Reflections on The New Psychological Contract and the Ownership of Human Capital

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When it comes to employment law reform aimed at enhancing the welfare of employees, I am a skeptic about implied contract. Implied contract—by which I mean a legal rule that imposes rights and obligations upon employer and employee as a matter of law upon proof of certain facts—is sometimes offered as a way to protect employees against arbitrary or opportunistic discharge or other oppressive terms. It has also been used to confer significant rights on the employer. Both the at-will rule and the various limits on it are examples of implied contract terms.¹

I am a skeptic about the implied contract approach to employee protection for two reasons. First, experience has shown that judges are not the first group of people one ought to rely upon to protect employees. Second, and more significant, judicial decisions recognizing employee-protective implied contract terms are easily avoided. The terms are, after all, gap-fillers, and will not apply when there is no gap to be filled.² Employers need only require employees to sign an express agreement incorporating whatever terms the employer favors, and—“Presto!”—no more protections.

It was, therefore, with some skepticism that I approached the reading of Knowledge at Work: Disputes Over the Ownership of Human Capital in

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¹ When I refer to “implied contract,” I mean implied terms in an existing employment contract, rather than, as the term “implied contract” may be used in contract law, where the entire agreement is implied in fact (as where one calls a plumber to fix a pipe the court will find an implied-in-fact contract to pay a reasonable fee) or implied in law (as where no agreement was ever made, but one party conferred a benefit on the other and the court will require the party to pay for it to avoid unjust enrichment). See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 1.11, at 21-22 (4th ed. 1998) (explaining implied contract and providing examples, including the plumber example repeated here); id. § 2.9, at 56-59 (explaining implied just cause terms in employment contracts).

² Id. § 2.9, at 56.
the Changing Workplace. In her article, Professor Katherine Van Wezel Stone offers a new view of how the implied contract concept can be harnessed to improve the situation of workers. My doubts were, to a very significant extent, allayed. The piece is ambitious, important, provocative, and persuasive. She argues that the terms of the implied employment contract have changed in the last twenty years. In her view, one of the most important elements in the new employment relationship is the promise of training that will enable employees to develop their human capital. From this description of the new employment contract, Stone draws prescriptions for a number of areas of employment law.

The area on which the editors of the Connecticut Law Review have asked me to comment is the body of law relating to ownership of employee-generated intellectual property and the portability of human capital. On this point, Stone argues that, "[w]hen forced to decide who owns the employees’ general human capital, courts should factor the implicit terms of the new psychological contract into their determination" and should treat as suspect employer efforts to restrict the portability of the employee’s general human capital through noncompete or confidentiality agreements and trade secret litigation.

Stone’s thesis regarding the employment contract and control of employee human capital raises four questions. The first is descriptive: Is the “new psychological contract” an accurate description of the employment relationship? The second is normative: What values underlie Stone’s effort

4 Id. at 731.
5 Id. at 732.
6 See generally id.
7 For the most part, I use these two concepts interchangeably in this Article as shorthand. In fact, they are two different things, for the knowledge encompassed by the term “human capital” may be more diffuse or inchoate than the term “intellectual property” connotes. The differences between them do not matter for my purposes here.
9 Stone, supra note 3, at 764.
10 Id.
new psychological contract is an accurate and desirable definition of today’s employment relationship, what difference would recognizing it make to current doctrine? Fourth: Will any contract-based reconceptualization of the nature of employment achieve the law reform goals that Stone seeks? These implications of her work provide the focus and structure of my Commentary.\footnote{Because Stone says little on the normative issue of whether employment should be as contingent as the new psychological contract describes it, I will not either. See Stone, supra note 3, at 724-25. I harbor some doubts about whether the new world of insecure employment and, supposedly, increased employability well serves many workers (and she may also).}

Although I have modest reservations about her descriptive claim and more significant concerns about the likely success of her project in reforming the law, Stone’s prescriptions for the changes in law that should be made to reflect changes in the nature of employment seem absolutely correct.\footnote{See Stone, supra note 3, at 763.} If employment has become as temporary as the new psychological contract suggests, and if employers are asking employees to sacrifice employment security for the training and network opportunities that will give them employability security,\footnote{See id. at 733-34.} then the law of trade secrets and restrictive covenants should give employers no more control over employee human capital than they have bargained for. For the considerable percentage of employees who lack express written employment contracts—or at least express contracts regarding intellectual property—Stone’s proposed reforms would represent a significant and salutary improvement.\footnote{See id. at 763.} My main concern is that, unless we are prepared to impose non-contractual rules about how much they can bargain for, I think we should not expect to see significant change in the amount of control many employees in fact enjoy with regard to the portability of their human capital or intellectual property. Employers will simply gain what they want by express contract.

I. THE NEW PSYCHOLOGICAL CONTRACT AS A DESCRIPTION OF MODERN EMPLOYMENT

It has become a cliché of the literature on the modern workplace that temporary, contingent, insecure, or, as Stone calls it, “precarious” employment has replaced the long-term employment that was thought to characterize white-collar male employment in the mid- to late twentieth century.\footnote{Many of the sources on this point are cited in Stone’s admirably extensive footnotes. See Katherine V.W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. REV. 519, 540-47 nn. 57-92 (2001). In the law review} In other words, for most workers, employment security is a thing of
the past. Stone’s article examines the data on current employment practices and, with significant qualifications, accepts the truth of the claims of change. The first contention of her article is that employment practices have changed so fundamentally as to necessitate that we change the way we think about the terms of the employment contract. Stone’s article is an enormously helpful and provocative description of modern employment: the “new psychological contract” is a useful way of understanding changes in employment practices.

