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Beyond Words: An Empirical Study of Context in Contract Creation

Abstract
This article reports on an empirical study into how judges interpret contracts. In general, the study demonstrates that key participants do look to context for guidance on issues of contract creation. Part II summarizes the modem legal perspective on these questions, as stated in the Restatement (Second) of Contracts, as posited in the scholarly debate about relational contracts, and as exemplified in case law regarding employment contracts. Part III describes a study designed to capture the thinking on these questions of participants in an employment contract. Part IV presents the results obtained from respondents who represented the parties to the contract, namely the employee and the company's human resources manager, as well as results from another important group of respondents-lawyers assigned to represent the employee or the company. Part V summarizes the numerical results and discusses the implications of the study.

Keywords
Contract law, language, relational contract theory, employment, human resources

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BEYOND WORDS: AN EMPIRICAL STUDY OF CONTEXT IN CONTRACT CREATION

DEBORAH A. SCHMEDEMANN*

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I. INTRODUCTION

What makes a contract? What fixes its meaning? Words alone? Or also the parties' conduct and circumstances? These questions have intrigued, if not bedeviled, contract theorists and judges for many years.[1]

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1. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 3.6, 3.9, 7.7–.14 (3d ed. 1999).

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This article reports on an empirical study into these questions. In general, the study demonstrates that key participants *do* look to context for guidance on issues of contract creation.

Part II summarizes the modern legal perspective on these questions, as stated in the Restatement (Second) of Contracts, as posited in the scholarly debate about relational contracts, and as exemplified in case law regarding employment contracts. Part III describes a study designed to capture the thinking on these questions of participants in an employment contract. Part IV presents the results obtained from respondents who represented the parties to the contract, namely the employee and the company's human resources manager, as well as results from another important group of respondents—lawyers assigned to represent the employee or the company. Part V summarizes the numerical results and discusses the implications of the study.

II. CONTRACT LAW

The question of "creation" of a contract, as the term is used in this article, is as follows: Have the parties created a contract that obligates the promisor to do the act the promisee claims to be owed? Contract creation thus entails two issues that the law generally treats as distinct. First, the issue of formation: Has a contract been made? Second, the issue of interpretation: What does the contract mean? As to both of these issues, the matter of context arises: Does the text alone, whether oral or written, govern, or does the context of the words—the parties' conduct and circumstances—also come into play?

A. *The Second Restatement*

On the issue of *contract formation*, the authors of the Restatement (Second) of Contracts (Restatement) generally require, in addition to consideration, "a manifestation of mutual assent to the exchange."[2] Mutual assent is manifested when both parties "either make a promise or begin or render a performance."[3] This occurs through "written or spoken words," actions, or failure to act.[4] Whatever their forms, the manifestation of each party must occur in reference to the other.[5]

Generally mutual assent is manifested through offer—a manifestation of willingness to bargain that justifies the other in believing assent will conclude

2. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981). The exceptions are certain formal contracts and reliance-based exceptions to the consideration requirement. *Id.* §§ 17(2), 82–94.

3. *Id.* § 18.

4. *Id.* § 19(1); *see also id.* § 4 ("A promise may be stated in words or . . . inferred from conduct."). Thus, the distinction between express and implied contracts is without legal significance. *Id.* § 4 cmt. a. On silence or inaction as acceptance, see RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

5. *Id.* § 23.

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the bargain[6]—followed by acceptance[7]—"a manifestation of assent to the terms" of and in the manner invited by the offer.[8] However, this two-step process is not necessary.[9] Indeed, mutual assent can exist even though the time of formation cannot be determined.[10]

The Restatement authors chose "manifestation of assent" in lieu of "meeting of the minds" to underscore that apparent, as much as actual, assent suffices.[11] In other words, the Restatement embraces the modern objective theory of contract formation over the earlier subjective theory.[12] Thus, if a promisor does not intend to be legally bound, but fails to manifest that intention, the promise may create a contract.[13]

The Restatement authors call for an expansive approach regarding evaluation of a party's manifestations. As to both verbal and nonverbal manifestations, various facets of the parties' situation are relevant.[14] Furthermore, when confusion arises as to whether a manifestation is contractual, the issue is not only what each party knew but also what each party had reason to know.[15] The latter inquiry may be seen as asking what a reasonable person in the position of the recipient of the manifestation would understand by it.[16]

On the issue of *contract interpretation*, the Restatement authors would honor the parties' text, take into account the parties' conduct, and consider "all the circumstances" in an effort to discern the parties' purposes.[17] The authors favor this expansive approach without regard to whether the contract language is ambiguous.[18] The Restatement deems express terms most weighty, followed by contextual factors in order of weight applied: first course of performance, then course of dealing, and finally usage of trade.[19]

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6. *Id.* §§ 22(1), 24.
7. *Id.* § 22(1).
8. *Id.* § 50(1).
9. *Id.* § 22(2).
10. RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1981). In particular, when a bargain is fully performed on one side, there is no need to determine the moment when the contract was formed. *Id.* § 18 cmt. b.
11. *Id.* § 17 cmt. c.
12. *See* FARNSWORTH, *supra* note 1, § 3.6.
13. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21.
14. *Id.* § 19 cmt. a ("[a] wide variety of elements of the total situation" as to conduct); *see id.* § 20 cmt. b ("the context and . . . the prior experience of the parties").
15. *See id.* § 20 (framing the options in which the parties experience misunderstanding as to their manifestations).
16. *See id.* § 19 cmt. b (defining "reason to know" with regard to manifestation by conduct); *see also* FARNSWORTH, *supra* note 1, § 3.7.
17. RESTATEMENT (SECOND) OF CONTRACTS § 202(1).
18. *Id.* § 202 cmt. a.
19. *Id.* § 203(b).

