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THE PERNICIOUS EFFECT OF EMPLOYMENT RELATIONSHIPS ON THE LAW OF CONTRACTS

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I. INTRODUCTION

The relationship between employment and contract law is peculiar. On the one hand, employment in modern American society seems to be a classic voluntary agreement among consenting adults. It is a "promise or a set of promises," in the wooden but circular language of the Restatement, "for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[1] Thus, employment relationships figure prominently in a great many landmark contract law decisions, in areas like capacity,[2] duress,[3] certainty,[4] consideration,[5] promissory estoppel,[6] illegality and public pol-

† Associate Professor, Texas Wesleyan University School of Law. This paper was originally presented at the Symposium on The Role of Contract in the Modern Employment Relationship, held at Texas Wesleyan University in March, 2003. I benefited from the comments of several participants at the Symposium, particularly Debora Threedy (who encouraged) and David Slawson (who contested) some of the points made here. I owe particular thanks to Rachel Arnow-Richman for her help with developing this idea and her patient comments on earlier drafts; to the Editors of the Texas Wesleyan Law Review for the invitation to speak and their work on the manuscript; and to David Cook for his excellent research assistance.

1. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) [hereinafter SECOND RESTATEMENT].

2. *See, e.g.*, Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460, 464 (N.Y. 1969).

3. *See, e.g.*, Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 538 (Cal. Ct. App. 1966).

4. *See, e.g.*, Varney v. Ditmars, 111 N.E. 822, 824 (N.Y. 1916).

5. *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99, 100 (9th Cir. 1902); Webb v. McGowin, 168 So. 196, 196–97 (Ala. Ct. App. 1935).

icy,[7] anticipatory repudiation,[8] mitigation of damages,[9] and specific performance.[10] On the other hand, many of these same cases fit uneasily into the larger theoretical framework of contract law. They are important, not as the decisions that created the broad principles of contract law, but often for the opposite reason: they limit the application of contract rules in employment contexts,[11] create variant forms of the established rules,[12] or act as cautionary tales about the ability of abstract doctrine to yield unjust results.[13] Often, contract law seems to be applied differently in employment cases than in cases involving commercial transactions.

My thesis is that this uneasy relationship exists because employment is not really a contractual relationship at all; it is, and always has been, one of *status*. I am not arguing that it *should* be a status relationship, merely that it has been one since time immemorial and continues to be treated so today, regardless of the legal theories applied. In many respects, employment is more analogous to a family relationship than it is to a contract between a widget manufacturer and a retail distributor. It is not a simple commercial transaction, but instead, as explained by Rachel Arnow-Richman, it is a "fundamental, life-ordering institution[ ]."[14] As such, it is regulated by law in a host of ways entirely unrelated to the agreement of the parties, dependent solely upon the relative status of parties as employer and employee.[15]

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6. *See, e.g.*, Katz v. Danny Dare, Inc., 610 S.W.2d 121, 122 (Mo. Ct. App. 1980); Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 168 (Mo. Ct. App. 1959).

7. *See, e.g.*, Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281–83 (Ariz. 1999); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984) (noting that covenants not to compete should not be "unreasonable and oppressive").

8. *See, e.g.*, Hochster v. De la Tour, 118 Eng. Rep. 922, 923 (Q.B. 1853).

9. *See, e.g.*, Parker v. Twentieth Century-Fox Film Corp., 74 P.2d 689, 692–93 (Cal. 1970).

10. *See, e.g.*, Lumley v. Wagner, 42 Eng. Rep. 687, 689 (Ch. 1852).

11. We learn, for example, that employment cases are exempt from the ordinary rules for specific performance, *see Lumley*, 42 Eng. Rep. at 689, and that the standard for mitigation of damages may be more lenient for an employee than for a commercial enterprise, *see Parker*, 74 P.2d at 692.

12. Examples include the variation on the pre-existing duty rule created by *Webb v. McGowin*, 168 So. 196, 198 (Ala. Ct. App. 1935), and the new formulation of "capacity" in *Ortelere v. Teachers' Ret. Bd.*, 250 N.E.2d 460, 464–66 (N.Y. 1969).

13. Thus, we see the doctrine of consideration used to evade paying higher wages to striking workers, *see Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100 (9th Cir. 1902), and the doctrine of certainty is used to help an employer renege on a promise to share profits with a key employee, *see Varney v. Ditmars*, 111 N.E. 822, 824 (N.Y. 1916).

14. Rachel Arnow-Richman, *Non-Competes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 162 (2003) [hereinafter Arnow-Richman, *Non-Competes*].

15. There are far too many to name, but as I took a break from writing and went into this law school's staff lunchroom for a cup of coffee, I was informed by posters on the walls of my rights under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2002), the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651–678 (2003), the Family and Medical Leave Act of 1993, 29 U.S.C.

As a result, contract law frequently does a poor job of dealing with employment law issues.[16] The decision in *Alaska Packers' Ass'n v. Domenico*,[17] for example, is a kind of poster child for the problems that arise when we try to analyze employment issues under the framework of classical contract theory. As Debora Threedy has shown,[18] *Alaska Packers* is all about workers using concerted economic power to gain wage increases from a consortium of employers. The real question is whether workers who have agreed to a given wage can legitimately strike for a higher wage, although this issue plays little or no role in the decision. Rather, the court treats the case as one involving the arcane contract doctrine of "consideration," specifically one small part of the doctrine known as the "pre-existing duty rule."[19] If *Alaska Packers* arose today, it would be seen as a labor dispute. The issue would be whether the striking workers who signed the contract are violating their obligations under the labor laws. Specifically, are they engaging in appropriate collective action using appropriate economic weapons? We would view it as a problem of collective bargaining and apply the body of law that, over the past hundred years, has come to be called labor law. It is highly unlikely that doctrines like "offer and acceptance," "bargained-for exchange," and "pre-existing duty" would play any role in our analysis.

This disconnect between contract theory and the reality of employment cuts both ways. While contract law frequently does a poor job of handling employment issues, as discussed below, the fact is that trying to force employment issues into a contracts framework has unfortunate effects on contract doctrine. The valuable role of contract law in structuring wealth-maximizing commercial relations are destabilized

§§ 2601–2654 (2003), the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2003), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 (2003), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2003), the Equal Pay Act of 1963, 29 U.S.C. § 206 (2002), the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2003), and the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2003). There are others.

16. Many examples of this are dealt with elsewhere in this Symposium. *See* Arnow-Richman, *supra* note 14; W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 33 (2003).

17. 117 F. 99 (9th Cir. 1902).

18. *See* Debora L. Threedy, *A Fish Story:* Alaska Packers' Association v. Domenico, 2000 UTAH L. REV. 185, 196–97 (2000); Debora L. Threedy, *Labor Disputes in Contract Law: The Past and Present of* Alaska Packers' Ass'n v. Domenico, 10 TEX. WESLEYAN L. REV. 65, 66 (2003).

19. This is the rule that performing a legal duty that is already owed to the promisor (or promising to perform that duty) cannot be consideration for the promise. *See* SECOND RESTATEMENT, *supra* note 1, §§ 73, 75; E. ALLAN FARNSWORTH, CONTRACTS §§ 4.21, 4.22 (3d ed. 1999). *See generally* Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49 (2001) (analyzing the subtleties of the problems associated with the modification of contracts).

and made less effective by doctrines developed to protect employees and solve perceived social problems in the workplace.

As noted below, attempts to deal with the issues that arise from this particular institution with tools designed for commercial transactions are unlikely to be successful. We are trying, as it were, to fill a round hole with a square peg. It is true that in any particular case we can get the peg to go in if we get a big enough hammer and pound long enough. But, it is unlikely that it will ever do a good job of filling that particular hole. More important, for my present purposes, this does not do the square peg much good, either, because it gets so dented and deformed in the process that it no longer fits well even into its original square hole.

Using contract law to solve problems in a status relationship like employment has been as harmful to contract law as it has been to employment law. To make this point, Part II of this article begins with a brief discussion of both contract and employment law, specifically focusing on their origins, their relationship to each other, and the role of status in each. Part III examines three areas of contract law—consideration, capacity, and promissory estoppel—focusing on the influence that employment issues have had on contract law. Part IV concludes with a brief investigation of how courts continue to grab the tools of contract in an unsuccessful attempt to deal with the problems in a status relationship.

II. A Brief History of Employment and Contract Law

To illustrate the point, it is helpful to start with some history. It is sometimes said that the "traditional" view of employment is that it is a contract,[20] an agreement to buy and sell labor, negotiated in much the same way as any other contract, and depending entirely on the terms to which the parties agree. But to the extent that this is a tradition, it is a remarkably new one, dating not much back beyond the Civil War, and no earlier, even in speculative theory, than the American Revolution.

A. *Origins of Employment Law*

For most of the history of the common law—and long before that—our concept of employment has been one of *status*.[21] You might be a lord, possessing certain rights and obligations. Or you might be a

20. *See, e.g.*, Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 Berkeley J. Emp. & Lab. L. 356, 406 (1995) (noting that "the traditional baseline conception of the employment relationship is that it is a voluntary (i.e. non-coercive) contractual relation").

