EMPLOYMENT AS A RELATIONAL CONTRACT

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A contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings. An at-will employee . . . is not merely performing an existing contract; she is constantly remaking that contract.¹

I. INTRODUCTION

Employment scholarship focuses too much on laws and not enough on norms.² Yet employment norms³ capture the complete terms of employment better than legal contracts ever can.⁴ First, employment norms are

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3. Jesse Rudy, What They Don’t Know Won’t Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection, 23 BERKELEY J. EMP. & LAB. L. 307, 343–44 (2002) (defining norms in the employment context as “‘rules or standards enforced solely by private (that is non-state) actors,’ [that] develop informally, through repeated interactions over time, eventually becoming standards or rules that govern relationships between people” (quoting Rock & Wachter, supra note 2, at 1914 n.1)).

more prevalent. While one-third of employees work without a contract referencing discharge laws, work norms influence virtually all employees present in a workplace. Second, employment norms are perceived as law more than laws are. Empirical studies reveal that most employees rely upon norms, not laws, to define workplace rules. Third, employment norms embrace what legal agreements cannot. Virtually every aspect of the employment relation that falls outside the treatment by contract lawyers—corporate culture, office politics, future planning, and the complex social matrix of organizational life—is the exclusive domain of norms. Finally, parties remake employment norms continuously and without cost as workplace practices develop. A legal contract can only freeze party intentions at a single moment in time. Bundled together, work norms form a contract, a relational contract, which is more important to the parties in most situations than any formal written agreement.

In spite of this, employment scholarship almost always focuses on laws. Whereas scholars have frequently examined legal aspects of employment contracts, employment at will, and wrongful discharge, little certain workplace norms and employees signal adherence to employer norms through the active negotiation of their identities.

5. See J. Hoult Verkerke, An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate, 1995 WIS. L. REV. 837, 867 ("About one-third (33%) of employers use no documents that specify the terms governing discharge.").


attention has been paid to systematically developing an enforceable theory of employment norms. This Article fills this scholarly gap by defining employment as a relational contract forged by the behavior of the parties. Part II of this Article defines employment as a relational contract. Part III establishes the sources of relational contract at work. Part IV presents two case studies that show that maintenance of relational contract is essential for any successful organization. Part V devises an opportunism-based enforceable theory of relational contract in the employment context.

II. THE EMPLOYMENT RELATIONSHIP AS A RELATIONAL AGREEMENT

A. The Relational Theory of Contract

Popularized by noted scholar Ian Macneil,11 relational contract theory holds that agreements are not always transactional occasions whereby parties exchange only value. Relational contract theorizes that parties to contracts develop a relationship between one another that incorporates planning, trust, and solidarity that far exceed the terms of the original document.12 Relational contract theory emphasizes the importance of terms

Frauds: Time to Amend the Statute, 30 AM. BUS. L.J. 97 (1992) (arguing for a change in the statute of frauds to preserve employment at will doctrine).


outside of the written document that may arise through interpersonal relationships between the parties.\textsuperscript{13} Originally arising as a tool for better understanding commercial contracts, relational contract theory has influenced law and society, law and economics, libertarian, and liberal communitarian thinking.\textsuperscript{14}

Certain characteristics distinguish a relational contract from a merely transactional one.\textsuperscript{15} A transactional contract typically has a short duration, precise measure of money and goods, little or no future cooperation, no altruism, and no friendship.\textsuperscript{16} A visit to a gas station while traveling on vacation is an example of a transactional contract.\textsuperscript{17} This is a one-time exchange of an easily commoditized good for cash. No significant relationships existed in the past nor is there a chance for one to occur in the future. The purely transactional agreement is short-term and requires no personal interaction.\textsuperscript{18}

A relational contract is far different. First, the relationship of exchange continues over a significant period of time and is not a "spot" market deal like a transaction for securities or commodity futures.\textsuperscript{19} Long-term supply contracts or even marriages are examples of long-term relational arrangements.\textsuperscript{20} Second, relational contracts contain significant open terms and reserved discretion for the parties,\textsuperscript{21} in part because the extended duration of relational contracts prevents the parties from calcu-

\begin{itemize}
\item \textsuperscript{13} James W. Fox, Jr., \textit{Relational Contract Theory and Democratic Citizenship}, 54 \textit{Case W. Res. L. Rev.} 1, 5 (2003).
\item \textsuperscript{14} \textit{Id.} at 4–5.
\item \textsuperscript{15} Not all of these characteristics need be present to confer relational status upon a contract. For example, a long-term lease arrangement whereby the tenant is responsible for maintenance of the property does not necessarily create a close relational bond between the landlord and tenant. Melvin A. Eisenberg, \textit{Why There Is No Law of Relational Contracts}, 94 \textit{Nw. U. L. Rev.} 805, 814 (2000). Rather, these characteristics appear to represent guideposts for placing a given contract on a continuum between a purely transactional contract and a wholly relational agreement.
\item \textsuperscript{16} Timothy L. Fort, \textit{Trust and Law's Facilitating Role}, 34 \textit{Am. Bus. L.J.} 205, 211 (1996).
\item \textsuperscript{18} \textit{Id.} at 856–57. Macneil explains that even this highly discrete transaction can be deeply embedded with relational elements. Even gas purchases are rooted in highly complex property and social relations. Custom indicates that the property owner allows the customer to enter his property to obtain the gas, certain types of gas are expected, and communication is possible between customer and attendant through a common language. \textit{Id.} at 857 n.10.
\item \textsuperscript{20} Speidel, \textit{supra} note 19, at 823.
\item \textsuperscript{21} \textit{Id.} at 828.
\end{itemize}
lating the full value of the exchange.\textsuperscript{22} Parties plan for the future and expect that new opportunities and challenges will arise from the changing circumstances that discretion inevitably brings.\textsuperscript{23} Third, relational contractors expect future cooperative behavior and facilitate that arrangement through agreed upon governance mechanisms.\textsuperscript{24} Parties not only expect changing needs, but expect those needs to be accommodated within the terms of the contract. For example, if a plant mishap prevents a seller from providing a contracted-for part, the buyer might accept an alternative good and even adjust production until the seller can restart operations and re-supply the part once again. Fourth, benefits and burdens are shared, not divided.\textsuperscript{25} For example, questions involving terms that dictate flexibility in price and output requirements are resolved by cooperative behavior instead of self-interest and opportunism.\textsuperscript{26} Fifth, parties may make capital investments specifically for the needs of the contract.\textsuperscript{27} For example, a mine supplying a utility invests in special equipment to produce the specific coal for that utility.\textsuperscript{28} Sixth, personal relationships between the parties arise from the contract, forging bonds of friendship, interdependence, and altruism.\textsuperscript{29} Seventh, the parties expect trouble as a matter of course.\textsuperscript{30} Dispute resolution arrangements are prearranged in the event a problem arises that cannot be resolved informally.\textsuperscript{31} Eighth, the relationship gains independent value apart from the exchange.\textsuperscript{32} Contracting parties meet not only to exchange goods, but to maintain friendships, share experiences, and communicate about issues in the industry. In short, relational contracting signifies a commitment to cooperate in far more depth than a mere bargain-for allocation of risk.\textsuperscript{33}

Employment relationships (the focus of this Article) are well suited

\textsuperscript{22} Id. at 823.


\textsuperscript{24} Speidel, \textit{supra} note 19, at 829.

\textsuperscript{25} Id.

\textsuperscript{26} Id. at 829–30.

\textsuperscript{27} Id. at 830.

\textsuperscript{28} Id.

\textsuperscript{29} Id.; \textit{see also} Fort, \textit{supra} note 16, at 211 ("[Relational] contracts involve the expectation of future cooperation and relations of friendship. There is significant pressure for virtues such as truth-telling, promise-keeping, commitment to quality, altruism, and group solidarity because the long-term interests of the parties require mutual support.").

\textsuperscript{30} Speidel, \textit{supra} note 19, at 830 n.31.

\textsuperscript{31} Id. at 829.

\textsuperscript{32} Id. at 830 n.31.

for relational contract theory because they contain strong relational elements. Employment relationships, with the exception of contingent work and independent contractor arrangements, are rarely short in duration and typically have no finite end. Most employment relationships permit the employee at least some discretion in performing tasks. It is also quite common for the employer and employee to cooperate and enrich an employee’s contractual duties over time through promotions and lateral position changes. Such career development promotes higher productivity, increases job satisfaction, and primes an organization for continuous change.

Furthermore, cooperation between the parties in an employment arrangement is an integral part of the relationship. Each party makes significant transaction-specific investments even in the early stages of the relationship. Employers provide on the job training, negotiate and draft customized agreements, and deposit funds in an employee’s benefit plan. Employees often leave a prior job or uproot family to a different city in order to form or maintain a relationship with an employer. Internal dispute resolution mechanisms for sexual harassment problems, disciplinary violations, and grievances are common within a company hierarchy. Employees find satisfaction from not just wages, but the sociability, security, dignity, self-respect, and meaningfulness that gainful employment brings. Employers may treat their workforce as not just a means to an end, but an end in itself.

Labor economists and other scholars have developed a four-phase

34. See, e.g., IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 10–21 (2d ed. 1978); Speidel, supra note 19, at 826; Gudel, supra note 11, at 771–72.

35. See generally PEGGY SIMONSEN, PROMOTING A DEVELOPMENT CULTURE IN YOUR ORGANIZATION: USING CAREER DEVELOPMENT AS A CHANGE AGENT (1997) (discussing benefits of creating a career development system within an organization); Philip H. Mirvis & Douglas T. Hall, Psychological Success and the Boundaryless Career, 15 J. ORG. BEHAV. 365 (1994) (discussing the psychological impact of career progress as definitions of work change).

36. Estlund, supra note 2, at 34.

37. See, e.g., Carol Hazard, Printer Business in Richmond, Va., Puts Employees First, Wins Integrity Award, KNIGHT RIDDER/TRIB. BUS. NEWS, May 2, 2003 (quoting Freddy Cobb, owner of Cobb Technologies and recent winner of a marketplace integrity award, as stating in response to the adage that the customer comes first, “No they don’t; the employee does”). However, this may not be a widespread U.S. business practice. See Edson W. Spencer, Capital-Gains Shift Could Curb LBO Break-Ups, WALL ST. J., Jan. 27, 1989, at A14.

Ask a Japanese CEO to rate his stakeholders and he will put his employees first, his customers second and his shareholders third. In contrast, U.S. takeover law says that if a business is to be sold, the board’s job is to get the highest price, regardless of the effect on employees and customers, or on the communities affected by the sale of a company.

Id.
model of career wage relationships that explicitly explains a labor cost and benefit balance and implicitly explains how relational norms in employment change over time. In phase one, a new employee receives wages equal to or slightly in excess of her value to the firm. Both parties at this point make transaction-specific investments in both firm-specific and non-firm-specific skills. Even at this early stage, relational aspects are present. The new worker wants to learn the proverbial ropes of the company in hopes of continued work and also to offer her "best face" to the firm. The excitement of a new job generates enthusiasm and loyalty. The employee is eager to show that the employer has hired the right person for the job and that she may be trusted.

Over time, the employee learns new skills and increases the value of her marginal product beyond the value of both her wage and her opportunity for wages elsewhere. This is considered to be phase two of the model. Although it may be economically maximizing for the employee to leave at this point (better opportunities exist elsewhere), according to the model she will stay with the current firm. She expects that the job will now remain steady and that her salary will rise throughout her career. According to the model, she defers higher immediate compensation at another firm for expected long-term increases in pay and steady work at her current employer. In relational terms, the employee relies upon future cooperative behavior from the employer in the form of higher benefits in exchange for lower compensation now.

At this point, new relational terms replace earlier ones. The employee embeds in the current employment "contract" a long-term relationship between her and her employer. Future opportunities for promotion, career development, and salary increases are now part of the expected future, as long as she performs her work as required. She may have formed friendships with co-workers, forged a romantic relationship, and joined activities

39. Stone, supra note 38, at 536.
40. Id.
41. Id.
42. Id. at 537.
such as company prayer groups and quality circle committees. She may have befriended management and been promised consideration for managerial work or other leadership tracks. In relational language, she has formed a close personal relationship that is independent of contractual obligations and characterized by friendship, reputation, interdependence, and altruism. By now, the employee has adopted company culture and traditions, and the skills not used for her employer fade from her skill set.

The employee's firm-specific investment of her human capital leads her to phase three. The employee is now worth much “more to her employer than she is to other employers.” She will be paid more than the value of her opportunity wage, which might be considered to be the value of her marginal product minus her firm-specific investments and transactional costs. However, she is still paid less than the value of her marginal product. Finally, phase four arrives late in her career. At this point, her productivity decelerates. However, pay does not drop accordingly because of customs, norms, or pre-set pay ladders. She receives more pay than both her marginal product value and her opportunity wage. This may be seen as a recoupment stage where the employee reaps the benefits of long term firm-specific training and

43. See generally Lewis D. Solomon, Reflections on the Future of Business Organizations, 20 CARDOZO L. REV. 1213, 1221-22 (1999) (describing importance of prayer circles and spirituality generally in organizations, noting that “proponents of encouraging spirituality in business organizations recognize that the workplace provides employees with more than a source of income”).


46. The process by which an employee understands and adopts the attitudes, values, beliefs, and behaviors of a firm is known as organizational socialization. See, e.g., Robert J. Taormina & Talya N. Bauer, Organizational Socialization in Two Cultures: Results from the United States and Hong Kong, 8 INT'L J. ORG. ANALYSIS 262, 262-64 (2000) (describing organizational socialization as “a process of acquiring the knowledge and skills needed to perform one’s job” and the characteristics that form the content of socialization (emphasis omitted)).

47. Stone, supra note 38, at 537.

48. Id.

49. Id.

50. Id.

51. Id.
deferred compensation. At this point, planning norms established early in her career come to fruition—a comfortable job with strong job security and a comfortable wage that follows the employee into retirement in the form of a pay-based pension benefit and a generous health plan.

These relational qualities are no less influential when employers sever the relationship. Stewart Schwab writes in his article, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, that wrongful discharge rulings implicitly follow an employee "life-cycle" doctrine that gives more protection to workers at certain stages of their career and less protection at other stages. Early-career employees are vulnerable to improper discharge because they commit far more resources to the relationship than their employer. For example, employees may give up firm-specific skills when leaving a prior employer for a new position. The employer, having little investment in the employee in the way of job training or trust, can remove that new employee with little cost to itself. Late-career workers are also vulnerable to opportunistic firing because these employees are paid disproportionately well compared to their productivity. Workers hold strong interests in their future at this late stage—expecting that their post-retirement benefits will carry them through retirement. Mid-career employees, Schwab concludes, require the least legal protection because it is at this stage that employers are most vulnerable to shirking by the employee. The employer may be reluctant to repeat significant recruiting and training costs with a new employee. Why would an employee shirk in mid-career? A breach in the relational terms of the employment arrangement may be the cause. The employee may reach a point in the hierarchy beyond which she cannot pass, no matter how productive her work. Career development and training opportunities

52. Id.
54. Id. at 11.
55. Id. at 41.
56. Id. at 39.
60. Id. at 47.
at the firm may be exhausted. She may have been wronged by company politics at some time in her career. In any event, the mid-career employee is the one who has invested much in the firm and has not received matching compensation. If anyone, the mid-career employee who has not received her perceived due relies the most on relational elements—a contract between herself and the firm that fair treatment will come in the future. Both Schwab’s life-cycle theory and the four-phase model of career relationships reveal the strong and shifting relational elements embedded in an employer-employee relationship throughout an employee’s career.

B. The Problematic Interpretation of the Employment Relationship as a Purely Neo-Classical Contract

Although employment relationships are deeply relational, employment law largely ignores relational norms. One of the fundamental problems is that much of employment law simply engrafts contract law upon the employment relationship. Contract law, although not wholly incompatible with employment, does not fully account for the broad range of relational interests and contexts present in employment relationships.

