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THE RIGHTS OF INDIVIDUAL WORKERS

THE CONTRACT OF EMPLOYMENT AND THE RIGHTS OF INDIVIDUAL EMPLOYEES: FAIR REPRESENTATION AND EMPLOYMENT AT WILL

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One of the potentially significant developments in American labor law in the last decade is the unheralded reemergence of the individual contract of employment as a central legal concept. The law is rediscovering that whether the employment relation is governed by a collective agreement or by unilateral employer action, a basic building block is the individual contract.

One of the principal contributions of this refocusing of labor law is to give increased emphasis to the rights of individual employees. When employment is not covered by collective agreements, which is more than seventy percent of the labor market, the individual contract can be a significant source of legal protection for the individual employee against arbitrary employer action. Increased protection will come by giving increased protection to that contract. When there are collective agreements, there are also individual contracts of employment, the terms of which are defined by the collective agreement. It is this individual contract of employment that is the basic source of legal protection against arbitrary union action.

The reemergence of the individual contract of employment as a central legal concept thus links two seemingly unrelated areas of turmoil and transition in labor law—the duty of fair representation and the doctrine of employment at will. My thesis here is that both the present turmoil and the future direction of the law can be better understood by recognizing the contract of employment as the central focus. This thesis is presented only in suggestive outline without any attempt to work out its implications in detail. That must wait upon another day.

I. The Contract of Employment—An Historical Sketch

The English common law, as formulated by Blackstone, viewed employment as a contractual relationship that bound the parties to a continuing relationship. Blackstone stated the rule of presumed duration in simple terms: "If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year . . . ."[1] This presumption of a yearly hiring could be rebutted by facts showing a

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1. 1 W. Blackstone, Commentaries *425.

contrary intent of the parties. As this rule was elaborated by courts and treatise writers, the most significant facts showing the intention of the parties were the custom in the trade and the frequency of periodic payments.[2] The effect was to reduce the contract of employment from one for a year to one for a lesser period—a quarter or a month.[3] The strong presumption, however, was that the contract was for a term. Employment at will was possible, but only if the parties expressly agreed that either could terminate at any time. Such employment, however, was treated as an anomaly. In the words of one treatise writer: "In these cases there is in truth no contract of hiring at all. The transaction amounts merely to an authority to serve upon certain terms."[4]

The English rule of presumed hiring for a term was adopted by American courts, and was broadly accepted by treatise writers on the law of master and servant and the law of contracts during the last half of the nineteenth century.[5] The solitary exception was H.G. Wood, who, in a treatise on the law of master and servant, stood the rule on its head. With all of the self-confidence required when precedents are to the contrary, he declared:

> 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.[6]

This unsupported assertion[7] provided the authority for the judicially developed doctrine of employment at will.

Wood's rule did not win immediate acceptance. Williston's edition of *Parsons on Contracts*, published in 1893, accepted without discus-

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2. For a tracing of the devlopment of the English rule, see Feinman, *The Development of the Employment at Will Rule*, 20 Amer. J. Legal Hist. 118, 119-20 (1976).

3. J. Chitty, Law of Contracts 532-34 (10th ed. 1876).

4. 2 C. Addison, Contracts § 887 (3d Am. ed. 1876) (citation omitted).

5. *See, e.g., id.* at 882-87; 2 T. Parsons, Law of Contracts 33-34 (6th ed. 1873) [hereinafter cited as T. Parsons I]; J. Schouler, Domestic Relations 607-08 (1870); C.M. Smith, Master and Servant *41-47. The development of the American law is traced in Feinman, *supra* note 2, at 122-25.

6. H.G. Wood, Master and Servant § 134 (1877).

7. The cases cited by Wood did not support his proposition. For an analysis of these cases, see Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335, 341 n.54 (1974) [hereinafter cited as *Implied Contract Rights*]. Wood cited no cases holding to the contrary, although there were such cases, *see* Davis v. Gorton, 16 N.Y. 255, 257 (1857); Bleeker v. Johnson, 51 How. Pr. 380, 381 (N.Y.C.P. 1876), including two he miscited to support his rule, Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 59 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115, 116 (1871).

sion the English rule.[8] Indeed, Wood himself, in his annotations to *Addison on Contracts* in 1888, noted no difference between the English and American rules.[9] Courts took diverging paths, some continuing to follow the English rule,[10] and others adopting Wood's rule.[11]

As late as 1891, the New York Court of Appeals in *Adams v. Fitzpatrick*[12] restated the rule that employment for an unstated term was presumptively for the term of periodic payments. Quoting from earlier treatises that contradicted Wood's rule, the court stated: "In this country, at least, if a contract for hiring is at so much per month, it will readily be presumed that the hiring was by the month, even if nothing was said about the term of service."[13] Four years later, the court reversed directions. In *Martin v. New York Life Insurance Co.*,[14] an employee hired for a stated annual salary was discharged in mid-year without cause. The court dismissed its statement in *Adams v. Fitzpatrick* as dictum, quoted from Wood's treatise, referred to no other treatises, and cited five cases from other states, not all on point. This decision gave the doctrine of employment at will credibility and dominant authority.

The important point for our purposes is not that the employment at will doctrine had no foundation in legal precedent, or that it was contrary to basic contract principles in creating a legal presumption that overrode the parties' unexpressed intent. Despite its lack of legiti-

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8. 2 T. Parsons, Law of Contracts 34-35 (S. Williston 8th ed. 1893) [hereinafter cited as T. Parsons II]. Successive editors of Parsons, including Williston, after stating the English rule as requiring a month's notice, added: "We are not aware that a similar rule exists in this country . . . ." *Id.* at 34; 2 T. Parsons I, *supra* note 5, at 33. No cases were cited.

9. *See* C. Addison, Contracts (8th ed. 1888) (American notes by H.G. Wood). The preface to the American edition stated: "[S]pecial attention has been given to topics on which the law of this country is different from that of England." *Id.* at vii. Wood's appendix makes no mention of the difference he had emphasized ten years before, and the case table includes none of the cases he originally cited, nor any subsequent cases. The year preceding the publication of these notes to Addison, Wood had published a second edition of his *Master and Servant*, with no change in the text on this point. H.G. Woods, Master and Servant § 136, at 283 (2d ed. 1886).

10. *See, e.g.*, Rosenberger v. Pacific Coast Ry., 111 Cal. 313, 316, 43 P. 963, 964 (1896); Magarahan v. Wright, 83 Ga. 773, 777-78, 10 S.E. 584, 585 (1889); Smith v. Theobald, 86 Ky. 141, 146-47, 5 S.W. 394, 396 (1887); Norton v. Cowell, 65 Md. 359, 362, 4 A. 408, 409-10 (1886); State v. Fisher Varnish Co., 43 N.J.L. 151, 153 (1881); Tucker v. Philadelphia & R. Coal & Iron Co., 6 N.Y.S. 134, 135 (Sup. Ct. 1889).

11. *See, e.g.*, Haney v. Caldwell, 35 Ark. 156, 168-69 (1879); Perry v. Wheeler, 75 Ky. 541, 548-49 (1877); Finger v. Koch & Schilling Brewing Co., 13 Mo. App. 310, 310-11 (1883); Boogher v. Maryland Life Ins. Co., 8 Mo. App. 533, 534 (1880); East Line & R.R.R.R. v. Scott, 72 Tex. 72, 77-78, 10 S.W. 99, 104 (1888).

12. 125 N.Y. 124, 26 N.E. 143 (1891).

13. *Id.* at 129, 26 N.E. at 145.

14. 148 N.Y. 117, 42 N.E. 416 (1895).

mate parentage, the doctrine inherited or appropriated to itself recognition of the law.