21. *See* Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 Colum. L. Rev. 2291, 2306 (2002) (noting the theoretical change from status to contract conceptions of employment).

lord's retainer and have a different set of rights and obligations. You might be a master weaver or an apprentice, a sailor or a merchant, a fletcher, a thatcher, a carter, or a cook, a serf, or a villein—but regardless of your situation, you would have relatively little control over the matter.[22] If you were employed by someone else, chances are that the details of that arrangement would have little to do with your own choice or the specific bargain you struck with the master. There have always been exceptions,[23] but most people at most times in history have had little or no control over either who they worked for or the terms on which they worked:

> [I]n the constitution of primitive societies . . . the individual creates for himself few or no rights, and few or no duties. The rules which he obeys are derived first from the station into which he is born, and next from the imperative commands addressed to him by the chief of the household of which he forms part.[24]

In such societies, the family and its dependents are not individuals bound by agreement to each other, but parts of an organic unit. The deepest roots of employment law thus lie not in the law governing transactions among merchants, but the law of the family.[25]

Nor by "primitive societies" are we talking only about the ancient Sumerians or the Trobriand Islanders. Pre-industrial England was just such a place, where the 14th century Statute of Labourers and the 16th century Statute of Artificers—with subsequent legislation and judicial decisions—enforced a regime of "quasi-feudal servility."[26] The regulations fixed maximum wages and punished employers who paid too much, made it a crime for workers to refuse to accept the legally set maximum, punished those who enticed a worker away with promises of higher wages, and required servants who desired to leave the parish to obtain a certificate from their masters that they were allowed to leave.[27] Two striking features of the law were that the master's interest was viewed as a *property* interest in the servant, and

22. *See* VICTOR RUTENBERG, FEUDAL SOCIETY AND ITS CULTURE 21–27 (Barry Jones trans., 1988).

23. An early one is Jacob's seven-year employment contract with his uncle Laban, *see Genesis* 29:18–28; a later one is the tailored articles of indenture, including the ultimate sale of the business, in *Kingston v. Preston*, 99 Eng. Rep. 437 (K.B. 1773). *See* FARNSWORTH, *supra* note 19, at 554–55 (citing Kingston v. Preston, 99 Eng. Rep. 437 (K.B. 1773)).

24. SIR HENRY SUMNER MAINE, ANCIENT LAW 259 (Dorset Press 1986) (1861).

25. It is interesting that these historic ties between family and employment law come full circle in proposals to import the same approach family law uses to govern prenuptial agreements into the area of employee covenants not to compete. *See* Rachel Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1226–34 (2002); Arnow-Richman, *Non-Competes*, *supra* note 14.

26. *See* Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 86 (1982).

27. *Id.* at 86–87.

the fact that employers could enlist the courts to compel servants to serve out their full employment.[28]

Weighed against this was the fact that the law prohibited a master from firing a servant without proving justifiable cause before two justices of the peace.[29] In the American colonies, servants were also protected by prohibitions on dismissal without cause, which also had to be proved before public officials.[30] Masters had a duty to provide their servants with sufficient support to prevent them from becoming public charges, and to care for them when sick.[31]

The fledgling United States at the dawn of the 19th century was not much different. The householder, or the "man of property," was the *paterfamilias*, while the servants, apprentices, journeymen, and hired laborers—virtually all the non-propertied class—were dependents of the head of the household and subject to his management and control.[32] The legal regime governing employment thus was rooted in ideas of dependence and social inferiority and regulating the relationship between powerful (master) and weak (servant).[33] Thus, employees, like wives and minor children, had a right to be supported by their masters, and could sue him if he failed to do so.[34] But they had the duty to submit to him as well, and even (in some cases) to be physically chastised by him if they failed to do as they were told.[35] The master could lose his authority if he failed to support his dependents, likely grounded on the theory that he had forfeited his natural right to govern.[36]

Even in situations where employees were not part of the household, the regulation presupposed the relation of dominance. The older English rule was that unless the master and servant had agreed otherwise, the term of an employment contract was one year.[37] The effect of this was to protect the employer by ensuring that the employee would not leave at an inopportune time (for example, harvest season) because the employee was not entitled to compensation until the year was completed.[38] But this also forced the employer to care for the

28. *Id.* at 87.
29. *Id.* at 88.
30. *Id.* at 88–89.
31. *Id.* at 89.
32. *See* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 344–45 (1989).
33. *See id.*
34. *See id.* at 344.
35. *See id.* at 344–45.
36. *See id.* at 345.
37. *See* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 93 (1996) [hereinafter Ballam, *Original Myth*].
38. *See* Pettigrew v. Bishop, 3 Ala. 440, 441–42 (1842); Stark v. Parker, 19 Mass. (2 Pick.) 267, 274 (1824); Erving v. Ingram, 24 N.J.L. 520, 522–23 (1854). "[I]t does not very well accord with the good faith, which the rules of law uniformly require, to

employee rather than dismiss him or her when the busy time was over, or when the employee became ill or unable to work.[39]

In short, the law of employment originated in the heavily status-based relationships of the family and feudal society, and from its earliest days has been influenced by the vision of hierarchical dominance and dependence.[40] That idea has continued to this day, and is still reflected in the term used to describe this area of the law: "master-servant."[41]

B. *Origins of Contract Law*

The law of contracts comes from a very different background. Contract law arose in the world of voluntary transactions among buyers and sellers. Its roots lie in two different bodies of law. The first is the law of property—where early contract doctrine arose as a means of dealing with incomplete exchanges of property, usually involving land and estates (given the relative unimportance of transactions in goods at that time).[42] The second is the law of merchants—where, for centuries, special non-royal courts had adjudicated disputes among merchants.[43] The uniting factors of these two disparate strands of law are that (1) each involves disputes among those who are more or less equal and free to refuse to deal (*i.e.*, buyers and sellers of estates; merchants trading with each other), and (2) in each case, legal rights depend on the voluntary undertakings of the parties. In such cases, we are at the opposite end of the dominance-dependence model that characterizes the rise of employment law.

Originally, contract was not a distinct body of law, but a series of various kinds of transactions and different remedies.[44] The idea that these transactions and remedies could be combined into one distinc-

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allow [the employee] to stop at any stage of his labor, in open violation of his agreement, and still compel his employer to pay him what his services are worth." Miller v. Goddard, 34 Me. 102, 107 (1852).

39. This is not to suggest, however, that the system nicely balanced the interests of employees and employers. An employee who quit before the term was up might be liable to imprisonment, as well as forfeiture of substantial wages; the employer might be liable for a fine of forty shillings. *See* Jacoby, *supra* note 26, at 90.

40. Some of this history is also traced in ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 15–54 (Thomas A. Green ed., 1991).

41. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

42. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 162–63 (Oxford Univ. Press 1992) (1977).

43. A useful short history is Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 353–56 (1983); a fascinating longer version is LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF THE COMMERCIAL LAW (1983).

44. *See generally* Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35 (1983) (explaining the dynamics of common law administration and its relationship to the development of the early common law of contract).

tive body of law, which focused on the intent of the parties to bind themselves, was a very late arrival. Before the 19th century, nothing resembled our modern "law of contracts" based on principles that apply equally to all sorts of disparate transactions. Rather, there were many bodies of discrete legal regimes covering certain kinds of relationships or transactions, which were organized not by legal doctrines but by forms of pleading. There were laws of bailments or agencies or conveyances, of promissory oaths, sealed instruments or suretyships, and actions of assumpsit, debt, covenant, and replevin—with little concept of any underlying or unifying principles among them. A decade before the American Revolution, when Blackstone was writing his *Commentaries*,[45] contract law was little more than a minor appendage of the larger law of property.[46] In the ensuing hundred years, the idea of contract changed so radically that Oliver Wendell Holmes justifiably wrote that there was little point in historical research in the field of contracts because the "doctrine . . . has been so thoroughly remodelled [sic] to meet the needs of modern times."[47]

The evolution of modern contract law was caused by the twin revolutions wrought in 1776 by (1) Adam Smith's *The Wealth of Nations*[48] and (2) the American Declaration of Independence. The Declaration proclaimed that "all men are created equal," and were free to pursue their own happiness,[49] while Smith extolled the great increases in social welfare that flowed from "the obvious and simple system of natural liberty" that leaves everyone "perfectly free to pursue his own interest in his own way, and to bring both his industry and capital into competition."[50] These new philosophies led theorists who examined the old cases to see that the reason for enforcing different kinds of promises that had been enforced in different kinds of actions lay not in the forms of action or in ideas of substantive justice, but in the intent of free and autonomous parties. Thus, the first treatise on the law of contracts—published fourteen years after the stirring events of 1776—declared that the source of contractual duties was in "the consent of [the] parties alone."[51] The philosophical ties between this con-

45. Sir William Blackstone's *Commentaries on the Laws of England* are generally accepted as the most satisfactory exposition of the common law of England, instrumental in shaping American Jurisprudence.

46. *See* HORWITZ, *supra* note 42, at 162–63.

47. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 247 (1881).

48. Adam Smith is famous for his theory that nations attain wealth and function best where individuals are completely free to use their skills and capital (money, land, etc.) in their own self-interest and at their own discretion. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Hackett Publishing Co. 1993) (1776).

49. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

50. *See* SMITH, *supra* note 48, at 165.

