

Marco Biasi  
and Giovanni Tuzet

**From Judge-made Law to  
Scholar-made Law?  
The strange case of  
Employment-at-Will in the US\***

## 1. INTRODUCTION

This paper addresses a puzzling issue for legal theory: the story of a rule that was “invented” by an obscure American scholar and yet was largely accepted by the legal community as the law in matter of termination of the employment relationship.

Horace Wood was the scholar and his rule is known as “Employment-at-Will” (or “Wood’s rule”). According to this rule, an indefinite duration contract is presumed to be “terminable at will” (without notice) by either the employee or the employer. The problem with this rule is that the Common Law tradition had a rather different rule, namely the rule of dismissal with notice.

In the following we basically address three questions about that rule: *how* Employment-at-Will became the law in the US; *why* it so became; *whether* the shift from the Common Law rule to Wood’s rule was legitimate from a legal point of view.

To answer the first question we will retrace the story of the rule’s “invention”, acceptance and use. To answer the second one we will point out that the promotion of some values and liberties (free trade and employment in a market economy) was the ultimate reason for the rule’s acceptance. To answer the third one, which is not an explanatory but a normative question, a theory of legal sources is needed together with a normative account of judicial law-making (which is beyond the reach of the present contribution).

\* Every part of this paper has been discussed among the coauthors, who share the views expressed in it; however, Marco Biasi is responsible of §§ 2-7 and Giovanni Tuzet of §§ 8-9.

The first paper of the paper (§§ 2-7) is more focused on the legal and historical aspects of the topic. The second part (§§ 8-9) is more theoretically inclined and tries to provide a framework that makes Wood's puzzle explicit.

In a nutshell, we provide answers to how and why the American law was changed with respect to the termination of the employment relationship, and we leave to others the answer to the legitimation challenge in the hope that our theoretical framework will help clarify the issue at least.

## 2. THE COMMON LAW RULE OF DISMISSAL WITH NOTICE

Employment-at-Will, i.e. the faculty of both the parties of the employment relationship to terminate immediately (i.e. *at-will*) the employment bond, does not pertain to the Common Law tradition.

In the well-known *Commentaries on the Laws of England* by William Blackstone, the Author reckoned that servants were presumed to be hired on an yearly basis, due to “a principle of natural equity, that the servant shall serve and the master maintain him throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not”.<sup>1</sup> Accordingly, the master was not allowed to “put away” the servant, being the latter equally not allowed to leave the former without a quarter-year “warning” (i.e. one-season notice), unless a “reasonable cause” occurred.

Such British Common Law rules on the duration of the master and servant bond were easily transplanted into the American Colonies, considering how, at least initially, the two systems were based on similar, typically feudal rules in matter of labor organization.<sup>2</sup>

However, the picture changed dramatically at the end of the XIX century, when the two countries had to cope with the upsurge of the II Industrial revolution.<sup>3</sup>

Notwithstanding the shift from a rural to an industrial society, British Courts kept applying the one-year duration presumption and the rule of reasonable notice to terminate the employment relationship, unless one of the two parties committed a “fundamental breach of contract”, thus allowing the other party to withdraw immediately from the contract (“summary termina-

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<sup>1</sup> Blackstone 2015 [1765], 110.

<sup>2</sup> Selznick 1969, 125.

<sup>3</sup> Feerick 1979.

tion”).<sup>4</sup> Whereas such one-year duration presumption progressively lost its importance during the XX century, the right of the Servant (ultimately, the employee) to a reasonable notice in case of termination of the employment contract was for long the core protection in matter of dismissal.<sup>5</sup> Only in the '70s, the British legislator passed a law requiring the scrutiny of the dismissal “fairness”,<sup>6</sup> thus converging towards the policy standard of employment protection set by continental Europe countries and further distancing the US “anomaly” brought about by “Wood’s rule” at the end of the XIX century.

