Articles

GOOD FAITH PERFORMANCE IN EMPLOYMENT CONTRACTS: A "COMPARATIVE CONVERSATION" BETWEEN THE U.S. AND ENGLAND

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I. INTRODUCTION

Voltaire's *Candide* is famous for the many instances in which the main character encounters situations that initially seem to be both familiar and promising. Despite his eternal optimism, first appearances often deceive him and catapult him once again into calamitous circumstances. All too easily, a comparative analysis of contract law between common law systems can suffer the same fate. The language of offer, acceptance, consideration, repudiation, and implied terms sound so like old friends to the common lawyer far from home. This familiarity, however, can also be crushingly deceptive. Nevertheless, with a little more worldliness than Candide, and a carefully comparative approach, disasters can be avoided.

The contract law of both England¹ and the United States share mutual roots² in the common law. Although the U.S. began to forge a distinctive

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¹. For the purposes of this paper, England is used to refer predominantly to the law of England and Wales. There are occasional references to the interpretation of the Scottish Law of Session and Employment Tribunals in relation to the development of the implied covenant of mutual trust and confidence. No further mention of the Scottish law of contract will be included.

². See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (providing an introduction to Blackstone's work and discussing the influence it has had on English and American legal thought).
path in developing its own style of common law, most of the tools of contractual analysis remained facially similar to those in England. These familiar-sounding doctrines are not all false friends, however, and some straight comparison is possible. What is particularly striking is how some of these tools have been used to achieve substantively different results. This paper traces one such difference in the context of the evolution of the employment relationship to changed circumstances.

It is best to clarify one matter before we progress any further. Much of the discussion in the academic literature about employment market flexibility concerns the at-will presumption. This paper will take a different course by not debating the question of whether the at-will presumption is desirable. Instead, the focus will be on variation within the employment relationship itself. Although many of the issues of employee handbook variation will concern differing terms relating to termination, the

3. Although as P.S Atiyah and Robert S. Summers note, in general "the English legal system is highly 'formal' and the American highly 'substantive,'" in the area of variation of employee handbooks that distinction is turned on its head. See P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (Clarendon Press 1987) [hereinafter FORM AND SUBSTANCE] (providing a very interesting study of English and American legal method).

4. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (William S. Hein & Co. 1981) (1877) (presuming that the employment relationship may be terminated at the "will" of either party to the contract without notice and without cause).

5. Uniform Law Commissioners' Model Employment Termination Act (1991); Janice R. Bellace, A Right of Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. MICH. J.L. REFORM 207 (1983) (proposing a state-by-state adoption of a simple statutory guarantee of protection from unjust discharge); Lawrence E. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967) (discussing obstacles faced by employees in the employment at will context); Richard A. Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV. 947 (1984) (one of the key pro-at-will contributions concluding that while the contract at will is not useful in every situation, it remains constructive in a few circumstances); William B. Gould IV, The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework, 1986 BYU L. REV. 885 (1986) (reviewing the common law and suggesting a statutory system that would fix some of the current problems); Cornelius J. Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 (1979) (predicting that courts will soon require employers to have just cause for terminating the employment relationship); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976) (arguing that the doctrine of employment at will should be abandoned and instead more legal protections should be given to employees); Peter Stone Partee, Note, Reversing the Presumption of Employment At Will, 44 VAND. L. REV. 689 (1991) (advocating reversing the presumption of employment at-will and encouraging the courts to establish a rebuttable presumption that an employee can be fired only for just cause, rather than at-will); Note, Protecting At Will Employees Against Wrongful Discharge: the Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980) (proposing an economic rationale for judicial revision at common law to provide at-will employees with a better remedy in wrongful discharge cases).
focus of this paper will be on the contractual mechanisms surrounding this variation, while the relationship is kept alive.

A. The Common Factual Dilemma

The tension between the twin poles of flexibility and concrete specificity in the contract will form another theme running throughout this paper. Both the courts and the parties are caught between the desire to ensure certainty of the specific obligations from the moment of formation, and to maintain sufficient flexibility in the relationship once created. This tension is present across all areas of contract law, especially where the contract is to last for any significant length of time. Surprisingly, it is often particularly clear in the enforcement of contracts of employment. This tension manifests itself in incompleteness of the bargain.

Contracts are left deliberately incomplete for various reasons. First, transaction costs of bargaining for more precise provisions are often higher than the expected benefits. Second, language will not actually permit them to be completely exhaustive. The longer the relationship is to last, the more situations it must cover. It is not only costly but impossible, given the inherent limits of language for an employer to specify, ex ante, every conceivable duty and obligation of an employee and of every benefit which will accrue. Also, "[a]s economists have long recognized, however, such complete contracts are vanishingly rare. . . . [i]n practice, contractual [language] . . . tends to be marred by gaps and flaws, forcing a choice between intensity and extensiveness."

6. E.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 92-93 (1989) ("These transaction costs may include legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred. Rational parties will weigh these costs against the benefits of contractually addressing a particular contingency. If either the magnitude or the probability of a contingency is sufficiently low, a contract may be insensitive to that contingency even if transaction costs are quite low."); see also OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 70, n.30 (1985); Ian R. Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. REV. 854, 871-73 (1978) (explaining discrete transactions in neoclassical contract law); Steven Shavell, Damage Measures for Breach of Contract, 11 BELL. J. ECON. 466, 468 (1980) (providing that when the probability of a contingency is low, it can be less costly to deal with problems as they arise).

7. See H.L.A. HART, THE CONCEPT OF LAW 127-154 (2d ed. 1994) (discussing the consequences of the "open texture" of language and the inevitability that "human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring").

8. John D. Donahue, Market-Based Governance and the Architecture of Accountability, in MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND
Third, as Ayres and Gertner have noted, one party may sometimes have strategic reasons for leaving a provision underspecified. Where one party is more informed than the other, if they attempt to contract around a certain problem, they risk alerting the less informed party to the existence of the problem. Ayres and Gertner propose that, "the possibility of strategic incompleteness leads us to suggest that efficiency-minded lawmakers should sometimes choose penalty defaults that induce knowledgeable parties to reveal information by contracting around the default penalty."

In employment contracts, there is a fourth reason for incompleteness not always encountered in other types of contract. As Hugh Collins notes, "[c]ontracts of employment illustrate a type of contract which is incomplete by design," for a reason other than expected transaction costs. Over-specificity runs the risk of ossifying the deal. This would run against the interests of employer and employee; both parties often "recognise that adjustments to their obligations will have to be made in order to respond to changing market conditions." Both parties desire flexibility. This is not a situation of informational asymmetry alone; even if all the information which could have been known ex ante, was complete on both sides, and transaction costs were removed, neither party would necessarily wish to set it in stone ex ante.

It is a common feature of long term contracts on both sides of the Atlantic that they "must often be phrased in broad, flexible terms to enable the parties to adjust their bargain to meet changing circumstances." In employment contracts, in order to mitigate this inherent tension between the need for specificity of the obligations, and the need to retain flexibility within the bargain, employers often either retain broad contractual discretions or issue employee handbooks. These set out company rules and policies on employee obligations, benefits, sick and pregnancy leave, dismissal process, harassment complaint mechanisms, and so forth.

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9. Ayres & Gertner, supra note 6, at 94.
10. Id.
12. Id.
13. Id.
15. See Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L. Rev. 105, 146 (1997) (finding that in 1996, 51 percent of employees said that they had been issued handbooks before they accepted their job offers).
B. Two Questions

American and English law, therefore, face a common dilemma in how to control variation of these employment handbooks and how to conceive of the employment relationship more generally. In both jurisdictions some handbook terms have been held to have a contractual effect. In order to maintain flexibility, however, the law also regulates the degree to which such specifying documents are subject to change. Some provision for variation of the rules and policies contained within such handbooks must be provided in order to prevent the contract forcing the parties into an inefficient deal.

This paper will be concerned with two specific questions against this background. First, in England the courts' approach is highly influenced by the implied term of mutual trust and confidence. This term is stated in such broad terms that it appears, on first glance, not to pass the test for implication of terms into contracts used in the rest of English contract law. Moreover, it appears to affect the interpretation of the other terms of the contract into which it is implied to a greater degree than traditional contract scholars would expect.\(^\text{16}\)

The second issue relates to the treatment of employee handbooks in the United States. The basis for permitting variation to these handbook provisions is in conceptual disarray with three main approaches that are applied in different states. Some states do not allow any variation without additional consideration,\(^\text{17}\) some permit any variation (provided actual notice is given),\(^\text{18}\) and some permit variation, but only with reasonable notice. This third approach, although the most attractive intuitively, currently lies on a very uncertain doctrinal framework.

The search for a solution to these two questions will take the form of a "comparative conversation" between the two legal systems. This will bring together the cases, principles, academic commentary, and statutory provisions from both sides of the Atlantic in order to tease out these difficult questions. A large amount of the difference results from the difference between the terms, also known as implied "default rules."\(^\text{19}\)

Implied terms play a large part in employment contracts, as the parties rarely specify many terms expressly, if at all. As Mark Freedland notes, "[c]ompared with that of many other types of contract, the content of personal work or employment contracts is to a very large extent dependent


\(^{17}\) E.g., Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999).


upon implied terms." The cases also betray a difference in the way the other formal doctrines are applied. For example, bilateral offer and acceptance and the doctrine of consideration are applied differently due to the variations of the terms of employment in the U.S. as well as in England. The manners in which these formal and substantive doctrines interact have important consequences for the legal presumptions used by the courts in both applying and interpreting contracts of employment.

This paper will take the doctrine of good faith as a focus for unraveling some of these dilemmas and argue that it has been underutilized by courts on both sides of the Atlantic. The coherence forming function of good faith has often been overlooked. In order to argue for theoretical coherence, however, as well as "justice" case-by-case, it will become essential to analyze the nature of "good faith" and its operation as a legal mechanism in common law adjudication.

C. Tensions within Adjudication: Atiyah and Llewellyn

Not only is there a tension inherent in the factual pattern of the employment relationship, but the courts in both the U.S. and England face a common dilemma within the process of common law adjudication itself. This tension is recognized by Patrick Atiyah as the discord between the court's function as an arbiter of individual disputes and its role of setting out legal principle for the settlement of future disputes, which he terms "the hortatory function." Good faith is an abstract concept; if it is to have any utility, it must both serve a useful hortatory function and the function of individual dispute settlement in the case at hand. It will be argued that part of the Court's reluctance to use this concept within the employment relationship on both sides of the Atlantic can be traced to this tension. Courts are either worried that it will be too hortatory and infect other doctrines with its over breadth, or are skeptical of its ability to determine concrete cases.

Some of the predominant commentators on good faith have criticized the founding father of the Uniform Commercial Code for misunderstanding

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21. P.S. Atiyah, Pragmatism and Theory in English Law 125 (1987) [hereinafter Atiyah, Pragmatism and Theory]; P.S Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, 65 Iowa L. Rev 1249 (1980) [hereinafter From Principles to Pragmatism]. See also Melvin Aron Eisenberg, The Nature of the Common Law 4-7 (1988) (noting that the courts have the two businesses of deciding individual disputes and of enriching our body of legal norms); Elisabeth Peden, Policy Concerns Behind Implication of Terms in Law, 117 L.Q.R. 459 (2001) (noting that the strictness of the necessity test can lead to seeming incoherence: "when the courts focus too intensely on whether a term is 'necessary,' rather than relying on broad principles, the results can be unfortunate.")
the project of conceptualization and for incorporating the concept of good faith,\textsuperscript{22} which was insufficiently coherent.\textsuperscript{23} However, it will be argued that Karl Llewellyn’s methodology of deciding cases by situation sense\textsuperscript{24} has greater appeal than many have given it.\textsuperscript{25} “Situation sense” is the method of dispute resolution put forward by Llewellyn in his later work, of reasoning by “type-facts in their context.”\textsuperscript{26} He saw this as best captured by Levin Goldschmidt:

   Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place.\textsuperscript{27}

As Todd Rakoff has convincingly argued, this passage can make situation sense sound rather too “mystical.”\textsuperscript{28} In fact, Llewellyn’s methodology does not fall into being mere intuitionism; it is “meant to be both a practical and a creative human activity, and not mere divination.”\textsuperscript{29}

   This methodology captures much of the essence of the dispute settlement function of judges. In a system using the situation sense method, the judge is applying the type-fact specific application of the rule. This explains why good faith can be described by Summers as excluding multifarious different facets of “bad faith” conduct.\textsuperscript{30} Use of a situation sense method does not preclude the judge from recognizing general unifying principles. It should be remembered that finding the appropriate

\begin{itemize}
\item \textsuperscript{22} UCC § 1-203 (2004).
\item \textsuperscript{24} Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 398 (1950) [hereinafter How Statutes Are To Be Construed].
\item \textsuperscript{25} See e.g., Todd D. Rakoff, The Implied Terms of Contracts: Of “Default Rules” and “Situation-Sense”, in GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson and David Friedmann eds., 1995) (praising and using constructively a notable use of a “situation sense”).
\item \textsuperscript{26} KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60, 121-154 (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION].
\item \textsuperscript{28} Rakoff, supra note 25, at 202.
\item \textsuperscript{29} Id. at 203.
\end{itemize}
solution to "type-facts in their context"\textsuperscript{31} is itself an important principle. It is important for the central thesis that Llewellyn's methodology does not preclude the possibility of principles of substantive law aiding in the process or of a situation sense judgment.\textsuperscript{32}

The tension between general hortatory function and close attention to the resolution of the individual dispute is clearly visible in English law in relation to the implied term of mutual trust and confidence. The courts purport to be constrained by a strict test which permits the implication of terms only in very narrowly defined circumstances, which pushes the courts away from the more general into a term tailored as closely as possible to the fact pattern of the case. This deliberately downplays any hortatory effect of an implication. The reason behind this is always cited as being the fiction that the court's role is only to fulfill small gaps in contracts, rather than dealing more generally at the level of default standards. In employment contracts, which are naturally incomplete, this is a fiction.

An implication of a good faith term therefore poses large problems for the way English courts view their own role. Until they are comfortable with their hortatory role, they will not be comfortable with fully acknowledging the mode of operation of principles. There is, however, a paradox: by playing down their hortatory role, the English courts are forced into considerations of policy to decide individual cases. General assertions of the parties which go beyond the fact pattern of the case are tested against a generalized "floodgates" argument of "public policy." Often the English courts' conception of "public policy" can often seem under theorized and can result in an insufficiently thorough analysis of the economic, social, and political issues. This paper will argue for an approach which appeals to good faith as a principle, and not just as a policy.