51. JOHN J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 229 (1790), *quoted in* HORWITZ, *supra* note 42, at 160.

sent theory of contract and the ideals of personal liberty continue to exert substantial influence today.[52]

Since its original articulation, contract doctrine has been rooted in the idea that it should facilitate the free agreements of parties without regard to their particular economic or cognitive situations. Under modern contract law, each party acts in his or her own interest and for his or her own particular gain, resulting in an increase of wealth for both parties. As a result, the law of contracts, as noted by Richard Epstein,

> [D]oes not create one set of rules for people who are rich and powerful and another set for those who are frail or meek. Instead, the law speaks about two hardy standbys in all contractual arrangements: A and B. These people are colorless, odorless, and timeless, of no known nationality, age, race, or sex.[53]

These assumptions of contract law may obviously be criticized on grounds both normative (*e.g.*, that the law ought to protect the frail and disadvantaged) and descriptive (*e.g.*, that contract law does in fact take the relative power of the parties into account in many cases). However, the kind of abstract, non-contextual rules that Epstein endorses are entirely appropriate for sophisticated parties who regularly engage in commercial transactions.[54]

For such parties, it is important that the law be clear, predictable, and easy to use. Lisa Bernstein has shown that merchants who regularly deal with each other prefer a system of fixed, understandable, and predictable rules, and place a great deal of emphasis on the terms of written agreements.[55] They shun attempts to look for the "true bargain" of the parties, and frown on evidence of things like "trade usage" to imply duties not expressed in the written agreement. As Alan Schwartz and Robert Scott have recently shown, this is because most parties involved in contracting (unlike, say, tort victims) are re-

52. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984).

> Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations. Just as it is regarded as prima facie unjust to abridge these liberties, so too is it presumptively unjust to abridge the economic liberties of individuals.

53. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 73 (1995).

54. *See generally* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. (forthcoming 2003) (arguing that formal and freedom-enhancing contract terms are suitable for firms engaged in commercial endeavors).

55. *See generally* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1819 (1996) [hereinafter Bernstein, *Merchant Law*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1760 (2001) [hereinafter Bernstein, *Cotton Industry*]; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 727 (1999).

peat players who generally assume they can look out for their own interests.[56] Such players prefer rules that are simple, predictable, and inexpensive to employ, and which *usually* reach the right result; they dislike rules that are complex, unpredictable, and expensive to employ, and *always* reach the right result.[57] Thus, despite generations of work by academics, who claim to be looking out for their interests, ungrateful merchants and their lawyers have steadfastly insisted on retaining such simple, formal provisions as the "perfect tender rule,"[58] rather than more amorphous standards that could provide better justice in particular cases.[59]

C. *Employment as Contract*

In the 19th century employment law and contract law suddenly came together. In the new American republic, shorn of its hereditary aristocracy and glutted with immigrants anxious to escape the past and make a new future in a free land, the ideas of servility and dependence had a bad name. After all, "people who are competent enough to marry, vote, and pray" certainly ought to be able to "protect them-

56. *See* Schwartz & Scott, *supra* note 54. There are two reasons for this. First, there is no particular reason to believe that judges and juries, who are affected by hindsight and the self-serving testimony of the parties after the fact, are likely to be more accurate in divining the real intent of the parties than are the plain written evidences of the deals themselves. *See* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847, 848, 871–74 (2000) [hereinafter Scott, *Formalism*] (arguing that courts and juries looking at agreements in context do not do a better job than courts applying formalist rules). Second, even if they could, the additional cost involved in a thorough-going evidentiary hearing, with conflicting (and expensive) expert witnesses, weeks of depositions, and millions of pages of document production vastly outweighs the gains in accuracy.

57. *See* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 Harv. L. Rev. 465, 526–27 (1987) (noting that merchants like clear rules because they trust their abilities to protect their own interests more than they trust judges and juries to do so).

58. The rule is that in the sale of goods, the goods must conform perfectly to the contract or the buyer has a right to reject. *See* U.C.C. § 2-601 (1997) (providing that if tendered goods fail in any respect to conform to the contract, the buyer can reject all or part of the goods). Karl Llewellyn, the U.C.C.'s principal draftsman, wanted to substitute a standard of "mercantile performance," under which merchants would be obliged to accept goods that did not exactly meet the contract specifications because this would avoid "mercantile injustice" and prevent buyers from speculating at sellers' expense. *See* Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 Alb. L. Rev. 325, 337–38 (1995). It was the merchants themselves who fought for the simple bright line rule. *See* Wiseman, *supra* note 57, at 526 ("The abuses . . . that concerned Llewellyn were, in the merchants' view, largely matters that they could take care of themselves 'mighty quick' through other merchant practices.").

59. *See* Scott, *Formalism*, *supra* note 56, at 873–74 (noting that merchants frequently prefer to use formal arbitration rather than full-scale litigation in disputes over the meaning of contracts). Two industries that have entirely opted out of the flexible and contextual approach to contracts under the U.C.C. are studied in Bernstein, *Merchant Law*, *supra* note 55, at 1769 (studying the grain industry) and Bernstein, *Cotton Industry*, *supra* note 55, at 1735–36 (studying the cotton industry).

selves in their day-to-day business transactions."[60] A republic managed by the people themselves depended on those who could manage themselves, and the new nation viewed servile dependency as corruption antithetical to society. Thus, a new concept arose. Employment would no longer be a "hierarchical relationship of dependence and governance," but a "purely contractual engagement between juridical equals."[61] As one Massachusetts legislator stated in 1853:

> In a free government like ours, employment is simply a contract between parties having equal rights. The operative agrees to perform a certain amount of work in consideration of receiving a certain amount of money . . . . The employed is under no greater obligation to the employer than the employer is to the employed; and the one has no more right to dictate [outside of work] than the other. In the eye of the law, they are both freemen—citizens having equal rights, and brethren having one common destiny.[62]

By the dawn of the American Civil War, Sir Henry Maine viewed this new field of contract as the central organizing principle of the modern world:

> [T]he society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract . . . . Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention . . . . The point, for instance, which is really debated in the vigorous controversy still carried on upon the subject of negro servitude, is whether the status of the slave does not belong to bygone institutions, and whether the only relation between employer and labourer which commends itself to modern morality be not a relation determined exclusively by contract.[63]

The destruction of chattel slavery and the gradual emancipation of women seemed to confirm Maine's conclusion that the process from status to contract was inevitable.

From about that time to the start of the Second World War, it was common to use the rhetoric of contract in talking about and dealing with employment issues. Perhaps the greatest barometer of the spread was the growth of the "employment-at-will" doctrine, under which in the absence of a specific agreement, workers were free to quit when they chose, but could also be fired immediately and without cause at the pleasure of the employer. This doctrine did not become

60. Epstein, *supra* note 52, at 954.

61. Steinfeld, *supra* note 32, at 351.

62. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, at 550 (Boston 1853) (address delivered by Henry Williams), *quoted in* Steinfeld, *supra* note 32, at 351.

63. *See* MAINE, *supra* note 24, at 252–53.

clearly articulated in American courts until after the Civil War,[64] although it had been regularly (though not uniformly) applied in earlier decades.[65] The rising use of contract doctrine in dealing with employment issues reflected a real philosophical bias in favor of freedom and not the particular effects of increasing industrialization or judicial class bias. This is evident by the fact that employment-at-will was adopted earliest in the least industrialized states and those where the judiciary was the least elite, and later spread into the more industrialized and class-differentiated states.[66] Another marker was the Supreme Court's efforts from 1897 to 1937[67] to elevate freedom of contract in employment—"the right to purchase and sell labor upon such terms as the parties may agree to"[68]—to the level of a constitutional right in decisions like *Lochner v. New York*,[69] *Adair v. United States*,[70] *Coppage v. Kansas*,[71] and *Hitchman Coal & Coke Co. v. Mitchell*.[72]

D. *Back to Status*

But it may be doubted whether any of this rhetoric was as widely accepted as the Court's statements of such broad rules implied. This is

64. Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 654 (2000) [hereinafter Ballam, *Impending Death*].

65. Some argue that the doctrine was already well settled in practice even before it was clearly articulated. *See* Ballam, *Original Myth*, *supra* note 37, at 98. Others take a very different view of the historical record. *See* Donna R. Mooney, *The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872*, 21 BERKELEY J. EMP. & LAB. L. 633, 676 (2000) (arguing that the doctrine did not take root in California until the 20th century).

66. *See* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 699–702 (1994) (tracing the adoption of the doctrine state by state). In the 1870s, the only states to have explicitly adopted the doctrine were Louisiana, Maine, Mississippi, Wisconsin, California, Illinois, Colorado, and the Dakota Territory. *Id.* at 748. The doctrine was not adopted in the most industrialized states, New York and Pennsylvania, until the 1890s. *Id.* at 703. Morriss's analysis suggests that adoption of the doctrine was unrelated to the degree of industrialization of the state. *See id.* at 736.

67. The period is usually dated from the decision in *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (explaining that "liberty" under the Fourteenth Amendment includes the right to enter into "proper, necessary and essential" contracts), to the Court's full retreat in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (explaining "that freedom of contract is a qualified and not an absolute right" that can be restricted by the government under the Constitution). *See, e.g.*, Michael J. Phillips, *The Substantive Due Process Decisions of Mr. Justice Holmes*, 36 AM. BUS. L.J. 437, 438–41 (1999).

68. Lochner v. New York, 198 U.S. 45, 64 (1905).

69. *Id.* at 62 (holding unconstitutional state law limiting working hours to sixty per week).

