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Tenuous Distinction between Performance and Excusable
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The Statute of Frauds and Oral Promises of Job Security: The Tenuous Distinction Between Performance and Excusable Nonperformance

Daniel P. O’Gorman*

I. INTRODUCTION

In general, an employment relationship between an employer and an employee is considered to be on an “at will” basis, meaning that either the employee or the employer can terminate the relationship at any time for any reason, without liability.¹ An employment re-

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¹ See RICHARD A. BALES, JEFFREY M. HIRSCH & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 1 (2007) (noting that employment “at will” means that an employer or employee can terminate the employment relationship for any reason); SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 39 (3d ed. 2008) (“American common law generally construes employment for an indefinite or unstated term as a relationship which may be terminated ‘at will’ by either party.”); Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 459 (2008) (“Today, the at-will rule remains the default employment rule in every state but Montana”); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976) (“In almost every jurisdiction in the United States an employer can discharge an employee without notice and without cause unless the duration of the employment relation is specified in an employment contract.”). The classic statement of the employment-at-will doctrine is that an employer has the right to “dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.” *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915); see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 683 (1994) (referring to the *Payne* statement as the “now classic statement of the rule”). Montana is the exception. See Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (Westlaw through 2009); see also MODEL EMPLOYMENT TERMINATION ACT (1991). Interestingly, the Montana statute was enacted after employers complained of large damage awards for wrongful terminations based on violations of the implied covenant of good faith and fair dealing. See Jonathan Tompkins, *Legislating the Employment Relationship: Montana’s Wrongful-Discharge Law*, 14 EMP.

relationship will be construed as other than “at will,” however, if a contract or statute so provides.²

Typical examples of written contracts providing for job security include collective bargaining agreements between unions and employers, which almost always include a provision prohibiting the employer from terminating employees for other than “just cause” or “good cause,”³ and contracts between employers and key employees.⁴

REL. L.J. 387, 387 (1998). Although the statute prohibits terminations without just cause, it limits damages to lost wages. *Id.* at 394.

² See BALES, HIRSCH & SECUNDA, *supra* note 1, at 1 (same); ESTREICHER & HARPER, *supra* note 1, at 39 (noting that a contract or statute can create an exception to the “at will” rule). Noteworthy examples of statutory exceptions to the “at will” rule include the anti-discrimination statutes, which prohibit covered employers from terminating employees because of their race, color, religion, sex, national origin, age, or disability. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006) (age); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006) (race, color, religion, sex, and national origin); Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006) (disability); *see also* National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006) (prohibiting covered employers from terminating employees for engaging in concerted activities to improve working conditions). Also, government employees “are protected by tenure arrangements or other civil service procedural devices.” Theodore J. St. Antoine, *You’re Fired!*, HUM. RTS. Q., Winter 1982, at 32, 34.

³ See Lawrence E. Blades, *Employment at Will vs. Industrial Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 (1967) (noting that “just cause” provisions are “typically found in collective agreements”); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 462 (1979) (“[P]ractically all collective bargaining agreements provide in substance that no employee in the bargaining unit may be discharged, suspended, or otherwise disciplined except for ‘just,’ ‘good,’ or ‘proper’ cause . . .” (footnote omitted)); Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 946 (1985) (“[P]rivate sector employees enjoy job security through collective bargaining provisions permitting employer discipline or discharge only for ‘just cause.’ Nearly every collective bargaining agreement negotiated by a union today contains a provision that protects members of the bargaining unit against unjust discipline and discharge.”); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955) (noting that collective bargaining agreements generally provide that discipline and discharge “shall be for cause, or good cause”); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000) (noting “[t]he near universal acceptance of just cause protection in collective agreements”); St. Antoine, *supra* note 2, at 34 (noting eighty percent of collective bargaining agreements “expressly prohibit discharge or discipline except for ‘cause’ or ‘just cause.’” (footnote omitted)).

⁴ See St. Antoine, *supra* note 2, at 34 (noting that one of the three different groups of employees who have avoided the at-will rule include “the handful of persons whose knowledge or talents are so unusual and valuable that they have the leverage to negotiate a contract for a fixed term with their employer”); Summers, *supra* note 3, at 68 (observing that only upper-level managers have employment contracts with a provision providing for job security).

In the absence of a union or the employee being a key employee, it is unusual, however, for an employee and an employer to have a written contract promising job security. Some courts have held that employee manuals and handbooks distributed by an employer can constitute a contract providing for job security,⁵ but courts are often reluctant to make such a finding,⁶ and in any event, a manual's or handbook's contractual nature can usually be avoided by an explicit disclaimer indicating that it is not a contract.⁷

An oral promise of job security can, however, rise to the level of an enforceable promise.⁸ For example, an employer might orally promise the employee that he or she will remain employed for a definite period of time, or for as long as he or she performs satisfactorily, or that he or she will only be terminated for good cause.⁹

Even if such a promise is otherwise enforceable,¹⁰ however, the oral nature of the promise renders it subject to a Statute of Frauds ("the Statute") defense.¹¹ Specifically, such a promise might be considered incapable of being performed within a year, thus necessitat-

⁵ See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 885 (Mich. 1980) (allowing a handbook to be considered part of the employment contract); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1101 (1984) (noting that *Toussaint* "was considered a breakthrough decision").

⁶ See, e.g., *Walton v. Health Care Dist. of Palm Beach County*, 862 So. 2d 852, 855 (Fla. Dist. Ct. App. 2003) ("Florida's courts have expressed a decided reluctance to find that provisions in an employee handbook or policies and procedures manual rise to the level of enforceable rights . . .").

⁷ See Summers, *supra* note 3, at 75 ("[T]his protection has been seriously undercut by allowing employers to escape contractual liability by including in the handbook a disclaimer provision . . ."). See generally Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *INDUS. REL. L.J.* 326 (1991) (examining the use of disclaimers in employee handbooks).

⁸ See Lucy Haroutunian, Comment, *Employee, You Have a Job For Life: But Is This Oral Promise Enforceable Under the Statute of Frauds?*, 50 *BAYLOR L. REV.* 493, 496 (1998) ("Often, due to the lack of a written contract, an employee's only evidence of a contract is an oral assurance or oral promise by an employer or an employer's agent that the employee has job security.").

⁹ See BALES, HIRSCH & SECUNDA, *supra* note 1, at 43 ("The first way at-will employment typically is changed is by a contract between the employer and an individual employee. Such a contract may be written or oral, express or implied, definite-term or satisfaction."); Haroutunian, *supra* note 8, at 496 ("An example is a promise that an employee has a job for life or for as long as he performs satisfactorily.").

¹⁰ See, e.g., *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (holding that employer's oral assurance to employee that she would remain employed as long as she did a good job was too indefinite to constitute an offer).

¹¹ See BALES, HIRSCH & SECUNDA, *supra* note 1, at 47-49 (discussing applicability of the Statute to oral promises of job security).

ing the promise to be evidenced by a writing to be enforceable.¹² On the other hand, courts might construe the employer's promise as providing the employer or the employee with the right to terminate the employment relationship within one year. In such cases, the contract might be considered capable of being performed within one year of its formation and thus outside of the Statute.

Courts that have addressed these issues have reached conflicting results.¹³ Essentially, the issue revolves around whether any retained right by either the employee or the employer to terminate the employment relationship within one year of its formation means that the contract can be performed within a year or alternatively, whether such a right to terminate is considered either the defeasance of the contract based on excusable nonperformance or cancellation based on the other party's breach.¹⁴ If it means the contract can be performed within one year, the Statute is not a bar; if the right to terminate the relationship is construed as either defeasance based on excusable nonperformance or cancellation based on breach, the Statute renders the contract unenforceable.¹⁵

This Article maintains that in "close" or "doubtful" cases, an event that permits early termination of an employment contract should be construed as excusable nonperformance instead of performance. Such an approach is consistent with the purpose of the Statute's one-year provision and the purpose of the employment-at-

¹² See RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(e) (1981) ("The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception: . . . a contract that is not to be performed within one year from the making therefore (the one-year provision).").

¹³ See BALES, HIRSCH & SECUNDA, *supra* note 1, at 48 ("The statute of frauds is difficult to apply to employment cases, and courts (often within the same jurisdiction) are inconsistent.").

¹⁴ See *id.* ("Part of the problem derives from a longstanding disagreement over the meaning of performance, termination, and excusable nonperformance.").

If a court determines the parties intended the occurrence of the contingency to constitute full performance of the contract within one year from the date of its making, that contract is enforceable under the statute of frauds. On the other hand, if the parties intended the occurrence of the contingency to terminate the contract, or failed to address the contingency, that contract is not enforceable under the statute of frauds.

Haroutunian, *supra* note 8, at 499.

¹⁵ As stated by three leading employment law commentators, the issue "derives from a longstanding disagreement over the meaning of performance, termination, and excusable nonperformance." BALES, HIRSCH & SECUNDA, *supra* note 1, at 48.

will doctrine.¹⁶ Part II of this Article provides a brief background on the Statute of Frauds, including the history of its enactment, its purpose, and its treatment by the courts, with an emphasis on the Statute's one-year provision. Part III discusses the employment-at-will doctrine, with an emphasis on the likely reasons for its adoption. Part IV reviews the leading decisions involving oral promises of job security and the Statute. Part V sets forth the appropriate rules for determining whether an oral promise of job security is unenforceable under the Statute's one-year provision.¹⁷

II. THE STATUTE OF FRAUDS

The history of the Statute begins with the state of English contract law before the seventeenth century. Originally, under English common law, there was no general basis for enforcing promises.¹⁸ Rather, enforcement of a promise had to occur through one of the established forms of action.¹⁹

Several of the established forms of action could be used to enforce particular types of promises, but each had its limitations. The writ of covenant, which arose near the end of the twelfth century²⁰ and which originally could be used at times to enforce informal promises, was by 1321 restricted to promises made under seal.²¹

The writ of detinue provided for the recovery of goods from one who had obtained possession of them lawfully but who no longer had the right to possess them.²² Detinue would presumably be available to enforce a promise to deliver goods, provided title to them had passed

¹⁶ Professor Frank Vickory has argued that the Statute should be amended to avoid the enforcement of oral promises of permanent employment. See Frank Vickory, *The Erosion of the Employment-at-Will Doctrine and the Statute of Frauds: Time to Amend the Statute*, 30 AM. BUS. L.J. 97, 119–20 (1992). The merits of such a proposal are beyond the scope of this Article.

¹⁷ How the Statute should apply to oral promises of job security that are enforceable under the doctrine of promissory estoppel is an issue beyond the scope of this Article. Rather, this Article's scope is limited to promises that are enforceable as part of a bargained-for exchange.

¹⁸ E. ALLAN FARNSWORTH, *CONTRACTS* 11–12 (4th ed. 2004).

¹⁹ *Id.* at 12.

²⁰ *Id.* at 13.

²¹ J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 318–19 (4th ed. 2002).

²² JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 110 (9th ed. 2008).

to the promisee,²³ but it could not be used to enforce promises generally.²⁴

The writ of debt enabled the recovery of a sum certain in money, but only if the promisee had performed his side of the bargain and thus given a benefit to the promisor.²⁵ Also, a defendant in an action of debt could avoid liability through so-called “wager of law,” which permitted the defendant to avoid liability by having a number of oath-helpers swear that the defendant was being truthful when he denied the debt.²⁶

The writ of assumpsit could be used to recover loss to person or property as a result of the promisor’s misfeasance in the performance of a promised undertaking²⁷ and thereafter was extended to economic losses caused by reliance on an unperformed promise.²⁸ Near the end of the sixteenth century, common-law courts extended assumpsit even further, permitting its use to enforce unperformed promises where there had been no reliance by the promisee.²⁹ Thus, assumpsit offered a form of action that could possibly provide a general theory for enforcing promises. Also, an advantage of assumpsit was the availability of a jury trial that, unlike debt, could not be defeated by the defendant’s wager of law.³⁰ Importantly, though, where an action of debt was available, the plaintiff could not use assumpsit, and this proved disadvantageous to creditors.³¹

By the middle of the sixteenth century, however, assumpsit began making inroads on the use of debt. For example, by this time, an action in assumpsit could be brought if a defendant who was already indebted to the plaintiff made a subsequent promise to pay a particular sum.³² This form of action became known as *indebitatus assumpsit*, or “general assumpsit,” as distinguished from the older form of assumpsit, which was known as “special assumpsit.”³³ The death knell for debt, and the triumph of assumpsit, finally came in 1602 as a re-

²³ *Id.*

²⁴ *Id.*

²⁵ FARNSWORTH, *supra* note 18, at 13–14.

²⁶ *Id.* at 14.

²⁷ *Id.*

²⁸ *Id.* at 15.

²⁹ *Id.* at 15–16.

³⁰ *Id.* at 17.

³¹ FARNSWORTH, *supra* note 18, at 17.

³² *Id.*

³³ *Id.*

sult of *Slade's Case*.³⁴ In that case, the court held that a debt alone, without a subsequent express promise to pay the amount owed, could support an action in general assumpsit.³⁵ As a result, a creditor was assured a jury trial,³⁶ and the decision virtually put an end to the use of wager of law.³⁷ Because a judgment in assumpsit barred an action of debt for the same amount and vice versa, “the action of debt on a contract went almost out of use.”³⁸ *Slade's Case* thus had the beneficial effect of unifying contract law through the action of assumpsit.³⁹

But there were downsides to unifying contract law through assumpsit. Whereas wager of law had protected defendants from fraudulent claims of debt, after *Slade's Case* the only protection for defendants from such claims was the jury, and the jury, for a variety of reasons, was not well-suited for this new task.⁴⁰ For example, during this period of English law, the jury was not entitled to the benefit of the testimony of the parties or any interested person;⁴¹ juries, while not familiar with the parties and the dispute, were also not the disinterested jurors of current times;⁴² and there was an undeveloped law of evidence.⁴³ As a result, there was “a distrust of the ability of juries to determine the truth of conflicting testimony about the making of a

³⁴ *Slade's Case*, (1602) 76 Eng. Rep. 1074 (K.B.). For useful discussions of *Slade's Case*, see J. H. Baker, *New Light on Slade's Case*, 29 CAMBRIDGE L.J. 51 (1971); David Ibbetson, *Sixteenth Century Contract Law: Slade's Case in Context*, 4 OXFORD J. LEGAL STUD. 295 (1984); H. K. Lücke, *Slade's Case and the Origin of the Common Counts*, 81 L. Q. REV. 422 (1965); A. W. B. Simpson, *The Place of Slade's Case in the History of Contract*, 74 L. Q. REV. 381 (1958).