One of the problems faced by courts in both the U.S. and the U.K. is that broad hortatory principles often conflict. Recognition of conflict at the level of principles is hardly novel within contract law;\textsuperscript{33} however, it is one

\textsuperscript{31} LLEWELLYN, THE COMMON LAW TRADITION, supra note 26, at 60.

\textsuperscript{32} ATIYAH, PRAGMATISM AND THEORY, supra note 21, at 89-143.

\textsuperscript{33} Particularly in the U.S., for example, it is a common theme within the work of the American Legal Realists and Critical Legal Studies Movement. See generally Felix Cohen, The Ethical Basis of Legal Criticism, 41 YALE L.J. 201 (1931) (discussing the challenges in such an approach); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935) (expanding upon his earlier views); Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L.J. 997 (1985) (evaluating dualities in the doctrinal structure of contract law); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) (examining the conflict between general rules and ad-hoc decisions). Ronald Dworkin recognizes that conflict of principles is also a problem with which his hypothetical ideal judge, Hercules, must contend. RONALD
which is in need of careful treatment when a solution is proposed in practice. In U.S. law there is a potential for conflict between the hortatory effect of good faith and the hortatory effect of the at-will presumption. However, in this particular situation, this can be resolved without necessarily requiring the demise of the at-will rule by separating out the content of the individual dispute settlement norm from the hortatory function of the principle. Specific applications of the good faith, or at-will principles, can be used at the lowest level of abstraction as rules, without annihilating either principle. The hortatory function of the at-will presumption will be reduced by the recognition of the good faith principle in variation, where previously it had affected the rhetoric of the more pro-variation cases and dissents.34 Although issues concerning variation and termination may in some senses be similar, they are essentially different. The requirements of good faith have a stronger claim on the regulation of variation of the contract than termination does, as the relationship is purported to be continuing. This separation of variation and termination can be supported by arguments from autonomy and efficiency.

Therefore, bearing all of these tensions in mind, we will start with an analysis framed from situation sense. First of all, the "handbook variation" situation will be considered from the American approach, and then from the English approach. The English approach will introduce the broader issues of the conceptualization of the relationship between the parties. This will set the scene for the comparative conversation and analysis of the potential role of good faith. Once the role of good faith has been introduced, the paper will consider the ramifications for this at the level of principle and rule application on the at-will presumption.

II. VARIATION OF HANDBOOKS: THE U.S. APPROACHES

Handbooks provide a crucial mechanism for employers to specify employee obligations, policies and benefits. Historically, the U.S. state courts have been hesitant to accept any contractual effect of employee handbooks. For example, in Johnson v. National Beef Packing Co., the Kansas Supreme Court held that a handbook was "only a unilateral expression of company policy and procedures. . . . its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities."35 However, from the early 1980s the courts have shown

DWORKIN, LAW'S EMPIRE 177 (1986).
increased willingness to consider the effects of handbooks in contract or promissory estoppel. This paper will not attempt to set out the development of the employee handbook jurisprudence as this is set out admirably in articles by Kohn and by Pratt, but instead to sketch out, by way of case example, three of the predominant modern approaches. This will be followed by a consideration of the policy arguments surrounding the area.

The states are divided over the contractual basis for enforcement of terms within employee handbooks. Some states consider the handbook to constitute a unilateral contract, whereas others treat it as an independent bilateral contract. This has large implications for whether the courts view consideration as necessary for variation.

A. No Consideration Required: Govier v. North Sound Bank

Ms. Govier, on the first day of her employment, was given a copy of the personnel handbook. Although she had not been told at the time that her employment was for any specific length of time, the handbook provided that

[a] probationary period lasting the first ninety days of your new job applies to all new employees. . . . If you reach the end of this probationary period successfully, you will have your first formal performance appraisal interview with your supervisor prior to the end of the first ninety days, and you will be considered a permanent employee, assuming continued satisfactory performance.

It additionally provided that once the probationary period was over, employees "would not be dismissed for poor performance without first being counselled [sic] . . . and [] given an opportunity to improve [their] performance." During Govier's employment, the bank varied the


39. Id. at 813 (emphasis added by the court).

40. Id. (emphasis added).
handbook unilaterally at least eight times. The distribution of a memo to all employees was deemed by the bank to be the moment of modification.\textsuperscript{41}

In 1993, the Bank presented new agreements to Govier and her loan originator colleagues and told them that they must sign the contracts within three days or be terminated. The new terms were less favorable in that they eliminated sick leave, holiday and vacation pay and allowed either party to terminate on 20 days notice.\textsuperscript{42}

Judge Seinfeld held that "an employer may unilaterally amend or revoke policies and procedures established in an employee handbook" regardless of whether this power is reserved expressly.\textsuperscript{43} The court held that bilateral contract analysis was not appropriate as the bank had, without employee consent, varied the handbook at least eight times. Judge Seinfeld reasoned that "[t]he law should not tie employers to anachronistic policies in perpetuity merely because they failed to expressly reserve at the outset the right to make policy changes."\textsuperscript{44} The court's only requirement was that the employer must notify the employee of the change.

This approach has drastic results for employees like Ms. Govier as, by refusing to accept the new terms, they are caught between a metaphorical rock and a hard place. They can neither rely on previous contractual terms, as they had been validly unilaterally varied, nor may they rely on the new terms if they refuse to sign the new agreements.\textsuperscript{45} In effect, the employment contract practically evaporates.

\textbf{B. Consideration Is Required: Demasse v. ITT Corp.}\textsuperscript{46}

This case involved a change to the mechanism of deciding which employees would be dismissed in the situation of a need for collective redundancy. The employment handbooks originally provided that layoffs would be carried out in reverse order of seniority (commonly referred to as "last in, first out" or "LIFO" in English cases). It expressly provided that "ITT Cannon reserves the right to amend, modify or cancel this handbook, as well as any or all of the various policies, rules, procedures and programs outlined in it."\textsuperscript{47} In 1993, ITT changed its layoff guidelines such that

\textsuperscript{41} Id. at 814.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 815.
\textsuperscript{44} Govier., 957 P.2d at 816.
\textsuperscript{45} Id. at 817.
\textsuperscript{46} 984 P.2d 1138 (Ariz. 1999). Here the Supreme Court of Arizona was ruling on two questions certified by the Court of Appeals for the Ninth Circuit. Similar cases in other jurisdictions include Robinson v. Ada S. McKinley Cmty. Serv., Inc., 19 F.3d 359, 364 (7th Cir. 1994); Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995); Brodie v. General Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997).
\textsuperscript{47} Demasse, 984 P.2d at 1141.
layoffs would not be performed under LIFO, but on each employee's "'abilities and documentation of performance.'"48 All of the plaintiffs were laid off before less senior employees and attempted to rely on their pre-1989 contract provisions.49

Writing for the majority, Judge Feldman held, under Arizona law, that "[w]hen employment circumstances offer a term of job security to an employee who might otherwise be dischargable [sic] at will and the employee acts in response to that promise, the employment relationship is no longer at will but is instead governed by the terms of the contract."50 In a unilateral contract, once the offer is accepted by performance, the terms cannot be changed. The court held that as there is no difference in law between express and implied contracts, an implied contract cannot be varied without offer, acceptance, and consideration.51 Crucially, the court added that "[c]ontinued employment after issuance of a new handbook does not constitute acceptance."52

In defiant strain, Judge Feldman took the opposite policy approach to that taken in Govier. He recognized that

[i]f a contractual job security provision can be eliminated by unilateral modification, an employer can essentially terminate the employee at any time, thus abrogating any protection provided the employee. For example, an employer could terminate an employee who has a job security provision simply by saying, "I revoke that term and, as of today, you're dismissed."55

Jones, VCJ, concurring in part and dissenting in part, argued that it was necessary as a practical matter of employment law that "[o]nce an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. . . . [B]ecause the employer retains this control over the employment relationship, unilateral acts of the employer are binding on its employees and both parties should understand this rule."54

In reply to Justice Jones's dissent, the court argued,

[t]o those who believe our conclusion will destroy an employer's ability to update and modernize its handbook, we can only reply that the great majority of handbook terms are certainly non-

48. Id.
49. Id.
50. Id. at 1143 (emphasis in original). The court considers that a handbook is typically made up from promissory and non-promissory terms. For a similar approach, see Soderlun v. Public Serv. Co. of Colo., 944 P.2d 616, 621 (Colo. App. 1997). The court there cites Pratt, supra note 37.
51. Demasse, 984 P.2d at 1144.
52. Id. at 1145.
53. Id. at 1147.
54. Id. at 1154.
contractual and can be revised . . . permission to modify can always be obtained by mutual agreement and for consideration.\textsuperscript{55}

C. Unilateral Variation with Reasonable Notice: Asmus v. Pacific Bell\textsuperscript{56}

The benefit at issue in Asmus was a "Management Employment Security Policy" (MESP), which Pacific Bell had previously offered management level employees. This provided that:

\[ \text{[i]t will be Pacific Bell's policy to offer all management employees who continue to meet our changing business expectations employment security through reassignment to and retraining for other management positions, even if their present jobs are eliminated. This policy will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement.} \textsuperscript{57} \]

In 1990, Pacific Bell notified its employees that it might need to discontinue the MESP "given the reality of the marketplace, changing demographics of the workforce and the continued need for cost reduction."\textsuperscript{58} In October 1991, Pacific Bell notified its employees that it would discontinue the policy as of April 1, 1992.\textsuperscript{59}

The court held that, for unilateral contract, "once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required."\textsuperscript{60} Approving Justice Jones' dissent in Demasse, they held that "[t]he mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only."\textsuperscript{61} They also held that continued performance of employment did constitute consideration, and noted that to hold otherwise "would contradict the general principle that the law will not concern itself with the adequacy of consideration."\textsuperscript{62}

Chief Judge George dissented, arguing that the majority had misinterpreted ordinary contract law, as had the majority in Demasse. He also argued that the economic incentives of the majority's holding "condones and encourages manipulative, oppressive, and unfair treatment of employees" as it permits an employer to rescind a promise "simply because the promise later becomes inconvenient or

\textsuperscript{55} Id. at 1148.
\textsuperscript{56} 999 P.2d 71 (Cal. 2000).
\textsuperscript{57} Id. at 73.
\textsuperscript{58} Id. at 73-74.
\textsuperscript{59} Id. at 74.
\textsuperscript{60} Id. at 78.
\textsuperscript{61} Id.
\textsuperscript{62} Asmus, 999 P.2d at 78.
financially disadvantageous to the employer during an economic downturn, a time when the employee would most expect to be able to rely upon and benefit from the employer’s promise." 63 Such contractual promises, he asserts, if they could be altered so easily “would be only as good as the employer’s desire to keep the promise at some unspecified point in the future.” 64 He sees the key as being the employer’s ability to contract out of the obligation ex ante with regard to new employees. 65

Although Chief Justice George in Asmus argues that, if the employer is concerned about flexibility of handbooks, she should expressly forbear from incurring obligations in the first place; this is not necessarily desirable for either party. As discussed in Part I, there is always a tension between the needs of specificity and flexibility; to dismiss this tension in this offhand manner is not likely to lead to coherence. The law should not be encouraging employers to forebear from providing any degree of specificity at all. Specificity is not only useful for the employer, but also the employee, as this enables them to have notice of their rights and obligations.

1. Substantive Fairness and Good Faith – A Slightly Different Approach

It is arguable that the approach in Bankey v. Storer Broadcasting Co. 66 is a different approach from that adopted in Asmus. 67 Twelve years before, the Supreme Court of Michigan had held in Toussaint v. Blue Cross Blue Shield that an employee may “legitimately expect” that his employer will uniformly apply personnel policies “in force at any given time.” 68 However, in Bankey the Supreme Court of Michigan reduced the scope of this ruling by holding that an employer may amend the handbook “from time to time” even if no discretion to amend was included within the handbook. The Court nevertheless cautioned “against an assumption that our answer would condone changes made in bad faith.” 69 Poetically, the Court argued that “[f]airness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight.” 70 Therefore, reasonable notice must be

63. Id. at 82.
64. Id.
65. Id.
67. See Kohn, supra note 35, at 826-37 (arguing that the Bankey court did not utilize a unilateral contract analysis and that the Asmus court did).
69. Bankey, 443 N.W.2d at 120.
70. Id.
required.

Brian Kohn and Jason Walters consider this to be a different approach altogether. Kohn sees the court as having "eschewed the unilateral contract analysis altogether." This is a very strong reading of Bankey. Judge Griffen did not entirely dispense with contractual analysis before delving in to the policies to be weighed. After an exhaustive analysis of the case law, he held instead that "[t]he principles on which Toussaint is based would be undermined if an employer could benefit from the good will generated by a discharge-for-cause policy while unfairly manipulating the way in which it is revoked." Although traditional contract analysis does not reach a decisive result in this case, this does not necessarily mean that the court's reasoning was set loose, ungrounded in the realm of policy balancing. This is not a decision made entirely on "policy" but from an important "hortatory principle." Judge Griffen also cautioned "against an assumption that our answer would condone changes made in bad faith." The use of the language of "bad faith" intimates that the true rationale behind Toussaint appeals to the principle of good faith. Arguments from principle appeal to a more persuasive level of coherence and depth than mere assertions of "policy."

2. What Is Reasonable Notice?

Before the comparison may continue to an analysis of the basis for this requirement, it is necessary to take a short side step and consider briefly what is sometimes regarded as reasonable notice in the states which have adopted and recognize this condition. For example in Asmus, the two-year period from 1990 was held to be "ample." In Al-Safin v. Circuit City Stores, Inc., the Court of Appeals for the Ninth Circuit applied Washington law and held that posting change to arbitration policy in stores and in applicant packets did not constitute reasonable notice to former employees. However, in Mannix v. County of Monroe,78 the Court of

72. Kohn, supra note 35, at 826.
73. Bankey, 443 N.W.2d at 120.
74. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (stating that, although Dworkin inconsistently uses of these terms himself, the distinction between them is important as principles appeal to coherence at a system wide level, whereas "public policy" is an often pejorative term for unsophisticated balancing of individuals interests in a case).
75. Bankey, 443 N.W.2d at 120.
76. Asmus, 999 P.2d at 81.
77. 394 F.3d 1254 (9th Cir. 2005).
78. 348 F.3d 526 (6th Cir. 2003).
Appeals for the Sixth Circuit, applying Michigan law, held that "[d]istribution of a new employee handbook constitutes reasonable notice, regardless of whether the affected employee actually reads it." 79 In Highstone, 80 the Court of Appeals for the Sixth Circuit, applying Michigan law, held that publishing the handbook online and sending two emails one month in advance, were sufficient to show reasonable notice. 81 The method used to distribute must be "uniform and reasonable." 82 Therefore, although the case law is not entirely consistent, the court tends to look to whether the employer went through reasonable efforts to notify the employees; the standard appears to be constructive, rather than actual, notice.