The important point here is that judicial acceptance of the employment at will doctrine effectively eliminated for most workers all rights as to the future from the contract of employment, and thereby drained it of all substantial content. Prior to the adoption of Wood's rule, almost all employment was for a term—presumptively for a year or for the period of wage payment. Both the employer and the employee were bound; each had continuing contractual rights and duties of legal and practical substance. Employment at will was legally possible, but only when the parties explicitly so agreed, and this was the exception. The customary employment relationship was based on a contract of employment that established terms governing the continuing relationship between the employer and the employee.

When employment is at will, contractual rights and duties largely disappear or become empty shells, for rights and duties arising out of a continuing relationship can have little substance when either party can terminate the relationship at any moment for any or no reason. The only legal obligation of the employer is to pay for work performed in the past. Even this has limited substance, for any attempt by the worker to insist on this right will guarantee that he will have no work in the future. Addison, though theoretically incorrect, was substantially right when he stated, "there is in truth no contract of hiring at all."[15] The presumption that employment was at will, as expressed by Wood and later endorsed by the courts, had the effect of stripping most workers of the legal protection of a contract of employment. They ceased to have legal rights in their employment: Their only right was to be paid for work performed at the rate established by the employer, which was always subject to change as to any future work.

Individual contracts of employment were given new life and substance by the emergence of collective contracts. A principal function of collective agreements, as originally conceived and as viewed for more than half a century, was to create contractual rights in employees by giving content to the individual contract of employment. The collective agreement not only provided security of employment, but established terms of employment that the employer could not change during the life of the agreement.

Although courts had difficulty fitting collective agreements into Procrustean contract molds,[16] the common result of applying their

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15. *See* 2 C. Addison, *supra* note 4, at § 887.

16. Comment, *Collective Bargaining Agreements*, 15 Or. L. Rev. 229, 230-35 (1936) [hereinafter cited as *Collective Bargaining Agreements*]; *see* Fuchs, *Collective Labor Agreements in American Law*, 10 St. Louis L. Rev. 1, 2-3 (1925); Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 Mich.

various theories was that collective agreements created legally enforceable contract rights in individual employees.[17] The collective agreement, some courts said, established a custom or usage that was read into the individual contract of employment.[18] Other courts reasoned that the union acted as the employee's agent in making an individual contract of employment,[19] or that the employee was a third-party beneficiary of the collective agreement.[20] No one of these theories, however, provided an adequate rationale for meeting three basic institutional needs—that all employees are entitled to the full benefits of the agreement; that no employee is allowed to contract for other or lesser terms; and that the employer and the union have the enforceable right and duty to ensure that the agreement is followed.[21] To meet these needs, the courts sometimes used an amalgam of theories, or abandoned theory entirely to simply declare results.[22]

Regardless of the theories used, the results reached all assumed and built on the existence of individual contracts of employment. This, however, did not preclude the existence of a contract between the union and the employer, nor bar the union from enforcing the contract on behalf of employees. The terms of the individual contract were determined by the terms of the collective contract. The combined contractual structure created parallel individual and collective rights; both rights could coexist, and both the individual and the union could sue.

The legal view of collective agreements as creating and defining the contractual rights of individual employees corresponded with gener-

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L. Rev. 1109, 1133-53 (1941); Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572, 604 (1931); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L.J. 195, 195-96 (1938).

17. Note, *The Ability of an Individual Employee to Sue His Employer on A Collective Bargaining Agreement*, 3 Buffalo L. Rev. 270, 271 (1954); Note, *Legal Consequences Flowing From Trade Agreements*, 24 Colum. L. Rev. 409, 411 (1924).

18. *See* Yazoo & M.V.R.R. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 468-69, 9 S.W.2d 692, 694 (1928).

19. Mueller v. Chicago & N.W. Ry., 194 Minn. 83, 85, 259 N.W. 798, 799 (1935); *see* Barnes & Co. v. Berry, 169 F. 225, 241 (6th Cir. 1909).

20. Yazoo & M.V.R.R. Co. v. Sideboard, 161 Miss. 4, 14-15, 133 So. 669, 671 (1931); Gulla v. Barton, 164 A.D. 293, 295, 149 N.Y.S. 952, 954 (1914).

21. *See* Lenhoff, *supra* note 15, at 1143-53; Witmer, *supra* note 15, at 238; *Collective Bargaining Agreements*, *supra* note 15, at 1250-53.

22. *See* Donovan v. Travers, 285 Mass. 167, 174, 188 N.E. 705, 708 (1934); Hall v. St. Louis-S.F. Ry., 224 Mo. App. 431, 435-38, 28 S.W.2d 687, 689-90 (1930); Burton v. Oregon-Wash. R.R. & Navigation, 148 Or. 648, 659-60, 38 P.2d 72, 76 (1934). Each of the theories, if followed to its logical conclusion, would preclude the individual from enforcing the terms established by the collective agreement in some circumstance. The courts often seemed to choose the theory that would rationalize the result desired on policy grounds. *See* Witmer, *supra* note 15, at 238-39.

ally accepted practices, at least up to 1940 or 1950. The individual employee was a proper, if not necessary, party in proceedings to enforce the terms of the collective agreement. Without parading exhaustive proof, I would call attention to the following: One of the oldest grievance arbitration systems is that established in the anthracite coal industry in 1902.[23] From the beginning, grievances could be filed only by an individual miner, who could appear before the arbitration board with representatives of his own choosing.[24] The grievance was conceived as belonging to the grievant. From Grievance No. 1[25] in 1903 to Grievance No. 8103[26] in 1983, the arbitration cases are titled in the fashion—"Certain Miner v. Anthracite Company." The complainant is not the union, but the individual miner; the union is his representative in enforcing his rights through his grievance.[27]

In the railroad industry, the grievance procedure historically treated claims arising under the collective agreements as claims by the individual employee that his rights were violated.[28] The Railway Labor Act,[29] agreed on by the unions and the employers, made no explicit provision for individual claims, but the Supreme Court found

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23. Young, *Fifty Years of Grievance Arbitration: The Anthracite Experience*, 8 Lab. L.J. 705, 705 (1957).

24. The Report of the Anthracite Coal Commission (1920) [hereinafter cited as Anthracite Commission Report] recommended preservation of the right of nonmembers to present their grievances directly to the Board of Conciliation if the grievance committee or mine committee failed to obtain a result satisfactory to the individual employee. This right to appeal to the Board "shall be inviolate." *Id.* at 303. This was expressly accepted by the union officer on the Commission. *Id.* at 320. Individuals did successfully appeal to the Board after local committees rejected their grievance. *See, e.g.*, Contract Miners v. Pennsylvania Coal Co., 16 Anthracite Bd. Conciliation Rep. 19, 20 (1925) (Grievance No. 1880); Certain Contract Miners v. Buck Ridge Coal Co., 10 Anthracite Bd. Conciliation Rep. 47 (1919) (Grievance No. 798).

25. Certain Employees v. J.S. Wentz & Co., 1 Anthracite Bd. Conciliation Rep. 1 (1903) (Grievance No. 1).

26. Certain Pumpmen v. Jeddo-Highland Coal Co., Grievance No. 8100 (1983) (unpublished Umpire decision) (available in files of *Fordham Law Review*).

27. The mine committee cannot on its own raise a grievance on behalf of an employee; the grievance must be signed by the aggrieved employee. Certain Employees v. Susquehanna Collieries Co., 17 Anthracite Bd. Conciliation Rep. 429, 431 (1929) (Grievance No. 2754); Certain Contract Miner v. Laurel Coal Mining Co., 15 Anthracite Bd. Conciliation Rep. 170, 172 (1926) (Grievance No. 2040); Certain Employees v. Reading Anthracite Co., Grievance No. 8029 (1982) (unpublished Umpire decision) (available in files of *Fordham Law Review*); Certain Employees v. Reading Anthracite Co., Grievance No. 8002 (1981) (same) (available in files of *Fordham Law Review*).