³⁵ FARNSWORTH, *supra* note 18, at 17.

³⁶ *Id.* at 18.

³⁷ BAKER, *supra* note 21, at 345; *see also id.* at 348 (“A direct consequence of *Slade's Case* was the complete replacement of wager of law by jury trial in disputed actions to recover debts.”).

³⁸ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 286 (2d ed. 1979).

³⁹ *Id.* at 287.

⁴⁰ BAKER, *supra* note 21, at 348–49.

⁴¹ *See* BAKER, *supra* note 38, at 288–89 (“The parties themselves, and interested persons, were excluded from the witness box at common law on the assumption that their testimony would be biased and therefore worthless.”); Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 430 (1928) (explaining that when the Statute was enacted, “neither the parties to the action, nor their husbands or wives, nor any person who had any interest in the result of the litigation, were competent witnesses”).

⁴² James J. O'Connell, Jr., Comment, *Boats Against the Current: The Courts and the Statute of Frauds*, 47 EMORY L.J. 253, 257 (1998).

⁴³ *Id.*

contract.”⁴⁴ There was also a lack of judicial control over juries,⁴⁵ which included an inability to reverse verdicts contrary to the manifest weight of the evidence,⁴⁶ and contract law was not well developed at the time such that it could provide suitable guidance to the jury.⁴⁷

Defendants were perceived to be at a disadvantage and at risk of having contractual liability when no contract was made.⁴⁸ If wager of law had resulted in perjury in favor of defendants, the use of assumpsit resulted in perjury in favor of plaintiffs.⁴⁹ During the “Restoration period[,] the problem was keenly felt.”⁵⁰ One jurist remarked in 1671 that two men could no longer talk together without one of them claiming a promise had been made.⁵¹

But it was too late to judicially change *Slade’s Case*, and thus a legislative answer was sought.⁵² A return to wager of law was not seriously pursued, but a writing requirement for certain types of promises appeared to be a convenient solution, which would be a partial return to the law of covenant.⁵³

⁴⁴ DAWSON ET AL., *supra* note 22, at 907.

⁴⁵ See Willis, *supra* note 41, at 429 (“[T]he modern control of the court over the jury, in the matter of the limits and elements of injury, the rules by which compensation for pecuniary injuries shall be ascertained, and in cases of passion and prejudice, was only just beginning.” (footnote omitted)).

⁴⁶ JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 63 (5th ed. 2000).

⁴⁷ See Willis, *supra* note 41, at 431.

[A]t the time of the enactment [of the Statute,] the modern informal contract law was in the making. The law of agreement, consideration, conditions, illegality, etc., had not been fully worked out. The Statute of Frauds was an attempt to cover a field now perhaps adequately covered by other topics. If our modern contract law had existed in the seventeenth century, there probably would have been no fourth and seventeenth sections of the Statute of Frauds at least.

Id.

⁴⁸ O’Connell, *supra* note 42, at 255–56.

⁴⁹ BAKER, *supra* note 21, at 349.

⁵⁰ *Id.*

⁵¹ *Id.* It has been asserted that “the confusion attending the rapid succession of Civil War, Cromwellian dictatorship, and Restoration . . . encouraged unscrupulous litigants to pursue false or groundless claims with the help of manufactured evidence.” E. Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L. Q. REV. 174, 174 (1947) (quoting G.C. CHESIRE & C.H. FIFOOT, LAW OF CONTRACT 106 (1946) and citing LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES 225 (1939)).

⁵² BAKER, *supra* note 21, at 349.

⁵³ *Id.*

The legislative solution chosen was the Statute, which was enacted in 1677⁵⁴ and entitled “An Act for the Prevention of Frauds and Perjuries.”⁵⁵ The Statute had two related goals: (1) protecting defendants from perjury and (2) curbing the power of juries.⁵⁶ The only explicit statement of the Statute’s purpose was included in an introductory clause that provided as follows: “For prevention of many fraudulent Practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury Be[] it enacted”⁵⁷

Section 4 of the Statute identified the following five classes of contracts that needed to be in writing to be enforceable: (1) “to charge any Executor or Administrator upon any special[] promise to answer[] damages out of his own[] Estate”; (2) “to charge the Defendant upon any special[] promise to answer[] for the debt default or miscarriages of another person”; (3) “to charge any person upon any agreement made upon consideration of Marriage”; (4) “any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them”; and (5) “any Agreement that is not to be per-

⁵⁴ The date of the Statute has been the subject of dispute, but 1677 is the date that is now generally accepted. See George P. Costigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 341 (1913) (“[T]he Statute of Frauds was finally passed and received the royal assent on April 16, 1677”); Crawford D. Hening, *The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors*, 61 U. PA. L. REV. 283, 285 (1913) (“[T]he final draft of the bill, as passed by both houses and assented to by the Crown, was not made until April 16, 1677”); Willis, *supra* note 41, at 427 (“There has been a difference of opinion among law writers as to the date . . . of the Statute of Frauds; but it now seems to be settled that the correct date for this celebrated Statute is April 16, 1677” (footnote omitted)).

⁵⁵ An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3 (Eng.); see *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 472 N.E.2d 992, 993 (N.Y. 1984) (“The ancient Statute of Frauds is derived from the original English ‘Act for Prevention of Frauds and Perjuries’ enacted in 1677”).

⁵⁶ Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 VAND. L. REV. 1383, 1422–23 (1983); see also *D & N Boening, Inc.*, 472 N.E.2d at 993 (“The entire Statute was intended to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury”); Costigan, *supra* note 54, at 343–44 (noting that Professor James Bradley Thayer had surmised that the Statute was intended primarily to keep certain kinds of cases from juries, and stating that “[t]he judges who framed the Statute of Frauds were . . . anxious to tie the hands of juries”); Willis, *supra* note 41, at 427 (“The original purpose for the enactment of the statute of Frauds was to prevent fraud caused by perjury; or in other words, to make it sure that legal effect should not be given to transactions never entered into, and that parties should not be held on promises never made.”).

⁵⁷ An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3 (Eng.).

formed within the space of one year[] from the mak[ing] thereof.”⁵⁸ Section 17 of the Statute required that certain contracts for the sale of goods be in writing.⁵⁹ It has been suggested that these classes of contracts were chosen because these were “the groups of cases in which the courts had encountered trouble because of uncertainty of evidence and difficulty in ascertaining the scope of individual transactions.”⁶⁰

It is not known for sure, however, why contracts that were not to be performed within one year were included in the Statute,⁶¹ and the provision’s purpose has baffled courts, lawyers, and historians.⁶² The traditional explanation, and the one given by a jurist in 1697, was the desire to not “trust to the memory of witnesses for a longer time than one year.”⁶³ The theory is that fraudulent claims could succeed in these types of cases because the “memory of an agreement’s exact terms and of the rights and responsibilities of its parties, availability of witnesses, etc., all suffer when actions on oral contracts are stretched out over several years.”⁶⁴ “[B]ecause these were continuing contracts—it might be very difficult to find any evidence at the time they

⁵⁸ *Id.* § 4; see Jeffrey G. Steinberg, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 *FORDHAM L. REV.* 114, 114 (noting that “[o]f the original twenty-five sections [of the Statute], only the fourth and seventeenth are important for contract purposes”).

⁵⁹ An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3, § 17 (Eng.).

⁶⁰ Rabel, *supra* note 51, at 184.

⁶¹ Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39, 77 (1974).

⁶² See *Prof'l Bull Riders, Inc. v. AutoZone, Inc.*, 113 P.3d 757, 759 (Colo. 2005); *P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT* 208 (1979); see also *C.R. Klewin, Inc. v. Flagship Props., Inc.*, 600 A.2d 772, 775 (Conn. 1991) (noting that of the Statute’s various provisions, the one-year provision “has caused the greatest puzzlement among commentators”).

⁶³ *Smith v. Westall*, (1697) 91 Eng. Rep. 1106, 1107 (K.B.); see also *Boydell v. Drummond*, (1809) 103 Eng. Rep. 958, 965 (1809) (K.B.) (Justice Bayley stating that the purpose of the provision was to prevent “the leaving to memory the terms of a contract for longer time than a year”); *RESTATEMENT (SECOND) OF CONTRACTS* § 130 cmt. a (1981) (“The design was said to be not to trust to the memory of witnesses for a longer time than one year”); 4 *CAROLINE N. BROWN, CORBIN ON CONTRACTS* § 19.1, at 571 (Rev. ed. 1997) [hereinafter *CORBIN*] (“Where actions on contracts are long delayed, injustice is likely to be done because of bad memory or because witnesses have died or moved away . . . [a]nd in the case of a contract whose performance is to cover a long period of time, actions are likely to be long delayed.”).

⁶⁴ O’Connell, *supra* note 42, at 286; see also Vickory, *supra* note 16, at 98–99 (“This rule recognizes that since witnesses become unavailable and memories fade over time, the possibility of enforcing fabricated verbal agreements increases with time.”).

came to be enforced.”⁶⁵ Under this theory, the one-year provision’s purpose was consistent with the Statute’s overall purpose and was not concerned with whether it was worthwhile to use the power of the state to enforce a particular type of promise. Rather, it was concerned with whether a promise had been made at all.

But courts and commentators have noted that the one-year provision does not always effectuate the purpose of dealing with this problem because there is no necessary relationship between the length of time it takes to perform a contract, when the contract is breached, and when a lawsuit is brought.⁶⁶ For example, a long-term contract might be breached soon after it is made and a lawsuit brought soon thereafter. In such a situation, the time between the making of the contract and the lawsuit would be short. In contrast, a plaintiff might not bring suit on a short-term contract until just before the statute of limitations expires, and the time between the making of the contract and the lawsuit might therefore be long.

It is difficult to believe, however, that the Statute’s drafters did not have in mind specific purposes for including the one-year provision, and it is likewise difficult to believe they would have drafted a provision that did not effectively implement those purposes. As several commentators have noted, “The legislation certainly was not concocted hastily. It was formally pending for more than four years before its passage, went through numerous revisions, many of which were substantial, and accumulated new clauses suggested by a variety of legal experts of the time.”⁶⁷

P.S. Atiyah has suggested that

it seems . . . at least possible that [the one-year] provision was simply designed to put an outer limit to the enforcing of executory contracts. A man might bind himself for the future if he

⁶⁵ Willis, *supra* note 41, at 431.

⁶⁶ See *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 472 N.E.2d 992, 993 (N.Y. 1984); see also *C.R. Klewin, Inc. v. Flagship Props., Inc.*, 600 A.2d 772, 776 (Conn. 1991) (“That explanation is, however, unpersuasive, since . . . the language of the statute is ill suited to this purpose.”); RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. a (1981) (“The design was said to be not to trust to the memory of witnesses for a longer time than one year, but the statutory language was not appropriate to carry out that purpose. The result has been a tendency to construction narrowing the application of the statute.”); 4 CORBIN, *supra* note 63, § 19.1, at 578 (stating that “this provision of the statute is . . . ill-supported by any sensible rationale”).

⁶⁷ DAWSON ET AL., *supra* note 22, at 907.

pleased, but, at least in the absence of writing, he was not to be held bound to any performance due more than a year later.⁶⁸

But this theory—seemingly premised on a notion of government paternalism—suffers from the fact it would not fulfill the Statute’s purpose, which was aimed at fraudulent claims. Rather than being directed at whether a promise was made, it would be directed at whether enforcing a particular promise was worthwhile.

Professor Joseph M. Perillo has proposed the following theory: “It seems quite likely . . . that as in the case of other subdivisions the draftsmen had in mind a transaction type: employment and similar relationships, such as apprenticeships and fiduciary retainers.”⁶⁹ Professor A.W.B. Simpson has also suggested that contracts of service might have been the purpose of the one-year provision.⁷⁰ As he notes, it is possible that the one-year provision was borrowed from Scotland, which in the seventeenth century required proof by writ for contracts of service for more than one year.⁷¹

As discussed below, English common law presumed employment to be for a term of one year. It makes sense that if a person sought to establish a period of employment for more than the one-year presumption, he should be required to do so with a writing evidencing the promise. If it is unusual for a particular promise to have been made, more evidence than usual should be demanded to prove the alleged promise.⁷² This theory would be consistent with the Statute’s overall purpose and would be directed at determining whether a promise had been made, rather than being directed at whether it is worthwhile to enforce the particular type of promise. (Of course, this theory could also be premised on the belief that it is not worthwhile to enforce long-term employment and service contracts.) But as noted by Professor Farnsworth, such a purpose is inconsistent with

⁶⁸ ATIYAH, *supra* note 62, at 208.

⁶⁹ Perillo, *supra* note 61, at 77 n.214.

⁷⁰ See A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 611–12 (paperback ed. 1987).

⁷¹ See *id.* at 612.

⁷² Courts in the United States often used this rationale to require “additional consideration” (i.e., consideration other than the employee providing services to the employer) to prove an employer’s alleged promise of job security. See *Darlington v. Gen. Elec.*, 504 A.2d 306, 314 (Pa. Super. Ct. 1986) (discussing “additional consideration” requirement and its use as an interpretation device), *overruled on other grounds*, *Krajsa v. Key punch, Inc.*, 622 A.2d 355, 360 (Pa. Super. Ct. 1993).

the one-year period running from the date of the contract's formation as opposed to the date performance is to begin.⁷³

Thus, we are left without a satisfactory explanation of the original purpose of the one-year provision, assuming we demand an explanation that is a perfect fit. At this point, one could simply abandon an attempt to explain the one-year provision's purpose. Or, accepting that no explanation will be a perfect fit, one could piece together the most plausible explanation, taking into consideration the various rationales that have been advanced for the Statute and the one-year provision as well as other plausible explanations.

If the latter approach is adopted, the best interpretation of the one-year provision's purpose is that it was aimed primarily at employment and service contracts, and it was aimed at such contracts for a variety of reasons, including that (1) it was unusual to have such an arrangement in excess of one year; (2) it was often difficult to determine the truth in such cases since they were often brought long after the alleged oral promise was made (i.e., when the employee or employer terminated the relationship after the typical one-year period had elapsed); (3) the risk of error in such cases would be of particular concern because the remedy for a breach of a long-term contract was likely to be substantial; and (4) it simply was not good policy to hold a person to such a long-term contract, particularly when the person had not reduced it to writing and thus perhaps not given it the desired contemplation. These rationales give primacy to the Statute's purpose of avoiding fraudulent claims (the first, second, and third bases), but also include as a basis the belief that it is not worthwhile to enforce long-term oral employment contracts (the fourth basis).