Employment and contract are different because they have entirely separate histories. Early employment relationships involved dominant-subservient bonds based upon the status of the parties. In feudal times, an homage ceremony marked the inception of the relationship with elaborate formality. The vassal placed his hands inside the hands of the lord demonstrating the lord’s role as protector and the vassal’s role as receiver of protection. The two parties exchanged the kiss of peace, symbolizing devotion, and the vassal swore an oath of fidelity to the lord. The parties could not dissolve this arrangement without demonstrable cause. These obligations were, literally, a matter of life and death. A summoned vassal accompanied his lord to fight alongside him in a war, and a lord could be

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61. See Stone, supra note 38, at 537 (“The model illustrates the fact that during the middle two periods, employees have made an investment for which they have not yet been compensated and for which they anticipate deferred compensation.”).
62. See id. (noting that during the middle two periods of the four-phase model, employees’ “investments in firm-specific human capital and willingness to work for deferred compensation are made not on the basis of some explicit contractual arrangement, but rather take the form of an implicit contract”).
64. Id. at 169 n.7. The custom later gained religious connotations as placing one’s hands together came to symbolize prayer to God. Id.
65. Id.; see also THE HISTORY OF FEUDALISM 70–71 (David Herlihy ed., 1970) (describing the ritual and the meaning behind it).
66. Heriot, supra note 63, at 169.
67. See id. at 169–71 (describing the lord and vassal relationship in more detail).
called upon to sacrifice his life defending his vassal against attackers.\textsuperscript{68}

Loyalty, however, should not be confused with mobility. For most individuals at that time, little choice existed over the terms and conditions of work regardless of whether a formal arrangement was formed with a lord or not.\textsuperscript{69} Class and station defined employment status, and class mobility was extremely limited.\textsuperscript{70} In spite of this strong stratification, both low and high status persons possessed obligations to the other that could not easily be breached. Even as late as the nineteenth century, dominant-subservient employment relationships created mutual obligations on both the employer and employee, much as the head of the household was obligated to support his wife and minor children, who in turn had the duty to submit to his authority.\textsuperscript{71} In essence, employment law has its origins in a master-servant relationship, characterized by status-based relationships of profound interdependence.\textsuperscript{72}

In the middle of the nineteenth century, contract law and its focus on transaction subsumed employment law and its focus on status.\textsuperscript{73} A rustic individualism pervaded the American psyche, shedding dependence relationships as characteristic of hereditary aristocracy and old world beliefs.\textsuperscript{74} Horace Gray Wood's 1877 treatise, ironically entitled \textit{Master and Servant}, pronounced employment at will the dominant employment law of

\begin{itemize}
  \item \textsuperscript{68} Id. at 170 & n.13.
  \item \textsuperscript{70} See id. at 36–37 (noting that for most of common law history, employment status has been defined by class station and beyond the control of the individual).
  \item \textsuperscript{71} Id. at 38.
  \item \textsuperscript{72} Id. at 39; see also Heriot, supra note 63, at 170 & n.13 (defining in detail both lord and vassal obligations).
  \item \textsuperscript{73} See Greg T. Lembrich, \textit{Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants}, 102 COLUM. L. REV. 2291, 2306 (2002).

English employment law (long known as the law of master and servant) emerged from medieval systems based on status, in which feudal lords were able to use land ownership in order to extract labor from vassals. It has since evolved over the centuries and become solidly grounded in the law of contract. \textit{Id.} (footnote omitted)); see also Henry Sumner Maine, \textit{Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas} 165 (U. Ariz. Press 1986) ("[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.");

\item \textsuperscript{74} Snyder, supra note 69, at 42–43; see also Ken Matheny & Marion Crain, \textit{Disloyal Workers and the "Un-American" Labor Law}, 82 N.C. L. REV. 1705, 1709 (2004) ("Legal thinking in the nineteenth century was heavily influenced by economic individualism, and the courts adopted a laissez-faire attitude toward the employment contract."); Clyde Summers, \textit{Individualism, Collectivism, and Autonomy in American Labor Law}, 5 EMP. RTS. & EMP. POL’y J. 453, 455–56 (2001) ("Much of the law of employment contracts, however, is still shaped by the courts, and much of the economic individualism of the late 19th century permeates the judges’ thinking.").
\end{itemize}
Employment at will rode on the coattails of the rising prominence of contract. By the time the freedom to contract reached constitutional proportions at the turn of the twentieth century, employment at will was well entrenched as the default employment discharge rule.

Employment at will remained largely intact through much of the twentieth century, although its harshness was tempered somewhat by the practice of offering employees stable, secure employment with cradle-to-grave benefits. In the late twentieth century, that practice broke down as employees were increasingly laid off from what employees believed were lifelong jobs. The result is today, even with the presence of numerous exceptions, employment at will leaves American workers some of the most vulnerable to arbitrary discharge in the Western world.

Even though the law of employment at will assumes laissez-faire conditions, equal bargaining power, and contractual freedom, employ-

75. Matheny & Crain, supra note 74, at 1709–10. Interestingly, “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.” Snyder, supra note 69, at 44. Snyder credits this as evidence that the rising prominence of contract manifested a genuine “philosophical bias in favor of freedom and not [a side effect of] industrialization or judicial class bias.” Id.

76. See, e.g., Lochner v. New York, 198 U.S. 45, 64 (1905) ("[T]he freedom of master and employ[ee] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (finding that the Fourteenth Amendment to the U.S. Constitution protects "the right of the citizen ... to earn his livelihood by any lawful calling ... and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.").

77. See, e.g., Adair v. United States, 208 U.S. 161, 180 (1908) (upholding an employer's ability to terminate employment at will by reversing criminal conviction for terminating employee because of union membership).


80. The non-regulatory approach that employment at will endorses might even offend established religious traditions. Cf. Jim Wishloff, Catholic Social Thought and Business Ethics: The Application of Ten Principles, 25 REV. BUS. 15, 19 (2004) (“The Catholic perspective explicitly opposes the doctrine of economic laissez faire .... 'Reasonable regulation of the marketplace and economic initiatives in keeping with a just hierarchy of
ment practice still retains much of its master-servant roots. The corporation may be today's modern lord and the employee its vassal. Just as the medieval vassal was not dispatched from his lord’s land at the first opportunity that it was beneficial to do so, long-term employees today expect equitable treatment from their employers that contradicts the draconian machinations of employment at will.\(^\text{81}\)

Furthermore, most workers are dependent upon wages paid to them by an entity owned by another. The corporation, not the state, is the primary source of the social safety net when individuals become unemployed.\(^\text{82}\) Companies provide health benefits, retirement payments, and workers compensation payments to the sick, disabled, retired, or unemployed.\(^\text{83}\) The workplace is now a significant source for forming relationship networks, assigning socioeconomic class, and establishing reputation status of the individuals that work there.\(^\text{84}\) Who we are, how much money we earn, and whom we marry and socialize with all originate from our association with our employer. As one author noted even in the early 1950s, “For our generation the substance of life is in another man’s hands.”\(^\text{85}\) As another author has written, “[T]he 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 . . . .”\(^\text{86}\)

values and view to the common good is to be commended.”’ (quoting THE CATECHISM OF THE CATHOLIC CHURCH 2425 (Image Doubleday 1994)).

81. Macneil, supra note 17, at 898. Macneil writes:

[C]onsider an employee of a small business who has been treated very decently by his employer for thirty years. He quite naturally comes to expect decent treatment throughout the relation including through retirement. Moreover, he relies on that expectation; and if the expectation is not realized, the employer may very well have derived benefits from the reliance by the employee that, in terms of the relational as it is existed, are unjustified. We can, and do, infer promises in such situations, but they are far from the defined promises of discrete transactions.

\textit{Id.}

82. Snyder, supra note 69, at 46 (citing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 3 (1990)).

83. \textit{Id.}


85. FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis omitted).

86. Snyder, supra note 69, at 46.

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.

TANNENBAUM, supra note 85, at 9; \textit{see also} Lawrence E. Blades, Employment at Will Vs.
Not only are employees vulnerable to the whims of their employer, but the employer can cause enormous psychological and societal damage when it fires even one person. When a company fires an employee, it condemns that person to an increased likelihood of depression, alcohol and drug abuse, physical illness, and even suicide. Profound feelings of loss, guilt, and inadequacy are common. For every one percent increase in unemployment, homicides rise 5.7%; suicides increase 4.1%; deaths from heart disease, liver cirrhosis, and stress-related disorders increase by 1.9%; and 4.3% more men and 2.3% more women admit themselves to mental hospitals.

The effects of joblessness reach far beyond the individual. Perhaps because Western society views paid employment as a social and moral duty, unemployment brings social disapproval toward the entire family. Unemployed heads of household tend to isolate themselves from other family members, leaving children and spouses without emotional support. As unemployment lengthens, spouses of unemployed workers report greater depression, anxiety, and interpersonal problems. Incidents of divorce more than double in families where a spouse is unemployed. Child abuse, physical illness, and even infant mortality are tied to high unemployment rates. When children see their parents without jobs, they tend to see no hope for themselves, promoting an ever worsening cycle of low self-esteem and ambition. Finally, joblessness contributes to societal

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*Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1404 (1967) (noting that employees are dependent upon employer for “the substance of life” (emphasis omitted) (quoting TANNENBAUM, supra note 85, at 9)).

87. Peregoy & Schliebner, supra note 84, at 193.


89. Schliebner & Peregoy, supra note 88, at 368.

90. Id. at 369.

91. Id.

92. Id.

93. Id.

94. Id.


The future stinks. You’re supposed to spend your childhood preparing for the real life of being an adult. But what if that real life is no good? What’s the sense? Look at my parents. They always did everything the way you’re
problems of poverty and criminal activity. Few breaches of ordinary commercial contracts trigger so many primary, secondary, and tertiary effects.

The neo-classical contract model upon which modern employment at will is based fails to account for the full complexities of the employment relationship. The model assumes fully informed parties with equal bargaining power engaging in a transactional relationship wholly described by the text of a contract. At least initially, contract law dismisses as irrelevant the parties' identities, transactionalizing the subject matter of the contract as much as possible. As a result, contract law forces employment to be interpreted as a short-term, impersonal, and commodifying event that contradicts most scientific, anecdotal, and analytical evidence about the nature of the employment relationship.

The source of this commodification originates from an emphasis on discreteness and presentation in contract. A discrete exchange separates the contract from all present, past, and future relations. Little difference in treatment exists between total strangers brought together by chance and long-standing friends doing business for a number of years. A barter of goods or services for money is the primary goal, which must happen quickly before a relationship develops that deprives the transaction of its discrete nature.

A classical contract also maximizes presentation, the incorporation of future events and conditions into the present moment of contract formation.
The contract restricts expected future effects of the relationship to only those that can be accounted for at the beginning of the relationship.\textsuperscript{104} Presentation enhances discreteness because it severs the obligations under the contract from the social relations of the contracting parties. Ian Macneil drives home the essence of presentation in the following example from a 1961 film:

One of the two white men [traveling] with [an Eskimo] had fallen through the ice in the midst of a raging blizzard, and [the Eskimo] and the other had quickly pulled him out of the water. The victim was freezing to death in spite of the efforts of his friend to slap circulation through his body. Watching the frantic efforts, [the Eskimo] said, "Your friend is dead." It was a perfectly sensible statement even though the doomed man was still breathing, his heart still beating, and his limbs still moving. All the events had occurred which would cause his death, and there was not the slightest chance of avoiding that event.\textsuperscript{105}

Some readers might condemn the Eskimo as cold or insensitive, and this emotional reaction reveals the problem with the discrete and presentiative norms in contracts. Eventually, containment of any contract within the frozen amber of discreteness and presentation does not make sense. As Macneil writes, "Somewhere along the line of increasing duration and complexity, trying to force changes into a pattern of original consent becomes both too difficult and too unrewarding to justify the effort, and the contractual relation escapes the bounds of the neo-classical system."\textsuperscript{106} Contractual dealings transform the parties' relationship into a "minisociety with a vast array of norms beyond the norms centered on exchange and its immediate processes."\textsuperscript{107} Viewing employment as not just a contract, but a relational contract, mitigates the harmful effects of an artificially transactionalized neo-classical employment law.\textsuperscript{108}

\begin{footnotes}
\item[104] Id. at 863; see also Campbell, supra note 11, at 39.
\item[105] Ian R. Macneil, \textit{Presentation and Adjustment Along the Spectrum of Contracts}, in MACNEIL, THE RELATIONAL THEORY, supra note 11, at 182. This scene originated from a 1961 film called \textit{THE SAVAGE INNOCENTS} (Paramount Pictures 1961) in which Anthony Quinn played the Eskimo. \textit{Id.}
\item[106] Id. at 196; see also Macneil, supra note 17, at 901.
\item[107] Macneil, supra note 17, at 901.
\end{footnotes}
III. SOURCES OF RELATIONAL CONTRACT NORMS: THE PSYCHOLOGICAL CONTRACT, COMPANY CREDO, AND ORGANIZATIONAL CULTURE

Whereas Part II of this Article established the relational nature of employment and the inability of employment law to incorporate relational norms, this Part reveals the sources of these relational norms. This Part presents three potential sources of relational norms: the employee’s psychological contract, the employer’s company codes, and the firm’s organizational culture.

A. The Psychological Contract

A psychological contract is an employee’s perception of the mutual obligations that exist between the employee and her employer. Not contracts in the legal sense, psychological contracts emerge when an employee perceives that contributions she makes obligate her employer to reciprocal acts. Psychological contracts result in expectations by the employee that the employer will behave in a certain fashion based upon promises or past practices.

The earliest foundations of psychological contract theory arose from social contract theorists such as Hobbes and Locke, who described an extant “social contract” that assumes individuals living in a state of nature impliedly consent to develop an organized society. The social contract is a reciprocal agreement between the state and its citizens whereby citizens pay taxes, obey laws, and shoulder defense responsibilities in exchange for state-supported services. Its first application in management described an inducement-contribution model, in which employees receive inducements such as pay and benefits in exchange for contributions to the firm. According to the model, employees will continue to contribute as long as


113. Id.

114. See generally JAMES E. MARCH & HERBERT A. SIMON, ORGANIZATIONS (1958) (discussing the theory of formal organizations).
the benefits offered are equal or greater than the value of the contribution.\textsuperscript{115} At the same time as the development of the inducement-contribution model, renowned psychiatrist Karl Menninger posited that contracts involve the exchange of tangible items as well as reciprocal satisfaction of parties' needs (e.g., pleasure of companionship) and a feeling that the exchange is fair.\textsuperscript{116}

In the early 1960s, scholars introduced the term "psychological contract" as a means of defining the implicit understanding between labor and management.\textsuperscript{117} In examining the relationship between workers and a foreman, one scholar observed that workers maintained high production and low grievance in exchange for the foreman respecting informally established norms of fair pay and treatment.\textsuperscript{118} Another author interviewing employees at a utility company discovered that workers spoke of expectations as having an obligatory quality "as if the company were duty-bound to fulfill them."\textsuperscript{119}

As psychological contract literature developed, writers shifted from defining it as reciprocal obligations\textsuperscript{120} to a one-sided expectation formed in the mind of the employee.\textsuperscript{121} Receiving scattered attention during the 1970s and 1980s,\textsuperscript{122} psychological contract theory experienced a renewed interest in the late 1980s and 1990s as corporate restructuring, downsizing, use of contingent workers, and foreign competition threatened once stable employment relationships.\textsuperscript{123} Employers, once perceived by employees as caretakers who virtually guaranteed a job until retirement in exchange for company loyalty, now laid off employees en masse.\textsuperscript{124} This stands in sharp contrast to twenty-first century workplaces where both employers and employees have lower expectations for long-term employment.\textsuperscript{125}

\textsuperscript{115} Roehling, supra note 112, at 205. See generally Chester I. Barnard, The Functions of the Executive (1938).

\textsuperscript{116} Karl Menninger, Theory of Psychoanalytic Technique 21 (1958).

\textsuperscript{117} E.g., Chris Argyris, Understanding Organizational Behavior 97 (1960).

\textsuperscript{118} Id.

\textsuperscript{119} Roehling, supra note 112, at 207 (quoting Harry Levinson et al., Men, Management, and Mental Health 20 (1962)).

\textsuperscript{120} See id. at 206–07.

\textsuperscript{121} See Abigail Marks, Developing a Multiple Foci Conceptualization of the Psychological Contract, 23 Emp. Rel. 454, 455 (2001) (noting this distinction).

\textsuperscript{122} Roehling, supra note 112, at 208–12 (describing developments in psychological contract literature at that time).


\textsuperscript{124} Stone, supra note 38, at 552 (quoting Marcie A. Cavanaugh & Raymond A. Noe, Antecedents and Consequences of Relational Components of the New Psychological Contract, 20 J. Org. Behav. 323, 323 (1999)).

\textsuperscript{125} Id.
Psychological contracts possess certain characteristics. First, an employee’s psychological contract with her employer may not necessarily be shared by the organization itself.\(^{126}\) Second, psychological contracts are based upon future expectations in a relationship. Psychological contracts may result from written promises, oral statements, company policies, or implicit cues that trigger expectations in the mind of the employee.\(^{127}\) Third, employees’ psychological contracts are perceived to be with the organization as a whole and not with individual managers.\(^ {128}\) Finally, psychological contracts change as an employee’s relationship with the organization grows over time.\(^ {129}\) The psychological contract is widely accepted to be an important part of organizational theory.\(^ {130}\)

Although scholars research various characteristics of psychological contracts,\(^ {131}\) the aspect most relevant to this Article is the concept of “violation.” Violation occurs when employees believe that their organization has failed to fulfill one or more obligations that comprise their psychological contract.\(^ {132}\) Violation has been considered an important aspect of psychological contract theory, and according to one author it deserves a “central place” in psychological contract research.\(^ {133}\)

\(^{126}\) Morrison & Robinson, supra note 123, at 228.


\(^{128}\) Morrison & Robinson, supra note 123, at 228. But cf. Marks, supra note 121, at 464 (concluding that psychological contracts are “multifarious in nature and employees hold psychological contracts with all organizational constituents, the strength of which is determined by the proximity of the employee to the constituent”); Peter Herriot & Carole Pemberton, Contracting Careers, 49 HUM. REL. 757, 764 (1997) (contending that multiple potential contracts exist with various supervisors in the organization).