28. Schreiber, *The Origin of Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 Rutgers L. Rev. 237, 244-45, 274-77, 287-96 (1971).

29. 45 U.S.C. §§ 151-188 (1976 & Supp. V 1981).

that the statute allowed individual employees to file grievances and to appeal to the Adjustment Board and then to the district courts.[30]

Finally, Section 9(a) of the Wagner Act[31] provided that individual employees "shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative."[32] All of these had as their premise that the collective agreement created legally enforceable contract rights in the individual. One function of the collective agreement was to give life and meaning to the individual contract of employment.

The elaboration of grievance procedures, and particularly the increased use of grievance arbitration, subordinated the individual and submerged the contract of employment. The grievance procedure was administered by the union and arbitration was between the union and the employer. As the union asserted exclusive control over enforcement procedures, rights under the collective agreement came to be viewed by both unions and employers as belonging solely to the union.[33] This view was naturally endorsed by grievance arbitrators, who owed their existence to the parties' procedures, and was reinforced by the parties' insistence that the individual employee was not a party to the arbitration proceedings.[34] The individual contract of employment was lost from view; the only visible contract was the collective agreement, and the only contractual relationship created by the collective agreement was between the employer and the union.

This perspective was forcefully articulated by Professor Cox in his 1956 article *Rights Under A Labor Agreement*.[35] He started from the premise that an employer and union could agree by contract who should have rights under the collective agreement and the power to enforce or surrender those rights. He then created a presumption reminiscent of Wood's presumption of an employment at will: "Unless a contrary intention is manifest, the employer's obligation under a

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30. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 728-38 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946); *see* Kroner, *Disciplinary Hearings Under the Railway Labor Act: A Survey of Adjustment Board Awards*, 46 Minn. L. Rev. 277, 300-02 (1961); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362, 385-88 (1962).

31. National Labor Relations (Wagner) Act § 9, 29 U.S.C. § 159(a) (1976 & Supp. V 1981).

32. *Id.*

33. *See* Anthracite Commission Report, *supra* note 23, at 167-69.

34. *See* Ford Motor Co., 1 Lab. Arb. (BNA) 409, 410 (1945) (Shulman, Arb.). For discussions revealing the general attitude of arbitrators, see Fleming, *Due Process and Fair Procedure in Arbitration*, in Arbitration and Public Policy, 14 Proc. Nat'l Acad. Arb. 69 (1961); Wirtz, *Due Process in Arbitration*, in The Arbitrators and The Parties, 11 Proc. Nat'l Acad. Arb. 1 (1958).

35. 69 Harv. L. Rev. 601 (1956).

collective bargaining agreement which contains a grievance procedure controlled by the union shall be deemed to run solely to the union as the bargaining representative."[36]

The effect of this reasoning was to convert the collective agreement from an instrument giving life and substance to the individual contract of employment into an instrument for subordinating individual rights, leaving the contract of employment with even less scope than Wood's rule.[37] Most unions have sought, and employers have granted, grievance procedures that expressly, or with the aid of the presumption, give the union exclusive control. In all such cases, the individual has no contract rights; there can be no individual contract of employment. Even those employees who might be able to bargain for a substantial individual contract, or whose employer might otherwise provide individual contracts, are barred by the collective agreement from having any contract of employment or contract rights.

I do not mean to suggest that this conception of collective agreements leaves workers substantively as bad off or worse off under collective agreements than under Wood's rule. The opposite is clearly the case. Wood's rule stripped employees of all protection against unjust dismissal or termination without notice. Collective agreements have provided a measure of job security and protection against arbitrary treatment by prohibiting unjust dismissal, creating seniority rights and requiring minimal notice of lay-off. I have urged elsewhere, shamelessly plagiarizing myself,[38] that Wood's rule should be repudiated, and that all employees should be given protection against unjust dismissal equivalent to that given employees under collective agreements.

My focus here is quite different; it is on the individual contract of employment as a legal concept. I have sought to sketch how Wood's rule drained the contract of employment of practical substance, leaving most employees with no legal rights in their future relationship; how collective agreements returned life and substance to contracts of

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36. *Id.* at 619.

37. Under Wood's rule, the individual could make a contract of employment expressly providing terms governing the future, including duration of employment, reasons for termination, and requirements of notice. Under Cox's rule, combined with J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944), see *infra* notes 38-39 and accompanying text, the employee could contract only on matters not covered by the collective agreement.

38. *See, e.g.*, Summers, *Introduction: Individual Rights in the Workplace: The Employment at Will Issue*, 16 U. Mich. J.L. Reform 201 (1983); Summers, *Unjust Dismissal: The Need for a Statute*, 20 Indus. & Lab. Rel. Rev. 8 (1982); Summers, *Protecting All Employees Against Unjust Dismissal*, Harv. Bus. Rev., Jan.-Feb. 1980, at 132; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976) [hereinafter cited as Summers, *Time for a Statute*].

employment by creating individual legal rights; and then how collective agreements were conceived to cast the contract of employment again into darkness and deny the existence of individual rights.

The reason for focusing on the contract of employment is that, in my view, protection of individuals under the collective agreement and protection of those who have no collective agreement have as a common base a recognition of the existence and importance of the individual contract of employment. The current developments in both of these areas can best be understood as developments in the law of contracts of employment—repudiation of the employment at will doctrine that emptied the employment relation of contractual content, and recognition that collective agreements do not swallow individual contracts but give them substance.

II. Individual Contracts and the Duty of Fair Representation

The Supreme Court never endorsed the reasoning that an employer's obligations under a collective agreement run solely to the union; it always assumed the coexistence of an individual contract of employment. In *J.I. Case Co. v. NLRB*,[39] while holding that "individual contracts can not subtract from collective ones," the Court stated:

> Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship.[40]

In cases under the Railway Labor Act, the Court held that an individual could sue in his own right.[41] Moreover, in *Elgin, Joliet & Eastern Railway v. Burley*,[42] the Court held that the individual could sue even though the union had settled the grievance, if it had done so without his consent. The Court took for granted that the individual had legally enforceable rights; the only question was whether he must first exhaust the procedures of the National Railroad Adjustment Board.[43]

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39. 321 U.S. 332 (1944).

40. *Id.* at 335.

41. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 738-48 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946); Steele v. Louisville & N.R.R., 323 U.S. 192, 207 (1944); Moorre v. Illinois Cent. R.R., 312 U.S. 630, 632-36 (1941). The complex of lower court decisions leading to *Moore* is traced in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 676-80 (1973).

42. 325 U.S. 711 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946).

43. *See* Transcontinental & W. Airlines v. Koppal, 345 U.S. 653, 660 (1953).