### 3. WOOD’S EMPLOYMENT-AT-WILL DOCTRINE

Until the 2<sup>nd</sup> half of the XIX century, US Courts kept adhering to both the annual hire presumption and termination with notice Common Law rules.<sup>7</sup> Therefore, if the employee had left before expiration of the contractual period, he/she would not have been entitled to the wage for the work carried out, pursuant to the *Entire Contract Doctrine*.<sup>8</sup>

However, as previously mentioned, a fundamental fracture with British Common Law occurred at the end of the XIX century.

The turning point was the publication in 1877 of the *Treatise on the Law of Master and Servant* by Horace Gray Wood, a lawyer from Albany.

In his influential work, Wood stated: “with us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof”<sup>9</sup>. In other terms, an indefinite duration contract was presumed to be *terminable at-will* (without notice) by either the employee or the employer.

The rather assertive statement by Wood became later the target of some heavy criticism by several US scholars, who mainly stressed the fact that the

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<sup>4</sup> Freedland and Kountouris 2011, 244.

<sup>5</sup> Rideout 1976, 151-155.

<sup>6</sup> See Industrial Relations Act 1971, replaced by Employment Rights Act (Era) 1996: Ratti 2014.

<sup>7</sup> *Bleeker v. Johnson*, 51 How Pr. 380, 1876.

<sup>8</sup> Holt 1986.

<sup>9</sup> Wood 1877, 272.

Employment-at-Will rule was unsupported by any judicial precedent and it was thus a pure “invention” of the Lawyer from Albany.<sup>10</sup>

Still, Wood affirmed clearly that “his” rule, although “inflexible”, applied (only) if “from the language of the contract itself it is evident that the intent of the parties was that it should at all events continue for a certain period or until the happening of a certain contingency”.<sup>11</sup> It was merely a presumption, which could be rebutted by either party who could demonstrate that the parties’ intention was to pre-determine the duration of the contract and/or to limit the faculty of either party to terminate it *ante tempus*.<sup>12</sup>

#### 4. THE ACCEPTANCE OF WOOD’S “UPDATED” RULE BY US COURTS

Since the publication of Wood’s Treatise, US state Courts started to adhere to the Employment-at-Will rule, gradually subverting the British Common Law rule of the termination with notice.

However, although the Courts often referred to Wood’s alleged authority (“high repute”),<sup>13</sup> they partially – but significantly – departed from “his” rule. In fact, while denying any relevance to the intention of the parties (if any) to limit their power to terminate the employment contract before a certain moment,<sup>14</sup> they turned the Employment-at-Will presumption “invented” by Wood into an absolute right of either party to terminate the employment relationship without any (notice and, mostly) judicial interference.<sup>15</sup>

Some scholars argued that this revised version of Wood’s rule could benefit the same employee, given that it allowed the latter to claim his/her right to the

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<sup>10</sup> Feinman 1993, 126; Summers 1984, 1083; Shapiro and Tune 1974, 341.

<sup>11</sup> Wood 1877, 265-266.

<sup>12</sup> Freed and Polsby 1990, 553.

<sup>13</sup> McCullough Iron Co. v. Carpenter, 11 A. (Maryland, 1887).

<sup>14</sup> Martin v. New York Life Ins. Co., 42 N.E. (New York, 1895); Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minnesota, 1936); East Line & Red River Railroad Company v. Scott, 10 S.W. 99 (Texas, 1888); Perry v. Wheeler, 81 Cal. 596, 22 P. (Kentucky, 1899). See Pitcher v. United Oil & Gas Syndicate Inc., 139 So 760 (Louisiana, 1932): “An employee is never presumed to engage in services permanently, thereby cutting himself off from all chances of improving his condition; indeed in the land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself”.