I do not suggest that each member of Parliament who voted for the Statute had in mind each of these rationales. Rather, I suggest that most of the members likely had in mind employment or service contracts and that most of the members had such contracts in mind for one or more of the four reasons I have provided. Although the one-year provision does not perfectly implement each of the rationales provided, it does a good job of providing a general rule to address the myriad of concerns raised. Although the one-year provision might be both underinclusive and overinclusive with respect to the concerns raised, so is any general rule.

⁷³ FARNSWORTH, *supra* note 18, at 372–73.

Each state in the United States has enacted its own version of the Statute, with the exception of Louisiana, Maryland, and New Mexico, and the latter two have held by judicial decision that the original Statute was received into the state.⁷⁴ Although most of the Statute was repealed in England in 1954,⁷⁵ and despite the fact it has been criticized in the United States as an anachronism that promotes more fraud than it prevents,⁷⁶ the Statute remains part of our law.⁷⁷ In fact, most of the American statutes remain essentially the same as the original 1677 Statute.⁷⁸

⁷⁴ *Id.* at 354 & n.5; O'Connell, *supra* note 42, at 258 (noting that the Statute "has been adopted, either by legislation or via judicial opinion, more or less intact by forty-nine states. Louisiana is the only exception."). The current version of Article 2 of the Uniform Commercial Code requires that contracts for the sale of goods for the price of \$500 or more be evidenced by a writing. U.C.C. § 2-201. The current version of Article 2 has been adopted in every state except Louisiana. WHITE & SUMMERS, *supra* note 46, at 4.

⁷⁵ See O'Connell, *supra* note 42, at 259–60 ("[I]n 1954, Parliament repealed all of the Statute except for the provision dealing with agreements to answer for the debt of another and contracts for the sale of land. . . . [T]he English based this repeal, in large part, on the theory that the Statute caused more fraud than it prevented." (footnote omitted)); see also Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34 (Eng.).

⁷⁶ Willis, *supra* note 41, at 432; *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 106 (2d Cir. 1985).

Whatever may be the fact with regard to the history of the statute, and whatever may have been the difficulties arising from proof that all sides agree brought about the enactment of the statute of frauds over 300 years ago, it is an anachronism today. The reasons that prompted its passage no longer exist. And, far from serving as a barrier to fraud—in the case of a genuinely aggrieved plaintiff barred from enforcing an oral contract—the statute may actually shield fraud.

Id. at 106; see also Francis M. Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273, 274 (1916) (noting that the Statute promotes more fraud than it prevents); Rabel, *supra* note 51, at 187 ("[T]he Statute essentially belongs to distant times, far removed from the conditions of modern life.").

⁷⁷ See FARNSWORTH, *supra* note 18, at 355 ("Statutes of frauds remain in this country despite their many critics."); O'Connell, *supra* note 42, at 256 ("Not even the demise of the Statute in the nation of its birth has been enough to bring about its elimination in the United States because by the time its English parents saw fit to put it down, the Statute had already placed one foot firmly in the mud on this side of the Atlantic[,] and has remained here by "hop[ping] regularly, if not always gracefully, from state code to state code, from judicial opinion to judicial opinion.") (quoting James Fitzjames Stephen & Frederick Pollock, *Section 17 of the Statute of Frauds*, 1 L. Q. REV. 1, 6 (1885)); see also Steinberg, *supra* note 58, at 115 ("[T]he legislatures of virtually every state have maintained their individual statutes paralleling the English original.").

⁷⁸ O'Connell, *supra* note 42, at 267; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 205 (3d ed. 2005) ("The states adopted the statute almost verbatim."). The proposed revisions to Article 2 of the Uniform Commercial Code would only

Despite the Statute's vitality in the United States, courts have interpreted the Statute narrowly,⁷⁹ and this is particularly true with respect to the one-year provision.⁸⁰ One reason for this narrow interpretation of the one-year provision is because, as previously mentioned, it does not always effectuate its traditionally stated purpose.⁸¹

Accordingly, following English precedent established well before 1776,⁸² courts have generally limited the provision to contracts that cannot possibly be performed within one year,⁸³ even if performance within one year is unlikely.⁸⁴ Thus, for example, "[c]ontracts of uncertain duration are simply excluded"⁸⁵ This rule does not, how-

require a writing for contracts for the sale of goods for the price of \$5,000 or more. U.C.C. § 2-201(1) (Proposed Amendments 2003).

⁷⁹ FARNSWORTH, *supra* note 18, at 357.

⁸⁰ *Id.* at 357 n.22 (citation omitted); 4 CORBIN, *supra* note 63, § 19.1, at 572 ("In its actual application, the courts have perhaps been even less friendly to this provision than to the other provisions of the statute.")

⁸¹ See *supra* note 66.

⁸² See *Warner v. Tex. & Pac. Ry.*, 164 U.S. 418, 422–23 (1896).

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

Id. In the first reported case in England dealing with the one-year provision, Lord Holt seemed to suggest that the actual time for performance was the critical issue. *Francom v. Foster*, (1692) 90 Eng. Rep. 912 (K.B.) (discussed in *Warner*, 164 U.S. at 421). But in *Peter v. Compton*, a case considered by all of the judges, the majority of the judges concluded that a contract was only within the Statute if it was impossible for it to be performed within one year. (1693) 90 Eng. Rep. 157, 157 (K.B.) (discussed in *Warner*, 164 U.S. at 421–22).

⁸³ *D & N Boening, Inc.*, 472 N.E.2d at 993; see also Willis, *supra* note 41, at 439 ("As interpreted by the courts this means any agreement that by its express terms cannot possibly be performed, either by one or by both parties, within one year from the making thereof" (footnote omitted)); see also *Warner*, 164 U.S. at 434 ("The question is not what that probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year."); 9 RICHARD A. LORD, WILLISTON ON CONTRACTS § 24:3, at 450–56 (4th ed. 1999) [hereinafter WILLISTON] ("A promise . . . is not within the Statute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year." (footnote omitted)).

⁸⁴ *Deevy v. Porter*, 95 A.2d 596, 597 (N.J. 1953).

⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. a (1981).

ever, apply to performance by “abnormal and unusual methods not within the contemplation of the parties” when they entered into the contract.⁸⁶ Also, “[d]espite prevailing views, one continues to find courts who are prepared to ‘look to the circumstances’ and bring within the statute oral agreements that might conceivably have been performed within a year.”⁸⁷ Further, the contract must be capable of being performed within one year of its formation; thus, an employment contract for a one-year term, but which is to begin several days after formation, is not capable of being performed within a year.⁸⁸

A promise of performance during the life of a particular person is generally not within the Statute because the person might die within a year of the contract’s formation.⁸⁹ Similarly, “[a] promise of permanent personal performance is, on a fair interpretation, a promise of performance for life, and therefore not within the Statute”⁹⁰ Also, under the “great weight of authority,”⁹¹ “[i]f the plaintiff’s part of the contract has been fully performed, the defendant’s part becomes enforceable without regard to the period covered.”⁹² Termination as a result of breach is not, however, the same as termination by performance and will not constitute performance within a year.⁹³

⁸⁶ 9 WILLISTON, *supra* note 83, § 24:4, at 466–70.

⁸⁷ DAWSON ET AL., *supra* note 22, at 913; *see also* Great Hill Fill & Gravel, Inc. v. Shapleigh, 692 A.2d 928, 929–30 (Me. 1997) (finding that the parties “plainly manifested” an intention for performance to last more than one year).

⁸⁸ Kass v. Ronnie Jewelry, Inc., 371 A.2d 1060, 1061–62 (R.I. 1977).

⁸⁹ 9 WILLISTON, *supra* note 83, § 24:4, at 476–79.

⁹⁰ *Id.* § 24:5, at 480.

⁹¹ 4 CORBIN, *supra* note 63, § 19.14, at 617.

⁹² *Id.* § 19.1, at 578–79. This doctrine is different from the so-called “part performance” doctrine and renders the promise enforceable at law, not simply in equity. *Id.* § 19.14, at 617. “Part performance not amounting to full performance on one side does not in general take a contract out of the one-year provision.” RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. e (1981). The application of the part-performance doctrine is therefore beyond the scope of this Article.

⁹³ *See* D & N Boening, Inc. v. Kirsch Beverages, Inc., 472 N.E.2d 992, 995 (N.Y. 1984).

[T]he commentators have long agreed that the mere possibility of a breach within the first year of an agreement does not constitute the possibility of some alternative performance which would take the agreement out of the Statute. Clearly, termination of an agreement as a result of its breach is not performance thereof within the meaning of the Statute of Frauds, and an oral agreement which by its own terms must continue for more than a year unless terminated by its breach is void.

Id. (citations omitted)

The one-year provision was included in the First Restatement of Contracts, published in 1932.⁹⁴ The First Restatement provides that the following contracts are unenforceable unless evidenced by a writing: “Bilateral contracts, so long as they are not fully performed by either party, which are not capable of performance within a year from the time of their formation.”⁹⁵ The First Restatement further provides that “[w]here any of the promises in a bilateral contract cannot be fully performed within a year from the time of the formation of the contract, all promises in the contract are within [the one-year provision], unless and until one party to such a contract completely performs what he has promised.”⁹⁶ Under the First Restatement, promises in unilateral contracts⁹⁷ are not within the one-year provision (such contracts being fully performed by one party at the time of formation).⁹⁸ The First Restatement further provides that “[t]he fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the Statute.”⁹⁹ Importantly, the First Restatement states that “[a] distinction must be taken between promises which can be ‘fully performed’ within a year and promises which though they cannot be ‘fully performed’ within that time may be excused within it by the happening of some event.”¹⁰⁰

The one-year provision was also included in the Second Restatement of Contracts, published in 1981.¹⁰¹ The Second Restatement essentially tracks the language of the First Restatement, providing that “[w]here any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.”¹⁰² The Second Restatement provides that “the provision covers only those contracts whose performance cannot possibly be completed within a year.”¹⁰³ It further

⁹⁴ RESTATEMENT (FIRST) OF CONTRACTS § 178(1) (1932).

⁹⁵ *Id.* A bilateral contract is one in which both parties to the contract have made a promise. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 57 (6th ed. 2009) (“[A] contract where both parties have made promises is bilateral.”).

⁹⁶ RESTATEMENT (FIRST) OF CONTRACTS § 198 (1932).

⁹⁷ A unilateral contract is one in which only one party has made a promise, and the other party accepts the offer by performing. See PERILLO, *supra* note 95, at 56–57.

⁹⁸ RESTATEMENT (FIRST) OF CONTRACTS § 198(1) cmt. a (1932).

⁹⁹ *Id.* cmt. b.

¹⁰⁰ *Id.* cmt. c.

¹⁰¹ RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(e) (1981).

¹⁰² *Id.* § 130(1).

¹⁰³ *Id.* cmt. a.

provides that where an agreement could be discharged by a power to cancel or performance might be excused by supervening events, even when such an event is identified in the contract as an excuse, such occurrences are not considered performance.¹⁰⁴ The Second Restatement states that “[t]his distinction between performance and excuse for nonperformance is sometimes tenuous; it depends on the terms and the circumstances, particularly on whether the essential purposes of the parties will be attained.”¹⁰⁵

Because the original grounds for enacting the Statute might no longer exist (i.e., distrust of a jury’s ability to recognize perjury and a court’s inability to control juries), commentators have sought to identify the reasons for its survival. Common arguments include (1) the fact that a writing requirement promotes reflection by the parties before contracting (and presumably thereby increases the likelihood that contracts will be value-enhancing to each party and thus worthy of encouraging);¹⁰⁶ (2) its use as a device for easily resolving disputes involving important transactions (a concern with reducing litigation expenses, which is a potential transaction cost associated with contracting);¹⁰⁷ (3) a way for courts to determine which agreements the parties intended to be binding (promoting autonomy of the parties);¹⁰⁸ (4) a desire to encourage parties to reduce their agreements to writing, because such agreements are easier for courts to interpret,¹⁰⁹ and the number and cost of trials will thereby be reduced (transaction costs);¹¹⁰ (5) increased literacy rates (the elimination of a basis for opposing a writing requirement);¹¹¹ and (6) the modern developments of business, which include greater reliance on written records (the elimination of a basis for opposing a writing requirement).¹¹² In addition, not surprisingly, continuing support for the Statute has been based on the desire to prevent fraudulent claims.¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY T. KRONMAN, *CONTRACTS: CASES AND MATERIALS* 756 (3d ed. 1986).

¹⁰⁷ *Id.*

¹⁰⁸ O’Connell, *supra* note 42, at 261.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 261–62 & 262 n.38.

¹¹¹ Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 747 (1931).

¹¹² *Id.*

¹¹³ *See* Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 118–19 (2d Cir. 1985) (Wyatt, J., dissenting).

Robert Braucher, the reporter for the Statute chapter of the Second Restatement, noted that “a cautious approach to the Statute of Frauds seems to be in harmony with American professional opinion.”¹¹⁴

If one combines the likely reasons for the adoption in 1677 of the one-year provision with the likely reasons for the Statute’s survival in the United States, it can be concluded that the one-year provision (and its survival) is based on avoiding the litigation expenses and the risk of error involved in determining the truth of a party’s allegation that he or she was given an oral promise of long-term employment, along with a desire to insulate employers from long-term commitments that were perhaps not given serious consideration by the employer.

Most likely, those who dislike the Statute believe that it is used by parties with superior bargaining power to deceive weaker parties with impunity. Under this theory, the weaker party either fears that requesting a written agreement will cause the stronger party not to proceed with the proposed transaction, or the weaker party is unsophisticated and trusts the stronger party and therefore does not realize a written promise should be secured. Then, when the weaker party sues for breach of the oral promise, the stronger party escapes liability based on the Statute. The Statute does not have a negative effect on stronger parties because their bargaining position and sophistication cause them to obtain written agreements when deemed advantageous to them (often through the use of form contracts). To persons who hold this theory, oral promises by employers to employees with respect to job security fit this description perfectly. Accordingly, the Statute’s one-year provision is viewed as a pro-employer, pro-business device to enable employers to deceive employees with impunity.

