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## CHANGES IN THE BONDING OF THE EMPLOYMENT RELATIONSHIP: AN ESSAY ON THE NEW PROPERTY<sup>†</sup>

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In some late 19th century treatises, the master-servant relationship was still being counted as one of the domestic relations.<sup>1</sup> Even then, this was anachronistic; the law of master and servant was already a distinct field, having developed the characteristic rules that later would be subsumed under the headings of agency, contract, and labor law.<sup>2</sup> One of these rules, adopted by

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<sup>†</sup>This article develops part of the thesis of a larger work exploring the relationship of recent trends in employment law, family law, and social welfare law to a broad historical shift in the relative importance of work, family, and government as focal points of standing and security in society. M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (scheduled to be published by Butterworth & Co. in 1980).

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<sup>1</sup> The old system of classification was used as late as 1895 in Schouler's leading treatise, J. SCHOULER, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT* 3 (5th ed. 1895) [hereinafter cited as SCHOULER]. See also W. TIFFANY, *HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* 488 (2d ed. 1909). The difficulty with continuing to treat the situation of industrial workers under the old rubric of master and servant was evident in the curious title of an 1890 treatise: I. BROWNE, *ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED* (2d ed. 1890) [hereinafter cited as BROWNE]. In his text, however, Browne treated employment under the title, "Master and Servant," defining servant "as including all such employees as are in the exclusive service of the employer and constructively under his supervision, as clerks in stores, operatives in mills, persons employed on public conveyances and the like." *Id.* at 123-24. In the analytical scheme of Blackstone's *Commentaries*, he grouped Master and Servant, Husband and Wife, and Parent and Child together under the Law of Persons as the "three great relations in private life." 1 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND*, Book I, ch. 14, at 422 (G. Sharswood ed. 1875) (first published in 1765) [hereinafter cited as BLACKSTONE].

<sup>2</sup> There seems to have been something of a struggle among the treatise writers for jurisdiction over what was emerging as a new body of law. SCHOULER, *supra* note 1, at 744, classified as servants, "persons commonly known in popular speech as workmen or employees. . . . In this case are included day laborers, factory operatives, miners, colliers, and numerous others, of whom nothing more definite can be said

the end of the 19th century by the great majority of American courts, was that an employment with no fixed duration was presumptively an employment at will, terminable for any or no reason by either party at any time.<sup>3</sup> Although this new doctrine was first asserted without analysis or judicial support by H. G. Wood in his 1877 treatise on master and servant law,<sup>4</sup> it was highly compatible with prevailing laissez-faire notions and was readily accepted by the courts.<sup>5</sup> By virtue of this rule, the master-servant relationship escaped the conceptual framework of the law of domestic relations, where it had been dominated by the ideas of protection and loyalty that had characterized the still older relationship of lord and vassal. Indeed, in its day the rule could be seen as a "progressive reaction to the status concepts" that had governed the employment relation in the past.<sup>6</sup>

At the same time the free terminability of the employment relationship was being established at the level of principle, no rule seemed more certain than that the husband-wife relationship, another of Blackstone's "three great relations in private life,"<sup>7</sup> was terminable only for serious cause.<sup>8</sup> There were, of course, discrepancies between principle and practice in both cases.<sup>9</sup>

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than that they are hired to perform services of a somewhat unambitious character." Though recognizing that these are anomalies in the law of domestic relations, he then proceeded to discuss trade unions, arbitration, and early social legislation. *Id.* at 7-8, 743, 745-49. In 1913, Labatt in his treatise on Master and Servant labelled as a "mere anachronism" the "fact that modern writers on the subject of the domestic relations still deem it necessary to include in their works a general discussion of the relation of master and servant." 1 C.B. LABATT, *MASTER AND SERVANT* 14 (2d ed. 1913) [hereinafter cited as LABATT]. At present, of course, the terms Master and Servant themselves are anachronisms, surviving, however, as headings in the West key number system, *American Law Reports, Corpus Juris Secundum, American Jurisprudence and Words and Phrases*.

<sup>3</sup> LABATT, *supra* note 2, at 516-18. See generally 9 S. WILLISTON ON CONTRACTS § 1017 (3d ed. Jaeger 1967); 3A A.L. CORBIN, CONTRACTS § 684 (1960); RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

<sup>4</sup> H. WOOD, *MASTER AND SERVANT* § 134, at 272 (1877); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 (1974) [hereinafter cited as Note, *Implied Contract Rights*]. Wood rejected the English doctrine that a general hiring was presumptively a hiring for a year. Compare J. CHITTY, *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS* 839 (1842), and see text and note 47 *infra*. Unlike the Master and Servant writers, Schouler continued to state the English rule even after Wood's new doctrine had been firmly established in the American case law. See SCHOULER, *supra* note 1, at 751.

<sup>5</sup> Note, *Implied Contract Rights*, *supra* note 4, at 340-43.

<sup>6</sup> Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438 (1975) [hereinafter cited as Note, *A Common Law Action*].

<sup>7</sup> BLACKSTONE, *supra* note 1, at 422.

<sup>8</sup> As Schouler put it:

On two points only do English and American jurists seem to agree: first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.

SCHOULER, *supra* note 1, at 334-35. See also BROWNE, *supra* note 1, at 63-66. See generally the historical survey in H. CLARK, *DOMESTIC RELATIONS* 6-8 (2d ed. 1974).

<sup>9</sup> For a discussion of *de facto* termination of marriage, see H. FOSTER, *Common Law Divorce*, 46 MINN. L. REV. 43 (1961). See text and note 49 *infra* for a discussion of

Nevertheless, in the century that has passed since the free terminability of the employment relationship was formulated, these two former domestic relations not only have become completely separated in legal theory, they have exchanged their conceptual starting points so far as the termination of each relationship is concerned. While marriage is now terminable by either spouse at will in the majority of states,<sup>10</sup> most employees in the labor force can be discharged only for cause. In similar juxtaposition, marriage has been extensively dejuridified, while employment has been subjected to heavy regulation.

Our thesis is that recent changes in the laws governing the termination of employment are part of a broader change in the bonding of the employment relationship, through which the web of relations that bind an individual's job to him and, more subtly, bind him to his job, is becoming tighter and more highly structured. The ties that bind the job to the individual and the ties that bind the individual to the job are discussed, respectively, in Parts I and II of this article. Part III of the article places these legal changes within the long historical process that has brought about a fundamental shift in the relative importance of job and family as determinants of wealth, standing, self-esteem, and security. At a time of transition in family behavior and in the nature and forms of wealth, the legal changes described in this article reflect and reinforce expectations that economic security against old age or misfortune will be secured through one's own work and work-related benefits.

We begin by examining two developments of the 1970's that illustrate the way the law is responding to the changing roles of work and family in determining standing and security. The first is the repudiation by the highest courts of New Hampshire, in 1974, and Massachusetts, in 1977, of the rule that an employer can discharge an at-will employee for any or no reason.<sup>11</sup> The second is the adoption in 1973 by the State of Washington of a law that requires a judge to grant a divorce upon the application of one party.<sup>12</sup> At first, these two phenomena seem isolated<sup>13</sup> and unrelated. In fact they are neither. Each marks the culmination of a long-developing trend, and both are part of a broad shift in the focal points of standing and security.

This shift is more easily demonstrated in the case of marriage than in the termination of employment contracts. The leading American authority on family law, Professor Homer Clark, wrote in 1976 that changes in divorce law in only five years have meant that in the majority of states either spouse can now obtain a divorce at will.<sup>14</sup> The significance of the Washington law is thus

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how the apparent severity of the at-will employment rule was mitigated from the beginning.

<sup>10</sup> Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441, 444 (1976).

<sup>11</sup> *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Fortune v. National Cash Register*, 1977 Mass. Adv. Sh. 1569, 364 N.E.2d 1251 (1977).

<sup>12</sup> Washington Marriage Dissolution Act 1973, WASH. REV. CODE ANN. § 26.09.030 (Supp. 1977).

<sup>13</sup> The *Monge* case, 114 N.H. 130, 316 A.2d 549 (1974), was said to be "clearly *sui generis*" in *Pirre v. Printing Developments, Inc.*, 432 F. Supp. 840, 841 (S.D.N.Y. 1977), and was described as "an exception standing in splendid solitude" by C. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 486 n.29 (1976).

<sup>14</sup> Clark, *supra* note 10, at 444.

chiefly symbolic. While other so-called no-fault divorce laws in form require the court to find that a marriage has broken down before it can dissolve the marriage, the Washington law provides that the court *must* dissolve the marriage merely upon the allegation of one party that the marriage has broken down.<sup>15</sup> This statute requires neither the presentation of evidence to support the allegation nor a judicial inquest into the fact of breakdown. In the words of one Washington judge, it places the burden of adjusting or terminating the marital relationship "upon the parties rather than upon the state."<sup>16</sup> Of course, even in Washington, a spouse still must go to court to terminate a marriage legally and get a license to remarry; but there, and in an increasing number of other states, the divorce proceeding is now a mere formality.<sup>17</sup>

It is less obvious that the two decisions rejecting the employer's prerogative to discharge at will merely consolidate the evolution of the case law and the existing practices in various employment contexts. Indeed, as late as 1975, the *American Law Reports* annotation on arbitrary dismissal as a breach of employment contracts terminable at will began with the statement:

Despite its sometimes harsh operation and the obvious opportunities for abuse it affords an unscrupulous employer, few legal principles would seem to be better settled than the broad generality that an employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party for any reason or for no reason at all.<sup>18</sup>

The assumption that the rule of unfettered prerogative controls in the absence of agreement or legislation to the contrary is widespread.<sup>19</sup> However,

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<sup>15</sup> See generally M. GLENDON, *STATE LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE*, 227-37 (1977) [hereinafter cited as GLENDON].