<sup>15</sup> Mauk 1985, 202.

remuneration related to the whole period before termination of the contract (by way of resignation),<sup>16</sup> previously denied by the above mentioned Entire Contract Doctrine.<sup>17</sup>

Nevertheless, only a few cases in matter of Employment-at-Will ever regarded resignation of the employee.<sup>18</sup>

Arguably, the consequences of the solemn affirmation of the free termination of the employment contract were much more relevant in the event of dismissal rather than in case of resignation, as demonstrated by the “hail” of claims filed by employees in the following decades.

US Courts had soon the chance to finally unveil the true rationale of the Employment-at-Will-Doctrine. As the Supreme Court of Tennessee held in *Payne v. The Western & Atlantic Railroad co.*, employers may freely “dismiss their employees at-will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of a legal wrong”. The explanation was that “Trade is free, so is employment[;] the law will not interfere, except for contract broken[;] this secures to all civil and industrial liberty”.<sup>19</sup>

Under an accredited interpretation, the general acceptance of the Employment-at-Will rule by US Courts was based more on values and economic goals than on legal principles deriving from the law of contracts. Accordingly, the Courts simply gave response to the social change occurring during the rugged years of the II Industrial Revolution,<sup>20</sup> which required the consolidation of an absolute managerial discretion in the hands of the entrepreneurial class.<sup>21</sup> Not by chance, the same Courts displayed a similar attitude while confronting with early labor legislation<sup>22</sup> and, above all, with the new labor unions phenomenon,<sup>23</sup> preserving managerial prerogatives from any intromission, by either State or private autonomy, always in the name of liberty. Whose liberty, though?

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<sup>16</sup> Liebman 2010, 166; Stone 2007, 86.

<sup>17</sup> Stone 2000, 353; Orren 1991, 8-9.

<sup>18</sup> *Boogher v. Maryland Life Ins. Co.*, 8 Mo. App. 533 (Montana, 1880).

<sup>19</sup> *Payne v. Western & A. Rwy. Co.*, 81 597, 518-519 (Tennessee, 1884).

<sup>20</sup> Atleson 1983, 15-16; Leonard 1988, 641; Ballam 1996; Bales 2008.

<sup>21</sup> Hogler 1986; Blades 1967, 1405.

<sup>22</sup> *Coppage v. Kansas*, 236 U.S. 1 (US Supreme Court, 1915); *Adair v. U.S.*, 208 U.S. 161 (US Supreme Court, 1908).

<sup>23</sup> Forbath 1989, 59; Hermann and Sor 1982.

## 5. BREAK IN THE CONTINUITY: THE SPREAD OF LIFE-TIME EMPLOYMENT IN THE AFTERMATH OF WORLD WAR II

Notwithstanding the persistence of the Employment-at-Will rule, in the aftermath of World War II the general trend of US companies was to pursue a long-term employment policy.

A shared view claimed that a Core Workforce featured by life-time hired employees was more devoted, motivated and thus more productive.<sup>24</sup> In this respect, scholars spoke of a new, “Psychological Contract” based on an “Implied Job Security”<sup>25</sup> of long-term, mutual commitment of both the parties. Companies relied on internal labor markets to fill vacant positions and the career ladders provided employees with strong incentives to ascend in the company ranks.<sup>26</sup>

None of the two parties had an interest in terminating the employment bond without a valid reason and, in any case, the extensive coverage of collective agreements entailing “Just Cause” standards for dismissal prevented employers from easy layoffs.<sup>27</sup>

Therefore, any employee who showed an adequate commitment and a diligent attitude could reasonably expect a long-term duration of his/her relationship with the employer,<sup>28</sup> and this condition paved the way of a whole generation towards the *American Dream*.<sup>29</sup> Apparently, Employment-at-Will did not hamper the stability of jobs in the times of economic growth,<sup>30</sup> but, once again, the profound modifications due to III Industrial Revolution were destined to alter the whole landscape, severely affecting the above illustrated Life-Term Employment perspective and ultimately challenging the Employment-at-Will itself.

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<sup>24</sup> Stone 2000, 48.