The Statute of Frauds does not seem to be an “anachronism” for such cases as that at bar. The oral lifetime employment contract was claimed by [the plaintiff] to have been made in a telephone conversation between him in California and [the defendant’s agent] in New York. The conversation was not recorded; no memoranda were made. The only testimony was, and could only be, that of [the plaintiff and the defendant’s agent]. Not only was [the plaintiff] a witness hostile to [the defendant, but so was the defendant’s agent, who had since been terminated]. Thus, [the defendant] was at the mercy of [the plaintiff and its former agent] in the sense that no person and no writing was available to confirm or contradict them; they alone had made the claimed oral contract and there was no writing.

Id.

¹¹⁴ Robert Braucher, *The Commission and the Law of Contracts*, 40 CORNELL L.Q. 696, 705 (1955).

Those who support the Statute most likely believe that it prevents parties from fabricating oral promises and that it also precludes enforcement of promises that in most instances would not be construed by reasonable persons as a commitment. With respect to the former, persons who hold this view likely distrust the litigation process as a means of arriving at the truth, and are probably particularly distrustful of the jury system. At least with respect to cases brought by weaker parties against stronger parties, the jury might be inclined to sympathize with the weaker party and therefore find the existence of an oral promise even though the evidence is meager. I suspect that persons who hold this view likely also believe that a person who fails to obtain a promise in writing has been negligent and should pay the price for such carelessness. The risk of error in such cases should be borne by the party whose fault it is that the evidence is unclear. Also, one would expect that a party who had really been made a promise within the Statute's various categories would have secured it in writing.

With respect to the Statute rendering unenforceable promises that in most instances would not be construed by reasonable persons as a commitment, the Statute operates as a rule as opposed to a standard, eliminating the cost of litigating cases where it is likely that a "promise," as defined under contract law, has not even been made.¹¹⁵ For example, if most promises for a long-term business (or employment) arrangement would not be construed as a binding commitment in the absence of a written promise, it makes sense (if one is seeking to reduce litigation expenses) to render unenforceable all oral assurances of a long-term arrangement.

Those who hold these views are likely to be businesses who distrust their chances in front of a jury, who believe responsible persons reduce long-term and important commitments to writing, and who desire to reduce litigation expenses because they are repeat players in litigation.¹¹⁶

¹¹⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

¹¹⁶ See STEVEN VAGO, LAW & SOCIETY 285–87 (8th ed. 2006) (discussing so-called "repeat players" in litigation as opposed to so-called "one-shotters").

III. THE EMPLOYMENT-AT-WILL DOCTRINE

A. *The Duration of Employment Relationships at English Common Law*

Under English common law, employment without an agreed term was presumed to be for one year, and this rule applied to all types of servants, though there were exceptions.¹¹⁷ Blackstone asserted that the yearly hiring rule was based “upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.”¹¹⁸ Thus, the rule prevented opportunism by precluding masters from discharging servants after the planting season, and servants from quitting after the winter season.¹¹⁹

But the rule was not based solely on a concern for fairness between master and servant, and it was extended beyond agricultural servants.¹²⁰ Rather, the one-year presumption “was designed to compel labor and to control labor competition by restricting a worker’s mobility for annual periods” and to “minimize[] parochial relief rates by forcing the master to retain his servants during the months when they were unlikely to find alternative employment.”¹²¹ Accordingly, the presumption was a default provision presumably based both on what the parties would have agreed to had they considered the matter (a provision to prevent opportunism by either party) and on economic reasons (compelling workers to work, restricting labor competition, and reducing parochial relief rates).¹²²

Interestingly, this one-year presumption (which for the previously stated reasons implied a long-term employment relationship) would seem to conflict with the Statute’s one-year provision, which was perhaps concerned with employees fabricating oral promises of long-term employment. In fact, the one-year presumption would seemingly render an oral employment contract unenforceable under the Statute’s one-year provision, unless employment began imme-

¹¹⁷ Feinman, *supra* note 1, at 119–20; Summers, *supra* note 5, at 1082.

¹¹⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *413.

¹¹⁹ See Feinman, *supra* note 1, at 120; Bales, *supra* note 1, at 456.

¹²⁰ See Feinman, *supra* note 1, at 120; Minda, *supra* note 3, at 968–69.

¹²¹ Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 90 (1982).

¹²² On filling gaps in contracts, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

diately upon entering into the contract. Such seemingly inconsistent purposes can be reconciled by concluding that one year was not considered a long term for an employment contract, but more than a year was, particularly with respect to employment and service contracts, and by also concluding that such contracts were generally considered to be formed when services commenced (not sooner).

The one-year-employment rule was merely a presumption, and the key issue was the parties' intentions.¹²³ Trade custom and the frequency of wage payments were important considerations in determining the parties' intentions and, as a result, the term of employment was often found to be less than a year.¹²⁴ A strong presumption remained, however, that the employment was for a specific term and not on an at-will basis.¹²⁵ An express agreement for an at-will relationship was necessary to rebut the presumption of employment for a definite term, and an at-will relationship was considered an anomaly.¹²⁶

B. American Common Law Before the Late-Nineteenth Century

The history of how employment relationships were treated by American courts has been the subject of extensive debate. In fact, there is no consensus on how courts before the late-nineteenth century approached the issue.

Professor Jay Feinman has asserted that through the middle of the nineteenth century, the law in the United States was not as clear as English law.¹²⁷ As stated by Professor Sanford M. Jacoby, "[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."¹²⁸ Professor Clyde Summers has also recently asserted that "[b]y 1870, the law in the United States was confused, with courts going in diverse directions."¹²⁹ In contrast, Professor Deborah Ballam has asserted that except for a brief time in the

¹²³ Feinman, *supra* note 1, at 121; *see also* Summers, *supra* note 5, at 1082–83 ("This presumption of a yearly hiring could be rebutted by facts showing a contrary intent of the parties.").

¹²⁴ Summers, *supra* note 5, at 1083.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Feinman, *supra* note 1, at 122.

¹²⁸ Jacoby, *supra* note 121, at 109.

¹²⁹ Summers, *supra* note 3, at 67.

colonies, employment-at-will was the norm.¹³⁰ Professor Summers has previously stated, however, that “[t]he English rule of presumed hiring for a term was adopted by American courts”¹³¹

C. *Courts Adopt Wood’s Rule*

To the extent that the law was confused, in the late-nineteenth century the confusion started to lift. In 1877, an Albany lawyer and treatise writer named Horace Gray Wood published a treatise on master and servant law, and in it he maintained that the United States inflexibly followed the employment-at-will rule. He stated,

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, and in this respect there is no distinction between domestic and other servants.¹³²

Under what is now known as “Wood’s rule,”¹³³ the employee had the burden of proving a term of employment, thereby reversing any previous presumption that might have existed of employment for a definite term.¹³⁴

Although Wood had not intended a mechanical application of the rule,¹³⁵ the rule’s effect was to render most employment relationships at will, instead of for a definite term.¹³⁶ Thus, in the absence of

¹³⁰ Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996).

¹³¹ Summers, *supra* note 5, at 1083.

¹³² HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134, at 272 (1877) (footnotes omitted).

¹³³ Minda, *supra* note 3, at 971.

¹³⁴ Summers, *supra* note 5, at 1097; *see also* Jacoby, *supra* note 121, at 112 n.174 (“Wood placed the burden of proof on the employee since the hiring was ‘*prima facie* a hiring at will.’”) (quoting WOOD, *supra* note 132, at 272).

¹³⁵ Jacoby, *supra* note 121, at 112.

¹³⁶ Summers, *supra* note 5, at 1097.

sufficient evidence to rebut the at-will presumption, the rule required a verdict for the employer.¹³⁷ The rule also had “the effect of granting employers absolute control and power over the employment relationship by transforming a relational or status relationship into a discrete contract transaction.”¹³⁸

For the last several decades, commentators have debated whether Wood had support for his proposition and whether the cases he cited in support were on point.¹³⁹ Some have argued that his proposition was an “aberration”¹⁴⁰ and an “unfounded generalization of existing law.”¹⁴¹ Others have noted that in 1877 the at-will doctrine had already been adopted by seven states,¹⁴² and another commentator has asserted that the at-will doctrine was the norm throughout American history.¹⁴³

What is undisputed, however, is that by no later than the end of the 1930s, employment-at-will was the prevailing rule in the United States.¹⁴⁴ The rule was primarily adopted by courts as a matter of

¹³⁷ Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 736 (1991).

¹³⁸ Minda, *supra* note 3, at 982.

¹³⁹ Compare J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974) (no support), and Feinman, *supra* note 1, at 126 (no support), and Summers, *supra* note 5, at 1083 (no support), and Summers, *supra* note 3, at 67 (“Wood’s Rule, by imposing a blanket presumption that all indefinite hirings were at will, misstated existing law.”), and Minda, *supra* note 3, at 970 (“Commentators now agree that Wood invented his own rule.”), with Ballam, *supra* note 130, at 94 (“In actuality, with the exception of a brief period in early colonial times, employment-at-will has been the norm in the United States. . . . The only late-nineteenth century change was that some courts stopped interpreting fixed-term agreements for payment of wages as an agreement to employ the worker for that same term.”), and Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 552 (1990) (asserting that Wood’s citations supported his proposition).

¹⁴⁰ Minda, *supra* note 3, at 982.

¹⁴¹ Summers, *supra* note 5, at 1097; see also St. Antoine, *supra* note 2, at 33 (asserting that the at-will rule “sprang full-blown in 1877 from the busy and perhaps careless pen of an American treatise writer”).

¹⁴² Morriss, *supra* note 1, at 681.

¹⁴³ Ballam, *supra* note 130, at 126.

¹⁴⁴ See Bales, *supra* note 1, at 458, 460; Glendon & Lev, *supra* note 3, 457–58 (asserting that “by the end of the nineteenth century, nearly every American court had formally adopted the at-will rule”); Summers, *supra* note 3, at 68 (“[B]y 1930, the doctrine had become embedded in American law.”).

common law, not by statute,¹⁴⁵ and Wood's rule was accepted by courts uncritically¹⁴⁶ and with little analysis.¹⁴⁷

Importantly, "a strong version of the [employment-at-will] rule came to be the dominant form."¹⁴⁸ As applied by the courts, it was difficult for employees to rebut the at-will presumption,¹⁴⁹ and courts often refused to consider extraneous evidence of the parties' intentions.¹⁵⁰ Thus, the rule was often more of an irrebuttable presumption or a substantive rule of law that trumped the parties' intentions than a rebuttable presumption.¹⁵¹ In fact, the rule, as applied by the courts, has been described as "virtually impermeable."¹⁵² Under this strong version of the rule, even promises of "permanent" employment were presumed to be at will.¹⁵³ Additional "superimposed spurious doctrines,"¹⁵⁴ such as mutuality of obligation, and the need for the employee to provide additional consideration beyond his or her services, strengthened the employment-at-will doctrine.¹⁵⁵ One of the results of the strong version of the at-will rule was that employment termination cases based on an alleged breach of contract would rarely be submitted to the jury.¹⁵⁶

¹⁴⁵ Bales, *supra* note 1, at 460.

¹⁴⁶ Minda, *supra* note 3, at 986.

¹⁴⁷ See Bales, *supra* note 1, at 460; Morriss, *supra* note 1, at 697; Summers, *supra* note 3, at 68; Shapiro & Tune, *supra* note 139, at 342.

¹⁴⁸ Morriss, *supra* note 1, at 763.

¹⁴⁹ Feinman, *supra* note 1, at 129.

¹⁵⁰ Jacoby, *supra* note 121, at 116. Professor Feinman has argued that "Wood's rule represented a signal to the courts to view skeptically employees' evidence of contracts of long duration." Feinman, *supra* note 137, at 736.

¹⁵¹ Summers, *supra* note 5, at 1097; Summers, *supra* note 3, at 69.

¹⁵² Bales, *supra* note 1, at 461.

¹⁵³ Summers, *supra* note 5, at 1097 n.66; see also *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936) (holding that the words "permanent employment" imply at-will relationship); Jacoby, *supra* note 121, at 117 ("The courts in most jurisdictions after 1890 held that contracts for 'permanent' or 'lifetime' employment were indefinite as to duration and thus terminable at will.").

¹⁵⁴ Summers, *supra* note 5, at 1099.

¹⁵⁵ *Id.* at 1097-99; see also Minda, *supra* note 3, at 963 ("The current rule of employment at-will is frequently defended on the principle of mutuality of obligations. If the employee can quit the relationship at any time and for any reason, it is argued, then the employer must be granted the mutual right of contract termination."); Freed & Polsby, *supra* note 139, at 558 (noting that courts "applied the contract principles of consideration and mutuality to conclude that an employee was not entitled to job security under an indefinite contract").

¹⁵⁶ Morriss, *supra* note 1, at 683.

D. *The Reasons for the Success of Wood's Rule in the United States*

Commentators disagree on why the employment-at-will rule succeeded in the United States. Some commentators have asserted that part of the reason the rule succeeded might have been because it was announced in “a modern, comprehensive treatise,” and it was “a clear rule of practical application”¹⁵⁷ As one commentator stated, “the judicial adoption of the rule reflected the benefits to judges of a simple, clear rule which was consistent with the contemporary style of legal analysis.”¹⁵⁸

Other commentators have asserted the employment-at-will rule spread as part of the courts' implementation of the general theory of contract developed by Christopher Columbus Langdell, Oliver Wendell Holmes, Jr., and Samuel Williston in the late-nineteenth and early-twentieth centuries.¹⁵⁹ The foundation of this general theory of contract was the freedom of the parties to structure their relationship as they saw fit.¹⁶⁰ This general theory was an abstraction, and under it the contract's subject matter should be irrelevant.¹⁶¹

As Professor Feinman has noted, though, the employment-at-will doctrine, at least as applied by the courts, was a rejection of this general theory of contract:

The employment at will rule represent[ed] . . . a departure [from the general theory of contract] because the courts did not deal

¹⁵⁷ Feinman, *supra* note 1, at 127.

¹⁵⁸ Morriss, *supra* note 1, at 682.

¹⁵⁹ See Bales, *supra* note 1, at 454 (“The prevailing wisdom is that the at-will rule spread because of a judiciary fixated, from about 1890 to 1930, on laissez-faire reasoning and freedom of contract.”); Freed & Polsby, *supra* note 139, at 558 (“Several courts identified freedom of contract as the predominant policy reason for employment at will”); Jacoby, *supra* note 121, at 116 (“Perhaps the most common explanation for the courts' embrace of the at will doctrine was the rise of a formalistic approach to contract interpretation.”); James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 235 (2007) (stating that the doctrine is “[r]ooted in freedom of contract and private property principles”); see also GRANT GILMORE, *THE DEATH OF CONTRACT* 6 (1974) (“[T]he idea that there was such a thing as a general law—or theory—of contract seems never to have occurred to the legal mind until Langdell somehow stumbled across it. It remained, of course, for Langdell's successors [such as Holmes and Williston] to organize the great discovery, to map its outlines, and to plot its contours.”); Minda, *supra* note 3, at 977 (“By 1913, the contract justification for Wood's Rule was accepted in New York and elsewhere as the general rationale governing at-will employment contracts.”).

