysis and contrary conclusions in *Rowe v. Montgomery Ward*.²⁸⁰ The court reviewed and reversed an \$86,500 jury award to Mary Rowe, a highly successful commissioned salesperson for Wards. At hiring, she was told "she would have a job at [Wards] as long as she achieved her sales quota," and trial testimony from the company employee who hired her corroborated that specific statement.²⁸¹ Rowe also signed a sheet of "Rules of Personal Conduct" that enumerated other permissible grounds for termination. More than five years later, in 1982 and 1983, Wards issued a series of revised handbooks that included a "Sign-Off Sheet" confirming employees' at-will status and expressly reserving the right to change the conditions of employment. Despite repeated requests from the company's personnel office, Rowe refused to sign this sheet.²⁸² Two years later, Rowe was observed leaving work during a scheduled shift. Although the court's lead opinion offered an unflattering portrayal that suggested Rowe was irresponsible to leave work and insubordinate when asked to explain her absence, the dissent described additional evidence that cast her conduct in a far more sympathetic light.²⁸³ Nevertheless, the store manager decided to fire her.

The lead opinion, speaking for three justices,²⁸⁴ began candidly enough with what reads as a stinging repudiation of *Toussaint*. Echoing

²⁷⁹ See *infra* text accompanying notes ___ - ___ (discussing *Rowe v. Montgomery Ward*).

²⁸⁰ 473 N.W.2d 268 (Mich. 1991).

²⁸¹ *Id.* at 294-95 (Justice Levin dissenting).

²⁸² 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 and do not wish to sign." *Id.* at 293 n.19.

²⁸³ Rowe was an outstanding salesperson who routinely garnered awards for leading the store in sales. She was covering a shift for another Wards employee and alerted a co-employee that she had to attend to some personal business. Although she failed to clock out when she left, her hours worked played no role in determining her compensation as a commissioned salesperson. She also testified that the department was adequately covered in her absence. *Id.* at 291 n.13.

²⁸⁴ Justice Boyle concurred separately but expressed agreement with all three of the main parts of Justice Riley's lead opinion. Justice Mallett was recused, and Justices Levin and Cavanagh dissented. Thus, the final vote was 4-2 for reversal.

the *Bullock* dissent, the opinion condemned the informal “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.²⁸⁵

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.

Concerning legitimate expectations, Justice Riley continued a rhetorical battle begun in *Bankey* and *Bullock*. According to his lead opinion, those cases distinguished between “a promise *implied in law* arising from the 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.”²⁸⁶ 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*.”²⁸⁷ 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.”²⁸⁸ Justices Riley, Griffin, and Boyle all appear to use the “non-contractual” label as part of a concerted strategy to delegitimize the “legitimate expectations” branch of the *Toussaint* holding.

When the lead opinion finally turned its attention to Wards’ personnel policies, it concluded:

[The] 1983 manual clearly and unambiguously notified plaintiff of the company’s termination-at-will policy. We are persuaded therefore that

²⁸⁵ *Id.* at 269.

²⁸⁶ *Id.* at 272 n.4 (emphasis added).

²⁸⁷ *Id.* at 285 n.8 (emphasis added).

²⁸⁸ *Bullock* at 132.

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.²⁸⁹

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

Moving on from these efforts to domesticate legitimate expectations, Justice Riley and Justice Boyle also 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. Relying on the venerable *Lynas* decision, the opinion saw no "distinguishing features or provisions" or "special circumstances" that might limit the employer's right to discharge Rowe.²⁹⁰ Without evidence of additional consideration or some comparable validation device, the lead opinion concluded that the historically strong at-will presumption should prevail. Justice Riley also expressed profound skepticism about oral promises of job security—or what his opinion somewhat disparagingly called promises of "permanent employment."²⁹¹ Echoing the *Bullock* dissent's reference to the Statute of Frauds,²⁹² he emphasized "the difficulty [of] verifying oral promises."²⁹³ Finally, Justice Riley asserted that Rowe's contract claim must fail because of "omitted term[s]" and

²⁸⁹ *Id.* at 277 (emphasis added).

²⁹⁰ *Id.* at 272 (quoting *Lynas*).

²⁹¹ *Id.* at 272.

²⁹² See *supra* Section III.B, text at notes ____ - ____.