70. 208 U.S. 161, 180 (1908) (striking down federal law prohibiting the firing of workers merely for joining a union).

71. 236 U.S. 1, 26 (1915) (invalidating state law prohibiting yellow dog contracts).

72. 245 U.S. 229 (1917). The court noted that employer's refusal to engage in collective bargaining, firing of employees who join a union, and insistence on having employees sign yellow dog contracts is "a part of the constitutional rights of personal liberty and private property." *Id.* at 251.

not merely because courts at this same time were upholding a great many status-based regulations on employment, although they were.[73] For our purposes, it is even more significant that each of these cases involved statutes passed by elected organs of government specifically to regulate the employer-employee relationship without regard to what the parties themselves agreed to, but solely on the basis of the employment relationship. Many of these statutes imposed criminal penalties on employers for their violation.[74] Therefore, it is evident that some people at least—and presumably a lot of people—were not viewing employment as a purely contractual matter. As Justice Holmes noted in his dissent in *Lochner*, to the extent that the Court viewed the employment relationship as something to be governed solely by contract law, "a large part of the country" disagreed.[75]

Moreover, even during this heyday of contract talk, most employment law still turned on questions of status, not contract. The vast bodies of law known as "agency" and "master-servant" evolved during the 19th century with little regard to the specific agreements between the parties. The court's analysis of a servant's liability to his or her employer does not vary markedly from the 1786 case of *Purviance v. Angus*,[76] to the 1884 case of *The Hettie Ellis*,[77] to the 1988 case of *Audet v. Champagne*.[78] In none of these cases does the court pause to inquire into the precise nature of the agreement between the parties.

By the early days of the 20th century it was apparent that, to the extent the nation had flirted with the idea of employment as contract, a return to status was imminent.[79] Much of the history of employment law in the 20th century concerns the increasing public regulation of

73. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 438 (1917) (upholding statute prescribing maximum work day hours for factory workers of both sexes); Muller v. Oregon, 208 U.S. 412, 416, 423 (1908) (upholding statute prescribing maximum work day hours for women "in any mechanical establishment, or factory, or laundry"); Holden v. Hardy, 169 U.S. 366, 380, 398 (1898) (upholding statute upholding maximum work day hours for miners and workers in smelters).

74. *See, e.g.*, *Adair*, 208 U.S. at 168–69 (imposing criminal penalties for firing employees solely because they joined labor unions); *Lochner*, 198 U.S. at 52 (imposing criminal penalties for employing bakers more than ten hours a day or sixty hours a week).

75. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

76. 1 U.S. 180, 184 (1786) (rejecting ship master's claim that he was not liable for loss caused to his employers due to harm he caused to third parties because his contract did not deal with that issue).

77. 22 F. 350, 351 (C.C.E.D. La. 1884) (noting that ship's master is liable to the owners who employ him for failures of judgment).

78. No. CV-85-347, 1988 Me. Super. LEXIS 266, at *2 (Me. Super. Ct. Oct. 28, 1988) (rejecting claim that employer was liable to employee for harm caused by employee's negligent conduct in auto accident).

79. *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 40 (1917) (predicting that status would make a big comeback in the 20th century).

the employment relationship.[80] These regulations do not depend on what the parties in any given transaction would prefer, nor on the specific circumstances of a given employer and employee. They also do not require us to find any flaws in the bargaining process. For instance, we prohibit yellow dog contracts and agreements to work for less than minimum wage even if both parties devoutly wish to enter them, whether or not it is in the best interest of both to do so. We also impose the requirements of the Occupational Safety and Health Act (OSHA) of 1970[81] and the Employment Retirement Income Security Act (ERISA) of 1974,[82] even if both parties would prefer that we did not.

Why we choose to regulate employment as a status relationship is not important for our present purposes. It may be that we realize that the modern employee of today, like his or her medieval forebears, really is a servile dependent in need of protection from the abuse of a powerful master:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation the substance of life is in another man's hands.[83]

Or it may be that today employment is much more socially important because of political decisions that push most of the responsibility for public welfare onto private employers. This shift in responsibility counsels for achieving standardization by regulation rather than leaving social programs to the vagaries of private decisions:

> In the American political economy, the job rather than the state has become the source of most of the social safety net on which people must rely when they are not employed—that is, when they are sick, disabled, or retired. And the plants and offices in which we work are the places where we spend much of our adult lives, where we develop important aspects of our personalities and our relation-

80. *See* Epstein, *supra* note 52, at 947 (noting that the law of employment "has shifted heavily in favor of direct public regulation, which has been thought strictly necessary to redress the perceived imbalance between the individual and the firm").

81. 29 U.S.C. §§ 651–678 (2003).

82. 29 U.S.C. §§ 1001–1461 (2002).

83. FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis omitted). The idea of "something new in the world" should obviously be taken with a grain of salt. It is difficult to believe that the modern employee of a Pizza Hut franchisee is more dependent for sustenance on others than, say, the serf on a medieval manor. But the assumption that the worker is a helpless pawn dependent on others for the elements of life is something that would have been shared by our medieval forebears.

> ships, and where we may be exposed to a variety of physical or psychological traumas.[84]

Or it may have more to do with changing ideas of freedom and personal identity. We have moved from a society that values individual self-discipline and responsibility to one that values individual flourishing and self-expression. This means that our idea of freedom has changed from the negative one of freeing ourselves from coercion to the positive one of enabling us to maximize our choices. According to Deborah A. Ballam:

> Modern law is dominated by the individual's "demand for rights" resulting in "fewer zones of immunity from law—fewer areas of life which are totally unregulated." The modern conception of individualism, focusing so intently on freedom of choice, demands "a thick network of rules and rule-structures for the very purpose of protecting freedom of choice." Modern society, then, is a system of "rights and entitlements" which can be protected and nourished only by more and more laws that protect those rights and entitlements.[85]

Under this view, the employee's own flourishing may depend on being able to coerce the employer into taking actions for his or her benefit.

For present purposes, again, the reasons are irrelevant. The point is that we, like our medieval ancestors, view and regulate employment primarily as a status relationship, and regard it as one that should be regulated as a status. To the extent that contract law is involved, it is (as is the case in family relationships) ancillary to the status relationship.

III. The Influence of Employment Issues on Contract Law

The point of the foregoing is to show that the origins and interests involved in cases of employment and cases involving commercial transactions are very different. However, contract law is universally applied and uses the same doctrines in a vast array of cases. A contract is a contract, whether its subject matter is a farm, a job, a haircut, a venture capital investment, a battleship, or a series of tango lessons. Thus, the law has a tendency to use the same principles in dealing with the relationship of employer and employee as it does with any other voluntary commercial arrangement.[86] A principle of law developed in a case involving the sale of a skyscraper is therefore fully applicable in

84. Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law 3 (1990).

85. Ballam, *Impending Death*, *supra* note 64, at 684 (citations omitted) (describing and quoting the views expressed in Lawrence M. Friedman, The Republic of Choice 11–15, 62, 97 (1990)).

86. *See* Epstein, *supra* note 53, at 73 (noting that contract law "does not speak about one set of rules for employers and another for employees, or one set for landlords and another for tenants").

a contract for a magazine subscription as well as an employment agreement, and vice versa.

But this creates a problem for those who want a law of contracts that is reliable and useful for commercial actors. Our status notions with respect to employment are so strong that they tend to give us a powerful message as to what the "right" result ought to be in a given case, regardless of the specific agreement of the parties. We may decide, for example, that it is not right that an employer fire an employee solely because he or she refuses to commit some criminal or antisocial act, and may therefore punish an employer who does so. But this perceived "right" result has nothing to do with the agreement between the parties, and attempts to find some contractual basis for liability ultimately fail.[87]

The literature is full of cases that resemble the following fact pattern: A court is faced with a problem that arises in the employment context, but the only tool available is contract law. The justice of the servant's cause is apparent, and the case cries out for the court to solve the problem. However, existing contract law does not solve this particular plaintiff's problem, so in order to make contract law work, the court must bend or twist the law to fit the situation. The newly bent doctrine saves this particular plaintiff in this particular case. Justice is done. But because the problem was not really a *contract* problem in the first place, the new rule does a poor job of solving the problems of many other employees in similar situations but with somewhat different facts. Ultimately, the legislature has to step in with status-based regulation to solve the problem, rendering the earlier decision largely irrelevant in the employment context from which it sprang.

But because the case was decided on *contract* law grounds and was not limited to the employment setting, and because lawyers are good at pulling abstract rules out of cases to use in very different situations, the bent doctrine now runs madly around in all kinds of other contexts far from the special relationship of employer and employee. A rule crafted in contract to protect interests that derive from status is suddenly being applied in situations that are quintessentially commercial—with results that are destabilizing at best.

87. In *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974), for example, the court held that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract." This is obviously a doubtful basis for the decision. Even if we assume that this non-retaliation provision really was somehow part of this agreement, the natural question is what happens when the employer specifically provides in the employment agreement for retaliation in the event the employee fails to commit perjury? The court would certainly find such a provision void as against public policy, which means that the non-retaliation provision does not come from the contract at all, but from some other source. Talking about breach of contract adds nothing to the discussion.

I want to illustrate this process with three examples, all of them taken from cases widely known to American lawyers.