\(^{130}\) See, e.g., Heather Maguire, Psychological Contracts: Are They Still Relevant?, 7 CAREER DEV. INT’L 167, 167 (2002) (noting the importance of psychological contracts for examining organizational relationships); see also Roehling, supra note 112, at 204 (discussing psychological contracts generally). Although psychological contract theory has been lauded as a key underpinning of organizational behavior, it has been challenged as lacking the analytical rigor possessed by more enduring psychological constructs. Marks, supra note 121, at 454. The theory has also been challenged as ambiguous and overly accepting of questionable scholarship. Id. at 455.


\(^{132}\) Morrison & Robinson, supra note 123, at 230.

\(^{133}\) Vincent Cassar, Violating Psychological Contract Terms Amongst Maltese Public Service Employees: Occurrence and Relationships, 16 J. MANAGERIAL PSYCHOL. 194, 196
While some scholars conclude that an employer's affirmation that employment is at-will clearly expresses employment terms, psychological contract research contradicts this assumption. A 1994 study surveying 128 MBAs revealed that 54.8% of the respondents believed that their employer violated a promised obligation at one time or another. Respondents gave detailed accounts of the violation and described how employers lured them with promises that employers could later not keep. Some respondents gave specific examples of violation, including:

- "Sales training was promised as an integral part of marketing training. It never materialized."
- "Specific compensation benefits were promised and were either not given to me, or I had to fight for them."
- "[My] employer promised I would be working on venture capital projects. I was mainly writing speeches for the CEO."
- "[I was] promised greater responsibility. More strategic thinking/decision making . . ."

When an employee perceives a violation of a psychological contract, relational attitudes change. First, the employee loses trust in her

(2001). See Richard A. Epstein, In Defense of the Contract At Will, 51 U. CHI. L. REV. 947, 955 (1984) ("[E]mployers and employees know the footing on which they have contracted: the phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less."); Andrew P. Morriss, Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law, 74 TEX. L. REV. 1901, 1929 (1996) ("One obvious characteristic of the at-will rule is that the legal responsibilities of the employer are clear—it has none. How then are employees systematically fooled?"); Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 HOFSTRA L. REV. 83, 96 n.55 (1996) ("With a clear rule stating that employees can quit at any time for any reason and employers can fire at any time for any reason, there is little room for dispute.").


135. Id. at 256.


137. Id. at 256.

employer. Trust has been defined as a "state involving confident positive expectations about another’s motives with respect to one’s self in situations entailing risk." Trust implies that contributions will be reciprocated. Trust increases one’s vulnerability to opportunistic behavior and is an indicator of confidence that one person has in another person or in an organization.

More than an abstract notion of dependence, trust is a critical element supporting an organization’s effectiveness. A lack of trust inhibits communication and retards cooperation, problem solving, and overall performance. Employees with the highest trust in the organization—those whose trust the employer should value most—suffer the greatest negative reactions when that trust is violated.

An employee who perceives a violation of a psychological contract also reduces her commitment to the organization. Commitment is a reciprocal bond that measures an employee’s performance and loyalty to the organization. Commitment also implicates an employee’s sense of attachment, affiliation, and identification with the organization. When an employee reduces her commitment to the organization, she perceives her status in the company in terms of self-worth, not organizational worth. In addition, personal accomplishment supercedes a desire for promotion. Employees begin to look outwards for other jobs that provide increased status and wages.

Additionally, breaches of psychological contract result in lower job satisfaction. Reduced satisfaction can result in many of the problems

140. Cassar, supra note 133, at 197.
141. Jeffries & Reed, supra note 139, at 873.
142. Robinson & Rousseau, supra note 135, at 255.
144. Id. at 257.
145. Cassar, supra note 133, at 197–98.
148. Id.
149. Id. at 177–78.
150. Cassar, supra note 133, at 198.
mentioned above: higher turnover, lower productivity, and reduced loyalty to the organization.\textsuperscript{151} Thus, psychological contracts form an integral part of the relational contract between an employee and an employer.

\textbf{B. Corporate Codes and the Relational Contract}

A corporate code (also known as a corporate credo, code of ethics, or simply a credo)\textsuperscript{152} is a document developed by an organization that expresses that organization’s values and the ethical rules it expects employees to follow.\textsuperscript{153} Such codes have been described as a “middle ground” between formal legal structures and informal personal values—an explicit but general standard of behavior that promotes conformity with standards by rewarding compliance and penalizing deviance.\textsuperscript{154}

Commentators on corporate codes classify them according to content and design.\textsuperscript{155} Corporate codes state commitments to constituencies as well as present affirmations of company values.\textsuperscript{156} Johnson & Johnson, the worldwide provider of health care goods and services, has a code of this nature.\textsuperscript{157} Values statements and management philosophy statements

\textsuperscript{151} See Marks, supra note 121, at 457.

\textsuperscript{152} Although these terms may signify slightly different expressions of desired ethical behavior, this Article will use these terms interchangeably.

\textsuperscript{153} Margaret Anne Cleek & Sherry Lynn Leonard, \textit{Can Corporate Codes of Ethics Influence Behavior?}, 17 J. BUS. ETHICS 619, 622 (1998) ("A code of ethics is a formal document that states an organization’s primary values and the ethical rules it expects its employees to follow."); M. Schwartz, \textit{The Nature of the Relationship Between Corporate Codes of Ethics and Behaviour}, 32 J. BUS. ETHICS 247, 248 (2001) ("[A] code of ethics is . . . a written, distinct, and formal document which consists of moral standards used to guide employee or corporate behaviour.").

\textsuperscript{154} Earl A. Molander, \textit{A Paradigm for Design, Promulgation and Enforcement of Ethical Codes}, 6 J. BUS. ETHICS 619, 619–20 (1987) (defining ethical code as “part of that middle ground between internalized societal values on the one hand and law on the other”); see also Messod D. Beneish & Robert Chatov, \textit{Corporate Codes of Conduct: Economic Determinants and Legal Implications for Independent Auditors}, 12 J. ACCT. & PUB. POL’Y 3, 6 (1993) (defining corporate code of conduct as a “self-regulatory device[] in which a corporation provides behavioral guidance to employees and policy commitments to stakeholders”).


\textsuperscript{156} William S. Laufer & Diana C. Robertson, \textit{Corporate Ethics Initiatives as Social Control}, 16 J. BUS. ETHICS 1029, 1030 (1997) (noting that corporate credos are “statements of commitment to constituencies, as well as statements of corporate values”); see also Patrick E. Murphy, \textit{Corporate Ethics Statements: Current Status and Future Prospects}, 14 J. BUS. ETHICS 727, 728 (1995) (discussing codes as illustrative of corporate commitment to ethics).

\textsuperscript{157} Newberg, supra note 155, at 256 n.15 (listing Johnson & Johnson as a company with a code of ethics).
establish guiding organizational principles of the firm, while compliance rules emphasize prohibitions against illegal and unethical conduct. Corporate codes may be inward looking, focusing on the regulation of intra-corporate structures, or outward looking, emphasizing corporate citizenship and relations to stakeholders. Credos can vary in specificity, ranging from highly specific regulations to simple statements of values. While some codes neatly fall into one of these classifications, many codes combine multiple types of credos (i.e. combining a values statement with a compliance code) in a single statement. Some organizations even have multiple corporate codes that address differing constituencies.

Although corporate codes vary widely across organizations, most codes share a few common traits. A typical corporate code usually expresses some broad-based commitment to integrity, highest ethical standards, or principled business conduct. More specific policy

158. Laufer & Robinson, supra note 156, at 1030 (defining management philosophy statements as “formal edicts of corporate philosophy”); Murphy, supra note 156, at 728 (defining values statements as proclamations “intend[ing] to set out the guiding principles of the firm”).

159. Laufer & Robinson, supra note 156, at 1030 (defining compliance codes as “codes with provisions that contain guidelines and prohibitions regarding unethical and illegal conduct”).

160. See Patrick E. Murphy, Creating Ethical Corporate Structures, 30 SLOAN MGMT. REV. 81, 85 (1989) (exploring benefits of corporate codes on internal company functions).


164. For example, Johnson & Johnson has both a corporate credo and a code of ethics. Newberg, supra note 155, at 256 n.15; see also Murphy, supra note 160, at 83 tbl.2 (reproducing credo). The credo may also be found at the company’s website at http://www.jnj.com/our_company/ourcredo (last visited Nov. 29, 2005).

165. See Newberg, supra note 155, at 257 (highlighting commonalities among corporate codes).

166. E.g., Intel Corp., Principles for Responsible Business (2004), http://www.intel.com/intel/finance/prin_resp_bus.htm (“Intel adheres to strict standards of honesty and conducts business with uncompromising integrity and professionalism.”); MTL Sys., Inc., Letter from MTL’s Employee Owners (2003), http://www.mtl.com/about/employeeletter.htm (“Our word is our bond as is properly reflected in our Corporate Credo: Corporate integrity makes the Difference! Personal Integrity makes the Corporation!”).

167. E.g., Kmart Corp., Kmart Corporation Code of Business Conduct (2003), http://www.kmartcorp.com/corp/story/general/code_of_conduct.stm ("Kmart... values its reputation for integrity and adherence to the highest ethical standards by its associates.");
statements tend to fall into four categories. First, credos affirm that the organization will follow the law. Certain laws are specifically mentioned, such as intellectual property protections, antitrust rules, and employment discrimination laws. Firms may also commit themselves to following the laws of other nations in which they do business. Second, codes demand honesty, including the maintenance of corporate records, accurate reporting, and avoiding the deception of competitors, customers, and suppliers. Third, codes require employees to be loyal to the company by not having personal employee interests interfere with the interests of the organization. This includes steering business to a relative or disclosing company secrets. Finally, codes exhort fair and respectful treatment of external stakeholders such as investors, suppliers, employees, customers, and competitors.

A corporate code can play an essential role in an organization’s thinking. In 1982, an unknown assailant tampered with Johnson & Johnson brand Tylenol capsules, resulting in a number of deaths in the Chicago area. Tylenol’s share of the analgesic market plummeted from that of a leading brand to a paltry ten percent virtually overnight. Johnson &

Johnson Controls, Inc., Ethics Policy—The Cornerstone of Customer Satisfaction (2003), http://www.jci.com/corpvalues/ethics_print.htm (“Our Creed . . . We will conduct our business with the highest ethical standards.”).


170. Id. at 258–59.

171. E.g., Medtronic, Inc., Code of Conduct, http://www.medtronic.com/corporate/codeofconduct.html (last visited Nov. 29, 2005) (“Medtronic must comply with export control and economic sanctions laws of the United States, as well as those of other countries in which it does business.”). The company explains that it possesses a credo because “Medtronic’s reputation throughout the world for legal, moral, and ethical behavior is one of [its] most valuable assets.” Id.

172. Newberg, supra note 155, at 260 (advocating honest business practices).

173. Id. (illustrating prohibition on conflicts of interest).

174. Id. at 261.


177. David Collins, A Lesson in Social Responsibility: Corporate Response to the 1980s Tylenol Tragedies, 27 VT. L. REV. 825, 826 (2003) (illustrating Tylenol’s drop in business). David Collins was a member of the strategy committee that managed the Tylenol crisis. Id.
Johnson reacted swiftly by mandating a nationwide recall, communicating openly with the press and public, and assuming full responsibility for the tragedy even though it had no legal obligation to do so.\textsuperscript{178} Johnson & Johnson's reliance on its corporate credo to treat stakeholders fairly and deal with the public honestly was viewed as pivotal in containing the tragedy.\textsuperscript{179} As a result, Tylenol remained the market leader in its field.\textsuperscript{180} Scholars and managers now view Johnson & Johnson's heavy reliance on its credo during the Tylenol tragedy as the prototypical example of ethical behavior based upon a corporate code of ethics.

Although Johnson & Johnson's strong reliance on its credo represents a dramatic example of the power of corporate codes, credos with that much power over a firm's activities may be the exception and not the norm. Although limited support exists showing that credos promote ethical behavior,\textsuperscript{181} other research concludes that minimal or no association exists between the presence of a corporate code and ethical employee behavior.\textsuperscript{182} A 2001 survey of nineteen studies of code effectiveness conducted since 1979 revealed that only eight studies showed a significant relationship between corporate codes and ethical behavior.\textsuperscript{183} The remaining eleven

\begin{itemize}
\item \textsuperscript{178} Id. at 825–27.
\item \textsuperscript{179} See Collins, supra note 177, at 827–28 (illustrating Johnson & Johnson's use of the credo); Brian Allen Warwick, Commentary, Reinvinting the Wheel: Firestone and the Role of Ethics in the Corporation, 54 ALA. L. REV. 1455, 1468 (2003) ("Because of a credo that Johnson & Johnson had in place, a directive that prioritized the responsibilities of the corporation, the company was able to quickly react to a faulty product in the marketplace and avert a financial catastrophe."); see also Michael Novak, Business as a Calling 153–58 (1996) (summarizing Johnson & Johnson's use of the credo); Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L.J. 1559, 1635 & n.449 (1990) (reporting that Johnson & Johnson was widely applauded for adhering to its credo during the Tylenol tragedy).
\item \textsuperscript{180} Collins, supra note 177, at 826 (discussing Tylenol's return to the top of the market).
\item \textsuperscript{181} See, e.g., Donald L. McCabe et al., The Influence of Collegiate and Corporate Codes of Conduct on Ethics-Related Behavior in the Workplace, 6 BUS. ETHICS Q. 461, 471 (1996) (reporting that the existence of ethical codes is correlated with lower levels of self-reported unethical behavior); Mark John Somers, Ethical Codes of Conduct and Organizational Context: A Study of the Relationship Between Codes of Conduct, Employee Behavior and Organizational Values, 30 J. BUS. ETHICS 185 (2001) (discussing a survey of management accountants that revealed a positive correlation between presence of corporate codes and reduced unethical conduct).
\item \textsuperscript{182} See Lawrence B. Chonko & Shelby D. Hunt, Ethics and Marketing Management: An Empirical Examination, 13 J. BUS. RES. 339, 356 (1985) (surveying marketing managers and concluding that "no relationship [exists] between corporate and industry codes of ethics and the extent of ethical problems"); Cleek & Leonard, supra note 153, at 627 (surveying business students and reporting that "codes of ethics are not powerful enough tools to affect ethical decision-making behavior").
\item \textsuperscript{183} Schwartz, supra note 153, at 249–50.
\end{itemize}
studies reported a weak or non-significant relationship.\textsuperscript{184}

If it is uncertain that corporate codes are an effective tool for changing company behavior, it is similarly questionable that corporate codes impact employees’ relational contracts. Some codes, particularly those that are outward looking in nature,\textsuperscript{185} may not address employees. Furthermore, most credos do not appear to take a values-centered approach that would best express company commitment to its workforce.\textsuperscript{186} Rather, most credos offer rule-based statements of right and wrong, exhorting employees to be good organizational citizens and to treat customers well.\textsuperscript{187} A more recent study surveying the two hundred largest companies in the world revealed stronger, but not robust, evidence of concern for employees in corporate codes.\textsuperscript{188} Of the 105 corporate codes examined,\textsuperscript{189} forty percent encouraged the personal growth and talents of its employees, thirty-nine percent exhorted treating employees with dignity and respect, twelve percent offered competitive terms of employment, and two percent advocated enabling a balance between work and private life.\textsuperscript{190} Far more common in these codes were commitments to obey the law (fifty-seven percent), supply quality goods and services (sixty-seven percent), and treat the environment with due care (fifty-six percent).\textsuperscript{191} Concern for the customer, the environment, and following the law received more emphasis than commitments to employees’ work environment or well-being. Overall, empirical evidence supporting the influence of corporate codes over employees appears to be mixed at best\textsuperscript{192} and perhaps unsupportable.\textsuperscript{193}

\textsuperscript{184}Id.
\textsuperscript{185}See Cresse & Moore, supra note 161, at 57 (noting that some codes of conduct “show concern for ethics in decisions affecting a corporation’s ‘publics’ (such as competitors, consumers, governments, and others)).
\textsuperscript{186}See Donald Robin et al., A Different Look at Codes of Ethics, 32 BUS. HORIZONS 66, 70 (1989) (discussing codes’ lack of ethical content).
\textsuperscript{187}See id. at 71.
\textsuperscript{188}Muel Kaptein, Business Codes of Multinational Firms: What Do They Say?, 50 J. BUS. ETHICS 13 (2004).
\textsuperscript{189}The remaining ninety-five organizations surveyed did not report having a corporate code of ethics. See id. at 17.
\textsuperscript{190}Id. at 19 tbl.V.
\textsuperscript{191}Id. at 19-20 tbl.V.
\textsuperscript{192}Gary R. Weaver, Does Ethics Code Design Matter? Effects of Ethics Code Rationales and Sanctions on Recipients’ Justice Perceptions and Content Recall, 14 J. BUS. ETHICS 367, 367 (1995) (“Although codes of ethics figure prominently in organizations’ efforts to reduce unethical behavior on the part their members, evidence on the actual impact of codes is at best mixed.” (citation omitted)).
\textsuperscript{193}See, e.g., John C. Lere & Bruce R. Gaumnitz, The Impact of Codes on Decision Making: Some Insights from Information Economics, 48 J. BUS. ETHICS 365, 372-73 (2003) (“Although the literature suggests that an important role for codes of ethics of corporations . . . is to affect decision making among those who are ‘governed’ by the code, empirical evidence indicates that there is little impact of codes or statements in codes on decision making.”).
In addition, courts have been reluctant to enforce corporate codes as enforceable promises.194 In Tripodi v. Johnson & Johnson,195 Tripodi, an employee of Therakos, Inc.,196 questioned the effectiveness of his employer's testing of certain medical equipment, which the employer called Centrinet. Tripodi contended that a prior photoreceptor, which had been approved by the FDA, and Centrinet, which had not been approved, were sufficiently distinct that new clinical tests were necessary to establish Centrinet's effectiveness.197 Such tests would have resulted in significant marketing delays.198 After Tripodi repeatedly raised the issue with superiors, Therakos discharged him.199 Tripodi claims that Therakos discharged him because of his justified criticism that what Therakos planned to do violated FDA regulations.200 Therakos responded that it discharged Tripodi for inappropriate comments to management and failure to establish a time chart, satisfy goals, and guide the research effort properly.201