¹⁶⁰ Feinman, *supra* note 1, at 124–25; Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286 (1990).

¹⁶¹ See LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 20–24 (1965); Feinman, *supra* note 1, at 125.

with the issue as a matter of pure doctrine; the fact that an employment contract was at stake made all the difference in the shaping of the law. If the law on duration of service contracts had followed the teachings of pure contract theory, the agreement established by the parties would have been enforced. Thus the duration of hiring and the notice required would have been open questions in each case to be decided without presumptions of either yearly hiring or termination at will. The period of payment and the business customs of which the parties would have been cognizant would be important factors But the contract approach was never implemented because of the rise of employment at will.¹⁶²

Professor Summers concurs: “The employment at will doctrine is cast in contract language, but it has no basis in contract law. The courts have not asked the basic contract question—what did the parties intend?”¹⁶³ Professor Feinman has also noted that it is unlikely that the spread of Wood’s rule was because employees and employers generally presumed their relationships to be at will, pointing out that the rule was developed in response to cases brought by mid-level employees, relationships under which both employee and employer would have expected some degree of permanence.¹⁶⁴

The most common explanation for the rise of the employment-at-will doctrine is the effect of economic factors. Professor Ballam, who maintains that the employment-at-will rule was adopted in colonial times,¹⁶⁵ believes the English yearly hiring rule did not take hold in the colonies because most laborers were occasional or day laborers, indentured servants, or slaves to whom the yearly hiring rule was inapplicable.¹⁶⁶ Also, a shortage of labor increased wages, and employers could generally not afford to be bound by a yearly hiring.¹⁶⁷ Further, most employers were small subsistence farmers who did not need permanent help, and the free laborers would not want to be bound for a year because they simply wanted to earn enough

¹⁶² Feinman, *supra* note 1, at 125.

¹⁶³ Summers, *supra* note 5, at 1099.

¹⁶⁴ Feinman, *supra* note 1, at 131–32; see also John Blackburn, *Restricted Employer Discharge Rights: A Changing Conception of Employment at Will*, 17 AM. BUS. L.J. 467, 482 (1980) (asserting that the probable intent of employees and employers is that the employee will not be terminated without good cause); Summers, *supra* note 5, at 1097 (“The new presumption was not based on any finding, or even assertion, that it expressed the way the parties in fact viewed their relationship.”).

¹⁶⁵ Ballam, *supra* note 130, at 129.

¹⁶⁶ *Id.* at 127.

¹⁶⁷ *Id.*

money to buy their own land, which would not take long because land was cheap.¹⁶⁸

Other commentators, most notably Professor Feinman, have taken the position that the rise of the employment-at-will doctrine was a result of the development of advanced capitalism.¹⁶⁹ He maintains that the essential elements of advanced capitalism include an owner's freedom to terminate employees and a division between capital and labor.¹⁷⁰ He asserts that the rule succeeded because "judges were conservative people, trained in an environment that exalted the values of business," and "Wood's rule served the purposes of the owners of capital."¹⁷¹ He maintains that the rule was "the ultimate guarantor of the capitalist's authority over the worker. . . . If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor."¹⁷² Also, the combination of severe business cycles, which were common in the late-nineteenth century, and the rule that permitted terminations without notice placed the burden of these cycles on employees, not the owners.¹⁷³

Other commentators have similarly asserted that economic factors were responsible for the employment-at-will doctrine's spread. For example, two student authors argued in an influential student note that the spread was due to ideological conviction, namely a desire to support "freedom of enterprise, which was considered to include the 'fundamental right' of the employer to discharge employees as he or she pleased."¹⁷⁴ Professor Jacoby has argued that the employment-at-will rule spread because trade unions were weak in the United States and could not secure a better rule from the courts, and the rule was applied to white-collar workers because they were not perceived as particularly higher in status than blue-collar workers.¹⁷⁵ Professor Summers argued,

¹⁶⁸ *Id.* at 127–28.

¹⁶⁹ See Feinman, *supra* note 1, at 131; see also St. Antoine, *supra* note 2, at 33 (stating that Wood's "pronouncement was admirably suited to the *zeitgeist* of an emerging industrial nation").

¹⁷⁰ Feinman, *supra* note 1, at 134.

¹⁷¹ *Id.* at 135.

¹⁷² *Id.* at 132–33.

¹⁷³ *Id.* at 134.

¹⁷⁴ Shapiro & Tune, *supra* note 139, at 343 (footnote omitted).

¹⁷⁵ Jacoby, *supra* note 121, at 119–26.

The assumption is that the employee is only a supplier of labor who has no legal interest or stake in the enterprise other than the right to be paid for labor performed. The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise.¹⁷⁶

Professor Richard Bales recently argued that once a handful of under-industrialized states adopted the rule, “other such states would have felt economic pressure to follow suit to avoid being left behind in attracting capital. The industrialized states would then have felt similar pressure to adopt the rule to maintain their competitive advantage in the labor market.”¹⁷⁷

Professors Mayer Freed and Daniel Polsby argued that “[t]he employment-at-will rule was the natural offspring of a capitalist economic order, reflecting the value of individualism, the growth of competition and the mobility of labor.”¹⁷⁸ Professors Mary Ann Glendon and Edward R. Lev similarly asserted that the doctrine “was highly compatible with prevailing laissez-faire notions”¹⁷⁹ Professor Summers noted, however, that “a principle of limited government intervention can not explain why one presumption rather than another is to be imposed; neutral interpretation of the parties’ intent would be more appropriate to *laissez faire*.”¹⁸⁰

Professor Gary Minda argued that by the early-nineteenth century, employment contracts “became ‘fused’ with master-servant concepts, which emphasized the importance of a servant’s loyalty to his master, the need for authoritarian control, and the idea that the employment relation must serve the needs of the enterprise.”¹⁸¹ He argued that although the master-servant relationship originated in contract, it was considered a legal status.¹⁸² It has also been suggested, however, that “in its day the [at-will] rule could be seen as a ‘progres-

¹⁷⁶ Summers, *supra* note 3, at 65.

¹⁷⁷ Bales, *supra* note 1, at 465.

¹⁷⁸ Freed & Polsby, *supra* note 139, at 558.

¹⁷⁹ Glendon & Lev, *supra* note 3, at 458; *see also* Sonne, *supra* note 159, at 243 (“[T]here is no question its opposition to the English presumption of one-year hiring captured the laissez-faire spirit of both the legal and business cultures of the time” (footnote omitted)).

¹⁸⁰ Summers, *supra* note 3, at 68.

¹⁸¹ Minda, *supra* note 3, at 986.

¹⁸² *Id.*

sive reaction to the status concepts' that had governed the employment relation in the past."¹⁸³

Professor Andrew P. Morriss argued that the rise of the at-will rule was not the result of industrialization¹⁸⁴ or judicial class prejudice.¹⁸⁵ He based his conclusion on the fact that the first states to adopt the at-will rule were in the under-industrialized West and South.¹⁸⁶ Thus, he concluded that the rule was adopted to keep such disputes out of the courts because of courts' limited capacity "to evaluate evidence concerning performance by white collar, skilled employees."¹⁸⁷

In sum, it is likely that the spread of the at-will rule, like the adoption of the Statute's one-year provision, was the result of multiple factors, including (1) notions of autonomy and freedom of contract (in the sense that a failure to agree on job security means an absence of consent to anything other than an at-will relationship); (2) a desire to retain employer and employee flexibility in order to promote wealth maximization (with the parties retaining the right to discontinue the relationship if it became unprofitable for one of the parties, or a more profitable alternative became available); and (3) a desire to keep out of the court system cases that are difficult from an evidentiary standpoint.

E. The Employment-at-Will Rule in Modern Times

The so-called "strong version" of the at-will doctrine remained common through the 1950s.¹⁸⁸ Starting in the late 1950s, however, exceptions to the at-will doctrine began to arise.¹⁸⁹ Some courts sought to move toward pure contract theory and return Wood's rule to its original intent, which was as a rebuttable presumption of at-will status, and to make use of implied-in-fact contracts and reliance to render promises of job security enforceable.¹⁹⁰ For example, courts today are more likely to enforce promises of job security made orally

¹⁸³ Glendon & Lev, *supra* note 3, at 458 (quoting Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438 (1975)).

¹⁸⁴ See Morriss, *supra* note 1, at 681.

¹⁸⁵ See *id.* at 682.

¹⁸⁶ See *id.* at 701.

¹⁸⁷ *Id.* at 762.

¹⁸⁸ Bales, *supra* note 1, at 458.

¹⁸⁹ *Id.* at 459.

¹⁹⁰ Minda, *supra* note 3, at 951.

or in employment handbooks.¹⁹¹ But “[t]his approach has not provided a major exception to the common law rule because courts have narrowly defined the facts and circumstances needed to rebut the normal presumption that employment is terminable at will.”¹⁹²

Courts have also created a “public policy exception” to the at-will doctrine, under which tort claims are recognized for terminations of employment that are detrimental to a clearly articulated public policy.¹⁹³ However, “courts frequently require that the discharge actually violate some clear and specific statement of public policy found within state law. Hence, unless some specific statutory provision has been violated, most courts have refused to apply the public policy exception to the common law rule.”¹⁹⁴ Some courts have also recognized an implied-in-law covenant of good faith and fair dealing in the employment-at-will relationship,¹⁹⁵ but most courts have rejected this approach.¹⁹⁶ Congress and the state legislatures have created numerous statutory exceptions, including prohibitions on terminations based on protected characteristics such as race and sex,¹⁹⁷ or based on union activity¹⁹⁸ or whistle blowing¹⁹⁹ to name just a few.

But importantly, the exceptions to the employment-at-will doctrine have not fundamentally altered the rule itself. The exceptions generally apply to a termination for a specific, improper reason and do not create a general “good cause” or “just cause” requirement for terminations, like those that exist in most collective bargaining agreements. For employees who have been terminated because they allegedly did not perform well, or allegedly broke a workplace rule, the at-will rule will apply, and there will generally be no claim for wrongful termination.

One commentator recently recognized, “[D]espite these restrictions on employer discretion, the employee protections are exceptions that coexist with the rule of at-will employment. For the most

¹⁹¹ Bales, *supra* note 1, at 459.

¹⁹² Minda, *supra* note 3, at 951.

¹⁹³ *Id.* at 951–52.

¹⁹⁴ *Id.* at 952.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 953.

¹⁹⁷ *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

¹⁹⁸ *See, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006).

¹⁹⁹ *See, e.g.*, Whistleblower Law, 43 PA. CONS. STAT. ANN. §§ 1421–1428 (West 2009).

part, employers still retain broad firing discretion.”²⁰⁰ As stated by Professor Summers, “[t]he exceptions were narrowly restricted and . . . [t]he employer’s divine right to dismiss at any time, for any reason, and without notice has survived with vigor.”²⁰¹ The employment-at-will “doctrine has been, and still is, a basic premise undergirding American labor law.”²⁰² Professor Summers stated,

What has emerged is that judicially created exceptions to the rigid employment at will doctrine, which had the potential for providing employees, especially long time employees, with substantial protection from unfair dismissals, have been so grudgingly applied by most courts, that they are little more than paper shields against arbitrary employer actions. The dominant judicial perspective is that employers should have unfettered freedom to determine who should be employed and that workers are subordinate to the employer’s decisions—however arbitrary they may be.²⁰³

As one commentator has recently noted, “[w]hat recent years have *not* seen . . . is the long-predicted death of employment at will.”²⁰⁴ Summers has argued that the employment-at-will rule continues to “draw[] its strength from the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker”²⁰⁵

IV. CASES INVOLVING THE APPLICATION OF THE STATUTE OF FRAUDS TO ORAL PROMISES OF JOB SECURITY

Courts that have addressed the application of the Statute’s one-year provision to oral promises of job security have reached conflicting results as to whether the Statute bars the enforcement of such promises.²⁰⁶ Of course, “[t]he general rule, almost universally ad-

²⁰⁰ Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 79 (2007).

²⁰¹ Summers, *supra* note 3, at 73.

²⁰² *Id.* at 65.

²⁰³ *Id.* at 77.

²⁰⁴ Scott A. Moss, *Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 300 (2005) (emphasis added).

²⁰⁵ Summers, *supra* note 3, at 78.

²⁰⁶ See BALES, HIRSCH & SECUNDA, *supra* note 1, at 48 (“The statute of frauds is difficult to apply to employment cases, and courts (often within the same jurisdiction)

hered to, is that a contract for personal services which by its terms is not to be performed within a year must be in writing.”²⁰⁷ Thus, an oral employment contract under which an employer and an employee each promise an employment relationship for a definite term to last more than one year from the contract’s formation is without question barred by the Statute if there is no possibility of early termination other than as a result of a total material breach.²⁰⁸

But alleged oral promises of job security are not always bilateral contracts under which an employer and an employee each agree to a definite term of employment, subject only to early termination as a result of a party’s total material breach.²⁰⁹ For example, an employer might promise employment for a specific duration, but the employee might retain the right to quit at any time.²¹⁰ Or an employer’s promise of a definite term of employment might be construed as including the right of the employer to terminate the relationship within a year for reasons other than the employee’s total material breach. For example, even without an explicit right to terminate the employment relationship during the term of employment, an employer generally has an implied-in-fact right to terminate the relationship for “just cause.”²¹¹ Or either party might retain the right to terminate the con-

are inconsistent.”); JEFFREY FERRIELL & MICHAEL NAVIN, UNDERSTANDING CONTRACTS 301 (2004) (“Such long term contracts have been viewed in conflicting ways, with some courts treating ‘termination’ as an excuse, similar to death, and others treating termination as a means of alternative performance.” (footnote omitted)).

²⁰⁷ French v. Sabey Corp., 951 P.2d 260, 262 (Wash. 1998).