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The text is the primary point of reference.[20] Words are interpreted in light of their linguistic context, whether that context be general or technical.[21]

In addition, the parties' course of performance under the contract is to be given great weight.[22] Course of performance involves repeated occasions for performance by one party, knowledge and opportunity to object on the part of the other, and acceptance or acquiescence by that other.[23]

Furthermore, the agreement is to be interpreted consistently with any pertinent course of dealing between the parties.[24] Course of dealing involves previous conduct by the parties that establishes a common basis of understanding.[25]

Finally, the agreement is to be interpreted consistently with trade usage.[26] Trade usage is a practice that is regularly observed in the trade or place, that gives rise to an expectation that it will be observed in a particular instance, where both parties know or have reason to know of the practice, and neither knows or has reason to know of an inconsistent meaning held by the other.[27]

Overall, the Restatement's approach to the question of contract creation is flexible and expansive. While text certainly plays a significant role in both the making and the meaning of a contract, context also plays an important part. The parties' conduct speaks for them, and their circumstances are taken into account when issues of contract creation arise.[28]

B. *Relational Contract Theory*

Appreciation of context is the hallmark of relational contract theory as developed by Ian Macneil beginning in the 1960s and continuing as the subject

20. *See id.*

21. *Id.* § 202(3).

22. *Id.* § 202(4). If course of performance cannot reasonably be interpreted consistently with express terms, then waiver, modification, or mistake may have occurred. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981).

23. *Id.* § 202(4).

24. *Id.* § 202(5). However, the parties may choose to alter their own course of dealing. *Id.* § 223 cmt. b.

25. *Id.* § 223.

26. *Id.* § 202(5). However, the parties may choose to contradict trade usage. RESTATEMENT (SECOND) OF CONTRACTS § 222(3) (1981) (stating usage of trade in vocation or trade in which the parties engage supplements their agreement "unless otherwise agreed").

27. *Id.* § 222.

28. The drafters of the Uniform Commercial Code similarly opted for a flexible and expansive approach to questions of contract creation. *See, e.g.*, U.C.C. § 1-303 (course of performance, course of dealing, and usage of trade are all relevant, in that order); § 2-202 (use of course of dealing, course of performance, usage of trade to explain final written expression); § 2-204(1)-(2) (formation in any manner sufficient to show agreement, including conduct; moment of making contract need not be determinable); § 2-207(3) (conduct can establish contract although writings do not).

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of considerable discussion today.[29] In a recent symposium on relational contract theory, Professor Feinman compared modern contract law with relational contract theory:

> Neo-classical contract [including the Second Restatement] emphasizes the autonomy of individuals and the limited liability that autonomy necessitates. It focuses, therefore, on the agreement process as an exercise of autonomy to create libaility, and tries to construct the expectations of the parties from their agreement and the context that gives their agreement meaning. In contrast, relational contract emphasizes the interdependence of individuals in social and economic relationships. Because its paradigmatic unit of inquiry is the extensive relationship rather than the discrete transaction, relational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection.[30]

In that same symposium, Professor Macneil summarized his work. He defined "contract" as "relations among people who have exchanged, are exchanging, or expect to be exchanging in the future."[31] His scholarship is perhaps best known for its spectrum of contracts. According to Professor Macneil, although all exchanges occur within relationships, some are relatively "discrete" while others are relatively "relational."[32] Compared with discrete contracts, relational contracts are longer in term, are more difficult to articulate clearly and fully at the outset (and thus typically include open terms, reservations of discretion, and dispute resolution mechanisms), and involve greater interdependence both between the parties and between the parties and others interested in the transaction.[33] Professor Macneil associates certain contracting behaviors and norms with contracts of a certain type: implementation of planning and effectuation of consent with as-if-discrete contracts; role integrity, contractual solidarity, and harmonization with the social matrix with relational contracts.[34]

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29. For both a history and a lively debate, see the articles in *Relational Contract Theory: Unanswered Questions—A Symposium in Honor of Ian R. Macneil*, 94 NW. U. L. REV. 737 (2000).

30. Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 748 (2000).

31. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 878 (2000).

32. Macneil now prefers a different set of terms: "as-if-discrete" (which recognizes that there is some enveloping relationship) and "intertwined" (so that the end of the spectrum does not have the same label as the spectrum itself). *Id.* at 894–95.

33. *See* Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 823–24 (2000).

34. Macneil, *supra* note 31, at 896–97.

In light of this description of contracting behavior, Professor Macneil developed "relational contract theory" with four "core propositions":

> First, every transaction is embedded in complex relations.
> Second, understanding any transaction requires understanding all essential elements of its enveloping relations.
> Third, effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.
> Fourth, combined contextual analysis of relations and transactions is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of transactions.[35]

Professor Macneil commends this rich analysis to lawyers, judges, administrators, and academics engaged in an analysis of contract cases, for they are "like surgeons who need often to remind themselves that it is patients, not just organs that they are carving up."[36]

Over the years, other contract scholars have come to agree with much of Professor Macneil's descriptions of contracts.[37] Other contract scholars also have focused on the merits of contextual analysis,[38] some through cross-disciplinary and empirical work. Recently, for example, Professor Mertz has drawn on the linguistic principle of pragmatics: To understand an utterance, one must know about the relationship between the speaker and the audience, their previous communications, the occasion, the setting, and so on.[39] And Professor Bernstein has examined the actual significance, or lack thereof, of trade usage and commercial standards in the diamond trade.[40]

Not surprisingly, some contract scholars disagree with Professor Macneil's conclusions as to the best legal methodology for deciding contract disputes.[41]

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35. *Id.* at 881.

36. *Id.* at 886.

37. *See* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000) ("We are all relationists now. . . . Contract, we now know, is complex and subjective and synthetic in every sense of those terms.").

38. A prominent example is the Wisconsin contract materials, currently presented in STEWART MACAULAY, ET AL., CONTRACTS: LAW IN ACTION (1995). *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000).

39. Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—"Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 921–22 (2000).

40. *See* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

41. *See, e.g.*, Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000); Scott, *supra* note 37.

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As shown in the next section, in deciding contract disputes involving employer and employee—a species of contract widely deemed relational[42]—courts also vary in their approaches.

C. *The Law of Employment Contracts*

The case law of employment contracts pertaining to job security,[43] the type of contract explored in the study herein, displays both the primacy of text and the relevance of context. Employment contract case law operates against the backdrop of the employment-at-will rule, which, according to the classic formulation, provides that the employer may discharge an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong."[44] That default rule is subject to contractual override in certain circumstances.