<sup>25</sup> Stone 1993, 363; Limani 2007, 309-310.

<sup>26</sup> Jacoby 1983, 261.

<sup>27</sup> Phelps 1959.

<sup>28</sup> Rosen 1985, 1144.

<sup>29</sup> Crain 2012.

<sup>30</sup> Schanzenbach 2003.

## 6. THE DEVELOPMENT OF THE COMMON LAW EXCEPTIONS TO THE EMPLOYMENT-AT-WILL IN THE '70S

In the '70s, the fundamental shift in the economy and production “from widgets to digits” took place and it severely impacted, along with the enhancing globalization, the US labor market.<sup>31</sup> The latter became extremely competitive and firms generally decided to replace their long-term hiring policy based on an implied-job security with a short-term oriented approach focused on flexibility.<sup>32</sup>

In the same period, collective bargaining started its ongoing regressive trend, thus depriving the majority of employees of their “safety valve”, i.e. the “just cause” provision, keystone of the collective agreements.<sup>33</sup>

In the event of mass layoffs, while, on the one hand, several Scholars endorsed a substantial reform of the Employment-at-Will regime, on the other hand, Common Law began to autonomously limit the excessive harshness of Wood's rule.

In the wake of the Supreme Court of California *dictum* in *Petermann v. International Brotherhood of Teamsters*,<sup>34</sup> the Courts of a few States allowed employees to claim against *retaliatory*,<sup>35</sup> *malicious*,<sup>36</sup> or *Public Policy* violating dismissals,<sup>37</sup> granting them different remedies (either in contract or in tort).<sup>38</sup>

Additionally, they (seldom) gave relevance to the *Implied Covenant of Good Faith and Fair Dealing*<sup>39</sup> and to the “promises of stability”<sup>40</sup> which could be

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<sup>31</sup> Stone 2004.

<sup>32</sup> Stone 2006, 78-83. On the rise of the “Contingent workforce” in the US, see Biasi 2016.

<sup>33</sup> Biasi 2015.

<sup>34</sup> *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184 (California, 1974).

<sup>35</sup> *Smith v. Atlas Off-Shore Boat Service, Inc.* 552 F. Supp. 128 (S.D. Miss., 1982).

<sup>36</sup> *Monge v. Beebe Rubber Co.*, 316 A.2d (New Hampshire, 1974); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8<sup>th</sup> Circuit, 1984).

<sup>37</sup> *Nees v. Hocks*, 536 P.2d 512 (Oregon, 1975); *O'Sullivan v. Mallon*, 160 N.J., A.2d (New Jersey, 1978), *Frampton v. Central Ind. Gas Co.*, 260 Ind., 297 N.E.2d (Indiana, 1973); *Kelsay v. Motorola Co.*, 74 Ill. 2d 172 (3<sup>rd</sup> Circuit, 1978).

<sup>38</sup> *Agis v. Howard Johnson Co.*, 355 N.E. 2nd 315 (Massachusetts, 1976); *Kaminski v. United Parcel Serv.*, 120 A.D.2d (New York, 1986).

<sup>39</sup> *Fortune v. National Cash Register Co.*, 364 N.E. 2d 1251 (Massachusetts, 1977). See Dana 2004.

<sup>40</sup> Arnow-Richman 2011, 31.

extrapolated from the *Employer Handbooks*,<sup>41</sup> or even from the verbal promises of the employer during the hiring process.<sup>42</sup>

Not by chance, the unpredictable spread of the Common Law exceptions to the Employment-at-Will led the State of Montana to pass a statute on dismissal based on the “just cause” standard. Remarkably, employers firmly supported this piece of legislation, because it capped the amount of damages due to the unfairly dismissed employee, unlike in the event of application of the Common Law Exceptions.<sup>43</sup>

## 7. THE SHORT-REACH OF COMMON LAW EXCEPTIONS AND THE RESILIENCE OF THE EMPLOYMENT-AT-WILL IN THE US

Notwithstanding the Common Law remedies, it is generally accepted (and broadly known) that the US rule with respect to dismissal is still Employment-at-Will,<sup>44</sup> with the only exception of the State of Montana.