<sup>16</sup> Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 *GONZ. L. REV.* 39, 56 (1973).

<sup>17</sup> GLENDON, *supra* note 15, at 226, 233-37. In 1978, the incoming Chairman of the American Bar Association Family Law Section stated that "the time is coming when a couple without collateral legal problems may terminate their marriage at a clerk's counter, never setting foot inside a courtroom or even a lawyer's office." *Lawscope*, 64 *A.B.A. J.* 815 (1978). No suggestion is made here that economic or child-related disputes in connection with marriage termination will or should be summarily determined.

<sup>18</sup> Annot., 62 *A.L.R. 3d* 271, 271 (1975).

<sup>19</sup> Indeed, some of the rule's sharpest critics share this assumption. Summers, *supra* note 13, at 521, argues that a statute is needed to displace the rule. Others have advocated a tort action for wrongful discharge. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 *COLUM. L. REV.* 1404, 1413 (1967); Note, *A Common Law Action*, *supra* note 6, at 1454. Professor Blumrosen shares the authors' view that the common law rule is already moribund, but he bases his conclusion on his belief that Title VII protects minorities and women against arbitrary dismissal and that, by virtue of the Equal Protection Clause, this protection now extends to all employees in the labor force. See notes 41 and 43 *infra*. See also Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Discretionary Power: United States Report*, 18 *RUTGERS L. REV.* 428, 428 (1964) (predicting that the American law of employer discipline "may be moving toward a general requirement of just cause and fair dealing between employer and employee").

the following section of this article suggests that the major—one might almost say the entire—significance of the recent actions by the New Hampshire and Massachusetts supreme courts is their willingness to break openly with defunct principles to which lip service so far has been paid routinely by the very courts that have interred them. As is often the case, the evolving court decisions simultaneously reflect and reinforce the trends that have given them birth. As will be shown, this trend has been evident for some years.

### I. TIES THAT BIND THE JOB TO THE EMPLOYEE

The rule that an at-will employment relationship can be severed freely by employer and employee alike for any or no reason is a variant of the same majestic law that prohibits rich and poor alike from sleeping under a bridge.<sup>20</sup> In 1908, the United States Supreme Court expressed its version of this rule of "mutuality" in *Adair v. United States*.<sup>21</sup> It stated: "[T]he right of the employee 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 the employee."<sup>22</sup> In the years since *Adair*, the employer's theoretical prerogative to dismiss an employee for any or no reason has been eroded so thoroughly by the enactment of legislative protection for the job tenure of numerous and diverse categories of employees, and by good cause provisions in labor agreements and in civil service employment, as to be but dimly visible in the few remaining dismissal cases that involve at-will employment and are uncomplicated by allegations of illegal discrimination or reprisal. In such cases, it is generally assumed that the underlying common law rule continues to govern employment termination.

The way toward judicial reappraisal of "Wood's rule" has been presaged by the substantial body of arbitration law developed in cases dealing with discharges of employees covered by collective bargaining agreements. In 1976,

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<sup>20</sup> ANATOLE FRANCE, *L'AFFAIRE CRAINQUEBILLE* (1901).

<sup>21</sup> 208 U.S. 161 (1908).

<sup>22</sup> *Id.* at 174-75. The decision held that legislation adopted in 1898 limiting the employer's right to discharge by reason of membership in a labor organization violated the employer's liberty of contract and his property interests protected by the fifth amendment. The Court later expressed a different view on the employee's "right to quit" in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the Court upheld the National Labor Relations Act provision forbidding an employer to discharge or otherwise discriminate against employees on account of union activity:

[A] single employee was helpless in dealing with an employer; . . . he was dependent ordinarily on his daily wage for the maintenance of himself and family; . . . if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.

*Id.* at 33 (Hughes, C.J.). On numerous occasions, however, the Court has made it clear that it does not view the National Labor Relations Act as interfering generally with an employer's right to fire an employee at will in the absence of an unfair labor practice. See cases collected in Note, *Implied Contract Rights*, *supra* note 4, at 346-47. See also § 10(c) of the NLRA, 29 U.S.C. § 160(c) (1976), providing that "no order of the [National Labor Relations] Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for cause."

labor organizations in the United States represented about 22.4 million employees.<sup>23</sup> In 1978, the nationwide work force was about 100 million.<sup>24</sup> Since practically all collective bargaining agreements provide in substance that no employee in the bargaining unit may be discharged, suspended, or otherwise disciplined except for "just," "good," or "proper" cause,<sup>25</sup> over a fifth of the labor force is removed from the operation of the common law rule.

In labor arbitrations, the fluid concept of good cause takes on meaning from the practices of the parties and the gradual accumulation of countless arbitration decisions over the years. Thus, its content can and does vary considerably. At the minimum, however, good cause has meant that the employer must furnish reasons for the penalty imposed.<sup>26</sup> If the propriety of a discharge or other discipline is tested, an arbitrator determines the question of cause in an employment context, bringing to bear on it the customs of the industry, relevant plant practices, and his own individual sense of justice.<sup>27</sup> The trier's discretion is so considerable as to make his decision virtually immune from appeal.<sup>28</sup>

In recent years, arbitrators appear to have detected and responded to the heightened importance of the job relationship as a focus of security and standing in society. Over the last two decades or so, arbitrators have demanded increasingly stringent justification from employers before sanctioning a severance. This observation is based in part on a comparison of ninety-eight discharge cases reported during a six-month period in 1963-64<sup>29</sup> with 106 discharge cases reported in the corresponding period in 1977-78.<sup>30</sup>

Reinstatement of Discharged Employees  
in Reported Arbitration Decisions

	Number of Employees	Discharges Upheld	Reinstated with Full or Reduced Back Pay	Reinstated Without Back Pay
1963-64	98	62	17	19
1977-78	106	36	46	24

<sup>23</sup> U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, LABOR UNION AND EMPLOYEE ASSOCIATION MEMBERSHIP—1976 (1977).

<sup>24</sup> U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, THE EMPLOYMENT SITUATION: JULY 1978 (1978).

<sup>25</sup> Summers, *supra* note 13, at 483, 499.

<sup>26</sup> *Id.* at 499-500.

<sup>27</sup> See the trilogy cases: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

<sup>28</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

<sup>29</sup> 41 Lab. Arb. & Disp. Settl. (containing reported arbitration decisions from September 4, 1963, to February 26, 1964).

<sup>30</sup> 69 Lab. Arb. & Disp. Settl. (containing reported arbitration decisions from September 7, 1977, to February 22, 1978).



As the table shows, in the reported cases for a six-month period in 1963-64, arbitrators reinstated, with or without back pay, thirty-six (36.73%) of ninety-eight discharged employees. In the reported cases for the corresponding period in 1977-78, by contrast, arbitrators reinstated seventy (66.04%) of 106 employees. This amounts to a complete reversal of the percentages in less than fifteen years. The comparison becomes even more striking when one realizes that unionized employers, gradually sensing the increased difficulty of discharging an employee protected by a good cause provision, tend less and less to precipitate the grievance and arbitration procedures by discharging in the first place. An arbitrator is likely not only to reinstate a wrongfully discharged employee,<sup>31</sup> but also, at his discretion, to award the employee the back pay he would have earned had employment continued (less interim compensation earned from another employer). The back pay penalty is a substantial deterrent to employers from discharging without good grounds.<sup>32</sup> Hence, the discharge cases which have been submitted to arbitration in recent years have been screened by management so that the odds in favor of the employer's winning a particular case should have increased. In spite of this, the percentages of reinstatements in arbitration proceedings have been reversed in favor of the employees. Assuming the sufficiency of the sample,<sup>33</sup> and assuming the representative quality of the periods selected, the inference is strong that arbitrators have both sensed and contributed to the evolution of an altered conception of the work relationship.

Besides the approximate fifth of the labor force covered by collective bargaining agreements, another large sector of the labor force has gained legal protection against discharge without good cause. Most federal, state, and local government employees, who comprised about 16.2% of the work force in 1975,<sup>34</sup> are protected by civil service laws and regulations.<sup>35</sup> Many of these

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<sup>31</sup> "When discharge is found inappropriate, arbitrators, with rare exceptions, order reinstatement, even though the employer strongly objects and reinstatement may create tension with supervisors and fellow employees." Summers, *supra* note 13, at 505. In none of the cases surveyed for the table in text at notes 29 and 30 *supra*, was reinstatement denied when the discharge was found wrongful.

<sup>32</sup> Management counsel over the past 10 or 15 years increasingly have advised their clients to suspend, rather than discharge, employees. Suspension often achieves the desired disciplinary purpose without exposing the employer to back pay penalties. Cf. Summers, *supra* note 13, at 507-08.

<sup>33</sup> Not all arbitration decisions are published. In the first place, arbitrators submit their decisions for publication only if both sides consent. Then, of the awards submitted, the Bureau of National Affairs (BNA) publishes only those where it deems the issue to be of general interest and where the "arbitrator's opinion sets forth his reasoning in a manner that can be clearly understood by persons other than the parties." Bureau of National Affairs, Policy Statement on Arbitration Award Selection, [1979] 3 LAB. REL. REP. (BNA) 91-92. The policy statement on the selection process declares that no consideration is given in the process to which party won the case. *Id.*

<sup>34</sup> U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1977, table 1, at 21, table 46, at 96 (1977). See also Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 943 n.1 (1976).

