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W. David Slawson

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W. David Slawson†

† Torrey H. Webb Professor of Law, The Law School, University of Southern California. B.A., Amherst College 1953; M.A., Princeton University 1954; LL.B., Harvard Law School 1959. I would like to thank the participants in the faculty workshop at which I presented a draft of this article for their many helpful comments and suggestions.

I. INTRODUCTION

Employment in the United States is typically "at will," which means that both the employer and the employee can end it at any time for any reason or no reason at all.[1] Employment at will is still the norm; however, its dominance was almost universal until early in the 20th century.[2] The courts of that time developed a doctrine that made it nearly impossible for an employee to prove or enforce any employment rights.[3] The rationale was that it was so unusual for an employee to have employment rights that anyone who claimed he did must be lying or mistaken. At its peak, the doctrine made the employment at will even if the employee could prove that the employer had promised employment rights[4] unless the employee could also prove that he gave some consideration in addition to the services for them.[5] Even then, moreover, enforcement of the rights was "at best uncertain and frequently illusory."[6]

By now, however, the effect of the employment at will doctrine has been reduced in most jurisdictions by the creation of various exceptions to it.[7] The principle one of which is the "handbook exception."[8] Under it, courts have recognized employment rights if the employee proved the employer had distributed a handbook providing them, had given oral assurances of them, or even had merely followed a practice of recognizing them.[9] Most of the courts that adopted the handbook

1. Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-At-Will*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 231, 235–36 (2000).
2. *See id.* at 235–37.
3. *Id.* at 236.
4. *See id.* at 236–38.
5. *Id.* at 239–40.
6. *Id.* at 240.
7. *See* James N. Dertouzos et al., *The Legal and Economic Consequences of Wrongful Termination*, RAND INST. FOR CIV. JUST. R-3602-ICJ, at 13 (1988); Cheryl S. Massingale, *At-Will Employment: Going, Going . . .* , 24 U. RICH. L. REV. 187, 190–91 (1990).
8. Massingale, *supra* note 7, at 191, 195–98.
9. *See, e.g.*, Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 438 (6th Cir. 1988) (citing Mers v. Dispatch Printing Co., 483 N.E.2d 150, 153 (Ohio 1985)). The United States Supreme Court recognized the possibility of contractual employment

exception rested it on unilateral contract grounds.[10] The employer's handbook, oral assurances, or practices were considered offers, which the employees accepted by continuing to work, and their continuing to work was also their consideration.[11] The employment rights most often involved were rights not to be discharged without cause and rights not to be laid off except in reverse order of seniority.[12]

The question has now arisen of how such rights, once created, can be reduced. Of the sixteen jurisdictions whose courts have addressed the question, only seven have answered in accord with contract law.[13] The other nine have allowed the employer to reduce the rights unilaterally—that is, without obtaining the employees' consent or giving them any consideration.[14] The courts of three of these jurisdictions reached this result through misunderstandings of contract law.[15] The courts of the other six reached it by making new contract law on the ground that existing contract law conflicted with public policy. The public policy was the need for management flexibility to meet changing business conditions.[16]

Section II will state cases from each of these groups to show the reasons the courts gave for reaching their decisions and some of the decisions' consequences. Section III will explain how existing contract law should apply both to the initial creation of employment rights and

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rights being implied by the employer's conduct when it held that they were "property" that could not be deprived without due process of law. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–77 (1972); Perry v. Sindermann, 408 U.S. 593, 601 (1972).

10. Jason A. Walters, Comment, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's Assent*, 32 CUMB. L. REV. 375, 382 (2002).

11. Stephen Carey Sullivan, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261, 274–77 (1995).

12. *See id.* at 275–86.

13. *See, e.g.*, Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995).

14. Asmus v. Pac. Bell, 999 P.2d 71, 78 (Cal. 2000); Parker v. Boise Telco Fed. Credit Union, 923 P.2d 493, 499 (Idaho Ct. App. 1996); Bankey v. Storer Broad. Co. (*In re* Certified Question), 443 N.W.2d 112, 115 (Mich. 1989); Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296, 300 (N.D. 1988); Fleming v. Borden, Inc., 450 S.E.2d 589, 595 (S.C. 1994); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 401 (Utah 1998) (quoting Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1002 (Utah 1991)); Progress Printing Co. v. Nichols, 421 S.E.2d 428, 430 (Va. 1992); Grovier v. N. Sound Bank, 957 P.2d 811, 815–16 (Wash. Ct. App. 1998); Hogue v. Cecil I. Walker Mach. Co., 431 S.E.2d 687, 691 (W. Va. 1993).

15. *See Sadler*, 431 N.W.2d at 300; *Ryan*, 972 P.2d at 401; *Progress Printing Co.*, 421 S.E.2d at 431. I have not counted a Maryland appellate court decision that also addressed the question because the answer it gave was so confused and confusing that I doubt the Supreme Court of Maryland will look to it for guidance when it addresses the question. *See* Elliott v. Bd. of Trs. of Montgomery County Cmty. Coll., 655 A.2d 46 *passim* (Md. Ct. Spec. App. 1995).

16. *See Asmus*, 999 P.2d at 78; *Parker*, 923 P.2d at 499; *Bankey*, 443 N.W.2d at 119–20; *Fleming*, 450 S.E.2d at 595; *Grovier*, 957 P.2d at 815–16; *Hogue*, 431 S.E.2d at 691.

to their subsequent amendment. An explanation of the rights' initial creation is included because in my opinion, it was their misunderstanding of this that misled so many of the courts into allowing the employer to reduce or eliminate the rights unilaterally. Section IV will show that the new contract law the courts in the third group made is inferior to existing contract law for the following reasons: (1) the benefits the courts claimed for it are illusory because existing contract law already provides them; (2) it is unjust because it enables employers to disappoint their employees' reasonable expectations and undercut their justifiable reliance with impunity; and (3) it is bad public policy because it deprives employers of a valuable means of attracting and keeping superior employees, and makes joining a labor union the only way that employees can obtain rights—as opposed to unenforceable promises—of employment security. Section V will show that the law the courts made by misunderstanding existing contract law has these same drawbacks, plus the drawback of operating coercively. Section VI will offer a brief conclusion.