Employers now pay a lot of attention in order to avoid explicit<sup>45</sup> or implicit<sup>46</sup> promises of job security and, above all, Common Law remedies are short-reaching:<sup>47</sup> accordingly, the persistence of Employment-at-Will in the US legal framework is often reaffirmed by US Courts nowadays.<sup>48</sup>

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<sup>41</sup> *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Washington, 1984); *Cleary v. American Airlines*, 168 Cal.Rptr. (California, 1980). See Berks 2000; Decker 1985.

<sup>42</sup> *Fries v. United Mine Workers*, 30 Ill. App. 3d (3rd Circuit, 1975); *Toussaint v. Blue Cross & Blue Shield*, 409 Mich., M.W. 2d (Michigan, 1980); *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d (California, 1972).

<sup>43</sup> See 1987 Montana Wrongful Discharge From Employment Act (Mwdfe): Schramm 1990; Tompkins 1998.

<sup>44</sup> Harrison 2013; Bernt 2008.

<sup>45</sup> Fineman 2008.

<sup>46</sup> Hillman 2000.

<sup>47</sup> Cf. Muhl 2001; Miller 2001, 178; *Scrogan v. Krafco Corp.*, 551 S.W. (Kentucky, 1977); *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d (Indiana, 1984); *Geary v. U.S. Steel Corp.*, 319 A. 2d (Pennsylvania, 1974); *Patton v. J.C. Penney Co.*, 719 P.2d 854 (Oregon, 1986); *Frankel v. Warwick Hotel*, 881 F. Supp. 183 (Pennsylvania, 1995).

<sup>48</sup> *Kentucky Technical Education Personnel Board v. Solly*, 253 S.W. 3d 537 (Kentucky, 2008); *Bammert v. Don'S Super Valu, Inc.*, 254 Wis. 2d 347 (Wisconsin, 2002); *Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 837 A.2d 759 (Connecticut, 2004); *Mallard v. Boring*, 182 2d 390 (California, 1960).



Yet, US Scholars kept wondering about the opportunity of a federal statute on dismissal.

Promoters highlight the basic equality and fairness needs,<sup>49</sup> or eventually the interest of the same employers to avoid the uncertainties of the Common Law remedies.<sup>50</sup>

Opponents firmly defend Employment-at-Will as the only system that might be consistent with a free-market economy.<sup>51</sup>

Like in a tug of war between equal forces, the outcome is a standstill, clearly shown – or driven? – by the lack of any reference to the disputed item on the agenda of the last US administrations.<sup>52</sup> This marks a major difference with the European context, where policy makers have repeatedly intervened in the dismissal discipline, either enhancing or reducing the employment protection legislation, but always with the aim of striking a fair balance between social rights and market freedoms or, more generally, between labor and capital. On the contrary, the *laissez-faire* approach of US policy makers (especially the democratic administrations) shows how the idea of individual liberty, which was animating the times when Wood's rule was “invented” and extended, is still grounded in the spirit of the “land of opportunities” par excellence.

## 8. A PUZZLE FOR LEGAL THEORY

If we now look at the story told above in the perspective of legal theory, we find that it certainly has some puzzling features. These explain our title (*From Judge-made Law to Scholar-made Law*) and our subtitle (*The strange case of Employment-at-Will in the US*).

The case of Employment-at-Will is strange because Wood's rule was “invented” but largely accepted by the legal community. And because Wood had no real authority. He was no official in charge of interpreting and applying the law. He was no reputed scholar either. Thus, given that a scholar is not supposed to “invent” his/her findings and given that scholars – *a fortiori* obscure ones – are not sources of law, the case is strange indeed.