<sup>35</sup> Frug, *supra* note 34, at 945; see also Summers, *supra* note 13, at 497. Federal employees are protected by 5 U.S.C. § 7512(a) (1976), which permits dismissal only "for such cause as will promote the efficiency of the service."

employees, of course, are covered by labor agreements in addition to the civil service laws. In his comprehensive analysis and survey in 1976 of the development of protections for civil service employees against discharge, Professor Gerald Frug concluded that civil service employees, in the absence of serious misconduct, had "the equivalent of life tenure" after a short probationary period.<sup>36</sup> He cited factors that make the discharge of a government employee more difficult than that of an employee in the private sector:

[G]overnment today is subject to two basic restrictions of its power over its employees that are inapplicable to private enterprise: It can discipline or discharge its employees only for "cause" and it must provide them with procedural protections in determining the existence of that cause. Of these two limitations, the procedural protections most restrict the government's ability to enforce a standard of job performance. Incompetence is generally assumed to be sufficient "cause" for termination. But the procedures that must be followed to establish incompetence make such terminations extremely unlikely.<sup>37</sup>

We have already seen that employees covered by collective bargaining agreements may be discharged only for cause, and we will presently demonstrate the extent to which this notion is influencing other employment arrangements. Thus, it is really the second, or procedural, factor mentioned by Professor Frug which sets the civil service employee apart. The procedure that must be followed in civil service discharges is lengthy and complicated. By contrast, the arbitration proceedings which test the validity of a discharge of a unionized employee in the private sector are prompt and efficient. In the large preponderance of private discharge arbitrations, a decision may be had within four to six months. Moreover, as Professor Frug points out, it is unclear to what extent the Constitution mandates certain procedures for the removal of civil servants.<sup>38</sup> A whole new dimension is added to the difficulty of civil service discharge if due process requires that the propriety of the discharge be determined *before* the employee is removed from the payroll.

Apart from collective bargaining agreements and the laws governing civil service, there are other, quite different sorts of legal arrangements that significantly affect an employer's ability to terminate certain employment relationships. We refer first to that growing and complex network of state and federal laws that, at least in form, do not require employers affirmatively to show reasons *for* discharge, but nevertheless forbid discharges for "bad reasons." Beginning principally with the National Labor Relations Act in 1935,<sup>39</sup>

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<sup>36</sup> Frug, *supra* note 34, at 945. Frug makes a convincing case that procedures simplifying the process of discharge of civil servants for incompetence (as distinct from misconduct), such as those adopted by Congress in 1978, Pub. L. No. 95-454 §§ 7511-7514, 92 Stat. 1111 (1978), are both desirable and constitutional.

<sup>37</sup> Frug, *supra* note 34, at 946.

<sup>38</sup> *Id.* at 989 *et seq.*

<sup>39</sup> National Labor Relations Act, 29 U.S.C. §§ 151-168 (1976). Precursor to the NLRA in this regard was the Railway Labor Act, 44 Stat. 577 (1926) (codified at 45 U.S.C. §§ 151-188 (1976)), which, *inter alia*, prohibited coercion of railroad employees by reason of their union activities.

but especially since the Civil Rights Act of 1964,<sup>40</sup> protective legislation has tended to perpetuate existing employment relationships by forbidding discrimination<sup>41</sup> or reprisal<sup>42</sup> of various kinds. While these laws theoretically do not affect the employer's right to discharge an employee for any but the statutorily proscribed "bad reasons," they frequently affect the expense of enforcing that right, especially in those cases where the party challenging the discharge is a governmental body with extensive resources available to defray the legal expense.<sup>43</sup> An incidental effect of this legislation is to make an

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<sup>40</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e (1976)).

<sup>41</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976) (race, color, national origin, religion, sex); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976), as amended by Pub. L. No. 95-256, 92 Stat. 189 (1978) (increasing, effective January 1, 1979, the protected age from 65 to 70). Other antidiscrimination statutes are collected in Note, *A Common Law Action*, *supra* note 6, at 1147 nn. 58-63; Summers, *supra* note 13, at 492-97. Federal antidiscrimination statutes, along with their local counterparts, address not only discharge, but also hiring, promotion, seniority practices, and other terms and conditions of employment.

For purposes of the present discussion, it is important to note that the comprehensive network of statutory protections afforded the job status of women and members of minority groups places greater numbers of persons within protected categories than without. Indeed, theoretically, antidiscrimination statutes also protect whites, males, Protestants, and Mayflower descendants because the statutory prohibitions are directed generally to discrimination on the basis of race, color, religion, sex, and national origin without specifying the particular groups within those categories. See Blumrosen, *Strangers No More: All Workers are Entitled to "Just Cause" Protection under Title VII*, 2 INDUS. REL. L.J. 519, 563-64 (1978). Professor Blumrosen gallantly extrapolates from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the EEOC experience, and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), a rule that *all* workers, white and black, male and female, are now protected from terminations and refusals to hire by a "just cause" standard. In practice, there is a good deal of truth to this, since the employer in a discrimination case before a court, an agency, or an arbitrator, always proffers his purity of reason for the challenged employment decision. But as a matter of law, it is premature to suggest that "just cause" is the standard in all cases. It is closer to that standard for minorities and females who benefit from the justifiable presumption that they have been victimized in the past and therefore are being victimized at present. It is substantially less so for whites and males.

As a practical matter, it is the *Age* Act that is likely to have the most direct impact on employee turnover by binding the older employee's job to him until retirement.

<sup>42</sup> *E.g.*, National Labor Relations Act, §§ 7, 8(a)(3), 29 U.S.C. §§ 157, 158(a)(3) (1976), which protects employees from discharge (or refusal to hire, or other discriminatory treatment) motivated by anti-union considerations. Other statutes prohibiting discharge of employees for exercising a variety of rights are collected in Note, *A Common Law Action*, *supra* note 6, at 1447, and Summers, *supra* note 13, at 492-97 nn.58-63.

<sup>43</sup> See Summers, *supra* note 13, at 493. Blumrosen argues that the employer's motive in a discrimination case is no longer material. Blumrosen, *supra* note 41, at 594 *et. seq.* This is questionable. Even if *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), suggested this view, Justice Rehnquist seems to have foreclosed it in *Furnco Construction Corp. v. Waters*, 98 S. Ct. 2943 (1978), wherein he stated that "when the prima facie showing [by a complainant] is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive." *Id.* at 2951.

employer especially wary of discharging anyone in a protected category, even though she may believe good cause exists.<sup>44</sup>

All of the foregoing protections against discharge developed against an assumed background of the employer's right to terminate an "at-will" employment relationship for any or no reason. Yet, in a small but increasing number of states, employees recently have challenged successfully termination of at-will employment arrangements, and the very starting point of discourse has been changed. Subject almost from its inception to a process of steady erosion, the rule announced by Wood in 1877 has started to collapse. In its place, two state supreme courts have begun the formulation of new rules that are better adapted to the realities of the world of work. The latest changes are best understood in the light of the development of Wood's rule over the past century.

The employer's absolute right to terminate an employment relationship at will appeared at about the same time in England, France, Germany, Sweden, and the United States. Its appearance coincided generally with the zenith of legal acceptance of those conceptions of contract and property that accompanied and fostered the growth of entrepreneurial industry.<sup>45</sup> The United States was alone among the above listed countries, however, in the extremes to which, at least in theory, it took the rule. In England, France, Germany, and Sweden, the law implied in contracts for employment at will a requirement of customary or reasonable notice before termination, except in cases of serious misconduct or where a contract expressly provided to the contrary.<sup>46</sup> Furthermore, in England throughout the 19th century, an employment relationship for an indefinite term was presumed to be for a period of one year, and the employer could dismiss an employee during this period only for just cause.<sup>47</sup> But in the United States by the end of the 19th century, an employment relationship for an indefinite term was presumed to be at will, and the employer, in theory, could discharge an employee at any time for any or no reason. Stated in the extreme, the American rule embraced not only the employer's right to discharge "arbitrarily," "for any reason," or "for no reason," but even for reasons that were "morally wrong."<sup>48</sup>

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<sup>44</sup> Summers, *supra* note 13, at 494-95. There is an additional practical deterrent to discharge arising from unemployment compensation laws which monetarily burden the employer unless the discharge was for misconduct.

<sup>45</sup> Summers outlines the development of the rule in these countries. *Id.* at 508-19. The historical development of the American variant is discussed in detail in Note, *Implied Contract Rights*, *supra* note 4, at 335, 340-47.

<sup>46</sup> Summers, *supra* note 13, at 485, 509, 511, 513, 515.

<sup>47</sup> *Id.* at 485; Note, *Implied Contract Rights*, *supra* note 4, at 340.

<sup>48</sup> See *Payne v. Western & A.R.R.*, 82 Tenn. 401, 410-12 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). See also *Hinrichs v. Tranquillaire Hospital*, \_\_\_ Ala. \_\_\_, 352 So. 2d 1130 (1977) (discussed at note 80 *infra*).

C.B. Labatt, in his 1913 treatise, speculated that the American rejection of the English rule was probably induced by prevailing American social and economic conditions. LABATT, *supra* note 2, at 519. He was not, however, an enthusiast for the new rule. He characterized the wholesale American adoption of the doctrine that an indefinite hiring was presumptively at will as the substitution of one extreme presumption

In practice, however, American courts began to temper the severe rule, almost from the moment it was articulated, by interpreting the contract, where the facts permitted, as one for a fixed term.<sup>49</sup> Then, beginning with a 1959 California decision, *Petermann v. International Brotherhood of Teamsters*,<sup>50</sup> a growing minority of courts created outright exceptions to the rule. In *Petermann*, a former business agent of the Teamsters Union brought a wrongful discharge suit against his employer-union, alleging that he had been fired because of his refusal to commit perjury at his employer's request.<sup>51</sup> The California Court of Appeal held that Petermann had stated a claim for relief and that considerations of public policy might limit the employer's right to discharge. The Court said:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.<sup>52</sup>

The notion in *Petermann* that an employer's right to discharge was subject to at least some exceptions based on public policy slumbered until the 1970's. Then it suddenly became the basis for a number of decisions in favor of employees,<sup>53</sup> particularly where the courts could find an explicit legislative declaration of public policy.

for another, *id.*, and argued that it would be more reasonable to treat "the duration of the engagement as an entirely open question of fact, unencumbered by any presumption whatever." *Id.* at 520.