II. The Decisions

A. *Correctly Understanding Contract Law*

1. *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.* (Supreme Court of Connecticut 1995)[17]

Defendant hired Plaintiff Torosyan in 1982 to manage one of its new laboratories.[18] Plaintiff asked about employment security in the job interview, was told that he would not be discharged without cause and was given an employee manual so stating.[19] Defendant revised the manual in 1984 to say that it was informational only, that it could be amended without notice, and that the employment was at will.[20] Defendant discharged Plaintiff in 1985, giving what the trial court apparently found was the dishonest justification that Plaintiff had falsified company records when the true reason was that he had repeatedly expressed safety concerns about the laboratory.[21] The trial court awarded Plaintiff approximately $191,000 in damages and Defendant appealed.[22]

The Connecticut Supreme Court affirmed the trial court.[23] The 1984 manual did not modify Plaintiff's employment contract.[24] A modification, to be effective, requires an offer and an acceptance.[25]

17. 662 A.2d 89 (Conn. 1995).
18. *Id.* at 92, 100.
19. *Id.* at 94.
20. *Id.* at 95.
21. *Id.* at 100–01.
22. *Id.* at 92.
23. *Id.* at 106.
24. *Id.* at 99.
25. *See id.* at 96–98.

When a new employment manual "substantially interferes with an employee's legitimate expectations about the terms of employment," the employee's merely continuing to work does not constitute his acceptance of the offered modification.[26]

B. *Misunderstanding Contract Law*

1. *Progress Printing Co. v. Nichols* (Supreme Court of Virginia 1992)[27]

Plaintiff Nichols was given an employee handbook when he was hired, which stated that employees would not be discharged or suspended without at least one written warning and without just cause.[28] Two weeks later, Defendant's personnel director asked him to sign a printed form stating that employment was at will and Plaintiff signed it.[29] Two years later, Plaintiff became upset at Defendant's failure to fix a recurring defect in a print job on which he was working and refused to continue working on it until the defect was cured.[30] Defendant fired him without giving him a written warning.[31] Plaintiff sued and was awarded $9,500 in damages, and Defendant appealed.[32]

The Supreme Court of Virginia reversed this part of the court's judgment.[33] It held that Plaintiff was bound by the contract he made when he signed the printed form and that he gave consideration by remaining in Defendant's employ.[34]

2. *Ryan v. Dan's Food Stores, Inc.* (Supreme Court of Utah 1998)[35]

Plaintiff, a pharmacist, allegedly told Defendant in the pre-employment hiring interview that he thought he had been discharged by his previous employer for reporting that a co-employee was stealing narcotics and that he did not want that to happen to him again.[36] Defendant allegedly assured him that it would not.[37] Shortly after Plaintiff was hired, he was given an employee handbook and told that before he could get his paycheck, he had to sign a form which recited that he had read the handbook and acknowledged that it was not an employment agreement and that employment was at will.[38] Despite expres-

26. *Id.* at 99.
27. 421 S.E.2d 428 (Va. 1992).
28. *Id.* at 429.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 431.
34. *See id.*
35. 972 P.2d 395 (Utah 1998).
36. *Id.* at 399.
37. *Id.*
38. *Id.* at 399, 401.

sing his reservations, Plaintiff signed the form.[39] Defendant allegedly fired him because of his alertness in discovering fraudulent prescriptions.[40] The court granted summary judgment for Defendant and Plaintiff appealed.[41]

The Supreme Court of Utah affirmed the trial court.[42] "[A]n original employment contract may be modified or replaced by a subsequent unilateral contract. 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 employment supplies the necessary consideration for the offer."[43] Thus, even if Plaintiff's allegations about what Defendant said to him in the employment interview were true, his signing of the form and continuing to work changed the employment to employment at will.[44]

C. *Making New Contract Law on the Ground That Existing Contract Law Conflicts With Public Policy*

1. *Toussaint v. Blue Cross & Blue Shield* (Supreme Court of Michigan 1980)[45]

Defendant Blue Cross & Blue Shield discharged Plaintiff Toussaint for what it claimed was good cause, but it did not give him the procedural protections to which its Supervisory Manual and Guidelines entitled him.[46] Although Defendant had reserved the right to change these documents at any time and had changed them on several occasions, the procedural protections at issue were in effect when Plaintiff was discharged.[47] Plaintiff sued and won a verdict of approximately $72,000.[48]

The Michigan Supreme Court ultimately held that an employer could create employment rights without the employees' agreement and without their giving consideration.[49] All that was necessary was that the employer's conduct gave rise to "legitimate expectations" of such rights in the affected employees.[50]

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39. *Id.* at 399.
40. *Id.* at 400.
41. *Id.* at 399.
42. *Id.*
43. *Id.* at 401 (quoting Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1002 (Utah 1991)).
44. *Id.*
45. 292 N.W.2d 880 (Mich. 1980). This decision is relevant for present purposes only as background for the following decision by the same court.
46. *Id.* at 883, 892.
47. *See id.* at 892.
48. *Id.* at 883.
49. *See id.* at 894–95.
50. *See id.* at 895.

2. *Bankey v. Storer Broadcasting Co.* (In re *Certified Question*) (Supreme Court of Michigan 1989)[51]

Defendant Storer's Personnel Policy Digest provided that an employee would not be discharged except for cause.[52] The Digest was revised in January 1981 to eliminate the "for cause" language and to replace it with a statement that employment was at will.[53] Defendant allegedly discharged Plaintiff Bankey for poor job performance in March of that same year, without the finding of cause to which the Digest would previously have entitled him.[54] Plaintiff had worked for Storer for thirteen years.[55] He sued and was awarded $55,000 in damages and Defendant appealed.[56] The court's opinion did not make clear whether his allegedly poor job performance, if proven, would have constituted cause.[57] The United States Court of Appeals certified the question to the Michigan Supreme Court of whether an employer could change an employee's legally enforceable right not to be discharged except for cause to a condition of employment at will, without obtaining the employee's consent or having expressly reserved the right at the outset to make such a change.[58]

