JUST CAUSE FOR TRUST: HONORING THE EXPECTATION OF LOYALTY IN THE AT-WILL EMPLOYMENT RELATIONSHIP

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I. INTRODUCTION

The Eastman Kodak Company (Kodak) was one of the great industrial giants of the twentieth century. Headquartered in Rochester, New York, Kodak employed not only highly paid executives and engineers but also thousands of blue-collar workers.[1] In fact, Kodak was credited with creating "two generations of middle-class wealth in Rochester."[2] One former Rochester resident explained, "If you lived in Rochester and worked for Kodak, the expectation was that you would stay there until retirement, and receive a handsome pension thereafter."[3] Even though the working class employees were employed at will,[4] this expectation of loyalty undoubtedly inspired trust between

1. Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES: UPSHOT (Sept. 3, 2017), https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html.

2. *Id.*

3. David DiSalvo, *The Fall of Kodak: A Tale of Disruptive Technology and Bad Business*, FORBES (Oct. 2, 2011, 2:39 PM), https://www.forbes.com/sites/daviddisalvo/2011/10/02/what-i-saw-as-kodak-crumbled/ #553c89697df1 [https://perma.cc/SGP6-5BUA].

4. New York has long subscribed to the doctrine of employment at will. *See* Martin v. N.Y. Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) ("[A] general or indefinite hiring is, *prima facie*, a hiring at will . . . .") (emphasis added)).

Kodak and its employees. As a former forklift operator opined, "There were times I wasn't happy with the place . . . . But it was a great company to work for and gave me a good living for a long time."[5]

Unfortunately, Kodak is now a shell of what it once was,[6] but in its prime, Kodak earned the trust of its employees through a genuine, albeit implied, commitment to lifetime employment.[7] By contrast, a typical at-will employee enjoys no such guarantee or commitment to permanence. Perhaps not coincidentally, and despite a robust legal regime in the United States designed to protect employees from arbitrary employment actions, a significant number of employees do not trust their employers. A 2016 survey reported in the *Harvard Business Review* found that only forty-six percent of U.S. employees have a high amount of trust in their employers.[8] The study reported that "too much employee turnover" was one of the major factors contributing to this lack of trust.[9] Indeed, empirical research reveals that employees are less trusting of their employer when the employer does not offer adequate job security.[10]

Employees who trust their employer are generally more productive, effective, and cooperative.[11] Employers thus have a strong incentive to foster trust in their employees, but the at-will employment doctrine—the default employee-employer relationship in the absence of an employment contract for a specified duration—may undermine trust in the employment relationship. Despite extensive scholarship on the doctrine of at-will employment, an important question remains unanswered: how (if at all) can the law encourage trust between at-will employees and their employers? Importantly, this Note does not call for a complete end to at-will employment in favor of a universal just cause system; there are still many benefits that both parties can derive from the at-will default, and it may, in fact, be the

5. Irwin, *supra* note 1.

6. Due in large part because of the failure to keep pace with technology, Kodak filed a bankruptcy petition under Chapter 11 in January 2012. Tendayi Viki, *On the Fifth Anniversary of Kodak's Bankruptcy, How Can Large Companies Sustain Innovation?*, FORBES (Jan. 19, 2017, 3:28 AM), https://www.forbes.com/sites/tendayiviki/2017/01/19/on-the-fifth-anniversary-of-kodaks-bankruptcy-how-can-large-companies-sustain-innovation/#592e67fb6280 [https://perma.cc/N26Y-QUU2].

7. Thomas A. Kochan, *Rebuilding the Social Contract at Work: Lessons from Leading Cases* 4 (Inst. for Work and Emp't Research, Working Paper No. WP09, 1999), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.544.1182&rep=rep1&type=pdf [https://perma.cc/P8NX-MSNA].

8. Karyn Twaronite, *A Global Survey on the Ambiguous State of Employee Trust*, HARV. BUS. REV. (July 22, 2016), https://hbr.org/2016/07/a-global-survey-on-the-ambiguous-state-of-employee-trust [https://perma.cc/7SAG-UCT6].

9. *Id.*

10. *See* discussion *infra* Section III.B.

11. *See* discussion *infra* Section III.B.

proper default in a variety of situations. But the law should do more to honor the expectations of employees in this otherwise employer-dominated employment relationship.

This Note proposes that the at-will presumption should remain the initial default, but when an employee forms a legitimate expectation of loyalty, the law should no longer consider the employment relationship presumptively at will. As an employment relationship is essentially contractual, the law should honor the expectations of the parties as the contract evolves. To determine whether an employee has a legitimate expectation of loyalty, courts should examine the following factors: (1) the employee's record of service to the employer; (2) the employer's investment in the employee; and (3) the length of the employment relationship. And if a court determines that an employee formed an expectation of loyalty during the course of employment, the employment presumption should shift to a just cause standard. This solution will not only allow both the employee and the employer to benefit from the advantages of at-will employment during the initial stages of the employment relationship, but it will also serve to enhance job security, which will consequently promote trust.

In support of this recommendation, this Note is further divided into four parts. Part II presents an overview of the employment at-will doctrine and explores the general relationship between trust and law. Part III analyzes at-will employment in greater depth. First, Part III examines the concept of employment as a contractual agreement and considers the effect of employees' expectations. Part III then analyzes trust between employees and employers in the at-will relationship. In addition, Part III explores proposals that scholars have previously offered to reform the at-will system. After establishing that none of the previous ideas adequately encourage trust, Part IV proposes that although at-will employment should remain the default presumption at the start of an employment relationship, the law should honor employees' expectations and elevate certain employee-employer relationships above the at-will presumption when an expectation of loyalty arises. Additionally, Part IV presents the criteria that a court should examine to determine whether an employee holds a legitimate expectation of loyalty. Finally, Part IV confronts counterarguments to the proposed solution. Part V offers a conclusion.

II. BACKGROUND

Part II presents the two foundational concepts of this Note. First, this Part explores the doctrine of employment at will as well as the statutory and common law exceptions to the doctrine. Second, this Part examines the relationship between trust and law.

A. The Employment At-Will Doctrine

Employment at will is the default rule in the United States for an employee-employer relationship in the absence of an express employment contract for a specified duration of time.[12] An employment agreement that does not state a specified term of employment and does not limit an employer's ability to terminate an employee is presumptively an at-will agreement.[13] Unless a limitation is imposed by statute, common law, or contract, either party in an at-will employment relationship may terminate the relationship at any time, with or without cause.[14] The common articulation of the doctrine is that an at-will employee can be terminated "for good cause, bad cause, or no cause at all."[15] Although this articulation appears largely one-sided, the at-will employee similarly enjoys the freedom to sever the employment relationship for any reason and at any time. Scholars have roundly criticized the doctrine in calling for change to the default presumption,[16] but courts continue to adhere to the basic principle that the employment relationship is presumptively at will.[17] To be certain, this presumption is not conclusive and may be overcome by

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12. RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW INST. 2015). At-will employment is the default rule in forty-nine states and the District of Columbia. *Id.* § 2.01 cmt. b. Montana is the only state that has statutorily modified the default rule to require "good cause" terminations. *See* MONT. CODE ANN. § 39-2-904(1)(b) (2017). This Note will not specifically address Montana law, other than to acknowledge the exception.

13. RESTATEMENT OF EMP'T LAW § 2.01 cmt. b; *see also* McNichols v. Dep't of Transp., 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002) ("An at-will employee is defined as one whose employment is not governed by a written contract for a specific term and who is terminable at the will of either the employer or the employee.").