Pine River State Bank v. Mettille[45] exemplifies the primacy of text. Shortly after he completed his probationary period, Mr. Mettille received an employee handbook covering performance evaluation, job security, and the procedural steps to be followed when employees failed to meet job requirements. The bank intended the handbook to be a source of information, not a contract.[46] About a year later, the bank fired Mr. Mettille for deficiencies in his loan files and then sued him for defaulting on two notes held by the bank; Mr. Mettille counterclaimed for breach of contract.[47]

The Minnesota Supreme Court stated that the general rule is that employment is terminable at will subject to limitation by the parties.[48] A handbook provision on job security becomes a binding contract when the language constitutes an offer, the offer is disseminated to the employee, and the employee continues to work, thereby accepting the offer and providing consideration.[49] This applies even when the offer is disseminated after the employee is hired.[50]

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42. *See* Speidel, *supra* note 33, at 826; *see also* Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 771–72 (1998).

43. The following discussion is illustrative only. For additional case descriptions, see LEX K. LARSON, 1 UNJUST DISMISSAL ch. 8 (1996 & Supp. 1997-2001) and HENRY H. PERRITT, JR., 1 EMPLOYEE DISMISSAL LAW AND PRACTICE (4th ed. 1998 & Supp. 2003). For a critique of the legal frameworks in this area, which include unilateral contracts and promissory estoppel, see Stephen F. Befort, *Employee Handbooks and the Legal Effects of Disclaimers*, 13 INDUS. REL. L.J. 326 (1991/1992) and 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 (1986).

44. Payne v. W. & Atl. R.R., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

45. 333 N.W.2d 622 (Minn. 1983).

46. *Id.* at 624–26.

47. *Id.* at 625.

48. *Id.* at 628.

49. *Id.* at 626–27.

50. *Id.* at 629–30.

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The court focused on the language the bank had chosen because that language governs over any contrary subjective intentions.[51] To form the basis for a contract, that language must be "definite" and more than "general statements of policy."[52] The court parsed the language in the bank's handbook, finding some of it definite enough to meet the definiteness requirement[53] and some of it not definite enough.[54]

Shah v. American Synthetic Rubber Corp.[55] illustrates the relevance of context. Mr. Shah was a chemical engineer fired after a little over a year of employment at American.[56] He sued for breach of contract, alleging a contract requiring cause for termination. The trial court granted American summary judgment, and the appellate court affirmed.[57]

The majority[58] of the Kentucky Supreme Court wrote:

> The duration of an employment contract must be determined by the circumstances of each particular case, depending upon the understanding of the parties as ascertained by inference from their written or oral negotiations and agreements, the usage of business, the situation and objectives of the parties, the nature of the employment, and all circumstances surrounding the transaction.[59]

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51. Pine River State Bank v. Mettille, 333 N.W.2d 622, 630 n.6 (Minn. 1983).

52. *Id.* at 626.

53. The following is a portion of the definite language:

> Disciplinary Policy: . . . If an employee has violated a company policy, the following procedure will apply: 1. An oral reprimand . . . 2. A written reprimand . . . 3. A written reprimand and a meeting with the Executive Vice President and possible suspension from work without pay for five days . . . 4. Discharge from employment for an employee whose conduct does not improve as a result of the previous actions taken. In no instance will a person be discharged from employment without a review of the facts by the Executive Officer.

Id. at 626, 630 n.3.

54. The following is a portion of the indefinite language:

> Job Security: Employment in the banking industry is very stable. It does not fluctuate up and down sharply in good times and bad, as do many other types of employment. We have no seasonal layoffs and we never hire a lot of people when business is booming only to release them when things are not as active.

Id. at 630, 625 n.2.

55. 655 S.W.2d 489 (Ky. 1983).

56. *Id.* at 490.

57. *Id.*

58. Three justices dissented on the grounds that tendering services as an employee does not suffice as consideration adequate to create a contract overriding the at-will rule. *Id.* at 493 (Stephenson, J., dissenting).

59. *Id.* at 490 (citing Putnam v. Producers' Live Stock Mktg. Ass'n, 75 S.W.2d 1075, 1076 (Ky. 1934)).

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Where the evidence shows that the parties have indeed contracted for protection against termination without cause, the employee need only perform the promised services to make the contract binding.[60]

The court reviewed the following evidence: Mr. Shah's educational and employment background; the benefits at a previous employer that Mr. Shah sacrificed to join American; American's "sales pitches;" a contract providing for a ninety-day probationary period; a contract apparently referring to termination for cause and procedures to that effect;[61] examples of employees with twenty years of service; and quotations from the personnel director defining "for cause" as "something like work connected [poor] performance, insubordination, violation of policy or rules, or lack of work."[62] The court also noted that the parties had chosen the language customary in unionized work settings in which job protection is routine.[63] The court determined that the evidence was sufficient for Mr. Shah to defeat the employer's motion for summary judgment.[64]

The *Shah* court is correct in its observation that job protection in unionized settings is routine. Most collective bargaining agreements require the employer to have "just cause" to discipline or discharge an employee.[65] For a discharge to be based on just cause, the employee must have engaged in misconduct sufficient to justify loss of employment,[66] and the employer must have afforded the employee due process.[67]

The typical collective bargaining agreement assigns the primary responsibility for enforcement of the contract to one or more arbitrators.[68] The courts are to enforce the arbitrator's award unless it fails to "draw[] its essence from the collective bargaining agreement."[69] In the words of a leading text on labor arbitration, "[a]rbitrators seek to interpret collective agreements to reflect the intent of the parties."[70] Arbitrators rely on a range of standard techniques[71] and context[72] in parsing the parties' language. Among the weightiest

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60. *Id.* at 492.

61. The contents of the written document are unclear.

62. Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489, 491 (Ky. 1983).

63. *Id.* at 491–92.

64. *Id.* at 492.

65. PERRITT, *supra* note 43, § 5.5, at 268.

66. *See id.* §§ 5.5–5.8.

67. *Id.* § 5.5, at 269–70 (forewarning of the consequences of the conduct, fair investigation before discipline, substantial and compelling evidence, and proportionate penalty).

68. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 8 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997; Edward P. Goggin & Alan Miles Ruben eds., Supp. 1999).

69. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); *accord* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509-10 (2001); W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 764 (1983).