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.,[44] in 1955, raised the question whether under section 301 of the Taft-Hartley Act[45] the union could sue to compel payment of back pay due some 5,000 employees under the collective agreement. This case produced a Babel of judicial opinions, but there was agreement on one point—the individual had a contract of employment and legally enforceable rights under the collective agreement. In Justice Frankfurter's words:

> To hold that the union may sue, it is not necessary to hold that the employee may not sue in any forum, and vice versa. At least when the union and the employee are in agreement, there is no reason why either or both should not be permitted to sue.
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> . . . .
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> The employees have always been able to enforce their individual rights in the state courts.[46]

Justice Reed was even more explicit: "The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement."[47] Justice Douglas was equally direct: "Individual contracts of employment result from each collective bargaining agreement."[48]

The coexistence of individual contracts and collective agreements was reaffirmed in *International Union, U.A.W. v. Hoosier Cardinal Corp.*[49] The Court held that the appropriate statute of limitations in a suit for back pay was the statute applicable to oral contracts because it depended on "proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees."[50]

In 1962, the Supreme Court in *Smith v. Evening News Ass'n*[51] first faced directly the question whether under the NLRA individual employees acquired legally enforceable rights under the collective agreement. The Court held that individuals who claimed they had been laid off in violation of the collective agreement could sue under section 301 in their own name without intervention of the union. Any doubts about whether this result was based on the absence of a grievance procedure were erased two years later by *Humphrey v. Moore*.[52] A

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44. 348 U.S. 437 (1955).
45. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1982).
46. 348 U.S. at 459-60 (footnote omitted).
47. *Id.* at 464 (Reed, J., concurring).
48. *Id.* at 466 (Douglas, J., dissenting).
49. 383 U.S. 696 (1966).
50. *Id.* at 706.
51. 371 U.S. 195 (1962).
52. 375 U.S. 335 (1964).

truck driver who claimed that he had been wrongfully deprived of his seniority by a decision of a joint union-management committee sued under section 301 to protect his seniority rights. The Court held that the individual could sue to enforce his seniority rights under the collective agreement even though the union had agreed to the result of the grievance procedure. The Court found, however, that because the result was authorized by the collective agreement, there was no violation of the duty of fair representation and no cause of action.

The implication of *Humphrey* that the duty of fair representation in grievance handling is rooted in the individual contract of employment was made more explicit in *Vaca v. Sipes*.[53] The basic premise of *Vaca* is that an individual employee acquires legal rights under the collective agreement that he can enforce in his own name under section 301. Echoing the language in *Westinghouse* and *Smith v. Evening News*, the Court explained:

> [L]et us assume a collective bargaining agreement that limits discharges to those for good cause and that contains no grievance, arbitration or other provisions purporting to restrict access to the courts. If an employee is discharged without cause, either the union or the employee may sue the employer under [section 301].[54]

The logic of *Vaca* was that the individual had a legally enforceable contract right. The presence of a grievance procedure, contrary to the proposition of Professor Cox, did not change this basic fact; it only required the individual to invoke and exhaust the contractual procedures. To excuse exhaustion, the individual must show that he attempted to enforce his rights through those procedures but was prevented from doing so by the union's failure to represent him fairly.

When the employee sues the employer, violation of the duty of fair representation is not the basis of the action. The suit is for violation of contract; fair representation by the union serves only as a bar to that suit. The union's duty is a separate legal duty enforced in a separate cause of action, with a separate measure of damages. But one of the elements of the suit against the union is proof of a violation of a contract, and the damages include additional wages or other contractual rights lost because of the delay in the individual obtaining a remedy caused by the union's failure to meet its statutory duty to the employee.[55] The underlying right is the employee's contract right, and the substantive damages are for violation of that right.

The premise of *Vaca* was reinforced by *Hines v. Anchor Motor Freight, Inc.*,[56] in which the Court restated *Smith v. Evening News*:

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53. 386 U.S. 171 (1967).
54. *Id.* at 183.
55. *See* Bowen v. United States Postal Serv., 103 S. Ct. 588, 593-98 (1983).
56. 424 U.S. 554 (1976).

"Section 301 contemplates suits by and against individual employees as well as between unions and employers."[57] In *Hines*, an employee whose discharge for theft had been upheld in arbitration was later proven not guilty. The Court held that the discharge was a violation under the collective agreement of the employee's contract right not to be discharged without just cause, and the employee could sue in his own name under section 301. The employer's only defense was that the employee had been fairly represented by the union, but the union's failure to investigate prior to arbitration removed that defense. The employer was liable to the employee for violating his contract right even though the employer had no part in the union's failure to represent fairly, and an arbitration award had upheld the discharge. Said the Court: "[W]e cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty."[58]

The basic premise of *Smith*, *Humphrey*, *Vaca* and *Hines*, that individual employees have contractual rights under collective agreements, leads to three subordinate propositions that are crucial in measuring the protection to be given individual contract rights. First, the union does not "own" the grievance. This commonly accepted notion is based on the premise rejected by the Court that the employer's obligation runs solely to the union. The union may, by agreement with the employer, assert control over access to the grievance procedure and insist on being the exclusive representative in those proceedings. But the individual continues to have contractual rights under the collective agreement and can sue in her own name to enforce those rights. That suit is barred only if the union has represented her fairly in the procedures over which it has asserted control.

Second, the union's function in grievance handling is completely different from its role in negotiations. In negotiating an agreement, the union is creating contract rights that the individual did not otherwise have. As the Supreme Court recognized in *Steele v. Louisville & Nashville Railroad*[59] and *Ford Motor Co. v. Huffman*,[60] the rights created are a complex package of compromises, not only with the employer, but among diverse groups within the union. The union's duty is not to discriminate unreasonably, and the individual's claim is only for a roughly fair share. In grievance settlement and arbitration, when the grievance claims a violation of the agreement, the union is administering a procedure for enforcing contract rights, including

57. *Id.* at 562.
58. *Id.* at 570.
59. 323 U.S. 192 (1944).
60. 345 U.S. 330 (1953).

contract rights of individual employees. The union's duty is to act as the employees' representative in those procedures to enforce their rights, not to deprive them of their rights. In negotiations there are no basic guidelines as to what rights should be created; in grievance settlement the basic guideline is the contract right.

Third, the obstacle to individual suits does not arise from the union's statutory status as exclusive representative; it is erected by the union and employer agreeing that the grievance procedure and arbitration shall be the exclusive means for remedying breaches of contract. In *Vaca*, the individual's suit was barred because, as the Court repeatedly emphasized, the collective agreement provided that the union had sole power to appeal the grievance and demand arbitration. It was the union's assertion, with the assent of the employer and without the consent of the individual, that it had exclusive control over these enforcement procedures that obstructed the employee's suit.

Recognition that the collective agreement creates contract rights in individual employees provides a useful perspective for measuring the union's duty in enforcing those rights. The individual could sue to enforce his or her own contract rights, but for the union's asserting exclusive power to act as representative to enforce those rights. The union, by insisting on acting for the individual, assumes an obligation to act on behalf of the individual. When the individual has contract rights, the union's duty is to enforce them.

Much of the present uncertainty and confusion in duty of fair representation cases comes from a failure to recognize that the right at stake is the individual's contract right and the union is trustee of that right. Decisions and discussions often narrow the duty to near nothingness by proceeding from the rejected premises that the collective contract swallows the individual contract, that only the union has contract rights, and that the union owns the grievance.

The full implications of recognizing the individual contract of employment within the framework of the collective agreement cannot be elaborated here. The following examples are only suggestive:

In *Lerwill v. Inflight Motion Pictures, Inc.*,[61] the collective agreement clearly defined the work-day and work-week, with a premium for overtime, but the employer refused to pay this premium. The union would not process a grievance, claiming that if the right to the overtime premium were enforced, the employer would shorten the work-week and deprive employees who wanted the extra hours. The court upheld the employees' suit for the overtime. The employees had an undisputed contract right to overtime pay. The union, which

61. 582 F.2d 507 (9th Cir. 1978).

assumed the role of exclusive representative to enforce such rights, could not refuse to enforce them on the employees' behalf and at the same time bar the individual employees from enforcing their rights on their own behalf.