14. RESTATEMENT OF EMP'T LAW § 2.01.

15. *E.g.*, Lauture v. Int'l Bus. Machs. Corp., 216 F.3d 258, 263 (2d Cir. 2000) ("[A]n at-will employee can be fired for good cause, bad cause, or no cause at all . . . .").

16. *E.g.*, Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4-5 (2010) [hereinafter Arnow-Richman, *Just Notice*] ("To be sure, for the last fifty years, employment law scholars have evinced a near consensus that employment at will . . . ought to be abolished."). *See* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000) ("The future of employment-at-will . . . is that it has no future.").

17. *See, e.g.*, Hoskins v. Howard Univ., 839 F. Supp. 2d 268, 281 (D.D.C. 2012) ("It has long been settled in the District of Columbia that an employer may discharge an at-will employee at any time and for any reason, or for no reason at all." (quoting Adams v. George W. Cochran & Co., 597 A.2d 28, 30 (D.C. Cir. 1991)); Burnett v. E. Baton Rouge Par. Sch. Bd., 99 So. 3d 54, 59 (La. Ct. App. 2012) ("Generally, an employer is at liberty to dismiss an at-will employee at any time for any reason without incurring liability for the discharge. In fact, there need be no reason at all for the discharge." (citations omitted)); Tex. Farm Bureau Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 608 (Tex. 2002) ("[A]bsent a contract, the relationship between an employer and an employee is 'at will,' meaning that . . . either party may terminate the employment relationship for any reason or no reason at all."); Preston v. Marathon Oil Co., 277 P.3d 81, 85 (Wyo. 2012) ("At-will employment may be terminated by either the employer or the employee at any time for any or no reason, with no legal consequence.").

evidence demonstrating that the parties intended to contract for a definite period of employment.[18] Still, the burden falls squarely on the employee to rebut the at-will presumption, and as explained in Section III.A, overcoming this presumption is, without question, a "heavy burden."[19]

The at-will doctrine has been a foundational principle in U.S. employment law since the late 1800s.[20] Some scholars argue, however, that the doctrine arose from a misstatement of the law.[21] Indeed, U.S. law was "rather confused" with respect to employment agreements of indefinite duration throughout the 1800s.[22] When faced with such an agreement, "[d]ifferent courts might rule that an identical, indefinite contract was either presumptively annual, terminable at will or terminable at the end of a payment period."[23] Then, in 1877, Horace Wood authored a treatise in an attempt to alleviate the confusion in the law.[24] Wood wrote: "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."[25] Eighteen years later, the New York Court of Appeals adopted this language verbatim in *Martin v. New York Life Insurance Co.*,[26] and by 1930, the at-will employment doctrine was firmly embedded in U.S. law.[27] Whether Wood's treatise was indeed a misstatement of the law is entirely irrelevant now because (with the exception of Montana[28]) the at-will employment doctrine has with-

18. Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1197 (Pa. Super. Ct. 1987).

19. *See* discussion *infra* Section III.A; *see also* Howard v. Wolff Broad. Corp., 611 So. 2d 307, 311 (Ala. 1992) ("[E]mployees . . . bear a heavy burden of proof to establish that an employment relationship is other that 'at will.' ").

20. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67-68 (2000).

21. *Id.* at 67 ("Wood's Rule, by imposing a blanket presumption that all indefinite hirings were at will, misstated existing law."). *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976) (arguing that the employment at-will rule "was mostly inconsistent with contract doctrine and classical master and servant law").

22. Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 109 (1982).

23. *Id.*

24. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (William S. Hein & Co. 1981) (1877).

25. *Id.*

26. 42 N.E. 416, 417 (N.Y. 1895).

27. *See* Summers, *supra* note 20 at 67-68 ("Because of the prestige of the New York Court of Appeals, this decision gave credibility and dominant authority to the employment at will doctrine . . . .").

28. *See supra* note 12 and accompanying text.

stood the test of time and remains the default rule in the United States.

Theoretically, employees can derive a variety of benefits from the at-will relationship. To begin, at-will employment recognizes the venerable notion that an employee is the "full owner of his labor" and honors freedom of contract.[29] The at-will default allows for a prospective employee to bargain for the terms and conditions of employment that he or she considers acceptable.[30] Consequently, employees will generally receive higher wages under an at-will employment agreement.[31] Moreover, employees may even value the freedom to move from one job to the next without any restrictions.

In addition, at-will employment constrains the potential for an employer's abuse of power.[32] If an employer makes excessive or unfair demands on its employees, the at-will employee is free to sever, or threaten to sever, the employment relationship and walk away without any legal repercussions.[33] In contrast, a fixed-period employment arrangement "invites abuse by the employer" because the employer is "free to demand of the employee whatever services he wants for some fixed period of time."[34] Therefore, at-will employment may serve to limit the employer's potential for abuse of power.

However, the most significant drawback to the at-will doctrine may be the fact that an at-will employee can be terminated at the whim of the employer, at any time and for any reason. Indeed, employees in the United States are more vulnerable to arbitrary termination than in any other developed nation.[35] In an effort to remedy this vulnerability, Congress has enacted numerous statutes to prevent discriminatory employment actions and the common law has carved out exceptions to the at-will default.

1. Statutory Exceptions to Employment At Will

Numerous statutes offer some protection against employers that are otherwise free to terminate at-will employees for any reason. At

29. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953-55 (1984).

30. *Id.* at 955.

31. Martin Neil Baily, *Wages and Employment Under Uncertain Demand*, 41 REV. ECON. STUD. 37, 38 (1974) (explaining that an employer "must pay a higher wage if there is some positive probability of unemployment than it would if employment were guaranteed").

32. Epstein, *supra* note 29, at 966.

33. *Id.* at 966-67.

34. *Id.* at 966.

35. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 160 (2005).

the federal level, Congress has enacted a number of statutes designed to protect employees from discriminatory employment actions.[36] The most fundamental statutory exception to the at-will doctrine is the Civil Rights Act of 1964, which prohibits an employer from terminating (or otherwise discriminating against) an employee on the basis of race, color, religion, sex, or national origin.[37] In addition, the Age Discrimination in Employment Act of 1967 prohibits employers from discharging an employee because of age.[38] Similarly, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 prevent employers from discriminating against employees with disabilities.[39] And more recently, the Genetic Information Nondiscrimination Act of 2008 prohibits the use of genetic testing to influence employment decisions.[40] Although this is not an exhaustive list of the statutory protections afforded to employees in an at-will employment relationship, these examples illustrate that an employer's ability to terminate an at-will employee is not without limitation.

2. Common Law Exceptions to Employment At Will

In addition to statutory protections, the common law has carved out exceptions to the at-will employment doctrine. The three main common law exceptions are: (1) the public policy exception; (2) the implied contract exception; and (3) the covenant of good faith and fair dealing exception.[41] These exceptions address employee terminations that technically comply with the at-will employment doctrine but seem inappropriate or unjust.[42] The recognition of these exceptions varies from state to state, and only six states recognize all three exceptions: Alaska, California, Idaho, Nevada, Utah, and Wyoming.[43] Yet four states do not recognize *any* of these three exceptions: Florida, Georgia, Louisiana, and Rhode Island.[44] The overwhelming ma-

36. In addition to federal legislation, every state has adopted measures to prohibit employers from engaging in discriminatory termination behaviors. Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 555 n.20 (2010).

37. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012).

38. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) (2012).

39. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-718 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2012).

40. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, and 42 U.S.C. (2012)).

41. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 4, https://www.bls.gov/opub/mlr/2001/01/art1full.pdf [https://perma.cc/RJB4-MMK2].

42. *Id.* at 4.

43. *Id.*

44. *Id.*

jority of states thus accept at least one common law exception to the at-will doctrine.

The most recognized common law exception to at-will employment prevents an employer from terminating an employee for reasons that violate well-established public policy of the state.[45] California created the first public policy exception in *Petermann v. International Brotherhood of Teamsters*.[46] In *Petermann*, the plaintiff was terminated by his employer for giving truthful and correct testimony when his employer instructed him to make false and untrue statements.[47] The California Court of Appeal conceded that because the plaintiff's employment contract did not specify a term of employment, the employment relationship generally would be "terminable at the will of either party for any reason whatsoever."[48] The court, however, charted new territory by announcing that the right to discharge an employee under such an employment relationship may be limited by public policy considerations.[49] Still, the *Petermann* court acknowledged that " 'public policy' is inherently not subject to a precise definition,"[50] and courts have struggled to both define public policy and determine when an employee's termination violates public policy.[51]

The implied contract exception applies when an employer and an employee form an implied contract despite the lack of an express, written agreement detailing the employment relationship.[52] Under this exception, an employer's oral or written representations about job security or procedural actions may create an implied contract.[53]

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45. *See* Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1593 (1994). Specifically, forty-three states recognize the public policy exception, making it the most widely accepted exception to at-will employment. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980) (recognizing as contrary to public policy an employee's termination for reporting employer's violations of a food safety statute); DeRose v. Putnam Mgmt. Co., 496 N.E.2d 428, 431 (Mass. 1986) ("[A]n at-will employee has a cause of action for wrongful discharge if the discharge is contrary to public policy"); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. Ct. App. 1976) (finding that a termination in retaliation for filing a workmen's compensation claim is contrary to public policy). *But see* DeMarco v. Publix Super Mkts., Inc., 384 So. 2d 1253, 1253-54 (Fla. 1980) (declining to recognize an exception to the at-will employment doctrine when employee was terminated for refusing to withdraw a lawsuit against employer); Troy v. Interfinancial, Inc., 320 S.E.2d 872, 878-79 (Ga. Ct. App. 1984) (rejecting an exception to the at-will presumption when employee was terminated for refusing to commit perjury).

46. 344 P.2d 25, 27 (Cal. Ct. App. 1959).

47. *Id.* at 26.

48. *Id.* at 27 (citations omitted).

49. *Id.*

50. *Id.*

51. Swift, *supra* note 36, at 557.

52. Muhl, *supra* note 41, at 7.

53. *Id.*

Accordingly, it logically follows that a termination that does not comport with the employer's oral or written representations may constitute a breach of the employment contract. A common situation in which this exception arises involves employee handbooks that state employees can only be terminated under specified circumstances, or "for cause."[54] In practice, however, this exception affords little protection to employees because employers can escape contractual liability by simply including a disclaimer provision in employee handbooks,[55] and employers are generally not bound by oral representations unless they "result from specific bargaining over job security."[56]

The covenant of good faith and fair dealing exception is the "most significant departure" from the at-will employment doctrine.[57] Under this exception, an employer's termination decisions are subject to a just cause standard, and terminations made in "bad faith" or "motivated by malice" are prohibited.[58] For example, in *K Mart Corp. v. Ponsock*, the Supreme Court of Nevada found that an employee's termination was a "bad faith discharge" because K Mart terminated the employee to avoid paying his retirement benefits.[59] But only a small minority of states recognize this exception,[60] and those that have applied the exception have done so quite narrowly.[61] Instead of adopting the express obligation of good faith and fair dealing included in the *Restatement (Second) of Contracts*,[62] courts have only invoked the good faith and fair dealing exception in the at-will employment context when an employer terminates an employee to avoid paying the employee's deferred compensation.[63] Indeed, no state "has

54. *E.g.*, Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 442 (N.Y. 1982).

55. Summers, *supra* note 20, at 75.

56. Sally C. Gertz, *At-Will Employment: Origins, Applications, Exceptions and Expansions in the Public Service*, 31 INT'L J. PUB. ADMIN. 489, 495 (2008).

57. SHAWE & ROSENTHAL, EMPLOYMENT LAW DESKBOOK § 16.03 (2017).

58. *Id.*

59. 732 P.2d 1364, 1369 (Nev. 1987).

60. *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/7VEX-YY4E] (last visited Jan. 1, 2018); *see also* Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1259 (1992) (explaining that only "[f]ourteen states have allowed an obligation of good faith in some form to restrict the employer's at will rights").

61. Rachel Arnow-Richman, *Modifying at-Will Employment Contracts*, 57 B.C. L. REV. 427, 470 (2016) [hereinafter Arnow-Richman, *Modifying*].

62. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981).

63. Arnow-Richman, *Modifying*, *supra* note 61, at 470; *see also* Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasona-*

adopted the broad definitions of good faith . . . in the context of employment at will."[64]

Despite the numerous federal statutes designed to prevent an employer from terminating an at-will employee for discriminatory reasons, and despite the common law exceptions that courts have carved out to rectify unjust terminations, employees in the at-will relationship remain vulnerable to no cause, or arbitrary, terminations. Although essential to prevent discrimination, the statutory exceptions afford no protection for an arbitrary termination action. Moreover, the common law exceptions "have been so grudgingly applied by most courts" and amount to "little more than paper shields" against arbitrary termination actions.[65]

Presumably, the law offers these exceptions to curtail opportunistic employer behavior. Absent evidence of bad faith, however, the exceptions offer little security to an at-will employee. But instead of immediately falling in line with scholars calling for a complete overhaul of the at-will employment doctrine,[66] an understanding of the general relationship between trust and law is necessary to arrive at a more informed solution.

B. Trust and Law

In *A Cognitive Theory of Trust*, Professors Claire Hill and Erin O'Hara aptly define trust as "a state of mind that enables its possessor to be willing to make herself vulnerable to another—that is, to rely on another despite a positive risk that the other will act in a way that can harm the truster."[67] Indeed, trust involves an exposure to opportunistic behavior, but trust also involves confidence: confidence that the trusted party will not act in a way to harm the trusting party, or confidence that the trusted party will adhere to certain values that will lead the trusting party "to act in the way the trusting person desires."[68] In short, a trusting party is vulnerable to opportunistic behavior but believes that the trusted party will not behave opportunistically.

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ble Notice of Termination, 66 FLA. L. REV. 1513, 1559-60 (2014) ("The only factual context in which good faith claims by employees have enjoyed a modicum of success has been where the plaintiff's termination results in the deprivation of a promised benefit.").

64. Arnow-Richman, *Modifying*, *supra* note 61, at 470.

65. Summers, *supra* note 20, at 77.

66. *See infra* note 173 and accompanying text.

67. Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1724 (2006).

68. *Id.* at 1725.