70. ELKOURI & ELKOURI, *supra* note 68, at 479.

71. Examples include construing the agreement as a whole and preferring specific over general language. *See generally id.* at 470–515.

72. *Id.* at 479–80.

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considerations taken into account is the parties' own past practice or custom.[73] For example, if the parties have settled a similar dispute, that settlement may influence the arbitrator.[74] Industry practice and the practices of the same employer or union with a different contracting partner are also important.[75]

III. STUDY DESIGN AND PARTICIPANTS

Given contract law's aim to give effect to the parties' intentions, a fair question is: How do the *parties* view their contract? Also, how do lawyers who counsel parties view the contract? The empirical study described in this part was designed to address these questions.

A. *Policy Capturing*

The methodology employed in the study is called "policy capturing."[76] In policy capturing, the researcher selects the critical factors to be studied and writes varying versions of each factor. The researcher then devises scenarios, each containing one version of each factor. The respondents read the scenarios one by one and answer the same questions about each scenario. The questions address the judgments of interest that the researcher has hypothesized to be influenced by the factors.[77] Because the answers are numerical, the respondents' answers to the questions about the various scenarios can be analyzed statistically.[78]

Policy capturing is an efficient and effective method for studying decision-making for several reasons. It is more feasible to obtain a large data set through policy capturing than through field research (that is, interviewing or observing employees and human resource managers).[79] One can focus tightly on a limited set of critical factors and eliminate other factors.[80] The cognitive biases that taint self-reporting of decision-making are minimized if not eliminated.[81] When the factors, versions, scenarios, and questions are realistically drawn, policy

---

73. *Id.* at 507, 630–54.

74. *Id.* at 508–09.

75. *Id.* at 507–08.

76. For a general discussion of policy capturing, see Kenneth M. York, *Defining Sexual Harassment in Workplaces: A Policy-Capturing Approach*, 32 ACAD. MGMT. J. 830, 832–33 (1989).

77. *Id.* at 832.

78. For examples of policy capturing analysis of other employment issues with legal dimensions, see *id.*; Denise M. Rousseau & Ronald J. Anton, *Fairness and Implied Contract Obligations in Job Terminations: A Policy-Capturing Study*, 1 HUM. PERFORMANCE 273 (1988); Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994).

79. Caroline L. Weber & Sara L. Rynes, *Effects of Compensation Strategy on Job Pay Decisions*, 24 ACAD. MGMT. J. 86, 91–92 (1991).

80. *Id.* at 92.

81. *Id.*

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capturing results can predict actual decisions made in similar real-world situations.[82]

B. Scenarios and Questions

This study explored termination of employment in breach of an employment contract for several reasons. Most people have some experience with employment, so they understand how a contract might be formed and breached in an employment setting as well as how significant the employment contract is to all concerned.[83] Employment contracts have features similar to those of many other contracts in today's economy: generally they are drafted by one party and presented to the other, they are not subject to negotiation, many individuals are bound by the same contract with the drafting entity, and they govern relationships lasting some years. Finally, the study reported here builds on a previous study, using the same methodology, that focused on the textual factors influencing contract formation in employment contracts.[84]

In this study, the respondents first read the following basic situation:

> The employee had been working for the company for several years. The employee has just been terminated for "poor performance," effective immediately. There is a company document stating that the company gives an employee terminated for poor performance the opportunity to discuss the situation with management, that is to know the reasons for termination and to present his or her point of view. The employee was not given this opportunity.

The opening material also assigned the respondent a role in the situation: the employee,[85] the company's human resource manager, the employee's lawyer, or the company's lawyer.

Respondents then read twelve different scenarios, each consisting of three sentences. Each sentence presented a version of one of three factors. The first factor was *company practice*, presented in two versions:

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82. *See id.* at 91–92; Irwin P. Levin et al., *External Validity Tests of Laboratory Studies of Information Integration*, 31 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 173 (1983).

83. For an overview of the literature on employment contracts, see Schmedemann & Parks, *supra* note 78, at 664–67, 678–80.

84. *See* Schmedemann & Parks, *supra* note 78 (finding that the most influential factors are the strength of the verb used in the promissory language and the presence of a disclaimer; legal jargon, specificity, and a signature block are less influential).

85. The basic situation, scenarios, and questions referred to "you" rather than "the employee" respondents assigned to take the perspective of the employee.

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> When the company has terminated other employees, it has *nearly always* given the employee the opportunity to discuss the situation with management.
>
> When the company has terminated other employees, it has *never* given the employee the opportunity to discuss the situation with management.

The second factor was *co-worker perception*, also presented in two versions:

> Over the years, co-workers have told the employee that they believe that the company must make good on the promises in the document.
>
> Over the years, co-workers have told the employee that they believe that the company can simply ignore the promises in the document if it wishes.

The third factor was *timing*, presented in three versions:

> The employee first read the document during the interview before the employee was hired at the company.
>
> The employee first read the document a year ago, after working at the company for two years.
>
> The employee first read the document just last week, after the employee's employment was terminated.

The order in which the three factors appeared in each of the twelve scenarios was selected at random, so that no factor appeared more or less important than the others by virtue of their sequence.[86]

Following each scenario were two identical sets of questions. The first set was preceded by the following assumption:

> Assume first that the company document is an employee handbook; there is no union at the company.

The second set was preceded by the following assumption:

86. The order in which each respondent read the scenarios also was set by random draw so that the twelve scenarios appeared in different orders for the different respondents.

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> Assume now that the company document is a labor agreement between the company and the union that represents the employees of the company.

Through this device, the fourth factor—*unionization*—was presented. This rather obvious presentation was selected for the unionization factor for two reasons: previous research indicated that people do indeed perceive a difference in legal rights between unionized and non-unionized employees (the latter having greater rights than the former),[87] and this presentation reduced both the number of scenarios and the number of factors within each scenario the respondents were asked to read, thereby reducing the risk of respondent fatigue.

Both the union and non-union sets of questions included these two questions:

> The employer has breached its *legal contract* with the employee.
>
> 1 2 3 4 5 6 7
> strongly disagree strongly agree
>
> The employer has violated its moral *obligation* to the employee.
>
> 1 2 3 4 5 6 7
> strongly disagree strongly agree

These questions stated the two judgments of interest: legal contract and moral obligation. The one-to-seven scale provided respondents with an opportunity to signify not only disagreement, neutrality, or agreement but also some degree of conviction.