The Michigan Supreme Court answered in the affirmative, offering several reasons.[59] First, it would not be reasonable to require mutual assent before employment rights could be eliminated because mutual consent was not required to create them initially.[60] Second, the court had anticipated this conclusion in *Toussaint*, even if it had also said some things there that seemed to contradict this conclusion.[61] Third, the court noted with approval decisions from other jurisdictions that stressed the need of employers not to be bound to employment policies that would constrain their ability to meet changing business conditions.[62] Fourth, it would be unreasonable to expect employers who chose to amend their employment contracts from time to time to keep track of which employees had been hired when each version of the contract was in effect.[63] Fifth, without a right to unilaterally amend, the Michigan employers that had granted employment rights before the court's holding in *Toussaint* that such rights were contractually binding "would be tied to anachronistic policies in perpetuity merely

51. 443 N.W.2d 112 (Mich. 1989).
52. *Id.* at 114.
53. *Id.*
54. *Id.* at 113.
55. *Id.*
56. *Id.* at 114.
57. *See id.* at 120–21.
58. *Id.* at 113.
59. *Id.* at 115–21.
60. *See id.* at 116, 119. The court here was referring back to its decision in *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980).
61. *Bankey*, 443 N.W.2d at 115.
62. *See id.* at 117–19.
63. *See id.* at 120.

because they did not have the foresight to anticipate" *Toussaint.*[64] Finally, and apparently most important in the court's opinion,[65] the ground for enforcing an employer's policies of employment security is "not . . . because they have been 'offered and accepted' as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies."[66] It follows, therefore, that "[w]hen, as in the question before us, the employer changes its discharge-for-cause policy to one of employment-at-will, the employer's benefit is correspondingly extinguished, as is the rationale for the court's enforcement of the discharge-for-cause policy."[67]

It seems fair to say that the last four reasons emanated from the court's belief that public policy required that employers have the management flexibility to change their employment policies to meet changing business conditions,[68] and even the first two reasons treated employment rights as an exclusively management prerogative.[69] The last reason—that *the sole ground* for enforcing employment rights is the benefits in enhanced employee morale, etc. that *the employer* expects to obtain from providing such rights, *not* the mutual benefits that contracting parties must both expect to obtain[70]—is especially telling. The court apparently saw no expectations in the employees worth protecting. All that mattered, in the court's view, was the employer's ability to manage its business in its own interests.

The Michigan Supreme Court then held that an employer can unilaterally reduce or eliminate its employees' employment rights provided only that it gives reasonable notice of its intent to do so.[71] The court must have considered two months to be reasonable notice because this amount of time was what had elapsed between Defendant's issuance of the revised Digest and its discharge of Plaintiff.[72]

3. *Asmus v. Pacific Bell* (Supreme Court of California 2000)[73]

Plaintiffs were sixty former management employees of Defendant Pacific Bell.[74] Defendant issued a Management Employment Security Policy (MESP) in 1986, which provided that it would give job security to all management employees who continued to meet its expectations by reassigning and retraining them for other positions if their current

64. *Id.*
65. *See id.* at 119 (devoting much more space to this reason than to any of the others).
66. *Id.*
67. *Id.*
68. *See id.* at 117–20.
69. *See id.* at 115–16.
70. *See id.* at 120.
71. *Id.*
72. *Id.* at 113–14.
73. 999 P.2d 71 (Cal. 2000).
74. *Id.* at 74.

jobs were eliminated and that this job security would be "maintained so long as there [was] no change that [would] materially affect Pacific Bell's . . . business plan achievement."[75] Defendant's purpose was to induce its management employees not to resign to take higher paying positions in the then-booming California high technology industries.[76] Defendant gave notice in January 1990 that it might terminate the MESP, and it did so in April 1992, replacing it with the Management Force Adjustment Program (MFAP).[77] Under the MFAP, although all the affected employees received enhanced pension benefits, those who chose to retire before the end of the year would receive additionally enhanced pension benefits, and those who chose to retire in November would receive the additionally enhanced benefits plus more, including outplacement services, one year's medical and life insurance, and severance pay.[78] Plaintiffs chose to forego these additional benefits and continue working for Defendant past the end of the year.[79] Fifty-two of them eventually signed waivers of their rights to sue under the MESP or its termination.[80] Defendant discharged all sixty employees several years later.[81]

The United States District Court granted summary judgment for the defendant against the fifty-two plaintiffs who had signed waivers.[82] The remaining eight plaintiffs and defendant stipulated that the defendant would drop its defense that business conditions had materially affected its business plan achievement; the court would enter summary judgment against it for breaching the MESP; and Defendant would file an interlocutory appeal.[83] On appeal, the United States Court of Appeals certified the following question to the California Supreme Court: "Once an employer's unilaterally adopted policy—which requires employees to be retained so long as a specified condition does not occur—has become a part of the employment contract, may the employer thereafter unilaterally [terminate] the policy, even though the specified condition has not occurred?"[84]

The California Supreme Court answered in the affirmative.[85] "General contract law" allows an employer that has unilaterally conferred contract rights on its employees also to reduce or eliminate them unilaterally.[86] To require that an employer promise a wage in-

75. *Id.* at 73.
76. *See id.* at 82 (George, C.J., dissenting).
77. *Id.* at 73–74.
78. *Id.* at 74.
79. *Id.*
80. *See id.*
81. *See id.*
82. *Id.*
83. *Id.*
84. *Id.* at 72–73 (alteration in original) (quoting Asmus v. Pac. Bell, 159 F.3d 422, 423 (9th Cir. 1998)).
85. *Id.* at 73.
86. *Id.* at 76–77.

crease or other benefit in exchange for the rights it takes away, as consideration, "would incorrectly impose a bilateral principle on the unilateral relationship, leaving the employer unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles."[87] Moreover, the employer gives consideration by forbearing to shut down or curtail its business operations—"something employers have the absolute right to do."[88] The court ended with the following statement: "Therefore . . . we conclude that . . . [a]n employer may terminate a written employment security policy . . . if . . . the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits."[89] The context implies that the court intended "vested benefits" to mean monetary benefits that an employee has already earned—bonuses or pension rights, for example.