A. *Consideration:* Webb v. McGowin

Most everyone remembers *Webb v. McGowin*[88] from law school. The worker, you recall, is high up in the factory scaffolding.[89] The president of the company (whose family owns the business) walks by underneath.[90] The servant is in the process of throwing a large, heavy block down on the floor, when he suddenly realizes that it will crush the master.[91] The servant reaches for the block to deflect it.[92] He manages to do so, but in the process he loses his balance, falls to the floor, and is permanently disabled.[93] The grateful master promises him a pension ($15 every two weeks) for the rest of his life.[94] The master pays it for several years, but when the master dies, his estate refuses to pay.[95] The servant sues.

Webb is the classic case of a servant who is injured in the service of his master. For the better part of a thousand years it has been society's idea that one injured in the service of his or her master has a right to a pension. The lord whose vassal is killed or maimed while fighting for him is supposed to take care of the vassal's family. That right may or may not have been legally enforceable—the court system in 15th century England left much to be desired—but it was unquestionably regarded as the duty of a good master, regardless of the particular terms of the lord's agreement with the vassal.[96]

The idea that one injured in the service of his or her master should receive a pension is still very much with us today. However, we no longer rely on feudal duties or *noblesse oblige*, we accomplish it instead with workers' compensation and disability laws, which are status-based schemes in which employers usually are required to contribute whether they wish to or not.[97] However, *Webb* does not

88. 168 So. 196 (Ala. Ct. App. 1935).
89. *Id.* at 196.
90. *Id.*
91. *Id.*
92. *Id.* at 197.
93. *Id.*
94. *Id.*
95. *Id.*
96. Before the 19th century, masters in Britain apparently had the legal as well as the moral obligation to care for their servants who became ill or injured while in service, and third parties could sue masters for aid given to such servants without regard to any promise by the master. *See* Scarman v. Castell, 170 Eng. Rep. 353, 353 (K.B. 1795) (master was obliged to pay for medicine advanced to one of his servants who was ill). The older cases are summarized in Annotation, *Master's Duty to Care for or to Furnish Medical Aid to Servant Stricken by Illness or Injury*, 64 A.L.R.2d 1108, § 59(a)–(b) (1959).
97. The workers' compensation system is effectively mandatory in every state except Texas. *See* PETER M. LENCSIS, WORKERS COMPENSATION: A REFERENCE AND GUIDE 13 (1998). A standard clause in such policies today provides that in the case of

arise in the middle ages or the 21st century. It is Alabama, 1935, at the apogee of the contract-is-king movement, two years before President Roosevelt's court-packing plan and the Supreme Court's retreat from *Lochner v. New York*.[98] The workers' compensation benefits Webb received from the rudimentary Alabama system of the day have expired. If the Alabama Court of Appeals is going to impose this kind of obligation on a master, it must be found in the law of contracts.

The problem of turning to contract law is that Webb's prior employment agreement did not contain any obligation to pay a pension in the event of disability.[99] His duties probably already included not killing anyone in the factory. No bargain was struck before Webb saved his boss.[100] Under classic contract theory, there was simply no *consideration* for McGowin's subsequent promise. Without consideration, or some other handy substitute, the court can not find a contract. And without a contract, the master's estate does not have to pay.

However, the court does find a contract.[101] For present purposes, its reasoning can be summarized fairly simply. McGowin, says the court, had a moral obligation to pay Webb for saving his life.[102] Webb's action also conferred a material economic benefit on the master, who was presumably making good money and would now be able to continue to do so.[103] The master had also recognized the obligation and the benefit by making a subsequent promise.[104] None of those things alone would be sufficient, but all are combined, and the court finds a valid contractual obligation.[105] Webb prevails. We can agree that compensating him for an on-the-job injury was the right result. Today, as I noted previously, we recognize that this is the right result *whether or not* there is any subsequent promise to pay.

The result in this case is perfectly understandable, but the real problem in *Webb* is not one of contract, it is of a worker injured on the job. If the goal is to protect workers from on-the-job injuries, *Webb* does a very poor job. If the potential victim had been a poor fellow servant instead of the rich master, or if the person saved had been the master's autistic three-year-old daughter instead of the master him-

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total disability, the worker will get two-thirds of his or her weekly pay so long as the disability continues. *See id.* at 146. Most American workers injured on the job today are thus covered by long-term disability benefits. *See* Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 428–29 (1998).

98. 198 U.S. 45 (1905).

99. *See Webb*, 168 So. at 197.

100. *Id.* at 198.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *Id.*

self,[106] or if the boss had been an ungrateful jerk who fired Webb for being careless instead of promising a pension, Webb would be out of luck. Because it is doubtful that most workers will have the same advantageous fact situation as *Webb*, the decision does very little to solve the underlying problem, best remedied by a full-blown modern workers' compensation and disability scheme that does not rely on promises made by grateful employers.

Webb has very little relevance as a workers' compensation case, but the rule of contract law it developed—its fuzzy blend of moral obligation and material benefit—has not been confined to the workers' compensation arena. Because it is a rule of "contract" law, and because a contract is a contract, whether it's to pay a pension or buy a nuclear power plant or cut the lawn, the *Webb* rule subsequently has taken on a life of its own. Consideration, after all, is consideration, and lawyers are adept at pulling legal rules out of very different factual scenarios and advancing them in new situations.

We therefore see *Webb v. McGowin* move out of the labor world. It is rarely treated as an employment case; instead, it is most often used to illustrate a basic principle of contract law. This is how it is presented in first-year contracts casebooks.[107] Lon Fuller famously treats the case as one involving the general enforceability of moral obligations.[108] Richard Posner views it as a "rescuer" case and explains why enforcement encourages economically valuable voluntary rescue activities.[109]

But *Webb* is not a "rescuer" case. The real "rescuer" case is *Harrington v. Taylor*.[110] In that case a husband is being attacked by his abused wife, who is wielding an axe.[111] She is on the point of killing him, when a neighbor intervenes, deflecting the axe and saving his life.[112] In the process the neighbor's hand is mutilated.[113] Although the husband promises to pay her damages, he doesn't.[114] She sues and subsequently loses because the North Carolina court finds no consideration for the promise.[115] While there may be a social consensus that injured workers are entitled to be paid for their disability, there is no

106. Saving the minor daughter would have conferred no economic benefit on McGowin, and economic benefit was a major part of the court's analysis. *Id.*

107. *See, e.g.*, DAVID G. EPSTEIN ET AL., MAKING AND DOING DEALS 414, 414–19 (2002); E. ALLAN FARNSWORTH ET AL., CONTRACTS 45–48 (6th ed. 2001); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 228–32 (4th ed. 1999).

108. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 821–22 (1941).

109. Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 418–19 (1977).

110. 36 S.E.2d 227 (N.C. 1945).

111. *Id.* at 227.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

such consensus that mere voluntary rescuers, however noble, are entitled to be paid.

As a result of this social consensus, *Webb*, not *Harrington*, has become enshrined in that bastion of black letter law known as the Second Restatement of Contracts. As a brand-new Restatement section 86 provides, "[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice."[116] *Webb* appears as one of the illustrations for this principle, although it is completely shorn of its employment setting: "A saves B's life in an emergency and is totally and permanently disabled in so doing. One month later B promises to pay A $15 every two weeks for the rest of A's life, and B makes the payments for 8 years until he dies. The promise is binding."[117] As a result, *Webb* is elevated to the level of a rule of contract law, while *Harrington* is relegated to a mere "*but cf.*"[118]

Thus, we see in *Webb* the creation of a contract doctrine eminently unsuited to the problem for which it was created, yet which manages to find new life while generating confusion in a wholly unrelated area. *Webb* has, in fact appeared in far more casebooks and law review articles than judicial opinions, but it has surfaced in disputes like a bank's suit to enforce warrants against a school district[119] and an insurance company's dispute over commissions on premiums with one of its backers.[120] Ultimately, it has made the doctrine of consideration more complex and confusing, which in turn only makes commercial transactions less predictable.[121]

B. *Capacity:* Ortelere v. Teachers' Retirement Board

A second example of the process is another well-known case, *Ortelere v. Teachers' Retirement Board*,[122] which is also a staple of the casebooks.[123] Grace Ortelere, you may recall, is a teacher who is entitled to a pension from the Retirement Board.[124] The Board, like many such entities, gives its employees two options: (1) to take benefits for the life of the employee, or (2) to take benefits for the life of

116. SECOND RESTATEMENT, *supra* note 1, § 86(1).

117. *See id.* § 86 cmt. d, illus. 7 and reporter's note cmt. d.

118. *Id.* § 86 reporter's note cmt. d.

119. *See* First Nat'l Bank v. Walker County Bd. of Educ., 11 So. 2d 297, 299 (Ala. 1943).

120. *See* Old Am. Life Ins. Co. v. Biggers, 172 F.2d 495, 499 (10th Cir. 1949).

121. A good dialogue exploring the complexities of the *Webb* rule occurs in James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 302–06 (1991) (attempting to explain why such promises are enforceable).

122. 250 N.E.2d 460 (N.Y. 1969).

123. *See, e.g.*, RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 161–204 (1978); FARNSWORTH, *supra* note 107, at 305.

124. *Ortelere*, 250 N.E.2d at 461.

the employee or her spouse, whichever is longer.[125] The monthly benefits are obviously lower for option B.