²⁹³ *Id.* at 273.

indefiniteness. Thus, we see in the *Rowe* decision a resurgence of precisely the sort of hostile and formalistic reasoning that previously barred all but a very few employment contract claims.²⁹⁴

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 theory of enforcement. For example, the New Jersey Supreme Court, in *Woolley v. Hoffmann-La Roche*, recognized a new contract claim based on handbook assurances of job security.²⁹⁵ The court repeatedly quoted long passages from *Toussaint* and relied heavily on that court's reasoning.²⁹⁶ But rather than endorsing an informal theory based on legitimate expectations, the court instead offered not one but three formal doctrinal theories of the case—including both unilateral contracts and promissory estoppel.²⁹⁷ Other courts similarly drew inspiration from *Toussaint* but recoiled from its most novel innovation. Instead, decisions liberalized enforcement of employer assurances while hewing closely to familiar formal doctrinal categories. And thus, Michigan remained an outlier. Perhaps *Toussaint*'s 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 theory never gained a foothold. Courts instead insisted on forcing formal doctrinal rules to yield their desired outcome.

IV. EMPLOYMENT AT-WILL 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

²⁹⁴ In a subsequent decision, *Rood v. General Dynamics*, 507 N.W.2d 591 (Mich. 1993), 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. However, the reasoning of *Rood* confirms that the court has curtailed the expansiveness of *Toussaint* and brought Michigan back into line with centrist jurisdictions.

²⁹⁵ 491 A.2d 1257, 1266-68 (N.J. 1985).

²⁹⁶ *Id.* at 1263, 1268 & n.10.

²⁹⁷ *See id.* at 1266-68.

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 employment-at-will relationships built on contemporary contract principles. We understand employment as a bilateral contract of indefinite duration.²⁹⁸ 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 and gives courts new insight into the employment relationships they are regulating.

A. Understanding At-Will Employment as a Contract

We begin with the question of whether an employment-at-will relationship is a contract at all. In Part II, we characterized employment as a hyper-relational setting.²⁹⁹ Thus, workers and firms anticipate an engagement for an indefinite period, subject to termination by either party, governed by a broad array of written and oral policies, and giving the employer 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 lacks consideration because the parties' promises would, as a result, be illusory.³⁰⁰ Similarly, their promises often would be too indefinite to warrant legal enforcement because they omit key terms or specify those terms imprecisely.³⁰¹

Our critique of existing law has shown how courts have historically responded to these doctrinal problems. When evaluating oral assurances

²⁹⁸ Arnow-Richman has explored this idea in earlier work, which we draw on throughout this part. *See, e.g.*, Arnow-Richman, *Modifying*, *supra* note ___ at 480-81; Arnow-Richman, *Mainstreaming*, *supra* note ___ at 1565-68.

²⁹⁹ *See supra* text accompanying notes ___-___.

³⁰⁰ *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 96 (1960).

³⁰¹ *See* Varney v. Ditmars, 111 N.E. 822 (1916); *supra* Part I.A.

of job security, promises of deferred benefits, or the enforceability of handbook policies, judges customarily ask whether that specific promise formed a contract.³⁰² Rather than viewing employer statements as part of an ongoing contractual relationship, cases currently struggle to determine whether one isolated part of that ongoing interaction should be legally enforceable.³⁰³ This fragmented analysis betrays a distorted judicial understanding of employment. Notably, this approach also presumes that the broader employment relationship is non-contractual.

Contemporary contract principles prescribe quite a different analysis. Starting in the mid-20th century, reform-minded critics of classical contract law inspired courts to reexamine traditional doctrinal obstacles to enforcing incomplete and indefinite agreements.³⁰⁴ Most jurisdictions have since relaxed formerly stringent rules of contract formation and interpretation and invigorated the duty of good faith and fair dealing as a constraint on contractually conferred discretion. Thus, promissory indefiniteness far less often bars enforcement because these judges now treat the parties' intent to be bound as the primary indicator of a contractual commitment.³⁰⁵ In addition, courts more readily admit contextual evidence both to interpret and to supplement written agreements. Default rules fill open terms, and a more permissive parol evidence rule significantly lowers barriers to enforcing oral promises.³⁰⁶ Finally, the duty of good faith and fair dealing has become a robust constraint on the exercise of contractually conferred discretion.³⁰⁷

These doctrinal innovations reflect the jurisprudential influence of the Realist Movement and find full expression in provisions of the UCC and the Second Restatement. Examples abound showing how these developments have transformed commercial and business contract practice. First, courts now readily enforce output and requirements

³⁰² See *supra* Section I.B.

³⁰³ *Id.*

³⁰⁴ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code 1940-1949*, 51 S.M.U. L. REV. 275 (1988).