III. Contract Law in the Employment Context

A. *Contract Law*

Contract law uses the objective theory of interpretation.[90] Contractual manifestations have the meaning a reasonable person would give them under the circumstances they were made unless both parties gave them the same meaning.[91] In that case, the meaning the parties gave them is the meaning they will have, regardless of what a reasonable person might have thought.[92]

Generally, contract law does not count an offeree's silence as her acceptance.[93] An offeree's silence may constitute her acceptance, however, if (1) it was reasonable to expect her to speak up if she did not want to accept or (2) she intended her silence to be her acceptance.[94] The principal justification for this rule is the objective theory: at least under most circumstances, a reasonable person would not think someone's silence was her acceptance unless one of the exceptions applied.[95] A second justification is the public policy against harassment.[96] For example, if the rule did not generally prohibit silence

87. *Id.* at 78. The traditional employment principles to which the court referred presumably were management's traditional power to fire employees at will.

88. *Id.* at 78 (quoting Demasse v. ITT Corp., 984 P.2d 1138, 1155 (Ariz. 1999) (Jones, V.C.J., dissenting)).

89. *Id.* at 81.

90. *See* Restatement (Second) of Contracts § 203(a) (1981) [hereinafter Restatement].

91. *See id.*

92. *Id.* § 201(1).

93. *Id.* § 69(b)–(c).

94. *Id.*

95. *See id.* § 203(a).

96. *See* 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.14 (2d ed. 1998).

as acceptance, we might all be pestered by receiving offers over the internet or in the mail that we would have to answer in order to avoid accepting.

A common situation that fits the first exception is one in which the offeree has previously agreed that her silence will be her acceptance. Of course, it is then reasonable to interpret her silence as acceptance. The public policy against harassment is not violated because she has agreed to the arrangement. Thus, a book club may ask its members to agree that they will have accepted the books it sends them each month unless they send the books back within a certain number of days. Previous agreement, however, is not the only situation that fits this exception.[97]

The second exception is merely an application of the part of the objective theory that uses the parties' meanings instead of the reasonable person's if the parties' meanings are the same. The offeror has manifested his intent that the offeree's silence will be her acceptance by saying it will be. Therefore, if the offeree also intends her silence to be her acceptance, both of them will have intended her silence to mean her acceptance, and this meaning will prevail. The public policy against harassment is not violated in this case either because the offeree wants to make the contract.

The reported decisions have dealt with the offeror's attempt to make the offeree's literal silence her acceptance—by saying, for example, "If I do not hear from you by next Tuesday, I shall assume you accept."[98] However, if evasions of the rule are to be prevented, the meaning of "silence" in this situation must be extended to include the doing or not doing of anything the offeree has a right to do or not do without its signifying her acceptance. For example, an offeror could not make an offeree's jogging in the morning her acceptance because she might want to jog without accepting. The reverse is also true—an offeror also could not make her not jogging in the morning her acceptance. Without this extension, an offeror could evade the operation of the rule by making the offeree's acceptance her doing or not doing of something he knows she might want to do or not do instead of her literal silence. The public policy against unjustified coercion also requires this extension because, without it, people could coerce others into doing or not doing things by making their doing or not doing of them acceptances of offers.[99] For example, "You will have accepted

97. *See, e.g.*, Day v. Caton, 119 Mass. 513, 515–16 (1876) (one neighbor held to have silently accepted the other's equally silent offer to build a party wall if the first neighbor would pay half the cost because the first neighbor could so easily have disabused the second of his evident belief that the first neighbor had agreed).

98. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2.18 (4th ed. 1998).

99. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.14 (2d ed. 1998).

my offer of a one year subscription to my newspaper for a price of twenty-five dollars a month if you vote in the upcoming election."

Contract law also imposes a consideration requirement.[100] A promise will not be enforced unless the promisor received consideration for it (or unless it is enforceable on some other ground).[101] Consideration is a detriment to the promisee or a benefit to the promisor given in exchange for the promise.[102] A detriment is the doing of something the law does not require or the not doing of something the law does not forbid.[103] A promise to do or not do something is a detriment if the doing or not doing of the thing would be a detriment.[104]

Contract law requires that a contract be performed and enforced in good faith.[105] Good faith means, among other things, not so as to deprive the other party of the benefits he reasonably expected to obtain from the contract.[106] This requirement logically implies that parties cannot contract out of it because it would not be imposed by law if they could. Good faith would then be only a factual presumption they could rebut.[107]

Contract law will excuse a party's performance of a contract if the conditions of either the doctrine of commercial impracticability or the doctrine of frustration of purpose are met.[108] The first doctrine excuses the performance if unanticipated events make the performance substantially more difficult or expensive for a party and that party did not assume the risk of the events.[109] The second doctrine excuses the performance if unanticipated events defeated the principal purpose for which a party made the contract and that party did not assume the risk of the events.[110]

100. RESTATEMENT § 71; *see* CALAMARI & PERILLO, *supra* note 98, §§ 4.1–4.2.
101. *See* RESTATEMENT § 71.
102. *See id.*
103. *See id.* § 79 cmt. b.
104. *Id.* § 75; CALAMARI & PERILLO, *supra* note 98, § 4.2.
105. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT § 205. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (2002). The common laws of contract of *almost* every state agree with these statements. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369, 404 (1980); *see* CALAMARI & PERILLO, *supra* note 98, § 11.38.
106. RESTATEMENT § 205 cmt. a.
107. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17 (2d ed. 1998).
108. RESTATEMENT §§ 261, 265; CALAMARI & PERILLO, *supra* note 98, §§ 13.9, 13.12.
109. RESTATEMENT § 261; CALAMARI & PERILLO, *supra* note 98, § 13.9.
110. RESTATEMENT § 265; CALAMARI & PERILLO, *supra* note 98, § 13.12.

B. *Contract Formation When the Employment is At-Will*

Contract formation is easy if the employment is at will.[111] The employer can make the employees' continuing to work their acceptance of its offer whether or not one regards their continuing to work as silence.[112] It is not silence, at least technically, because under employment at will, the employees do not have a right to continue to work without the employer's permission.[113] The employer is therefore entitled to make its permission conditional on the employees' acceptance of its offer. This view of the matter, however, is a bit artificial. It is not reasonable to think the employer would really discharge an employee who showed up for work but said, "I reject," when what he would be rejecting would be something entirely in his favor. And if it is not reasonable to think this, the objective theory will not make it the meaning of the employer's offer.