The smart decision for someone who expects to die before her spouse is option B. The smart decision for someone who expects to outlive her spouse is option A. Given that the average wife is younger than her husband, and given that the life expectancy for women is longer than that of men,[126] the smart choice for many women is option A. Mrs. Ortelere, without consulting her husband,[127] elects option A. She will get higher monthly benefits, but they will only run for the period of her life. As it turns out, Mrs. Ortelere guesses wrong. She dies two months after making the election and her husband is precluded from receiving future benefits.[128] He sues to set aside his wife's election.[129]

Obviously, there are important issues at stake here. Mrs. Ortelere has been teaching for forty years and has spent her entire career contributing to this pension plan.[130] In a flash, by a single bad guess, all of that effort goes out the door. Our society has elected to leave retirement planning largely to private persons and the masters who employ them, but there is a strong public interest in seeing that hard-working people are not deprived of the benefits they paid to get—not to mention the public interest in having spouses of such workers be left as public charges.

But at the time of this case, the New York Court of Appeals has few tools around to deal with the problem, so it turns to contract law. At first glance, this doesn't look good. The contract is perfectly fair and reasonable. There is no duress or unconscionability surrounding Mrs. Ortelere's election.[131] The Board has given her precisely what she was promised. The only hook the court can find that will protect Mr. Ortelere is *capacity*, and even that looks like a poor basis. Mrs. Ortelere plainly meets the traditional test for capacity: "A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect . . . he is unable to understand in a reasonable manner the nature and consequences of the transaction . . . ."[132] Even the majority concedes that Mrs. Ortelere "had com-

125. *Id.* at 462–63.

126. *See* AMERICA'S ELDERLY: A SOURCEBOOK 31–33 (Edward E. Duensing ed. 1988) (noting that women on average are four years younger than their husbands and that women outlive men by an average of seven years).

127. *Ortelere*, 250 N.E.2d at 463.

128. *Id.* at 461.

129. *Id.* at 462.

130. *Id.* at 461.

131. The Board did not pressure her to pick one option or the other. *See id.* at 463. Because the amounts were actuarially determined to be equivalent, the likelihood is that the Board was entirely indifferent to which option she chose.

132. SECOND RESTATEMENT, *supra* note 1, § 15(1)(a).

plete cognitive judgment or awareness when she made her selection."[133]

In order to protect Mr. Ortelere, the court casts about and ultimately decides that the traditional test is too restrictive, and not in accord with the judges' own "modern understanding of mental illness."[134] Therefore, the court crafts a new test that the evidence suggests Mrs. Ortelere *may* be able to meet: that while she understood what she was doing, she was incapable of acting rationally to protect her interest.[135] The case is remanded for a new trial, with Mr. Ortelere entitled to try to get the benefit election set aside.[136]

Note that the problem in this case is *not* that Mrs. Ortelere is mentally ill. The problem is that a servant who has been contributing to a retirement fund for forty years may lose it all by making a single wrong pick without consulting her husband, who obviously has an interest in the question. If Mrs. Ortelere had been in perfect mental health but had been run over by an uninsured motorist two months after making the election, Mr. Ortelere would be in precisely the same position, and the court's solution to the problem would be entirely useless. Although the court's application of contract doctrine was beneficial to Mr. Ortelere, it does nothing to address the same problem when faced with the thousands of retirees who are not mentally ill and who also guess wrong.

Today, of course, pension benefits are controlled by statute and regulations, the most important of which is ERISA.[137] All the problems are not resolved, but at least Mrs. Ortelere, mentally ill nor not, would today be precluded from waiving her spouse's benefit rights without her spouse's consent.[138] Federal regulation thus has stepped in to provide a status-based remedy for the problem.

Ortelere is irrelevant today in the arena that gave it birth—pension law. But since it was decided on *contract* grounds, it has also been transmuted into all kinds of other situations. Its new definition of incapacity does not remain in the narrow field of pensions and employment law, but soon gets turned into a black letter rule applicable in *all* contracts. It is now enshrined in section 15(1)(b) of the Second Restatement: "A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect . . . he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition."[139]

133. *Ortelere*, 250 N.E.2d at 462.
134. *Id.*
135. *Id.* at 465.
136. *Id.* at 466.
137. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2002).
138. *Id.* § 1055.
139. SECOND RESTATEMENT, *supra* note 1, § 15(1)(b).

The rule reaches this exalted status even though *Ortelere* is the only case the drafters of the provision can muster in support of it.[140] And, lawyers being lawyers, it promptly starts getting used by everyone from hedge fund operators trying to get out of real estate deals on the ground that they are manic-depressive[141] to personal injury plaintiffs trying to get out of settlements on grounds that they suffer from nervous tension and anxiety.[142] Sometimes this gambit works, sometimes it doesn't—but in any event it increases the litigation costs for everyone.

C. *Promissory Estoppel: The Pension Cases*

In my previous two examples, the line from employment law problems to contract solutions to new black-letter contract rules ran straight and true. That pattern is certainly present in this third category, but the story is a little more complicated.

Many casebooks feature the problem of pension promises made by masters to their servants. The most popular cases are from a line of Missouri decisions beginning with *Feinberg v. Pfeiffer Co.*[143] Some popular casebooks use *Feinberg*,[144] while others use the later case of *Katz v. Danny Dare, Inc.*[145] The facts are similar. Servant has worked faithfully for master for many years.[146] Grateful master promises servant a pension upon retirement.[147] The pension promise is not bargained for or made a part of any formal employment agreement.[148] It is not conditioned on any period of future service.[149] Servant subsequently retires and Master pays the pension for a while and then stops.[150] Servant sues.

As noted above, there are important social interests at stake in pension promises. We have an interest in seeing that employees, as a class, get the pensions they expect. Our interests have led to extensive

140. The circular nature of the link between *Ortelere* and § 15(1)(b) has been noted. The court in *Ortelere* relied on a proposed draft of § 15(1)(b)—which had been promulgated without any citations to cases supporting it—as authority for its holding. *Ortelere*, 250 N.E.2d at 465. The Second Restatement authors returned the favor by citing *Ortelere* in support of the new section. *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 519 n.101 (1998).

141. *See* Fingerhut v. Kralyn Enters Inc., 337 N.Y.S.2d 394, 396–98 (N.Y. Sup. Ct. 1971), *aff'd*, 335 N.Y.S.2d 926 (N.Y. App. Div. 1972).

142. *See* Schmaltz v. Walder, 566 S.W.2d 81, 82, 84 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

143. 322 S.W.2d 163 (Mo. Ct. App. 1959).

144. *See, e.g.*, FARNSWORTH, *supra* note 107, at 39, 91.

145. 610 S.W.2d 121 (Mo. Ct. App. 1980); *see, e.g.*, EPSTEIN, *supra* note 107, at 430–36; KNAPP, *supra* note 107, at 175–80.

146. *Feinberg*, 322 S.W.2d at 164; *Katz*, 610 S.W.2d at 122.

147. *Feinberg*, 322 S.W.2d at 164–65; *Katz*, 610 S.W.2d at 123.

148. *Feinberg*, 322 S.W.2d at 165; *Katz*, 610 S.W.2d at 123.

149. *Feinberg*, 322 S.W.2d at 164–65, 167; *Katz*, 610 S.W.2d at 123.

150. *Feinberg*, 322 S.W.2d at 165; *Katz*, 610 S.W.2d at 123.

modern regulation of the issue by legislatures. So it is natural that courts, even before modern status-based regulation, looked for ways to uphold these promises.

But in 1959, there is no ERISA, and the Missouri Court of Appeals, with *Feinberg* before it, has to look for some other set of tools. It finds them in contract law. The court fixes on the doctrine of promissory estoppel to hold that the employee who retires in reliance on the employer's promise is entitled to have that promise enforced. The court holds that a promise, which itself creates no liability, will create liability if it is reasonably relied upon.

It should be noted that the Missouri court was not being innovative in the same sense that the courts in *Webb* and *Ortelere* were, by making up a rule from scratch. In fact, the doctrine of promissory estoppel was created nearly thirty years earlier, as section 90 of the First Restatement of Contracts, which states, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[151]

It is generally agreed that section 90 is a provision that the drafters of that document made up, not out of whole cloth, but out of snippets from a variety of offbeat cases in which courts had enforced promises without the necessity of finding a contract. Most of these cases involved granddaughters who were given promissory notes by grandfathers who died before the note was paid and did not provide for the money in a will,[152] or sons who got oral gifts of land and had made major improvements to the land before their fathers tried to renege,[153] or wealthy donors who made written pledges of support to charitable institutions but later repudiated them,[154] or gratuitous bailees who forgot to procure the fire insurance they had promised the bailor they would get.[155]

Except for the fact that most of these cases at some point involved the "justifiable reliance of the promisee," they had little in common[156] and even reliance is doubtful in some of them, particularly the charitable cases. There was certainly no real need for any overarching theory to reconcile all of them, let alone a *contract* theory. The first three categories of cases have nothing to do with contracts or commercial relations at all because they are all failed gifts or bequests. All could easily have been dealt with by holding that gifts of money are com-

151. RESTATEMENT OF CONTRACTS § 90 (1932) [hereinafter FIRST RESTATEMENT].
152. *See* Ricketts v. Scothorn, 77 N.W. 365, 366 (Neb. 1898).
153. *See* Freeman v. Freeman, 43 N.Y. 34, 38–39 (1870).
154. *See* Barnes v. Perine, 12 N.Y. 18, 25–27 (1854).
155. *See* Siegel v. Spear & Co., 138 N.E. 414, 415 (N.Y. 1923).
156. KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 253 (Paul L. Murphy ed., Contributions in Legal Studies No. 59, 1990).