D. Policy Arguments

The following sections will advocate an approach which takes the same policy direction as Asmus, Bankey, and some of the sentiments from Demasse. This is for five reasons.

First, the Govier rule is in neither the interests of the employee nor the employer. The tension between flexibility and certainty, mentioned in Part I, does not parallel exactly the interests of the employer or the employee. This tension plays itself out within the interests of both of the parties to the contract. It is too simple to say that the employer has an interest in maintaining her own flexibility as complete flexibility for the employer may be harmful to her employer's interests. For example, Slawson argues that a rule which allows the employer to vary its express promises without notice "deprives employers of a valuable bargaining chip with their employees, and of a valuable means of attracting and keeping desirable employees, and of increasing its employees' job satisfaction and loyalty." 83 This is because a well-informed employee knows that any promise can be revoked.

Second, as the employee will have no incentive to bargain for such an unenforceable promise, this will have the effect of mandating at-will employment, as any promises of job security will be, themselves, revocable at-will. This is an inefficient outcome, as those employees who would value these extra safeguards will be practically precluded from securing them. 84

79. Id. at 536.
81. Id. at 552-53
84. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 69-110 (2d ed. 1997); Ayres & Gertner, supra note 6, at 91 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF
Third,

the employer’s inability to make enforceable promises of employment security will also put both employees who do not want to join unions and their employers who do not want them to join at an unfair disadvantage. . . . Union organizers in the states where the courts [permit unilateral modification] can now tell employees that no matter what their employers may promise them, the only way they can obtain rights—rather than just unenforceable promises—of employment security is to join a union. 85

As Professor Hugh Collins has noted, “although the willingness to adapt is an essential ingredient in a co-operative and productive working relation . . . a fear that this discretionary power will be operated unfairly by an employer is likely to subvert the cooperation.” 86

Fourth, as noted above, neither the employer nor the employee is well served by a complete lack of specificity in the terms. As was noted in the discussion of Chief Justice George’s dissent in Asmus, some degree of specificity is in the interests of the employer, as this helps them to direct the employees. Employees are also benefited by increased specificity as this allows them to be more certain what duties they owe and what benefits they can expect in return. In the United Kingdom, the obligation to provide a written statement of particulars of employment 87 is considered to be one of the first modern employment rights to have been enacted. 88

Fifth, the situation of handbook variation will always have an inherent asymmetry, as the variation will be solely at the instigation of the employer. The employer knows what the new variation will be in advance of its effect, but if the variation is deemed to take effect immediately, the employee does not. Professors Ayres and Gertner have proposed a theory of how to decide when default rules in contract should be penalty defaults. 89 Penalty defaults are used to remedy certain informational asymmetries inherent in a relationship. A rule which provided for reasonable notice would not be a traditional type of penalty default, as information is not elicited when the stronger party contracts round it, but

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85. Slawson, supra note 83, at 31.
86. HUGH COLLINS, EMPLOYMENT LAW 106 (2004).
87. Contracts of Employment Act of 1963 (repealed). The slightly modified and enhanced right is now contained within the Employment Rights Act, 1996, c. 18, § 1-7 (Eng.).
89. Ayres & Gertner, supra note 6.
later in the contract performance itself. In this situation, the penalty is in
the information about the content of the new terms the employer must
provide the employees within a reasonable time for a lawful variation to
take place. This added time to consider the new terms will allow the
employees an opportunity to decide whether to remain in this employment
or seek other opportunities elsewhere.

Such a penalty default rule could avoid another informational
asymmetry in the case of variation of handbooks within a contract which is
already at-will (although this situation was not covered on the facts of the
cases cited above). In this situation, an employer can terminate the
employment without notice at any time. This paper will argue that such
contracts should not be simply variable at-will in the same way as they are
terminable. In altering the terms of employment in an at-will contract, the
employer is, in effect, terminating the relationship. It is possible that this
might not be self evident to an employee, who is still receiving instructions
from the employer. A terminated employee considering re-engagement on
different terms, if unaware of the nature of at-will employment, may
consider themselves to be under less control and with “less to lose” than the
employee who is purportedly retained, but under different conditions.

The question of employee expectations in this situation is clearly an
empirical one. An employee may or may not have more expectations of
what they are due under the contract, depending on how aware they are of
the background default rules. Some employees, it seems, have a large
degree of faith in legal default rules, over explicit statements in contracts.
For example, Pauline Kim has conducted an empirical study into employee
expectations relating to dismissal. She found that even where a handbook
provided that the “‘[c]ompany reserves the right to discharge employees at
any time, for any reason, with or without cause,’” 74% of employees
nevertheless believed that discharge without cause was unlawful. A
similar method to the one used by Professor Kim could be used to test the
hypothesis that at-will employees consider variation in their employment
terms as different from their termination. If employees have such a degree
of faith in legal default rules to protect them from the employer terminating
them at-will, it would be interesting to discover whether there was also a
high level of ignorance of the employee's right to unilaterally walk away
from the contract at any time. If a significant degree of ignorance would be
found, a penalty default requiring reasonable notice of variation could
ensure that this informational asymmetry would be corrected.

90. Pauline T. Kim, supra note 15, at 139. A study of unemployment claimants was
carried out during August, September and October of 1996 in St Louis City and County,
Missouri. Claimants with different levels of education, between no high school diploma and
graduate degree were assessed. Id. at 127-30
E. Summary of the U.S. Arguments

The different states seem to be in conceptual confusion over the appropriate policy and legal basis for handbook variation, oscillating between requiring no notice and conceptualizing the relation as unilateral and requiring consideration or reasonable notice and considering the relation to be bilateral. None of the approaches described are without their various problems. Unilateral or bilateral analysis here is used as little more than a label for the policy approach recognized by the courts. In this confusion, it is unsurprising that the courts in *Bankey* and *Asmus* plumped for an in-between approach. The strands assembled in the previous sections will be reanalyzed and a proposal for coherence suggested as part of the comparative conversation of Part IV. However, before this is possible, the English position must be first put on the table.

III. Handbooks in England

The existence of an employment handbook is not sufficient to give it contractual effect. English Law requires an employer to give every employee a written statement of particulars of employment under section one of the Employment Rights Act of 1996.\(^9\) English law treats the important issue instead as one of whether it is incorporated into the employment contract itself. As in most states in the U.S., as far as a handbook contains a codification of policy instructions to employees, these do not have contractual effect and are the subject of managerial prerogative. They may, therefore, be varied unilaterally without notice.\(^9\)

A. The Question of Incorporation

The main practitioners guide, Harvey on Industrial Relations and Employment Law, states that the test for whether handbook terms are incorporated into the contract of employment is "whether it is reasonably to be inferred from the circumstances that the parties must have intended them to have contractual force."\(^9\) For example in *Petrie v. Mac Fisheries, Ltd.*\(^9\) the court held that displaying a notice about sick pay entitlements on the factory notice board was insufficient.

The terms must also be suitable for incorporation in the contract. The

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91. Employment Rights Act, 1996, c. 18, § 1 (Eng.).
92. Sec'y of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; DEAKIN & MORRIS, supra note 88, at 268.
93. Harvey on Industrial Relations and Employment Law (last updated February 2005) at [371-75] [hereinafter Harvey].
94. [1940] 1 K.B. 258.
courts and Employment Tribunals divide terms in a handbook between terms and policies. Policies tend to be treated as mere instances of managerial prerogative. Policies must nevertheless be “introduced for a legitimate purpose” and must be consistent with the implied term of mutual trust and confidence discussed below.95

The test for whether provisions in a handbook are incorporated is always a difficult matter of construction, for which the courts and employment tribunals use a variety of tests. In Quinn v. Calder Industrial Materials Ltd., 96 the court held that regard should be given to whether the document has been drawn to the attention of employees by the employer, or whether it has been followed without exception for a substantial period.

Another option for the court is to imply terms into the employment contract under the “officious bystander test,” although this approach is not often used for handbook terms and work rules. The “officious bystander” test was first set out in 1926 in the Court of Appeal’s judgment in Shirlaw v. Southern Foundries:

[primafacie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "oh, of course!".97

The English cases on variation of handbook terms often involve situations where the handbook has been collectively bargained by a union. The general rule is that an employer cannot alter the contract by unilateral denunciation of the collective agreement where the relevant terms have become part of the contract of employment.98 Likewise, the employer cannot unilaterally recoil from the terms by mere disagreement with the union,99 although two cases suggest that, if the employee leaves the union membership, they may cease to be bound by the collectively bargained

95. Dryden v. Greater Glasgow Health Bd. [1992] I.R.L.R. 469, 472 (EAT) (introducing a no smoking policy); see also Wandsworth London Borough Council v. D'Silva [1998] I.R.L.R. 193, 193 (CA) (ruling that length of sick pay requirement could be unilaterally altered by employer because it was not incorporated); Grant v. S.W. Trains Ltd. [1998] I.C.R. 449, 449-50 (QBD) (stating equal opportunities policy did not have contractual effect because it was not incorporated into the contract).
97. Shirlaw v. Southern Foundries (1926), Ltd. [1939] 2 K.B. 206, 227 (stating that the term must also be sufficiently precise); see also Lister v. Romford Ice and Cold Storage Co., Ltd. [1957] A.C. 555, 578, 591 (stating that the cry of “oh, of course,” must come from both parties, and not just from one of them); Deeley v. British Rail Eng’g Ltd. [1980] I.R.L.R. 147 (ruling that the original express contractual terms controlled).
terms.100


The role of handbooks in the English cases, in contrast to the predominant approaches taken by the U.S. courts, is always analyzed in light of the employment relationship as a whole, rather than as extraneous contracts. The approach is distinctly bilateral. In England, courts are most unlikely to hold that the provisions of the handbook are exhaustive of either party's obligations under the contract.

This is illustrated in Secretary of State for Employment v. ASLEF (No 2),101 where the employees of British Rail, in protest, instigated a policy of "work-to-rule" under union direction. They performed only the duties specified in the employment handbook to the bare minimum the wording would require.102 The Court of Appeal, for a variety of reasons, held unanimously that employees who had initiated a "work-to-rule" were in breach of their employment contracts.103 The reasoning of the three judges in the Court of Appeal is particularly interesting because they each have different conceptions of the scope and nature of the employment contract.104

Lord Denning M.R. argued that the work rules did not constitute terms in the employment contract. Nevertheless, he held that there is "clearly a breach of contract first to construe the rules unreasonably, and then to put that unreasonable construction into practice."105 The lack of a good faith motive rendered the employees in breach.106 Roskill L.J disagreed with Lord Denning's use of subjective motivation in construing the contract and held that "questions of intent are usually irrelevant in determining whether or not there has been a breach of contract."107 He held instead that employees may not rely on an interpretation of the rule which is "wholly unreasonable."108 As an alternative ground he found that there was an implied term that the employee would not seek to interpret the rules so as

100. Singh v. British Steel Corp. [1974] I.R.L.R. 131 (ruling that employee was no longer bound by union agreements after he voluntarily left union); Land v. West Yorkshire Metro. County Council [1981] I.C.R. 334, 334 (CA) (ruling that one agreement could be divisible into two, and that one could be validly terminated without affecting the other). The editors of Harvey, supra note 93, at A[339], consider these cases to be incorrectly decided and that the approach of Tocher is to be preferred.
102. Id. at 486
103. Id. at 457.
104. Id. at 486-511.
105. Id. at 490.
106. ASLEF, (No.2) [1972] 2 Q.B. at 492.
107. Id. at 506.
108. Id. at 507.
to disrupt the railway system. He appears to have used the "officious bystander" test for terms implied in fact rather than in law. Third, Buckley L.J. held that there was an implied term "that within the term of the contract the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed." Buckley L.J.'s interpretation, which imports the strongest background norm into the contract, is the one which has been generally followed by the courts. As we will see in the next section, the willingness of the courts to recognize that the express terms of the employment contract rest on a large residue of legal defaults and principles has been a major factor in the development of the implied term of mutual trust and confidence.

C. Variation of Incorporated Terms

In the context of a favorable variation of the employee handbook, the courts have held that the employees' continuation of work is sufficient consideration for the variation, "thereby abandoning any argument that the increase should have been even greater and removing a potential area of dispute between employer and employee. The employer has both secured a benefit and avoided a detriment." Attempts to challenge only variation of policies "have not met with great success."

Attempts to diminish rights under an employee's contract are dealt with under the "portmanteau" implied term of mutual trust and confidence. English law recognizes a number of terms implied by law into the employment relationship. The most important of these by far is

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109. Id. at 508.
110. Id. at 498.
111. See British Telecomm. Plc. v. Ticchurst [1992] I.C.R. 383, 384 (CA) (ruling that an implied term to faithfully serve his employer's interests was breached by the employee); Cresswell v. Inland Revenue [1984] I.R.L.R. 190 (ruling that employees were obligated to adapt to new job requirements based on an implied term of cooperation).
113. Harvey, supra note 93, at [376]. See Dryden v. Greater Glasgow Health Bd. [1992] I.R.L.R. 469 (holding that no implied term to smoke at work); Wandsworth London Borough Council v. D'Silva [1998] I.R.L.R. 193 (ruling that express contractual terms must be evaluated within the framework of the entire contract); Grant v. S.W. Trains Ltd. I.C.R. [1998] 449, 449-50 (QBD) (stating that the term was not incorporated into the contact because it was too general).
115. At common law, English courts have implied a duty of cooperation by the employee. See Secretary of State for Employment v. ASLEF (No.2), 2 Q.B.; Cresswell [1984] I.R.L.R. 190 (referring to an employee's implied duty of obedience); Laws v. London Chronicle, [1958] 1 W.L.R. 698, 700 (referring to an employee's duty of obedience); Hivac Ltd. v. Park Royal Scientific Instruments Ltd. [1946] Ch. 169, 169 (CA)
the implied term of mutual trust and confidence. Arguably its development is the most significant common law development in English individual employment law in the Twentieth Century. It is also most notable as being a common law innovation to have been developed through the Employment Tribunals and not the High Court.

The Honorable Mr. Justice Lindsay, a former President of the Employment Appeal Tribunal, writing extra-judicially, notes that one of the first recognizable formulations of the implied term of mutual trust and confidence was seen in Courtaulds Northern Textiles v. Andrew. In this case the court approved a formulation of the term proposed by the claimant's lawyers, "that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties."

In Woods v. W.M. Car Services (Petersborough) Ltd., the court in the Employment Appeal Tribunal approved the Courtaulds formulation of the implied term. They added, "[w]e regard this implied term as one of great importance in good industrial relations."