I have one quibble about her descriptive claim. That employment practices have changed for some does not mean they have changed for all. As Stone points out, the “old psychological contract” of long-term and secure employment never described the job situations of many workers, particularly women and minorities. The “new psychological contract” does not accurately describe the jobs of all employees either.

This may be an obvious point, and I doubt she would disagree. But it is a point worth remembering when we come to the question of how legal doctrine ought to change. If some firms or employees are still operating under the old rules of long-term employment, internal labor markets, and job security, then we perhaps should exercise some caution in proposing new legal rules for everyone that are designed to respond to the conditions of only some. For that significant percentage of workers whose work does not provide the networking opportunities and skill development that are part of the employability security aspect of the new psychological contract, we should not assume that they have traded away employment security.

Stone claims that in exchange for reduced employment security, firms now promise (explicitly or implicitly) “employability security.” That is, firms promise employees that the work they do will enhance their skills and give them the relevant training, experience, and contacts to get a new job once the current one ends. That, in a nutshell, is the new psychological contract.

Stone’s effort to discern the terms of the implied employment contract is part of a long tradition in employment law. One of the most vexing, political, and controversial aspects of employment law throughout the last century has been attempting to define the terms of the employment con-

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15 See Stone, supra note 3, at 726-27.
16 See id. at 724.
17 See id. at 731 (citing Marcie A. Cavanaugh & Raymond A. Noe, Antecedents and Consequences of Relational Components of the New Psychological Contract, 20 J. ORG. BEHAV. 323, 324 (1999) (citations omitted)).
18 Stone, supra note 3, at 734.
century has been attempting to define the terms of the employment contract. Ever since contract replaced status as the dominant legal framework for the employment relationship, courts have struggled to reconcile the premises of contract law—private ordering achieved through bargained-for exchange—with the realities of the employment relationship. The conventional understanding of the nature of a contract does not easily fit the long-term and informal nature of the employment relationship, where "bargaining" over terms is invisible and, perhaps, even a poor heuristic for understanding the way the terms of the relationship are formed. Negotiation over terms is hampered by unequal information and, with respect to just cause for termination, by social norms that make it difficult for employees to negotiate for the right to keep their job unless they really screw up or for employers to announce to prospective employees that they would like to be free to fire them arbitrarily. There are significant incentives for both sides to engage in opportunistic behavior, and devastating social policy consequences occur when one party can exploit its superior market power at the expense of the other.

In short, contract law has never been a perfect fit for employment. Yet it has endured in part because contract discourse is a way to achieve substantive ends in regulating human relationships without appearing to impose one's values on another. Contract allows an almost invisible movement between description and prescription. Even the most discerning reader frequently cannot tell when a judicial opinion analyzing the obligations of the employer and employee is describing what the parties themselves chose or what the court thinks should be their respective rights and obligations.

Although I agree with Stone's description of modern employment, I have some doubts about whether the idea of the "new psychological con-

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20 Whistleblower cases provide examples of where the public might have an interest in preventing an employer from exercising its right to fire employees at will.

21 See Stone, supra note 3, at 733-36.
ment relationship, and will effectively reorient judges' decisions. A counter-narrative can be told about the nature of the employment, in which the exchange is not employment insecurity for employability security, but employment on whatever terms for cash plus the possibility of continued employment if the employee performs well—until the employer changes its mind. In this counter-narrative, the scope of the knowledge that the employee is expected to be able to take with her to new employment is far more limited than in the narrative that Stone gives, and the disloyalty of the employee who attempts to pirate secret knowledge is morally and legally blameworthy. Given the informality of employment relations and the wealth and contested nature of the facts that would be necessary to choose between the two narratives, I am not confident that the employee's interpretation of the nature of the unwritten employment contract will be the dominant narrative.

The limitations of implied contract may be seen from other areas of employment law where judges commonly invoke the unilateral contract idea as a way of giving employers unfettered discretion to change the terms of the employment contract without notice and without consideration. A judge has a range of possibilities in deciding how to characterize the nature of the implied employment agreement. When a judge writes an opinion allowing the employer to impose an arbitration agreement or an express at-will agreement on a current employee without payment of additional consideration, she typically describes the employment contract as a series of one-day, unilateral contracts in which the employer offers salary and employment, which the employee accepts by showing up for work each day. On that analysis, the employee accepts any change in the contract by continuing to work.

I have to wonder whether judges really believe that the employer and employee share the understanding of employment as a day-to-day, or even a minute-to-minute relationship. Unilateral contract offers a legal rationale for a result reached on other grounds; judges embrace it even if they know it does not describe the reality of employment contracting. The scholarship on the lifetime employment cycle seems to have had more impact on academic arguments about the real nature of employment agreements than on judicial interpretation of the relationships in real cases. Judges are not

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22 See id. at 735-36.

23 In Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112, 115-19 (Mich. 1989), the Michigan Supreme Court discussed cases adopting the unilateral contract theory of modification of just-cause terms of employee handbooks. The court critiqued as "strikingly artificial" the characterization of employment as a series of one-day unilateral contracts: "Few employers and employee begin each day contemplating whether to renew or modify the employment contract in effect at the close of work on the previous day." Id. at 116.

24 Id. at 116.

25 See, e.g., Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment
likely to be more protective of employees in the next twenty years than they were in the last twenty.