<sup>49</sup> The cases are collected in 3A A.L. CORBIN, CONTRACTS § 684 (1960). Corbin expressed skepticism about the notion that there was an "English" and an "American" rule, noting that "[t]he question is one of factual interpretation, and very frequently it is a jury question." *Id.* at 224.

<sup>50</sup> 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

<sup>51</sup> *Id.* at 187, 344 P.2d at 26.

<sup>52</sup> *Id.* at 188-89, 344 P.2d at 27.

<sup>53</sup> *E.g.*, *Harless v. First National Bank in Fairmont*, \_\_\_ W.Va. \_\_\_, 246 S.E.2d 270, 276 (1978). The West Virginia court held that an at-will bank employee's allegation that his discharge was in retaliation for efforts to require his employer to comply with consumer credit laws stated a cause of action. The court stated:

We conceive that the rule giving the employer the absolute right to discharge an at-will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

*Id.* at 275. *See also* *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), and *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1979) (employees alleging discharge in retaliation for filing a workmen's compensation claim stated cause of action for damages); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (compensatory damages granted at-will employee discharged for having accepted jury duty); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (despite "general rule" that employment at will may be terminated for any or no reason, discharge for filing workmen's compensation claim violates public policy); *Reuther v. Fowler & Williams*, \_\_\_ Pa. Super. Ct. \_\_\_, 386 A.2d 119 (1978) (cause of action stated by allegation that employee was discharged for accepting jury duty).

Even in recent cases that favor employers and purportedly follow the "general rule," courts have begun to recognize exceptions in the fashion characteristic of that gradual common law process which often leads to the interment of an unsatisfactory rule. For example, in *Geary v. United States Steel Co.*,<sup>54</sup> the Pennsylvania Supreme Court, although holding over dissent that no claim was stated for a wrongful discharge based on an employee's report of unsafe products, stated:

We recognize that economic conditions have changed radically since the time of *Henry v. Pittsburgh & Lake Erie Railroad Co.* . . . The huge corporate enterprises which have emerged in this century wield an awesome power over their employees. It has been aptly remarked that

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. For our generation, the substance of life is in another man's hands.<sup>55</sup>

Although it denied relief to the discharged employee, the *Geary* court took pains to indicate the narrowness of its holding:

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevates an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited. But this case does not require us to define in comprehensive fashion the perimeters of this privilege, and we decline to do so. We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge.<sup>56</sup>

<sup>54</sup> 456 Pa. 171, 319 A.2d 174 (1974).

<sup>55</sup> *Id.* at 176, 319 A.2d at 176 (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)).

<sup>56</sup> *Id.* at 184-85, 319 A.2d at 180. The court also carefully pointed out in a footnote that its decision did not necessarily reject the rationale of the *Petermann* and *Frampton* cases, note 53 *supra*, which, in the court's view, differed from *Geary* in that, in the former cases, "the mandates of public policy were clear and compelling . . ." *Id.* at 184 n.16, 319 A.2d 180 n.16. See *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 333, 563 P.2d 54, 57 (1977), in which the court said:

The employment at will rule is not, however, an absolute bar to a claim of wrongful discharge. As a general exception to the rule allowing either the employer or the employee to terminate the employment relationship without cause, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.

Other courts soon may join the growing minority of courts that recognize exceptions to the established rule. In 1977, the Washington Supreme Court disclosed its readiness to reexamine the terminable at-will doctrine in a proper case.<sup>57</sup> And, in 1979, the Illinois Supreme Court resolved in favor of the discharged employee a conflict between two appellate panels on the status of the rule.<sup>58</sup> More importantly, however, the highest courts of New Hampshire and Massachusetts have granted relief for wrongful discharge, not by recognizing exceptions to the rule, but by reformulating it. Although both courts have departed from the traditional rule, they have done so in significantly different ways.

In the New Hampshire case, *Monge v. Beebe Rubber Co.*,<sup>59</sup> the plaintiff was an immigrant Costa Rican school teacher and married mother of three children who was working nights in the defendant's factory to put herself through college so that she could assume her former profession in the United States. Claiming that her discharge had resulted from her foreman's hostility towards her because she refused to go out with him, she sued for damages for breach of her oral contract of employment.<sup>60</sup> The New Hampshire Supreme Court<sup>61</sup> became the first state supreme court to repudiate Wood's rule. Assert-

See also *Percival v. General Motors Corp.*, 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976); *Campbell v. Ford Indus. Inc.*, 274 Or. 243, 249, 546 P.2d 141, 145 (1976).

<sup>57</sup> The court observed that "the future of this doctrine is a compelling issue . . ." *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 898, 568 P.2d 765, 770 (1977) (en banc).

<sup>58</sup> *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1979) (employee allegedly discharged for filing workmen's compensation claim has cause of action for tort of wrongful discharge). Compare *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1026, 366 N.E.2d 1145, 1148-49 (1977), with *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d 1016, 1020, 366 N.E.2d 1141, 1144 (1977).

<sup>59</sup> 114 N.H. 130, 316 A.2d 549 (1974).

<sup>60</sup> *Id.* at 130-32, 316 A.2d at 550-51.

<sup>61</sup> Only a year earlier, the New Hampshire Supreme Court had been the first court in the country to replace the limited tort immunity of landlords with a general duty of ordinary care. *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973). In *Monge*, the court used its recent landlord-tenant decisions as a bootstrap for the reconceptualization of the employer-employee relationship:

When asked to reexamine the long-standing common-law rule of property based on an ancient feudal system which fostered in a tenancy at will a relationship heavily weighted in favor of the landlord, this court did not hesitate to modify that rule to conform to modern circumstances. *Kline v. Burns*, 111 N.H. 87, 90, 276 A.2d 248, 250 (1971); *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973).

The law governing the relations between employer and employee has similarly evolved over the years to reflect changing legal, social and economic conditions.

*Id.* at 132, 316 A.2d at 551.

Compare with *Monge* the District of Columbia landlord-tenant decision, *Robinson v. Diamond Housing*, 463 F.2d 853, 861, 865, 867 (D.C. Cir. 1972), in which Judge Skelly Wright used analogies from employment law to break new ground in landlord-tenant law. Such legal phenomena accord well with Professor Ian Macneil's analysis of contract law as "relational" rather than as dealing with discrete transactions. See note 86 *infra*.

ing that the "employer has long ruled the workplace with an iron hand"<sup>62</sup> by reason of this rule, and that "courts cannot ignore the new climate prevailing generally in the relationship of employer and employee,"<sup>63</sup> the court proffered a new standard to govern discharge cases:

We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract. . . . Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.<sup>64</sup>

The majority opinion in *Monge* leaves no doubt about the court's expansive views both of public policy and of its own role in formulating it:

In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.<sup>65</sup>

The dissenting judge took issue with "the broad new unprecedented law laid down in this case,"<sup>66</sup> and with the sufficiency of the plaintiff's case even under the new rule, since the uncontradicted evidence showed other, business reasons for terminating the plaintiff's employment.<sup>67</sup> He pointed out that the new rule went well beyond cases, such as *Petermann*, where the discharges were alleged to be in violation of a clear, usually statutory, expression of public policy. The fact that the majority in *Monge* candidly based its holding on a judicial balancing of the interests of employee, employer, and the public may serve to exacerbate fears like those expressed by the Pennsylvania Supreme Court in *Geary* of venturing into "uncharted territory,"<sup>68</sup> and therefore to limit the authority of *Monge* outside New Hampshire.<sup>69</sup>

<sup>62</sup> 114 N.H. at 132, 316 A.2d at 551.

<sup>63</sup> *Id.* at 133, 316 A.2d at 551.

<sup>64</sup> *Id.* at 133, 316 A.2d at 551-52 (citations omitted).

<sup>65</sup> *Id.* at 133, 316 A.2d at 551.

<sup>66</sup> *Id.* at 135, 316 A.2d at 553.

<sup>67</sup> *Cf. Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44; *NLRB v. Brown*, 380 U.S. 278, 282-83 (1965) (discussion of "motive" under the NLRA).

<sup>68</sup> *Geary v. United States Steel Corp.*, 456 Pa. 171, 174, 319 A.2d 174, 175 (1974).

<sup>69</sup> See note 13 *supra*. See also *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 509, 573 P.2d 907, 909 (Ariz. App. 1978) ("*Monge* does not represent the law in Arizona.").