³⁰⁵ See, e.g., UCC § 2-204; *Hodgkins v. New England Telephone*, 82 F.3d 1226, 1231 (1st Cir. 1996).

³⁰⁶ See, e.g., *Masterson v. Sine*, 436 P.2d 561, 564-567 (Cal. 1958).

³⁰⁷ See, e.g., *Carrico v. Delp*, 490 N.E.2d 972 (Ill. App. 1986).

contracts for the purchase or sell an indefinite quantity of goods. Parties to these contracts may demand (or supply) only a quantity required (or produced) in good faith.³⁰⁸ Similarly, 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.³⁰⁹ Countless decisions also confirm that oral agreements, established practice, and industry norms play an increasingly important role in determining contractual terms and the meaning of those terms.³¹⁰ And, in at least some cases, even the discretionary power to terminate an agreement may only be exercised in a manner consistent with good faith.³¹¹

Such dramatic changes invite us to reconsider employment contract law. As we have seen, contemporary contract doctrine ordinarily enforces commercial agreements whenever parties intend to be bound, even if key terms of the deal, such as the duration of the relationship and the terms of exit, remain indefinite.³¹² It also tolerates the allocation of considerable discretion to one of the contracting parties.³¹³ 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.

These more permissive rules imply that existing employment contract doctrine is woefully out of date. 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.³¹⁴ In contrast, workers are comparatively unsophisticated, make few employment contracts in their lifetime, and

³⁰⁸ See UCC § 2-306(1).

³⁰⁹ See UCC § 2-306(2).

³¹⁰ See, e.g., *Nanakuli Paving v. Shell Oil*, 664 F.2d 772 (9th Cir. 1981); *Columbia Nitrogen v. Royster*, 451 F.2d 3 (4th Cir. 1971).

³¹¹ See, e.g., *Carrico*, 490 N.E.2d at 976; *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 644–45 (2d Cir. 1945).

³¹² See *supra* note ____.

³¹³ See, e.g., *Amoco Oil v. Ervin*, 908 P.2d 493, 498 (Colo. 1993).

³¹⁴ See Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 501-19 (2010).

rarely enjoy legal representation during the negotiation or the performance of those contracts.³¹⁵ 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. And, as we noted earlier, legislative reform efforts have made no significant headway despite decades of academic advocacy.³¹⁶ Thus, in this section, we offer a preliminary vision of a formal approach that replaces antiquated reasoning with contemporary contract principles and terminology. We conclude by describing some implications of our approach and identifying areas for further research.

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 sufficiently definite and specific to justify enforcement.³¹⁷ 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

³¹⁵ See Verkerke, *Legal Ignorance*, *supra* note 7.

³¹⁶ See *supra* note ____.

³¹⁷ See Verkerke, *Empirical Perspective*. Although we focus here on job security terms, courts may also find a binding restrictive covenant or agreement to arbitrate. But current caselaw similarly analyzes these clauses in isolation from the rest of the employment relationship. Thus, the fragmented approach we describe in Parts I & II treats all employment contract claims as separate questions of contract formation rather than as elaborations or modifications of an ongoing contractual relationship.

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 employment-at-will 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.³¹⁸ 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. In the world of commercial contracts, there is nothing problematic or even unusual 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.³¹⁹ Common law cases similarly hold that a service contract exists despite its indefinite duration or even an express at-will termination provision.³²⁰

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

³¹⁸ See *supra* Part II (contrasting the hyper-relational employment relationship with the unilateral reward paradigm).

³¹⁹ See Uniform Commercial Code § 2-309. 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 (N.Y. 1917).

³²⁰ See, e.g., *Carrico*, 490 N.E.2d at 976; *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 644–45 (2d Cir. 1945).

implement a modern understanding of good faith in contractual relations that confer wide discretion on one party.³²¹

The full implications of requiring reasonable duration and reasonable notice of termination are beyond the scope of this Article.³²² 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 has provoked considerable controversy.³²³ But if at-will employment must persist for a reasonable duration and during a reasonable notice period, then it is also sufficient to support enforcement of any reciprocal promise. Those same requirements also 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 work.³²⁴ Among jurisdictions that have considered this issue, most have held that an at-will termination provision absolutely precludes such an employee's contract claim.³²⁵ 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.

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,

³²¹ 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. 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 also include constraints on exculpatory language and remedies for contractual overreaching.

³²² One of us has explored the implications of reasonable notice elsewhere. *See* Arnow-Richman, *Reasonable Notice*.