Briefly, the key in the English cases is whether the term in the handbook is incorporated. D'Silva provides that this will be so if the provision, properly regarded, confers a right on employees rather than simply setting out guidelines as to what is expected or required. Interpretation of a right conferring provision will be subject to interpretation in light of the implied term of mutual trust and confidence and will require consideration to flow for variation.

D. Other Uses of the Implied Term of Mutual Trust and Confidence

This term implied at law is not just important for the specific duties it imparts, but has also been influential in the way in which employment contracts are interpreted. For example, in United Bank v. Akhtar the EAT

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(referring to the employer's duty of fidelity); Woods [1981] I.C.R. 666, 666 (discussing the implied term of trust between employee and employer). More recently this has been called the implied term of mutual trust and confidence. Malik [1998] A.C. 20, 35.

116. The Honourable Mr. Justice Lindsay, The Implied Term of Trust and Confidence, 30 INDUS. L.J. 1, 2-3 (2001).
120. Id. at 671.
was confronted with a term providing that, "the Bank may from time to time require an employee to be transferred temporarily or permanently to any place of business which the Bank may have in the UK for which a relocation or other allowance may be payable at the discretion of the Bank." Using the implied term of mutual trust and confidence, the court held that this could only be lawfully exercised if reasonable notice were given and if the discretion as to allowances was exercised reasonably.

The question of the strength of the implied obligation of trust and confidence was directly considered in Johnstone v. Bloomsbury Area Health Authority. Although Stuart Smith L.J. wrote that the implied term of mutual trust and confidence superceded the express wording of the contract, the other two members of the Court of Appeal held otherwise. Leggatt L.J. wrote, formalistically, that the implied term cannot have any effect over the express terms of the contract.

Browne-Wilkinson V-C's solution is more elegant. He wrote that where the express term includes a contractual discretion, this must be read as being bounded by the implied term of mutual trust and confidence. Although traditional contract scholars consider this to be unconventional, it is far from so. This is precisely the approach that the courts take in interpreting many statutes; presuming them not to violate rule-of-law principles unless clear wording is used. Given the openness of text, the impossibility of an uncontroversial reading purely from the language, and the speculation involved with deriving true legislative intent, a presumptive approach is all the court is left with. What commentators, such as Phang

122. Id. at 343-44
123. Id. at 347
124. Id. at 350
126. This suggestion was criticized by Leggatt L.J. and subsequently by Andrew Phang. Id. at 347; Phang, supra note 16.
and Legatt L.J., miss is that courts' adjudication of contracts involves far more than following the intention of the parties. By even venturing into presumed intention, they are going beyond the simple autonomous will of the two parties. This will be considered in greater detail in Part IV against the backdrop of the U.S. case *Tymshare v. Covell* and the English case *Mallone v. BPP Industries*.

E. *Unfair Contract Terms Act of 1977*

It is worth noting in a brief detour, that express terms may be avoided under the Unfair Contract Terms Act of 1977. Under section 3, a party is prevented from unreasonably excluding or restricting liability for rendering substantially different or no performance. Under the test in *Brigden* a court will make a distinction between exclusion clauses, to which the test of reasonableness will then be applied, and provisions “setting out the [] entitlement and limits of his rights.”

F. *Summary of the English Position*

The English approach is, therefore, very different from that of the majority of U.S. states. The English courts consider the relationship to be distinctly bilateral. This does not, however, conclude the analysis. Given the dominant effect of the implied term of mutual trust and confidence on the employment contract itself, the two most important questions in the English cases have been set out. First, whether the particular term or condition has been “incorporated” into the contract of employment; and second, what the effect of the implied term of mutual trust and confidence will have on the recognition and flexibility of that term with regard to all of the others in the relationship as a whole.

IV. *CROSS FERTILIZATION: THE COMPARATIVE CONVERSATION*

There are several unexplained issues on both sides of the Atlantic. One is the search for the doctrinal source of the obligation of reasonable notice from *Asmus*. Another relates to the English implied term of mutual trust and confidence and how such a broad obligation can satisfy the usually stringent test for implying terms into contracts. The analysis in this chapter will aim to demonstrate that tools for answering both of these dilemmas can be derived from both the U.S. and the U.K. As Atiyah and Summers note, the English and American systems do have important

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methodological differences in legal reasoning. This means that any proposal for a "legal transplant" must be treated carefully and sensitively.\textsuperscript{130} However, with appropriate sensitivity and care to these factors, there are interesting lessons to be learned from both systems, which can bring clarity to these two confused issues.

\textbf{A. How Could the Implied Term of Mutual Trust and Confidence Have Survived the Test For Implication of Terms Into the Contract?}

In English Law terms may be implied into contracts in three ways: by statute,\textsuperscript{131} by custom,\textsuperscript{132} and by operation of law. Terms implied at common law fall into two categories, those "implied in fact" and those "implied in law." We have already considered the officious bystander test in Shirlaw v. Southern Foundries, when considering incorporation of handbooks into the contract of employment. Another formulation of the test is that implication must "give the transaction such business efficacy as must have been intended at all events by both parties."\textsuperscript{133} If the contract can be operative without the term, it is not implied into the bargain. Terms implied in law may be implied into contracts of a certain type. The test for implication clearly cannot be the business efficacy/officious bystander test, as this would make the implied term of mutual trust and confidence impossible.

However, the distinction between terms implied in fact and those implied in law has not been without its critics. For example, Andrew Phang argues that only the narrow officious bystander test is capable of providing the necessary degree of certainty. He argues that the distinction between fact and law, between "the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship" is futile.\textsuperscript{134} In Scally v.

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\textsuperscript{130} Atiyah & Summers, supra note 3, at 428-432.
\textsuperscript{131} See, e.g., Sale of Goods Act, 1979, c. 54, § 12-14 (describing the implied terms that will apply in contracts for the sale of goods); Equal Pay Act, 1970, c. 41, § 1 (discussing how English law terms may be implied by statute).
\textsuperscript{132} A custom will generally be implied into a contract if it was generally accepted by those doing business in the particular trade at that place and time, and a reasonable observer would be able to discover it. Hutton v. Warren [1836] 1 M & W 466; Palgrave, Brown & Son Ltd. v. S.S. Turid (Owners) [1922] 1 A.C. 397 (showing that this is an objective test that will be applied whether or not the parties knew of the custom); see also Kum v. Wah Tat Bank Ltd. [1971] 1 Lloyd's Rep. 439 (explaining that customarily property does not pass from one party to another until delivery).
\textsuperscript{133} The Moorcock (1889) L.R. 14 P.D. 64. See also Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (showing J. Cardozo's approval of this test). But see Melvin Aron Eisenberg, The Principles of Consideration 67 Cornell L. Rev. 640, 649-51 (1982) (questioning whether the test was applied at full strength in this case).
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Southern Health and Social Services Board, Lord Bridge concluded that "the criterion to justify an implication of this kind is necessity, not reasonableness."\textsuperscript{135}

The implied term of mutual trust and confidence would not easily have survived the officious bystander test as it is both specified very broadly and is recognized in a much broader class of contracts than previous implication at law cases have held.\textsuperscript{136}

Like Leggatt L.J.'s approach to the interpretation of contractual terms in Johnstone, the test for the implication of terms in English law is aggressively formalistic. It shows the same symptoms of skepticism of abstract principles, or what P.S. Atiyah termed, "explicit theory."\textsuperscript{137} This brings us to a peculiarity of English legal reasoning, which will have large ramifications for the rest of the analysis. Atiyah is correct when he observes:

[The truth is that the inclination towards pragmatism, and the aversion to theory which I have suggested are characteristic of the English legal system, turn out to be an aversion to explicit theory rather than an aversion to all theory. Implicit theories exist all around us in the law and the legal system, sometimes half acknowledged, sometimes understood but not thought suitable for discussion, and sometimes probably not appreciated at all. I need hardly point out that this reliance on implicit theory does not adequately substitute for an avowed willingness to discuss explicit theory. Experience is, in truth, no substitute for logic in the appropriate place, a pragmatic emphasis on remedies is no adequate substitute for an understanding of the rights which those remedies are invoked to protect, the use of precedent without principle would render the law a meaningless jumble, and the wholly practical lawyer without the assistance of the academic would probably do much the same. And implicit theory is no substitute for explicit theory for the obvious reason that it is not available for discussion and refutation.\textsuperscript{138}

This caution toward explicit theory can be seen in the test formulated by the courts to imply terms. Where terms cannot be imputed to the parties intentions, as in the business efficacy test, the test permits the courts to imply only what is "necessary" rather than what would be reasonable. This encourages the courts to look for the narrowest language rather than the best justification for the term, while discouraging coherence and theoretical soundness.

\textsuperscript{135} Id.

\textsuperscript{136} See, e.g., Liverpool City Council v. Irwin [1977] A.C. 239 (HL) (displaying an example of the narrower class of case in which bystander test applied).

\textsuperscript{137} ATIYAH, PRAGMATISM AND THEORY, supra note 21, at 148.

\textsuperscript{138} Id.
Patrick Atiyah argued that “the judicial process serves . . . two main functions” that of individual “dispute settlement,” and what he termed the “hortatory function” or the process by which the law produces incentives and disincentives for various types of behavior. These two functions, he posits, produce a tension between principles and pragmatism. English lawyers, according to Atiyah, have a tendency to embrace pragmatism at the expense of theoretical and principled coherence. This produces “serious weaknesses in the common law pragmatic tradition, because of the tendency, sometimes more and sometimes less pronounced, to concentrate on precedent rather than on principle.”

The difference between the hortatory effect of broadly stated principles and precise rules can be seen in the recent case of Crossley v. Faithful & Gould Holdings Ltd. In this case Dyson L.J. acknowledged that the test for implication of terms in law is not one of strict “necessity,” but “it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations.” What test he does propose is unclear. This test is better suited to the implication of terms such as mutual trust and confidence. It shows the courts’ willingness to consider interest balancing, and a move towards the embracing of an approach which welcomes more expansive theoretical justifications and principles openly into the adjudicative process. Under the former test of necessity, the courts appeared to have been in denial about the degree to which default rules, prescribed by law, were necessary for the operation of a contract. It belonged to a time of fiction of the agreement as a complete “meeting of the minds” of the parties. The necessity test had also been allied to conservative incrementalism.

139. Atiyah, From Principles to Pragmatism, supra note 21, at 1249; see also Eisenberg, supra note 21, at 4-7 (noting that the courts have two businesses, that of deciding individual disputes, and of enriching our body of legal norms).

140. Atiyah, Pragmatism and Theory, supra note 21, at 125-26; see also Peden, supra note 21 (observing that the strictness of the necessity test can lead to seeming incoherence; “when the courts focus too intensely on whether a term is “necessary,” rather than relying on broad principles, the results can be unfortunate.”).


142. Id. at para. 36.

1. Adding Principled Coherence

However, relaxing the strictness of the "necessity" test for implication into one which considers "reasonableness and fairness" is not, by itself, sufficient to bring principled coherence to English contract law. As Atiyah noted in the passage reproduced above, English courts' reluctance to embrace explicit theory leads them to rely on implicit theory. In order for the law in this area to be properly understood, what is needed is a justification for the implication of the implied term of mutual trust and confidence which is not married exclusively to the subjective agreement of the parties, or a strict incrementalist approach to the court's role in private law adjudication. What is needed is not just, as Dyson L.J. suggested an approach which appeals to "policy," but one which also appeals to "principle."

One credible solution lies in the doctrine of good faith, which has been developed to a much greater degree over the last century in American contract jurisprudence than by the English courts. This is unsurprising, as Professor Atiyah observed that "American legal theory is profoundly different from ours," in its openness to principle and theorizing. In England, in Malik v. BCCI, Lord Nicholls recognized that the implied term of mutual trust and confidence is a "portmanteau obligation." Although this description is clearly true on one level, as the term does operate on the level of individual dispute settlement as a generalized suitcase full of specific rights, it is misleading in that it does not appeal to the justifying principles which drive it. These implicit moral principles are those of reciprocity and good faith.

Given the breadth of the implied term of mutual trust and confidence, it is not surprising that the courts have begun to flirt with the rhetoric of good faith in this area. This is an exciting development. In 1766 in Carter v. Boehm, an insurance case, Lord Mansfield famously referred to good faith as "the governing principle . . . applicable to all contracts and dealings." From the perspective of the end of the twentieth century, Farnsworth notes that in England "the course of the doctrine of good faith performance has been downhill" since then.

A few of the U.K. courts have suggested that the mutual obligation of

144. Atiyah, Pragmatism and Theory, supra note 21, at 167.
147. Id. at 1910
trust and confidence and good faith are in fact synonymous. The first example was in *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, where Sir Nicolas Browne-Wilkinson, V.-C. in the Chancery Division, held that employee beneficiaries of a company pension scheme were entitled to the protection of the implied term of mutual trust and confidence. Crucially, he equates this with "the implied obligation of good faith." The Vice Chancellor gives a hypothetical example where "the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B." Good faith, in Sir Nicolas Browne-Wilkinson's view, is not a test of "whether the company is acting reasonably." The duty of good faith is interpreted to require "that the company should not exercise its rights for the purpose of coercing that class [the closed class of employees] to give up its rights under the existing trust." This terminology was also more recently approved by Lord Steyn in *Eastwood v. Magnox Electric* and has also been spoken of favorably by some academic commentators.

However, the U.K. courts rarely use the terms interchangeably. This seems to be due to several misconceptions about the principle of good faith. First, Justice Lindsay, a former President of the EAT, suggests that judicial reluctance is due to the ease of confusing "good faith" with contracts "uberrimae fidei." However, it would be unfortunate if lawyers' inability to distinguish utmost-good-faith, from good faith, was sufficient to prevent conceptual coherence within the law. Second, and perhaps more clearly in the courts' mind, there is a deep seated suspicion that good faith is merely a subjective test which would lead to unadministrable uncertainty. Douglas Brodie, for example, claims that "[t]he practical difference between this obligation of good faith and that of mutual trust and confidence would appear to lie in the fact that the former is subjective".

150. Id. at 598.
151. Id. at 597.
152. Id. at 598.
153. Id. at 599.
156. Lindsay, supra note 116, at 6.
158. Douglas Brodie, Commentary, *The Heart of the Matter: Mutual Trust and Confidence*, 25 INDUS. L.J. 121, 128 (1996). See also Malik v. BCCI [1998] A.C. 20, 35 (HL) (citing Lord Nicholls who held that "the conduct [required of a breach] must . . . impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer") (emphasis added).
whereas the implied term of mutual trust and confidence is subjective.