Tripodi alleged that Therakos wrongfully discharged him in violation

194. See Allen v. Ethicon Inc., 919 F. Supp. 1093 (S.D. Ohio 1996) (determining that the credo of a company owned by Johnson & Johnson was not a specific promise of job security or continued employment, but an articulation of the company's aspirational goals and ideals); cf. Ullmo v. Gilmour Acad., 273 F.3d 671, 677 (6th Cir. 2001). In Ullmo, the court held that the “philosophy” section in a school's student and parent handbook stating that school “teachers mirror the Holy Cross tradition as they work for the full development of their students, in and out of the classroom, respecting pupils’ differing abilities and styles of learning” was too nonspecific and aspirational to require an enforceable promise to provide child with parents’ desired type of education that was designed to help overcome learning disability. Id. at 674, 676–77. Vague statements that are not specifically corporate credos have also not been upheld as enforceable contractual language. See, e.g., Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1084 (Wash. 1984) (finding that handbook language providing that terminations “will be processed in a manner which will at all times be fair, reasonable and just” was too vague and general to establish a legally enforceable implied promise of just cause termination); see also Vice v. Conoco Inc., 150 F.3d 1286 (10th Cir. 1998); Monroe v. Host Marriot Servs. Corp., 999 F. Supp. 599 (D.N.J. 1998); Orr v. Westminster Vill. N., Inc., 689 N.E.2d 712, 721 (Ind. 1997) (holding that handbook’s vague and general statements concerning employee performance evaluations and job security are insufficient to create valid offer when balanced against clear and definite language which gave employer discretion in disciplining employees). But cf. Sol Picciotto, Rights, Responsibilities and Regulation of International Business, 42 COLUM. J. TRANSNAT’L L. 131, 145 (2003) (examining how corporate codes may be enforceable through contractual agreements between retailer and subcontractors that incorporate them).


196. Johnson & Johnson, Inc. was the corporate parent of Therakos, Inc. Id. at 234. Tripodi was employed directly by Johnson & Johnson before his assignment to Therakos. Id.

197. Id. at 234–35.

198. Id. at 235.

199. Id.

200. Id.

201. Id.
of Johnson & Johnson's company credo—a widely disseminated document applicable to all employees of Johnson & Johnson and its subsidiaries.\textsuperscript{202} This credo establishes the company's general obligations to various stakeholder groups, including its employees.\textsuperscript{203} The credo does state that "[e]mployees must feel free to make suggestions and complaints" and that "[management's] actions must be just and ethical."\textsuperscript{204}

The trial court rejected the notion that the credo established specific employment rights to Tripodi including job security and heightened protection from discharge.\textsuperscript{205} The court concluded that the credo statements were not contracts but "goals and aspirations. . . . [E]mployees could not reasonably expect that the generalized statements concerning employee relations were enforceable obligations."\textsuperscript{206} The court analogized to other parts of the credo, noting that its stated commitment to nurses and doctors for high quality products at reasonable prices is not a contractual command for a specific kind of good. In addition, its statement that "[o]ur suppliers and distributors must have an opportunity to make a fair profit"\textsuperscript{207} does not impose a contractual obligation upon Johnson & Johnson to guarantee a profitable return to them.\textsuperscript{208} The court set aside the plaintiff's verdict and entered judgment notwithstanding the verdict in favor of the defendant.\textsuperscript{209}

An interesting adjunct to the \textit{Tripodi} case is the reaction of the jury. The jury concluded that the credo constituted a binding contract between Johnson & Johnson, Therakos, and Tripodi.\textsuperscript{210} The jury found that Tripodi was not terminated for just cause and that Therakos breached its promise to Tripodi.\textsuperscript{211} The trial court set aside the jury's verdict.\textsuperscript{212} The divergent jury

\textsuperscript{202} Id.
\textsuperscript{203} The portion of the Johnson & Johnson credo relevant to employees states:

We are responsible to our employees, the men and women who work with us throughout the world. Everyone must be considered as an individual. We must respect their dignity and recognize their merit. They must have a sense of security in their jobs. Compensation must be fair and adequate, and working conditions clean, orderly and safe. We must be mindful of ways to help our employees fulfill their family responsibilities. Employees must feel free to make suggestions and complaints. There must be equal opportunity for employment, development and advancement for those qualified. We must provide competent management, and their actions must be just and ethical.


\textsuperscript{204} Id.
\textsuperscript{205} \textit{Tripodi}, 877 F. Supp. at 239–40.
\textsuperscript{206} Id. at 240.
\textsuperscript{207} \textit{Johnson & Johnson}, supra note 203.
\textsuperscript{208} \textit{Tripodi}, 877 F. Supp. at 240.
\textsuperscript{209} Id. at 240.
\textsuperscript{210} Id. at 236.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 240.
finding supports psychological contract literature noting the breadth and depth of expected promises by employees in the workplace well in excess of existing laws. The finding also reinforces that a difference exists between employee psychological contracts and employment terms perceived as actionable in court.

Although research is mixed on the effectiveness of codes and the judiciary is suspicious of codes as enforceable obligations, this does not necessarily mean that corporate codes are merely ceremonial pronouncements without importance or effect. Rather, corporate codes have a multitude of uses for organizations wishing to use them as a strategic tool. First, in spite of the discussion of codes earlier in this section, corporate codes can actually be used as a genuine source of an organization’s value system. One need only consider Johnson & Johnson’s reaction to the Tylenol disaster as an example of a code successfully guiding the employees of an organization through a corporate crisis. The lack of support for a broader empirical basis supporting the influence of credos may come as much from the difficulty in developing measurable tests than from their lack of influence over the organization. Employees may be reluctant to make known their ethical failings, or there are simply no useful mathematical measurement tools that can accomplish the task.

Even if we assume that corporate codes have no influence over employees’ perceived relationship with their employer, codes still have an important place in organizational life. Firms may use codes to benefit from the growing demand by consumers to support ethically behaving organizations. Socially responsible investing, the consideration of the social and environmental performance of firms as a significant factor in making investment decisions, is a two trillion dollar industry.

213. Interestingly, this is the same credo that the Tripodi court rejected as a source of an enforceable contract. Id. at 236.

214. Newberg, supra note 155, at 267 n.84 (“Measuring ethical or unethical behavior, and in turn linking it to the character of a code, is difficult.” (quoting Weaver, supra note 192, at 368)).

215. Id.

216. See Cressey & Moore, supra note 161, at 73 (concluding that “there is no practical way of measuring any effects the codes might have had on the conduct of corporate personnel”); Charles E. Harris, Structuring a Workable Business Code of Ethics, 30 U. FLA. L. REV. 310, 327 (1978) (“[E]thics are not susceptible to being measured or established by mathematical formulae or other quantifiable factors.”).

217. Newberg, supra note 155, at 288; see also Cynthia A. Willams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197, 1278 (1999) (“Information about a management’s pattern of compliance with domestic statutes and international treaties is financially significant information...”).

218. Steve Schueth, Socially Responsible Investing in the United States, 43 J. BUS. ETHICS 189, 191 (2003). Quite surprisingly, the socially responsible investing movement is a purely consumer driven phenomenon. See id. (“Wall Street did not cook this one up. The vast majority of the nearly 800 investment management firms in this country who currently...”)
Although a strong empirical connection has yet to be established between corporate codes and socially responsible investment decisions, no doubt the ethical practices of an organization are considerations to socially conscious investors. Also, firms may engage in social marketing, advertising that their products were manufactured with some aspect of social or environmental policy in mind. Consumers may only purchase products from socially conscious organizations or be willing to pay a premium for environmentally friendly products. Finally, corporate credos may buttress efforts at corporate social reporting, the practice of some large corporations of voluntarily disclosing annual reports of their corporate social activities such as charitable contributions and environmental stewardship.

In sum, although questionable evidence exists supporting the argument that corporate codes have a direct effect on employee behavior, the ambiguity in this area may arise from the difficulty of applying appropriate research tools as much as the lack of available evidence. Corporate codes may have some influence over an employee's relational contract, but further research will decide exactly how much, what kind, and in what fashion.

C. Organizational Culture and the Relational Contract

In 1985, two pipeline companies merged their resources to form an interstate business benefiting from economics of scale. After facing a number of financially difficult years, the company entered the energy trading market and transformed from a barely surviving firm into a thriving organization. By the late 1990s, commentators praised this once tiny enterprise as one of the world's most innovative organizations. The company not only traded energy, but created whole new futures markets for commodities such as Internet bandwidth, television time for advertising, and weather futures. This seventy billion dollar company, known to the world as Enron Corporation, was poised to dominate the twenty-first

219. See Geoffrey Brewer, Consumers Want Brands— and Social Responsibility, 152 SALES & MARKETING MGMT. 76, 76 (2000) (reporting the results of a survey which states that "[f]ifty-four percent of Americans . . . watch a company's social performance, including its labor practices, business ethics, and environmental impacts”).


221. See Michel Laroche et al., Targeting Consumers Who Are Willing to Pay More for Environmentally Friendly Products, 18 J. CONSUMER MARKETING 503 (2001) (discussing profile of consumers who are willing to pay more for environmentally friendly products).

century economy. Enron, of course, had a code of ethics. This lengthy tome exhorted its employees to "be proud of Enron and to know that it enjoys a reputation for fairness and honesty and that it is respected." The code declared that "[l]aws and regulations affecting the company will be obeyed." Enron's Principles of Human Rights affirmed that it takes its role as an international employer and global corporate citizen seriously. These principles pronounced that the company should treat others like one treats oneself, work with customers honestly, and respect the rights of all individuals.

Enron's code had much to say about its employees as well. The code charged employees to adhere to the "highest ethical standards." Enron employees were to play an active role in the community, thereby fostering a long-term partnership with the neighborhood where its employees live. The code also establishes ethical standards for securities trading by employees, employee conduct and firm loyalty, employee use of company secrets, and workplace safety. Compliance with these ethical standards was a condition of employment, and the code warned that any violations of these ethical standards might result in disciplinary action, even termination.

Obviously, Enron did not practice what it preached. Put simply, Enron devised quasi-partnerships that allowed the company to sell assets and manufacture false earnings. Debt was shuttled into other partner-

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225. At sixty-two pages, Enron's code is more detailed than all but two of the top 200 multinational firms. See Kaptein, supra note 188, at 18.

226. Id. at 13.

227. Id. at 4.

228. Id. at 4-6.

229. Id. at 12.

230. Id. at 5-6.

231. Id. at 7-12.

232. Id. at 13-14.

233. Id. at 15-22.

234. Id. at 24.

235. Id. at 8.

ships to keep the losses off Enron's own balance sheet.²³⁸ Ultimately, Enron’s questionable partnerships became public, failed in increasing numbers, and placed millions of dollars of unanticipated liability on Enron’s books that Enron could not satisfy.²³⁹

A “culture of cleverness” devolved from a pursuit of excellence to a mere appearance of excellence through elaborate self-dealing transactions.²⁴⁰ Even with the presence of a specific code of ethics, ethical boundaries at Enron simply eroded away in a rule-breaking, intimidating, aggressive work environment.²⁴¹ As one employee reported, “[I]t was all about . . . deliberately breaking the rules.”²⁴² Another stated that “there were no rules for people, even in our personal lives. Everything was about the company and everything was supposed to be on the edge—sex, money, all of it . . . .”²⁴³ Work was a “very arrogant place, with a feeling of invincibility.”²⁴⁴ Enron’s implicit corporate culture, not its explicit code of ethics, established the norms of this workplace.

Corporate culture has been defined as an internal consistency within an organization that influences the behavior and values of its employees.²⁴⁵ Culture to an organization is what personality is to an individual.²⁴⁶

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²⁴¹ Id. at 244 (citing C.A. BARTLETT & M. GLINSKA, ENRON’S TRANSFORMATION: FROM GAS PIPELINE TO NEW ECONOMY POWERHOUSE (2001) (Harvard Business School case study)).

²⁴² Id. at 247.

²⁴³ Id. at 247.

²⁴⁴ Id.


²⁴⁶ Id. (citing R. KILMAN ET AL., GAINING CONTROL OF THE CORPORATE CULTURE ix
corporate culture represents the cumulative philosophies, beliefs, values, assumptions, and norms of an organization. More formally, culture is:

a pattern of shared basic assumptions that was learned by a group as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.

Definitions of culture need not be so esoteric, but rather have been described as simply a "feeling in the organization," to "rules of the game," to "how things are done around here."

Unlike the limited empirical support found for the ability of a corporate credo to influence employee behavior, significant research shows that corporate culture has a profound impact on employees' relationships with their employers. For example, a frequent topic of management scholars is organizational commitment, the psychological state of an employee affecting his or her decision to remain with an organization and support its goals. Affective commitment, loyalty to the firm made by choice and not solely by economic necessity or threat of punishment, represents an emotional identification with an organization. Genuinely committed employees offer an enormous competitive advantage to the organization that possesses them. Both customer loyalty, the outcome of superior customer service, and investor loyalty, the result of superior shareholder value, depend upon businesses retaining their employees'...
commitment and loyalty. Other benefits from highly committed employees include increased retention, attendance, work effort, and overall job performance. Committed employees also produced improved objective measures such as increased sales, improved cost control, and improved manager ratings of employee performance. Simply, committed employees are more likely to go above and beyond established expectations than less committed ones. Corporate culture has been linked to overall organizational performance. Denison and Mishra found that strength of culture is tied to corporate performance such as return on assets, return on investment, sales growth, and market share. A properly supportive culture promotes company-wide initiatives such as total quality management practice that can improve an organization's overall capabilities.

The origins of this valuable firm asset, not surprisingly, arise from a supportive and positive corporate culture. Cultural characteristics such as employer's supportiveness of employees, management's recognition of employees, employees' perception of fair treatment from management, and employees' feeling valued as an asset to the organization are the strongest indicators of predicting employee commitment. A 2003 study reinforces these conclusions. Researchers surveyed selected employees of seventy-five publicly held corporations who were asked the organization's prioritization of internal and external stakeholders. The study found that when employees believe that the employer organizational attitudes are focused primarily on non-employee interests, these employees have significantly lower levels of employee commitment to the organization. Companies whose culture maintains this non-employee focus tend to have lower sales, lower net income, and lower market value than those firms

255. Sheri Bridges & J. Kline Harrison, Employee Perceptions of Stakeholder Focus and Commitment to the Organization, 15 J. MANAGERIAL ISSUES 498, 500 (2003).
256. Id.
257. Id.
261. Id. at 501–03.
262. Id. at 504–05.
whose employees believe are more employee focused.\textsuperscript{263}

Corporate culture is not created in a vacuum. Rather, employers, particularly leaders of a company, have a profound impact upon the development, nature, and characteristics of employees' cultural norms.\textsuperscript{264} When certain issues capture a leader's attention, expressed by her questions, praises, or criticisms, employees will interpret the leader's behavior as stating what is important to the company. For example, a leader that continually fixates on the bottom line sends a relational signal to his workers that financial performance, not necessarily ethical behavior or employee welfare, is the top priority for the company.\textsuperscript{265} In such a culture, employees may perceive laws, rules, ethics, or even themselves as speedbumps in the way of overall profitability.\textsuperscript{266}