The New Hampshire federal district court has adopted the reasoning of *Monge*. It held that an employee at will who had moved to New Hampshire at his employer's behest stated a jury question by alleging that his employment had been terminated maliciously and in bad faith. Citing the rule in *Monge* that termination motivated by bad faith or malice or retaliation is a breach of the employment contract, the district court judge commented:



In what probably will become a leading case in this area, the Massachusetts Supreme Judicial Court in 1977 unanimously granted relief to a terminated at-will employee using a rationale well devised to allay such fears. Indeed, the holding of *Fortune v. National Cash Register*<sup>70</sup> fits so well into the body of existing case and statutory law that it makes the reformulation of the traditional rule appear not only permitted but actually required. In *Fortune*, a sixty-one year old former salesman, whose twenty-five year employment was terminated shortly after he completed arrangements for a \$5,000,000 sale of cash registers, brought an action for unpaid sales commissions. Although the company had paid Fortune the portion of the commission due under the literal terms of his contract, Fortune alleged that his employer terminated his employment to avoid paying him additional amounts that would have become due under the contract. The jury specially found that the company had acted in bad faith in terminating the employment. The principal issue on appeal was whether the at-will contract was breached by this bad faith termination.<sup>71</sup>

The Supreme Judicial Court noted that under traditional law and under the express terms of the contract the company clearly could have terminated Fortune without cause, and that he had received all the commissions to which the contract entitled him. Nevertheless, the court agreed with Fortune that, despite the express terms of the contract, he was entitled to a jury determination as to the company's motives in terminating his employment.<sup>72</sup> The court held that Fortune's contract contained "an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract."<sup>73</sup> Far from venturing into "uncharted territory,"<sup>74</sup> the court found ample authority for granting a contract remedy to Fortune:

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The court's purpose in evolving such a rule is to provide the economic system, and especially the nonunion worker, with a "certain stability of employment." *Monge, supra*, 316 A.2d at 552. This court will not stifle the purpose of *Monge* by limiting it to its particular facts. The task of circumscription belongs to its progenitors and not this court.

Foley v. Community Oil Co., 64 F.R.D. 561, 563 (D.N.H. 1974). *Monge* was also followed in *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 2 (1st Cir. 1977).

<sup>70</sup> 1977 Mass. Adv. Sh. 1569, 364 N.E.2d 1251 (1977).

<sup>71</sup> *Id.* at 1569-74, 364 N.E.2d at 1253-55.

<sup>72</sup> *Id.* at 1575, 364 N.E.2d at 1255.

<sup>73</sup> *Id.*, 364 N.E.2d at 1255-56.

<sup>74</sup> The court cautiously declined to pursue the New Hampshire Supreme Court's inquiry into the "proper balance" between the interest of employers and employees, stating:

We believe that the holding in the *Monge* case merely extends to employment contracts the rule that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing" [emphasis supplied]. *Uproar Co. v. National Broadcasting Co.*, 81 F.2d 373, 377 (1st Cir.), cert. denied, 298 U.S. 670, 56 S.Ct. 835, 80 L.Ed. 1393 (1936), quoting from *Kirke LaShelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163 (1933). *Druker v. Roland Wm. Juras Assocs.*, 370 Mass. 383, 385, 348 N.E.2d 763, 765 (1976). RESTATEMENT (SECOND) OF CONTRACTS § 231 ( Tent. Drafts Nos. 1-7, 1973). 5 S. WILLISTON, CONTRACTS § 670 (3d ed. 1961).

1977 Mass. Adv. Sh. at 1579, 364 N.E.2d at 1257.

[W]e are merely recognizing the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another. Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard. See G.L. c. 106, § 1-203 (good faith in contracts under Uniform Commercial Code); G.L. c. 93B, § 4(3)(c) (good faith in motor vehicle franchise termination).

A requirement of good faith has been assumed or implied in a variety of contract cases.<sup>75</sup>

It should be emphasized that *Fortune* does not hold that a good faith requirement is implicit in every contract for employment at will.<sup>76</sup> The case does stand, however, as a clear signal to employers, at least in Massachusetts, that to terminate an employee for reasons that a jury may find to be unacceptable may bring about a retroactive liability of such proportions as to warrant a prudent decision not to terminate at all.<sup>77</sup> More broadly, the case offers a rationale that is apt to prove more acceptable to courts in other jurisdictions than the one in *Monge*.<sup>78</sup> Imposing a standard of good faith and fair dealing in termination cases is tantamount to a requirement of good cause.<sup>79</sup>

<sup>75</sup> *Id.* at 1576-77, 364 N.E.2d at 1256 (citations omitted). See also the dissenting opinion of Justice Goodman in *Fortune v. National Cash Register Co.*, 1976 Mass. App. Adv. Sh. 716, 728, 349 N.E.2d 350, 355 (1976); *Zimmer v. Wells Mgt. Corp.*, 348 F. Supp. 540, 542-43 (S.D.N.Y. 1972) (discharge of executive to deny him stock rights vesting after 5 years employment held to violate "implied covenant of good faith and fair dealing" to be read into an employment contract deemed to be "one of adhesion").

<sup>76</sup> The court reasoned:

In the instant case, we need not pronounce our adherence to so broad a policy nor need we speculate as to whether the good faith requirement is implicit in every contract for employment at will. It is clear, however, that, on the facts before us, a finding is warranted that a breach of the contract occurred.

*Id.* at 1579, 364 N.E.2d at 1257.

<sup>77</sup> See also *Agis v. Howard Johnson Co.*, 1976 Mass. Adv. Sh. 2346, 2348-49, 355 N.E.2d 315, 319 (1976) (employee stated cause of action in tort for severe emotional distress intentionally or recklessly caused by summary dismissal).

<sup>78</sup> Justice Abrams' opinion in *Fortune* accords well with Cardozo's views on the role of judges in the growth of the law:

There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in *Dwy v. Connecticut Co.*, 89 Conn. 74, 99, express the tone and temper in which problems should be met: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life."

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 151-52 (1921).

<sup>79</sup> See Note, *Implied Contract Rights*, *supra* note 4, at 368.

*Fortune* and *Monge*, forerunners in the current evolution of the common law governing at-will employment, augment the trend towards making it more difficult for an employer to divorce himself from an employee.<sup>80</sup> In an increasing number of states, an employee already can contest his termination—in a way costly to his employer—unless the grounds for it appear reasonable and just to a jury.<sup>81</sup> And, as we have seen, the common law rule has been displaced for many employees by collective bargaining agreements, arbitration law, anti-discrimination legislation, and civil service law.

This movement away from the common law rule is not surprising. Modern scholarly writing has uniformly criticized the rule as anachronistic.<sup>82</sup> Moreover, the United States is unusual among Western industrialized nations in not providing general legal protection against termination without cause.<sup>83</sup> In England, for example, a requirement of customary and reasonable notice has tempered the harshness of the common law rule from its beginning, and statutes have protected employees against "unfair dismissal" since 1971.<sup>84</sup> Ac-

<sup>80</sup> The only recent state court decision we have found categorically endorsing *Wood's* rule in its pure form is *Hinrichs v. Tranquillaire Hospital*, \_\_\_ Ala. \_\_\_, 352 So. 2d 1130 (1977) (three judges dissenting), affirming summary judgment in favor of the employer in a wrongful discharge suit brought by an employee who alleged she had been dismissed for refusing to falsify medical records. In reciting the rule, the court stated that terminable at will means terminable for "a good reason, a wrong reason, or no reason." *Id.* at 1131. The court justified its refusal to recognize a public policy exception to the rule on three grounds: the introduction of such an exception would interfere with freedom of contract, would overrule 70 years of Alabama case law, and would constitute too nebulous a standard. *Id.* On the first point, the court's reasoning is reminiscent of the mutuality doctrine favored by the United States Supreme Court in *Adair*, *supra* note 21, but abandoned in the New Deal cases:

Alabama has followed the general rule which is that in a contract of employment "at will," the contract means what it says, that it is at the will of either party. The employee can quit at will; the employer can terminate at will [citations omitted]. This is true whether the discharge by the employer was malicious or done for other improper reasons.

*Id.* It should be clear from our analysis of the cases that, in our view, *Hinrichs* is an isolated decision which will become more so as other states review the common law rule and move either toward the further creation of exceptions or toward the reformulation of the rule itself.

<sup>81</sup> Realistically, once a jury is permitted to interpose its judgment in these matters it is predictable that employees will be favored.

<sup>82</sup> See especially Summers, *supra* note 13, at 499; see also Blades, *supra* note 19, at 1416-18; Blumrosen, *supra* note 19, at 431-33; Note, *Implied Contract Rights*, *supra* note 4, at 337, 350-51; Note, *Common Law Action*, *supra* note 6, at 1442-46; Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973).

<sup>83</sup> Kahn-Freund, *Labor Law and Social Security*, in 1 AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 428 (E. Stein & T. Nicholson eds. 1960). See also Summers, *supra* note 13, at 508-09.

<sup>84</sup> Trade Union and Labour Relations Act 1974, c. 52, sched. 1, para. 10(a), as amended by Employment Protection Act 1978, c. 44. Statutory job protection was initiated in England by the Industrial Relations Act 1971, c. 72. See Marshall, *Unfair Dismissal: A Veritable Rogue's Charter?*, 127 NEW L.J. 987 (1977); Summers, *supra* note 13, at 513-15. The employee's remedies do not, however, include reinstatement, the normal remedy under American arbitration law, and under certain circumstances there is a statutory option to contract out of the protective provisions. Trade Union and Labour Relations Act 1974, c. 52, sched. 1, para. 12(b); see Joffe, *Fixed Term Con-*

ording to Otto Kahn-Freund, "Generally speaking, the idea of the arbitrary right to 'hire and fire' has, all over Europe, given way to what the French call the principle of 'stability of employment' or job security."<sup>85</sup>

From one point of view the trend in the common law governing employment contracts is but a specific instance of general trends in contract law.<sup>86</sup> These trends have begun to transform the law of leases and are now beginning to affect yet another type of agreement that involves status and a continuing relationship—the employment contract. From another point of view, they accord well with trends in tort law.<sup>87</sup> More generally, these changes in the common law regarding employment contracts are part of a "growing recognition of the centrality of work in a person's life,"<sup>88</sup> and of the fact that "[f]or most employees, their job is the most valuable thing they possess."<sup>89</sup> From this recognition, it is but a short step to speak of jobs and job-related benefits, such as seniority and pensions that flow from jobs, as "property rights" and "entitlements." By 1940, *Coppage v. Kansas*<sup>90</sup> and *Adair v. United States*,<sup>91</sup> both cases suggesting that employers, but not employees, have constitutionally protected property rights in the employment relationship, had been "completely sapped . . . of their authority."<sup>92</sup> The law has now come almost full circle to consider seriously whether employees, but not employers, have legally protected rights in their employment that may be conceptualized as property or entitlements for purposes of constitutional law.<sup>93</sup>

*tracts*, 128 New L.J. 580 (1978). The legislation does not apply to small employers. Summers, *supra* note 13, at 513-15.