Apparently in that historical context the law was changed neither by the legislature nor by the judiciary. It was changed by Wood himself and by the ac-

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<sup>49</sup> St. Antoine 1988; Summers 1976, 481; Bellace 1983, 232.

<sup>50</sup> Gould IV 1986, 908.

<sup>51</sup> Epstein 1984; Power 1983.

<sup>52</sup> The last attempt to pass a federal statute in matter of dismissal protection dates back to 1991 Model Employment Termination Act, which was aimed at introducing the “Good Cause” requisite. See St. Antoine 1994.

ceptance of his rule. Now, the idea of *Judge-made Law* is not easy to square with the standard Continental Doctrine of the Separation of Powers; however, it can be accommodated within a larger theory of the Sources of Law, encompassing Common Law rules and other forms of judicial law-making. But the idea of *Scholar-made Law* is really hard to digest in both Common Law and Continental Law systems.<sup>53</sup>

In the perspective of legal theory, the puzzle can be made explicit if we use a simple but powerful model inspired by John Searle's theory of social reality.<sup>54</sup>

For our purposes, suffice it to say that, according to Searle, social reality is made of facts that are not natural (not physical in particular) but are real in that they constitutively depend on our social attitudes. For instance, that a certain piece of paper counts as a 10 Euro banknote is not a natural fact. It is a social fact. It is such because *we* take that piece of paper as having that value and having the corresponding role of a medium of exchange.<sup>55</sup>

To take another example, that a certain person counts as the President of the Italian Republic is not a natural fact, but a social fact depending on our attitudes, rules and procedures. In Searle's jargon, it is not a "brute" fact but an "institutional fact" grounded in a web of attitudes, rules and procedures conferring deontic powers.<sup>56</sup>

Law is typically a part of our social and institutional reality (and an active part in that it shapes many social processes).<sup>57</sup> Law does not spring from the ground, nor falls from the sky like rain or manna. It is a social product.

Searle uses a formula to capture this. The formula is well-known among philosophers and social ontology scholars. In symbols, it is the following:

X counts as Y in C

where "X" is a physical or natural entity, "Y" is an institutional entity and "C" is the relevant context. For instance, a certain piece of paper (X) counts as a 10 Euro

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<sup>53</sup> See however the "realist" approach supported by Guastini (2014, 411-422, 429-430): legal scholars contribute to the modeling of legal systems.

<sup>54</sup> See Searle 1995, 1999 and 2010. We make abstraction here from the details of his theory and from the changes it underwent.

<sup>55</sup> For a clear presentation and a critical assessment of Searle's framework, see in particular Celano 2010; cf. Roversi 2012, 55-83. See also Ferraris 2009, 161-176 and 2012, 80-82.

<sup>56</sup> The "building blocks" of social reality are the assignment of functions, collective intentionality, and constitutive rules (Searle 1995, Ch. 1).

<sup>57</sup> As Ehrenberg (2016, 11-12) points out, it is an institution that generate further institutions.

banknote (Y) in our institutional EU context (C); a certain person (X) counts as the President of the Italian Republic (Y) in our national constitutional context (C); etc.

Such mechanism can be iterated to construct complex institutional structures, claiming, for instance, that being the president of a certain republic counts as being the commander in chief of its armed forces, which in turn counts as having certain powers, and so on.

Now, let us assume that a certain individual, call him Mario, is the president. He is so according to the rules and procedures of a given system. Then imagine that everyone, or almost everyone, in the relevant context starts thinking that the president is not Mario, but Gigi. Who is the president?

According to the rules and procedures we have been assuming, it is Mario. But according to the attitudes of the people involved, it is Gigi. The situation would be puzzling because, according to the rules of context C, the president is Mario, but according to the attitudes of the people involved, the president is Gigi. What is the relevant social fact?

Similarly, towards the end of the XIX century the rule for dismissal in the US legal system was the traditional termination with notice rule. But then Woods came with his Employment-at-Will rule and the relevant legal community started thinking he was right. In fact he was *not* right. However, his “invention” paradoxically became the rule. Accordingly, a false statement about the system became a legal truth.