Certain relationships are prone to undertrust, "where the risks of trust seem great," or in other words, where vulnerability to opportunistic behavior is too great.[69] In such relationships, the law should seek to promote trust because the parties are unlikely "to gravitate toward optimal trust levels on their own."[70] Yet the goal should not simply be to blindly maximize trust, but rather to *optimize* trust, and optimizing trust involves striking the appropriate balance of trust and distrust.[71] Legal scholars traditionally assumed trust and distrust exist on a "unidimensional continuum"; however, under an alternative view, both trust and distrust can simultaneously exist.[72] And this condition of simultaneous trust and distrust is the most prevalent for "working relationships in modern organizations."[73]

But as a preliminary matter, scholars disagree on the ability of law to promote trust. For example, Professor Larry Ribstein was of the belief that law could do nothing to encourage trust.[74] In distinguishing between trust and mere reliance, Professor Ribstein acknowledged that "[t]he law can clearly produce a decision to *rely*," but he refused to accept that law had the ability to effect *trust*.[75] Moreover, Professor Ribstein argued that "law actually may undermine trust."[76] He theorized that the imposition of legal duties designed to encourage trust would give the parties an opportunity "to get more than they bargained for."[77] The additional duties intended to "reduce the parties' vulnerability to the risk of disappointment" would have the adverse effect of increasing their "vulnerability to op-

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69. *Id.* at 1795.

70. *Id.* at 1750-51.

71. *Id.* at 1720.

72. *Id.* at 1730.

73. Roy J. Lewicki et al., *Trust and Distrust: New Relationships and Realities*, 23 ACAD. MGMT. REV. 438, 447 (1998).

74. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 576 (2001).

75. *Id.* at 556. In *Law v. Trust*, Professor Ribstein used the employee-employer relationship as an example of a relationship in which "[t]he disposition to trust is particularly important." *Id.* at 561. He wrote:

> If . . . workers are disposed to trust, then there is no need for law. Law may dispose one party to *rely on* another because the other is subject to legal constraints. But this has nothing to do with the distinct concept of *trust*. . . . Legal coercion might be said to cause a disposition to trust that is based on one's favorable experiences in relying on others. . . . But legal coercion . . . also reduces their ability to learn how others will act when they are *not* subject to legal constraints.

Id. at 562-63.

76. *Id.* at 576.

77. *Id.*

portunistic litigation."[78] In addition, Professor Ribstein believed that law would inhibit the "creation of trust."[79] Like Professors Hill and O'Hara, he understood that trust requires vulnerability, and "[l]egal coercion of faithful behavior" would eliminate vulnerability and thereby prevent the development of trust.[80]

Many scholars, however, remain optimistic in the law's ability to foster trust.[81] Trust involves exposing oneself to a risk of opportunistic behavior, and as Professors Hill and O'Hara explain, "an individual has a maximum level of vulnerability that she is willing to accept, and she is unwilling to make herself more vulnerable than that."[82] In other words, when the risk of opportunistic behavior is too great, an individual simply will not trust. But if an individual perceives the risk to be below the "maximum vulnerability level," then the individual will be more inclined to trust.[83] Indeed, people are more likely to trust when the risk is minimized.[84] Law can therefore promote trust by sufficiently reducing the risk of trusting to a level that an individual is willing to accept.

Importantly, law should not entirely eliminate the risk of opportunistic behavior when seeking to enhance trust. Professors Hill and O'Hara argue that individuals should shoulder a "co-pay" to trusting: "The optimal regime is likely one akin to a 'co-pay' arrangement, whereby people are largely protected from opportunism but bear some modest portion of the costs themselves."[85] By bearing a cost or co-pay to trusting, people are largely protected from opportunistic behavior; however, vulnerability is not eliminated altogether.[86] Because they remain vulnerable to a risk of opportunistic behavior, people must still gather and process trust-relevant information and make assessments as to whether trust is appropriate.[87] In essence, law can reduce vulnerability enough to encourage interaction, allowing people to acquire the necessary information to determine whether

78. *Id.*

79. *Id.* at 576-85.

80. *Id.* at 580.

81. Hill & O'Hara, *supra* note 67, at 1752; *see also* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1735 (2001); Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1457 (2005).

82. Hill & O'Hara, *supra* note 67, at 1752.

83. *Id.*

84. *Id.*

85. *Id.* at 1753.

86. *Id.*

87. *Id.*

trust is warranted.[88] Therefore, by not entirely eliminating vulnerability, it remains possible for trust—as opposed to mere reliance—to develop.

III. ANALYZING THE AT-WILL DOCTRINE: CONTRACTUAL PRINCIPLES, TRUST, AND PREVIOUSLY PROPOSED REFORMS

Part III begins with an analysis of the employment relationship as a contractual agreement and highlights the importance of expectations in contract law. After establishing the benefits of trust between employees and their employers, this Part endeavors to explain the possible reasons for the lack of trust in the relationship. This Part then considers arguments that scholars have previously offered to reform the at-will system. Ultimately, this Part concludes that the previously suggested reforms, while not without merit, would not sufficiently promote an optimal level of trust in the employment relationship.

A. Contractual Principles Applicable to Employment Law

At its most fundamental level, an employment relationship is a contractual agreement between employer and employee: the employer promises to pay the employee in exchange for the employee's work.[89] To be certain, employment agreements are treated just as any other contract.[90] The at-will employment relationship, even though terminable for any reason at any time by either party, is a contractual agreement as well.[91]

The *Restatement of Employment Law* embraces the contractual nature of the at-will employment relationship and recognizes that an "employment relationship is not terminable at will by an employer if . . . other established principles recognized in the general

88. *Id.*

89. 19 WILLISTON ON CONTRACTS § 54:1 (4th ed. 2017); *see also* RESTATEMENT OF EMP'T LAW § 2.01 cmt. b (AM. LAW INST. 2015) ("At its core, employment is a contractual relationship.").

90. *E.g.*, Tinder v. Pinkerton Sec., 305 F.3d 728, 734 (7th Cir. 2002) ("Wisconsin courts treat contracts concerning employment like any other contract."); *see also* Cuellar-Aguilar v. Deggeller Attractions, Inc., 812 F.3d 614, 619 (8th Cir. 2015) ("Under Arkansas law, '[t]he [employment] relationship' . . . 'is contractual in nature.' " (alterations in original) (first quoting ConAgra Foods, Inc. v. Draper, 276 S.W.3d 244, 249 (Ark. 2008); then quoting Turner v. Ark. Ins. Dep't, 297 F.3d 751, 756 (8th Cir. 2002))); McInerney v. Charter Golf, Inc., 680 N.E.2d 1347, 1349 (Ill. 1997) ("As with any contract, the terms of an employment contract must be clear and definite and the contract must be supported by consideration." (citations omitted)).

91. Richard Harrison Winters, Note, *Employee Handbooks and Employment-at-Will Contracts*, 1985 DUKE L.J. 196, 197; *see also* Darlington v. Gen. Elec., 504 A.2d 306, 309 (Pa. Super. Ct. 1986) ("Every employment relationship is also a contractual relationship.").

law of contracts limit termination of employment."[92] The most fundamental principle of contract law is to honor the expectations of the parties to a contract.[93] Indeed, "[r]easonable expectations permeate contract law."[94] Much scholarship has been written on the subject of reasonable expectations, and this Note will proceed with a brief definition of the concept. First, expectations are the beliefs held by the parties to a contract with respect to the "understandings, promises, and obligations" in fulfilling the bargained-for exchange.[95] They can arise from an express promise, or they may be implied from "words, conduct, or setting."[96] The concept of expectations thus involves a "subjective and probabilistic" anticipation of future events.[97]

Reasonableness, on the other hand, is a much more amorphous concept.[98] The concept of reasonableness "is an expression of . . . customs and mores that are themselves complex, variable with time and place, inconsistent and contradictory."[99] Reasonableness is thus highly contextual, but context is only the first step in the analysis.[100] To determine whether an expectation is reasonable, "the court filters the context through norms to reach a conclusion about reasonableness."[101] Norms defining reasonableness may arise from law, professional standards, or societal values.[102] Despite contract law's emphasis on ascertaining the "reasonable expectations" of the parties to a contract, courts appear to place greater emphasis on the "expectations" of the parties than on the "reasonableness" analysis.[103]

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92. RESTATEMENT OF EMP'T LAW § 2.02(e).