C. Respondents

There were 167 respondents. Eighty-nine were students in one of two graduate programs—law and business. Both programs are located in the northern midwest and draw students from a wide range of backgrounds and occupations. The students had not yet studied the matters explored in the study when they filled out the questionnaires and were assigned the role of the employee, a role most had, in fact, filled at some time.

The remaining respondents were experts in human resource management or law whose participation was solicited through a mailing or during continuing education programs they attended. Twenty-three were human resource managers without legal training; they were assigned the role of human resource

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87. *See* Schmedemann & Parks, *supra* note 78, at 653–56.

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manager for the company. Fifty-five lawyers participated; thirty-two were assigned the role of the company's lawyer, while twenty-three were assigned the role of the employee's lawyer.[88]

The pool was nearly evenly split between men (52%) and women (48%).[89] Most respondents (nearly 73%) were between twenty-six and fifty years old. Forty-nine percent earned $45,000 or less per year, while 51% earned more. Furthermore, 51% had ten or fewer years of work experience, while 49% had more. Less than a quarter (22%) had owned their own businesses, while a somewhat larger share (29%) had been members of labor unions. Only three respondents had sued an employer, although over one-fifth (22%) were well acquainted with someone who had done so. A dozen had been sued by an employee, and about 15% were well acquainted with someone who had been sued.

D. *Background Questions About Legal Entitlements*

Respondents were asked their perceptions of the law in the area of employee rights to due process upon termination of employment against which any contractual arrangements would operate. They were asked to circle a number from one to seven indicating agreement or disagreement with the following statements:

> 1. The employer may fire the employee WITHOUT giving the employee AN OPPORTUNITY TO KNOW OR REFUTE the employer's reasons.
> 2. The employer may fire the employee ONLY if the employer EXPLAINS THE REASONS for the firing to the employee.
> 3. The employer may fire the employee ONLY after the employer CONSIDERS THE EMPLOYEE'S EXPLANATION.
> 4. The employer may fire the employee ONLY if an UPPER LEVEL MANAGER AGREES with the supervisor's decision to fire the employee.
> 5. The employer may fire the employee ONLY if an ARBITRATOR (expert outside the company) AGREES with the dismissal.

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88. The numbers differ because of the vagaries of responses to solicitations to participate. Equal numbers of company lawyer and employee lawyer questionnaires were distributed, but the numbers of completed questionnaires differed.

89. Nearly all (92%) were white.

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Respondents answered these questions twice: first, on the assumption that the employee was not represented by a union and second, on the assumption that the employee was represented by a union.

Table 1 presents the mean (average) scores for each question, first for the non-union and then the union settings, for the four respondent groups. Note that a score of four represents neutrality.

Table 1. Legal Entitlements

Question	Non-union	Union	Stat. Sig.
Employee Perspective			
1. No rights	2.66	2.03	*
2. Explanation of reasons	4.30	4.82	
3. Consideration of employee viewpoint	2.78	3.56	*
4. Agreement of upper-level manager	2.87	3.31	
5. Agreement of outside arbitrator	1.83	3.30	*
Human Resource Manager Perspective			
1. No rights	3.77	2.73	
2. Explanation of reasons	3.27	5.09	*
3. Consideration of employee viewpoint	2.82	3.95	*
4. Agreement of upper-level manager	2.73	3.23	
5. Agreement of outside arbitrator	1.36	2.82	*
Company Lawyer Perspective			
1. No rights	5.16	2.90	*
2. Explanation of reasons	2.42	4.03	*
3. Consideration of employee viewpoint	1.90	3.80	*
4. Agreement of upper-level manager	2.00	3.00	*
5. Agreement of outside arbitrator	1.10	3.27	*
Employee Lawyer Perspective			
1. No rights	5.30	2.95	*
2. Explanation of reasons	2.48	4.27	*
3. Consideration of employee viewpoint	1.96	4.00	*
4. Agreement of upper-level manager	1.78	2.61	
5. Agreement of outside arbitrator	1.14	3.55	*

* Statistically significant difference (P<0.05) between non-union and union means.

Regarding the broad statement that employees are without rights, the employees and human resource managers disagreed for both the non-union and union settings. However, they did agree on only one of the statements about specific rights—the right to the employer's explanation of the reasons for the termination. Both employees and human resource managers agreed that employees in the union setting have this right, with the employees barely agreeing about this right in the non-union setting. For both employees and human resource managers, there was a statistically significant difference[90] between the means for non-union and union settings as to three of the five questions, with employees represented by a union viewed as more protected than unrepresented employees.

By comparison, with respect to the statement that employees are without rights, the two lawyer groups (those representing the company and those representing the employee) firmly agreed as to unrepresented employees and disagreed as to represented employees. Not surprisingly, they strongly disagreed with all of the statements asserting that unrepresented employees had specific rights. As to represented employees, the lawyers were neutral as to the statements regarding an explanation of the employer's reasons and consideration of the employee's viewpoint, and they disagreed with the remaining statements. For the lawyers, there was a statistically significant difference between the means for union and non-union settings for nearly all questions[91] with represented employees viewed as more protected than unrepresented employees.

In broad strokes, these results demonstrate that respondents by and large believed that employees do not enjoy the procedural rights referred to in the document as a matter of law, with the possible exception being the employer's explanation of its reasons for termination.[92] Put another way, respondents would look to the employment contract, rather than the law, as the source of such protection.[93] In addition, these results demonstrate that respondents perceived that represented employees stand on a different legal footing than unrepresented employees. This perception is well founded, for collective

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90. The statistical model is ANOVA (analysis of variance). For further technical detail, contact the author.

91. The exception was the question about upper-level management's agreement as answered by the employee lawyers.

92. As to this specific exception, respondents have some support in the law of Minnesota, where the study took place. *See* MINN. STAT. § 181.933 (2002 & Supp. 2003).

93. *But see* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (empirical study of Missouri workers showing widespread mistaken assumptions that the law protects against unjust discharge); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (finding same results in New York and California and suggesting that employer practices may give rise to a fairness norm that workers perceive to be a legal rule).