However, this is a misperception of the essence of good faith both in application in individual cases and as a guiding principle. In the U.S. the courts and commentators, although often divided on the true meaning of good faith, are almost unanimous in considering that good faith is not a purely subjective test. However, the U.S. commentators are divided on the level of subjectivity of the test for good faith. This does raise grave issues of administrability across contract law in general. However, it will be argued later in this Part that these concerns can be overcome at the level of rule application in these fact patterns with the aid of “Situation Sense.”

2. The English reluctance to embrace principle

The reluctance to recognize good faith may also be due to the English court’s occasional reluctance to differentiate between principle and policy. This links up with Atiyah’s observations that English practicing lawyers are averse to “explicit theory.” Ronald Dworkin famously described the distinction as turning on the fact that “[a]rguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole,” whereas arguments from principle “secures some individual or group right.” This captures one aspect of the distinction, but it is also important to note where this leads. Substantially, arguments from policy tend toward the role of the court as a settler of individual disputes and are unstructured considerations. Arguments from principle have a higher aim from the hortatory function. However, as Atiyah notes, the court can never safely ignore the hortatory function entirely as it exists forever in tension with their role as arbiters of individual disputes. Hostility to “explicit theory” easily becomes blindness to “implicit theory” and lack of coherence in policy arguments.

This can be seen in the way some of the English courts have dealt with the typical consequentialist policy argument of “floodgates.” This particular argument, typically raised to combat a newly proposed legal test or an implied term, alleges that the new formulation would “open the floodgates” to interminable litigation, radical uncertainty, and practical chaos. It is treated, on the surface, similarly to an argument that the rule

159. For example, Holdsworth notes that the concept of good faith in the English law of merchant “put into legal form the religious and moral ideas which, at this period coloured the economic thought of all the nations of Western Europe. . . . [Therefore, good faith] contributed to enforce those high standards of good faith and fair dealing which are the very life of trade.” 5 Sir William Holdsworth, A History of English Law 80-81 (2d ed. 1937).
161. Dworkin, supra note 74, at 82.
162. See Caparo Indus. Plc. v. Dickman [1990] 2 A.C. 605 (explaining that this is the
runs afoul of over breadth. Arguments from “floodgates” tend to involve a combination of empirical assertions and predictions as well as miscellaneous general worries. One thing this argument does not generally appeal to is “principle.” In the “rag bag” of prudential factors mentioned, arguments about hortatory coherence of the law or principled methods of analysis are left out. As some of the English House of Lords are increasingly recognizing, arguments from principle appeal to something higher than prudential balancing; a counter argument alleging that the principle is overbroad misses the importance of the hortatory effect of the principle.\textsuperscript{163} This is not to say that prudential concerns, such as are often expressed under the heading of “floodgates” are not valid concerns, but no coherent method is used for assessing their relevance or weight.\textsuperscript{164}

Duncan Kennedy notes, at the hortatory level, there is a value in showing “orderliness” to the debates which are often framed in terms of policy.\textsuperscript{165} The general reluctance of the English courts to consider the value in considering this higher level of ordering explains a large amount of their reluctance to recognize the principle of good faith. In mistaking the principle of “good faith” for a “rule” some hurl floodgates policy arguments at it. As will be considered later in this chapter, this criticism fundamentally misunderstands the nature of the operation of good faith as a hortatory principle as well as acting in different fact patterns as a specific rule.

Before we delve into these questions about the nature of good faith we must first consider the other question raised in this analysis.

B. Where Does the “Reasonable Notice” Obligation in Variation Cases Come From?

Richard Pratt has argued that “[i]t is grossly unjust to tell an employee who has been working for years under such a provision that the handbook has suddenly been changed.”\textsuperscript{166} As it was suggested at the end of the


\textsuperscript{164} See Pepper v. Hart [1993] A.C. 593 (providing an example of the failure of the floodgates arguments in practice as the House of Lords in this case recognized that legislative history could be relevant in the interpretation of statutes. Unlike the principled debate in the U.S., the judgments of the House of Lords seem mostly concerned with the prudential policy concern of whether such a holding would cause litigation to become more long-winded).

\textsuperscript{165} Kennedy, supra note 33, at 1724.

\textsuperscript{166} Pratt, supra note 37, at 223. See also Sullivan, supra note 37, at 263 (advocating
second chapter, this appeal to fairness seems to be intuitively correct. Policy reasons against the Govier analysis were clearly felt by the courts in Bankey and Asmus, as they require reasonable notice of a unilateral variation. However, the legal basis of this obligation is somewhat unclear. On the analysis in Asmus, the right to vary a separate unilateral contract without the need for consideration is an automatic consequence of its nature as unilateral. However, if this is the case, there seems to be little basis for requiring any notice, reasonable or not. In at-will contracts, for instance, the essence is that they are terminable without reasonable notice. Although the majority of employment handbook variation cases are not at-will contracts, at least prior to the variation, the reasonable notice requirement cannot be part and parcel of the fact that the contracts are unilateral.

In Bankey, the court put a large degree of emphasis on the "legitimate expectations" of the employer. However, invocation of legitimate expectations on their own can reduce to a circular appeal to policy as an expectation of reasonable notice will only be legitimate if the law regards it as subject to entitlement. The "legitimate expectations" analysis does, however, appeal to the recognition that the employment relationship as an ongoing one. This reasoning, however, has mainly been eschewed by courts, who seem to prefer instead the "traditional" contractual analysis.

Although Toussaint was not a variation case, its characterization of the relationship as one resting on legitimate expectations does appeal to the relationship of the parties as a foundation for the obligation. This inquiry is on more fertile ground than the arid search for whether the handbook is a unilateral or bilateral contract separate from the contract of employment. It is important because it notices a counter current to the strongly employer-favoring rhetoric of the at-will presumption. Recognition of certain expectations as legitimate is therefore a rhetorical tool for referring to deeper justifications for the ruling.


168. See Kohn, supra note 35, at 802 (stating that many courts have adopted a traditional contract analysis requiring either mutual assent or additional consideration to modify employee handbooks).

169. E.g., Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 731 (Ala. 1987) (recognizing that the Toussaint approach was "well reasoned and logical," but deciding instead to use the unilateral contractual analysis).
Once the invocation of "legitimate expectations" is viewed at the level of justificatory rhetoric it begins to sound similar to the courts' invocation of "good faith." The need to avoid bad faith is also referred to by the courts in both Govier and Bankey. The language of good faith is a familiar doctrinal tool of the U.S. courts in contract cases, contained within the Restatement (Second) of Contracts and regularly applied in commercial contracts as it is included within the UCC.

1. The Case for Explicit Recognition of a Doctrine of Good Faith Variation in Employment Contracts

The policy justifications for recognizing a rule requiring at least reasonable notice have already been considered at the end of Part II. There are also several compelling reasons why the doctrine of good faith should be invoked more freely by the courts as the underlying rationale for imposing these obligations on the employer.

Not only does good faith give a doctrinal basis for regulating the variation of employee handbooks, but its explicit recognition also adds coherence to the area of law as a whole. It appeals to the relationship as one of mutuality, where the employer's ongoing control over the employee is tempered by an obligation to exercise that control in good faith. As we have seen, in England the implied term of mutual trust and confidence grew up as a term symmetrical with the employee's duties of loyalty and cooperation to the employer. In return for faithful service, the employer exercises control over the employee, which must be exercised in a manner which does not destroy the relationship of mutual trust and confidence between the parties. United States law clearly recognizes one-half of the obligations in this relationship—that of the employer's control; for example, this is used as the central test for distinguishing between employees and independent contractors.\(^{170}\)

170. See Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1012 (9th Cir. 1997), cert. denied, 522 U.S. 1098 (1998) (describing how employer's recognition that workers were employees rather than independent contractors is what controls in these types of situations); Hunte v. Blumenthal, 680 A.2d 1231, 1235 (Conn. 1996) ("The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work"); Mortgage Consultants, Inc. v. Mahaney, 655 N.E.2d 493, 496 (Ind. 1995) (stating that although courts consider various factors to be relevant to the issue, existence of employer control is seen as one of the most important criteria); Mitzner v. State, 891 P.2d 435, 437 (Kan. 1995) (stating that the right of control test is what determines whether an employer/employee relationship exists); Kristianson v. Flying J Oil & Gas, Inc., 553 N.W.2d 186, 191 (N.D. 1996) (ruling that an employer may be liable for the actions of independent contractors if the employer retains sufficient control over the worker); DeWater v. State, 921 P.2d 1059 (Wash. 1996) (holding that a State does not retain sufficient control over the manner in which independent contractor foster parents perform their duties).
2. Good Faith Interpretation

Second, recognition of the principle of good faith in one area of the regulation of the employment contract can also unify it with another. As we saw in Johnstone, good faith can play an important role in the interpretation of contracts. This can be seen on the facts of Tymshare Inc. v. Covell, where an employer attempted to make use of a broad discretionary power in bad faith to deprive an employee commission sales representative of a benefit. In 1980 Covell’s sale quota was set at $1.2 million in expectation of a successful year. However, problems ensued and, in the spring of 1980, Tymshare reduced Covell’s quota to $815,000. Covell’s projected earnings were therefore approximately $31,000. In the fall, however, business boomed and Covell’s commissions bloomed. In December, before Covell had been paid his newly earned commission, Tymshare produced a revised quota plan in order to eliminate the increase. Covell’s employment was terminated on December 20th. Covell claimed that the discretion under the plan had not been exercised in good faith, which was a violation of Virginia law. As his accounts included contracts with the United States Postal Service the Court of Appeals for the Second Circuit held that they had jurisdiction under the District of Columbia to hear the case. This quirk of factual circumstances permitted Circuit Judge Scalia to write an academically dense judgment.

He agrees explicitly with the accounts of good faith by both Professor Summers and Professor Farnsworth (which will be discussed further below). Taking these two together he argues that “[w]hen these two insights are combined, it becomes clear that the doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes ‘bad faith.’” He sees this as consistent with the principle of “honoring the reasonable expectations created by the autonomous expressions of the contracting parties” although “[t]he new formulation may have more appeal to modern taste since it purports to rely directly upon considerations of morality and public policy.”

Interestingly, he uses the principle of “good faith” as a technique of

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171. 727 F.2d 1145 (D.C. Cir. 1984). See also Locke v. Warner Bros., Inc., 66 Cal. Rptr. 2d 921, 925 (Cal. Ct. App. 1997) (stating that where a contract confers a unilateral discretionary power, such power must be exercised in good faith).


173. Tymshare, 727 F.2d at 1152.

174. *Id.*
contractual interpretation. Tymshare, Inc. had argued that their contractual discretion permitted them to alter the benefit scheme in this way. However, Circuit Judge Scalia held that this interpretation would "require [such] a degree of folly on the part of these sales representatives we are not inclined to posit where another plausible interpretation of the language is available."\(^{175}\) The contract cannot be interpreted such as to take away the benefits which the employee has bargained for. This is similar to the formulation of good faith set out in the old case of *Kirke La Shelle Co. v. Paul Armstrong Co.*\(^{176}\):

> in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.\(^{177}\)

Not only is the formulation of "good faith" in *Kirke La Shelle* very similar to the formulation of the EAT in *Courtaulds Northern Textiles v. Andrew*\(^{178}\) that an employer must not act so as to destroy the relationship of mutual trust and confidence, but Circuit Judge Scalia's application of these principles to the case is very similar to that taken recently in the English case of *Mallone v. BPB Industries*.\(^{179}\)

Mallone was an executive of BPB's Italian subsidiary until 1995. His contract contained an executive share option scheme. However, when he was dismissed in 1995, BPB informed him that his share option was zero. At trial Christopher Symons Q.C. held that the contractual discretion under the employment contract did not entitle them to cancel the option scheme once it had been held for three years. In the Court of Appeal, Mr. Mallone's counsel argued that the directors' discretion was not exercised in "good faith." Lord Justice Rix held for the court that the contractual language could "in theory embrace an exercise of the directors' discretion

\(^{175}\) Id. at 1154.

\(^{174}\) 188 N.E. 163 (N.Y. 1933).

\(^{177}\) Id. at 167. Although this case was not cited directly by Judge Scalia in the judgment, he chooses instead to prefer that parties' reasonable expectations are honored. *Tymshare*, 727 F.2d at 1152. *See also* Uproar Co. v. Nat'l Broad. Co., 81 F.2d 373, 377 (1st Cir. 1936) (describing the implied covenant of good faith buried within every contract), cert. denied, 298 U.S. 670 (1936); Druker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976) (looking at the good faith covenant implied in every contract); RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tentative Drafts Nos. 1-7 (1973)) (describing the terminology necessary to create a promise); 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670 (3d ed. 1961) (reiterating the necessary terminology to create a promise).


\(^{179}\) [2002] EWCA Civ. 126, [2002] I.C.R. 1045 (ruling that directors acted irrationally in canceling share options and that these actions are invalid because the directors had a duty to act in good faith).
in relation to mature as well as immature options." 180 However, he then went on to consider whether the exercise of the discretion was "irrational." 181

In Clark v. Nomura Int'l, 182 Judge Burton had held that employer's discretions are "not unfettered . . . [A] simple discretion whether to award a bonus must not be exercised capriciously." 183 This, he equated, with a test of "irrationality or perversity" borrowed from the Administrative Law context - "whether any reasonable employer could have come to such a conclusion." 184 As in this case

[t]here is no sign any regard was had to the fact that the options were granted at a time when Mr. Mallone's performance was clearly regarded as excellent . . . I have no difficulty in saying that the judge was entitled to find that the committee's decision was one which no reasonable employer could have reached. 185

Lord Justice Rix never sounds entirely comfortable with the term "good faith," using it only twice in his judgment; he instead prefers to consider specific types of dishonesty, improper purpose, or arbitrariness. 186 For all intents and purposes, they are virtually indistinguishable tests. Neither of these is an instance of the use of contra proferentum construction.

In 1994 Professor Jack Beatson wrote that "[c]ontract law . . . has not been influenced either by public law principles or by the rules of statutory regulatory regimes." 187 However, were he to write the same article today, after Mallone, he could no longer claim this to be the case.