II. THE NEW PSYCHOLOGICAL CONTRACT AND NORMATIVE JUDGMENTS ABOUT EMPLOYMENT

Description of the nature of the employment relationship has never stood alone; it always serves a normative agenda. And, in this respect, Stone is no exception. Stone argues that if the implicit contract is that employees get employability security, the law of trade secrets and restrictive covenants should reflect the implied promise and restrictions on the portability of human capital should be relaxed so that employees can get the benefit of the implied bargain. Thus, the normative agenda animating Stone's descriptive thesis is to protect employees by increasing their control over the intellectual property and human capital they generate.

The historical development of the modern law regarding ownership of human capital illustrates the easy slippage between the descriptive and the normative in the law of employment contracts. Nowhere is this more obvious than in the law regarding the ownership of patents and copyrights and the enforcement of restrictive covenants and protection of trade secrets. Historical experience should also be sobering for those of us who would like to see employment law do more to enhance the welfare of employees. Throughout most of the past two centuries, the terms that judges have implied have not been the ones that the employee litigants advocated. After all, let us not forget that the at-will rule is an implied contract concept; it implies an at-will termination provision into employment agreements.

Turning to ownership of intellectual property and general human capital, we see the checkered past of implied contract. Prior to the last quarter of the nineteenth century, courts confronted with disputes about ownership of valuable workplace knowledge generally concluded that the employee owned it. Employee inventors owned the patents, employee authors


26 Stone, supra note 3, at 736.

27 See Fisk, Working Knowledge, supra note 7, at 464-68 (discussing early trade secrets cases).

28 See Fisk, Removing the 'Fuel of Interest', supra note 7, at 1130; Fisk, Working Knowledge, supra note 7, at 444-46; Fisk, Authors at Work, supra note 7, at 14-30.
owned the copyright, and information that today would be deemed a trade secret was freely portable. As industrialization led courts to see the value to firms of intellectual property and human capital, they began to conclude that an implied term of the employment contract was that employers would own the rights to patents or copyrights produced in the scope of employment and that employees could not use economically valuable information for their own advantage.

"Implied contract" was the rhetorical device that late-nineteenth-century courts used to expand the duty to guard workplace secrets. The duty was expanded from a relatively limited obligation to guard a particular and confidential piece of information, to a general employee duty to guard the secrecy of a wide range of workplace know-how. For example, in Cincinnati Bell Foundry Co. v. Dodds, William Howard Taft, who was then sitting as an Ohio superior court judge, held that the technique for making bells could be a trade secret and employees could be enjoined from using or disclosing it even in the absence of an express agreement. The evidence in the case showed that the employer had not attempted to keep the technique secret, yet Judge Taft concluded that the employee’s “obligation to preserve such secret as the property of his employer must be implied, even though nothing was said to him on the subject.”

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29 I discussed all the relevant cases in Fisk, Removing the ‘Fuel of Interest’, supra note 7, at 1142-50. As I explained in that article, no case prior to the late nineteenth century held that an employer was entitled to any rights in the patented inventions of its employees simply by virtue of the fact of employment. Id. To the extent that employers enjoyed any rights, the basis for the employer’s right to use the employee’s invention was that the employer had allowed the employer to use it and was therefore estopped from denying the employer the right to continue to use it. Id. at 1149; see McClurg v. Kingsland, 42 U.S. (1 How.) 202 (1843) (stopping employee from preventing employer from using patented invention developed during employment but assuming that employee owned patent).

30 I discuss the copyright doctrine in Fisk, AUTHORS AT WORK, supra note 7, at 14-30. See Wheaton v. Peters, 33 U.S. 591, 667-68 (1834) (assuming that court reporter would own copyright to those parts of reports he wrote himself so long as the copyright was properly registered); Myers v. Callaghan, 5 F. 726, 735 (N.D. Ill. 1881) (holding that state reporter is entitled to copyright for his contributions to volumes of reports even though he cannot copyright the opinions of judges); Boucicaut v. Fox, 3 F. Cas. 977, 980 (S.D.N.Y. 1862) (holding playwright rather than his employer, the theatre manager, owns copyright to play written while employed at a theatre); Roberts v. Myers, 20 F. Cas. 898, 899 (D. Mass. 1860) (same).

31 I discussed the absence of a trade secret doctrine in Fisk, Working Knowledge, supra note 7, at 464-68. See Deming v. Chapman, 11 How. Pr. 382 (N.Y. Sup. Ct. 1854) (employer could not prevent employee from divulging employer’s technique for marbleizing iron); Keefer v. Taylor, 53 Pa. 467 (Pa. 1866) (declining to enforce an agreement by which an employee promised not to manufacture scales using the former employer’s technology).

32 See Fisk, Removing the ‘Fuel of Interest’, supra note 7, at 1132-33; Fisk, Working Knowledge, supra note 7, at 445-46; Fisk, AUTHORS AT WORK, supra note 7, at 50-60.


34 Id. at 154, 158.

35 Id. at 157-58. Other cases using implied contract concepts to enlarge the range of information that the employer could prevent employees from using in subsequent employment are discussed in
"Implied contract" facilitated increased employer control over patents and copyrights as well. In the late nineteenth and early twentieth centuries, courts became far more willing than they had previously been to find that implied in an employment agreement was the employer's rights to a patented invention or copyrighted work created by the employee. For example, a Michigan Law Review article from 1903 asserted that ownership of workplace inventions, or even inventions "outside the scope of employment" could be allocated by an implied contract. Essentially, the implied contract was a rhetorical device, which allowed courts and commentators to switch from the old rule of employee ownership to a new rule. The new rule established that, "[w]here the employer and the employee both claim the invention[,] the presumption is prima facie in favor of the employer." One court said that in the case of copyright, when an artist is commissioned to create a work without agreement as to ownership of the copyright, "there appears to [be] a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron." Another court, in determining ownership of a copyright prepared within the scope of employment, held that "[w]here a contract of employment is silent, there may be an implication in favor of the employer."