A leader's reaction to crisis situations also sends strong signals about an organization's true culture.\textsuperscript{267} Crises force leaders to make rapid decisions under difficult circumstances. As most company crises are by definition unexpected, leaders cannot solely rely upon the experience of past practices.\textsuperscript{268} Some of the most notable corporate crises are the discovery of glass by a customer in Gerber Product Company baby food,\textsuperscript{269} the massacre of twenty-one customers in a San Ysidro, California, McDonald's restaurant,\textsuperscript{270} and the death of three thousand people due to

\begin{footnotesize}
\begin{enumerate}
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\item See generally Sheri Bridges et al., The Relation Between Employee Perceptions of Stakeholder Balance and Corporate Financial Performance, 68 SAM ADVANCED MGMT. J. 50 (2003) (discussing the value of paying attention to stakeholders).
\item See Edgar H. Schein, The Role of the Founder in Creating Organizational Culture, in PSYCHOLOGICAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 320 (Barry M. Staw ed., 3d ed. 2004); cf. Ken W. Parry & Sarah B. Proctor-Thomson, Leadership, Culture and Performance: The Case of the New Zealand Public Sector, 3 J. CHANGE MGMT. 376, 380 (2003) ("Within the leadership literature generally, there is clear recognition of the inextricable link between leadership and culture in the process of change." (citing J.P. Kotter and J.L. Heskett, CORPORATE CULTURE AND PERFORMANCE 166 (1992))).
\item Sims & Brinkmann, supra note 223, at 247.
\item See generally Ronald R. Sims, Changing an Organization's Culture Under New Leadership, 25 J. BUS. ETHICS 65 (2000) (arguing that new leadership and beliefs are necessary to change to a culture that supports ethical behavior).
\item See generally Donald C. Hambrick & Phyllis A. Mason, Upper Echelons: The Organization as a Reflection of Its Top Managers, 9 ACAD. MGMT. REV. 193 (1984) (offering a generalized discussion of the characteristics of top managers and their impact upon organizational decisionmaking).
\item Id. at 356–57.
\end{enumerate}
\end{footnotesize}
leakage of poisonous gas at a Union Carbide plant in Bhopal, India.271 With each crisis, leaders have an unparalleled opportunity to communicate to employees and other stakeholders the values of the firm.272 When a Scottish electronics company reacted to a strike of long-time, non-unionized employees by firing the entire workforce, the message the firm sent to its employees about its concern for their well-being and interests is undeniable.273 When a pipe foundry forces its workers to urinate in their pants instead of allowing them to take bathroom breaks during their shift, employees get the message quickly that even their most basic human dignity is of no concern, let alone matters of pay, job security, or safe working conditions.274

Corporate cultural messages need not only come from leaders. For example, when Disneyland management decided to discharge John Van Maanen for growing hair over his ears, an area supervisor pulled John off of his assigned ride after his shift had begun and publicly escorted him to an administration building.275 A personnel supervisor read a short, prepared statement as to formal cause for discharge.276 Security officers then walked John to the locker room, where his work uniforms and equipment were collected from him, and inspected his locker.277 Proceeding to the employees' “time shed,” the officers removed John’s card from the slot, wrote “terminated” across the top in red ink, and returned the card to its usual place.278 The two officers escorted the now ex-employee to the parking lot, scraped off the employee parking sticker attached to his car, and sent him on his way.279

Both the manner and reason for the discharge, which “followed a format familiar to an uncountable number of ex-Disneylanders,”280 sent a cultural message. Management fired John for violating one of the many exacting grooming and behavior rules that Disneyland enforces. The cultural norms for employees, enforced not just by a single leader, but

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272. Sims & Brinkmann, supra note 223, at 248.
273. This event is discussed in more detail infra Part V.B.
274. See Frontline: A Dangerous Business (PBS television broadcast Jan. 9, 2003), transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/workplace/etc/script.html. This award-winning documentary investigates the business practices of the McWane Corporation, a family-owned firm possessing a number of pipe foundries throughout the United States. Id.
276. Id.
277. Id.
278. Id.
279. Id.
280. Id.
practiced throughout management, displayed little tolerance for cultural resistance. Almost every step of the discharge process was public. The "terminated" time slip left in the time card box for all employees to see certainly sends a message of strong enforcement of rules and immediate discharge of deviant workers. In an environment where low pay, arbitrary and stifling supervision, and minimal discretion are the norm, a public firing based upon what most American workers might consider a non-issue only reinforces the cultural message sent to employees—at least by one ex-employee's reckoning—that even the most minute dissent from Disneyland's cultural norms will not be tolerated. Corporate norms, particularly those that arise from the culture of the organization, play a major role in forming the employee's relational contract with the organization.

IV. A TALE OF TWO RELATIONAL CONTRACTS: CASE STUDIES OF THE SUCCESSFUL AND THE BROKEN RELATIONAL CONTRACT IN EMPLOYMENT

"You must cut costs ruthlessly by 50 or 60 percent . . . . Depopulate. Get rid of people. They gum up the works."—Jeffrey Skilling, then-president of Enron, speaking at a 1997 industry strategy conference.

Do people gum up the works? When word of Skilling's comments reached Portland General Electric (PGE), a potential Enron merger target, fear spread so quickly through the company that PGE's CEO was forced to send an e-mail to all employees reassuring them about their job security. When Enron purchased the company over significant employee and regulator opposition in 1997, it quickly turned the culture of the conservative utility on its head. Ignoring worker concerns for environmental sensitivity, job security, and low utility prices for their customers, Enron wasted no time erasing what employees called PGE's

281. See id. at 305 ("Employees—at all ranks—are stage-managed by higher ranking employees who, having come through themselves, hire, train, and closely supervise those who have replaced them below.").
282. Id. at 304 ("The feeling of being watched is, unsurprisingly, a rather prevalent complaint among Disneyland people . . . .").
283. Id. at 304–05.
284. Enron President: People 'Gum up the Works', SEATTLE TIMES, Apr. 5, 1997, at C1, available at 1997 LEXIS 10850Q.
285. Id. ("Word of Skilling's comments spurred Ken Harrison, Portland General's chairman and chief executive officer, to send an e-mail to all Portland General employees reassuring them about their job security.").
down to earth and family-business-like culture. Enron raised utility rates, used PGE to make bogus purchases of electricity, and converted employees' conservative utility holdings into high risk Enron shares. When PGE outlived its use, Enron placed the company on the auction block. When Enron's share price showed weakness, Enron e-mailed all PGE employees promising that restoring lost stock value was a priority for the firm. Instead, Enron secretly blocked PGE employees from selling their Enron retirement shares. PGE employees watched helplessly as their life savings disappeared. Numerous employees lost both their jobs and their retirement savings upon Enron's collapse.

In three short years, Enron shattered a decades-long relational contract based upon a conservative, job-stable culture that readily employed generations of loyal and productive workers. The following section

286. Retirement Security: 401(K) Crisis at Enron: Hearing Before the S. Comm. on Governmental Affairs, 107th Cong. 4–5 (2002) (statement of William D. Miller, Jr., Bus. Manager and Fin. Sec'y, Int'l Bhd. of Elec. Workers, Local 125, Portland Gen. Elec.) ("PGE was a trustworthy, solid company with which we [the International Brotherhood of Electrical Workers union] had a good working relationship. . . . It was run almost like a family business and the culture was very down to earth.").

287. Id. at 6.

In July of 1997, after the sale [of PGE to Enron] was complete, all PGE stock held by employees was converted to Enron stock automatically. There were no other options available to employees. Not only did the stock change in name, but also in nature. It went from a stable, vertically integrated utility stock, to a volatile, high-risk investment. No one told our members that their holdings were now a dramatically different type of investment.

Id.


This employee discovered a discreet change in the employee handbook that stated that, in fact, employees could convert 100 percent of their Enron stock to other investments at age 50. No one knew about this change in the company policy, or when it took place. The union was not informed of this change, as is required by law, and we were not able to inform our members of this change until the savings plan was in the lock out period.

Id.

290. Id. at 8–9 ("Many of our members wanted to sell their Enron stock during the lock out. Instead, all they could do was simply watch, helplessly, as the stock price tumbled dramatically and their life savings disintegrated before their eyes.").


292. David Morris, Through Enron, Lay Left His Mark, All Right, MINNEAPOLIS STAR TRIB., Dec. 9, 2001, available at http://www.commondreams.org/views01/1209-01.htm ("Electrical World reported on the clash of culture that occurred. Three generations of the
employs two case studies highlighting the influence of relational elements on employer-employee relations. One company has sustained a relational contract for nearly a century. The other willfully abandoned a relational contract with disastrous results.

A. Lincoln Electric: A Thriving Eighty-Year Relational Contract

Founded in 1895 by John C. Lincoln, Lincoln Electric, Inc., (Lincoln) has survived for over one hundred years despite intense domestic and foreign competition from some of the most aggressive companies in the world. Beginning in a shop that repaired electric motors, Lincoln now produces a wide variety of welding products and equipment and exceeded $1 billion in annual sales for the first time in 1995. Lincoln functions in a highly cyclical business. Its market is susceptible to the ebbs and flows of the global industries in which its products are used, including shipbuilding, rail-car manufacturing, car manufacturing, and building construction.

The fact that the Ohio-based company has survived at all is remarkable. The fact that Lincoln has not laid off a single worker in its domestic operations in over sixty years is astonishing. Not only does Lincoln refuse to lay off employees, but Lincoln management guarantees employment for its U.S. workforce. Management promises at least thirty hours of work per week for employees with three or more years of experience, regardless of economic conditions.

Lincoln pays its workers on a piece-meal system—management links wage levels directly to individual productivity. Based upon time and same family might have worked for PGE. "We’re laid back, but we get the job done,” said PGE employee Scott Guptill. "We don’t burn out.”).


294. Id. at 2.

295. Id. at 78.

296. Id. at 51.


298. MACIARIELLO, supra note 293, at 12.

299. Id. at 52. In return, employees must work overtime and accept transfers into positions carrying a lesser pay grade due to lack of work. Id.

motion studies, engineers established pieces for over 70,000 tasks. The responsibility for quality rests heavily on the worker producing the product. Workers must rework faulty products themselves and on their own time. If quality control spots a defect, the employee responsible for the defect loses points that make the employee eligible for certain bonuses. A defect reaching the customer results in even greater point penalties, and the part is returned to the original employee who manufactured it. Employees pay for health insurance out of their own bonuses. Employees do not have formal sick days, but may draw payments from a combined "sick pool" taken from contributions made by co-workers.

Demand for jobs at Lincoln is intense despite challenging working conditions. On average, Lincoln interviews seventy-five applicants for each available production position. Half of those hired leave within ninety days. Those that pass the ninety day mark generally stay and thrive. Absenteeism remains at a minimal two percent a year and labor turnover hovers at a negligible three percent.

Management and worker relations are generally harmonious. Few work rules exist and routine supervision of workers is simply non-existent. Lincoln’s organizational structure is unusually flat, with 100 workers present for every one supervisor. Few layers separate the line worker from the CEO. Pay disparities are far less dramatic at Lincoln. The ratio between the CEO’s salary and the average factory worker was 15:1, compared with a 20:1 ratio in Japan and 326:1 ratio in the United States. Status symbols and executive perks, such as seniority preferences for promotions and reserved parking spots, simply do not exist. Workers

301. MACIARIELLO, supra note 293, at 42.
302. Orentlicher, supra note 300, at 196 n.144.
303. Id.
304. Id.
305. McGowan, supra note 297, at 180.
306. MACIARIELLO, supra note 293, at 46. Although piecemeal payment may seem oppressive, the piece rate system has resulted in some workers earning over $100,000 per year. Id. at 50.
307. Lincoln’s applicant pool is likely no different from the applicant pool in any other market. Only recently has Lincoln begun to require a high school diploma in its hiring practices. Id. at 35.
308. Id.
309. Id. at 11.
310. Id. at 36.
311. Id. at 31.
312. Id. at 34.
313. Id. at 35.
314. Id. at 31; see also James N. Baron & David M. Kreps, Consistent Human Resource Practices, 41 CAL. MGMT. REV. 29, 51 (1999).
315. MACIARIELLO, supra note 293, at 12.
return the commitment to egalitarian values with unparalleled loyalty. One-third of employees have stayed more than twenty years and thirty-four employees have served for over fifty years.\textsuperscript{317}

Lincoln’s relationship with its workers is deeply embedded with relational elements. One of the most fundamental is the presence of trust between workers and management.\textsuperscript{318} Trust, as noted \textit{supra}, is a critical factor in establishing organizational effectiveness\textsuperscript{319} and a significant factor in relational arrangements.\textsuperscript{320} Lincoln’s management creates trust through genuine communication with workers, open access to top management, visibility of management on the production floor, and the presence of a functioning suggestion system for workers.\textsuperscript{321} Management not only creates a climate of trust in it but also trusts its workers to treat the firm honestly. Due to the lack of supervisors, management does not confirm reported productivity rates of its workers. Rather, “honest counts” of output by workers are accepted measures of productivity and pay.\textsuperscript{322}

Lincoln’s practices send relational messages to its workforce. Handpick hires from a 75:1 hire pool sends a relational signal of selectivity and commitment to the individual lucky enough to find herself hired by Lincoln.\textsuperscript{323} The no-layoff policy ensures job security, allowing employees to make long-term suggestions for the firm’s benefit without fear of having their job eliminated. The company encourages continuous development of its employees to use their full talents and be proficient at a wide variety of tasks.\textsuperscript{324} Employees own a significant portion of company stock.\textsuperscript{325}

Just as relational bargains typically anticipate trouble and take


\textsuperscript{318} \textit{MACIARIELLO, supra} note 293, at 122 (“To succeed, communication must be based upon trust between management and labor.” (quoting Donald F. Hastings, Guaranteed Employment: A Practical Solution for Today’s Corporations, Address Before the Cleveland City Club (June 21, 1996))).

\textsuperscript{319} \textit{See supra} notes 139–44 and accompanying text.


\textsuperscript{321} \textit{MACIARIELLO, supra} note 293, at 94.

\textsuperscript{322} \textit{Id.} at 31.

\textsuperscript{323} \textit{Id.} at 97.

\textsuperscript{324} \textit{Id.}

\textsuperscript{325} \textit{Id.}
measures to resolve conflict ahead of time, so does Lincoln Electric have conflict management mechanisms already in place. Lincoln’s workers use the open communications system to channel complaints to upper management. For example, if workers find a particular piece rate system unfair, Lincoln allows rates to be changed. Advisory boards that have been in place since 1914 offer a venue for resolving conflicts on a broader scale. Although specific practices are always open to change, Lincoln proceeds cautiously when adapting to its changing competitive environment—convening committees and hiring outside consultants to review its productivity and compensation system. Lincoln’s reputation for steadfast consistency towards its employees has immense power. A circulated story reports that grade school children in Lincoln’s hometown of Cleveland, Ohio, sometimes receive report cards describing a child as “a real Lincoln Electric kind of person.”

Lincoln simply does not break its no-layoff promise to its employees, even during difficult economic times. During the early 1990s, much of the world was mired in an economic recession. Lincoln had made some costly mistakes expanding into global markets, paying a costly premium for European acquisitions because of the excessive demand for similar plant assets at that time. The combination of these factors resulted in anemic five percent shareholder returns in 1990 and 1991 and negative twenty percent returns in 1992 and 1993.

Instead of leaving in droves or blaming management, Lincoln workers banded together to improve domestic operations to offset foreign losses. Workers identified production bottlenecks where certain steps in the manufacturing process were unable to keep up with production levels. Instead of hiring new workers or making costly reengineering changes, workers in bottleneck areas simply worked harder. Four hundred fifteen

326. See Macneil, supra note 17, at 876–80 (describing various dispute resolution provisions included in labor agreements).
327. MACIARIELLO, supra note 293, at 98.
328. Id. at 42.
329. Id. at 39.
330. Baron & Kreps, supra note 314, at 51.
331. Id.
332. MACIARIELLO, supra note 293, at 116.
333. Id.; see also Donald F. Hastings, Lincoln Electric’s Harsh Lessons from International Expansion, 77 HARv. BUS. REV., May-June 1999, at 162, 164 (describing the company’s financial difficulties in the early 1990s due to international expansion); Hastings, supra note 317, at 138 (“In 1992 we about fell off the cliff with our European operations, and for two years we took substantial corporate losses.”).
334. MACIARIELLO, supra note 293, at 18.
335. Id.
336. Id.
337. The company has used other non-traditional methods to maintain employment.
employees in bottlenecked processes voluntarily gave up 614 weeks of vacation.\textsuperscript{338} Some employees worked seven days a week for months on end.\textsuperscript{339} As a result, productivity increased by six percent in 1991–92 and twelve percent in 1992–93.\textsuperscript{340} This effort, combined with management’s reorganization of its foreign acquisitions, allowed operations to turn profitable in 1994 and remain that way for years afterward.\textsuperscript{341}

All is not perfect at Lincoln, and critics charge that Lincoln’s workplace is harsh and unforgiving.\textsuperscript{342} However, any doubt about the success of Lincoln’s relational bargain is resolved by the proverbial bottom line. The company has kept its cost of return goods to less than 0.3% of overall costs for fifty years.\textsuperscript{343} Lincoln employees are more than twice as productive as their U.S. counterparts in similar businesses.\textsuperscript{344} Outside Lincoln Electric is a sign that reads, “No admittance prior to one-half hour before starting time,” put there because employees were so eager to begin work that lines formed outside the gate before the beginning of their shift.\textsuperscript{345} Consider for a moment whether a pure employment at will workplace could ever generate such productivity and loyalty.

\textit{B. TimTec Corporation: The Tale of a Relational Meltdown}

While Lincoln Electric provides important insights into the understanding of a successful relational contract, much also can be learned from a relational contract that has failed. Scholars frequently discuss breaches of implied promises and their effects on employees in a general sense. By contrast, this section illustrates what academic journals leave largely sanitized: a real-world example of a shattered relational contract.\textsuperscript{346}

\footnotesize

During one downturn, Lincoln trained fifty-four production workers to sell arc welding equipment to small businesses, resulting in a profitable new business for the organization. \textit{Id.} at 52. See also McGowan, \textit{supra} note 297, at 181 n.250 (“When demand lagged behind production, Lincoln recruited fifty-four factory workers for the sales force.”).