The reasonable interpretation of the employer's offer is probably that although the employees are free to continue working without that signifying their acceptance, the employer will assume they have accepted unless they speak up to the contrary. This interpretation, then, *is* acceptance by silence, but it also falls under the exception that makes the offeree's silence her acceptance if both she and the offeror intended it to be. The employer intended the employees' continuing to work to be their acceptance either because it expressly said so or because this was the reasonable implication of its offer. The employees, at least presumably, intended the same because who would not want to accept an offer entirely in their favor?

The employees' continuing to work is their consideration for the employer's promises whether or not their continuing to work is viewed as silence.[114] Their continuing to work is a detriment because they have no duty to continue working.[115] Their continuing to work is the agreed exchange for the employer's promises because it is what the employer asked them to do in order to accept its offer, at least by implication.[116]

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111. *See* Berks, *supra* note 1, at 235–36, 238.

112. *See* 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:42 (4th ed. 1991 & Supp. 2003).

113. *See* 2 *id.*; 19 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 54:19, 54:39 (4th ed. 2001 & Supp. 2003); Berks, *supra* note 1, at 235–36.

114. *See* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:2 (4th ed. 1992 & Supp. 2003).

115. *See id.* § 7:4; CALAMARI & PERILLO, *supra* note 98, § 4.9 (explaining pre-existing duty rule).

116. *See* RESTATEMENT § 71.

C. *Contract Amendment when the Employees Already Have Employment Rights*

The employees' continuing to work is "silence" in the contract-law meaning of the term if the employment rights they already have include a right to continue working.[117] Therefore, their continuing to work cannot be their acceptance unless one of the exceptions to the "silence" rule applies,[118] and neither of them does. The employees have done nothing to make it reasonable for the employer to expect them to accept unless they speak up, and there is no reason to think the employees intend their continuing to work to mean they are accepting. On the contrary, there is reason to think they do not intend their continuing to work to mean they are accepting because accepting would be against their interests. In this situation, therefore, the only way the employer can obtain the employees' acceptances is to ask for them and provide a means of their expressing them that does not violate the rule prohibiting silence as acceptance. For example, the employer could pass out sheets of paper, which each employee could sign and mark, "I accept . . ." or "I do not accept the new employment security contract."

If the employer's offer is only to reduce or eliminate the employees' existing rights—for example, if it is simply to restore employment at will—it is the employer, not the employees, that needs to provide some consideration.[119] The employer's permitting the employees to continue to work cannot be its consideration because they have a right to continue even without its permission.[120] Therefore, the employer's offer must include some non-nominal detriment to it or benefit to the employees as consideration.[121]

D. *Performing the Employment Contract in Good Faith*

Regardless of the type of the employment contract, the employer must perform its duties under it in good faith.[122] The principal meaning of good faith in the employment context is that the employer must not deprive the employees of the protections they would reasonably expect their employment rights to provide.[123] Thus, for example, if the rights include a right not to be discharged without a hearing and a finding of good cause, the employer must provide a procedure for the

117. *See supra* text accompanying notes 93–99 (discussing silence as acceptance).

118. *See* RESTATEMENT § 69(b)–(c).

119. 19 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 54:13 (4th ed. 2001).

120. *Id.*

121. *Id.* Whether the consideration is merely nominal must be gauged by comparison with what the employees are being asked to give up in exchange. *See* CALAMARI & PERILLO, *supra* note 98, § 4.6.

122. *See* RESTATEMENT § 205.

123. *See generally supra* text accompanying notes 105–07 (discussing good faith).

hearings that allows the employee to explain his side of the case and that is reasonably designed to reach a fair decision on the existence or nonexistence of good cause.

E. *The Employer's Reserved Rights of Unilateral Amendment*

Can an employer unilaterally revoke or amend the employees' rights if it reserved the right to do so in the contract that initially created them? Yes. An employer must exercise the reserved right in good faith, however, because it is a discretionary contractual power, which, like any contractual performance, must be performed—i.e., exercised—in good faith.[124] Thus, for example, the employer could not revoke employment rights merely in order to discharge certain employees that it wanted to get rid of without having to show good cause. Nor could it revoke the rights selectively to achieve the same end. The employer also could not revoke or amend the rights arbitrarily—that is, for no justifiable reason at all—because good faith also prohibits the arbitrary exercise of a discretionary contractual power.

The facts and holding of *Allen D. Shadron, Inc. v. Cole*[125] provide an example. Cole was one of the salespersons in the Shadron real estate brokerage firm.[126] The contract of employment provided that salespersons would receive commissions in addition to the usual ones for sales in excess of $75,000, subject, however, to Shadron's discretion.[127] The trial court found that the purpose of the discretion was to allow for the possibility that Shadron had incurred unusually large expenses in consummating the sale.[128] Shadron refused to pay Cole the extra commissions on four sales without claiming that it had incurred unusually large expenses in consummating them.[129] Cole sued and won in the trial court.[130] The Supreme Court of Arizona affirmed the trial court's judgment[131] on the ground that discretionary contractual powers must be exercised with "sound judgment" rather than arbitrarily, unreasonably, or oppressively.[132]

Some rights of unilateral amendment would ordinarily be implied even if the employer did not expressly reserve them. A right to unilaterally amend the procedures for the hearings for deciding the existence or nonexistence of cause for discharge is an example. The employer should ordinarily be allowed to make such changes unilaterally as long as they do not materially reduce the ability of the hearings to reach just decisions. My university has amended its hearing proce-

124. *See generally id.*
125. 416 P.2d 555 (Ariz. 1966).
126. *Id.* at 556.
127. *Id.*
128. *Id.*
129. *See id.*
130. *Id.*
131. *Id.* at 558.
132. *See id.* at 557.

dures for discharges from positions of tenure every few years since I began my employment here, and I have never heard a claim that it lacked the right to do so.