In short, courts used implied contract concepts to shift control of employee knowledge from employees to employers. Judicial embrace of implied contract concepts in order to define the rights and obligations of the parties has not been a value-free exercise over the last century or two. Implied contract concepts have served employer interests far better than they ever served employees, which is made apparent by the law governing ownership of human capital and intellectual property. Lest there be any doubt about the matter, one cannot say that employees gained employment

Fisk, Working Knowledge, supra note 7, at 499-503.
36 See Fisk, Removing the 'Fuel of Interest', supra note 7, at 1132-33; Fisk, Working Knowledge, supra note 7, at 445-46; Fisk, Authors at Work, supra note 7, at 50-60.
37 Dwight B. Cheever, The Rights of Employer and Employee to Inventions Made by Either During the Relationship, 1 Mich. L. Rev. 384, 384 (1903).
38 Id. at 386 (emphasis omitted) (citing Miller v. Kelley, 18 App. D.C. 163, 171 (D.C. Cir. 1901)). See Standard Parts Co. v. Peck, 264 U.S. 52, 60 (1923) (construing the decision to employ someone to develop a product as an agreement to assign the patent). Cases employing implied contract concepts to increase the employer's rights are cited and discussed in Fisk, Removing the 'Fuel of Interest', supra note 7, at 1171-97.
39 Diehlman v. White, 102 F. 892 (C.C.D. Mass. 1900); see also Lawrence v. Dana, 15 F. Cas. 26 (C.C.D. Mass. 1869) (holding title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employee, by virtue of the contract of employment, without any written assignment). A later case backed away from the presumption that works created by independent contractors belonged to the hiring party, limiting the presumption of employer ownership to cases involving employees. W.H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82, 88 (6th Cir. 1928).
40 W.H. Anderson Co., 27 F.2d at 88.
security in exchange for the loss of their human capital and intellectual property. The early twentieth century was also the era in which courts and treatise writers most enthusiastically proselytized for an iron-clad at-will rule.\footnote{See, e.g., Clarke v. Atl. Stevedoring Co., 163 F. 423, 425 (C.C.E.D.N.Y. 1908) (finding an agreement to provide continuous work and “to keep [the employees] as long as they fulfill their part of the program” is not an agreement to provide secure employment because it is an agreement for indefinite employment, and any agreement for indefinite employment is terminable at will); Skagerberg v. Blandin Paper Co., 266 N.W. 872, 873-74 (Minn. 1936) (finding an employment in which the “essential consideration” was that “the job will be a permanent one” was at will because “permanent” employment is indefinite employment, and indefinite employment is at-will); HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).}

There is nothing, in principle, to prevent courts from using the concept of implied contract to undo the effects of the legal changes made by nineteenth-century courts using implied contract concepts. As a historian, I find a lovely symmetry in this possibility. It would be a very quiet revolution, for the new wine of freely portable human capital would flow easily into the old bottles of implied contract. Legal doctrine could be changed quite profoundly in the old-fashioned common law method whereby the old constructs would acquire new meanings over time.\footnote{See supra note 3, at 730-32.} As such, there is much to be said for Stone’s clever and time-honored use of the implied terms of the modern employment contract as a way of accomplishing a covert normative agenda of generating a significant shift in the portability of human capital and intellectual property.

III. THE NEW PSYCHOLOGICAL CONTRACT AS A PRESCRIPTION FOR LEGAL RULES GOVERNING OWNERSHIP OF HUMAN CAPITAL

Among the most thought provoking of Stone’s arguments surrounding the new nature of the employment contract are her suggestions concerning the new psychological contract’s effect on legal doctrine regarding ownership of human capital.\footnote{Id. at 737-46. Stone does not address patent or copyright law, focusing instead on trade secrets and restrictive covenants. Her argument may, however, have implications for patent and copyright law.} In essence, she argues that the new psychological contract entails a reversal of existing doctrine allocating control of human capital to the employer.\footnote{Oliver Wendell Holmes, Jr., THE COMMON LAW 5 (1881).}
One of the interesting features of Stone's article is the way it translates sociological and management literature into legal praxis. However, this is also one of the difficult features of her argument. Although she and I agree that current doctrine does not adequately protect the ability of employees to control their human capital, I am not confident that the changes in doctrine that she suggests necessarily follow from her redefinition of the implied terms of an employment contract. Moreover, given the divergence between current doctrine and her assertion of what the employment relationship is, I wonder whether the shift from a redefinition of the implied contract to a new doctrine of trade secrets and restrictive covenants will occur as smoothly as we might wish.

Stone addresses this concern when she argues that:

When an employer has promised to give an employee skill development and general knowledge as part of the employment deal, then it cannot . . . be assumed that the employer intended to preclude the employee from using knowledge for her own advantage. Rather, . . . when human capital development is part of what an employee is promised in the employment deal, . . . it must be concluded that the human capital . . . belongs to the employee. But what if the employer and employee have expressly agreed that the employee does not have the right to use workplace knowledge to her own advantage? Ordinarily, an express agreement negates the existence of an implied agreement containing contrary terms. Is it not true that an express agreement not to compete might negate the existence of an implied "psychological contract" to the contrary?