<sup>85</sup> Kahn-Freund, *supra* note 83, at 428.

<sup>86</sup> See in particular R. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 197 (1968), demonstrating the extent to which judicial imposition of varied and numerous duties "in the name of contractual good faith" has transformed contract law. See generally the two articles by Macneil, *The Many Futures of Contracts*, 47 SO. CALIF. L. REV. 691 (1974), and *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. L. REV. 854 (1978), demonstrating the extent to which modern contracts and contract law are concerned with on-going relationships as distinct from isolated, discrete transactions.

<sup>87</sup> See Blades, *supra* note 19, at 1421-27.

<sup>88</sup> Note, *Implied Contract Rights*, *supra* note 4, at 339.

<sup>89</sup> Summers, *supra* note 13, at 532.

<sup>90</sup> 236 U.S. 1 (1915).

<sup>91</sup> 208 U.S. 161 (1908).

<sup>92</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

<sup>93</sup> See text and notes 116-121 *infra*. Compare the evolution of Wood's rule, see text at note 4 *supra*, with recent legal changes in the familiar rule that a landlord may terminate a tenancy at will or a tenancy from month-to-month for any or no reason upon complying with statutory notice requirements. A. CASNER & W.B. LEACH, *CASES AND TEXT ON PROPERTY* 533 (2d ed. 1969). In the public sector, the United States Supreme Court has held that a public housing authority must comply with a Department of Housing and Urban Development circular which requires that before a tenant can be evicted he must be given notice of the reasons for the eviction and an opportunity to reply. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 280-81 (1969). In the private sector, the Supreme Court has upheld the constitutionality of typical features of traditional summary process statutes, *Lindsey v. Normet*, 405 U.S. 56 (1972), but two state law developments have eroded the rule that evidence concern-

Constitutional protection of employment may result inevitably from our having become a "nation of employees."<sup>94</sup> It is not our contention, however, that the movements here observed will or should lead to a *constitutional* right to continued employment. We merely observe that with the advent of dismissal for cause only through state and federal statutory and case law, it becomes a largely theoretical exercise to scrutinize such cases as *Board of Regents v. Roth*<sup>95</sup> and *Perry v. Sindermann*<sup>96</sup> to learn whether job protection has risen as well to constitutional status.

## II. TIES THAT BIND THE EMPLOYEE TO THE JOB

We have considered above some recent additions to the legal, economic, and practical restraints upon an employer's ability unilaterally to terminate the employment relationship. Other current developments reinforce the ties that always have made it difficult for an employee to change occupations or employers. Together, these developments cut across legal, economic, and political lines. As job ties have tightened, simultaneously constraining and liberating the individual, the employment relationship has assumed a greatly enhanced importance for most persons.

An individual's decision to change or leave a job is more complex than her decision to take a job. Nevertheless, there is nothing particularly new about many of the factors that constrain an employee from shifting from one employer to another, or from one type of work to another. Inertia and the

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ing the landlord's motives for terminating the tenancy is inadmissible. One is the typical provision of rent control laws that a landlord can terminate the tenancy only for one of the enumerated statutory reasons. C. BERGER, *LAND OWNERSHIP AND USE* 173 (2d ed. 1975). The other is the recent statutory and judicial restrictions on eviction after a tenant has reported housing code violations or has asserted a defense based on the condition of the premises to rent or possessory action. See especially *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972). Compare the American landlord-tenant developments, *supra* note 61, and the English unfair dismissal legislation, *supra* note 84, with The Rent Act 1977, (1977 c.42), Sections 1-3, 47 Halbury's Statutes of England 393-98 (3rd ed. Continuation Vol. 1977) (consolidating earlier laws and providing "security of tenure" to a wide range of public and private tenants).

<sup>94</sup> See text and note 55 *supra*.

<sup>95</sup> 408 U.S. 564 (1972) (non-renewal of a state college teacher's teaching contract did not violate his fourteenth amendment rights to due process because there were no express or implied job security rights under his contract or under state law). Although the Court found that Roth had not been deprived of property in any form, it indicated what might be protected property interests: "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. See also *O'Connor v. Yezukevich and Samuelson*, \_\_\_ F.2d \_\_\_ (1st Cir. 1978) (temporary postal employee has no property interest in employment of constitutional rank).

<sup>96</sup> 408 U.S. 593, 601-03 (1972) (state college did not violate a teacher's fourteenth amendment right to due process when it refused to retain him and did not give him an opportunity to prove an implied contractual right to job security in the light of the policies and practices of his institution). See notes 116 and 121 *infra*.

fear of unknown ills have always weighed against any prospective advantages of a job change. Job satisfaction, while extremely significant, usually yields to the employee's perception of his economic condition.<sup>97</sup> This is an overriding consideration unless the employee's income is already well above a level which he deems appropriate to his needs, desires, and expectations. What is new, and what merits discussion here, is the increasing significance in recent years of pensions, and the benefits accruing from an accumulation of seniority, among the ties that bind an employee to his present job.

Pensions, in the private sector at least, are largely a post-World War II phenomenon. However, by 1973, according to one estimate, over half of the labor force was covered by pension plans, and enrollment was growing at a faster rate than the labor force.<sup>98</sup> Significantly, until vesting occurs in private, nonambulatory pension plans, an employee can accumulate credits to-

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<sup>97</sup> It is difficult to separate a person's attitude toward his job from the monetary rewards he receives for performing it. The employee's *perception* of his economic condition is relative to the employee's age, ambition, and the personal satisfactions he derives from activities unrelated to his work. See Best, *Preferences in Worklife Scheduling and Work-Leisure Tradeoffs*, MONTHLY LAB. REV. 31 (June 1978); Wool, *Future Labor Supply for Lower Level Occupations*, MONTHLY LAB. REV. 22 (March 1976); Kassalow, *White Collar Unions and the Work Humanization Movement*, MONTHLY LAB. REV. 9 (May 1977). See also White, *The Criteria for Job Satisfaction: Is Interesting Work Most Important*, MONTHLY LAB. REV. 30 (May 1977).

The latter article demonstrates the caution with which one must view responses to surveys. In 1972, a representative sampling of 1553 American "workers" at all occupational levels purported to show that "interesting work" was regarded as the most important of 25 aspects of work, with "good pay" ranked fifth and "job security" ranked seventh. SPECIAL TASK FORCE TO SECRETARY OF H.E.W., *WORK IN AMERICA* (1972) [hereinafter cited as *WORK IN AMERICA*]. But, as Professor White showed, the *Work in America* report neglected to classify the responses by occupational category. When that was done, the rankings were startlingly different. Blue collar workers, for example, dropped "interesting work" to fifth and sixth (depending on the category of blue collar employee) and ranked pay, fringe benefits, and job security first, second, and third, respectively. Among white collar workers, pay ranked second, and the "opportunity to develop special ability," which may mean no more than "chance to be promoted," ranked first.

<sup>98</sup> P. DRUCKER, *THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA* 15 (1976) [hereinafter cited as *DRUCKER*]. In 1970, about 30 million employees were covered by private retirement plans, compared to 4 million in 1940 and 9.8 million in 1950. S. REP. NO. 383, 93d Cong., 2d Sess. (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4890, 4899.

Because pension funds control a large amount of equity capital of American business, the growth of pension funds may well have revolutionary effects beyond their role in individual economic security. Drucker estimated in 1976 that pension funds own 25% of the equity capital of the nation's business and that within ten years pension funds holdings will amount to 50% or more. DRUCKER, *supra*, at 1. He points out that the pension funds of the 1000 or so largest companies had about \$115 billion in assets by the end of 1974. *Id.* at 12. The gradual accumulation of wealth and corporate stock voting power by pension funds concentrates a potentially great influence over economic decisions in the hands of a relatively few managers. Furthermore, since pensions are no more than promises (what Drucker called "blips in a computer memory," *id.* at 148), their value depends on the maintenance of a reasonably ordered society which permits employees to enforce the obligations of those institutions to whom the funds are entrusted.

ward vesting only by staying with his present employer.<sup>99</sup> Thus, at some point in the early years of employment, an employee begins to sense that he has made an investment which will be lost if he leaves before vesting occurs. By this time (ten years under ERISA) he may also be reluctant to forfeit the seniority, experience, and the other benefits of extended employment he has gained with his employer. The point at which an employee senses that he has accumulated sufficient pension or seniority credits to warrant staying where he is in order to avoid the forfeiture to be suffered by leaving varies with the particular employee, his family situation, his age, his health, and the perceptions he has of himself and his current job. In short, once it becomes distasteful for an employee to give up an accumulation of service credits toward vesting, he will tend to remain where he is. Just as the employee nearing the year in which his pension will vest is apt to remain with his employer, the vested employee feels the tug of the increase in retirement amount anticipated with each year's employment service.<sup>100</sup> In both cases, each year is a strand which strengthens the cable binding the employee to his particular employer.<sup>101</sup> The anticipated benefits of an increased pension, added to the difficulties older employees experience in securing new employment,<sup>102</sup> are formidable deterrents to a change in jobs.