F. *The Employer's Declaration that Its Practices of Employment Security Lack Contractual Status*

Can an employer escape the requirement that it implement its practices of employment security in good faith by including in the handbook or other documentation of them a declaration that they lack contractual status? Such declarations are not uncommon.[133] The argument for allowing the employer to escape the requirement is that the law only requires a contract be performed in good faith and there is no contract in this case. However, in my opinion, the duty of good faith should still be imposed for the following reasons.

The reasonable meaning of an employer's adoption of practices of employment security is that it will follow them in good faith, regardless of whether it says they lack contractual status. The employer adopts them, presumably, in order to make its employees more satisfied with their working conditions so they will be better and more loyal workers, and the employees presumably understand this motivation. The practices would not have these desired effects, however, if the employer did not follow them in good faith—for example, if it occasionally ordered an arbitrator to find cause for discharging an employee even if there was no evidence of it or simply fired an employee without giving him a reason or a hearing. Thus, the adoption of the practices, in itself, reasonably implies a promise to follow them in good faith.[134] If it is reasonable to imply a promise, the objective theory implies it. That promise, like any promise, is a contract by definition if the law will enforce it.[135] And the law will enforce it if the employees gave consideration for it, relied on it to their substantial detriment,[136] or provided some other enforcement grounds.[137]

The law that requires a contract to be performed in good faith provides another reason. As noted earlier, this law logically implies that parties cannot contract out of this requirement because the require-

133. *See, e.g.*, Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89, 95 (Conn. 1995) ("This publication is distributed for general informational purposes only . . . .") (alteration omitted); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 401 (Utah 1998) ("This handbook is not intended to create a contract of employment . . . and nothing contained in this handbook should be construed as a contract of employment or guarantee of a job.").

134. In *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892–95 (Mich. 1980), the Michigan Supreme Court made essentially this same argument to support its holding (arguing that an employer was bound to follow its employment security policies fairly and nondiscriminatorily as long as they were in force, even if it had the right to unilaterally terminate them).

135. *See* RESTATEMENT § 1.

136. *See id.* § 90.

137. *See, e.g.*, *id.* §§ 82, 84.

ment would not be imposed by law if they could.[138] Parties could, however, contract out of the requirement in effect if the courts gave effect to agreements that conduct which would otherwise be contractual was not. *Allen D. Shadron, Inc. v. Cole*[139] again provides an example. Shadron could have denied Cole his extra commissions with impunity if it had included language in his employment contract that its practice of paying the extra commissions was without contractual status—if the law were to permit this kind of evasion.

One of the premises of the foregoing argument is that the conduct which is said to lack contractual status would otherwise be contractual. This premise is necessary because, without it, there would be no evasion of the law that requires *contracts* to be performed in good faith. Would an employer's practices of employment security otherwise be contractual? Yes, because the employment relationship is contractual by nature. It is always a bargain, and bargains are contracts by definition.[140] Even if the employment is at will, the employer has at least agreed to pay the employee his wages in exchange for his services, and the employee has at least agreed to perform the services in exchange for his wages, until one of them chooses to end the relationship. Therefore, any aspect of the relationship that they agree will not be contractual otherwise would be. The fact that many other laws also govern the employment relationship does not contradict this. Many other laws also govern the parties to almost any contracts they make with one another in a modern society. Insurance is an example. Although the relationship of insurer to insured is always contractual,[141] the other laws that govern this relationship are numerous enough to require lengthy treatises to describe them.[142]

G. *Duties Without Specified End*

Some contracts expressly provide when a duty will end: for example, "Employee shall not compete with Employer for at least two years after this employment relationship ends." Others set a time after which the contract will be breached if the duty has not been performed: for example, "The goods shall be delivered on or before October 1, 2003." Still others create duties that will never end: for example, "First party agrees to surrender his claim against second party arising out of the automobile accident that occurred on June 3, 2003 if second party pays first party $25,000 within thirty days hereof

138. *See generally supra* text accompanying notes 105–07 (discussing good faith).
139. 416 P.2d 555 (Ariz. 1966); *see supra* text accompanying notes 125–32.
140. *See* RESTATEMENT §§ 71–72.
141. *See, e.g.*, 12 JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 7004 (1981 & Supp. 2003); 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D §§ 17:9, 17:16 (1997 & Supp. 2003).
142. *See, e.g.*, APPLEMAN & APPLEMAN, *supra* note 141, which consists of twenty-two volumes, including an index volume, plus supplements.

and to never sue or bring any other legal action against second party with respect to said accident." Sometimes, however, contractual duties are created without any specification of when or whether they will end, in which case contract law, as always, asks what a reasonable person would have intended or understood.[143]

The customs and practices followed by the parties or by others under similar circumstances are an important source of answers to this question.[144] For the employment situation, the practices followed when a labor union is present would seem to be the most favorable to the employees that a reasonable person could expect because, of course, it is the very purpose of a labor union to look out for the employees' interests. The common practice for wages and benefits when a labor union is present is that each collective bargaining contract sets them anew.[145] They may go up, down, or stay the same, depending on the relative bargaining strengths of the parties and whether economic conditions have worsened or improved. For wages and benefits that an employer has promised its employees in the absence of a union, therefore, a reasonable person under the circumstances would understand that the employer could change them at any time, at least after giving reasonable notice of when the changes would take effect.

Employment security rights, on the other hand, are typically *always* included in a collective bargaining contract, no matter how many times one contract has ended and another begun.[146] But because this is the case when a labor union is present, this is *the most* a reasonable person could expect in the absence of a labor union. However, the very purpose of employment security rights is to protect the employees when times are hard because that is likely to be the only time the employees need them. It would, therefore, not be reasonable to conclude that an employer was free to retract them at any time. For employment security rights even in the absence of a union, the conclusion should probably be that once an employer grants them, it is contractually bound not to retract them *as to its current employees* unless something extraordinary occurs that would justify it.[147] Of course, an employer is always free to change any of the terms of the employment contract for new employees it hires.

Employment security rights also do not prevent an employer from laying off employees—as opposed to discharging them—and replacing

143. *See* RESTATEMENT § 204.

144. *See id.* § 222(1), (3); *see also* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.13 (2d ed. 1998).

145. *See generally* 20 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 55:1, 55:6 (4th ed. 2001).