With respect to copyright, the work-for-hire provision in the statute renders the terms of the implied agreement irrelevant. 17 U.S.C. § 201 (1994 & Supp. V 2000). The statute establishes a statutory default rule, which the parties can contract around if they do so expressly and in writing. Id. Even if courts uniformly adopted the new "psychological contract" view of employment contracts, the employer would still be the copyright owner in the absence of an express written provision allocating the copyright to the employee. Her argument might, however, influence courts' interpretations of joint authorship issues or ambiguous copyright assignment agreements. See F. Jay Dougherty, Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225 (2001).

Interestingly, patent law is quite different from copyright law since an employee is deemed to own the patent unless she was employed to create the patented invention and did so during the scope of her employment. See Fisk, Removing the Fuel of Interest, supra note 7, at 1131-32, 1164-80 (discussing cases on patent law, involving employer-employee disputes). Consequently, the employer obtains only a shop right, a royalty free license to use the patent. If the existence of a "psychological contract" was enough to persuade the court that the tacit assumption of both parties was that the employee would trade reduced employment security for ownership of the patents to her inventions, than it might also affect the court's judgment as to whether the employee was hired specifically to invent.

45 Stone, supra note 3, at 733-37.
46 Id. at 754.
implied agreement containing contrary terms. Is it not true that an express agreement not to compete might negate the existence of an implied "psychological contract" to the contrary?

The problem comes, at least in part, from the play in the definition of what constitutes an employment "contract." Stone elides the differences between colloquial and legal uses of the term "contract," but how we interpret the term contract has enormous significance for the legal reforms that can be expected to emanate from her work. As Stone uses the term, "contract" encompasses both express and unspoken assumptions or understandings about the rights and obligations of employer and employee. As she defines it, under the principal terms of the new "psychological contract," the employee agrees to no employment security in exchange for developing knowledge and skills necessary to improved employability. Yet, this definition may not be the legally enforceable understanding shared by both parties. It is possible that the supervisor or recruitment coordinator will "promise" training and networking in the colloquial sense, and that mobility will be part of how they characterize the employment "package." However, if the person with actual authority to specify legally binding employment terms does not make similar assurances, or if the assurances are contradicted by an employment manual, a trade secret policy, or a confidentiality agreement, the "promise" of job mobility is not a legally enforceable contract.

Stone attempts to address this problem by defining the "psychological contract" as "an employee's perceptions of the terms of a reciprocal exchange. The reciprocal nature of the belief distinguishes a psychological contract from mere expectations, which reflect the employee's hopes and aspirations but not the belief in mutual obligation." Yet even the "reciprocal" nature of the "exchange" is not a legally enforceable contract if the "employee's perceptions" are not shared by the officials who have the authority to bind the firm. This is not a "contract" in the legal sense, and the difference between the unspoken understandings and actual contract terms is significant. It seems quite plausible to me that firms simultaneously maintain employee-restrictive trade secret policies—treating all the economically valuable knowledge as secret—while allowing low- and mid-level managers to reassure employees that they are getting valuable training and networking opportunities.

47 See Restatement (Second) of Contracts § 4 cmt. a (1981).
48 Stone, supra note 3, at 739-40.
49 Id. at 756 (stating that when courts are trying to determine if the fact that an employer paid for his employee's training is a sufficient reason to enforce a covenant not to compete, they should ask "whether the promise of general training was expressly or tacitly part of a larger employment deal").
50 Id. at 733.
51 Id. at 730 (internal citations omitted).
capital. In that case, Stone’s new “psychological contract” must be used as a gap-filler (a term implied in law). First, the employee may not be able to prove in discovery or at trial that the managers ever made such assurances since the managers may be reluctant to testify unfavorably against their employer. Second, even if the employee does come up with such evidence, it may not even raise a triable issue of fact against the company’s officially promulgated policies and signed agreements.

Consider how these issues would arise in the context of trade secrets. Trade secret doctrine protects firm’s efforts to keep information secret from competitors or from “the public” or “other persons who can obtain economic value from its disclosure or use.”52 In doctrinal terms, Stone’s argument is that, when “employees are expected to interact with networks and to develop knowledge about business practices, customers, competitors, and the larger context of the firm,”53 the firm must necessarily not try to keep the information from employees who can acquire economic value from using the information in subsequent employment.54

Recognition of the new “psychological contract” will not necessarily result in the restriction of trade secret liability that Stone favors.55 It is true that the employer’s own practices determine the scope of what may be deemed a trade secret.56 Thus, if the employer has not endeavored to keep its customer information or the know-how associated with its processes “secret,” then that information is not a trade secret.57 In that sense, the employment contract can affect the scope of the trade secret protections.