²⁰⁸ See, e.g., Trum v. Melvin Pierce Marine Coating, Inc., 562 So. 2d 235 (Ala. 1990) (oral employment contract for four years); Richard A. Naso & Assocs. v. Diffusion, 390 S.E.2d 106, 108 (Ga. Ct. App. 1990) (oral employment contract for five years); Cunnison v. Richardson Greenshields Sec., Inc., 485 N.Y.S.2d 272, 274 (N.Y. App. Div. 1985) (oral employment contract for five years); Garg v. Venkataraman, 561 N.E.2d 1005, 1008 (Ohio Ct. App. 1988) (oral employment agreement for ten years); RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b, illus. 5 (1981) (oral employment contract for five years); RESTATEMENT (FIRST) OF CONTRACTS § 198 cmt. d, illus. 3 (1932) (oral employment contract for thirteen months); 9 WILLISTON, *supra* note 83, § 24.1, at 438 (“A contract to serve for a period extending more than a year beyond the time of making the contract is uniformly held within the Statute.”). A party has a right to terminate or cancel a contract in response to a “total material breach” by the other party. FERRIELL & NAVIN, *supra* note 206, at 450. A “total material breach” is a material breach if it “cannot be cured or if a reasonable time for cure has expired.” *Id.*

²⁰⁹ In fact, one would think that most agreements of this kind would be in writing.

²¹⁰ See, e.g., Deevy v. Porter, 95 A.2d 596, 596 (N.J. 1953) (agreement for one-year employment term, subject to the right of the employee to quit at any time).

²¹¹ Short v. Columbus Rubber & Gasket Co., Inc., 535 So. 2d 61, 66 (Miss. 1988) (citing Masonite Corp. v. Handshoe, 44 So. 2d 41, 43 (Miss. 1950)). As stated by one

tract upon a certain amount of notice.²¹² Or an employer might promise employment not for a definite term, but for as long as the employee is performing satisfactorily.²¹³ In such cases, the application of the Statute becomes complicated.

In these cases, the question is whether “performance” can occur within one year as a result of the right to terminate the employment relationship. The answer to this question depends on the characterization of the event that permits termination within a year. If the event is a breach or an excuse for nonperformance, the contract is within the Statute.²¹⁴ But if performance has already occurred by the time of the event (or if the event is itself the completion of performance or the equivalent of full performance), it is not within the Statute.²¹⁵

As discussed below, some courts construe “performance” narrowly and hold that if the parties intended an employment relationship for longer than one year from the contract’s formation, a right by either party to terminate the relationship sooner is not a defense to the Statute “because although *defeasance* is possible within a year *performance* is not.”²¹⁶ Other courts, however, view “performance” more broadly and hold that such a right to early termination takes the contract out of the Statute’s one-year provision.²¹⁷

court, under an employment contract, it is assumed that the parties intended for the employee to “conform to the usual standards expected of an employee, and that he would render honest, faithful and loyal service in accordance with his ability. If there is a willful and substantial failure to adhere to those standards it would be justifiable cause for the employer to discharge him.” *Chiodo v. Gen. Waterworks Corp.*, 413 P.2d 891, 892 (Utah 1966) (footnote omitted).

²¹² See, e.g., *French v. Sabey Corp.*, 951 P.2d 260, 261 (Wash. 1998) (five-year employment contract that could be terminated upon six months’ notice).

²¹³ See, e.g., *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 104 (2d Cir. 1985) (promise of permanent employment as long as the employee did not “screw[] up badly,” though majority construed the promise as one giving the employer the right to terminate for “just cause”); *Hetes v. Schefman & Miller Law Office*, 393 N.W.2d 577, 577 (Mich. Ct. App. 1986) (alleged promise to employ plaintiff as long as she did “a good job”).

²¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 130(1) & cmt. a (1981).

²¹⁵ *Id.* § 130.

²¹⁶ PERILLO, *supra* note 95, at 668.

²¹⁷ *Id.* at 669. Interestingly, New York has a “peculiar variation” on the rule. *Id.* Under the New York rule, “the Statute does not apply if the option to terminate is bilateral or if the option is in the defendant, but the Statute would be a defense if the option of termination is only in the plaintiff.” *Id.* For example, in *Harris v. Home Indemnity Co.*, the court refused to enforce an oral promise of permanent employment “where the right to cancel or terminate is limited unilaterally to plaintiff.” 175 N.Y.S.2d 603, 603 (N.Y. App. Div. 1958). The court’s rationale was that “in such cases

A. *Courts Construing “Performance” Narrowly*

Perhaps the leading case finding that exercising the right to terminate the employment relationship within a year is not “performance” is *Deevy v. Porter*,²¹⁸ decided by the New Jersey Supreme Court in 1953. In *Deevy*, the plaintiff, as assignee of a claim, alleged that the defendants promised to employ the assignors (a husband and wife) for one year, with employment to start at some point after the contract was made, but that the employees “could quit at any time.”²¹⁹ Even though the employees could quit at any time, the court held that the agreement was within the Statute because “the parties bargained for a fixed-term employment agreement not to be performed within one year from its making,”²²⁰ and that “the employees’ promise, as allegedly given, could likewise not be fully performed within the year, even though upon the exercise of their option to ‘quit at any time’ nonperformance thereafter would legally be excused.”²²¹

The court, with little elaboration or analysis, presumed that the employees had made promises to work for a year, and that if the employees quit before that time, they would have failed to perform, though it would not have been a breach but excusable nonperformance.²²² The court relied on cases holding that an option to terminate a contract at the will of a party was the equivalent of rescission, not performance.²²³ As stated by one court, even though the employee has the right to terminate the relationship within one year, “it is significant that the agreement establishes a contemplated term, and the plaintiff’s departure would cut that term short, thereby frustrating the intent of the contract.”²²⁴

defendant’s liability endures indefinitely, subject only to the uncontrolled voluntary act of the party who seeks to hold defendant. Under such circumstances it is illusory, from the point of view of defendant, to consider the contract terminable or performable within one year.” *Id.* The court then noted that “it is to the party to be charged, alone, namely the defendant, that the statute is designed to provide protection from fraud and perjury.” *Id.*

²¹⁸ 95 A.2d 596 (N.J. 1953).

²¹⁹ *Id.* at 596.

²²⁰ *Id.* at 598–99.

²²¹ *Id.* at 599.

²²² *Id.*

²²³ *See id.* at 598 (citing *Wagniere v. Dunnell*, 73 A. 309, 310 (R.I. 1909)).

²²⁴ *Lamaster v. Chi. & Ne. Ill. Dist. Council*, 766 F. Supp. 1497, 1508 (N.D. Ill. 1991).

Another leading decision adopting a similar view is the 1959 U.S. Court of Appeals for the D.C. Circuit decision in *Coan v. Orsinger*.²²⁵ In *Coan*, the plaintiff alleged that he was orally promised the job of resident manager of an apartment development, and that the job was to last until he completed law school (which he had just started) or until he was obliged to discontinue those studies.²²⁶ A little over a month later he was terminated.²²⁷ The majority held that the plaintiff's claim was barred by the Statute, despite the plaintiff's argument that the contract could be completed within one year since he might be obliged to discontinue his law studies because of poor grades or other reasons.²²⁸ The majority reasoned as follows:

That contingency contemplates an annulment of the terms of the contract and would operate as a defeasance, thereby terminating and discharging the contract. Further performance under the contract would be impossible by either party. This annulment or defeasance provision does not contemplate the performance of the contract but only its termination and cancellation. Although it could be annulled within a year, it was none the less a personal service contract to last for more than a year, *e.g.*, until appellant completed his studies at Georgetown University Law School. Although this annulment or defeasance provision relieves the parties from further performance of the contract, it is not the type of *performance* that is necessary to take the case out of the operation of the statute.

....

The courts . . . recognize a distinct difference between a contingency which fulfills the terms of a contract and one which prevents fulfillment. If the contingency which fulfills and completes the terms of the contract happens or could possibly happen within a year, the contract is not within the statute. On the other hand, if the contingency prevents or discharges the parties from performing their obligations under the contract within a year, then the contract is within the statute.²²⁹

The court then concluded that the contract was for personal services in excess of a year, subject to the right to annulment that might occur sooner.²³⁰ The court held that "this in no way helps to further the

²²⁵ 265 F.2d 575.

²²⁶ *Id.* at 575–76.

²²⁷ *Id.* at 576.

²²⁸ *Id.* at 576–77.

²²⁹ *Id.* at 577, 578.

²³⁰ *Id.*

performance of the contract but rather serves to defeat it, rendering performance impossible, and thus bringing the contract within the statute.”²³¹

The dissent argued that the contract provided for two alternative methods of performance. The dissent asserted that “[t]he contract called for performance until appellant ‘was obliged to discontinue’ his studies. This contingency did not defeat the contract; it simply advanced a basis upon which it could be carried out.”²³²

In *French v. Sabey Corp.*, the Washington Supreme Court addressed whether an employment contract for a five-year term, but with the right of either party to terminate the employment relationship on six months’ notice, was within the Statute.²³³ The court ruled that the contract was barred by the Statute because the right to terminate on six months notice would constitute the defeasance of the contract, not its performance.²³⁴

Courts have also held that an employer’s right to terminate the employment relationship for cause constitutes a termination as a result of a breach, and the contract therefore remains within the Statute. For example, in *Haigh v. Matsushita Electric Corp.*, the plaintiff alleged that he had been orally promised employment until he retired (which would be in twenty-one years).²³⁵ The court held that a termination for cause would result from the employee breaching his promise to render satisfactory service, and was therefore not performance.²³⁶

Similarly, in *Windsor v. Aegis Services, Ltd.*, the plaintiff alleged that his supervisor orally promised him that he would have “a job as long as he did not violate the standards of conduct noted in an employee handbook given to [him] after he began his employment.”²³⁷ After the plaintiff’s employer terminated him, he filed suit for wrongful termination, asserting that his employer terminated him without just cause.²³⁸ The district court granted the defendant’s motion for summary judgment, holding that the Statute barred the oral promise

²³¹ *Coan*, 265 F.2d at 578.

²³² *Id.* at 580 (Danaher, J., dissenting).

²³³ *French v. Sabey Corp.*, 951 P.2d 260, 261 (Wash. 1998).

²³⁴ *Id.* at 263.

²³⁵ *Haigh v. Matsushita Elec. Corp.*, 676 F. Supp. 1332, 1346 (E.D. Va. 1987).

²³⁶ *Id.* at 1348.

²³⁷ *Windsor v. Aegis Servs., Ltd.*, 691 F. Supp. 956, 957 (E.D. Va. 1988), *aff’d*, 869 F.2d 796 (4th Cir. 1989).

²³⁸ *Id.* at 956–57.

because it could not be performed within one year.²³⁹ The court concluded that termination of the employment relationship for violating the standards of conduct does not constitute performance.²⁴⁰ The U.S. Court of Appeals for the Fourth Circuit affirmed on the basis of the district court's reasoning.²⁴¹

These courts adopt a narrow interpretation of "performance," concluding that a right to terminate the employment relationship within a year is either the defeasance of the contract or the right to cancel based on a total material breach. Under such an approach, courts have little difficulty concluding that the Statute bars the oral promise.

B. Courts Construing "Performance" Broadly

The other view treats an option to terminate within a year as an alternative method of performance. For example, in *Fothergill v. McKay Press*, the court strongly suggested that the Statute would pose no bar to an oral employment contract providing for five years' employment but terminable by either party upon six months' notice.²⁴² In *Taylor v. Canteen Corp.*, the U.S. Court of Appeals for the Seventh Circuit held that "[w]here . . . the promise of employment is cast in terms of lasting as long as the employee wants the job, the promise is capable of performance within one year and thus outside the Illinois Statute of Frauds."²⁴³

Courts have also held that an employer's right to terminate the employment relationship for "just cause" includes the right to terminate for reasons other than the employee's breach. The leading decision adopting this approach is the U.S. Court of Appeals for the Second Circuit decision in *Ohanian v. Avis Rent A Car System, Inc.*²⁴⁴

In *Ohanian*, the plaintiff alleged that the employer orally promised him that he would not be fired "unless [he] screwed up badly."²⁴⁵ After the employer fired the plaintiff, the plaintiff brought suit for breach of the alleged oral promise,²⁴⁶ and the defendant argued that

²³⁹ *Id.*

²⁴⁰ *Id.* at 960.

²⁴¹ *Windsor v. Aegis Servs., Inc.*, 869 F.2d 796, 797 (4th Cir. 1989).

²⁴² *Fothergill v. McKay Press*, 106 N.W.2d 215, 220 (Mich. 1960).

²⁴³ *Taylor v. Canteen Corp.*, 69 F.3d 773, 785 (7th Cir. 1995).

²⁴⁴ 779 F.2d 101 (2d Cir. 1985) (applying New York law).

²⁴⁵ *Id.* at 104 (alteration in original).

²⁴⁶ *Id.*

the Statute's one-year provision barred the suit.²⁴⁷ Importantly, the court construed the promise as permitting the employer to terminate the employee for "just cause" rather than for "screwing up badly."²⁴⁸ The court then concluded that under New York law, "just cause can be broader than breach and here there may be just cause to dismiss without a breach."²⁴⁹ For example, despite the plaintiff's best efforts, it might be necessary to terminate the plaintiff's employment because of adverse market conditions that necessitate "a change in [the employer's] business strategy, perhaps reducing or closing an operation."²⁵⁰ Accordingly, the court held that the Statute did not bar the oral promise because the employment relationship could have been terminated within a year for reasons other than the plaintiff's breach.²⁵¹

Similarly, in *Frazier v. Colonial Williamsburg Foundation*, the plaintiff alleged that his employer had given him oral assurances that he would only be terminated for cause.²⁵² The court rejected the employer's Statute defense, asserting without analysis that the plaintiff "could have been discharged for good cause within a year of having been hired," and the contract therefore could have been performed within a year.²⁵³ The court did not address whether the plaintiff had the right to terminate the employment relationship within one year.

V. SHOULD ORAL PROMISES OF JOB SECURITY GENERALLY BE BARRED BY THE STATUTE OF FRAUDS?

A. *Broad or Narrow Interpretation of "Performance"?*

The stakes involved regarding this issue are clear. If a narrow conception of "performance" is applied, fewer oral promises of job security will be enforced. If a broad conception of "performance" is applied, more oral promises of job security will be enforced. As with any difficult legal issue, there are factors pulling in each direction.

²⁴⁷ *Id.* at 105–06.

²⁴⁸ *Id.* at 107.

²⁴⁹ *Id.* at 108.

²⁵⁰ *Ohanian*, 779 F.2d at 108.