146. *See generally id.*

147. *See generally supra* text accompanying notes 108–10 (discussing the doctrines of commercial impracticability and frustration of purpose).

them with others if the job requirements materially change.[148] For example, workers who are competent for assembly line work but not for operating the computers that control automated assembly lines could legitimately be laid off despite employment security rights if the employer shifted from worker-manned to automated assembly lines. Finally, an employer that was willing to repudiate the existing employment contract and replace it with a new one could simply do so. Contract law makes a repudiation a breach,[149] so the statute of limitations would begin to run, and the employees would lose their rights unless they brought suit before the statutory time expired.[150] Statutes of limitations for breach of contract are usually four years for written contracts and sometimes less for oral contracts.[151]

H. *Excusing the Employer's Performance Because of Unanticipated Circumstances*

Of course, an employer should be excused from performing its promises of employment security if the requirements of the doctrine of commercial impracticability or of frustration of purpose are met.[152] On the facts of the cases briefed herein, however, these requirements were never met. *Asmus v. Pacific Bell*[153] is, perhaps, the best example. Both doctrines require that the party seeking to be excused from the contract not have assumed the risk of the supposedly excusing condition or occurrence.[154] The only condition or occurrence that Pacific Bell could have pointed to as possibly excusing it from its contracts with the sixty management employees were the changes in the industry that had made it no longer profitable to employ them.[155] But Pacific Bell had clearly assumed this risk. The whole point of the contracts was the assumption of the risk. If all Pacific Bell were promising these employees was to employ them as long as it thought it was profitable to do so, the promise would have been meaningless. Pacific Bell presumably would continue to employ any employee as long as it thought it was profitable to do so.

148. *See generally* 19 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 54:19 (4th ed. 2001).

149. *See* RESTATEMENT § 253(1).

150. *See, e.g.*, CAL. CIV. PRO. CODE §§ 337, 339 (West 1982 & Supp. 2003).

151. *E.g.*, *id.* § 337 (four years for a written contract); *id.* § 339 (two years for an oral contract).

152. *See* RESTATEMENT §§ 261, 265.

153. 999 P.2d 71 (Cal. 2000); *see supra* text accompanying notes 73–89.

154. *See supra* text accompanying notes 108–10 (discussing the doctrines of commercial impracticability and frustration of purpose).

155. *See Asmus*, 999 P.2d at 74.

IV. The New Law's Real Harms and Illusory Benefits

A. *Illusory Benefits*

All the claimed benefits of the new law are illusory because existing contract law already provides them. The principal claimed benefit was management flexibility.[156] The new law allows an employer to change its employment practices any time it likes, without having to obtain its employees' agreements, provided only that it gives them reasonable notice of the intended changes.[157] But existing contract law would allow an employer to do the same, provided only that it had the foresight to reserve the right to do so when it gave the employment rights initially.

Moreover, under some circumstances, existing contract law would do the same even if the employer had not had the foresight to reserve the right, expressly because such a right would be implied. The supposed plight of the Michigan employers who had adopted policies of employment security before the Michigan Supreme Court held that such policies were enforceable in *Toussaint* provides an example.[158] In *Bankey*, the Michigan court worried that unless it held that these employers could change these policies unilaterally, the employers "would be tied to anachronistic policies in perpetuity merely because they did not have the foresight to anticipate" the *Toussaint* decision.[159] But if it was indeed reasonable for a Michigan employer to have believed, prior to *Toussaint*, that its policies of employment security were not enforceable, the objective theory would have implied a right to change them unilaterally. Then, if the court had held in *Bankey* that employer-employee contracts were just as enforceable as contracts generally, all such employers would have had "one bite at the apple": one chance to unilaterally change their employment policies to whatever they wanted them to be, after which the policies would be just as enforceable as contracts generally. Finally, the objective theory would ordinarily imply a right to make merely procedural changes in rights of employment security unilaterally, absent contractual provisions to the contrary.[160]

Although existing contract law would require that any retained rights of unilateral change be exercised in good faith, whereas the new law does not, this difference is a harm rather than a benefit. The good faith requirement is a well-established principle of contract law, grounded in the public policy of honesty and fair dealing.[161]

156. *See supra* Section II.C.
157. *See id.*
158. *See* Bankey v. Storer Broad. Co. (*In re* Certified Question), 443 N.W.2d 112, 120 (Mich. 1989).
159. *Id.*
160. *See supra* Section III.E.
161. *See* Restatement § 205.

The Michigan Supreme Court also claimed the benefit of uniformity of treatment, which it said would be destroyed if employers were required to recognize different rights in different employees depending on which rights were in force when the employees were hired.[162] But a reservation of a right of unilateral amendment could also have been used to maintain uniformity, and again, a right to make merely procedural changes would ordinarily be implied even if not expressly reserved. More important, there are situations where there ought not be uniformity because certain employees will have been given benefits that the other employees do not have either because they made sacrifices the other employees did not make or because the benefits were rewards for extraordinary efforts or achievements. This was the case in *Asmus*, for example, with the sixty employees who had given up their opportunities to receive higher pay packages elsewhere in exchange for Pacific Bell's promises of employment until retirement age.[163] Pacific Bell's other employees had no guarantee of employment until retirement age, but they also had not given up opportunities to receive higher pay packages elsewhere.[164] In any event, an employer that finds itself with a confusing mix of unjustifiably different employment rights for different employees has only itself to blame. If making contracts unwisely were a sufficient reason for getting out of them, contracts would be of little value to anyone.