plete when a promissory note is given, that gifts of land are complete when the recipient enters into possession and makes improvements, and that written charitable pledges are enforceable when made. Only the final category has anything to do with commercial life, and even then, the issue is merely one of what liabilities a bailee undertakes in a gratuitous bailment, not whether gratuitous commercial promises are generally enforceable.[157] This issue can be (and was) dealt with by some minor tinkering with agency law.[158] Thus, there was substantial doubt whether any general rule of promissory estoppel ought to be extended to ordinary commercial dealings.[159]

I believe that much of the impetus for extending promissory estoppel into the commercial arena came from the problem of pensions. While I have said that the master-servant relationship is not primarily one of contract, there is little doubt that in 1930 it was so considered, at least by lawyers. The problem of employee pensions was one "commercial" arena where we see the same kinds of interests evident in status cases like those involving dutiful sons or grateful nieces. The classic early promissory estoppel case is a *family* case, and employment, as we saw before, is as close to family status as economic relations get. Thus, the second illustration to the original section 90 says, "A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding."[160]

At the time the section was written, there was considerable authority for the proposition that promises of employee benefits were generally enforceable, not because the employee had relied on them, but because the employer's offer of a benefit was an offer for a unilateral contract that was accepted by the employee arriving at work the next day.[161] Thus, a court could, two years after section 90 was invented, uphold the enforceability of an employee pension plan without reference to promissory estoppel.[162] But that analysis did not work in situations where the pension was granted merely in recognition of past

157. The key to this last group of cases is the *bailment* and not the *reliance* which is made clear by the fact that in cases not involving bailees, promises to procure insurance were not enforceable even when relied on. *See, e.g.*, Thorne v. Deas, 4 Johns. 84, 102 (N.Y. Sup. Ct. 1809).

158. *See* RESTATEMENT (SECOND) OF AGENCY § 378 (1958).

159. TEEVEN, *supra* note 156, at 254.

160. FIRST RESTATEMENT, *supra* note 151, § 90 illus. 2.

161. *See, e.g.*, George A. Fuller Co. v. Brown, 15 F.2d 672, 675–76 (4th Cir. 1926) (employee bonus); Tilbert v. Eagle Lock Co., 165 A. 205, 207 (Conn. 1933) (employee death benefit); Roberts v. Mays Mills, Inc., 114 S.E. 530, 531 (N.C. 1922) (promised Christmas bonus); Zwolanek v. Baker Mfg. Co., 137 N.W. 769, 772 (Wis. 1912) (employee profit-sharing plan).

162. *See* Schofield v. Zion's Co-op. Mercantile Inst., 39 P.2d 342, 344–45 (Utah 1934).

service and where the servant had retired immediately, such as in the Texas case of *Shear Co. v. Harrington*.[163] The importance of protecting the pensions of servants thus gave added impetus to the creation of a broad rule that would apply, even in what were then thought to be purely contractual relationships.[164]

As I noted above, the Missouri Court of Appeals had the bare section 90 in front of it when Mrs. Feinberg's case came along. Because she had already voluntarily retired in reliance on the pension promise, and the drafters of section 90 had helpfully provided an illustration, the court had little difficulty deciding that section 90 allowed her to recover.[165]

But promissory estoppel turns out to be a poor way of solving the pension problem. It does not, for example, protect the pension expectations of those who have not yet retired, or those whose retirement is forced by disability, because they have not "relied" on the promise. Nor does it do much for the vast number of employees who, unlike Mrs. Feinberg and Mr. Katz, are not insiders with crystal-clear board resolutions behind them. Promissory estoppel is usually a losing argument for employees.[166] *Katz* actually demonstrates that reliance is not likely to prove a good long-term mechanism for enforcing pension benefits, when the court strains to find the elements of a section 90 promissory estoppel case even though there is little or no reliance because the employee would have been fired anyway.[167]

Ultimately, then, trying to solve the problem of pension promises through the contract doctrine of promissory estoppel fails, and the legislature ultimately steps in with a status-based solution. Pension promises are now enforceable, not because of reliance or the nuances of unilateral contracts, but because Congress says they are. So cases like *Feinberg* and *Katz* are largely irrelevant today in the pension field that gave them birth.[168] But the rules on which they were decided—

163. *See* 266 S.W. 554, 557 (Tex. Civ. App.—Waco 1924, no writ).

164. The role of the pension cases in the development of § 90 is discussed in Benjamin F. Boyer, *Promissory Estoppel: Principle From Precedents: II*, 50 MICH. L. REV. 873, 883–87 (1952).

165. *See* Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 167–69 (Mo. Ct. App. 1959).

166. In most promissory estoppel claims that are actually litigated, the servant loses because the court finds that the promise was not definite enough, or that it was ambiguous, or that the employee did not substantially rely on it, or that such reliance was simply unreasonable. *See* Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 10–20 (1999).

167. *See* Katz v. Danny Dare, Inc., 610 S.W.2d 121, 125 (Mo. Ct. App. 1980).

168. Though not totally irrelevant. While the vast majority of pensions are awarded under plans covered by ERISA, one-shot special promises like those in *Feinberg* and *Katz* still might be governed by common law principles, although these situations would be rare. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2002); *see also Feinberg*, 322 S.W.2d at 165, 167; *Katz*, 610 S.W.2d at 123. And there is also some authority that promissory estoppel *might* still be able to play a role even under ERISA-governed plans in "extraordinary" situations. *See* Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 78 (2d Cir. 1996).

and that as a class of cases they helped to shape—live on. Today, we see the doctrine of promissory estoppel routinely used by securities underwriters attempting to hold customers liable for bonds they purchased for a planned resale,[169] landowners trying to enforce oral promises to purchase land,[170] prime contractors trying to enforce oral bids by subcontractors,[171] and franchisees trying to enforce oral promises of future franchise agreements.[172]

IV. Conclusion

I titled this paper "*The Pernicious Effect of Employment Relations on Contract Law*." That is a slight misnomer. The effects and the doctrines I have detailed here are not *necessarily* pernicious, in the sense that they are always harmful. Yet, all of these doctrines are certainly destabilizing. They make contract law and commercial dealings less predictable and they create more work for lawyers and more costs for everyone else.

That might not be a bad thing. We might conclude that a reduction in certainty is greatly outweighed by an increase in the fairness and justice of our law. We might, for example, conclude that we really do want to enforce promises of gifts if the gifts are in recognition of some moral obligation. We might, after suitable reflection, decide to allow all mentally ill people greater flexibility in deciding whether to perform their contracts. And despite the fact that promissory estoppel has largely been a failure as a means to protect employees,[173] and has rarely been successfully used in other contexts,[174] we might even conclude that reliance rather than bargain should be the fundamental basis for contractual recovery.[175]

We might. But the fact is that we didn't. We got these innovations not because willing buyers and sellers in the commercial marketplace needed them, but because courts tried to protect important status-based interests and contract doctrine was the only thing handy. By

169. *See* Dean Witter Reynolds, Inc. v. Cont'l Cas. Co., 897 F. Supp. 142, 142 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir. 1996).

170. *See* CSO Servicing Corp. v. City of Eau Claire, 536 N.W.2d 731, 732 (Wis. Ct. App. 1995).

171. *See, e.g.*, Pavel Enters, Inc. v. A.S. Johnson Co., 674 A.2d 521, 531–34 (Md. 1996) (recognizing that promissory estoppel could have been applied to find a contract, but the Plaintiff did not meet the burden to prove a case for promissory estoppel).

172. *See* Walters v. Marathon Oil Co., 642 F.2d 1098, 1099 (7th Cir. 1981).

173. *See* Hillman, *supra* note 166, at 6–10 (finding that employees lose more than ninety-five percent of their promissory estoppel claims).

174. *See* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 Colum. L. Rev. 580, 591–96, 619 (1998) ("Measured in terms of win rates in the courts, . . . promissory estoppel may no longer be, if it ever was, a significant theory of recovery.").

175. *See, e.g.*, P. S. Atiyah, The Rise and Fall of Freedom of Contract 771–79 (1979).

treating status relationships as ordinary contracts, by developing doctrines to serve those status relationships, and then by reasoning that doctrines suitable for one kind of contract are suitable in all kinds of contracts, we find ourselves using tools developed to address problems in master-servant relationships being deployed in suits between insurance companies and securities dealers.

This is not merely grumbling about the past. Today we are watching precisely the same processes at work. Courts concerned about protecting the status interests of employees are busy doing the same thing that their forebears did in *Webb*, *Ortelere*, and *Feinberg*. They are grabbing the tools of contract in an attempt to deal with the problems in a status relationship.