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bargaining agreements requiring just cause have predated the case law enforcing job security contracts of unrepresented employees.[94]

IV. RESULTS

The primary analysis entailed calculating the means of the responses by the groups of respondents to the conditions presented through the scenarios and assumptions. Through this analysis,[95] one can answer the following questions:

- Did the respondents perceive that the language presented had any contractual or moral effect?

- If so, how influential are the following four factors?

    - Unionization
    - Company Practice
    - Co-Worker Perception
    - Timing

As noted above, graduate students took the perspective of the employee to the contract, human resource managers took the perspective of the company, and lawyers were assigned to represent either the employee or the company.

A. Did the respondents perceive that the language presented had any contractual or moral effect?

The short answer is: Yes, more or less. Table 2 presents the overall means for each respondent group for union and non-union settings and for both legal contract and moral obligation judgments. All twelve means fall between 4.37 and 5.93. Recall that four signifies neutrality and seven signifies "strongly agree." Thus, a company document can create legal and moral obligations.

As to the legal contract judgment, note that the means for the union setting are considerably higher than the means for the non-union setting across all four respondent groups. Also note that the means within the union and non-union settings vary little between respondent groups.[96]

As to the moral obligation judgment, note that the means for the non-union and union settings generally vary little across all four respondent groups. Also

94. PERRITT, *supra* note 43, § 5.3.

95. The statistical model is ANOVA (analysis of variance). For further technical detail, contact the author.

96. The chief exception is the low mean for the employee lawyers as to the union setting.

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Table 2. Overall Means of Respondent Groups

Employees	Human Resource Managers	Employee Lawyers	Company Lawyers
Legal Contract—Non-union			
4.60	4.90	4.42	4.53
Legal Contract—Union			
5.70	5.93	4.93	5.85
Moral Obligation—Non-union			
5.38	5.86	4.53	4.54
Moral Obligation—Union			
5.54	5.82	4.59	4.37

note that the means within the union or non-union settings do vary among respondent groups. The human resource managers' mean is the highest, followed by the employees' mean, and then the two lawyer groups' means.[97]

Finally, note an interesting pattern between the legal contract and moral obligation results. For all respondent groups, the same pattern emerges: the moral obligation is weightier than the legal contract in the non-union setting, while the legal contract is equal to or weightier than the moral obligation in the union setting. Perhaps respondents envision an optimal balance between the job security interest of employees and the managerial prerogative interest of employers, which is represented by the concept of moral obligation. They perceive that employees in non-union settings are under-protected by the law relative to that optimum and that employees in union settings are properly or over-protected by the law.[98]

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97. Perhaps lawyers are less inclined than other people to ascribe moral responsibility because their training and work require them to discern and value the interests of both parties in a dispute. Thus, most matters are seen as a weighing of interests rather than a moral issue.

98. For an interesting discussion of the contrast between the legal and moral realms and of the possible neurological grounds for that contrast, see Oliver R. Goodenough, *Mapping Cortical Areas Associated with Legal Reasoning and Moral Intuition*, 41 JURIMETRICS 429 (2001).

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B. How influential was unionization?

Table 3A presents the results of the employees and human resource managers as to the unionization factor. As to the judgment of legal contract, the employees more firmly agreed that a contract had been created in the union setting (mean of 5.70) than in the non-union setting (mean of 4.60). This difference is statistically significant. Similarly, the human resource managers more firmly agreed that a contract had been created in the union setting (mean of 5.93) than in the non-union setting (mean of 4.90). This difference is also statistically significant. As to the judgment of moral obligation, the differences are smaller[99] and not statistically significant.

Table 3B presents the lawyers' results as to the unionization factor. As to the judgment of legal contract, the employee lawyers more firmly agreed that a contract had been created in the union setting than in the non-union setting, but the difference is not statistically significant. The company lawyers also more firmly agreed that a contract had been created in the union setting (mean of 5.85) than in the non-union setting (mean of 4.53); this difference is statistically significant. As to the judgment of moral obligations, the differences are smaller[100] and not statistically significant.

Table 3A. Unionization—As Seen By Contracting Parties

Legal Contract	**Non-union**	**Union**	**Stat. Sig.**
Employees	4.60	5.70	*
Human Resource Managers	4.90	5.93	*
Moral Obligation	**Non-union**	**Union**	**Stat. Sig.**
Employees	5.38	5.54	
Human Resource Managers	5.86	5.81	

* Statistically significant difference (P<0.05) between non-union and union means.

99. Indeed, the human resource managers saw a slightly higher moral obligation in the non-union setting than in the union setting.

100. Indeed, lawyers disagreed as to which setting involved the higher moral obligation, with the employee lawyers slightly favoring the union setting and the company lawyers favoring the non-union setting.

Table 3B. Unionization—As Seen By Lawyers for the Parties

Legal Contract	Non-union	Union	Stat. Sig.
Employee Lawyers	4.42	4.93	
Company Lawyers	4.53	5.85	*
Moral Obligation	**Non-union**	**Union**	**Stat. Sig.**
Employee Lawyers	4.53	4.59	
Company Lawyers	4.54	4.37	

* Statistically significant difference (P<0.05) between non-union and union means.

Overall, these results confirm that context is influential. More specifically, procedural protection in the face of termination of employment is common in union settings, but not in non-union settings. In other words, there are two distinct trade usages surrounding contracts of the sort explored in the study. Employees, human resource managers, and some lawyers were aware of these trade usages and employed them in evaluating the scenarios.