The union, of course, may negotiate amendments to contractual provisions it finds undesirable, thereby creating new contractual rights. The fairness of the amendment will be judged by the good faith standard of *Steele* and *Huffman* rather than the contractual standard of *Vaca*. But until the collective contract is amended by procedures prescribed by union rules for amendment, the contractual rights of individual employees must be recognized. The union's duty is to enforce, not destroy, those rights.

Rupe v. Specter Freight Systems[62] illustrates the other side of the contractual coin. The collective agreement prohibited discharge of employees without just cause. This was clearly applicable to seniority employees and clearly inapplicable to probationary employees, but was silent as to casual employees. When a casual employee was discharged, the union agreed with the employer that a casual employee was comparable to a probationary employee, and that only seniority employees were protected against discharge.

In this case, the rights of casual employees were not agreed upon when the agreement was negotiated; their rights not to be discharged were unsettled. Like many other problems arising under collective agreements when there are gaps and ambiguities, the rights of casual employees were to be resolved during the contract term. The casual employee had acquired no contract right not to be discharged because that term was not agreed upon. The union, in settling the grievance, completed the contract by filling in the missing term. The union did not refuse to enforce a contract right, it only refused to create one. Its duty was that of *Steele* and *Huffman* for contract making, and not that of *Vaca* for contract enforcement.

Contractual analysis can also illuminate and help resolve difficult cases in which the union is confronted with representing employees who have conflicting claims. In *Smith v. Hussman Refrigerator Co.*,[63] the employer promoted four employees on the basis of their skill and ability. The union processed a grievance on behalf of four other employees on the basis of their seniority. The union is not barred from acting in such a case simply because two groups of employees have competing claims; the union is obligated, however, to enforce contract rights. If the agreement provides that skill and ability shall control, then those who have superior skill and ability have contract

62. 679 F.2d 685 (7th Cir. 1982).
63. 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).

rights to promotion and the union's duty is to enforce those rights. If the union insists, as it did in *Hussman*, that despite the contract, those with greater seniority should be promoted regardless of skill and ability, the union is using its position to take away the contract rights of one group of employees to give them to another group.

If the contract is ambiguous, or the facts are in dispute, the union is entitled to resolve the ambiguity and to make a reasoned judgment of the facts in determining what the contract requires. The union's advocacy of that result fulfills its duty to enforce the contract rights of those it represents.

Recognition that contractual rights of the individual employee are at stake makes clear that the union has a duty to use care in processing those rights. In *Dutrisac v. Caterpillar Tractor Co.*,[64] the business agent failed to keep track of the time limit for demanding arbitration and filed a claim two weeks late. As a result, arbitration of the employee's discharge was barred. The employee had a contract right that he could enforce in court but for the union's asserting exclusive control over enforcement of that right. The union voluntarily asserted sole responsibility for protecting that right; it thereby assumed the duty to use reasonable care in enforcing that right. One who undertakes to enforce another's contract right becomes a trustee of that right and owes a substantial duty of care. When that trusteeship is not based on the employee's consent, but on the union's assertion of control without the employee's consent, the duty can scarcely be denied or downgraded.

Similarly, in *Hines*, a truck driver was discharged because his receipt for his motel bill was larger than the amount shown on the motel books as actually paid. The culprit, however, was not the driver but the motel clerk who falsified the books and pocketed the money. The discharge violated the driver's contract right not to be discharged without just cause. The union's responsibility as his representative was to protect that right, and that included a duty to make at least a minimal investigation when the employee suggested that the motel clerk was responsible.

These cases barely sketch some of the outlines of the duty of fair representation. Even with further elaboration, the individual contract of employment will not resolve all of the problems. The contract of employment often has ambiguities, the facts are often uncertain, and other considerations may enter in. The point is a simple but broad one: The collective agreement defines the rights in individual contracts of employment, and viewing the union's duty of fair representation from this perspective gives substance to the union's duty and provides significant guidelines as to its scope.

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64. 511 F. Supp. 719 (N.D. Cal. 1981).

III. The Contract of Employment: Unjust Dismissal

Wood's rule, as originally stated, was in the form of a presumption. A hiring for an indefinite period was "*prima facie* a hiring at will," and the burden was on the employee to prove that it was for a term. Wood's rule simply turned bottom-up the presumption expressed in English and prior American cases that the hiring was for a year, or the period of the wage payment. The new presumption was not based on any finding, or even assertion, that it expressed the way the parties in fact viewed their relationship. Nor was it asserted that the presumption served any social policy. It seemed, instead, to be an unfounded generalization of existing law by a prolific author whose pen moved ahead of precedent.

Because most hirings were not expressly for a stated period, the effect of Wood's rule was to convert most hirings presumed to be for a term to ones presumed to be at will. The rule, when applied as a presumption, had limited impact, for a contrary intent could be shown by surrounding circumstances. The impact of the rule depended on the weight given the presumption, and prior to 1895, many courts gave the presumption little or no weight.[65]

Later, the courts went far beyond creating a presumption that shifted the burden of proof to the employee to show that the parties had a contrary intent. The courts transformed Wood's presumption into a virtual rule of law. The presumption was made nearly irrebuttable by requiring that the parties expressly agree to a definite term.[66] Even if the presumption were rebutted, the employee would be denied protection by the spurious legal doctrines that the contract lacked mutuality, or that the employee had not given additional consideration.

The litany of mutuality, repeated mechanically by the courts, was that the employer and employee must be equally bound. If the employee could quit at any time without reason, the employer could dismiss at any time without reason. In *Meadows v. Radio Industries*,[67]

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65. *See* McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A. 176 (1887); East Line & R.R.R.R. v. Scott, 72 Tex. 70, 10 S.W. 99 (1888). A number of decisions invoked no presumption, but looked at all of the facts and circumstances to determine what the parties intended. Cases in which this inquiry reached a result favorable to the employee include: Smith v. Theobald, 86 Ky. 141, 5 S.W. 394 (1887); Babcock & Wilcox Co. v. Moore, 62 Md. 161 (1884); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871); Bascom v. Shillito, 37 Ohio St. 431 (1882).

66. Even a "permanent" hiring was deemed a "general or indefinite hiring," and therefore presumed to be at will. Perry v. Wheeler, 75 Ky. 541, 548-49 (1877); Sullivan v. Detroit Y. & A.A. Ry., 135 Mich. 661, 669-76, 98 N.W. 756, 758-61 (1904); Rape v. Mobile & O.R.R., 136 Miss. 38, 47-53, 100 So. 585, 586-88 (1924).

67. 222 F.2d 347 (7th Cir. 1955).

for example, an engineer who had been hired with no stated term was persuaded not to quit and take another job. He was told that his employment was permanent. The court held that in spite of this promise, he was an employee at will. The court declared that because he had not promised to stay, there was no mutuality and the employer could not be bound by a promise to keep him.

The rationale of mutuality was even endowed with constitutional sanctity. In *Adair v. United States*,[68] the Supreme Court declared unconstitutional a statute prohibiting discharge of a railroad employee because of his union membership, reciting the litany: "[T]he right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé."[69]

The doctrine of mutuality is as spurious contract law as it is misguided constitutional law.[70] Contracts require only exchanged consideration, not mutual obligations. 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, irrevocable after the employee's performance is begun even though there may be no duty of the employee to continue. Mutuality of obligation, particularly in the form of mirrored obligations as required by the courts in these cases, has never been considered essential to make promises binding. The effect of requiring mutuality was to convert the presumption into the substantive rule that unless the employee bound himself to work for a stated term, the employment must be at will. It was impossible for an employee, by accepting employment, to bind the employer to continue the employment so long as the employee was needed and his work was satisfactory.