The analogy to Administrative Law is interesting, and one which links up well with the approach of Judge Scalia in Tymshare. In Tymshare, some of Judge Scalia's language could be mistaken for that of an Administrative Law judgment. For example he states that "the language need not . . . be read to confer discretion to reduce the quota for any reason." 188 The contract is treated as an autonomous document, which has "purpose implicitly envisioned" by it. 189

However, we must consider whether it is wise for a theory of the

180. Id.
181. Id.
183. Id. at para. 40.
184. Id.
185. Id.
186. Id.
189. Id. at 1154-55.
interpretation of contracts to borrow a theory of statutory interpretation. Attempts to borrow theories in the opposite direction have rarely been uncontroversial. 190 Statutory interpretation involves more problematic questions of divining legislative intent than contractual interpretation, as a statute is the product of the entire legislative process, and the work of many minds. Ronald Dworkin persuasively argues that a theory of statutory interpretation cannot be "conversational;" a search for the subjective state of mind of the legislature is both doomed to failure and inconclusive. He points to the problems facing an intentionalist judge in determining who the true authors of a statute are, how they work together, and whether their mental state is relevant beyond their expressions in the wording of the statutes. 191 He echoes Max Radin's pessimism that "the intention of the legislature is undiscoverable." 192

Contracts, on the other hand, have far fewer of these particular problems. They tend not to be the product of so many disparate lines of thinking. The law repeatedly asserts that freedom of contract means freedom for the parties to contract for whatever they subjectively intend. However, even though the law grants this freedom, this does not necessarily mean that parties have exhaustively exercised it. If, as in a discretionary case, the limits to which the parties have bound themselves are unclear, we are not dealing with a question of limiting "freedom of contract," as the parties have not committed themselves either way. Although it may initially seem that Dworkin's conception of "conversational interpretation" is of most relevance to the interpretation of contracts, the similarities between contract and statutes become clearer and it appears that constructive interpretation is more suitable as a technique, given the creation of the "contract" as a separate entity to the "conversational" negotiations. The language of administrative statutory interpretation, therefore, seems to be particularly apt in this case. Its congruence with the principle of good faith is clear. 193


191. DWORKIN, LAW'S EMPIRE, supra note 33, at 313-355.

192. Radin, supra note 128, at 870.

193. See Stephen F. Ross & Daniel Tranen, The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation, 87 GEO. L.J. 195 (1998) (providing a very interesting article arguing in the opposite direction, that the relaxed approach to the parol evidence rule should be used to support the argument in favor of using legislative history in interpreting statutes).
3. Alternatives

After considering the case for evaluating good faith as a doctrinal basis for the reasonable notice criterion, we must consider some of the other options which have already been suggested. A note by Brian T. Kohn argues for an ingenious solution. He suggests that "[c]ourts should imply into all unilaterally adopted employee policies a subsidiary promise by the employer not to modify that policy."

He refers to a term implied in law recognized by the California Supreme Court in *Drennan v. Star Paving Co.* in the context of a contractor relying on a subcontractor's bid in preparing its own. He notes that this has been used once in the employment pension context by the Oregon Supreme Court to imply a subsidiary contract not to revoke a unilateral offer of a retirement plan. He argues that, as the courts have had no reluctance in implying terms in to the contract favoring the employer, there is no legal impediment to them implying a subsidiary promise not to vary the contract as well.

Kohn is on promising ground by looking to implied terms to solve this problem. However, this proposal runs into several potential pitfalls by relying on cross-fertilization between areas of law, without deriving it from an overarching principle. To use the terminology of Karl Llewellyn, Kohn's proposal is open to attack from situation sense. Kohn attempts to borrow a term across different fact patterns only by analogy. Analogous references are most successful across fact patterns which are as similar as possible. This type of reasoning is open to the attack that another term is instead more suitable from a nearer fact pattern. As in *Ferrera*, a court could instead import an alternative formulation of the at-will presumption. This is a condition transported from a closer fact pattern than Kohn's analogies to bids and the early pension case.

However, Kohn's suggestion gains weight if we counter that argument with one which goes one step deeper, appealing to a principled theoretical basis for implying such options into the contract. This is where the principle of good faith can play its role.

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197. *Id.* at 854 (citing *Taylor v. Multnomah County Deputy Sheriff's Ret. Bd.*, 510 P.2d 339 (Or. 1973)).
A similar suggestion is offered by Jason Walters.\footnote{Walters, supra note 71.} He argues that handbooks in at-will contracts can be modified at any time as the offer by the employer of employment may be terminated at any time.\footnote{Id. at 376} As unilateral offers cannot be revoked when performance is continuing, he argues that in at-will contracts the employer may determine at any time that performance is complete.\footnote{Id. See Id. ("When a unilateral employment contract contains a provision for job security ... an employee is not necessarily bound by the terms of new or revised handbooks by continuing to work after the new or revised handbooks become effective.").} Where a handbook term gives assurances to job security, however, the situation is different. He argues that, in this situation, performance cannot be deemed complete simply at the whim of either party.\footnote{See Pratt, supra note 37, at 213 ("[U]nilateral contracts are a class of contract exempt from the mutuality of obligation requirement.").} Therefore, the terms of the offer of employment may not be revoked or altered while the employee is still performing the contract.

There are several problems with this analysis. First, it is premised on the idea that contracts of employment must be unilateral contracts. The necessity for this is far from clear. As there is clearly an exchange of promises when the contract is formed, it could just as easily be analyzed as a bilateral contract. Given the mutuality of obligations on both parties in the contract, it is more appealing to analyze the contract of employment on bilateral principles. Only where a bilateral exchange of promises does not take place should unilateral contract analysis be applied.\footnote{Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 (2) (2006).}

Even assuming that unilateral contract analysis is appropriate in these situations, Walters's conclusions do not flow as simply from his premises as he suggests. His claim that, in an at-will contract, an employer may deem performance complete at any time and may therefore extinguish the obligations at any time is undoubtedly true. However, it is too formalistic to assume that an attempted variation is functionally the same as a termination. Although the end result of a successful variation will be a variation in the terms of the initial offer, it is too rigid to maintain that a termination has taken place at the moment of variation. For example, time accrued under the Family and Medical Leave Act of 1993 (which requires a worker to have been employed for at least twelve months and have at least 1,250 hours of service in the twelve-month period preceding leave) would be most unlikely to be held to be interrupted by a variation of the other terms of employment during that time.\footnote{See Pratt, supra note 37, at 213 ("[U]nilateral contracts are a class of contract exempt from the mutuality of obligation requirement.").}

There are clear differences between variation and termination, which have been suggested in Part II and will be analyzed further in Part IV of
this paper. Because of this, Walters’s contention that the employer may deem performance to be adequate is not of itself sufficient to demonstrate that the employer should be permitted to vary the contract unilaterally, at any time and without notice.

C. If Both Are Explainable by Good Faith, What Does Good Faith Mean?

We have repeatedly been colliding with the question of the meaning of good faith in the various fact patterns of the preceding analysis. Before progressing any further, the time has come to consider the broader question of what good faith may mean in general. Although the question sounds as though it is simple, the answer will likely not be. As Professor Farnsworth has noted, “if, as Professor Goode suggests, the English have difficulty in attaching any meaning to good faith, the difficulty in my country is quite the opposite: the Americans have, or so it might seem, too many meanings of good faith.”

Before turning to the issue of how best to conceptualize good faith, it is helpful to consider a brief general overview of how “good faith” fits into U.S. law.

1. Good Faith in U.S. Law

Lawyers in the U.S. are no strangers to the invocation of “good faith.” The classic formulation of good faith from the 1933 case of *Kirke La Shelle Co. v. Paul Armstrong Co.* has already been considered. This provides that parties are precluded by the doctrine from doing “anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”

The U.C.C., which applies to commercial contracts, imposes a general duty such that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” There are two standards specifying the duty of good faith, which seem to offer slightly different conceptions of the provision. Section 1-201(19) defines good faith as “honesty in fact in the conduct or transaction concerned,” whereas according to § 2-103(1)(b), which applies only to contracts of sale, good faith is defined as “honesty in fact and the observance of reasonable

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206. Farnsworth, Good Faith, in GOOD FAITH AND FAULT IN CONTRACT LAW, supra note 148, at 161.
205. 188 N.E. 163 (N.Y. 1933).
208. Id. at 167.
commercial standards of fair dealing in the trade.” The second definition explicitly recognizes an objective element in addition to a consideration of the subjective motivation of the parties. The Restatement (Second) of Contracts recognizes that good faith “excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”

2. Academic Debate over Good Faith

However, commentators in the U.S. have been debating the meaning of “good faith” for over fifty years. As Robert S. Summers noted, “general definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity.” In the search for a meaning for good faith, however, many of the commentators have strayed far from the reason for adopting the principle in the first place.

Professor Farnsworth has argued that, in good faith performance, “good faith has nothing to do with a state of mind— with innocence, suspicion, or notice. Here the inquiry goes to decency, fairness or reasonableness.” The “chief utility of the concept of good faith performance has always been as a rationale in a process . . . of implying contact terms.” The doctrine of good faith results in “an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations.”

In 1968, Robert S. Summers published a highly influential article which claimed that “good faith” must be defined negatively. He argued that “[i]n contract law, taken as a whole, good faith is an ‘excluder.’ It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith.” A focus on defining the positive content of good faith from the case law is therefore doomed to be more difficult as “the typical judge who uses this phrase is

212. Theories as to why these two provisions differ have been proposed. Allen R. Kamp, Downtown Code: A History of the Uniform Commercial Code 1949-1954, 49 BUFF. L. REV. 359, 414 (2001) (“[I]t was crucial that a merchant's contract and conduct be subject to good usages of trade. . . . [These U.C.C. sections defining good faith] imposed commercial norms on all commercial transactions.”); Allen R. Kamp, Uptown Act: A History of the Uniform Commercial Code: 1940-49, 51 SMU L. REV. 275, 320 (1998) (noting that the sections were a result of the drafters' attempt to balance the control of a contract's express terms with the use of commercial standards).
215. Farnsworth, Good Faith Performance, supra note 172, at 668.
216. Id. at 672.
217. Id. at 669.
primarily concerned with ruling out specific conduct, and only secondarily, or not at all, with formulating the positive content of a standard."

Justice John Priestly of the Supreme Court of New South Wales in Renard Constructions (ME) Pty Ltd. v. Minister for Public Works described Summers's approach as having "the great merit of being workable, without involving the use of fictions often resorted to by the courts where the good faith obligation is not available, and reflects what actually happens in decision making." Just as Lord Nicholls described the obligation of mutual trust and confidence as a "portmanteau," this is a very traditional English/Commonwealth common law method of embracing good faith in that it stresses the pragmatic over the principled. It is not surprising that Judge Priestly finds that looking at the individual concrete instances of good faith can be a useful tool in deciding when to apply it to cases.

However, the interesting question, if Summers's analysis is to be accepted, is whether anything in particular unites these separate instances under the principle of good faith at all. Summers does offer a general conceptualization: "In most cases the party acting in bad faith frustrates the justified expectations of another... [T]he ways in which he may do this are numerous and radically diverse." This sounds similar to the Court's invocation of legitimate expectations of the parties in Toussaint and Bankey. However, a crucial issue with a justification based on expectations is which particular expectations will be regarded as legitimate.

This is a particularly important factor to consider with regard to Steven Burton's analysis of good faith. He suggests that the doctrine of good faith is premised on the need to enforce the justifiable expectations of the parties when the contract was formed. Burton's theory has the advantage of explicitly resting on the recognition that contracts are incomplete ex ante. Even contractual discretions are naturally incomplete. The obligation of good faith therefore operates as a "gap filler." A party "performs in bad faith by using discretion in performance for reasons outside the justified expectations of the parties arising from their agreement."

219. Id. at 202.
221. Id. at 266.
223. Summers, "Good Faith" in General Contract Law, supra note 30, at 263.
224. Burton, Common Law Duty, supra note 172, at 371 ("[A] contract is an exchange expressed imperfectly and projected into an uncertain future.").
225. Id.
It might initially seem that there is little to tell between Burton and Summers, as both ultimately rely on the expectations of the parties. However, Summers and Burton clearly considered themselves to be in disagreement.\textsuperscript{227} One of the crucial aspects of disagreement is over the relevant timing of the expectations. Burton's stress is upon the moment of contracting. He argued that "bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting."\textsuperscript{228} Although Summers is not entirely clear on this point, his concept of good faith involves taking into account expectations and hopes formed after the initial moment of contract formation. One way of understanding this conception is that good faith legitimates expectations \textit{ex post}, rather than recapturing those formed \textit{ex ante}. Summers' reference to "justified expectations" is rather unfortunate in that it seems to suggest that the expectations are justified at the moment when they are formed rather than deemed to be so later in the life of the dispute.

Burton also characterizes Summers as advocating an approach which appeals to morality, rather than to the agreement of the parties. However, Burton rather overestimates the "agreement" between the parties. As in the interpretation of statutes which we considered above, the search for complete "intended meaning" is often as futile as resorting to palmistry. As with legislative intent "we have no means of knowing that content except by the external utterances or behaviour,"\textsuperscript{229} but more often than not the exact issue in question has not had any direct thought put into it at all. As Ronald Dworkin notes, we can attempt to glean presumed intent by engaging in elaborate counter-factualizing: what would X have thought had they thought about it?\textsuperscript{230} However, this kind of question also spirals off into wild speculation.\textsuperscript{231}

A common answer to this problem in the area of statutory interpretation is to invoke a presumption of rationality and good faith of the legislature.\textsuperscript{232} If we resolve questions about the interpretation of contracts by presuming good faith, we are appealing to a long standing tradition. However, the courts on both sides of the Atlantic are still wedded to the conception of the contract as a complete "meeting of minds." Both in the

\textsuperscript{228} Burton, \textit{Contractual Good Faith, supra} note 226, at 373.
\textsuperscript{229} Radin, \textit{supra} note 128, at 870-71.
\textsuperscript{230} Dworkin, \textit{Law's Empire, supra} note 33, at 325.
\textsuperscript{231} \textit{Id.} at 325-27.
\textsuperscript{232} For an example of this approach in the U.S., see Henry M. Hart & Albert M. Sachs, \textit{The Legal Process: Basic Problems in the Making and Application of Law} (W. Eskridge & P. Frickey eds., 1994). A similar suggestion, although one which is arguably stronger, has recently been made in the U.K. by T.R.S. Allan in Legislative Supremacy and Legislative Intention, supra note 127.
interpretation of contracts and the implication of terms this is not the case. Mark Freedland explains the reluctance of the courts in implying terms, which is also applicable to interpretation: "[W]hen the process of ascertainment of implied terms actually involves creative law-making, the real difficulty presents itself that the courts and tribunals are reluctant to evolve positive rationales for that creative law-making because they are committed to disclaiming the creative law-making role."  

Burton is therefore mistaken in referring to the subjective expectations of the parties before the formation of the contract. As Todd Rakoff has noted, the language of "intention" and "intended meaning" in contract is a "ceremonial bow" to private autonomy "answering to the needs of ideological justification rather than realistic description."  

A system which requires such obsequious devotion to a fiction, at the expense of principled coherence, is storing up trouble for any future developments.