³²³ *See, e.g.,* Camco v. Baker, 936 P.2d 829, 832 (Nev. 1997).

³²⁴ *See* Grouse v. Group Health Plan, 306 N.W.2d 114 (Minn. 1981).

³²⁵ *See* Petite v. DSL.net, Conn. Ct. App. No. AC27557 (July 10, 2007); Sartin v. Mazur, 375 S.E.2d 741 (Va. 1989); Slate v. Saxon, 999 P.2d 1152 (Or. App. 2000), *review denied*, 6 P.3d 1105 (Or. 2000).

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.”³²⁶ 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 they comprise a single agreement. As we have seen, courts have isolated an individual term of employment and asked incorrectly whether that term alone could constitute an offer that might ripen into a binding contract.³²⁷ But contemporary contract law rejects this approach. It requires courts to harmonize and reconcile the available evidence of the parties’ intent.³²⁸ This more modern framework would transform 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 disclaimers as conclusive proof of the parties’ intent. To the extent that such a disclaimer 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.³²⁹

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 their contractual status, nor does it undermine the legitimacy of the overall agreement.³³⁰ It merely suggests

³²⁶ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989). There is a rich literature addressing why such gaps exist and how courts should fill them. See, e.g., *id.*; Omri Ben-Shahar, “Agreeing to Disagree”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 *WIS. L. REV.* 389. 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).

³²⁷ See, e.g., *Anthony v. Jersey Cent. Pwr.*, 143 A.2d 762 (N.J. Super. 1958) (deferred benefits); *Woolley*, 491 A.2d 1257 (handbook terms); see generally *supra* Parts I & II.

³²⁸ See, e.g., *Byme v. Ivy*, 241 S.W.3d 229, 236-40 (Ark. 2006).

³²⁹ See, e.g., *Helle v. Landmark*, 472 N.E.2d 765, 775 (Ohio App. 1984).

³³⁰ 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

that the parties' contract includes wide areas of contractually conferred discretion. And that discretion aligns with the real-life experiences and expectations of workers. Employees 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.

Under contemporary contract law, a party may only exercise contractually conferred discretion consistently with a duty of good faith and fair dealing.³³¹ Good faith places modest, but legally significant, limits on the exercise of contractual rights. Under an output (or requirements) contract, for example, one party has the right to determine the quantity for sale (or purchase). But that quantity must be reasonable in relation to their needs or capabilities. 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.³³² Good faith should also constrain an employer's reserved discretion to modify handbook policies. Just as this duty imposes a requirement of reasonable notice for termination decisions, so it should require similar notice when altering an enforceable term of the employment relationship.³³³

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

procedures renders this "contract" illusory. *See, e.g.,* *Cheek v. United Healthcare*, 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. The implied constraints we discuss in the text ordinarily would ensure that such a commitment was sufficiently binding to satisfy the minimal requirements of consideration doctrine.

³³¹ *See* 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2022).

³³² *See* 3 WILLISTON ON CONTRACTS § 7:12 (4th ed. 2022).

³³³ Note that, in this respect at least, the current majority rule of reasonable notice for modification conforms with the strictures of good faith. *See Asmus*, 999 P.2d 71; *Bankey*, 443 N.W.2d 112. It would be a salutary result to base that rule on a firmer foundation than the fictitious right to modify a unilateral contract.

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 employment relationships.

In this Article, we deconstruct 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. Employment is a far deeper and richer hyper-relational setting that confounds the simplistic reward paradigm of unilateral contracts. To force this round peg into the square hole of unilateral theory, 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 Realist revolution that transformed contract law beginning in the mid-20th 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.³³⁴ 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.³³⁵ Thus, any recognition of new 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.³³⁶

In this Article we have laid the groundwork for answering such0 questions. The doctrinal nonsense we document in Part I and Part II currently obscures all these crucial issues. Reframing employment-at-will 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. At the very least, if courts insist on using formal contract doctrine to resolve employment contract disputes, we hope they will abandon antiquated, ill-fitting rules and instead embrace contemporary contract theory and doctrine.

³³⁴ We are currently hard at work on a companion paper that develops and defends such an alternative framework. See Rachel Arnow-Richman & J.H. Verkerke, *Reconstructing Employment Contract Law* (unpublished manuscript on file with the authors).

³³⁵ See *Magnum v. Anaconda Indus.*, 479 A.2d 781, 784-87 (Conn. 1984).

³³⁶ Cf. UCC § 2-316 (restricting exclusion or modification of warranties).