The problem lies in deciding when the expectation that employees develop networks and knowledge is inconsistent with other aspects of corporate practice which dictate that employee knowledge should not be re-

53 Id., supra note 3, at 758.
54 Id.
55 Id. at 763.
56 The Uniform Trade Secrets Act, as enacted in California, provides that a trade secret is information that “(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Uniform Trade Secrets Act, CAL. CIV. CODE § 3426.1(d) (West 1997).
57 See, e.g., id. § 3426.1(d)(2) (declaring that a trade secret must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy”); RESTATEMENT OF TORTS § 757 cmt. b at 5-6 (1939) (discussing the necessity for the contents of a trade secret to be kept secret); Vt. Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 150 (2d Cir. 1996) (holding that Vt. Microsystems, Inc. took reasonable steps to ensure the protection of its trade secrets, thereby allowing it to assert its rights under the Invention and Nondisclosure Agreement); Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731, 735 (Cal. Ct. App. 1997) (using the definition set forth in the Uniform Trade Secrets Act to affirm the trial court’s decision that “Morlife made reasonable efforts to maintain the secrecy of its customers’ identity . . .” (internal quotations omitted)).
revealed to competitors. While Stone refers to "tacit understandings" of the employment contract as making economically valuable knowledge freely portable, I think it is likely that firms will not only encourage employees to develop such knowledge but also simultaneously insist that it is secret. In a bureaucratic organization, such as any large firm, one could expect to find all sorts of written policies exhorting employees to maintain the secrecy of every conceivable bit of information as well as mid- or low-level supervisors who tout the benefits to the employee of gaining skills and networking. The court will then have to decide when a "tacit understanding" can trump an express secrecy policy. The argument works very well when courts are confronting ambiguous evidence as to what the parties' understanding may be with regards to the scope of a confidentiality agreement and conflicting evidence as to whether certain information is a trade secret. However, where the agreement is clear, the colloquial sense of a contract is likely to give way to the legal definition. Moreover, a court might even conclude that, in the face of a broad secrecy policy, the "tacit understanding" does not exist at all. The court could reason that the new "psychological contract" might exist in some other workplace, but that, in this one, the only agreement is the one that the employer asserts—an agreement that is embodied in its at-will and secrecy policies. In such a scenario, the employee enjoys no job security and no right to use the confidential information in subsequent employment.

Stone's new psychological contract encounters the same problem with respect to restrictive covenants. Restrictive covenants are enforceable in most states if they are reasonable in: (1) the kinds of work that they prevent the employees from engaging in; (2) the geographic scope in which the employee cannot work; and (3) the length of time they last. In assessing reasonableness, courts consider: the nature of the employer interest that is protected by the restraint; the effect of the restraint on the competitiveness of the market for the good or service that the employee provides; and, sometimes, the hardship on the employee of enforcing the agreement.

Stone's argument is that the new "psychological contract" should influence the courts' assessment of the reasonableness of the scope of the restraint and their decision concerning the legitimacy of the employer's

58 Stone, supra note 3, at 738.
59 Id.
60 Id. at 739-46.
62 See, e.g., 1 KURT H. DECKER, COVENANTS NOT TO COMPETE 44 (2d ed. 1993).
interest in enforcing it.\textsuperscript{63} She focuses in particular on the legitimacy of employer interests in restraining employees from doing business with customers of the former employer or from using general training for which the employer paid.\textsuperscript{64} She argues that "[w]hen an employer has promised to give an employee skill development and general knowledge as part of the employment deal," the employee should not be restrained from using it to advantage herself.\textsuperscript{65}

Here, as with trade secrets, Stone asks courts to decide that a tacit understanding of freely portable human capital trumps an express contract by which the parties in effect agree that the capital is not portable. In her view, the restrictive covenant is an effort to "renege" on the new psychological contract, and courts should not let the employer get away with such deceptive and opportunistic contracting behavior.\textsuperscript{66} But the employer does not "renege" if there is no contract. Doctrinally, the same problem emerges here as it does with trade secrets; courts are unlikely to find an implied contract term to trump an express contract, or, phrased another way, the express contract is likely to be quite persuasive evidence that the implied term does not exist at all.

The heart of Stone's argument is that restrictive covenants are unreasonable and should be unenforceable as contrary to public policy whenever the employer has made assurances that the employee will be able to use her training and customer contacts in subsequent employment.\textsuperscript{67} If one rephrases the issue to avoid the use of "implicit" and "tacit" contract, and instead focuses on Stone's main argument, then I think Stone may be onto something. In that case, she is not talking about contract terms to be implied, but about nonwaivable rights conferred upon the employee; public policy simply should not countenance the enforcement of this kind of contract in this situation.

But would the rule Stone proposes really be nonwaivable? What if the employer said something to the effect of: "We are paying for your training and we are encouraging you to network. These are valuable to us and to you because you will do your job better. Maybe you will be able to use that information later in your career. But remember your confidentiality agreement and restrictive covenant will prevent you from using any information covered by them. Therefore check the terms of those agreements before you depart our employ." I think that Stone's repeated emphasis on

\textsuperscript{63} Stone, supra note 3, at 739-46.
\textsuperscript{64} Id. at 722-23.
\textsuperscript{65} Id. at 754.
\textsuperscript{66} Id. at 762-63.
\textsuperscript{67} See id. at 754.
the notion of contract, the employment “deal,”\(^{68}\) suggests that, doctrinally, if the employer does not lead employees to believe that their human capital is portable then the law should not render it portable. And so, here as before, clever lawyers will tell employers exactly how to couch their speeches to employees so as to protect the firm’s control over its customer lists and know-how.

IV. THE IRREPRESSIBLE MYTH OF IMPLIED CONTRACTS AS A FORM OF PROTECTIVE LABOR REGULATION

The constant refrain in my Commentary has been to question the usefulness of the contract concept of implied contracts as law reform strategy. I have two fundamental reservations about reliance on the new psychological contract to protect employees in a world of precarious employment. First, I have little faith that the majority of judges are going to craft an implied contract doctrine that is vastly more employee-friendly than the one that has given us the at-will rule, the inevitable disclosure doctrine, and the other rules she critiques. Second, even if judges do craft contract rules that protect employee interests in the portability of human capital, employers will do what they increasingly have done: contract around the implied contract terms that judges create to protect employees.