3. The Several Faces of Good Faith: A Return to Llewellyn

It is helpful to go back, for a moment, to the founding father of the UCC, Karl Llewellyn. Llewellyn's influential work in the 1930s, like Max Radin's, had been distinctly within the legal realist movement. One of the tenets of this movement he recognized as "the distrust of verbally simple rules." In his early work he advocated "the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past," as deductive reasoning from abstract general legal concepts was doomed to indeterminacy and failure. This approach seems to be distinct at the "dispute settlement" end of Atiyah's tension. Even in Llewellyn's later work where he eschews the realist "dirges" in favor of "situation sense," he remains wedded to a pragmatic commitment to "type-facts in their context." What is someone who distrusts "verbally simple rules" and ascribes to such fact dependent pragmatism doing advocating a principle as abstract as that of "good faith and fair dealing" within the UCC? The key to this question appears to be what he considered to be the purpose of good rule making:

The way to write good law is to indicate what you want to do, and you assume within reason that the persons the law deals with

233. FREEDLAND, supra note 20, at 124.
235. Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931) [hereinafter Realism].
236. Llewellyn, Realism, supra note 235, at 1237.
237. Id.
will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in, which means that every statute ought to have two essential bases, one to show where the law wants you to go, and one to show where we will put you if you don’t.\textsuperscript{239}

Llewellyn criticizes lawyers for focusing only on the second sense of rule making. As these two facets of the law are inevitable, we should celebrate the functions of good faith in the first sense of Llewellyn’s distinction. We can see this function in practice, in its usage as an interpretative tool in the construction of contracts. Llewellyn’s second sense is more consonant with Summers’s excluder analysis; the doctrine of good faith can also be used to prescribe “dirty” conduct. For example, in this situation, there is immediate variation and depriving of rights in employee handbooks. Read in this manner, good faith is fully consistent with the requirements of situation sense.

In an interesting comparative work on legal reasoning in the U.S. and U.K., Summers\textsuperscript{240} and Atiyah writing in tandem conclude that the formulation of good faith is a “principle.”\textsuperscript{241} Such principles “generate highly substantive reasons . . . upon which private persons may act in the conduct of their ordinary affairs.”\textsuperscript{242} They concede that such principles conflict. It is in instances of conflict that the legal system comes to recognize such principles as law. On recognition as such it becomes, not only a substantive reason, but a formal reason, though only in that fact pattern. They note that “there can be little doubt that lawmakers, judges and other officials in the American system resort far more often to such principles directly and indirectly, as \textit{forms of valid law}, than is true in the English system.”\textsuperscript{243} Although he is often thought of as a pragmatist, there is ample space for principle in Llewellyn’s theory. This is demonstrated by one of his most elegant passages on statutory interpretation

\begin{quote}
[A] court must strive to make sense \textit{as a whole} out of our law \textit{as a whole}. It must . . . take the music of any statute as written by the legislature. . . . But there are many ways to play that music . . . and a court’s duty is to play it well, and in harmony with the other music of the legal system.\textsuperscript{244}
\end{quote}

This is another moment where we can see that the English court’s

\begin{quote}
\textsuperscript{240} This is the same Summers that proposed the “excluder” analysis. \textit{See} Summers, \textit{“Good Faith” in General Contract Law}, supra note 30, at 201-207.
\textsuperscript{241} \textit{ATIYAH \& SUMMERS}, supra note 3, at 94.
\textsuperscript{242} \textit{Id}.
\textsuperscript{243} \textit{Id}.
\end{quote}
treatment of "floodgates" arguments against good faith often miss the point of principle. As principles are able to generate and justify substantive reasons for certain substantive or procedural outcomes, rather than just prudential considerations and narrow defining terms they are not just operating simply at the level of rule application. Although, in the individual dispute the parties will have arguments mainly of policy concerning their fact pattern, arguments of principle cannot be ignored for hortatory purposes of the common law method.

A situation sense reading can also allay some of the fears of so broad a standard as good faith being difficult to administer. If Summers is correct, and at the level of rule application good faith does operate as an excluder to prevent various specific types of bad faith conduct, there may be certainty about the operation of good faith in that particular fact pattern. This paper is considering two particular fact patterns—that of variation of handbook terms and that of interpretation of the express terms of the contract of employment. In these fact patterns the implied term of mutual trust and confidence has not proved to be excessively hard to administer and has been mostly well received.245

This situation-sensitive analysis will be crucial to the argument in Part V that at-will and good faith variation can survive side by side.

V. INTERRELATIONS WITH AT-WILL: A ROUTE THROUGH THE TENSIONS

The argument in this section will suggest that, although at the level of principles, at-will appears to be moving along a different vector from that of good faith performance, the proposed development need not substantively change the scope of the at-will rule. It will only limit the "at-will principle."

The at-will rule in the U.S. has come under a barrage of criticism for decades.246 In the 1980s, Montana enacted legislation providing for a statutory remedy to unfair dismissal.247 Some states also have developed an exception to at-will based on good faith.248 However, since then, no other

245. Lindsay, supra note 116, at 1-7 (discussing English cases in which the implied term has been used).
246. See, e.g., Summers, Individual Protection, supra note 5, at 690 ("In a flood of normative argument, legal commentators have advocated . . . abolition of the at-will doctrine and implementation of a requirement that all dismissals be for just cause.").
state has followed suit, and the courts have increasingly become less willing to develop common law exceptions to the rule. It would therefore be reasonable to assume that the courts are committed to the survival of this rule for the foreseeable future; therefore, if recognition of a good faith restriction on variation would practically eliminate it, the courts would be much less inclined to recognize reasonable notice in variation as an instance of this doctrine. This section argues that good faith in variation does not eliminate the rule of at-will presumption in employment contracts. To do this, however, it must first set out why this might be a problem.

A. Fire and Rehire

There is a dominant shadow behind the question of variation of the employment contract: to what extent does regulation of the variation within the contract become practically meaningless if the employer is free to fire and then rehire employees on substantially different (and less favorable) terms. The interest in flexibility in U.S. employment law is often seen as, to a large extent, protected by the presumption that a contract is “at-will,” thus permitting either the employer or employee to terminate the contract with no notice. An employer, under an at-will contract, is therefore afforded flexibility by the ability to fire and then rehire employees on new terms. In England, there is no at-will presumption, but the Catamaran Cruisers case demonstrates that similar considerations also arise within English law.

1. The U.S. Story

In the majority of U.S. states, an employer is free to terminate an employment relationship without notice and then offer reemployment on different terms. An employer is also free to threaten an employee with total termination without reengagement if the new terms are not agreed to. The classic formulation of the rule was stated by Horace G. Wood:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is

an indefinite hiring and is determinable at the will of either party

2. The English Story

In order to see how this tension also appears with English law, it is necessary to give a summary of the rather complex law in this area. English law has both common law and statutory mechanisms of dealing with the end of the employment relationship. The common law action of wrongful dismissal stems from the presumption that servants in agriculture were hired for a fixed term of one year. If an employer fires an employee without notice she is liable for the wages for the notice period. These damages are subject to the duty to mitigate. An employer may only terminate without notice (summary dismissal) where the employee is guilty of gross misconduct. To confuse matters, these notice periods are calculated by statute. Like the "at-will" rule, this notice requirement also purports to be symmetrical. An employee must therefore give notice before resigning, as the employer can give notice of dismissal. Reason for termination has no role to play in an action for wrongful dismissal, except in the case where the employer is claiming that they have summarily dismissed the employee in response to known gross misconduct. This, however, is a simple application of the principles of repudiatory breach. If the employee has "disregarded an essential condition of the contract of service," the employer is entitled to accept this repudiation as termination of the contract.

The statutory concept of unfair dismissal has been present in U.K. law since the Industrial Relations Act of 1971. This Act permits an evaluation of the reasons for dismissal if an employee has been continuously employed for more than one year. This is now governed by Part X of the Employment Rights Act of 1996. An employer is under a duty to show that the dismissal of an employee is due to a reason which:

(a) relates to the capability or qualifications of the employee for

250. WOOD, LAW OF MASTER AND SERVANT, supra note 4, at 272 (citation omitted).
251. DEAKIN & MORRIS, supra note 88, at 5; Harvey, supra note 93.
252. DEAKIN & MORRIS, supra note 88, at 393. This rule has its origins in the Statute of Artificers of 1563 and the poor laws of the Seventeenth century.
254. After the Employment Act of 2002, the employer has operated a shortened disciplinary procedure as set out in the regulations to the Employment Act of 2002, c. 22, sched. 3 (Eng.).
255. Employment Rights Act (ERA), 1996, c. 18, §§ 86-91 (Eng.).
257. ERA, 1996, c. 18, § 108(1) (Eng.).
performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant [as discussed in Part XI of the Employment Rights Act 1996], or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment.\textsuperscript{258}

If the employer can not show that the dismissal was for one of the above reasons, the employer may show that there was "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."\textsuperscript{259} In addition the statute provides for various protected grounds which are automatically unfair.\textsuperscript{260}

Returning to \textit{Catamaran Cruises},\textsuperscript{261} the employer had fired his employees and then offered them much less favorable contracts as a result of financial difficulties. The Employment Appeal Tribunal held that the dismissal was not unfair as it was within the band of reasonable responses for "some other substantial reason".\textsuperscript{262} The EAT held that the employees had been unreasonable not to have accepted the new terms. The test, post \textit{Catamaran Cruises}, is essentially one of balancing the interests. What is clear, however, is that an employer is relatively safe to attempt to fire and then rehire, if it is rationally connected with a business reason and is not motivated by sharp practice. Since \textit{Catamaran Cruises}, the Employment Act of 2002 requires in addition that the minimal standard disciplinary and dismissal procedure set out in Part I of Schedule 2 is carried out in addition to the appropriate notice period.\textsuperscript{263} However, these guarantees are only

\begin{itemize}
\item \textsuperscript{258} \textit{Id.} § 98(2).
\item \textsuperscript{259} \textit{Id.} § 98(1)(b).
\item \textsuperscript{260} A list of automatically unfair reasons for dismissal: pregnancy, childbirth or maternity, maternity leave, parental leave, paternity leave, adoption leave (\textit{Id.} § 99); actions as a health and safety representative (\textit{Id.} § 100); shop workers refusal to work on a Sunday (\textit{Id.} § 101); complaint under the working time regulations (\textit{Id.} § 101A); actions as the trustee of an occupational pension scheme (\textit{Id.} § 102); making a protected disclosure (\textit{Id.} § 103A); assertion of a statutory right under ERA § 86, or under Trade Union Labor Relations Consolidation Act (TULRCA), 1992, c. 52, §§ 68, 86, 146, 168, 168A, 169, 170 (ERA, § 104); action taken with a view to enforcing the national minimum wage (\textit{Id.} § 104A); action taken with a view to enforcing Tax Credits Act, 2002, c. 21, § 25 (ERA, § 104B); requesting flexible working (\textit{Id.} § 104C); being an employee representative under Chapter II of Part IV of the TULRCA. Procedures under Schedule 2 to the Employment Act 2002 have not been completed to satisfy the procedural fairness requirements of ERA, § 98A(3).
\item \textsuperscript{261} \textit{Catamaran Cruisers, Ltd. v. Williams [1994]} I.R.L.R. 386 (EAT).
\item \textsuperscript{262} ERA, 1996, c. 18, § 98(1)(b) (Eng.).
\item \textsuperscript{263} This is a 3-step procedure requiring a statement of grounds for an action and invitation to meeting and opportunity for appeal meeting. Failure to comply with these procedures makes any resulting dismissal automatically unfair and subject to either
\end{itemize}
The shadow that both of these situations spread across any regulation of the conduct of the parties within the relationship, is whether any such regulation can be destroyed by the ease with which the parties can terminate the relationship. Also, if regulation of termination is governed by a principle which moves in one direction, how successful can a principle of good faith be when it moves along quite a different vector fare where the factual circumstances are closely interrelated? Any regulation of the modes of variation must inevitably take into account how it will fit with any provision for the regulation of termination.

B. Hortatory Principles and Rule-Application

Although Justice Holmes cautioned, "[g]eneral propositions do not decide concrete cases," questions of principle are unavoidable in adjudication. As Atiyah notes, "[i]n the process of generalisation, principles also attempt to give some overall structure or rational shape to the law, not just in the interests of elegance, but in the interests of consistency, of the desire to ensure that like is treated alike." It is crucial that the principle of good faith be recognized and utilized as a principle, not only in interpretation of contracts, but in the interpretation of contract doctrine itself. The hortatory function of good faith is an important counter balance against the pervasive hortatory function of the presumption of at-will termination. Both rules can, nevertheless, coherently coexist at the level of pragmatic rules within bounded spheres for pragmatic application. For their role as principles, however, their conflict, far from being fatal, is important for the safeguarding of coherent balance between flexibility and certainty in course of employment. At least part of the success of the recognition of the implied term of mutual trust and confidence has been because of its hortatory function.

The hortatory effect of at-will is strong in U.S. law. We can see its hortatory effect in the cases where the courts refuse to accept the possibility of a handbook exception to at-will. Although this hortatory fertilization has largely slipped in unnoticed in cases like Govier and in Justice Jones's dissent in Demasse, it has been resisted by some courts. They have noted reduction or inflation of the award by 10-50% (depending on which party is at fault in causing this failure). Employment Act, 2002, c. 18, § 31.

264. See Bob Hepple Q.C. & Gillian S. Morris, The Employment Act 2002 and the Crisis of Individual Employment Rights, 31 INDUS. L.J. 245, 266 (2002) (stating that the Act's procedures "are so rudimentary in nature that they afford little protection to employees.").


266. ATIYAH, PRAGMATISM AND THEORY, supra note 21, at 27.
that the rationales applied to at-will do not extend naturally into the variation cases, as "[t]he cases which reason that the at-will rule takes precedence over even explicit job termination restraints, simply because the contract is of indefinite duration, misapply the at-will rule of construction as a rule of substantive limitation on contract formation."\textsuperscript{267} This formal argument, however, seems to be but a frail twig against the tide of much of the courts’ strong rhetoric of laissez-faire and individual autonomy. Nevertheless, instances of good faith are visible, and indeed unavoidable, in the jurisprudence of employment contracts.