Another spurious contractual doctrine, sometimes used as an exception to the mutuality doctrine and sometimes used independently, was that to overcome the presumption that employment for an indefinite term was employment at will the employee must give some additional

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68. 208 U.S. 161 (1908).

69. *Id.* at 174-75.

70. The 19th century treatise writers assumed without discussion that mutuality of obligation was required in contracts of employment, at least as to duration of service. If the employee was free to quit, then the employer was free to dismiss. *See* C. Addison, *supra* note 4, § 882; 2 T. Parsons II, *supra* note 8, at 47. This doctrine, whatever its past acceptance, has long since been repudiated as a general contract principle. *See* Restatement (Second) of Contracts § 81 (1979); 1A A. Corbin, Contracts § 152, at 13-17 (1963); Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 28 Colum. L. Rev. 997 (1928). The hand of dead doctrine, however, continues to burden the employment contract.

consideration. Coming to work, even working for a number of years, was not consideration for a promise of future employment.[71] An employee must give something more.[72] Why something more than faithful service was required was never clearly explained. There seemed to be an assumption that because wages for work performed had been paid, the work could not be consideration for a promise of continued employment. As any first semester law student knows, however, one performance can be consideration to support two or even twenty promises. The work performed could be consideration for both the wages paid and the promise of future employment. The requirement of additional consideration was but a device for converting Wood's presumption into a substantive rule so that even an express promise of permanent employment would not bind the employer.

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? Both the overloaded presumption and the superimposed spurious doctrines led the courts away from an inquiry into what the parties, as reasonable persons, understood or intended. It led to the anti-contract incantation that in the absence of a specified term the employment was at will, regardless whether that fit the parties' intent in entering and continuing the employment relationship.

Two examples, drawn from recent decisions, may help reinforce this point. These are, admittedly, horrendous examples, but they are typical, and are no more horrendous than a hundred others.

In *Page v. Carolina Coach Co.*,[73] a bus driver who was protected by a collective agreement with seniority and just discharge clauses was persuaded to take a dispatcher's job that was not covered by the agreement, thereby surrendering these protections. When he expressed concern about job security, he was assured by his supervisor that he had good potential to move up in the company. Later, he was discharged under a mistaken belief that he was intoxicated when his condition was in fact due to medicine prescribed by his doctor. The

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71. Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964). Actions in reliance, such as terminating a business, moving from New York to California, and refusing other offers of employment are not enough unless bargained for. Levy v. Bellmar Enters., 241 Cal. App. 2d 686, 690-92, 50 Cal. Rptr. 842, 845 (1966).

72. *See, e.g.*, Eggers v. Armour & Co., 129 F.2d 729 (8th Cir. 1942) (surrender of tort claim); Stauter v. Walnut Grove Prods., 188 N.W.2d 305 (Iowa 1971) (sale of competing business to employer); Bussard v. College of St. Thomas, 294 Minn. 215, 200 N.W.2d 155 (1972) (sale of going business to employer). Giving up an offer of another job and buying a house owned by the company, however, was held not enough added consideration to make a promise binding. Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936).

73. 667 F.2d 1156 (4th Cir. 1982).

company admitted its mistake but refused to reinstate him, and the court upheld the company on the grounds that the employment was at will. The court, relying on precedent, held that additional consideration was required for lifetime employment and that giving up a position, job, business or profession was not enough. If the court had objectively asked the elementary contract question of what the employee as a reasonable man was led to believe, it would not likely have arrived at the same result. Would the bus driver reasonably understand that, having given up his seniority, the company would discharge him for an offense it knows he did not commit? Would the company reasonably believe that the employee so understood?

In *Hablas v. Armour & Co.*,[74] an employee was discharged after forty-five years of service, one year before reaching retirement age. When he joined the pension fund forty years before, the application form stated that the employment was at will, and supplemental plans had carried forward the old terms. Later, when he was considering taking another job, he was dissuaded by the statement: "[Y]ou have a good future with Armour, [and should] take into consideration [your pension rights] in making a final decision."[75] Another time, when he was pressing for a salary increase, he was told: "You simply can't afford to pass up all the pension rights you have coming for the sake of $500.00."[76] The court held he could be terminated without cause, even though his employment was described as permanent. If the court had not been encumbered by misbegotten precedent, it would have recognized the employment contract as comparable to a consumer contract in which the parties are not on an equal bargaining basis and that contracts of adhesion in standard form have questionable credibility. Even if the employment contract had been viewed as a common commercial contract, the court would almost certainly have found a binding obligation on an implied promise or promissory estoppel.

Courts increasingly have come to recognize that employment constitutes a continuing relation that creates rights and duties as to the future as well as to the past. Contract principles rooted in enforcing the understanding of the parties should govern all employment, whether for a definite term or an indefinite term. The parties' understanding is not to be determined by looking to the employer's presumed or secret intent to reserve the right to discharge without notice or reason, but by looking to the understanding of the employee generated by the employer's conduct both before and after the hiring.

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74. 270 F.2d 71 (8th Cir. 1959).
75. *Id.* at 76.
76. *Id.*

Although the courts have used a variety of legal theories, both tort and contract, to provide remedies for unjustly discharged employees, most of them are bottomed on the contract of employment. The results, though not the measure of damages, are capable of being rationalized in commonly accepted contract principles.

Some of the theories are explicitly contract theories, doing no more than applying ordinary contract principles. In *Toussant v. Blue Cross & Blue Shield*,[77] an employee, when hired some years earlier, was given a company manual of personnel policies, including grounds and procedures for discipline. The Michigan court, in what was considered a breakthrough decision, held that the manual became part of the employment contract and the employee could be discharged only in accordance with the manual. The result is little more than hornbook contract law; the terms of the contract are to be drawn from all surrounding circumstances that manifest the intention of the parties. The core of the decision is the unremarkable proposition: "If no definite time [of employment] is expressed, the court must construe the agreement . . . [by] assess[ing], or allow[ing] a jury to assess the evidence and determine the intent of the parties."[78] The jury, not unreasonably, concluded that the manual manifested the intent of the employer and was understood by the employee as assuring that employment would not be terminated without cause or proper procedures.

Ordinary contract principles of a different order were used in *Cleary v. American Airlines, Inc.*[79] An employee with eighteen years service was discharged for theft without a fair, complete or honest investigation as to his guilt. The California court first declared that there were "certain implied contract rights to job security, necessary to ensure social stability in our society," and then held that termination without legal cause after eighteen years of service "offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts."[80] Furthermore, the employer's regulations adopting specific procedures for adjudicating employee disputes obligated the employer "to engage in good faith and fair dealing rather than in arbitrary conduct."[81] The court recognized as the source of the employee's contract right an estoppel based on the employee's service and the personnel regulations. The principles and concepts used by the court are common contracts concepts and principles. The result does no more than enforce what courts,

77. 408 Mich. 579, 292 N.W.2d 880 (1980).
78. *Id.* at 600-01, 292 N.W.2d at 885-86.
79. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
80. *Id.* at 455, 168 Cal. Rptr. at 729.
81. *Id.*

unencumbered by the employment at will doctrine, would find to be the understanding and expectations implicit in the relationship.

The so-called "public policy exception" is less explicitly contractual. Indeed, it is sometimes said to sound in tort, although contractual analysis would often lead to the same result. In the pioneer case of *Monge v. Beebe Rubber Co.*,[82] for example, a woman employee was discharged for refusing to date her supervisor. The court held that this was contrary to public policy and an exception to the employment at will rule. This exception has been used to protect employees who have been discharged for testifying before a legislative committee,[83] serving on juries,[84] filing workmen's compensation claims,[85] or reporting violations of law.[86] The result in these cases is no more than would follow from ordinary contract law. The contractual question is, "What did the parties intend?," or, more accurately, "What did the employee reasonably understand were his rights and obligations in his contract of employment?" Could one imagine an employer saying to a woman applicant: "You understand, of course, that one of your obligations is to go out with your supervisor, and if you do not you will be fired." Even if such a provision were put in a written contract, could one imagine a court enforcing it?