I will here mention two prominent examples. The first is the question of mandatory employee arbitration agreements. Whether employees may be required, as a condition of employment, to submit all of their subsequent employment disputes to arbitration is obviously an important issue. We might conclude that employees should be required to arbitrate in such cases,[176] or we might conclude that they should not be.[177] In deciding that issue, we presumably would want to weigh considerations of general public interest in arbitration, the fairness of the arbitral process, the ability in arbitration to vindicate important employee rights, the public interest in remedying systematic employer abuses like racial or sexual discrimination, and so forth. But high among the many things that no rational person would think relevant are the nuances of the contract doctrine of consideration. Yet we see courts in cases like *Gibson v. Neighborhood Health Clinics*,[178] *Hooters of America v. Phillips*,[179] and *Floss v. Ryan's Family Steak*

176. *See, e.g.*, Christopher R. Drahozal, *Nonmutual Agreements To Arbitrate*, 27 IOWA J. CORP. L. 537, 565 (2002); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349, 1375 (1997); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 471 (2000); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 149–50 (1999).

177. *See, e.g.*, Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 29 (1996); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 135, 155–57 (1996); Pierre Levy, Comment, Gilmer *Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 480 (1996); Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 494–510 (2001); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 711 (1996).

178. 121 F.3d 1126, 1132 (7th Cir. 1997).

179. Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 617–18 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

Houses, Inc.,[180] straining to use that eminently unsuitable tool to get to what they conclude is the right result.

The fact pattern in *Gibson* is typical. The plaintiff is hired, and the day she shows up for work she is handed, and signs, the employer's form. It says:

> I agree to the grievance and arbitration provisions set forth in the Associates Policy Manual. I understand that I am waiving my right to a trial, including a jury trial, in state or federal court of the class of disputes specifically set forth in the grievance and arbitration provisions on pages 8-10 of the Manual.[181]

The arbitration provisions in the manual provide that all disputes will be submitted to arbitration pursuant to the state arbitration act. The plaintiff starts work, gets fired, and sues, claiming age and sex discrimination.[182] The district court dismisses the claim and orders arbitration, and the Seventh Circuit, obviously unhappy with the result, casts about for some reason to get the plaintiff to a jury. The court cannot hold that such claims are not arbitrable, because the parties have agreed they are and, in fact, the issue has been foreclosed by prior decisions.[183] The court can avoid the arbitration clause only if it finds that the plaintiff did not "agree" to it—if there is no contract. It turns to the doctrine of consideration. The angels-on-the-head-of-the-pin nature of this endeavor can be seen in the *Gibson* court's parsing of the issues:

> An employer's specific promise to continue to employ an at-will employee may provide valid consideration for an employee's promise to forgo certain rights . . . . In the present case, however, NHC [the employer] never made a promise to continue Gibson's employment in exchange for her promise to submit claims to arbitration. That is, it never communicated to her that if she signed the Understanding she could continue to work there, and that if she did not her status would be uncertain. It is true that NHC continued to employ her. Yet when an employer has made no specific promise, the mere fact of continued employment does not constitute consideration for the employee's promise.[184]

In other words, if the employer said, "Sign this or we'll have to think about how many hours we really need you to work," there would be "consideration," therefore creating a contract, and Gibson would lose. It is difficult to see why the absence of the explicit threat causes the contract to evaporate, but the court battles on:

> Finally, while in the employment context it has been held that one party's partial performance in reliance upon the other party's prom-

180. 211 F.3d 306, 314–16 (6th Cir. 2000).
181. *Gibson*, 121 F.3d at 1128.
182. *Id.* at 1129.
183. *Id.* at 1130.
184. *Id.* at 1132.

> ise may be sufficient consideration to make the promise enforceable, . . . there is no indication in the present case that NHC was induced to rely on Gibson's promise. It had made its decision to hire her prior to her agreeing to the terms of the Understanding, and there is no evidence that its decision to continue to employ her following her signing of the Understanding (on the day she returned to work) was based upon her agreeing to the terms contained therein.[185]

Apparently, the employer had no reason to have Gibson sign the agreement, and Gibson had no reason to sign it, so the whole transaction was—what? What exactly do we suppose Gibson was thinking? Why did she suppose the employer gave her the clause to sign? Is this any kind of basis on which to be deciding such issues?

The second example is the growing use of temporary employees, independent contractors, or employees of temporary agencies to do the kinds of work traditionally done by full-time, in-house employees.[186] This is frequently done to save money on benefits or to give the employer greater flexibility in adjusting the size of the work force. Whether large companies ought to be able to create classes of second-class employees and give them fewer benefits is an issue about which people of good will may differ. But courts concerned about the process are trying to use contract tools to remedy what they apparently view as a social problem.

The best (or perhaps worst) example is *Vizcaino v. Microsoft Corp.*,[187] which involved the giant software company's use of "temporary employees or independent contractors" to—as the disapproving court put it—avoid paying employee benefits and thereby increase its own profits.[188] Microsoft apparently has many "regular employees" who receive a generous benefit package. It supplements these with a group of workers ("freelancers"), who do not. Two of the benefits Microsoft offers are a "Saving Plus Plan" (SPP), under which the company matches employee retirement savings, and an Employee Stock Purchase Plan (ESPP), under which employees can buy the company's stock at below-market rates.[189] Freelancers are ineligible for either program. This is made clear to them at the time they are hired:

> The plaintiffs were told when they were hired that, as freelancers, they would not be eligible for benefits. None has contended that Microsoft ever promised them any benefits individually. All eight named plaintiffs signed . . . documents entitled "Independent Contractor/Freelancer Information" (information documents) when

185. *Id.*

186. *See* Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 112 (2003).

187. 97 F.3d 1187 (9th Cir. 1996).

188. *Id.* at 1189.

189. *Id.* at 1191.

> first hired by Microsoft or soon thereafter. . . . The information document . . . states that "as an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits."[190]

The plaintiffs go on to admit during their own testimony that at the time they took the jobs they understood that they would not be entitled to benefits.[191]

Nevertheless, as Microsoft's stock price skyrockets during the 1990s, the freelancers bring a class action suit claiming that they are entitled to the benefits. The Ninth Circuit majority is plainly disturbed by the idea that giant corporations can go around hiring people without giving them benefits solely to increase their bottom lines. The problem, though, is that this is not in itself illegal. Nor does the refusal to allow the freelancers to participate in the ESPP violate any government regulation. If the court is going to put some duty on Microsoft to retroactively let these employees buy its stock at discount prices, it will have to somehow find that Microsoft *agreed* to do so.

But the obvious problem with finding a contract is that it is plain that the parties agreed that the employees would not be entitled to the benefits. The most striking feature of *Vizcaino*—making it different from the myriad cases where employees were allegedly told this or that, or understood something else—is that none of the *Vizcaino* plaintiffs even attempted to argue that they thought they had agreed to get benefits. As Judge Trott noted in a disgusted dissent,

> No one disputes that the offer made by Microsoft and accepted by the plaintiffs explicitly excluded the ESPP benefits now sought. Plaintiffs freely admit as demonstrated earlier that they never expected when these contracts were formed to receive any such benefits. Microsoft never offered the benefits to the plaintiffs, either bilaterally or unilaterally, the plaintiffs never accepted them, and the plaintiffs never relied on them in any way whatsoever as part of their compensation package.[192]

He goes on to quote from the magistrate judge's Report and Recommendation:

> Microsoft indeed offered such benefits to its "regular employees" and described them in employee handbooks issued to regular employees, but not to freelancers. Moreover, it is not contended by any Plaintiff that he/she was ever offered such benefits by any Microsoft spokesperson, or even a handbook, and to the extent that any of them saw the books, they understood that they were not entitled to them.[193]

190. *Id.* at 1190.
191. *Id.* at 1201 (Trott, J., dissenting).
192. *Id.* at 1203 (Trott, J., dissenting).
193. *Id.* (Trott, J. dissenting).

The absence of any offer, acceptance, mutual understanding, or reliance might ordinarily be thought fatal to a contract claim. It would certainly be thought so in a commercial dispute. But we are in the world of employment, and the status interests of the employee (as the court seems to see them) demand some kind of remedy. And contract law is the only tool available.

The court finds the plaintiffs are entitled by contract to the benefits that they conceded they did not expect to get and that Microsoft did not intend to give them. Its path to that conclusion is a long and strange one, too peculiar to recount in detail. Perhaps the most remarkable feature is its use of dictionary definitions and maxims of construction to hold that the contract between the parties was, in reality, not what they both agree that they subjectively agreed to, but something else entirely.[194] In other words, the court used the maxims of statutory construction not to determine *what* the parties had actually agreed to—that was undisputed—but to conclude that the plaintiffs were entitled to benefits even though they had not.[195] Perhaps it is good policy to prohibit companies from creating different classes of employees with different benefit packages (or no benefit packages at all) it is clear that the *Vizcaino* court stretched contract law to the breaking point to get to its conclusion.

The fact is that neither of these problems—to the extent we consider them so—is going to be solved with contract tools. Employers have good lawyers, and given enough time, good lawyers can get around every contract problem. Lawyers who read *Hooters of America* will have no trouble avoiding the consideration issue. Lawyers who read *Vizcaino* are not likely to make the same mistake again. So these cases ultimately will prove to be of little help to employees and will end up being mostly traps for unwary employers too small to hire a lawyer.

Meanwhile, though, the doctrines in those cases will go on to have a life of their own, and generations of law students may face the task of sorting them out. We will make contract law even more confusing and less reliable than it already is.

194. *Id.* at 1196–1200.

195. *See id.* at 1200–01 (Trott, J., dissenting) ("All the maxims invoked by the majority to support their holdings are useless unless they square with the facts. If I know I have a 'no benefits' contract, . . . what good does it do to ask what the ordinary average Babbitt . . . might believe after reading a Random House Dictionary?")

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