²⁵¹ *Id.*

²⁵² 574 F. Supp. 318, 320 (E.D. Va. 1983). *Frazier* was presumably overruled by the Fourth Circuit's opinion in *Windsor v. Aegis Services, Inc.*, 869 F.2d 796 (4th Cir. 1989)

²⁵³ *Id.*

As an initial matter, the issue involves one of statutory construction. Thus, the plain language of the Statute should be followed.²⁵⁴ But this will not resolve every case because the Statute does not define “performance.” Legislative history could be consulted, but no relevant legislative history exists.²⁵⁵

As previously discussed, however, the best interpretation of the one-year provision’s purpose is that it was aimed primarily at employment and service contracts, and it was aimed at such contracts for a variety of reasons, including that (1) it was unusual to have such an arrangement in excess of one year; (2) it was often difficult to determine the truth in such cases since they were often brought long after the alleged oral promise was made (for example, when the employee or employer terminated the relationship after the typical one-year period had elapsed); (3) the risk of error in such cases would be of particular concern because the remedy for a breach of a long-term contract was likely to be substantial; and (4) it simply was not good policy to hold a person to such a long-term contract, particularly when the person had not reduced it to writing and thus perhaps had not given it the desired contemplation.²⁵⁶ These rationales support a narrow interpretation of “performance” in employment cases, and thus a more expansive application of the Statute.

As several leading employment law commentators have noted,

[I]t is easy for a fired employee to allege that she received an oral promise of lengthy employment, and such a promise is often difficult for an employer to disprove. The possibility that the employee will testify fraudulently—or at least “remember” the facts in a particularly favorable light after learning from her lawyer that she is otherwise an at-will employee subject to summary dismissal—is a real one.²⁵⁷

Just as in the seventeenth century, it might be perceived that defendants are at a disadvantage before a jury in such cases, particularly because the employee might have more sympathy with the jury than the employer.

²⁵⁴ See *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (“As with any question of statutory interpretation, our analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms.” (citations omitted)).

²⁵⁵ Cf. *Perillo*, *supra* note 61, at 77 (“No one knows why agreements not performable within a year were selected to be within the statute.”).

²⁵⁶ See *supra* Part II.

²⁵⁷ BALES, HIRSCH & SECUNDA, *supra* note 1, at 49.

Additionally, as previously discussed, the at-will rule—despite some erosion—remains the basic premise underlying employment law.²⁵⁸ The rule therefore continues to implement the reasons it was likely adopted, including (1) notions of autonomy and freedom of contract (in the sense that a failure to agree on job security means an absence of consent to anything other than an at-will relationship); (2) a desire to retain employer and employee flexibility to promote wealth maximization; and (3) a desire to keep difficult evidentiary cases out of the court system.²⁵⁹ Notably, some of the likely reasons for adopting the at-will rule are similar to the likely reasons for the one-year provision of the Statute, including a desire to keep difficult cases from an evidentiary standpoint out of the court system, a desire to avoid binding parties to lengthy contractual relationships, and a desire to ensure that parties are not subject to contractual arrangements they never agreed to. Thus, the continuing vitality of the employment-at-will rule also supports a narrow definition of “performance.”

Accordingly, the likely purposes of the Statute’s one-year provision and the employment-at-will rule dictate a narrow interpretation of “performance.” But while it is true that the Statute has been treated like common law,²⁶⁰ it remains a statute, and the Statute makes reference to “performed.”²⁶¹ Thus, the plain meaning of “performance” should be applied, and only in what could be referred to as “close” or “doubtful” cases should deference be given to the likely purposes of the Statute and the employment-at-will doctrine.

²⁵⁸ See *supra* Part III.E.

²⁵⁹ See *supra* Part III.D.

²⁶⁰ See FRIEDMAN, *supra* note 78, at 205 (“In one sense, the statute of frauds was hardly a statute at all. It was so heavily warped by ‘interpretation’ that it had become little more than a set of common-law rules, worked out in detail by the common law courts.”). Professor Grant Gilmore stated that the Statute is a celebrated example of an obsolescent statute being “reabsorbed within the mainstream of the common law.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977). I believe that such an approach by courts to a statute is illegitimate, and has no role in statutory interpretation (assuming it could be called “interpretation”), even if the statute at issue is one whose origins date back to 1677. If the statute is obsolete, it is the legislature’s role to revise or repeal it. Such a statute should be applied according to its plain meaning, with deference to its likely purpose in close cases. With respect to the Statute, I have accepted for purposes of this Article the court-imposed revisions to the Statute because it is unlikely these revisions will be abandoned. I believe, however, that any further court-imposed revisions to the Statute should be avoided.

²⁶¹ See An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3, § 4 (Eng.).

B. Determining If "Performance" Can Occur Within One Year

The starting point for courts is therefore to determine what constitutes "performance," under a plain meaning approach, by each party under the alleged oral contract for job security. This requires a careful analysis of what each party bargained for as part of the exchange.²⁶² Importantly, as discussed below, under such an analysis, many oral contracts for job security will be taken out of the Statute because they will be so-called unilateral contracts, under which performance by the employee is complete at the same time the contract is formed. Therefore, only the remaining oral contracts for job security that can be construed as bilateral are potentially subject to the Statute.

1. Unilateral Contracts

To properly analyze a Statute issue involving an oral promise of job security, the court must first determine what the employer bargained for in exchange for its alleged promise of job security.²⁶³ Under this analysis, a significant number of employer promises of job security will be taken out of the Statute because it will be determined that the employer bargained for a return performance, not a return promise.²⁶⁴ In such a case, the contract will be a unilateral contract, and thus outside the Statute.²⁶⁵

As stated by the Michigan Supreme Court:

[T]he typical employment agreement is unilateral in nature. Generally, the employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based. The employer's promise constitutes, in essence, the terms of the employment agreement; the employee's action or forbearance in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding. In such circumstances, there is no contractual

²⁶² Whether promissory estoppel can be used to circumvent the Statute is beyond the scope of this Article. See RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981) (providing that a promissory estoppel claim is not precluded by the Statute). *But see* Stearns v. Emery-Waterhouse Co., 596 A.2d 72, 74-75 (Me. 1991) (rejecting use of promissory estoppel in employment context to circumvent the Statute).

²⁶³ See Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980).

²⁶⁴ See *id.* at 900; see also Nitz v. Goodyear Tire & Rubber Co., No. 17098, 1995 WL 500073, at *2 (Ohio Ct. App. Aug. 23, 1995) (noting that employment contracts are "often" unilateral contracts).

²⁶⁵ PERILLO, *supra* note 95, at 670.

requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor.²⁶⁶

For example, if an employer orally promises an employee that the employer will only terminate the employment relationship if the employee does not perform satisfactorily, it is possible that the employee has not made a return promise in exchange. Rather, the employer might simply have bargained for the employee to start work with the employer. If that is the case, the employee's performance is complete at the same time the contract is formed (even if the employee has the right to keep working for a longer period), and the employer's promise is therefore outside of the Statute. Of course, if the employee has not yet performed, he or she has not yet accepted the employer's offer, and no Statute issue arises because no contract has been formed yet. Also, whether an employer's promise in circumstances such as these is unenforceable for other reasons, such as a lack of definiteness²⁶⁷ or consideration,²⁶⁸ remains a separate issue to be resolved.

It is beyond the scope of this Article to address when an employer's promise of job security should be construed as inviting a return promise or a return performance. But the important point is that such an analysis must be made when determining if an employer's promise is barred by the Statute. Only if it is determined that an employer's promise was given in exchange for a return promise by the employee, thus constituting a bilateral contract, is the Statute a potential bar.²⁶⁹ Although return promises can be implied from the circumstances,²⁷⁰ courts must be cautious about implying return promises simply to set up the Statute as a potential bar. Implying a return

²⁶⁶ *Toussaint*, 292 N.W.2d at 900 (footnote omitted).

²⁶⁷ *See, e.g.*, *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (holding that employer's oral assurance to employee that she would remain employed as long as she did a good job was too indefinite to constitute an offer).

²⁶⁸ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, illus. 2 (1981) (promise to employ agent for three years unenforceable when promise "reserves power to terminate the agreement at any time"). *But see* *Summers*, *supra* note 5, at 1098 ("The employee, by coming to work, provides sufficient consideration to make the employer's promise of continued or permanent employment binding. An offer by an employer to employ so long as there is a need and the employee's performance is satisfactory can be viewed as an offer of a unilateral contract. . . .").

²⁶⁹ *PERILLO*, *supra* note 95, at 670.

²⁷⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.").

promise by an employee in one case to set up the Statute as a bar will result in the case being used as a precedent in a subsequent case by an employer suing the employee for breach of such an implied promise. The legal theory that is used as a defense in one case will be used as a claim in another case.

2. Bilateral Contracts

The Statute therefore only applies to those remaining employer oral promises for job security that were given in exchange for a return promise. The question then becomes, what were the promises that were exchanged? This must be determined to evaluate whether both promises can be performed within one year of the contract's formation.²⁷¹ Identifying the promises will not always be an easy analysis, however, because, as previously noted, promises can be implied from factual circumstances.²⁷²

a. Bilateral Contracts with a Definite Term of Employment Exceeding One Year, with No Right to Early Termination

If the employer and the employee each orally agreed that the employment term would extend more than one year from the contract's formation, with no express or implied-in-fact right to terminate the relationship sooner, the contract is without question unenforceable under the Statute.²⁷³ Although the parties' duties might be discharged within a year as a result of doctrines such as impracticability²⁷⁴ or frustration of purpose,²⁷⁵ this does not render the contract capable of being performed within one year because termination of the contract by operation of law is insufficient to take the contract out of the Statute.²⁷⁶ Thus, the possibility that the employee might die within a year does not take the contract outside of the Statute because the employee's death would be excusable nonperformance by

²⁷¹ See *id.* § 130(1) ("Where *any* promise in a contract cannot be fully performed within a year from the time the contract is made, *all* promises in the contract are within the Statute of Frauds until one party to the contract completes his performance." (emphasis added)).

²⁷² *Id.*

²⁷³ 4 CORBIN, *supra* note 63, § 19.4, at 595.

²⁷⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

²⁷⁵ See *id.* § 265.

²⁷⁶ See 4 CORBIN, *supra* note 63, § 19.4, at 596 ("[I]n service cases it is recognized, at least as a general rule, that termination of duty by operation of law is not identical with performance of a promise." (footnote omitted)).

operation of law.²⁷⁷ If, however, the parties agree to a lifetime employment contract, the contract is not within the Statute because the employee might die within a year, and death would complete performance (not excuse it).²⁷⁸

b. Bilateral Contracts with a Right to Terminate the Employment Relationship Within One Year

Many employment contracts that contemplate employment extending more than one year after formation include an express or implied-in-fact right by one or both of the parties to terminate the employment relationship within one year. The application of the Statute to such contracts is complicated. As the Restatement (Second) of Contracts provides: “[T]he distinction between performance and excuse for nonperformance is sometimes tenuous; it depends on the terms and the circumstances, particularly on whether the essential purposes of the parties will be attained.”²⁷⁹

i. A Right to Terminate the Employment Relationship at Will, with or Without Notice

Perhaps the easiest case should be one in which the employer, the employee, or both, retain the right to terminate the employment relationship at will within one year of the contract’s formation. Whether notice is required before such a right is exercisable should be irrelevant.²⁸⁰ In such a case, the parties have agreed that perfor-

²⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b, illus. 5 (1981).

²⁷⁸ *Id.* illus. 9.

²⁷⁹ *Id.* cmt. b.

²⁸⁰ The Restatement (Second) of Contracts inexplicably takes the position that such a distinction is relevant. For example, in one illustration, an employment contract for five years that is subject to termination by either party upon thirty days’ notice is not within the one-year provision. *Id.* illus. 6. In the next illustration, however, an employment contract for five years, which provides that the employee may quit at any time if he gives thirty days’ notice, is held to be within the one-year provision. *Id.* illus. 7. It has been suggested that the apparent inconsistency between the illustrations is the result of the peculiar New York rule discussed previously, under which the Statute is inapplicable only if the defendant had the option to terminate the contract within one year. 4 CORBIN, *supra* note 63, § 19.6, at 603 n.6. This is based on the fact that the illustration is premised in part on a New York case. *Id.* But, as noted by Professor Caroline Brown, “the difficulty posed by the Restatement’s illustrations cannot entirely be explained by allusion to the New York cases: for one thing, illustration 7 places no emphasis at all upon the identity of A, who holds the right of termination; for another, we are not told whether A is plaintiff or defendant.” *Id.* Professor Perillo has noted that “[i]llustrations 6 and 7 appear to be contradictory.” PERILLO, *supra* note 95, at 669 n.2.

mance is only to last as long as one of the parties desires. For example, if the employee retains the right to terminate at will, it is likely that the employee has promised nothing more than to start work for the employer, and perhaps to perform his or her work satisfactorily while employed.²⁸¹ If that is so, the employee completes the promised performance merely upon commencing work (and perhaps continuing to perform satisfactorily while at work), and the employee's exercise of the right to terminate the employment relationship would occur after full performance of the employee's promise. In these cases, the employer's duties under the contract would also be fully performed upon termination of the employment relationship because the employer has kept the employee employed for as long as the employee desired. Each party's duties have thus been discharged through performance.

Of course, the employee's right to continue receiving wages is subject to the condition precedent of the employee continuing to perform services, but this is simply a condition to payment, not a promise by the employee to continue working.²⁸² Also, the preceding discussion assumed that there are no post-employment duties to which the parties are subject that would necessarily extend beyond one year from the contract's formation.²⁸³

As previously discussed, some courts, most notably the court in *Deevy v. Porter*, have held that the termination of the employment relationship under such circumstances would frustrate the essential purposes of the contract, particularly when the parties contemplated a term of employment for more than one year.²⁸⁴ In fact, the majority view is that a right to terminate a contract for any reason whatsoever is the defeasance of the contract, not its performance.²⁸⁵ But if the parties agreed that one or both of them could terminate at will, al-

²⁸¹ See, e.g., *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 108 (2d Cir. 1985) (inferring a promise by the employee to give his "best efforts").

²⁸² On the distinction between an express condition and a promise, see PERILLO, *supra* note 95, at 365-66.

²⁸³ However, it has been held that "a contract whereby an employee is to be paid a bonus or commission on an annual basis but which cannot be calculated and paid until after the books have been closed is not within the Statute although the bonus cannot be calculated until after the end of the year." *Id.* at 667. Also, a noncompetition agreement is generally considered capable of being performed within a year because the employee's death would be the equivalent of full performance. RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b & illus. 9 (1981).