C. *How influential was company practice?*

Table 4A presents the results from the employee and human resource manager respondents as to the company practice factor. With respect to the judgment of legal contract, the employees more firmly agreed that there was a contract when the employer acted consistently, rather than inconsistently, with the language in both the non-union setting (means of 4.84 and 4.36) and the union setting (means of 5.80 and 5.59). The differences between the consistent and inconsistent conditions are statistically significant in both the non-union and union settings for the employees. The results for the human resource managers follow this pattern (means of 5.31 [consistency] and 4.47 [inconsistency] in the non-union setting; means of 6.33 and 5.53 in the union setting), and again the differences are statistically significant. As for the judgment of moral obligation, the means are higher for employees and human resource managers, in both the non-union and union setting, when the employer has acted consistently, rather than inconsistently, with its language. This difference in means generally is statistically significant.[101]

Table 4B presents the results from the two lawyer groups as to the company practice factor. As to the judgment of legal contract, the employee

101. The exception is the union setting for employee respondents.

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lawyers more firmly agreed that there was a contract when the employer acted consistently than when it acted inconsistently with the language in both the non-union setting (means of 4.78 and 4.07) and the union setting (means of 5.39 and 4.48). The differences between the consistent and inconsistent conditions are statistically significant in both the non-union and union settings for the employee lawyers. The results for the company lawyers follow this pattern (means of 4.98 and 4.08 in the non-union setting, means of 6.23 and 5.46 in the union setting), and again the differences are statistically significant. As for the judgment of moral obligation, for both lawyer groups the means are higher in both the union and non-union settings when the employer has acted consistently with its language; however, the difference is generally not statistically significant.[102]

These results confirm that context is influential. More specifically, the company's practice is a form of course of performance, so far as it demonstrates the employer's behavior under the contract. Unlike standard instances of course of performance, the course is set with other parties to the same contract, and there is no clear acquiescence on the part of the individual now involved in a contract dispute. These results show that even when the course of performance is of this weaker sort, it influences the parties' understanding of their contract.

102. The exception is the non-union setting for company lawyers.

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Table 4A. Company Practice—As Seen By Contracting Parties

Legal Contract	Consistent	Inconsistent	Stat. Sig.
Employees			
• Non-union	4.84	4.36	*
• Union	5.80	5.59	*
Human Resource Managers			
• Non-union	5.31	4.47	*
• Union	6.33	5.53	*
Moral Obligation	**Consistent**	**Inconsistent**	**Stat. Sig.**
Employees			
• Non-union	5.52	5.24	*
• Union	5.64	5.44	
Human Resource Managers			
• Non-union	6.10	5.62	*
• Union	6.12	5.50	*

Table 4B. Company Practice—As Seen By Lawyers for the Parties

Legal Contract	Consistent	Inconsistent	Stat. Sig.
Employee Lawyers			
• Non-union	4.78	4.07	*
• Union	5.39	4.48	*
Company Lawyers			
• Non-union	4.98	4.08	*
• Union	6.23	5.46	*
Moral Obligation	**Consistent**	**Inconsistent**	**Stat. Sig.**
Employee Lawyers			
• Non-union	4.69	4.38	
• Union	4.69	4.49	
Company Lawyers			
• Non-union	4.77	4.31	*
• Union	4.57	4.17	

* Statistically significant difference ($P<0.05$) between consistency and inconsistency means.

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D. How influential were co-worker perceptions?

Table 5A presents the results from the employee and human resource manager perspectives as to the co-worker perception factor. As to the judgment of legal contract, the employees more firmly believed that there was a contract, in both the union and non-union settings, when their co-workers perceived the company to be bound than when the co-workers viewed the company as not bound. However, the differences in means in both settings are small and not statistically significant. The human resource managers also more firmly believed in both the non-union and union settings that there was a contract when the co-workers so perceived it. The difference is statistically significant in the non-union setting (means of 5.11 and 4.68), but not in the union setting. As to the judgment of moral obligation, for both parties in both settings, the means are higher when the co-workers perceived the company to be bound, but the differences are very small and not statistically significant.

Table 5B presents the results from the two lawyer groups as to the co-worker perception factor. As to the judgment of legal contract, both groups of lawyers more firmly believed that there was a contract in both the non-union and union settings when the employee's co-workers perceived the company to be bound. However, the differences in means are small and not statistically significant. As to the judgment of moral obligation, for both lawyer groups in both the union and non-union settings the means are higher when the co-workers perceived the company to be bound, but the differences are very small and not statistically significant.

These results provide a mixed message. The co-worker perception factor can be understood as a reflection of the contract principle of objectivity; it addresses how a reasonable, informed person in the same position as the contracting party interprets the language. Overall, it appears that the perceptions of others who are governed by the same contract with a dominant entity that drafted the contract, in which there is little if any room for negotiation, have little weight.

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Table 5A. Co-Worker Perception—As Seen By Contracting Parties

Legal Contract	Binding	Non-binding	Stat. Sig.
Employees			
• Non-union	4.66	4.54	
• Union	5.75	5.65	
Human Resource Managers			
• Non-union	5.11	4.68	*
• Union	6.01	5.85	
Moral Obligation	**Binding**	**Non-binding**	**Stat. Sig.**
Employees			
• Non-union	5.40	5.36	
• Union	5.56	5.52	
Human Resource Managers			
• Non-union	5.98	5.74	
• Union	5.86	5.76	

Table 5B. Co-Worker Perception—As Seen By Lawyers for the Parties

Legal Contract	Binding	Non-binding	Stat. Sig.
Employee Lawyers			
• Non-union	4.56	4.28	
• Union	5.02	4.85	
Company Lawyers			
• Non-union	4.62	4.44	
• Union	5.86	5.83	
Moral Obligation	**Binding**	**Non-binding**	**Stat. Sig.**
Employee Lawyers			
• Non-union	4.55	4.51	
• Union	4.61	4.57	
Company Lawyers			
• Non-union	4.59	4.48	
• Union	4.43	4.31	

* Statistically significant difference ($P<0.05$) between binding and non-binding means.

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E. *How influential was timing?*

Table 6A presents the timing factor results from the employee and human resource manager respondents. As to the judgment of legal contract, the employees more firmly believed that there was a contract, in both the non-union and union settings, when the employee became aware of the language early on rather than later. The differences in means are statistically significant only in the non-union setting, between time of hire and a year ago on the one hand and last week on the other (4.78 and 4.58 versus 4.44). The human resource managers more firmly believed that there was a contract when the employee became aware of the language early on rather than later in the non-union setting, although the difference is not statistically significant. There is no such pattern as to the union setting. As to moral obligation, the differences in means are fairly small and are not statistically significant. Furthermore, they do not follow a clear pattern.