B. *Injustices*

The new law is also unjust—not, however, because it allows employers to unilaterally change their employees' employment rights because existing contract law would allow them to do the same if they had reserved the right to do so—but because it allows employers to do this even when they have not reserved the right to do so.[165] The new law allows them to unilaterally change the employees' employment rights even when it would defeat the employees' reasonable expectations and undercut their detrimental reliance.[166] Both of the decisions discussed earlier that created the new law, *Bankey* and *Asmus*, demonstrate this injustice.[167]

In *Bankey*, the employee had worked for Storer Broadcasting Company for thirteen years under employment rights until Storer discharged him without benefit of the rights two months after unilaterally eliminating them.[168] The discharge surely must have de-

162. *See Bankey*, 443 N.W.2d at 120.
163. *See* Asmus v. Pac. Bell, 999 P.2d 71, 73–74 (Cal. 2000).
164. *See id.*
165. *See supra* Section II.C.
166. *See id.*
167. *See id.*
168. Bankey v. Storer Broad. Co. (*In re* Certified Question), 443 N.W.2d 112, 113–14 (Mich. 1989).

feated the expectations he had reasonably built up over the previous thirteen years. Likewise, in *Asmus*, Pacific Bell surely defeated its sixty employees' reasonable expectations of employment until retirement age when it summarily discharged them, and it almost surely must have left many of them worse off than if they had quit and taken the higher pay packages elsewhere.[169] That the new law requires the employer to give reasonable notice of its intent to unilaterally change the employment rights[170] does not lessen the injustice because there is nothing the notice enables an employee to do to protect himself. It only delays the injustice for the length of the notice period.

C. *Harmful Public Policies*

The new law also deprives employers of any means of making enforceable promises of employment security.[171] No matter how absolutely and unqualifiedly an employer promises its employees that it will not discharge them except for cause or promises them other employment rights, it can thereafter unilaterally change the rights with impunity.[172] Even if the employees would be willing to trust their employer's existing management to keep its unenforceable promises, they would have no way of protecting themselves against changes in ownership or, if the employer was a corporation, changes the shareholders or board of directors demanded. The new law thus deprives employers of a valuable bargaining chip with their employees, and of a valuable means of attracting and keeping desirable employees, and of increasing its employees' job satisfaction and loyalty.

Each of the cases briefed earlier illustrates one or more of the difficulties the new law will create in this respect.[173] In *Torosyan*, the plaintiff asked about employment security in the job interview and was told that he would not be discharged without cause and given a manual so stating.[174] In *Progress Printing Co.*, the plaintiff was given a handbook when he was hired that stated that employees would not be discharged or suspended without at least one written warning and without just cause.[175] In *Ryan*, when the plaintiff told the defendant in the pre-employment hiring interview that he thought he had been discharged by his previous employer for reporting that a co-employee was stealing narcotics and that he did not want that to happen to him again, the defendant allegedly assured him it would not.[176] In *Bankey*, the employment security rights that the employer unilaterally revoked

169. *See* Asmus v. Pac. Bell, 999 P.2d 71, 73–74 (Cal. 2000).
170. *See supra* Section II.C.
171. *See id.*
172. *See id.*
173. *See supra* Section II.
174. Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89, 94 (Conn. 1995).
175. Progress Printing Co. v. Nichols, 421 S.E.2d 428, 429 (Va. 1992).
176. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 399 (Utah 1998).

two months before discharging the plaintiff in violation of them had apparently been in effect for at least thirteen years.[177] In *Asmus*, the employer induced sixty of its management employees not to resign to take higher paying positions elsewhere in the then-booming high technology industries by promising them, in writing, that it would continue to employ them until retirement age so long as they did their jobs competently and undertook any necessary retraining.[178] None of these employers could have used these assurances or promises to attract new employees or keep old ones if the new law had been in effect because the new law would have made them unenforceable.

The employer's inability to make enforceable promises of employment security will also put both employees who do not want to join unions and their employers who do not want them to join at an unfair disadvantage. Federal law makes collective bargaining contracts enforceable[179] and makes federal law the exclusive law for enforcing them.[180] Contractual rights of employment security in collective bargaining contracts are therefore enforceable without regard to any laws the state courts may make for them.[181] Union organizers in the states where the courts have made the new contract law can now tell employees that no matter what their employers may promise them, the only way they can obtain *rights*—rather than just unenforceable promises—of employment security is to join a union. Whether one is for or against unions is not the question. What matters is that the new law is unfair to both employers and employees who might want rights of employment security but might not want the employees to have to join a union to get them.

V. The Consequences of Misunderstanding Contract Law

All the harms of the new law are also consequences of the misunderstanding of existing contract law. The misunderstanding gives employers the same ability to unilaterally amend or revoke their employees' employment rights as the new law gives them. In some respects, the consequences are even worse. The misunderstanding enables the employer to unilaterally revoke or amend the rights immediately, whereas the new law requires the employer to give reasonable notice.[182] In *Ryan*, for example, the plaintiff was required to surrender the employment rights he had been promised in the pre-employment hiring interview as a condition for getting his first paycheck.[183]

177. Bankey v. Storer Broad. Co. (*In re* Certified Question), 443 N.W.2d 112, 113–14 (Mich. 1989).

178. *See* Asmus v. Pac. Bell, 999 P.2d 71, 73–74 (Cal. 2000).

179. *See* Textile Workers of America v. Lincoln Mills of Ala., 353 U.S. 448, 454–56 (1957).

180. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

181. *Id.* at 103–04.

182. *See supra* Section II.

183. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 399, 401 (Utah 1998).

The misunderstanding of existing contract law is also worse because it works coercively. Whereas the new law at least makes it clear that the employees have no rights, the misunderstanding puts them in the position of seeming to have them but having to quit in order to avoid "agreeing" to surrender them[184] or to avoid giving the consideration that makes their surrender of them enforceable.[185] It was the employers, not the employees, that these courts should have required to give consideration, because it was the employees who were giving up their rights and therefore ought to have received something in exchange.

VI. Conclusion

The courts that made new contract law for the employment context in the belief that they were serving the public policy of employment flexibility to meet changing business conditions were mistaken. The new law gives employers no more flexibility than existing contract already gives them if they have the foresight to reserve it, and if they do not reserve it, giving it to them anyway is unjust and bad public policy. The flexibility then enables them to break their promises to their employees with impunity, it deprives them of a valuable means of attracting and keeping superior employees, and it makes joining a labor union the only way that employees can obtain rights—as opposed to unenforceable promises—of employment security. The law the courts made by misunderstanding existing contract law has these same drawbacks plus the drawback of operating coercively.

184. *See id.*; Progress Printing Co. v. Nichols, 421 S.E.2d 428, 431 (Va. 1992).
185. *See Ryan*, 972 P.2d at 401; *Progress Printing Co.*, 421 S.E.2d at 431.