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<sup>99</sup> Under the Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974), the interest of a participating employee under a private pension plan generally must vest within 10 years, with provisions for a longer vesting period under certain circumstances. Once the employee's pension has "vested," he is assured of a pension even if he or his employer thereafter terminates the employment relationship. Even after the employee's pension has vested, however, the employee cannot draw out his pension fund, use it as collateral or, as a rule, assign his rights in it prior to retirement. Employee Retirement Income Security Act, § 206(d).

<sup>100</sup> An ambulatory or portable pension plan under which an employee could transfer pension credits accrued in his years of service from one employer to another is generally thought to be infeasible except in multi-employer situations where all are subject to the same plan. M. C. Bernstein, *Strengthening Pension Equities Through Employee Contributions and the Clearing House for Credit* (1964), reprinted in SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECON. COMM., 90TH CONG., 1ST SESS., OLD AGE INCOME ASSURANCE 129, 136 (Joint Comm. Print 1968).

<sup>101</sup> This is confirmed by recent occupational mobility studies:

The proportion of workers transferring occupations varies according to what has been called a socioeconomic law: the highest proportion of mobile workers is found in the youngest age group, and the proportion declines steadily with increasing age. . . . [T]his is true for both men and women. The percentage of transfers is highest for the 16- to 19-year-old group and declines steadily to a low for the 60-and-over group, dropping from 57.6 to 11.9 percent for men and from 37.6 to 12.0 percent for women. Young workers are more likely to move from one occupation to another, testing their likes and dislikes in preparing themselves for career commitments. Also, they have fewer of the characteristics that tend to inhibit mobility, such as personal attachment to a career, seniority rights, and investment in experience, training, clientele and capital.

Sommers & Eck, *Occupational Mobility in the American Labor Force*, MONTHLY LAB. REV. 3, 5-6 (Jan. 1977). See Byrne, *Occupational Mobility of Workers*, MONTHLY LAB. REV. 53 (Feb. 1975). See also Walsh, *Occupational Mobility of Health Workers*, MONTHLY LAB. REV. 25 (May 1977).

<sup>102</sup> Despite the legal strictures placed upon employers by federal and local age discrimination statutes, note 41 *supra*, older employees enjoy far less job mobility than

Seniority also significantly deters employees from changing jobs by reason of the monetary and other advantages, such as protection against layoff, priority in recall, promotion opportunities, and vacation entitlements, which accrue from length of service with a particular employer. Seniority systems are particularly associated with collective bargaining agreements. Such agreements typically provide that where two or more applicants for promotion, or two or more employees subject to a contemplated reduction in the work force, have substantially equal abilities to perform the particular duties involved, seniority shall govern.<sup>193</sup> In practice, the prospect of arbitration proceedings constitutes a strong inducement to employers to choose the senior employee in all cases except where the junior employee is demonstrably superior. The net practical result is an absolute seniority system subject to rare exceptions.

Seniority is not limited to the industrial scene or to enterprises whose employees are unionized. Those employers that have successfully resisted unionization often have done so by providing wages and benefits equal to or better than their unionized counterparts. Usually this will include the adoption of a seniority system, in all but name, for appropriate classifications. Thus, in the great preponderance of employer-employee relationships in this nation, even in small enterprises with only a few employees, seniority systems have developed, either *de facto* or *de jure*, which increase the job retention or promotional opportunities of employees on a cumulative basis over time. Seniority has become a vested benefit whose maintenance and value depends on continued employment with a particular employer.<sup>194</sup>

Thus, the new ties that bind an employee to his job—seniority, pension rights, and related benefits—together with traditional constraining factors—fear of the unknown and economic pressure—simultaneously provide an

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younger employees. See Note, *Implied Contract Rights*, *supra* note 4, at 338 n.32. They suffer in the job market both from age stereotypes and from employers' fears that they will raise medical insurance premiums, upset the actuarial structure of pension plans, and be less malleable than young employees to the employer's training objectives. A recent study, based on a substantial number of confidential interviews, indicates that personnel directors, whenever possible, shy away from hiring older applicants. Rosen, *Management Perceptions of Older Employees*, MONTHLY LAB. REV. 33 (May 1978). Professor Rosen concluded that

[T]he overall pattern of results suggested the existence of age stereotypes that depict an older person as less employable than a younger person, particularly for highly demanding and challenging positions. The older person was perceived to be less capable of effective performance with respect to creative, motivational, and productive job demands. The older person was also rated lower on potential for development. These age stereotypes regarding older workers' performance capacity and potential for development could have potentially damaging effects on the career progress of older employees.

*Id.* at 34. See also DRUCKER, *supra* note 98, at 24.

<sup>193</sup> Most collective bargaining agreements reflect a compromise between the employer's desire to retain unfettered discretion to lay off and promote on the basis of qualifications and ability, on the one hand, and the union's demand that length of service become the sole determinant, on the other.

<sup>194</sup> For a discussion of seniority relief in an employment discrimination suit, see *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 343-67 (1977).



employee with security and limit his freedom to change jobs as service with a particular employer accumulates.<sup>105</sup>

### III. INDIVIDUAL SECURITY AND NEW PROPERTY

We have seen that the legal bonds which secure an employee's job to him, and the legally reinforced structures that tie him to his job, have been strengthened. In a broader sense, this is part of the development in which one's employment and/or governmental benefits have become for most people the principal forms of wealth. As Charles Reich put it in his 1964 article, *The New Property*:

[T]oday more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a

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<sup>105</sup> See Sommers & Eck, *supra* note 101, at 3. Sommers and Eck demonstrate, on the basis of the 1970 census, that almost a third of all workers in 1965 transferred to a different occupation by 1970. Sommers and Eck thought the census figures showed a "tremendous volume of occupational movement among workers." *Id.* at 5. Their monograph is extremely valuable, furnishing data of great interest to the "important but relatively unexplained facet of labor market behavior" represented by occupational mobility. As the factors which we have described as inhibiting over the last two decades the transfer of employees from one employer to another take hold, it is likely that the 1980 census will reveal a decrease in employment turnover. Available data indicates that in manufacturing "quits" averaged 2.28 per 100 employees for the period 1967-1971, and 2.06 per 100 employees for the period 1972-1976; "quits" averaged 1.4 and 1.7 for 100 employees for 1975 and 1976, respectively. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1977, at 100 (1977) [hereinafter cited as LABOR STATISTICS]; cf. Rosenfeld, *The Extent of Job Search by Employed Workers*, MONTHLY LAB. REV., 58 (Mar. 1977). Rosenfeld analyzed the reasons employees change jobs:

More employed jobseekers (34 percent) wanted to change jobs to obtain higher earnings than for any other reason, as shown in table 4. This reason was given more frequently by teenagers than by older persons, by blacks than by whites, by blue-collar, service, and farmworkers than by white-collar workers, and by persons earning under \$200 a week than by those earning more.

About 30 percent of the jobseekers were about equally divided among three groups who wanted better hours or working conditions, a job that had better potential for advancement, or work that would make use of their experience and skills. More women than men, and more whites than blacks desired a job with better hours or working conditions. A job with better potential for advancement was wanted by one-fourth of the jobseekers who were working as managers and administrators, a much greater proportion than for any other occupation group. The percentage of jobseekers giving advancement as the reason was higher for persons 20 to 44 years of age than those younger or older, higher for men than for women, and higher for full-time than part-time workers.

*Id.* at 60. Furthermore, the very specialization that is inherent in the division of labor in modern economic organization limits an individual's opportunity to change his occupation even when he changes his employer.

profession or job is secure. For the jobless, their status as governmentally assisted or insured persons may be the main source of subsistence.<sup>106</sup>

Reich's purpose in calling attention to the increasing dependence of individuals on new forms of wealth was to illustrate the precariousness of this dependence unless legal protection, analogous to that traditionally accorded to property rights, is extended to new statuses:

[I]t must be recognized that we are becoming a society based on relationship and status—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.<sup>107</sup>

Fifteen years later, as perception of the importance of "new property" for economic security has widened, its legal protection has been increased. *Sniadach v. Family Finance Corp.*<sup>108</sup> accorded heightened protection to wages. The Employee and Retirement Income Security Act of 1974 (ERISA) was a landmark in the protection of the form of new property represented by pensions.<sup>109</sup> We already have described the legal protection crystallizing around

<sup>106</sup> Reich, *The New Property*, 73 YALE L.J. 733, 738-39 (1964).

<sup>107</sup> *Id.* at 785.

<sup>108</sup> 395 U.S. 337 (1969) (state law permitting pre-judgment wage garnishment with provision for prior adversary hearing denies due process to defendant-employees).

<sup>109</sup> See note 99 *supra*. The Supreme Court's decisions in *Allied Structural Steel v. Spannaus*, 98 S. Ct. 2716 (1978), and in *International Bhd. of Teamsters v. Daniel*, 99 S. Ct. 790 (1979), can be seen as running contrary to the trend of affording legal protection to work-related new property. Lawrence Tribe has characterized the Court's invalidation in *Allied Steel* of a Minnesota statute designed to protect certain workers against loss of pension rights in the event of plant closing or plant termination as a mechanical application of "the Contract Clause in a manner reminiscent of the *Lochner* era." TRIBE, *AMERICAN CONSTITUTIONAL LAW* 43-44 (1979 Supp.). However, as Justice Stewart noted in the majority opinion, only nine months after Minnesota adopted the Act federal legislation addressed to the same social problem, ERISA, preempted the Act. 98 S. Ct. at 2725 n.21. Furthermore, the contrast between the "sudden, totally unanticipated, and substantial retroactive obligation upon the company," *id.* at 2725, imposed by the invalid Minnesota law, and the gradual applicability of ERISA, which afforded employers some opportunity to make plans and adjustments to the changes was clearly important to the Court's analysis. *Id.* at 2725 n.23.