The tort of abusive discharge has a concealed premise of contract of employment; an abusive discharge also would be a violation of contract. In *Novosel v. Nationwide Insurance Co.*,[87] an employee of the insurance company was discharged for refusing to participate in a lobbying effort to repeal no-fault insurance because he disagreed with the company's political stand. The court held that he could recover in tort for abusive discharge. The unspoken premise was that he had a valuable interest in continued employment; there was a stabilized relationship rooted in contract. Starting from this premise, contractual analysis could lead to the same result. It is quite conceivable that an employer might include in its employment contracts a promise by employees to support the company's political policies and employees might knowingly agree. It would not be surprising, however, for a

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82. 114 N.H. 130, 316 A.2d 549 (1974).

83. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

84. Nees v. Hocks, 272 Or. 210, 219, 536 P.2d 512, 516 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 33, 386 A.2d 119, 120-21 (1978).

85. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

86. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *cf.* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (employee discharged because he insisted employer comply with government regulations); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (same).

87. 721 F.2d 894 (3d Cir. 1983).

court to hold such a clause contrary to public policy and void. The contract analysis requires only articulate recognition of the underlying premise that the contract of employment was not freely terminable at will.

What we are observing in these cases, and in other cases protecting employees from unjust discharge, are devices to avoid the results of the employment at will doctrine without directly attacking it. These cases have repudiated or ignored the spurious mutuality of obligation and added-consideration doctrines, and have significantly weakened the presumption that employment for an indefinite term is at will. At the same time the courts have explicitly recognized that a contract of employment need not be either for a defined term or at will, but can be for an indefinite term. In all of these cases, the employer's right to dismiss is limited, while the employee is free to quit at any time. The employer is bound to continue employment until there is a legally acceptable reason for termination. In the handbook cases, this may be for such time as the employee performs satisfactorily and her services are needed. The contract of employment includes a right to future employment even though it is for an indefinite term, and that right is based upon the reasonable employee's expectations of continued employment.

Failure to recognize that the newly invoked contract and tort theories are being used to neutralize the court-imposed presumption of employment at will often leads the courts to anomalous results. In *Weiner v. McGraw-Hill, Inc.*,[88] the New York Court of Appeals forcefully rejected the requirement of mutuality of obligation. In an opinion characterized by the court as "bespeaking nothing but traditional contract law principles,"[89] it held that an employee hired for an indefinite term could not be discharged at will. The court relied on provisions in the personnel handbook incorporated by reference in the contract of employment, statements made after the employee was hired, and detrimental reliance by the employee.

Less than six months later, in *Murphy v. American Home Products Corp.*,[90] the court was tongue-tied on "traditional contract law principles." An accountant with twenty-three years of service refused to participate in a fifty million dollar illegal manipulation of secret pension reserves that would enable high-ranking officers to collect an unwarranted bonus. Instead, he reported it to the officers and directors of the corporations, as he claimed he was required by his position to do. His reward was discharge. The court refused to recognize the

88. 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982).
89. *Id.* at 466 n.7, 457 N.Y.S.2d at 198 n.7, 443 N.E.2d at 446 n.7.
90. 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983).

tort of abusive discharge of an at-will employee; "such a significant change in our law," said the court, "is best left to the Legislature."[91]

More significantly, the court could find no basis for a contract action. The court did not start with the basic contract inquiry as to the parties' understanding. If it had, it might have recognized the obvious—the common intent of the parties was that the employee would not be discharged for conscientious performance. Instead, the court proceeded from the conclusory premise that the employment was at will, "a relationship in which the law accords the employer an unfettered right to terminate the employment at any time."[92] The employer had this right as a matter of law in the absence of an express agreement limiting its right to discharge.

The court acknowledged that it recognized the implied obligation of good faith and fair dealing "in appropriate circumstances," but this obligation could not be implied when it would be "inconsistent with other terms of the contractual relationship."[93] In the context of an employment at will, said the court, "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."[94] With this circular logic, all inquiry into the understanding of the parties drawn from the circumstances was precluded. There was no express limitation on the employer's right of discharge. There could be no implied obligation of good faith and fair dealing not to discharge because that would be inconsistent with other terms of the contractual relationship, namely, the employer's right to discharge at will implied from the presumption that the employment is at will.

Traditional contract principles that look beyond the words to the parties' intent would lead to the opposite result. What would Murphy, as a reasonable accountant, believe his contract of employment provided? Could the company with a straight face assert that Murphy should understand: "If you discover fraudulent manipulation by high officers, do not report it but cover it up. Otherwise you will be fired." What is incongruous is the court's refusal to infer from the circumstances that the employer impliedly agreed that the employee would not be discharged for being faithful to his duties.

This anomolous pair of decisions results from the court's failure to state explicitly, or to admit silently, that in *Weiner* it was abandoning the old presumption and making a neutral or unweighted examination of the parties' intent as spelled out from all the facts and circum-

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91. *Id.* at 301, 461 N.Y.S.2d at 235, 448 N.E.2d at 89.
92. *Id.* at 304, 461 N.Y.S.2d at 237, 448 N.E.2d at 91.
93. *Id.*
94. *Id.* at 304-05, 461 N.Y.S.2d at 237, 448 N.E.2d at 91.

stances. When the *Murphy* case came before it, the court was paralyzed by the presumption it had failed to lay to rest. Such contradictory results are the hallmark of a body of law in transition, particularly when courts attempt quietly to abandon outmoded doctrines by invoking other doctrines as exceptions or limitations. Despite New York's backsliding, the direction of the law is toward recognition of the contract of employment and use of traditional contract principles to determine its content.

All of this only traces the painful past and explains the confusing present. The more important question is where elaboration of the contract of employment may lead.[95] Projections of the future are a mixture of tenuous speculation and wishful expectations, but at least four lines of development seem likely and desirable. The purpose is not to spell out these lines in detail but to suggest their direction.

First, the presumption of Wood's rule should be given another turn. The presumption should be that when a contract of employment has no definite term, it is terminable by the employer only for good cause, such as unsatisfactory performance or lack of need for the services. The weight and contours of the presumption would vary according to the length of time the employee had been employed, the accumulation of pension or other rights, the kind of work involved, and the customs of the industry.

The presumption of continued employment reflects the reality of most hirings for an indefinite term. The employer normally intends that if the employee proves satisfactory, she will be retained as long as needed; the employee normally assumes that if she is satisfactory, she will continue to have a job as long as she is needed. The overwhelming number of employments for an indefinite term are, in fact, continued on this basis; satisfactory employees are normally not terminated so long as work is available. The presumption fairly states the intention of the parties, and particularly the reasonable understanding of the employee. Although employers may harbor secret reservations, how many would be willing to state to his employees clearly and emphatically when they were hired and periodically thereafter: "No matter how good a job you do, you have no security, for I am a totally arbitrary person who may fire you at any time for no reason, or even a bad reason." Most employers attempt to assure their employees by

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95. For various approaches to the application of contract principles to the employment relation, see Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 Harv. L. Rev. 1816 (1980); *Implied Contract Rights*, *supra* note 7; Note, *Challenging the Employment-at-Will Doctrine Through Modern Contract Theory*, 16 U. Mich. J.L. Reform 449 (1983) [hereinafter cited as *Modern Contract Theory*].

word or conduct that the opposite is true, that the employer is fair and honest and will not discharge them arbitrarily.