\textsuperscript{338} MACIARIELLO, \textit{supra} note 293, at 18.

\textsuperscript{339} \textit{Id.}

\textsuperscript{340} \textit{Id.} at 18–19.

\textsuperscript{341} \textit{Id.} at 19. Average return on equity was twenty percent for the typical shareholder after 1994. \textit{Id.}

\textsuperscript{342} See, e.g., Keith W. Chauvin, \textit{Panel Discussion of The Excuse Factory}, 8 KAN. J.L. & PUB. POL’Y 59, 60 (1999) (“Lincoln is an unforgiving place. Lots of new hires can’t take it. Twenty percent go right back out within three months. If older workers slow down, tough luck, their pay drops. Employees pay for all of their health insurance, and have no paid holidays or sick days.” (quoting 60 \textit{Minutes: Guaranteed Employment at Lincoln Electric: Ahead or Behind the Times?} (CBS television broadcast Nov. 8, 1992))).

\textsuperscript{343} Orentlicher, \textit{supra} note 300, at 196 n.144.

\textsuperscript{344} Hastings, \textit{supra} note 317, at 138.

\textsuperscript{345} Chauvin, \textit{supra} note 342, at 60.

\textsuperscript{346} This case study is adapted from Judy Pate & Charles Malone, \textit{Post-“Psychological Contract” Violation: The Durability and Transferability of Employee Perceptions: The}
TimTec Corporation was a multi-national enterprise that began manufacturing operations in a city on the east coast of Scotland in 1943. TimTec produced various mechanical products and by the 1980s grew to become one of the city’s major employers. Like Lincoln, employment at TimTec was considered a long-term, even family, operation; multiple family members worked at TimTec at the same time, and terms of service upwards of thirty to forty years were common.

Just like Lincoln, TimTec endured difficult market conditions. In the 1980s, Japanese companies entering the market forced a decline in TimTec’s worldwide sales. Like Lincoln, TimTec management made a tactical misstep. TimTec left its well-established home PC product market and entered the highly-competitive electronic subcontract manufacturing sector. The transition did not help TimTec’s fortunes. By the early 1990s, it had reduced its workforce to a fraction of its peak numbers.

In 1992, a major client reduced its orders from TimTec, resulting in a six-month layoff affecting half of its remaining workers. The trade union representing the employees wanted layoffs rotated on an equitable basis. Management demanded full personnel discretion. After several unsuccessful attempts at negotiation, the employees began a strike in early 1993. The company responded by firing the entire workforce and replacing them with new employees. In spite of the mass layoff, the company could not survive, and by July 1993, senior management closed the plant’s factory doors for good.

Five years after the factory closed, two scholars conducted interviews of twenty former employees. The authors stratified respondents across categories such as gender, skill content of former job, and length of service. The authors inquired about respondents’ experiences with TimTec, perceptions about employers generally, and their experiences with their current employers.

Employees’ attitudes towards TimTec before the dispute were generally positive. Employees believed that TimTec offered a “family atmosphere.... [E]everyone was speaking, and you could go for a drink with your buddies on a Friday night... it was a good community atmosphere inside the factory.” Opinions toward the company itself were similarly positive. Employees generally believed that TimTec management remained loyal and committed to its workforce. Employees felt that once they became employed at TimTec, “you never thought of

Case of TimTec, 24 J. EUR. INDUS. TRAINING 158 (2000).
347. Id. at 160.
348. Id.
349. Id.
350. Id. at 161.
351. Id.
looking for another job. . . . [Y]ou were more or less set for life.”

After the layoff, former TimTec employees were, to put it mildly, critical of the company and its management. Even after five years, former TimTec employees despised their once family-like employer. An illustrative comment reported, “I would go out of my way to ruin TimTec. I hate them with a passion. I am more bitter and twisted than ever. I hate them.” Very few could put the layoff behind them. One person stated that she was bitter for the first three years and was then only able to put the experience behind her after she took courses in a new line of work. The painting on her wall of the TimTec picket line, she said, now meant nothing to her.

The layoff affected not only workers’ views of TimTec, but of other employers in general. Some workers believed that a “good” employer simply did not exist. All respondents surveyed believed that employers do not meet employee expectations. This response was typical: “In general, no you can’t trust them. They’re out to get as much out of you as possible for as little return. It’s worse in big companies, you’re only a number. There is very, very little loyalty.”

Before the layoff, employees expected fair pay, good working conditions, and a family atmosphere. They believed that the company was committed to the well-being of its workers. Employees expected a “job for life” when employed there. Employees forged a strong psychological attachment to the company, using words such as “family” to describe the relationship.

Although employees expected much from TimTec, they did not see their relational contract as one-sided. Most respondents reported that they were “hard worker[s]” who did their jobs “to the best of [their] abilit[ies]” and went beyond the usual job demands when asked to do so. Even when TimTec’s economic fortunes declined, the study reports, the employees displayed uncommon loyalty. Employees did not seek alternate job options and retained their commitment of high productivity and pride in their work.

After the mass firing, their attitudes changed. TimTec employees believed that workers in general presented more to the relationship than their employer did. As one person commented, citing a typical feeling amongst respondents, “Employers can trust employees more than the other

352. Id.
353. Id.
354. Id.
355. Id. at 162.
356. Id. at 163.
357. Id.
358. Id.
way around, but that comes through necessity. If you screw your employer, you get the sack; if they screw you, then tough, that’s the way it goes.\textsuperscript{359}

If one doubts the importance of relational elements in employment relationships, one need not look past the employees’ responses to TimTec’s mass layoff. No doubt employees believed that TimTec broke a promise to them. These employees did not merely feel disappointment or a sense of worry from a good job lost. Rather, they expressed outrage through anger, feelings of betrayal, and a desire to exact revenge against the company and “scabs” who replaced them on the job.\textsuperscript{360} Consider that one employee had a painting of the picket line on her wall and the deep emotional trauma that would warrant someone painting something as mundane as a picket line and someone else purchasing that painting and placing it in a place commonly reserved for treasured decorations, or more significantly, memories of lost loved ones. Only the most extreme violations in an employee’s mind would trigger such emotional responses as, “I was glad we closed them down,” “I would go out of my way to ruin TimTec,” and “I hate them with a passion.”\textsuperscript{361}

What exactly then was the reason that TimTec employees perceived such a catastrophic breach of the relational contract? Layoffs alone do not fully explain the reaction of TimTec workers. Most employees expect that reductions in force due to economic pressure are an unfortunate fact of modern existence. A 1997 study revealed that 78.6% of those surveyed (random unemployment insurance claimants with no legal training) believed that it was legal for an employer to discharge employees due to lack of available work.\textsuperscript{362} Layoffs are an expected though unwelcome fact of modern economic life. Relational contract theory does not demand a blanket prohibition of reductions in force.

TimTec employees seem to have violently reacted to not just the layoff, but the manner in which the layoff was performed. TimTec managers refused to layoff workers on a rotating basis as the employees suggested. Certainly from the employees’ perspective that would have been the most fair solution because it would have distributed the burden of reduced jobs across the entire workforce. Only after unsuccessful negotiation attempts did TimTec employees finally strike. TimTec responded by firing everyone and replacing the employees with scabs.

No doubt TimTec employees viewed this as an unfair decision and an act of betrayal. TimTec employees certainly thought they were negotiating within the confines of their relation with the company by suggesting a

\textsuperscript{359} Id. at 162.
\textsuperscript{360} Id. at 163–64.
\textsuperscript{361} Id. at 161.
\textsuperscript{362} Kim, supra note 7, at 127–28, 134.
method of layoffs that satisfied management needs while keeping workers employed. When TimTec fired all employees, it did so by choice and in a fashion that breached employees' trust in the firm. Employees believed that if they worked hard for TimTec and treated the company fairly, they would receive the same treatment in return. TimTec's mass layoff, by choice and without compromise, breached the bond of trust TimTec employees had for their long-time employer.

TimTec's workers had implicitly forged one of the most non-discrete arrangements imaginable—an environment of unquestioned mutual trust, commitment, and loyalty with workers producing beyond explicit expectations and expecting employment that would last a lifetime. Yet, TimTec destroyed that relational contract in one of the most unforgiving methods possible—a mass firing of loyal workers made without negotiation and by choice.\textsuperscript{363} The anger felt by these workers towards the company and its management perhaps requires modification of a traditional phrase about lost love, "Heaven has no rage like [job] to [joblessness] turned, [n]or hell a fury like a[n employee] scorned."\textsuperscript{364}

V. TOWARD AN ENFORCEABLE IMPLIED COVENANT OF THE EMPLOYMENT RELATION

There is much value in recognizing that an employment agreement is embedded in a relationship such as relational contract. Scholars, courts, and employers may more fully understand employee motivations, the importance of extra-contractual signals, and the source of those signals from company culture, practices, and principles. Such research is of greatest use in legal scholarship, however, when it is coupled with an applied theory explaining how these norms will impact or change the law. This section applies relational theory to the employment context and develops a workable standard of enforcing relational norms.

\textsuperscript{363} See Pate & Malone, \textit{supra} note 346, at 163 (noting that when "[e]mployees perceived that the company was able to maintain the contract, but was unwilling to do so... this typically resulted in extreme negative outcomes" (citing \textsc{Blair Sheppard Et Al., Organizational Justice: The Search for Fairness in the Workplace (1992)})).

\textsuperscript{364} The original quotation is:

\begin{quote}
Heav'n has no Rage like Love to Hatred turn'd,
Nor Hell a Fury, like a Woman scorn'd.
\end{quote}

\textsc{William Congreve, The Mourning Bride} act 3, sc. 8, \textit{available at} http://www.bartleby.com/100/212.3.html (last visited Nov. 29, 2005).
A. The Underlying Problem of Employment at Will

Developing an enforceable relational standard may appear at first glance to be an excessive imposition of judicial power upon fully informed parties. Certainly an argument may be made that employment at will, the current American rule allowing employers to discharge for virtually any reason—a good reason, a bad reason, or no reason at all—is widely understood. Employment at will has been the law of the land for over one hundred years. No rule could be simpler—either party may terminate the employment relationship for any reason. Such a rule, some scholars have concluded, should be obvious to any employee. As Richard Epstein has noted, "[E]mployers and employees know the footing on which they have contracted: the phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less." By this reasoning, any effort at enforcing implicit relational promises is unwarranted because no expectations beyond employment at will terms are justified.

The problem with this argument is the assumption that employees understand the rule. In 1997, Pauline Kim published an unprecedented study on worker perceptions of employment protection in an at-will employment context. Contradicting the perception that employees understood employment at will, Kim found that employees wrongly believed they have significant job security. Eighty-two percent of respondents incorrectly believed that an employer cannot replace an employee with another employee to do the same job for less pay. Seventy-nine percent of respondents incorrectly believed that an employer cannot fire an employee who reports theft of property by another to a supervisor. Eighty-seven percent of respondents incorrectly believed that an employer cannot mistakenly discharge an employee based upon the false belief that the employee stole company money. Finally, eighty-nine percent of respondents incorrectly believed that an employer cannot fire an

365. See, e.g., Morriss, supra note 134, at 1929 ("One obvious characteristic of the at-will rule is that the legal responsibilities of the employer are clear—it has none. How then are employees systematically fooled?"); Verkerke, supra note 5, at 874–75 (stating that employers prefer the at-will contract to the just-cause contract by a large majority and that many employers choose not to expressly contract for terms concerning discharge).


367. In fairness to Professor Epstein, empirical support contradicting his conclusion did not appear in the literature until well after publication of his 1984 article noting the clarity of employment at will.

368. Kim, supra note 7.

369. Id. at 134.

370. Id.

371. Id.
employee because of personal dislike.  

Employers do not have this problem. Most managers share their employees’ belief that it is generally wrong to discharge an employee without just cause. However, employers do not confuse these beliefs with the law, and most employers embrace the employment at will rule. Although there is some evidence indicating that employers overestimate the costs of wrongful discharge litigation, employers fully understand the employment at will rule and use its discretion to its full effect.

Employee overestimation of employment protections undermines a major assumption underlying employment at will: that employees understand the rule and will seek greater job security if they desire it through bargaining and job shopping. Capable employees will not create a market for enhanced job security by flocking to employers that offer it over ones that do not. Workers also have no reason to demand a wage premium for security because most believe such job security already exists at work. Employees will not bargain based upon their true preferences.

372. Id.

373. Estlund, supra note 2, at 12 (citing Denise M. Rousseau & Ronald J. Anton, Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Performance, 12 J. ORG. BEHAV. 287, 295 (1991)).

374. Id.

375. One study reveals that wrongful discharge costs, including judgments and settlements, amounted to approximately one hundred dollars per termination or ten dollars per employee. JAMES N. DERTOZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY xi (1992). However, employers plan their workforce as if their wrongful discharge exposure was one hundred times as great. Id. at xiii. Although some have questioned the exact results of this study, see David H. Autor et al., The Costs of Wrongful Discharge Laws (Nat'l Bureau of Econ. Research, Working Paper No. w9425, 2002), http://www.nber.org/papers/w9425 (stating that Dertouzos and Karoly used problematic instrumental variables that predate states' adoption of wrongful discharge laws), employer overestimation of wrongful discharge liability is well-documented, see, e.g., Lauren B. Edelman et al., Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 LAW & SOC'Y REV. 47 (1992) (analyzing the disparity between the actual threat of wrongful discharge liability and the imagined threat); Lauren B. Edelman, Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace, 95 AM. J. SOC. 1401 (1990) (noting that employers have expanded formal due process protections for employees even though the employers are not legally bound to do so).

376. See, e.g., Smith v. Monsanto Chem. Co., 770 F.2d 719, 724 (8th Cir. 1985) (finding that discharging employee for carrying three rag towels off of plant grounds is a permissible exercise of employment at will discretion); Zimmer v. Wells Mgmt. Corp., 348 F. Supp. 540, 543 (S.D.N.Y. 1972) (refusing to find that the employee’s termination for refusing to be a swinger and to “mix well in the swinging environment” constituted a breach of an implied covenant of good faith); Brunner v. Al Attar, 786 S.W.2d 784 (Tex. App. 1990) (finding that discharge based upon irrational fear of HIV-virus because of employee’s volunteer work at AIDS center constitutes permissible discretion of employment at will).


378. Id. at 10.
Employers benefit handsomely from this ignorance. Employees who believe that they have job security are more loyal than employees who feel insecure about their job. Loyal employees produce more and turn over less. Such loyalty, difficult to obtain but easy to lose, positively correlates with shareholder value. One study of more than 3000 companies revealed that firms who implemented employee motivation initiatives to increase loyalty had higher stock-price to book-value ratios than companies that did not. One company that instituted a loyalty development initiative reported as much as a $41,000 increase in market value per employee as a result. Employers receive these benefits but still exercise the right to fire at any time, loyal employee or not.

Taking advantage of employees' ignorance of the law is an example of relational opportunism. Relational opportunism is self-interest seeking that contradicts the terms of an established relational contract. At the beginning of an employment at will relationship, both parties have full discretion to terminate or modify the relationship as employment at will allows. However, over time this broad discretion narrows as relational norms establish themselves in the workplace through express and implied behavior. Employers and employees shift from obtaining individual utility maximization to focusing on mutually shared collective interests. Patterns of behavior, such as a managerial practice of fairly distributed

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380. Rob Duboff & Carla Heaton, Employee Loyalty: A Key Link to Valuable Growth, 27 STRATEGY & LEADERSHIP 8, 9 (1999) ("There is impressive evidence that retaining ... valued employees is directly connected to value growth.").

381. Id.

382. Id.

383. Opportunism is defined by Ian Macneil as "self-interest seeking contrary to the principles of the relation in which it occurs." Ian R. Macneil, Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus", 75 NW. U. L. REV. 1018, 1024 n.20 (1981); see also Richard E. Speidel, Article 2 and Relational Sales Contracts, 26 LOY. L.A. L. REV. 789, 795 (1993) ("Opportunism rears its ugly head when one party departs from the internally generated norms of the relationship, whether they be the primary norms of reciprocity and solidarity or the supplementary norms of cooperation and risk sharing ... "); Speidel, supra note 19, at 838 (noting that "a continuing challenge is for courts to recognize the special characteristics of relational contracts and to develop a set of default rules that are more responsive to the problems that those characteristics generate" and suggesting that "the most important challenges involve (1) deterring opportunism, and (2) facilitating continuing negotiation and agreed adjustment under a contract that is preserved for that purpose").
performance-based bonuses, are taken for granted and become part of the relational matrix. Employees, responding to implicitly established fair treatment norms, subordinate individual interests in favor of the firm's interest. An employee may work late on a time sensitive project at the expense of important personal obligations or report to work sick to aid a manager in peril.

Relational opportunism occurs when either party violates this implicit arrangement. Expressed differently, relational opportunism happens when one party violates these established norms by exceeding the discretion given to it by internally generated relationship practices. For example, an employer commits relational opportunism when it encourages employee loyalty through implied promises of job security and fair treatment and then retracts that security and fair treatment when they prove inconvenient. Such an act would be a self-seeking interest that contradicts the relational norms of non-arbitrary treatment previously established by the employer in the workplace.