As to my first reservation, Stone has a plausible response, and certainly her article performs a valuable service. When judges interpret the terms of the employment contract, in the face of conflicting (and often self-serving) evidence proffered by the employer and employee, conventional understandings of the nature of the employment relationship influence the judges’ perceptions.\(^{69}\) Stone’s description of the new psychological contract may shape the judges’ understanding of what the unspoken agreement may have been.

My second reservation is ultimately more profound and more significant than my first. As I have suggested, employers remain free to enter into express contracts to negate the rules that Stone proposes. If they are free to do so, I suspect that they will do it in droves. The fate of the implied contract theory pioneered by Justice Grodin in Pugh v. See’s Candies\(^ {70} \) (finding that while an employment contract is terminable at will, it does not give an employer the absolute right to terminate where the discharge violates public policy or where it is contrary to the express or implied terms of the agreement).

\(^{68}\) Id.

\(^{69}\) See id. at 762-63.

\(^{70}\) 171 Cal. Rptr. 917, 927 (Cal. Ct. App. 1981) (finding that while an employment contract is terminable at will, it does not give an employer the absolute right to terminate where the discharge violates public policy or where it is contrary to the express or implied terms of the agreement).
express at-will agreement. Nor will they enforce any other contract-based restriction on the right of arbitrary discharge, such as a covenant of good faith and fair dealing.\footnote{See, e.g., DeHorney v. Bank of Am. Nat'l Trust and Sav. Ass'n, 879 F.2d 459, 466 (9th Cir. 1989) (finding personnel policies did not modify clear terms of at-will employment agreement); Starzyński v. Capital Pub. Radio, Inc., 105 Cal. Rptr. 2d 525, 530-31 (Cal. Ct. App. 2001) (holding that "an at-will employee has not contractual claim for wrongful discharge based on constructive discharge on account of intolerable working conditions"); Cruy v. Gannett Co., Inc., 76 Cal. Rptr. 2d 670, 674-75 (Cal. Ct. App. 1998) (holding employment practices and personnel manual describing just cause employment do not modify express at-will agreement).}

In \textit{Pugh v. See's Candies}, the court used a totality of the circumstances approach, and found that even absent an express agreement, "agreement may be shown by the acts and conduct of the parties interpreted in the light of the subject matter and the surrounding circumstances."\footnote{See, e.g., Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1112 (Cal. 2000) (concluding that implied covenant of good faith and fair dealing does not impose substantive limits on employment relationship beyond those contained in parties' agreement); Foley v. Interactive Data Corp., 765 P.2d 373, 400 n.39 (Cal. 1988) (noting that a claim for breach of the implied covenant of good faith and fair dealing "cannot logically be based on a claim" that an at-will employment relationship was terminated without cause).} Today, however, employers increasingly require employees to sign contracts expressly stating the employment may be terminated at will. Employers also seem to have become a good deal more circumspect in the kinds of reassurances they make to employees, and when that is the case, courts find no just cause agreement.\footnote{See \textit{Pugh}, 171 Cal. Rptr. at 927 (internal quotations omitted).} \textit{Pugh} offers such employees absolutely no protection against arbitrary discharge.\footnote{See, e.g., Guz, 8 P.3d at 1094-95.} There is no reason to believe that a similar implied contract strategy will be any more successful in protecting employees' ability to take knowledge and general human capital with them. Indeed, there may be reason to believe it will be less successful than it was when \textit{Pugh} and similar decisions were rendered a generation ago.

It will be less successful because employers have become more astute and organized about requiring employees to sign express contracts. Management lawyers and human relations professionals have created a market for their services by convincing employers of the need to contract around the at-will rule and otherwise to develop policies to minimize the firm's risk of liability in terminating employees.\footnote{See, e.g., Lauren B. Edelman & Stephen Petterson, \textit{Symbols and Substance in Organizational Response to Civil Rights Law, in RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY} (Kevin T. Leicht ed., 2001); Susan Bism-Rapp, \textit{An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law, 22 BERKELEY J. EMP. & LAB. L. 1, 5 (2001)} [hereinafter Bism-Rapp, \textit{An Ounce of Prevention}] (noting that "[m]anagement attorneys proclaim the virtues of diversity and sexual harass-}
risk of liability with minimal changes in corporate practice.\textsuperscript{77} The danger of a contract-based approach to the control of human capital is that firms will have every reason to modify their express contracts and—to the extent necessary—to qualify some oral reassurances, to preserve their position with minimal change on corporate practices.\textsuperscript{78}

I believe that employers are likely to use express contracts to avoid possible liability under laws designed to protect employees even more in the areas involving intellectual property and human capital than they do in regard to just cause for termination. Experience with California law regarding noncompete agreements offers an example.

In California, covenants not to compete have been unenforceable against employees since 1872.\textsuperscript{79} Employers have nevertheless sought to restrict their employees from working for competitors. Employers ask their employees to sign such contracts anyway, presumably counting on the

\textsuperscript{77} See Bisom-Rapp, An Ounce of Prevention, supra note 76, at 5; Bisom-Rapp, Bulletproofing the Workplace, supra note 76, at 961.