Similarly, in the *Daniel* case, the Court's holding that the noncontributory pension plan involved was not subject to regulation under the Securities Acts, is accompanied by a careful explanation that ERISA now specifically operates on the underlying issue in that case. 99 S. Ct. at 801-02. From what we have said in Part II of this article, however, it should be clear that the authors' perception of the "economic realities" differs from that expressed by Mr. Justice Powell in the *Daniel* case, where *job retention* is concerned and especially where an older employee is involved:

[The employee's] decision to accept and retain covered employment must have only an extremely attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor to obtain a livelihood, not making an investment for the future.

the job itself, both in the public and in the private sector. With respect to government benefits,<sup>110</sup> the Supreme Court, in *Goldberg v. Kelly*,<sup>111</sup> accorded the most important of them the status of "property" for purposes of due process. Justice Brennan, in the majority opinion, held that welfare "benefits are a matter of statutory entitlement for persons qualified to receive them," and that New York could not terminate them without prior notice and hearing.<sup>112</sup> He seemed to agree with Reich<sup>113</sup> that the entitlements of the poor especially needed legal recognition. He emphasized that what was at stake was "the means to obtain essential food, clothing, housing, and medical care"—"the basic demands of subsistence"—and he noted the difficulties an individual can have in dealing with the "welfare bureaucracy" which controls the dispensation of vital necessities.<sup>114</sup> In a footnote Justice Brennan said: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."<sup>115</sup>

Later cases<sup>116</sup> have made clear that the Supreme Court is not prepared to redefine as "property" for due process purposes the whole spectrum of

*Id.* at 797.

In *Hisquierdo v. Hisquierdo*, 99 S. Ct. 802 (1979), a decision which may have important implications for the interpretation of ERISA, the Court reinforced the protection the Railroad Retirement Act offers to the individual employee by holding that the Act's anti-garnishment and assignment provisions preempt state community property law and that retirement benefits under the Act are not divisible on divorce as community property. *Id.* at 809-13.

<sup>110</sup> Reich particularly emphasized the role of government as a major source of wealth:

Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

<sup>111</sup> 397 U.S. 254 (1970).

<sup>112</sup> *Id.* at 262-64.

<sup>113</sup> Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) [hereinafter cited as Reich, *Individual Rights*].

<sup>114</sup> 397 U.S. at 264, 265.

<sup>115</sup> *Id.* at 262 n.8 (citing Reich, *Individual Rights*, *supra* note 113, at 1255).

<sup>116</sup> It is unclear to what extent cases like *Bishop v. Wood*, 426 U.S. 341 (1976), and *Meachum v. Fano*, 427 U.S. 215, *rehearing denied*, 429 U.S. 873 (1976) (suggesting that states can avoid procedural due process requirements by framing their positive laws to prevent any entitlements from coming into being) have eroded the potential of *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), for extending constitutional protection to state employees' claims of enti-

Reich's "entitlements."<sup>117</sup> The Court has, however, reinforced the pervasive legislative and administrative schemes through which government increasingly becomes the insurer of health, employment, and retirement, as well as the provider of a minimum level of subsistence for those in need.<sup>118</sup> Recent Supreme Court cases provide heightened protection to education (which in turn provides access to work-related new property),<sup>119</sup> and also promote the right of an individual to follow his chosen profession.<sup>120</sup> Protection of the individual's interest in a *particular* job, however, is coming primarily not through the Supreme Court, but through the developments traced above in the ties that bind the job to the employee.<sup>121</sup>

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tlement to continued employment based on state law or rules and understandings. See Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). However, the Court's recent decisions involving public employees have not foreclosed the development of a constitutional law of property. In *Arnett v. Kennedy*, 416 U.S. 134, *rehearing denied*, 417 U.S. 977 (1974), six of the nine Justices agreed that federal civil service law gives civil servants a property interest in their jobs that cannot be taken away without some constitutionally required minimum procedure. (In holding that, in *Arnett*, a post-discharge hearing sufficed, the Court did no more than conform the practices for federal civil servants to those uniformly followed in the unionized private sector where grievance procedures follow discharge.) See also *Paige v. Harris*, 584 F.2d 178, 181-83 (7th Cir. 1978), where the court, relying on *Perry v. Sindermann*, *supra*, held that a discharged government attorney had a constitutionally protected property interest in continued employment with the Department of Housing and Urban Development based on rules and understandings implicit in the practices of the agency and expressed in a personnel handbook. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 514-63 (1978) [hereinafter cited as TRIBE].

<sup>117</sup> Reich used the term "entitlements" to refer to "devices to aid security and independence" such as franchises, professional licenses, union membership, employment contracts, pensions, stock options, and welfare benefits. Reich, *Individual Rights*, *supra* note 113, at 1255.

<sup>118</sup> *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976), where the majority opinion assumes "that the interest of an individual in continued receipt of these [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment," *id.* at 332, even though the Court found no denial of due process in that case, *id.* at 349; cases cited in notes 119 & 120 *infra*.

<sup>119</sup> *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 573 (1975), where Justice White wrote for the majority, "on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education" and held that high school students were denied due process when they were suspended from school without a hearing. *Id.* at 581.

<sup>120</sup> Tribe characterizes *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (civil service regulation barring lawful resident aliens from federal civil service employment denies such aliens liberty without due process) as cases evincing "a revitalized concern to prevent at least procedurally unfair exclusions from the occupation or vocation of one's choice." TRIBE, *supra* note 116, at 950.

<sup>121</sup> Tribe and Van Alstyne argue that it would be undesirable for the form of new property represented by a government job to receive the same kind of due process protection that is accorded to public welfare benefits or traditional private property. Van Alstyne asserts that there is "something abrasive and offensive, something anachronistic, in the idea that public sector positions can be appropriately described as the property of the individual status holder. . . ." Van Alstyne, *supra* note 116, at 483. See also TRIBE, *supra* note 116, at 538.

The changing law has been a sensitive indicator of the fact that the most important relationship in the lives of most Americans, so far as economic security is concerned, is their own actual or potential employment relationship, with government and the family serving as back-up systems.<sup>122</sup> This is true even of spouses and children who may be dependent for periods of time on the employment of a family provider. We speak here of economic security not in the sense of the day-to-day pooling of contributions by members of a functioning family, but in the sense of an economic hedge against old age, illness, disability, unemployment, death of a family provider, and family disruption—the ills which all fear and to which all are susceptible. The importance of the employment relationship in assuring the economic security of the family is illustrated by the estimate made in 1977 by the Carnegie Council on Children that fully half of all American families cannot save.<sup>123</sup> To the extent a middle-income family has savings apart from home equity, they are less likely to consist of bank accounts or tangible assets than employment-related pension plans, stock purchase plans, insurance and other benefits.<sup>124</sup>

At present, there is a shift, though not a complete transfer, of responsibility for the aged, the ill or disabled, and surviving dependents, away from the family. This is proceeding in two directions. Initially, maintenance is increasingly linked to employment, particularly through pensions, insurance, and social security; and secondly, it is increasingly becoming the concern of the expanding social welfare state.<sup>125</sup> For most Americans the situation Alva Myrdal described in her report to the Swedish Social Democratic party in 1971 has become a reality: "Income from one's own job and the modern social insurance system are the two foundation stones upon which the security of the individual will rest in the future."<sup>126</sup>

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<sup>122</sup> Development and documentation of this point is presented in M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (scheduled to be published by Butterworth & Co. in 1980).

<sup>123</sup> K. KENISTON & THE CARNEGIE COUNCIL ON CHILDREN, *ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE* 29 (1977).

<sup>124</sup> Indeed, Peter Drucker has estimated that for a middle-aged member of an American family, pensions are now the largest single asset, exceeding in value the owner-occupied, single-family home and the automobile. DRUCKER, *supra* note 98, at 48; *see also* Dickinson, *Role of Retirement Plans*, 10 *REAL PROP., PROB. & TR. L.J.* 644 (1975).

<sup>125</sup> Drucker believes that for the majority of workers reaching retirement age, social security is becoming a supplementary source of retirement income with pension plans becoming the primary source. DRUCKER, *supra* note 98, at 48. However, a recent study of 989 private pension plans indicates that long-term, middle-income employees are retiring on pensions equal to an average of only one-fifth of their immediate pre-retirement earnings. Schulz, Leavitt and Kelly, *Private Pensions Fall Far Short of Pre-retirement Income Levels*, 102 *MONTHLY LABOR REV.* 28 (February 1979).

<sup>126</sup> Quoted in Sage, *Dissolution of the Family under Swedish Law*, 9 *FAM. L.Q.* 375, 379 n.20 (1975).

### CONCLUSION

Not all persons and groups in society are affected in the same way or to the same degree by the processes identified and discussed in this article. In particular, women and members of certain minority groups have limited access to some forms of work-related new property that presently are important sources of economic security in our society. These problems of access generate tension in the emerging balance of interests described here. Such tension, added to the fact that the developments examined here offer little security against lay off for economic reasons, introduces elements of stress and instability which, in connection with severe inflation or recession, might bring about an entirely different ordering of interests. At present, however, we believe the legal currents described in this article are affecting the majority of persons, primarily those who are neither at the highest nor the lowest economic levels.

In its day, Wood's rule reflected and interacted with the growth of industry just as strict legal limits on divorce at that time "fitted" the prevailing model of marriage as a support institution. The reversals described above show the current law reflecting and interacting with two newer social trends, both well-developed in the late 20th century: the strengthening of work ties (in a period of attenuation of family ties), and the tendency for the individual's social standing and economic security to be grounded in work or employment-related benefits backed up by government, rather than derived from family relationships.