Relational opportunism must be reckoned with as it is a primary cause of employee resentment. Violations in an employee’s psychological contract do not simply occur because difficult working conditions exist. Rather, it is the employer's failure to satisfy promised obligations that provoke employee perceptions of unfairness and consideration of judicial action. For example, laid-off TimTec employees did not focus on the job loss per se or poor economic conditions as their primary source of emotional trauma. What seemed to provoke extreme hostility was the manner of the discharge—a mass layoff that management executed not by necessity, but by choice. This promoted the belief that the employees were betrayed by their company for which they had worked for so long. The employer had established (whether implicitly or by design) a workplace where employees expected to sustain a long-term employment relationship with their firm. TimTec’s self-serving breach of its relational contract with its workers is a particularly harsh example of relational opportunism, and the anger it provoked was extreme and long-lasting. The backlash from this action was fatal to the firm.

384. Speidel, supra note 19, at 838. See generally Sally Riggs Fuller et al., Legal Readings: Employee Interpretation and Mobilization of Law, 25 ACAD. MGMT. REV. 200 (2000) (studying the effects of law and internal practices in the daily lives of employers and employees).
385. See Morrison & Robinson, supra note 123, at 230 (defining violation as the "emotional and affective state that may, under certain conditions, follow from the belief that one's organization has failed to adequately maintain the psychological contract").
386. Pate & Malone, supra note 346, at 163 ("Employees perceived that the company was able to maintain the contract, but was unwilling to do so . . .").
387. Id. at 161–63.
388. Id. at 161.
Thus, a covenant of the employment relation would be satisfied if the employer did not engage in relational opportunism towards its employees. Employers fulfill the covenant when they seek their self-interest while in harmony with the relational principles they have established in their relationship with their employees. Employers break this covenant when they treat employees in a manner contrary to the well-established relational norms in the workplace.

B. An Implied Covenant of the Employment Relation: Setting the Standard

The implied covenant of the employment relation is determined by examining both the promises and the practices established by the employer to its workforce. A promise may be defined as a manifestation of intention by an employer to act in a certain way such that an employee should reasonably understand that a commitment has been made. Promises are found within the discrete and traditional sources of agreement, such as employment contracts, official policies, workplace regulations, employee handbooks, oral promises by supervisors, and other explicit manifestations of work terms. The breaking of explicit promises forms the basis of many challenges to employment disputes.

Practices, by contrast, encompass a broad array of behaviors explicitly or implicitly performed by the employer to accomplish the same result. Practices can be rituals that promote good behavior, such as a periodic employee award ceremony rewarding longevity and perfect attendance, an annual family picnic on company time, generous annual gifts of thanks at a holiday party, continuous training on skills essential for long-term performance at the company, or the unspoken practice of allowing an employee accused of violating a work rule an opportunity to be heard.

Practices can also be signals that send implicit messages about workplace conduct. Using encouragement, such as "you are really valuable to us," and "management is in your future," sends strong signals of an employer’s commitment to develop that worker over time. Signals can be implicit as well as explicit. For example, a boss’s repeated practice of staying late and complaining that others do not work hard enough reasonably establishes a perceived rule that late hours are required of everyone else. Marking a time card with a red “X” and publicly escorting a discharged employee from the grounds are practices that certainly send a

389. This definition is adopted from the Restatement (Second) of Contracts § 2 (1979). For a more in-depth discussion of promise in contract, see Randy Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269 (1986).

390. See generally Fuller, supra note 384 (discussing factors that impact employee use of legal remedies in employment disputes).
signal to employees that certain rules will be strictly and publicly enforced.\textsuperscript{391}

Finally, practices can be \textit{symbols}. Posting a clear anti-sexual harassment policy flyer symbolizes employer commitment, but whether that flyer remains prominently displayed on a bulletin board or becomes thumb-tacked under an avalanche of routine business announcements is an even stronger symbol. Offering full-time employees offices with doors while segregating temporary workers to mere cubicles symbolizes that a bright line exists between employees and temporary workers and that employees deserve different treatment than temporary workers. The separation of executives to top-floor accommodations with separate elevator and washroom access symbolizes top management’s perception of its superiority over its rank and file workers.

There is a risk of over-examining employer practices such that the slightest management change, pattern of behavior, or human resource policy may be misconstrued as the source of an enforceable relational norm. Thus, relational norms must not only be discerned for their presence but measured for their strength in the workplace. Not all norms have equal influence upon an employee’s relational bargain, and assessing a norm’s influence is a necessary inquiry in determining its enforceability as part of any covenant. A weak norm will not establish a relational contract in the workplace, whereas a strong norm might significantly reduce an employer’s discretion to contradict it. The strength of norms in the workplace can be measured by the presence of four factors: screening, filtering, education, and socialization.\textsuperscript{392} Screening occurs when a given characteristic is taken into account in the hiring decision.\textsuperscript{393} The more important that conviction in the company’s practice is taken into account in its hiring practices, the more likely employee hiring will internalize the practice as a norm. Filtering involves accounting for a characteristic in promotion decisions.\textsuperscript{394} Just as with hiring, the more important adherence to a company’s practice is a factor in promotion decisions, the more likely promoted individuals in management or other key positions will inculcate the practice into their daily activities and adopt the values associated with it as their own. Educating employees about the importance of the practice or belief and initiating voluntary compliance programs will promote the

\textsuperscript{391} I am using the Disney example discussed in the text accompanying \textit{supra} notes 275–83.

\textsuperscript{392} These four factors are adapted from Robert Cooter & Melvin A. Eisenberg, \textit{Fairness, Character, and Efficiency in Firms}, 149 U. PA. L. REV. 1717, 1727 (2001) (discussing four factors in the context of how firms may assure good agent character in their organizations). For purposes of this Article, I modify their definitions slightly to accommodate inculcation of credo values.

\textsuperscript{393} \textit{Id.}

\textsuperscript{394} \textit{Id.}
perception that the practice has a meaningful role in company culture. Finally, socialization allows employers to communicate norms through informal interactions. Informal interactions between management and employees also communicate conscious or subconscious values about the employee’s relation to the firm. An executive regularly sharing lunch with rank and file co-workers in a company cafeteria allows that executive to communicate socialization norms and also signals that the company has an egalitarian view towards its workers. The more prevalently a practice is presented through these means, the more likely a value system will become a part of employees’ relational contract.

Discerning work norms and their influence over the workplace may appear to demand a comprehensive inquiry into organizational life. However, determining an employee’s relational bargain need not be cumbersome. Challenges to employee discharge can focus on relational norms relevant to discharge practices, such as due process norms, longevity signals, or patterns of non-arbitrary discharge behavior. Challenges to employee layoffs can focus on similar, but distinctly different norms, such as prior discharge practices; forthrightness of employer disclosures regarding economic conditions, loyalty, longevity, and dependence of the workforce and community on the employer; and the manner of layoffs given prior employer relationships and practices with their workforce.

Further easing the inquiry is well-developed management scholarship studying firm promises and practices. In an earlier section of this Article, I described the importance of psychological contracts, corporate codes, and organizational culture as sources of employee-perceived bargains. These topics are just the tip of a veritable iceberg of management research dedicated to the employees’ expectations of employers in the workplace. How business norms are created, how they develop over time, and how they affect employee perceptions are well documented in these resources. Any inquiry into relational opportunism would benefit from this research.

Also, a relational opportunism standard shares common ground with established contract doctrines. Such doctrines may be drawn upon as guideposts or analogues for applying the covenant. For example, Stephen Burton, responding to the prevailing view that good faith in contract is defined as the absence of bad faith, instead defined good faith in performance as the exercise of discretion for reasons within the justifiable

395. Id.
396. Id.
397. See supra Part IV-A.
expectations of the agreement. Stated conversely, bad faith occurs when a contracting party acts outside these expectations, allowing her to recover a cost of performance foregone when the parties formed the contract. Burton called these costs of performance “foregone opportunities.” To determine whether or not a party acted in bad faith, one must identify both an opportunity that has been objectively foregone and a subjective intention to recapture it. Burton framed the issue of good faith through two inquiries: (1) At formation, what were the reasonably expected costs of performance (forgone opportunities) to the discretion-exercising promisor? (2) At performance, did the discretion-exercising promisor use its discretion to recapture an opportunity forgone on contracting? If the discretion-exercising promisor attempted to recapture an opportunity foregone at contracting, the promisor acted in bad faith.

In 1994, Burton refined his definition and offered an understanding of good faith for insertion into the Uniform Commercial Code. Incorporated within that definition was Burton’s foregone opportunities approach as presented in 1980. Burton termed this approach the “practice view because it codifies the dominant approach in judicial practice” and “arises from a synthesis of hundreds of cases in which courts have interpreted and applied common law and statutory requirements of good faith in contract performance and enforcement.

Although I do not wish to imply that Burton would necessarily

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400. Id. at 387.
401. Id.
404. Burton proposed the following definition:
“Good faith” of a purchaser or holder means honesty in fact. “Good faith” in contract performance means exercising any discretion for reasons within the parties’ justifiable expectations arising from their agreement. “Good faith” in contract enforcement means asserting any remedial powers, whether provided by contract or law, when justified by their remedial purposes.

405. See id. (“The proposed definition of good faith in contract performance is intended to articulate the distinction between good and bad faith in that context.”).
406. Id. at 1548.
approve of the similarity,407 Burton’s justified expectations approach is at least somewhat analogous to the proposed relational opportunism doctrine. Whereas Burton inquires into the voluntarily foregone opportunities of the promisor in contracting performance, relational opportunism queries the employer’s foregone discretion of opportunistic behavior towards his employees. Burton’s second inquiry asks whether the discretion-exercising promisor improperly attempts to recapture a foregone opportunity. Similarly, the second prong of relational opportunism questions whether the employer failed to act within the justified expectations of the parties as established by relational norms.

Furthermore, scholars have already shown that relational contract theory has the flexibility to be applied in different fields.408 For example, feminists have developed a whole body of research, termed relational theory by feminist scholars, that explores the unique role of feminine, though not necessarily female, traits in interrelationships with others.409 According to this research, masculine traits focus on abstract rules and rights while feminine traits emphasize relationships, responsibility, and a concern for others.410 Contending that the legal system is yet another arena in which men subordinate women’s interest to their own, relational feminism holds that the feminine emphasis on connectedness and empathy has been devalued by the judicial system.411 Relational theory has attracted


410. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); Patricia Smith, Introduction to FEMINIST JURISPRUDENCE 7 (Patricia Smith ed., 1993).

feminist as well as gay and lesbian commentators and offers a useful "feminine voice" in contract.\textsuperscript{412}

Finally, relational opportunism has already appeared in a limited fashion in employment law. The implied contract doctrine permits employer representations to constitute enforceable contractual provisions in most states\textsuperscript{413} even though no express contract exists and the default at-will rule applies.\textsuperscript{414} Factors that may induce an obligation include performance evaluations, statements in an employee handbook, oral statements, and the overall history of company practices.\textsuperscript{415} States that accept implied contracts reason that it is appropriate to hold employers to the pledges made in the employment relationship.\textsuperscript{416} Most frequently, states approved of the implied contract exception simply because it was already recognized in other states.\textsuperscript{417} Several variants of implied contract theory exist among states that allow it as an exception to employment at will. Some states permit both oral and written representations by employers to constitute an implied contract,\textsuperscript{418} while other states acknowledge only written statements.\textsuperscript{419}

\begin{thebibliography}{9}
\bibitem{id} Id. at 647.
\bibitem{id2} Id.; see also Xin Liu v. Amway Corp., 347 F.3d 1125, 1138 (9th Cir. 2003); Conrad v. Bd. of Johnson County Comm’rs, 237 F. Supp. 2d 1204, 1254 (D. Kan. 2002). This case notes that factors determinative of an implied contract in employment include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.
\bibitem{id3} \textit{Id.} (quoting Morriss v. Coleman Co., 738 P.2d 841, 849 (Kan. 1987)).
\bibitem{id5} Walsh & Schwarz, supra note 413, at 666 (citing Hoffman-Laroche, Inc. v. Campbell, 512 So. 2d 725, 731 (Ala. 1987); Cook v. Heck’s, 342 S.E.2d 453, 459 (W. Va. 1986); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984)).
\bibitem{id7} For example, in \textit{Mullinax v. John’s Wholesale Jewelry}, 598 So. 2d 838, 839–40
\end{thebibliography}
Implied contracts in employment incorporate relational principles. First, relational arrangements thrive when relationships expand and grow over the long term. Similarly, in implied contract theory, courts consider the length of employment when determining whether an implied contract exists between the employee and the employer. Second, relational contracts generally contain significant open terms. Implied contract theory considers open terms to determine if such terms have developed independent meaning through the employer's conduct. Third, relational arrangements are characterized by cooperative behavior between the parties. Employer behaviors intended to produce cooperative behavior between employers and employees may create implied contracts between the parties. Fourth, relational contracts gain independent value apart from the exchange based upon the actions of the parties. Implied contracts, at least according to some courts, may be created by seemingly casual verbal statements regarding job security, commitment, or longevity that impart their own independent value to the relationship. Finally, relational contracts are characterized by transaction-specific investments by either party into the arrangements. In implied contracts in employment, specific investments by the employee based upon employer assurances are


422. Speidel, supra note 19, at 828.


424. See, e.g., Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (finding that a handbook articulating detailed disciplinary procedures intended to foster cooperative workforce gave rise to contract).

425. Speidel, supra note 19, at 830 n.31.

426. See, e.g., Rabago-Alvarez v. Dart Indus., Inc., 127 Cal. Rptr. 222, 224–25 (Cal. Ct. App. 1976) (holding that a statement that employees were only terminable for cause constitutes enforceable promise); Terrio v. Millinocket Cmty. Hosp., 379 A.2d 135, 138 (Me. 1977) (holding that a statement that employee "was secure in her job for the 'rest of [her] life'" created an enforceable contract); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 n.5 (Mich. 1980) (finding that an interviewer's comment that "he would be with the company as long as [he] did [his] job" implied discharge only for cause).

427. See Campbell, supra note 11, at 19–20; Speidel, supra note 19, at 830.
relevant to establishing the presence of an implied contract. 428

Some courts already use relational contract language in employment cases. For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*, 429 an allegedly at-will employee challenged the employer’s discretion to discharge him, arguing that because of an employment agreement, legitimate expectations arising from the employer’s policy statement, and oral statements made during hiring he was entitled to just cause protection. 430 The court concluded that the employer did not have the at-will discretion it exercised and offered the following reasoning:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties’ minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer’s policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “instinct with an obligation.” 431

Excerpts of this strongly relational language have been repeatedly

428. *See, e.g.*, Tonry *v.* Sec. Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (rellying on employee’s relocation to a new area at company’s request as a relevant factor in establishing implied good cause term), *abrogated on other grounds by Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022 (Cal. 1994), *as recognized in King v. AC & R Adver.*, 65 F.3d 764, 768 (9th Cir. 1995). *Turner* changed California’s wrongful discharge precedent by holding that a demotion, even when accompanied by a reduction in pay, does not constitute a wrongful discharge. 876 P.2d at 1027.


430. *Id.* at 884–85.

431. *Id.* at 892 (footnote omitted). Similarly, in *Small v. Springs Industries*, 357 S.E.2d 452 (S.C. 1987), the court stated:

> It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore those very policies as “a gratuitous, non-binding statement of general policy” whenever it works to his disadvantage. Assuredly, the employer would view these policies differently if it were the employee who failed to follow them.

*Id.* at 455. The South Carolina Supreme Court then recognized the implied contract doctrine as a viable cause of action in the state. *Id.*
quoted, and the "instinct with an obligation" language has a history all its own. As Toussaint and its progeny reveal, since relational principles are already applied in the employment context through implied contract doctrine, the application of a uniform relational theory based upon employer opportunism would represent a natural development of employment law.


Although relational contract in employment has broad applications in the workplace, the enforceability of a relational covenant is not without limits. For example, relational theory in employment is not a backdoor just cause requirement for employee discharge. Relational contract theory is not a mandatory imposition, but rather a demonstration that all transactions fall somewhere on a continuum between highly relational exchanges (e.g., a marriage) and highly discrete bargains (e.g., a purchase of gasoline). A discrete workplace, characterized by limited personal interactions, an absence of trust, and highly quantifiable measures of performance, is certainly feasible. Consider a hypothetical offered in a prior article:

[A]n employee . . . works in a high-pressure sales organization. Twelve- to fourteen-hour days are the norm. Co-workers steal client lists from one another in an effort to capture more commissions. The company tacitly approves of this behavior to promote competitive spirit. Salespeople are held to extremely high sales requirements by the organization and are constantly fired for failing to meet quotas. Employees leave constantly because of burnout and frustration. However, those that stay and survive are rewarded with lavish commissions. Turnover, office politics, and cutthroat competitiveness are a way a life. A top salesperson who has worked at this pressure-cooker company for over ten years is suddenly fired and replaced with another employee who is willing to accept a lower commission.


433. See generally Robert A. Hillman, "Instinct with an Obligation" and the "Normative Ambiguity of Rhetorical Power", 56 OHIO ST. L.J. 775 (1995) (analyzing the use and impact of the phrase "instinct with obligation").