C. The Ramifications of Conflict

Duncan Kennedy has recognized a tension in Private Law adjudication between individualism and altruism.\textsuperscript{268} He notices that both contradictory visions "emerge as biases or tendencies whose proponents have much in common and a large basis for adjustment through the analysis of the particularities of fact situations."\textsuperscript{269} He notes that "[t]here is a connection, in the rhetoric of private law, between individualism and a preference for rules, and between altruism and a preference for standards."\textsuperscript{270} This is not the same tension as the one described above. In the tension proposed by Atiyah between the hortatory power of a principle of good faith and the situation of specific application of a rule applied at its lowest level of abstraction, the abstract does not correlate with a more altruistic vision. In current U.S. employment law, the principle of at-will termination is pervasive at the abstract level through the rhetoric of flexibility. Kennedy, however, sees conflict at the level of hortatory principle as unavoidable. The process of law, therefore, must be able to go forward in light of this interminable conflict. Clare Dalton notes that theoretical duality exists in tension throughout contract law.\textsuperscript{271} Despite this conflict, she concludes that doctrinal talk is not "meaningless."\textsuperscript{272}

Recognition of conflict between hortatory principles can be important for coherence at the level of rules. Although the modes of individualism and altruism, as described by Kennedy, do conflict at the highest level, this

\textsuperscript{267} Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983).
\textsuperscript{268} Kennedy, supra note 33. Another interesting discussion of tension in the context of implied terms is contained in Duncan Kennedy, Dist\textsuperscript{269}ibutive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1982).
\textsuperscript{269} Kennedy, supra note 33, at 1776.
\textsuperscript{270} Id.
\textsuperscript{271} Dalton, An Essay in the Deconstruction of Contract Doctrine, supra note 33, at 1007.
\textsuperscript{272} Id. at 1009. See also Dworkin, Law’s Empire, supra note 33, at 444 (giving the argument that conflict leads to insolubility and short shrift).
does not mean that appeal to one mode automatically annihilates doctrines which have a shade of the other.

To see how lawyers can get through this, it should also be remembered that tension at the level of principle does not translate exactly into tension at the level of rule application. Judges and legislators are not aiming to create a mirror of a just society in the rules; these rules must be practicable and be likely to produce these effects. Ramifications at the level of principle can take on a different shade at the level of rule application. Although it is relatively easy to state a rule which would solve the case, ex post facto, it is much more difficult to state one which would prevent it occurring ex ante. As Scott and Krauss note, there a rule which is consistent with legal and moral principle may nevertheless have perverse incentive effects. This, it is argued, is captured in the essence of situation sense methodology. Llewellyn's Delphic comment, that situation sense is a compound of "Isness and Oughtness and what have you more," can be understood as acknowledging this dimension to the deciding of cases.

D. The Rationalization

To argue that the at-will rule in application is not impossible in a system which recognizes the principle of good faith, we must consider some of the differences between the situations of dismissal, fire and rehire, and variation, as was attempted in Govier, Asmus, Bankey, and Demasse. "Situation sense" must be applied to "type-facts in their context." We must now look at those contexts in detail to see how they can be distinguished from one another coherently.

1. The Argument from Situation Sense

Although it is clearly moving along a different vector at the level of principle, the recognition of an obligation of good faith in variation of employment contracts at the level of rule application does not necessarily subsume the presumption of at-will termination. Although the vast majority of employment cases which consider "good faith" do so in the context of termination, this does not mean that good faith in variation will

274. LLEWELLYN, THE COMMON LAW TRADITION, supra note 26, at 61.
275. This is a very different route from the one proposed by Kennedy. For an example of Kennedy's response to conflict in individual dispute resolution see Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518 (1986).
naturally become a doctrine of good faith termination. These actions can be kept analytically distinct; they are different "type-facts."

A host of different considerations arise when we are considering issues of termination as opposed to variation. This will be particularly so when we are considering a contract which provides specific restrictions on termination. For these to be variable at-will would negate any reason for the employee to have bargained for those enhanced terms. These considerations have already been analyzed in Part II. Breach of terms providing for added constraints on termination does not automatically bring the contract to an end. Without more, the employee can still legitimately expect performance of the other contract terms.\footnote{276}

There are many reasons why an employee may wish to do this. For example, an employee may need to accrue the necessary length of service with that one employer to be eligible for FMLA leave.\footnote{277} The employer also may wish to vary the contract, but not to lose all of the benefits inherent in the relationship itself. As was considered above, the employer in the course of employment has "control" over the employee (or it does not constitute a contract of employment at all, and is merely a contract for services). In notifying employees of a variation, an employer is communicating an intention to maintain that control. It is true that an employee can legally bring the relationship to an end at any time. But from the point of view of employee perception, a manifest intention on the part of the employer to maintain control may seem to be very different from a manifest intention by them to terminate the relationship. To treat all variations as if they terminate the entire relationship would be to ignore these relevant considerations.

2. The Argument from Autonomy

The principle of at-will termination is often justified by reference to considerations of autonomy.\footnote{278} In the passage quoted from Horace Wood in the Part IV,\footnote{279} it is clear that if parties wish to vary the legal default of at-will, they are free to contract around it. In most of the cases cited in this paper, the contractual term at issue was a variation of the default, to require for-cause termination or "last in, first out" (LIFO). The principle of autonomy respects the liberty of the parties to contract out of any default

\footnote{276. Provided that the employee does not elect to accept this fundamental breach as affecting repudiation.}
\footnote{278. E.g., Epstein, In Defense of Contract at Will, supra note 5 (arguing that there are two reasons why the contract at-will should be respected). For an example of a prominent proponent of the autonomy principle in contract law, see CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).}
\footnote{279. See supra note 250 and accompanying text.}
they wish to, provided there is an agreement and consideration. The rule in *Govier*, which provided no protection for those autonomous bargains already entered into, would violate the principle of autonomy. This is ironic, as the result in *Govier* is mostly buttressed by policy arguments usually seen in the context of proponents of at-will. In fact, the case runs counter to the guiding principle of autonomous dealing.

3. The Argument from Cross-Fertilization

Proponents of the at-will presumption in termination should also be comforted by the approach of the English courts to the implied term of mutual trust and confidence. The House of Lords in *Eastwood v. Magnox Electric*\(^{280}\) recently held that this does not, in any way, constrain the manner of dismissal of an employee. This is the exclusive domain of the statutory action for unfair dismissal. Although the House of Lords partly relied on an argument that, as a matter of statutory interpretation, the provisions of the Industrial Relations Act of 1971 (now contained within the Employment Rights Act of 1996, Part X) preclude any common law development in this area,\(^{281}\) the decision is founded on the rationale that dismissal is fundamentally different to the continuation of employment. Parliament has only “occupied the field” with regard to unfair dismissal.\(^{282}\)

To frame the debate in *Eastwood*, it is necessary to provide a little background. The year before, in *Johnson v. Unisys Ltd.*,\(^{283}\) the House of Lords had closed the door on the development of an action for damages for psychological harm due to the manner of dismissal under the implied term of mutual trust and confidence. They rejected the broad proposition that the implied term of mutual trust and confidence implied a term “that an employer [is obligated] to treat his employee fairly.”\(^{284}\) This was because the implied term of mutual trust and confidence does not extend to the conduct of termination.\(^{285}\) This introduced a distinction into the law of

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284. *Id.*
employment contracts that called into question how termination was to be differentiated from issues concerning termination. Given that the quantum of damages which could be claimed under statute and under the common law term of mutual trust and confidence was potentially huge, the stakes for identifying a clear distinction was high.\textsuperscript{286}

Although the facts of \textit{Eastwood} and \textit{McCabe} were difficult, Lord Nicholls held that “[i]dentifying the boundary of the ‘Johnson exclusion area’ as it has been called, is comparatively straightforward."\textsuperscript{287} Although a seemingly continuous course of conduct from disciplinary process to dismissal “may have to be chopped artificially into separate pieces,”\textsuperscript{288} the separation is held to nevertheless exist. Although it is clear that the distinction drawn in \textit{Johnson} is not particularly popular, many of the concerns relate to the low cap on damages for unfair dismissal.\textsuperscript{289}

Lord Hoffmann in \textit{Johnson} had primarily argued that the term of mutual trust and confidence “[i]n the way it has always been formulated . . . is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated.”\textsuperscript{290} He considered that, although it would be possible to imply a separate obligation to exercise the power of dismissal in good faith this was a different question, resting on different principles.\textsuperscript{291}

Even Lord Steyn, in his dissent in \textit{Johnson}, draws a distinction between hortatory principles, which can exist in conflict, and rules in application, which cannot. For example, when responding to an argument by counsel for the employers that recognition of the extension of the implied term of mutual trust and confidence would conflict with the express term providing that dismissal may be made on four weeks notice, he was unsympathetic, claiming that “they can live together.”\textsuperscript{292}

Therefore, the necessity of destroying the at-will presumption, were good faith performance to be recognized, is far from a \textit{fait accomplis}. There are considerations of both policy and principle for keeping them analytically distinct.

This discussion reaffirms the importance of recognizing the perpetual

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\textsuperscript{286} There is a “statutory cap” on the amount of damages which can be claimed under the statutory cause of action of unfair dismissal (currently approximately £55,000). However, actions under the implied term of mutual trust and confidence can run much higher.
\textsuperscript{287} \textit{Eastwood}, 3 W.L.R. at para. 27.
\textsuperscript{288} \textit{Id.} at para. 31.
\textsuperscript{289} \textit{Cf.} Barmes, \textit{Continuing Conceptual Crisis, supra} note 281.
\textsuperscript{290} \textit{Johnson} v. Unisys Ltd., [2003] 1 A.C. 518, 541.
\textsuperscript{291} \textit{Id.} at 541-42 (citing the judgment of Justice Iacobucci in \textit{Wallace} v. United Grain Growers Ltd., [1997] 152 D.L.R. 4th 1).
\textsuperscript{292} \textit{Id.} at 536.
\end{flushleft}
nature of Atiyah's inherent common law tension between hortatory principles and rule application. It also, however, reaffirms the importance of the courts being aware that this tension is always in play. Only when this is recognized can factual patterns be distinguished from each other in a principled manner.

VI. CONCLUSIONS

It is now time to pull together all of the threads in this "comparative conversation" while avoiding falling into peril similar to that of Candide. The proposition at the heart of this paper is that good faith is more useful in the employment context in both the U.S. and the U.K. than is currently recognized, particularly in the specific example of handbook variation. This seemingly simple proposition, however, encounters potential perils from many areas. Nevertheless, this paper has shown a plausible route through these challenges.

In finding a useful doctrinal route for good faith, courts are able to sidestep the vast abstract controversy over "what good faith means" by viewing it as a doctrinal tool, capable of permitting the courts to legitimate expectations of the contracting parties. Expectations are legitimated if they are within the reasonable band of interpretations and expectations, but not if they come outside those bounds and are likely to destroy the relationship of mutual trust and confidence. This formulation of good faith is captured in Scalia's judgment in Tymshare, where he holds that the implied covenant of good faith provides that "reasonable expectations" of the parties are protected. If the doctrine of good faith is seen to work ex post to legitimate expectations arising out of the employment relationship, this eliminates the necessity to form a definite view in the Summers/Burton debate as to whether good faith is an excluder or whether it protects legitimate expectations.

This view of good faith also has important practical implications for courts on both sides of the Atlantic. It is necessary to set the minds of the courts free from any temptation to treat the entire content of the contract as if it derives only from the subjective states of mind the individual parties. As mentioned in the Part I, a complete contract ex ante is at most "vanishingly rare." As subjective intent is unknowable, any content given to good faith will be that of "imputed intent" rather than actual hopes or expectations of the parties. "Conversational interpretation," in the

295. See generally DWORKIN, LAW'S EMPIRE supra note 33, Chapter 2.
sense of interpreting words to divine the true subjective "meaning" of the parties, is impossible in both the interpretation of contracts and statutory interpretation, as the text is settled at the time of formation.

This aspect of good faith explains why the English implied term of mutual trust and confidence seems initially to fail the emphatically laissez-faire imbued tests for the implication of terms into contracts. The courts, in developing the implied term of mutual trust and confidence have recognized that, as mentioned in the first section, both parties have a particularly strong interest in leaving the express terms incomplete in order to permit the employment relationship to evolve in changing circumstances. This situation naturally leads to the increased visibility of legal background norms. The invocation of "mutual trust and confidence" both conceptualizes the relationship as mutual, but also polices the edges of this relationship to exclude bad faith.

Viewing the operation of the implied term of mutual trust and confidence as an incidence of good faith also explains why in Mallone the courts could use the implied term of mutual trust and confidence as a principle to delimit an express discretion granted to the employer. Under formalist contractual orthodoxy, this strong hortatory effect should not have been possible. In fact, a large amount of the success of the implied term of mutual trust and confidence can be traced to its hortatory effect, in that it appeals to the principle of good faith as a higher justification. Many of the problems English lawyers seem to see with importing such a general concept of good faith can be allayed to large extent by much of the U.S. literature. Karl Llewellyn’s tool of situation-sensitive reasoning is particularly helpful here.

The English experience of what we have now concluded as an instance of good faith can be used to explain why and how the courts can justify regulating handbook variations in the U.S. When good faith is recognized as influencing the doctrinal framework, it is possible to build a strong case for the implication of a term at law which constrains the employer’s ability to vary unilaterally without notice. As in United Bank v. Akhtar,296 the implied obligation was to refrain from reading the mobility clause in the contract so as to allow it to deprive the employee substantially of the benefits of the rest of the contract. In the situation of handbook variation, good faith can also provide the justifying rationale for implying a term into the contract, limiting the manner in which the employer may vary a handbook provision.

The potential problem posed by any conflict between the hortatory function of good faith and the at-will presumption was faced head on in Part V of this article. In order to combat this objection, it was necessary to

consider the nature of principles and policies directly and their function within the jurisprudence of the courts. This is not in itself problematic if the court's role is seen as one as inherently in tension with the need to decide the individual case and the need to ensure coherence in the law. Yet it is recognized that it is the courts continuing duty to make its way through this treacherously difficult territory with the aid of doctrinal constructs, such as the various doctrines of contract law, in order to demarcate the permissible from the impermissible.

One of the most powerful tools at the courts' command, which is of particular importance when dealing with such a seemingly abstract doctrine as good faith, is that of situation sense. This forces us to see that it is necessary to look at disputes from both the more abstract side and from the side of the individual dispute. By doing so, both a greater understanding and coherence can be achieved. This is not to deny the inherent tensions between the specificity of the implied term and the breadth of the principle if stated as a rule. Instead, it is to recognize that, as the hortatory function of the common law and the individual rule application function are always pulling in different directions, it is useful to look at these tensions from both sides of the lens. Atiyah's analysis recognizes that one cannot live without the other. At the moment, in general, the U.S. courts tend to be more content at the hortatory end of the spectrum than the English courts (although in the case of handbook variation some of the U.S. opinions lapse into more formal hidden implicit theorizing than some of the English cases). If neither dimension is ignored, however, we can ensure that questions are considered from the abstract, at the coherence seeking analysis at the level of principle and at the level of individual situation. This brings us back to the very essence of the situation sense method. Without an appreciation of the principles behind a distinction between type-facts, no rule classification can appropriately be made. Situation sense, read in this way, is a methodology for linking the justifications for the rules while being attentive to the factual patterns to avoid over and under breadth of them in application.