Table 6B presents the timing factor results from the two lawyer groups. As to the judgment of legal contract, the employee lawyers and the company lawyers more firmly believed a contract existed when the employee became aware of the language early on rather than later, in both the union and non-union settings. However, for both the employee lawyers and the company lawyers, the differences in means are statistically significant only in the non-union setting (4.89, 4.61, and 3.77 for the employee lawyers; 4.95, 4.59, and 4.05 for the company lawyers). More specifically, both lawyer groups saw a significant difference between the when-hired and year-ago scenarios on the one hand and last-week scenarios on the other. As to the judgment of moral obligation, for both lawyer groups and both settings the pattern is the same; however, the differences in means are not statistically significant.

These results provide a somewhat mixed message. The law takes a flexible approach to timing of contract formation. This approach is obviously confirmed by the human resource managers' responses and by the employees' and the lawyers' responses with respect to the union setting. However, timing does matter to a certain extent for employees and both lawyer groups considering the non-union setting. The principle underlying the statistically significant results seems to be that both contracting parties should be aware of the language before its breach arises. Overall, the results confirm the flexibility of the legal rule, but not unequivocally.

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Table 6A. Timing—As Seen By Contracting Parties

Legal Contract	When Hired	Year Ago	Last Week	Stat. Sig.
Employees				
• Non-union	4.78 (B)	4.58 (B)	4.44 (A)	*
• Union	5.82	5.70	5.57	
Human Resource Managers				
• Non-union	5.08	4.90	4.76	
• Union	5.87	6.02	5.90	
Moral Obligations	**When Hired**	**Year Ago**	**Last Week**	**Stat. Sig.**
Employees				
• Non-union	5.42	5.42	5.29	
• Union	5.58	5.55	5.49	
Human Resource Managers				
• Non-union	5.84	5.97	5.78	
• Union	5.79	5.88	5.77	

Table 6B. Timing—As Seen By Lawyers for the Parties

Legal Contract	When Hired	Year Ago	Last Week	Stat. Sig.
Employee Lawyers				
• Non-union	4.89 (B)	4.61(B)	3.77 (A)	*
• Union	5.15	4.92	4.73	
Company Lawyers				
• Non-union	4.95 (B)	4.59 (B)	4.05 (A)	*
• Union	5.92	5.85	5.77	
Moral Obligations	**When Hired**	**Year Ago**	**Last Week**	**Stat. Sig.**
Employee Lawyers				
• Non-union	4.73	4.57	4.32	
• Union	4.73	4.65	4.40	
Company Lawyers				
• Non-union	4.77	4.49	4.34	
• Union	4.55	4.31	4.26	

* Statistically significant difference ($P<0.05$) among conditions; A versus B shows where the difference is.

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V. DISCUSSION

A. Summary

Table 7 summarizes the previous tables; it lists the factors that were statistically significant for the four respondent groups as to the two judgments. Two legal principles of contract creation received strong endorsement, while two received somewhat mixed results.

The contract principle receiving the strongest endorsement is the use of course of performance in interpretation of contract language. This principle, expressed as company practice either consistent or inconsistent with the document's promises, influenced all four groups in making the judgment of legal contract in both the non-union and union settings. Quite likely, respondents saw the company's practice as a reflection of its understanding of the language. Respondents also may have been applying a norm of parity, specifically, that the company should treat all employees alike.[103]

The contract principle receiving the second strongest endorsement is the use of trade usage. This principle, expressed in the unionization factor, influenced employees, human resource managers, and company lawyers.

By contrast, the principle favoring an objective focus, referring to what a reasonable observer would understand, received only weak endorsement. This principle, expressed through the co-worker perception factor, influenced only the human resource managers as to the non-union setting. These results may suggest that the perspective of a reasonable person in the position of one of the parties is not particularly important. More likely, these results suggest a narrower point: that the perceptions of other people who are governed by the same contract with a dominant entity that drafted the contract, as to which there is little or no room for negotiation, have little weight.

Finally, the results pertaining to the law's flexible approach to timing of contract formation are somewhat mixed. This principle was expressed through the timing factor. As to this factor, a result of *non*-significance represents an endorsement of the law's approach. This factor did not influence any group in the union setting, although it did influence three respondent groups (human resource managers excepted) in the non-union setting. The line was drawn between situations in which the employee learned of the contract before termination and situations in which the employee learned of the contract post-termination. By implication, variations in timing before breach of the contract are not significant.

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103. Company practice was also influential for three of the four respondent groups as to moral obligation, in one or both settings. It was the only factor influencing the judgment of moral obligation at a statistically significant level.

Table 7. Statistically Significant Factors

	Legal Contract	Moral Obligation
Employees	unionization company practice (both settings) timing (non-union)	company practice (non-union)
Human Resource Managers	unionization company practice (both settings) co-worker perception (non-union)	company practice (both settings)
Employee Lawyers	company practice (both settings) timing (non-union)	
Company Lawyers	unionization company practice (both settings) timing (non-union)	company practice (non-union)

B. *Implications*

The results largely support the modern approach to issues of contract creation. What lessons do they provide for the parties, as they create and carry out contracts, and for the courts, as they adjudicate contract cases?

The parties should realize that, as critical as contract language is, the context in which that language operates is equally significant. Contract language is understood in the context of trade usage, and the drafter should take this into account, either by drafting the language to incorporate a trade usage or by expressly negating a potentially pertinent trade usage. Contract language is understood to harmonize with the parties' conduct under the contract, so each party should take care to act in accord with the understanding it wishes to impart to the contract. Contracts can be formed in such a nebulous

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process that the moment when both parties know of the pertinent language is of little import; parties would do well to assume they are bound by contract even though formal contracting processes have not occurred.

As the courts adjudicate contract cases, they should seek to comport with these understandings of contract creation. An inquiry into context makes for a more complicated case, yet more than any other area of law, contract law seeks to conform to the parties' intentions.[104] If context is to matter in contract litigation, procedural devices that entail decision-making on a spare record, such as judgment on the pleadings,[105] generally should be avoided. For many situations, arbitration is a desirable option, because arbitrators are experts in the field and often readily admit evidence.[106]

Many years ago, Justice Holmes wrote, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[107] While the information presented here is less poetic and more empirical than Justice Holmes' observation, our points are much the same.

104. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981).

105. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1367–68 (2002 & Supp. 2003) (discussing Federal Rule of Civil Procedure 12(c)).

106. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").

107. Towne v. Eisner, 245 U.S. 418, 425 (1918).

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