²⁸⁴ *Deevy v. Porter*, 95 A.2d 596, 597-99 (N.J. 1953).

²⁸⁵ PERILLO, *supra* note 95, at 668.

though the parties might have hoped or expected for a longer relationship, they agreed that it need not last that long. The majority view, including decisions like *Deevy v. Porter*, runs contrary to the established rule that a contract is not within the Statute's one-year provision as long as it is capable of being performed within one year, even if the parties hoped that performance would last longer. Accordingly, such an agreement is capable of being performed within one year.

Decisions like *Deevy v. Porter* and *French v. Sabey Corp.* misconstrue the essential purpose of the contract. When the parties agree that one party retains the right to terminate the employment relationship for any reason, the contract's essential purpose is to provide employment for only as long as that party desires. To suggest that the essential purpose of the contract was employment for a definite term cannot be reconciled with the at-will termination provision. The appearance of a promise to work for a definite term is an illusion. It makes no sense to say that a party has promised to work for one year, unless he or she chooses to stop working sooner. And absent a promise to work more than a year from the contract's formation, the Statute is not a bar.

It is certainly true that, if decisions like *Deevy v. Porter* and *French v. Sabey Corp.* were incorrect, the likely purposes of the Statute could be easily circumvented. An employee could avoid the Statute by simply arguing that under the terms of the contract he or she (but not the employer, of course) retained the right to terminate the relationship at will. But such an assertion might lack credibility and, therefore, make the likelihood of success small. Also, such an assertion might result in the court concluding that the employer's promise lacked consideration because the employee did not provide a return promise. The employee could avoid the consideration issue by alleging that he or she only retained the right to terminate the relationship upon a certain amount of notice, but such an assertion would probably lack credibility.

ii. Bilateral Contracts with a Right to Terminate the Employment Relationship upon the Occurrence of a Specific Event

A bilateral contract under which the employer and the employee each agree to an employment term of longer than one year from its formation, subject to an explicit or implied-in-fact right to terminate upon the occurrence of a specific event (as opposed to at the mere will of either party) presents a more complicated case. In such a situ-

ation, the event giving rise to the right to terminate the employment relationship must be analyzed to determine if the event is closer to one that frustrates the contract's purpose, or closer to performance.

If the event is a breach of the contract, even a nonmaterial breach, it should not be considered performance of the contract, because a breach is not performance. It will not always be easy, however, to determine if an event is a breach. For example, an employer who has promised job security to an employee generally retains the right to terminate the employee for poor performance or misconduct.²⁸⁶ Such a right might be explicit or implied-in-fact. It is not always clear, however, that such an event is a breach of contract by the employee; it might simply be a condition to continued employment. To determine if the event was a breach, it would be necessary to determine if the employee explicitly or impliedly promised to perform well, or to meet the job requirements (such that the employee could be sued for breach for failing to perform as promised).

In any event, however, such events cannot be construed as attaining the parties' "essential purposes,"²⁸⁷ and are closer to frustrating them. For example, it has been asserted that "with a promise to employ someone as long as he meets the job requirements, the occurrence of the contingency—the employee's failure to meet the requirements—frustrates and cuts off the continuing performance of the contract."²⁸⁸ Accordingly, termination based on such events does not constitute performance.

Some definite-term employment contracts permit the employer to terminate the employment relationship if the employer is not subjectively satisfied with the employee's performance.²⁸⁹ In such a case, the employer might act unreasonably, but in good faith, and the employer would still be entitled to terminate the employment relationship. One commentator has argued that in such a contract, "the par-

²⁸⁶ See, e.g., *Ohanian*, 779 F.2d at 107; *Hetes v. Schefman & Miller Law Office*, 393 N.W.2d 577, 578 (Mich. Ct. App. 1986).

²⁸⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b (1981) (providing that the distinction between performance and excuse for nonperformance "depends on the terms and the circumstances, particularly on whether the *essential purposes* of the parties will be attained." (emphasis added)).

²⁸⁸ *Milazzo v. O'Connell*, 925 F. Supp. 1331, 1341 (N.D. Ill. 1996), *aff'd*, 108 F.3d 129 (7th Cir. 1997).

²⁸⁹ See, e.g., *Fursmidt v. Hotel Abbey Holding Corp.*, 200 N.Y.S.2d 256, 260 (N.Y. App. Div. 1960) (holding that satisfaction clause involving valet and laundry service to a hotel entitled the hotel to terminate the relationship if the hotel was not genuinely and honestly satisfied with the services).

ties intend for the contingency, the employee's unsatisfactory work for example, to constitute full performance of the contract."²⁹⁰

Although this is a more difficult case, such a termination should still be construed as closer to a frustration of the contract's purpose than performance. Under such a contract, the employer bargained for performance by the employee that would subjectively satisfy the employer. If the employee did not provide such performance, the employee has not provided the employer with that which the contract was intended to secure. It can hardly be said that the parties' "essential purpose" was to have a relationship that would only last as long as the employer was satisfied with the employee's performance. Rather, the essential purpose was to have a satisfactory employment relationship.

The more complicated issue arises when the employer has retained the right to terminate the employment relationship for reasons other than poor performance by the employee. For example, although some courts seemingly hold that an employment contract for a definite term of employment does not include an implied right to terminate based on the elimination of the employee's position,²⁹¹ other courts hold that an employer retains the right to terminate for economic reasons.²⁹² Thus, some courts have construed a promise to terminate the employment relationship only for "just cause" as including the right to terminate for reasons such as adverse market conditions.²⁹³

For the former courts, the contract would unquestionably be within the Statute—assuming it was a definite-term contract for more than one year from formation—because any termination prior to the end of the employment period would be a breach. Even for the latter courts, however, the event permitting termination is closer to excusable nonperformance than performance, and thus the contract should still be within the Statute. At a minimum, any event not addressed in the contract that would have discharged a party's duties under the

²⁹⁰ Haroutunian, *supra* note 8, at 510.

²⁹¹ *See, e.g.*, Grappone v. City of Miami Beach, 495 So. 2d 838, 839 (Fla. Dist. Ct. App. 1986) (holding that complaint stated a claim for breach of definite-term employment contract when employer eliminated position); Helberg v. Cmty. Work & Dev. Ctr. Indus., Inc., No. CX-93-958, 1994 WL 1121, at *2-3 (Minn. Ct. App. Jan. 4, 1994) (holding that definite-term contract did not include right to terminate employee because position was eliminated).

²⁹² *See, e.g.*, Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 107-08 (2d Cir. 1985).

²⁹³ *See id.*

doctrines of supervening impracticability²⁹⁴ or supervening frustration of purpose²⁹⁵ should be considered a discharge through excusable nonperformance. Because discharge under the doctrines of impracticability and frustration of purpose are considered excusable nonperformance,²⁹⁶ the mere fact that the parties addressed the occurrence of the event in the contract does not necessarily mean the event should be considered “performance” instead of excusable nonperformance.²⁹⁷ Therefore, merely because the parties indicate that an employee’s duties under a definite-term contract would be discharged as a result of the employee’s death, the death would not be considered “performance” because it is an event that would have discharged the employee’s duties under the doctrine of impracticability if it had not been addressed in the contract.²⁹⁸

With respect to events that would not have discharged a party’s duties under the doctrines of impracticability or frustration of purpose, the issue is whether such events are closer to the types of events that would fall within those doctrines or closer to an alternative method of performance. Because such cases will present a myriad of different contingencies that will permit termination of the employment relationship, each case must be analyzed to determine if the event is closer to performance or closer to impracticability or frustration. In general, an event that is not within either party’s control would seem to be closer to an event that would have discharged the party’s duties under the doctrines of impracticability or frustration of purpose. Also, as previously discussed, in “close” or “doubtful” cases, the likely purposes of the Statute’s one-year provision and the employment-at-will doctrine dictate that discharge as a result of the event should be considered excusable nonperformance.

²⁹⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

²⁹⁵ See *id.* § 265.

²⁹⁶ See 4 CORBIN, *supra* note 63, § 19.4, at 596 (“[I]n service cases it is recognized, at least as a general rule, that termination of duty by operation of law is not identical with performance of a promise.” (footnote omitted)).

²⁹⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b (1981) (“The possibility that such a discharge or excuse may occur within a year is not a possibility that the contract will be ‘performed’ within a year. *This is so even though the excuse is articulated in the agreement.*” (emphasis added)).

²⁹⁸ *Id.* illus. 5; see also *id.* § 262 (“If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.”).

Under this approach, an express or implied right to terminate based on adverse business conditions is closer to impracticability or frustration of purpose than performance. Even though adverse market conditions are generally not events that permit discharge under the doctrines of frustration or impracticability,²⁹⁹ such an event would be closer to frustration of purpose than an alternative method of performance. The illustrations in the Second Restatement of Contracts show that for discharge based on the occurrence of an event to be considered “performance,” the primary object of the contract must thereby be fully performed as a result of the event’s occurrence. For example, a promise to make support payments to a child until the child becomes twenty-one years old can be performed within a year because “[i]f the child dies within a year, the primary object of furnishing necessities to the child will be fully ‘performed.’”³⁰⁰ Likewise, a noncompetition agreement that extends more than one year can be performed within one year because the employee’s death within one year would give the employer “the equivalent of full performance.”³⁰¹

With respect to an express or implied right to terminate a definite-term employment contract within a year based on adverse market conditions, the occurrence of such an event does not result in the primary object of the contract being fully attained. Unlike a contract that reserves to one party the right to terminate the contract at will, the primary object of a definite-term employment contract under which each party is bound to the term is to have an employment duration for the full period. An early termination should not be considered an alternative method of performance because that would suggest that if the event occurred, the parties would agree that each party’s expected benefits under the contract had been realized. Without question, the employee would not feel this way. Additionally, if this were considered a “close” or “doubtful” case (which I do not think it is), the purpose of the Statute’s one-year provision and the purpose of the employment-at-will doctrine dictate that discharge be considered excusable nonperformance.

Accordingly, the court’s conclusion in *Ohanian v. Avis Rent A Car System, Inc.* that an employer’s right to terminate the employment relationship because of adverse market conditions was equivalent to

²⁹⁹ See, e.g., *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (holding that liability insurance crisis did not discharge duty to obtain such insurance).

³⁰⁰ RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b, illus. 8 (1981).

³⁰¹ *Id.* illus. 9.

performance was incorrect. The court incorrectly concluded that simply because it would not have been a breach, it meant the contract could be performed within a year.³⁰² Importantly, however, because the contract was not for a definite term but instead seemed to be a promise for lifetime employment, the possibility of the employee's death within one year should have constituted the equivalent of full performance.

Other agreements provide that a particular event unrelated to the employee's performance or adverse market conditions will terminate the employment relationship. For example, as previously discussed, in *Coan v. Orsinger*, the plaintiff alleged that his employer orally promised him the job of resident manager of an apartment development, with the job to last until he either completed law school (which he had just started) or was obliged to discontinue those studies.³⁰³ In a case such as *Coan*, it is necessary to make a factual finding as to the "essential purposes of the parties"³⁰⁴ and the "primary object" of the contract.³⁰⁵ If the essential purpose was simply to provide the employee with a job for as long as he was in law school, the occurrence of the event—the employee being obliged to discontinue his law studies—would be closer to performance. If, however, the essential purpose was to provide the parties with a three-year employment relationship, the occurrence of the event would be closer to frustration of purpose.

If, after reviewing the available evidence, the issue remains doubtful, the event should be considered closer to frustration. First, it is the type of event that might discharge the employee's duties under the doctrine of frustration of purpose. Being obliged to discontinue law studies was likely an event whose non-occurrence was a "basic assumption on which the contract was made,"³⁰⁶ and it might have been a job needed to help pay for law school while the employee was in the area. Second, the event was one essentially outside of the parties' control. Third, such a finding would promote the purposes of the Statute's one-year provision and the employment-at-will doctrine.

Professor Richard Lord, who contends that the case was incorrectly decided, states that "what the court appears to have overlooked

³⁰² 779 F.2d 101, 107–08 (2d Cir. 1985).

³⁰³ 265 F.2d 575, 575–76 (D.C. Cir. 1959).

³⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b (1981).

³⁰⁵ *Id.* illus. 8.

³⁰⁶ *Id.* § 265.

is that if anything had happened to interrupt plaintiff's studies, the performance of his duties (his promise to serve) as residential manager would have been complete, and nothing more would have been required of him. . . ."³⁰⁷ But Professor Lord's approach would eradicate the distinction between performance and excusable nonperformance in employment cases. Any event, other than a breach, that would permit a party to terminate the employment relationship within a year would constitute performance because the employee worked as long as he or she was legally required to. This approach is inconsistent with the rule that a party's discharge through excuse is not the equivalent of performance, and ignores the obligation to determine if the parties' "essential purposes" would be attained by the occurrence of the event.

VI. CONCLUSION

When addressing a Statute of Frauds defense to a breach of contract claim by an employee alleging an oral promise of job security, the court must carefully determine what express or implied promises have been made by each party. Often, an employee will not have made any promise, and the employee's performance will be complete when the contract is formed.

Even when the employee has made a return promise, often the only express or implied-in-fact promise made by the employee will be a promise to start work, to use his or her best efforts upon starting work, or both. If these are the only express or implied-in-fact promises made by the employee, the employee will retain the right to terminate the employment relationship at any time. If the employee terminates the employment relationship within a year of entering into the contract, the employee will have fully performed his or her promises. Likewise, the employer will have fully performed its promise of providing job security as long as the employee chooses to maintain the employment relationship. Also, because a "just cause" termination provision is the equivalent of a promise of lifetime employment, the contract can be performed within a year as a result of the employee's death.

With respect to the right to terminate a definite-term employment contract because of a particular event, the court must determine whether discharge as a result of the event's occurrence is closer to discharge under the doctrines of impracticability or frustration of

³⁰⁷ 9 WILLISTON, *supra* note 83, § 24:3, at 452 n.45.

purpose, or to performance. In making this determination, the court must consider the parties' "essential purposes" and the primary object of the contract. Only if the event accomplishes the parties' essential purposes and the primary object of the contract would the event be considered the equivalent of full performance. If the event is one that would have discharged a party's duties under the doctrines of impracticability or frustration of purpose, it is closer to excusable nonperformance than performance. Also, if the event is one outside of the parties' control, it is likely to be an event closer to excusable nonperformance. Further, in "close" or "doubtful" cases, the purpose of the Statute's one-year provision and the purpose of the employment-at-will doctrine dictate a finding that the event is closer to excusable nonperformance than performance.