93. *See* Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1467 (1989) ("[C]ourts construing contracts are always attempting to satisfy 'reasonable expectations.' "); *see also* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.1 (Joseph M. Perillo ed., rev. ed. 1993). The title of this section—the first section of this treatise—reads: "The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises." *Id.*

94. Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525, 537 (2014).

95. *Id.* at 535.

96. *Id.*

97. Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 24 (1997).

98. *See* 1 CORBIN, *supra* note 93, § 1.1 ("Reasonableness is no more absolute in character than is justice or morality.").

99. *Id.*

100. Feinman, *supra* note 94, at 535-36.

101. *Id.* at 536.

102. *Id.*; *see also* Kuklin, *supra* note 97, at 24 ("[T]he word 'reasonable' denotes an objective and normative aspect.").

103. Kuklin, *supra* note 97, at 24. ("In contract law . . . 'expectations' appear to be emphasized, not 'reasonable,' since this topic relates to consensual matters between individuals in which the state's interest is primarily to implement private preferences. If the pri-

But courts have been quite reluctant to supplant the at-will presumption based on an employee's expectation of loyalty. For example, in *Skagerberg v. Blandin Paper Co.*, the court applied a bright-line version of the at-will employment rule and refused to consider the circumstances of the employment agreement.[104] The plaintiff-employee was a consulting engineer who was sought after for employment as a superintendent and engineer by the defendant-employer.[105] At the same time, the plaintiff was also negotiating with a major university for a position as an associate professor.[106] After the university offered him the position, the plaintiff approached the defendant to discuss his employment options.[107] The defendant agreed to give him "permanent employment" at a specified monthly salary if he would reject the university's offer, give up his consulting business, move to the defendant's location, and purchase the departing superintendent's house.[108] The plaintiff agreed to these terms and accepted the defendant's offer.[109] Two years later, the defendant terminated the plaintiff, and the plaintiff brought suit, alleging that his employer "wrongfully, unlawfully and willfully" terminated the employment relationship.[110]

The Minnesota Supreme Court held that the plaintiff was an at-will employee and thus found that the plaintiff's claims had no merit.[111] The court stated that by agreeing to "permanent employment," the parties were merely agreeing to an indefinite term of employment.[112] The court further explained that an indefinite term of employment was employment at will.[113] Without evaluating the facts of the employment arrangement or the expectations of the parties in forming the employment agreement, the court mechanically applied the employment at-will rule to find in favor of the employer.[114]

Similarly, in *Ross v. Montour Railroad Co.*, the court determined that the plaintiff failed to overcome the at-will presumption.[115] In

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vate preferences are considered unreasonable by outside observers, to a large degree, so be it.")

104. 266 N.W. 872, 873-78 (Minn. 1936).
105. *Id.* at 872-73.
106. *Id.* at 872.
107. *Id.* at 873.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 876-78.
112. *Id.* at 873-74.
113. *Id.*
114. *Id.*
115. 516 A.2d 29, 31-32 (Pa. Super. Ct. 1986).

Ross, the plaintiff was a "productive and competent" employee who worked in the defendant's employ for twenty-two years.[116] He began as a mechanic and earned several promotions during his career.[117] Prior to the end of the employment relationship, the defendant promoted the plaintiff to assistant superintendent, gave him a $3,000 raise, and promised that the position of superintendent would be his in three to five months.[118] The defendant, however, never promoted the plaintiff to this promised position. The defendant experienced a downturn in business, and the plaintiff was " 'bumped' back to a position as machinist-welder" shortly before his employment ended.[119]

In considering whether the employment relationship was at will, the court stated that "[d]efiniteness is required to overcome the at-will presumption."[120] The court reasoned that the plaintiff's expectations of continued employment were "vague and conclusary [sic] contentions" that did not reach the requisite level of "definiteness" necessary to rebut the at-will presumption.[121] Instead, the court held firm in its determination that the employer never intended the relationship to move beyond the at-will default.[122]

Likewise, in *Yeager v. Harrah's Club, Inc.*, the court determined that the plaintiff-employee failed to rebut the at-will presumption.[123] In this case, the plaintiff was terminated after twenty-one years of continued service to his employer.[124] He began his employment as a cashier and worked his way up the ranks to become the assistant general manager of operations.[125] Despite many oral assurances that he would remain employed until his retirement, the plaintiff was terminated when his employer eliminated his position.[126] Two years after his termination, the plaintiff filed suit against his former employer in Nevada state court. The trial court granted summary judgment in favor of the employer, finding that the plaintiff failed to overcome the at-will presumption, and the Supreme Court of Nevada affirmed.[127]

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116. *Id.* at 30.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 32.
121. *Id.*
122. *Id.*
123. 897 P.2d 1093, 1094 (Nev. 1995).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1098.

The court found that the only evidence to rebut the at-will presumption came in the form of the plaintiff's "uncorroborated assertions" that the employer made oral assurances of long-term employment.[128] The court further reasoned that the absence of corroborating evidence indicating that the employer intended to enter into a long-term agreement with the plaintiff weighed in favor of the employer.[129] The dissent, however, offered a sharp criticism of the majority opinion, explaining that a "contract of continued employment" was well-established by the plaintiff.[130] According to the dissent, the majority placed "an unprecedented and unwarranted impediment" on employees who have been wrongfully terminated.[131] Moreover, the corroboration requirement, in the dissent's estimation, gave an "undue advantage to employers and treat[ed] employees in an unfair and discriminatory way."[132]

As this sampling of cases illustrate, courts are reluctant to supplant the at-will presumption despite the employees' legitimate expectations of loyalty. Perhaps the demonstrated unwillingness to honor this expectation contributes to the lack of trust between at-will employees and their employers, but it likely does not provide the entire picture. The next Section explores trust in the at-will employment relationship in greater depth.

B. Trust in the At-Will Employment Relationship

Trust is essential to the employee-employer relationship because it is directly proportional to employee effectiveness.[133] When employees trust their employer, productivity increases, along with revenue.[134] Perhaps more significantly, a lack of trust negatively affects employee communication (in both quantity and quality) and cooperation.[135] In addition, a lack of trust produces a decline in problem-solving and overall performance.[136] Simply put, trusting employees are better employees, and employers that inspire trust in their em-

128. *Id.* at 1095.

129. *Id.* at 1096.

130. *Id.* at 1099 (Springer, J., dissenting).

131. *Id.* at 1098.

132. *Id.* at 1101.

133. Bird, *supra* note 35, at 169.

134. Sue Bingham, *If Employees Don't Trust You, It's Up to You to Fix It*, HARV. BUS. REV. (Jan. 2, 2017), https://hbr.org/2017/01/if-employees-dont-trust-you-its-up-to-you-to-fix-it [https://perma.cc/FY5G-8ES6].

135. Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORGANIZATIONAL BEHAV. 245, 255-56 (1994).

136. *Id.* at 256.

ployees have a competitive advantage over those that do not.[137] Accordingly, employers should have a strong interest in promoting a trusting relationship with their employees. However, less than half of employees place a high amount of trust in their employers,[138] and as explained below, the at-will employment relationship is plagued by undertrust.[139]

Interestingly, research suggests that at-will employees do not fully understand the ramifications of employment at will.[140] In one survey of at-will employees, eighty-three percent of respondents believed that it was unlawful for an employer to terminate an employee for no reason.[141] But as stated above, the ability for an employer to terminate an employee for "good cause, bad cause, or no cause at all" is the essence of at-will employment.[142] Perhaps ignorance is indeed bliss because employees may likely be "inordinately unsettled and demoralized if they knew the cold hard truth of at-will employment."[143] Still, this fundamental misunderstanding of the default employment presumption is troubling, and as discussed below, it may account for the low levels of trust that employees have in their employers.

One scholar explains that even though employees may believe it is unlawful for an employer to terminate an employee without cause, it does not necessarily follow that employees believe their employers will adhere to the just cause standard.[144] Instead, "[e]mployees may believe that employers act illegally and get away with it—either because they can obscure the truth and manufacture a valid reason for discharge, or because legal remedies that exist in principle are unavailable or inadequate in practice."[145] This explanation shows that employees do not trust their employers to honor the job security that they believe the law affords them.

But assume that employees fully understand the nature of at-will employment. In this scenario, employees realize the ability of their

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137. Hill & O'Hara, *supra* note 67, at 1719; *see also* John Cook & Toby Wall, *New Work Attitude Measures of Trust, Organizational Commitment and Personal Need Non-Fulfillment*, 53 J. OCCUPATIONAL PSYCHOL. 39, 39 (1980) ("[T]rust between individuals and groups within an organization is a highly important ingredient in the long-term stability of the organization and the well-being of its members.").

138. *See supra* note 8 and accompanying text.

139. For a discussion of relationships characterized by undertrust, see Hill & O'Hara, *supra* note 67.

140. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, And Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 8-9 (2002).

141. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 119 ex.6.1 (1999).

142. *See* discussion *supra* Section II.A.

143. Estlund, *supra* note 140, at 17-18.

144. *Id.* at 15.

145. *Id.*

employer to make terminations without cause. They understand that job security is simply not available in an at-will employment relationship. Although the employee's at-will status might be the result of a negotiated employment agreement, job security remains "the most important factor in the life of a worker."[146] As explained below, job security is a major factor in promoting trust in the employment relationship.

A lack of job security, or a lack of trust in employers to honor job security (even if the belief in job security is mistakenly held), diminishes trust in the employment relationship, and the reverse is also true: job security encourages trust.[147] An employer's willingness to take measures to make its employees feel secure in their jobs is "an outward extension of an organization's commitment to and trust in its employees."[148] Consequently, employees who believe that they enjoy stability and security in their position "will reciprocate with high trust."[149] Employees are, in fact, more inclined to trust their employer when the employer provides "an adequate level of job security."[150] It thus follows that when employees are not confident in the security of their jobs, they will be less trusting of their employers than if they were assured some modicum of job security.

To be certain, at-will employment creates an imbalance of power that places employees in a disadvantaged position relative to their employers.[151] Proponents of the employment at-will system highlight the reciprocal nature of the relationship, but it is at best only nominally reciprocal because most employees generally value their jobs at a level far greater than employers value their employees' services on an individual level. Employees find value in their jobs "not only from wages and benefits but from the satisfaction of needs for security, sociability, self-respect, and meaning in life."[152] Thus, employees un-

146. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 481 n.64 (1980).

147. *See* Rosalind Searle et al., *Trust in the Employer: The Role of High-Involvement Work Practices and Procedural Justice in European Organizations*, 22 INT'L. J. HUM. RES. MGMT. 1069, 1073 (2011). *See* Dan P. McCauley & Karl W. Kuhnert, *A Theoretical Review and Empirical Investigation of Employee Trust in Management*, 16 PUB. ADMIN. Q. 265, 273 (1992) (explaining that employees are more likely to trust their employers when they are assured of an "adequate level of job security").

148. McCauley & Kuhnert, *supra* note 147, at 272.

149. *Id.*

150. *Id.*

151. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-05 (1967); Timothy J. Coley, *Getting Noticed: Direct and Indirect Power-Allocation in the Contemporary American Labor Market*, 59 CATH. U. L. REV. 965, 967 (2010); *see also* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 579-80.

152. Estlund, *supra* note 140, at 34.

doubtedly rely on their employers for a myriad of benefits beyond simply earning a paycheck, and many people allow their work to become part of their "existence and identity."[153] Therefore, an employee suffers far greater repercussions from a severance of the employment relationship than an employer.[154] Indeed, "[l]osing one's job has long been recognized as one of the most stressful and traumatic experiences a person may ever endure."[155] Moreover, a terminated employee may experience a higher risk of "depression, alcohol and drug abuse, and even suicide."[156] The ramifications of losing a job are staggering, and employees stand to lose much more than employers as a result of a severed employment relationship. Indeed, at-will employees are highly vulnerable to their employers' opportunistic behavior.

Although the exceptions to the at-will doctrine described in Part II seek to remedy the imbalance of power and reduce employees' vulnerability to opportunistic employer behavior, most employees in the United States have "only marginal security in their employment" due to their status as at-will employees.[157] Generally, an imbalance of power results in the weaker party growing distrustful of the stronger party, unless there is some mechanism or protection in place to encourage trust. And in the employer-dominated at-will employment relationship, the mechanisms presently in place do not adequately encourage trust. Therefore, law should do more to encourage trust in the at-will relationship. The next Section considers previously proposed reforms to the at-will system to determine whether the proposals, if implemented, would promote trust.

C. Proposed Reforms to the At-Will System

Because the at-will relationship so strongly favors employers, some scholars see the default employment rule as a matter of injustice that requires reform.[158] Scholars have offered two common arguments to reform at-will employment: (1) impose a fiduciary duty of

153. 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, 892.

154. Bird, *supra* note 35, at 162; *see also* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 852 (1994) ("The human tragedy wrought by such wrongful terminations is immeasurable. . . . It is therefore not surprising that many employees suffer severe emotional trauma when they are discharged.").

155. Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008).

156. John Joseph Peregoy & Connie T. Schliebner, *Long-Term Unemployment: Effects and Counseling Interventions*, 13 INT'L J. FOR ADVANCEMENT COUNSELING 193, 193 (1990).

157. Coley, *supra* note 151, at 967.

158. *E.g.*, Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988).

loyalty on employers; and (2) change the default presumption to a just cause standard for termination. But as discussed below, neither reform, if implemented, would sufficiently optimize trust in the employment relationship.

1. Imposing a Fiduciary Duty of Loyalty on Employers

Under conventional wisdom, fiduciary relationships are "broad commands against selfish behavior that lead to obligations to act with the utmost good faith and loyalty."[159] The suggestion to impose a fiduciary obligation is thus often proposed as a means to inspire trust in relationships where it otherwise does not exist.[160] Not surprisingly, several scholars have advocated for the need to impose fiduciary duties upon employers to reform the at-will employment relationship.[161] Although courts have "virtually unanimously" imposed a duty of loyalty on employees,[162] employers do not owe a fiduciary duty of loyalty to their employees.[163] To be certain, it seems largely one-sided for the law to hold at-will employees to a fiduciary standard while simultaneously affording employers the opportunity to terminate such employees for no cause whatsoever. But what remains unclear is whether the imposition of fiduciary duties on employers would encourage trust in the relationship.