\textsuperscript{78} If the firm is particularly concerned about the possibility that low- or mid-level managers will make reassurances that will trump the express contracts, they can include provisions in the confidentiality agreements and restrictive covenants to make them not subject to modification by subsequent oral or written assurances. An example of that strategy for preserving an at-will agreement from subsequent oral modification is found in Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986). In that case, Sears required job applicants to sign a document stating that the employment was at will and that "[they] understand that no store manager or representative of Sears, Roebuck & Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing." Id. at 456. The court enforced this disclaimer against the plaintiff's evidence that various store managers had made express oral promises of just cause employment. Id. at 461-62.

\textsuperscript{79} Ronald J. Gilson, The Legal Infrastructures of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 616 (1999) (noting that California enacted legislation making covenants not to compete unenforceable in 1872); CAL. BUS. & PROF. CODE § 16600 (West 1997) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").
their employees to sign such contracts anyway, presumably counting on the *in terrorem* value of the contract when the employee does not know that the contract is unenforceable. Out-of-state employers whose employees work in California may include a choice of law clause and a forum selection clause in noncompete agreement so that the validity of the agreement is determined in and under the law of a state that will enforce restrictive covenants. Although California courts take a dim view of such choice of law and forum selection clauses, the California courts' unwillingness to honor them can be preempted if the employer wins the race to the courthouse and obtains an injunction against the employee or the prospective employer litigating a suit in California.

The response to my skepticism may lie in an argument advanced by followers of behavioral economics. They argue that, if the implied contract doctrine confers significant rights on employees, employers will not be able to contract around those rights in most cases. Behavioral economists argue that legal doctrine can confer waivable default rights upon employees or employers, and of course can confer nonwaivable rights on either party as well. In this view, the initial allocation of waivable default rules does indeed matter because the default rules are sticky and employers frequently do not contract around them. Cass Sunstein has recently argued that this is particularly true when it comes to employment contracts because employees are risk averse and particularly reluctant to give up the rights that are conferred upon them (i.e., the endowment effect is particularly important when it comes to employment contracts).

In behavioral economics terms, Stone is essentially proposing a system of waivable employees' rights regarding the portability of human capital. If the behavioral economists are right, then Stone's redefinition of the

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80 Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73, 90 (Cal. Ct. App. 1998) (applying California law to determine enforceability of restrictive covenant between a non-California employee and a non-California firm when a California firm seeks to recruit the nonresident employee to work in California; holding the covenant unenforceable and employer's effort to enforce it constituted an unfair trade practice in violation of California law).


83 See, e.g., Sunstein, supra note 82, at 208.

84 Id. at 270-71.
terms of the implied contract could be very significant in practice. Employers will either not try or not be able to persuade employees to sign express contracts relinquishing their waivable rights to take their knowledge with them when they leave the job. If the behavioral economists are right about the stickiness of default rules in employment law, and if courts accepted Stone’s description of the nature of the new employment contract, then Stone’s article may work a substantial change in the law regarding employee human capital.

I question whether it matters very much who is given the initial entitlement because I expect that employers will frequently contract for an express allocation of the right to themselves. Certainly Stone’s work suggests the utility of empirical research on the use of contracts to restrict the portability of human capital and consideration of the likely frequency with which employers will contract around the default rule.

V. CONCLUSION

Stone’s New Psychological Contract\(^8\) is a creative and significant rethinking of the nature of the implied employment contract. It transcends the conventional wisdom about employment relations becoming more contingent and labor markets more fluid by offering new thinking about employment contracts. As a description of the nature of some (or most) of twenty-first-century, white-collar employment, Stone’s article achieves a great deal.

The normative and prescriptive aspects of Stone’s work, while more troubling to me, are even more fertile than the descriptive aspects of it. The reservations I have expressed about the likely success of her thesis in reorienting employment law doctrine and employment law practice are, for the most part, provisional. They depend on empirical work that no one has yet done. The prospects for the success of her work in achieving our shared vision of a more just and equitable employment relationship cannot be adequately assessed without empirical work.

Certainly her work suggests many further avenues for research. First, how, precisely, should the vague concept of freely portable human capital be translated into doctrinal change in the law of trade secrets and restrictive covenants? A common theme in both trade secret and restrictive covenant law is reasonableness. Courts will protect trade secrets only if the employer has made “reasonable” efforts to guard the secrecy of the information. If an employer has promised employees that the benefits of portable human capital outweigh the risks of insecure employment, has it made “reasonable” efforts to guard trade secrets? Stone suggests that it has not,

\(^8\) Stone, supra note 3.
and that courts should regard with some skepticism employer evidence of its secrecy policy if it is contradicted by employee evidence of the existence of a new psychological contract in that workplace. Reasonableness appears in the law of restrictive covenants in enforcing only those agreements that are “reasonable” as to time, geographic scope, and scope of material covered. Here again, the judicial evaluation of reasonableness should be informed by the employee’s evidence that job security was traded away for the development of portable human capital. Ultimately, if Stone’s goal is to be achieved, courts will have to treat “reasonableness” as a virtually nonwaivable protection for employees. Any evidence that the employee “reasonably” (whatever that means) understood that human capital was portable would make any other agreement unenforceable as contrary to public policy. This would take courts far away from the realm of contracts and a long way toward a tort-type notion, but Stone’s article articulates the reason why such a rule would be fairer than current law.

A second topic that Stone’s work suggests for further consideration concerns the types of rules courts should create to restrict the ability of parties to contract around the default rules. A number of possible rules could be explored, ranging from a set of presumptions to specific requirements about disclosure, consideration, and cooling-off periods, and even nonwaivable minimum protections for the portability of human capital.