The presumption of continued employment would serve a social purpose by providing a measure of job security from arbitrary action. Employees are inescapably vulnerable to economic forces; their insecurity ought not be compounded by complete vulnerability to employer whimsy or arbitrariness. In the absence of an explicit provision in the contract of employment, the employee should have assurance that her livelihood will not be cut off without cause.

Second, the implied obligation of good faith and fair dealing must play a central role in contracts of employment. The contract establishes a continuing relationship that requires a substantial measure of mutual trust and confidence. Spelling out all of the terms in advance is impossible, for the relationship changes, often in an evolutionary process that reshapes rights and duties without explicit recognition. Also, the employer must have a measure of freedom to change the rules as conditions change. The parties must rely on the implicit understanding that each will show respect for the other's interests and that the employer will not arbitrarily change the rules so as to change the character of the relationship. The obligation must reach beyond the gross misappropriation of *Fortune v. National Cash Register Co.*[96] to the considerations of *Cleary v. American Airlines, Inc.*[97]—the longevity of service, the expressed policy of the employer, the adoption of procedures for adjudicating disputes, and the lack of good cause for termination. In many respects the duty of good faith and fair dealing expresses the basic contract principle that the employer is bound to act as he has led the employee to believe he will act.[98] This principle, in turn, may be informed by how reasonable employers act and what is considered to meet community standards of fairness. An employer ought not be able to escape obligations to his employees by asserting, after the fact, that his employees know he is unfair and is not to be trusted.

Third, overreaching provisions in contracts of employment should be subject to close scrutiny for unconscionability. The employment contracts with which we are here concerned are seldom bargained contracts between equals. They are usually contracts of adhesion, in which the employer dictates the terms and reserves wide latitude in changing those terms as the employment continues. If there is a

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96. 373 Mass. 96, 364 N.E.2d 1251 (1977).

97. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

98. For analysis of the good faith performance doctrine as effectuating the intention of the parties or protecting their reasonable expectations through interpretation and implication, see S. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980).

written document, it is often a standard form, which the employee might not read or comprehend. Furthermore, the contract may incorporate by reference rule books or pension agreements with disclaimer clauses, the full import of which the employee might not recognize. The potential for overreaching is pervasive and ever present; the law here, as in consumer contracts, has a responsibility to protect the weaker party.

Fourth, the common contract principle of voiding provisions that are illegal or contrary to public policy should be used to bar employer reliance on both implied and express terms justifying discharge. This would encompass all of the cases in which the courts have applied the so-called "public policy exception," but it would reach beyond. Establishing a presumption of continuing employment would create a contract right in the employee and would require the employer to rely on an implied or express contractual provision that limits the employee's right to continued employment. In *Bruffett v. Warner Communications, Inc.*,[99] an employee was terminated when it was discovered she had diabetes. The discharge, based on physical handicap, violated the Pennsylvania Human Relations Act,[100] but the court held that the employment was at will. There was no action for wrongful discharge because there was a statutory remedy for discrimination. If the employment were not at will, the employer would have to rely on an implied contract provision that handicapped employees could be discharged. The court would certainly not enforce such a provision, uphold the discharge, and relegate the employee to her statutory remedy. Similarly, courts would refuse to enforce provisions, express or implied, that prohibit an employee from reporting that a product was unsafe, as in *Geary v. United States Steel Corp.*,[101] or that the officers were defrauding the company, as in *Murphy*. Courts have not generally required a violation of statute to hold a contractual provision unenforceable as contrary to public policy. There is no reason for them to be so limited in contracts of employment.

This is intended only to sketch how well-established contract principles might be applied to protect employees once the misguided employment at will doctrine is discarded. The argument here does not build on the premise that contracts of employment should be treated specially to give added protection to workers. The argument is much more modest—contracts of employment ought at least not be warped and degraded contrary to generally accepted contract principles so as to deprive employees of legal protection in their contractual relations with their employers.

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99. 692 F.2d 910 (3d Cir. 1982).
100. Pa. Stat. Ann. tit. 43, § 952(b) (Purdon Supp. 1983-1984).
101. 456 Pa. 171, 319 A.2d 174 (1974).

Conclusion: On Beyond Contract

The individual contract of employment provides a central legal concept for analyzing the rights and duties arising out of the employment relation, both when that relation is governed by collective bargaining and when it is defined by individual bargaining. This discussion has focused on the increased emphasis and protection it gives to the rights of individual employees. Recognition and protection of individual contract rights, however, will never give individual employees full, or even adequate, protection. Most employees are unable to protect their own interests, particularly when they must bargain individually with the employer. The contract itself may become an instrument of oppression. The law must not only enforce the contract of employment, but also require that it incorporate basic fairness.

The content of collective agreements has been limited by the duty of fair representation; the collective parties cannot include in the contract provisions that are basically unfair to individuals or groups of employees. Indeed, the duty of fair representation discussed here with reference to contract enforcement was first articulated in decisions striking down discriminatory provisions in collective agreements. The individual's rights under the collective agreement are rights under a contract that the law requires to be fair to all employees.

When employees have no collective agreement to protect them, but must bargain individually, they are often at the mercy of the employer. As courts extend protection to the individual by reading implied terms into the contract of employment, employers can legally write those terms out by express provisions in the contract. The employer's practical ability to do so is not unlimited, for expressly declaring that there is no job security and that the employer reserves the right to be wholly insensitive, unfair and arbitrary is not cost-free. Employees so forewarned may take the job only as a last resort, stay as short a time as possible, and favor the employer with low morale and low productivity. Many employers, however, will impose on employees contracts drawn by lawyers to limit employees to contract rights as meager and illusory as possible.

The employment contract will not only fail to provide adequate protection, the protection it does provide may be too costly to be enjoyed. Suits to enforce contract rights are slow and expensive, and employers with greater resources can complicate litigation to make it interminable and unbearable for the wronged employee. In such litigation, the only winners are the lawyers.

The only adequate solution for unjust dismissals is statutory protection. Just as collective agreements write into individual contracts of employment the right not to be dismissed without just cause, the statute should write into other individual contracts of employment an equivalent right. There is no need to spell out here the details of such a

statute; I have done that elsewhere,[102] Canada enacted such a statute in 1978,[103] and statutory proposals to provide comprehensive protection against unjust dismissal have been developed by others.[104] Bills have been introduced in several state legislatures,[105] and although none have yet been adopted, recognition of the need for legislation grows. In the last months, a bill drafted by a specially appointed study committee has been introduced in California.[106]

Reemergence of the individual contract of employment has made a significant contribution to our labor law. It provides a basic concept on which to build, and there is much building yet to be done. The task of protecting individual employees, however, ultimately requires us to go on beyond contract to broad statutory protection against unjust dismissal.

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102. Summers, *Time for a Statute*, *supra* note 37.

103. Act of Apr. 20, 1978, ch. 27, § 61.5, 1977-1978 Can. Stat. 607, 615-18.

104. *See* Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. Mich. J.L. Reform 207 (1983); Hawlett, *Due Process for Non-Unionized Employees: A Practical Proposal*, 32 Proc. Indus. Rel. Research Ass'n 164 (1979); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. Mich. J.L. Reform 319 (1983); *Modern Contract Theory*, *supra* note 84.

105. *See* Connecticut Committee Bill 8738, Gen. Assembly Jan. Sess. 1973; Michigan H.R. 5892 (1982); New Jersey Assembly Bill 1832 (1980); Pennsylvania H.R. 1742 (1981).

106. Assembly Bill 3017 (1984).