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159. Kelli A. Alces, *Larry Ribstein's Fiduciary Duties*, 2014 U. ILL. L. REV. 1765, 1766.

160. *See id.* at 1767.

161. *See* Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 854 (2017) ("[I]t makes sense to characterize the employment relationship as a whole as fiduciary, and the employer as a fiduciary of its employees."); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, *in* PROGRESSIVE CORPORATE LAW 219 (Lawrence E. Mitchell ed., 1995).

162. Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a "Duty of Loyalty" in the Twenty-First Century*, 93 NEB. L. REV. 267, 268 (2014); *see also* Michael Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL'Y J. 395, 402 (2012) ("[S]ome, though not many, courts . . . hold that at-will employees owe no duty to their employer, while many other courts impose only a limited duty . . . on at-will employees . . . ."). Some courts have adopted the approach taken by the *Restatement (Third) of Agency*, which defines agency as a fiduciary relationship and characterizes all employment relationships as agency relationships. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006); *see also* Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1257 (2015) (explaining that the *Restatement (Third) of Agency* "characterizes all employees as agents and thus subjects them all to a fiduciary duty of loyalty"). Yet other courts have adopted a more limited view, as articulated in the *Restatement of Employment Law*, restricting the applicability of the fiduciary duty of loyalty to employees who are "in a position of trust and confidence with their employer[s]." RESTATEMENT OF EMP'T LAW § 8.01 (AM. LAW INST. 2015).

163. Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL'Y J. 413, 419 (2012) ("The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills.").

In *Employment as Fiduciary Relationship*, Professor Matthew Bodie argues that "[t]he employment relationship is best understood as a mutual set of fiduciary relationships between employer and employee."[164] Professor Bodie relies on the characteristics of discretion and vulnerability in the employment relationship to support the imposition of a fiduciary duty on employers.[165] He contends that a fiduciary's discretion over a beneficiary "forms the cornerstone of many fiduciary theories."[166] In addition, Professor Bodie asserts that a beneficiary's vulnerability to discretion "triggers" the need for fiduciary duties.[167]

Employers certainly exercise discretion over the livelihoods of their employees, and employees are largely vulnerable to an opportunistic use of that discretion.[168] A fiduciary duty of loyalty, however, demands unselfishness[169] and would thus require employers to stop pursuing their own interests in running the business effectively to consider their employees' interests. But the very nature of the at-will presumption allows employers to act in their self-interest at the expense of their employees.[170] Moreover, a fiduciary duty of loyalty would be too great of a burden to place on employers as it would potentially result in massive inefficiencies.[171]

Further, if the law were to impose a fiduciary duty of loyalty on employers, then any employee could sue his or her employer for a breach of fiduciary duty, and employers could be punished for breaching their duty. This would eliminate the "co-pay" that is necessary to trust and would likely prevent the development of trust. Employees may question whether their employers are truly committed to their continued employment or simply acting to avoid legal punishment.[172] Therefore, this solution would likely not serve to promote trust in the at-will employment relationship.

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164. Bodie, *supra* note 161, at 862.

165. *Id.* at 855-59.

166. *Id.* at 856.

167. *Id.* at 858.

168. *See* discussion *supra* Section III.B.

169. Alces, *supra* note 159, at 1768.

170. Fisk & Barry, *supra* note 163, at 419 ("The employer . . . is free to pursue its self-interest by firing [the employee] to hire another for a lower wage or for better skills.").

171. *See* Epstein, *supra* note 29, at 951 (arguing that at-will employment represents "the efficient solution to the employment relation").

172. *See* Ribstein, *supra* note 74, at 575.

2. Just Cause as the Default Standard

Dating back to the 1960s, scholars have called for an abandonment of the at-will system in favor of a just cause requirement for termination.[173] Although the demand for a universal just cause system is not without merit, the scholarship fails to account for how changing the default presumption would affect trust in the employment relationship. The shift to just cause would certainly enhance job security, and as explained in Section III.B, job security is a major factor contributing to trust between employees and their employers.[174] But similar to the imposition of fiduciary duties, this change may not promote trust because employees would be skeptical of whether their employers are truly committing to their continued employment or simply abiding by a legal mandate. Moreover, this too would eliminate the trust co-pay by practically eliminating employees' vulnerability to opportunistic terminations.

IV. REFORMING AT-WILL EMPLOYMENT TO ENCOURAGE TRUST

Trust in the employee-employer relationship is suffering. By definition, the at-will presumption allows employers to act in their self-interest at the expense of their employees. Because employees value their jobs so highly, the central issue with trust is that employees are largely vulnerable to employers exercising their legally protected right to terminate at-will employees in an opportunistic manner. As long as an employee termination does not contravene one of the exceptions outlined in Section II.A, employers are free to sever the employment relationship for any reason. But the statutory exceptions to the at-will doctrine only serve to curtail discriminatory or bad cause terminations, and the "paper shield" common law exceptions offer little (if any) protection against arbitrary termination actions. Moreover, the previously offered arguments advanced by scholars to reform the at-will system would not sufficiently remedy the lack of trust in the employment relationship.

At present, the trust co-pay is likely too high for employees under the at-will employment doctrine. Employee vulnerability is simply too great under the current system. To be certain, employees must work to earn a living, so the lack of trust is not displayed through an

173. Blades, *supra* note 151, at 1410; Estlund, *supra* note 140, at 30; Peter Stone Partee, *Reversing the Presumption of Employment At Will*, 44 VAND. L. REV. 689, 708-11 (1991); Porter, *supra* note 155, at 84; Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 121 (2002).

174. *See* discussion *supra* Section III.B.

unwillingness to work.[175] Instead, the effectiveness of the employer's business suffers when trust is absent.[176] Despite an employer's incentive to promote trust in its employees, the employment relationship remains fraught with undertrust. And because relationships characterized by undertrust are unlikely to gravitate to an optimal level,[177] the law should play a role in encouraging trust.

To reduce vulnerability to opportunistic behavior and optimize trust in the employee-employer relationship, the law should elevate certain relationships above this initial presumption. The at-will presumption should remain the default, but the law should honor an employee's expectation of loyalty, and once this expectation exists, the employment relationship should no longer be presumptively at will.

A. At-Will Employment as the Initial Presumption

The at-will presumption should remain the initial default for an employment relationship. Retaining this default presumption at the beginning stages of employment is beneficial to both the employer and employee. As explained in Section II.A, the at-will presumption honors freedom of contract, and employees will likely earn a higher wage under this default. Moreover, an employee retains the flexibility and freedom to change employment if the employee values such freedom or determines that the position is ill-suited to the employee's particular skill set. In addition, this initial presumption honors the venerable notion that an employee is the "full owner of his labor."[178]

As for the employer, the initial at-will presumption allows an opportunity to get acquainted with its employees to determine if a commitment to continued employment is warranted. If the employer decides to commit to continued employment, then the employer can take the necessary steps to do so. But as an initial presumption, the employer is free to terminate the relationship or retain the employee in its present position without investing in the employee's continued employment. Of course, the employer bears the risk of losing talented employees to an employer that is willing to commit to a more secure employment arrangement.