434. Gudel, supra note 11, at 764. See also Macneil, supra note 17, at 857.

435. See Gudel, supra note 11, at 764 (describing a discrete contract as "a transaction 'of short duration, involving limited personal interactions, and with precise party measurements of easily measured objects of exchange'" (quoting MACNEIL, supra note 34, at 12)).
The relational agreement in this example is no less obvious. Revenue matters above all. Sell or be fired. There is little evidence of shared solidarity or developing relationships. Whether right or wrong, this is the implicit culture of this workplace. Certainly the employee received no indication that he would have his job for life or as long as it was performed satisfactorily.\textsuperscript{436}

There is no expectation in this example of anything more than commission for pay. The employer is not interested in the employees' quality of life, work/life balance, or long-term training. This message has not been explicitly stated, but has been implicitly made clear through the policies and practices the employer permits. The employer here has given up virtually no discretion to discharge or penalize because it has not operationalized any norms in the workplace that would lead employees to believe otherwise. Even if an employee manages a long tenure with this firm, there is no expectation that her position will be available beyond a moment to moment basis.

Further, enforceable relational elements do not exist simply because an employee enthusiastically believes them to be so. For example, in \textit{Daley v. Aetna Life & Casualty Co.},\textsuperscript{437} Virginia Daley sued Aetna Life and Casualty Company alleging that her employer improperly discharged her in retaliation for publicly criticizing her employer's substandard family leave policies.\textsuperscript{438} In 1991, Daley began a six-week period of maternity leave.\textsuperscript{439} After exhausting her maternity and vacation time, Daley requested to work at home one day per week.\textsuperscript{440} Her supervisor rejected Daley's request, citing a stressful corporate reorganization process, increased workload, decreased staff, and the changing needs of customers that would not accommodate a work-at-home schedule.\textsuperscript{441} Daley renewed her request for a work-at-home schedule a few months later with a human resources representative, Lorriane Hritzko, who denied the request.\textsuperscript{442} Daley then asked her supervisor if she could use one day per week as vacation time through the end of the year.\textsuperscript{443} This request was also denied.\textsuperscript{444} When Hritzko denied her request yet again early the following year, Daley said that management's refusal to accommodate her conflicted with "what the company said about its family flexibility program" and that Hritzko "was

\textsuperscript{436} Bird, \textit{supra} note 10, at 567.
\textsuperscript{437} 734 A.2d 112 (Conn. 1999).
\textsuperscript{438} \textit{Id.} at 116.
\textsuperscript{439} \textit{Id.} at 117.
\textsuperscript{440} \textit{Id.}
\textsuperscript{441} \textit{Id.}
\textsuperscript{442} \textit{Id.}
\textsuperscript{443} \textit{Id.}
\textsuperscript{444} \textit{Id.}
going to have a real problem if this doesn’t get ironed out in one way or the other.”

Throughout this period Daley received low evaluations regarding her job performance despite repeated opportunities to improve. In November 1992, Aetna’s newspaper announced the receipt of a “Good Guy” award by the chairperson of the company in recognition of the company’s model family and medical leave programs. One week later, Daley circulated a memorandum that discussed Daley’s efforts to secure work-at-home leave, her disappointment with those attempts, and efforts by other unnamed workers who had failed to receive flexible schedules.

445. Id. at 118.
446. Id. at 117–18.
447. Id. at 118. According to an article submitted as an exhibit by Aetna, program materials distributed at the award ceremony recognized that “Aetna employees may take up to six months of unpaid job-guaranteed family leave per calendar year with continued benefits and seniority.” Appellees’ Exhibit 6, Daley, 734 A.2d 112 (No. 16083). Aetna Chairman Richard Compton commented at the ceremony that “Aetna competes in a tough industry that’s under considerable pressure. . . . We know that our future depends upon the performance of every single Aetna employee. . . . That’s why work force issues are business issues, and they have my attention.” Id.
448. Daley, 734 A.2d at 118. The complete memorandum, available in the appellate record, offers a useful insight into Daley’s psychological contract, particularly her mindset regarding her perceptions of the company’s obligations to her and her coworkers:

With all the press that Aetna has received for its family programs, I was glad to see someone finally admit that “Aetna still has a long way to go in developing programs that are flexible enough to meet diverse employee needs as well as pressing business demands.”

Aetna consistently does a good job applying story term disability to maternity leaves and meeting the requirements of the Connecticut Family Leave Law, but when it comes to offering flexible family arrangements, Aetna’s performance is far from award winning.

I have worked for Aetna for seven years and have heard about Aetna’s “family flexibility” almost since I arrived here. I had a child in the summer of 1991 confident in the knowledge that I worked for a company that would work with me to find the best balance between raising a family and continuing a career with Aetna. I asked my supervisor about a work at home one day a week arrangement before returning from maternity leave. I was told that since the department was in the middle of the QFR process [Aetna’s term for downsizing] I would have to return to work on a regular basis for four months, “until the dust settled.” After four months I was told that there would be no alternative arrangements and not to ask again. I spoke to human Resources about this and was told they couldn’t help me. A short time later I was called in to my supervisors office where she repeated my conversation with Human resources to me almost verbatim and told me I had an attitude problem.

I have since spoken to Michelle Carpenter in family services who has told me that any flexible arrangements are totally at the discretion of the individual departments and supervisors and no one is obligated to follow the well advertised “family friendly” policies. I told Michelle that from my perspective, there was no flexible policy at Aetna. She empathized with my situation but
The memorandum urged Aetna to give its managers broader discretion to fashion flexible schedules and to grant employee relations departments the authority to ensure that Aetna follows its family friendly policies.\textsuperscript{449} In February 1993, Daley, who had already been on and off a thirty-day probationary period for poor performance and had repeatedly failed to complete her assigned tasks, was discharged by Aetna.\textsuperscript{450}

Daley's challenge focused not on a breach of an implied contract, but on an alleged retaliation for criticizing what she perceived to be lack of family friendly policies.\textsuperscript{451} Daley's case, nevertheless, is instructive in defining the limits of relational contracts between an employer and employee. A substantial portion of Daley's criticism focused on what she told me that for every person like me that she heard of, she knew of one that did have an alternative work arrangement so, that to her, the policy was working. Successfully implementing a heavily promoted program 50\% of time certainly does not seem like not [sic] award winning performance to me. I know of two people in my department alone, that have left the company in the last six months because they could not secure a flexible working arrangement and three others that have requested similar situations and have been turned down. That's a 17\% success rate, which is a failure by any measure.

I realize that Aetna is not in business to provide employment for me or anyone else, but Michelle Carpenter also pointed out that it will cost Aetna 193\% of my pay to replace me. Multiply that number by the number of people that Aetna is losing by reneging on its promise to provide flexible work situations and that has to be a substantial amount of money.

Realistic options for Aetna employees to meet their family obligations without sacrificing their careers are generally not available today. To continue to represent to Aetna employees and the national media that these options are available [sic] is unconscionable. Aetna is a company who's [sic] business is keeping promises. If Aenta [sic] cannot keep its promises to its employees, how can Aetna expect to earn the trust of the general public?

Department managers must be given the flexibility to appropriately staff to meet both the demands of workload and employee's family obligations. Human Resources, Family Services and Employee Relations must be empowered to ensure that Aetna's family flexible policies are adhered to. This direction has to come from the top; it has to come from a real "good guy."

Plaintiff's Exhibit 1a, Daley, 734 A.2d 112 (No. 16083).

\textsuperscript{449} Daley, 734 A.2d at 118.

\textsuperscript{450} Id.

\textsuperscript{451} Daley filed eleven counts against the defendants:

(1) retaliatory discharge under General Statutes \textsection 31-51q; (2) common-law wrongful discharge; (3) negligent misrepresentation; (4) fraudulent misrepresentation; (5) tortious interference with employment; (6) defamation; (7) negligent investigation and supervision; (8) negligent representation on behalf of Daley's son; (9) loss of mother-child consortium on behalf of Daley's son; (10) loss of family consortium by Daley's husband; and (11) loss of mother-child consortium.

\textit{Id.} at 118–19 (footnotes omitted).
saw as a misrepresentation to the general public of the strength of family friendly policies. She argued that Aetna misrepresented the thoroughness of these policies to the general public and that the chairperson of Aetna did not deserve the “Good Guy” award received from the National Women’s Political Caucus. She also argued in her appellant’s brief that she and her husband relied on the “benevolent image Aetna had purposely projected as a family friendly corporation” in deciding to have a child in 1990. Accordingly, her criticism primarily stemmed from Aetna’s undeserving public praise and not from a failure of Aetna to fulfill a perceived promise to her. Daley was apparently attempting to obtain a desired benefit, a flexible schedule, by highlighting the employer’s undeserved receipt of a family friendly relayed award by sending around the internal memorandum a week after the award’s receipt.

Aetna established its relational contract early on with Daley. Aetna’s employee handbook stated that requests for alternative scheduling are left to the “supervisor’s discretion in accordance with business needs and departmental workloads.” More importantly, Aetna did not mislead Daley into believing more was available in exchange for increased loyalty or productivity. In other words, Aetna did not promote an implicit relational contract with Daley that she would somehow be given alternative scheduling in exchange for completion of a specific task or expression of loyalty. This is evidenced by Daley’s testimony that defendants never represented to her that alternative work arrangements were an entitlement of the job.

Furthermore, Aetna’s treatment of Daley did not materially differ from established organizational practices. In a book critical of the Daley court’s ruling, the author states that a court-ordered survey revealed that less than half of all employees below corporate officer level who asked to work at home for part of the week had their requests granted between January 1991 and March 1993. In addition, although most people requesting a part-time schedule received it, Aetna denied most requests for job sharing and compressed workweeks. Although Aetna’s behavior may have disturbing implications for the value society places on motherhood, its practice of common denial sends a strong relational

452. Id. at 124.
453. Id.
454. Appellant’s Opening Brief at 7–8, Daley, 734 A.2d 112 (No. 16083).
455. Daley, 734 A.2d at 128.
456. Id.
458. Id.
459. Crittenden discusses the Daley case in order to highlight the cost of motherhood, which she calls, “The Mommy Tax.” Id. at 82; see also id. at 87–109 (discussing the
signal. Aetna will allow part-time work schedules, but will not approve other flexible work arrangements, even those necessary for child rearing.

The court also noted that Daley presented no evidence that Aetna would withhold disciplinary action against a person who relentlessly pursued an alternative work schedule. Any number of employer actions might have implicitly triggered an expectation that relentless pursuit of a benefit gets results. For example, assume that Daley’s boss had the consistent practice of only granting special requests when they are made repeatedly and aggressively. In this hypothetical company culture, management greases the squeaky wheel. Under these conditions, Daley could have more strongly argued that her persistence was an expected part of her implied relationship with her employer.

Similarly, Aetna could have fostered an environment whereby Daley’s public critique was a justified term of her psychological contract. Aetna could have encouraged employee suggestions through company “town meetings,” systematic employee feedback, commentary on its internal newsletter, or focus groups designed to improve its family leave policies. If Aetna had implemented any of these techniques on a sufficiently broad scope, and encouraged honest responses from its rank and file workers, Daley could arguably establish a breach of her relational contract that frank criticism was welcomed and would not result in discharge.

Daley would contend that Aetna encouraged the practice of frank feedback to establish trust and loyalty norms and opportunistically breached those norms when it fired Daley for speaking out at work.

Daley remarked that she lost as much as $154,000 in income from losing her Aetna job and being forced to work as a part-time consultant. Id. at 93.


See, e.g., Phillip L. Polakoff, Employee Focus Groups Cultivate Openness About Company Policies, 63 OCCUPATIONAL HEALTH & SAFETY 36, 36 (1994) (“Employee focus groups are an effective means for determining how workers feel about their company and its policies.”).

This assumes that Aetna discharged Daley for her outspoken criticism and not her poor performance at work.
Feedback gathering initiatives like this one and other employer programs do not merely generate data, but send relational messages to employees. Requesting employee feedback sends a message that employee criticism is welcome if not encouraged. Workers will feel that their opinion matters and they can shape company policy through honest discourse. Feedback initiatives also result in employees strengthening loyalty, increasing commitment, and improving productivity.\(^{466}\) Thus, requesting feedback, for example, like many progressive workplace practices, does not merely produce the desired result. Rather, the process of implementing the practice has an inherent meaning—signaling to employees the company’s interest and loyalty to them, which promotes positive responses by employees towards the firm.

In the Daley case, however, Aetna offered none of this. Aetna sent no relational signal that a confrontational critique like Daley’s would be welcomed or even tolerated. In addition, no Aetna manager ever exhibited the repeated practice of responding only to dogged requests for leave. Daley’s frustration was with a workplace as she would have liked it to be, not with an implied promise or action that breached her justified trust in the firm. According to Daley’s own letter, Aetna was in the middle of a “QFR process,” which is Aetna’s terminology for organizational change, which can include downsizing.\(^{467}\) Quite possibly, Aetna stood in less of a position than it otherwise would have been to consider flexible work options. Accordingly, Daley’s frustration from Aetna’s failure to adopt desired policies does not constitute a breach of her justified psychological contract. Aetna’s discharge of Daley was consistent with its established relational norms.

Employment contracts, because of their long-term and open-ended nature, tend to fall toward the relational end of the continuum. This does not mean, as the previous example shows, that all employment arrangements contain strong relational elements. Furthermore, it does not also mean that every employee expectation is a justified relational promise worthy of contractual enforcement. An employee cannot transform a consistently applied arbitrary rule (e.g., no left-handed employees may hold

\(^{466}\) See Scott Clark, Soliciting Employee Feedback Can Help to Boost Productivity, 11 SAN ANTONIO BUS. J. 40 (1997); Beverly Geber, Preaching the Gospel, 32 TRAINING 47, 50 (1995) (discussing study indicating that “workplace practices such as training, employee feedback, and increased rights and responsibilities for employees lead to greater productivity”).

supervisory positions) or malicious workplace practice (e.g., any workers reporting to management of another worker’s theft or embezzlement of company property are considered snitches and will be fired) into an actionable wrong just because that employee views that rule as unjust. If an employer chooses to establish such a climate and makes that climate a genuine practice, then the employee should expect the arbitrary treatment as part of the position.

VI. CONCLUSION

Employment is a relational contract. Employment relations immediately transcend wage-for-services exchanges and develop into complex whole person relationships based upon trust, commitment, and shared solidarity. Yet, current law insufficiently acknowledges relational norms. Employment at will allows a firm to discharge an employee for virtually any reason, no matter what bonds have been forged between the parties over time. While some states accept limited exceptions to employment at will, numerous jurisdictions cling to a rigid interpretation of employment at will based upon an outmoded notion of equal bargaining power and frontier individualism.

Both scholarship and law must acknowledge the presence of workplace norms and seek to integrate them into law’s order. Management and psychology scholarship delves deeply into the beliefs, expectations, and fears of workers, whereas legal scholarship leaves this rich norm-based arena unexamined. These norms impact virtually all areas of a workplace. Strong positive relational norms improve productivity, increase loyalty, enhance commitment, and promote organizational citizens. Most importantly for management, well-established positive norms enhance the bottom line.

Relational contract theory has much to offer employment scholars. This Article represents an introduction to what could be a greater scholarly inquiry into the impact of relational norms at work. Very little scholarship in either law or management examines relational expectations from the employer’s perspective.468 Employers draft contracts for employees to sign, but expect far more than the contracts’ terms—a solid work ethic, commitment to firm goals, improvement with experience, and a positive attitude. The law offers employers limited protection through requirements of duty and care and loyalty, but is this protection sufficient to protect an employer’s expectation of an employee’s relational promises? 469 Whether

469. See generally Benjamin Aaron & Matthew Finkin, The Law of Employee Loyalty in
employers who have invested skills and entrusted responsibility in their employees based upon employee relational promises have any remedy when an employee breaks those promises is a tantalizing open question.

Another important question is whether relational contract theory can support a gendered critique of employment at will. Significant evidence exists that perceptions of work relationships, work behaviors, and even work texts such as contracts or employee handbooks differ markedly across genders. A gendered approach to employment based upon relational contract theory might highlight law's failure to incorporate feminine (though not necessarily female) behaviors, expectations, and practices in the workplace into employment law. Relational norms might mean different things from a feminine or a masculine viewpoint, and further study into the gendered nature of workplace norms might illuminate important answers.

Finally, relational contract theory can be applied to a variety of workplace situations beyond employee discharge. Positive relational norms might enhance implementation of workplace sexual harassment policies. An interesting question remains as to what extent relational norms may be cited as support for the necessity of strong preventative policies necessary to avoid employer vicarious liability in employee sexual harassment cases. Relational norms might also support novel claims for breach of implied contract actions based upon wrongful demotion. Finally, relational norms of polite or coarse behavior might impact whether or not certain inappropriate actions in the workplace constitute a constructive discharge.

This Article has shown that while attorneys draft legal contracts, the parties draft relational agreements. Relational contracts represent the dominant bargain between employer and employee. An enforceable


relational contract, based upon well-established sources of culture, credo, and expectation, is an accurate representation of what the parties intend in the employment context.