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175. *See* FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) ("We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages.").

176. *See* discussion *supra* Section III.B.

177. *See* discussion *supra* Section II.B.

178. *See supra* note 29 and accompanying text.

B. Honoring the Expectation of Loyalty

As the employment relationship is fundamentally a contractual agreement, the law should do more to honor employee expectations. One of the expectations that arises in an employment relationship over time is the expectation of loyalty. An expectation of loyalty describes the belief that as long as the employee is upholding his or her end of the employment agreement,[179] the employer will continue to honor the agreement and will not opportunistically sever the relationship. This expectation of loyalty differs from a fiduciary duty of loyalty because it is not a legal mandate to refrain from selfish behavior and place the interests of another ahead of oneself. Rather, it is an expectation that the employment relationship will continue in good faith. And the expectation, when legitimately held, should supplant the at-will presumption in favor of a just cause termination standard.

Courts can ascertain the existence of an expectation of loyalty by examining three factors: (1) the employee's record of service to the employer; (2) the employer's investment in the employee; and (3) the length of the employment relationship. If an employee forms an expectation of loyalty during the course of employment, the employment relationship should no longer be presumptively at will.

With respect to the first factor, an employee's record must demonstrate quality service for the expectation to be legitimately held by the employee. If an employee has not performed to a satisfactory level, then it is unreasonable to expect loyalty from an employer in the form of continued employment. Indeed, an employee who consistently underperforms may be subject to termination for just cause, making this analysis entirely moot.

The employer must also have invested in the employee's continued employment for an expectation of loyalty to be formed. Whether through promotion or advanced training, an employer must demonstrate a commitment to continued employment beyond the investment necessary to train the employee to perform in an initial position. Training opportunities represent an employer's investment in the employee in both time and money. Additionally, and to borrow an idea from the military, promotions are generally not a reward for past performance, but rather an investment in the potential of the employee to serve in a higher position with greater responsibility.[180] From the perspective of the employer, both training and promotions

179. For an employee, this would involve, among other things, performing reasonably competent work.

180. U.S. AIR FORCE, PAMPHLET 36-2506, YOU AND YOUR PROMOTIONS—THE AIR FORCE OFFICER PROMOTION PROGRAM § 11 (1997).

represent investments in the employee's future potential and signal an expectation that the employment relationship will continue. Therefore, employees may form an expectation of loyalty based on the employer's investment in their continued employment.

In addition to quality service and employer investment, the length of employment also forms an expectation of loyalty. An employee cannot form an expectation of loyalty from the first day of employment (unless specifically bargained for), but it is important that the period of service not be fixed to a minimum length. An adequate length of time will largely be determined by the facts and circumstances of the employment relationship. But an employee who has remained employed for years, however, may form an expectation of loyalty, even if the other factors are not met.

By applying this analysis to ascertain whether an employee had an expectation of loyalty, the law will encourage trust by reducing an employee's vulnerability to arbitrary terminations. For those employment relationships in which an employee formed a reasonable expectation of loyalty, employees will be less vulnerable to arbitrary and opportunistic terminations because the law will no longer consider that relationship presumptively at will. Instead, employers will be required to show just cause for a termination. Honoring the expectation of loyalty will reduce vulnerability to arbitrary terminations, thereby enhancing job security and promoting a more trusting relationship.

C. Counterarguments

Critics of this proposal will quickly point out that the expectation of loyalty cannot be a reasonable expectation because it is contrary to the at-will doctrine that has been embedded in U.S. law for over 100 years; therefore, the law should not honor this ostensibly unreasonable expectation. But the law has previously honored a party's legitimate expectations when they contravened long-standing doctrine. In *Javins v. First National Realty Corp.*, the plaintiffs were apartment tenants who refused to pay rent because their landlord failed to maintain the premises.[181] In essence, the tenants formed an erroneous belief with respect to the duties of their landlord. The court explained that, traditionally, a lease was "the conveyance of an interest in land" and noted that according to common law rules of property, a landlord was under no obligation to continue to make the conditions of the leased premises habitable.[182] Nevertheless, the court deter-

181. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970).

182. *Id.* at 1074, 1076 ("[Under] the old common law rule . . . the lessor is not obligated to repair unless he covenants to do so in the written lease contract.").

mined that the legitimate expectations of the tenants warranted legal protection.[183]

To support its holding, the court turned to the landlord-tenant relationship and explained that the "inequality in bargaining power between landlord and tenant" provided "compelling reasons" for the law to protect the tenants' expectations.[184] The court noted that tenants have "very little leverage" in the relationship, and emphasized that landlords often "place tenants in a take it or leave it situation."[185] This inequality analysis led the *Javins* court to determine that it was necessary to protect the legitimate, albeit erroneous, expectations of the apartment tenants, despite the long-standing common law doctrine with respect to property leases.

The employment at-will relationship has many similarities with the landlord-tenant relationship, and like tenants, employees' legitimate expectations are equally deserving of legal protection. Although an expectation of loyalty may contravene the doctrine of at-will employment, the *Javins* case illustrates that an expectation that does not comport with long-standing common law doctrine may still be an expectation deserving of legal protection.

Other critics may suggest that this solution will be ineffective because, even though it shifts the presumption from at will to just cause, it only protects the relatively few employees who would be able to prove that they were terminated for purely arbitrary reasons.[186] Under a just cause presumption, the burden still falls on the terminated employee "to prove a fact-intensive question on an issue on which the employer holds all of the relevant information."[187] Terminated employees would thus likely find it difficult to prove the absence of any cause for their termination.[188]

This counterargument, however, fails to account for the expressive value law. Aside from imposing legal sanctions, the law influences behavior "because it signals patterns of public approval."[189] If the law requires employers to provide justification for their termination actions, then they should realize that arbitrary terminations contravene societal values. Accordingly, shifting the at-will presumption to

183. *Id.* at 1079.

184. *Id.*

185. *Id.*

186. Arnow-Richman, *Just Notice*, *supra* note 16, at 6-7.

187. *Id.* at 20.

188. *See id.* at 20-21.

189. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 373 (2000).

just cause should have the effect of aligning employer behavior with public values.

Still, other critics will rely on the empirical research in Section III.B to offer the counterargument that, at present, employees believe that just cause is the standard and still place little trust in their employers. They would question how offering a solution that only changes the default presumption for some employees could promote trust. But if the law required justification for terminations, employees would presumably witness fewer arbitrary terminations. If the frequency of arbitrary terminations decreased, employees may begin to gradually feel more secure in their positions. Moreover, the justifications for terminations made for good cause would indicate what conduct would lead to termination. Employees would likely feel more confident in the security of their jobs knowing the type of conduct that warrants termination.

V. CONCLUSION

Perhaps the days of Kodak-like job security are behind us. After all, the common employer practice to offer stable employment with "cradle-to-grave benefits" that was prevalent in the twentieth century is no longer a reality. But the lack of job security under the at-will doctrine today should not doom the employment relationship to one of distrust and skepticism. Indeed, the law can, and should, be properly used to reduce employee vulnerability to opportunistic termination, thereby encouraging trust between employees and employers. As the employment relationship is a contractual agreement, the law should honor employee expectations and afford an enhanced level of job security for employees who form a legitimate expectation of loyalty. This solution allows employees and employers to enjoy the benefits of the at-will presumption initially, while elevating certain relationships to a just cause standard. Ultimately, this solution offers just cause for trust in the employment at-will relationship.