Notice that the same happens with our previous imaginary example of Mario and Gigi, where it is false that the latter is the president and, nonetheless, it becomes true when the relevant people start thinking he is such.<sup>58</sup>

## 9. A POSSIBLE WAY-OUT?

There is a possible way-out of the puzzle. The intuition is this: we must distinguish the contexts. Instead of using a generic “C” to refer to an unspecified context, in our case we must distinguish a pre-Wood context and a post-Wood one. Call them “C<sub>1</sub>” and “C<sub>2</sub>”.

Then it is true that in C<sub>1</sub> the relevant rule is termination with notice and it is also true that in C<sub>2</sub> the relevant rule is Employment-at-Will. So the paradox disappears once we distinguish the contexts. Wood’s book and statements were so influential as to change the attitudes of the majority of the scholars and officials involved. His statement was false with respect to C<sub>1</sub> but became true in C<sub>2</sub>.

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<sup>58</sup> For more references and examples see on this issue Tuzet 2007, 185-186.

More precisely, we can reframe what happened along the following lines. The “X counts as Y in C” formula can be used to say two things:

- 1) in  $C_1$  some past utterances (judicial opinions) count as the Common Law rule of termination with notice;
- 2) in  $C_2$  some new statements (Wood’s opinion) count as the Employment-at-Will rule.

This is a theoretical way-out but it does not eliminate the legitimation problem which is remarkably present in our “strange case”. Was the change from  $C_1$  to  $C_2$  legitimate? We tried above to point out the rationale of the rule and of its acceptance in the post-Wood legal community (to protect the liberty of the contracting parties in a market economy) but that is not dispositive of its legal legitimacy. A scholarly statement does not amount to a form of legal enactment. Nor does it amount to an authoritative judicial opinion.

Therefore, according to the criteria of legal legitimacy valid in  $C_1$  Wood’s opinion was false and could not generate any legal rule substituting the traditional one in  $C_2$ .

But notice that Wood’s opinion did not change the system by itself: subsequent judicial opinions, supported by political consensus, adopted Wood’s rule and brought about a change in the system. And it is noteworthy that the restrictive attitude of US Courts towards the early labor legislation was visible well beyond the case of Employment-at-Will. Other paramount examples were the application of the 1890 Sherman Act Antitrust prohibition to employee combinations and industrial action in form of boycott<sup>59</sup> and the solemn affirmation by US Supreme Court that any statute precluding employer’s liberty to discharge a union member would breach the property right of employers.<sup>60</sup> Moreover, NY legislation setting limits to max working time was invalidated by the US Supreme Court, upon the premise that time limits violated the Fourteenth Amendment to the US Constitution, according to which no State shall “deprive any person of life, liberty, or property, without due process of law”: the imposition of limits to working time was taken by the Court as a violation of this “due process” clause

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<sup>59</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908), commonly known as “Danbury Hatters” case, where US Supreme Court equated unions with cartels that might hamper the flow of free commerce.

<sup>60</sup> *Adair v. U.S.*, 208 U.S. 161 (1908), questioning the 1898 Erdman Act provision that conferred upon railway workers the right to join and form unions and banned any dismissal due to union affiliation.

read as embedding a right to “freedom of contract”, namely the “liberty of the individual to contract”.<sup>61</sup>

Therefore, we might sight a social process leading to  $C_2$  in spite of the criteria valid in  $C_1$ . It was a social process leading (many) officials and scholars to accept Wood’s opinion, with a political consensus based on fundamental axiological preferences (conscious or not) in matters of market, trade, labor and liberty.

Thus, to better state the point, we should modify the above account 2) in the following way:

2) in  $C_2$  some new utterances (judicial opinions driven by Wood’s statement and supported by large social and political consensus) count as the new Employment-at-Will rule.

It remains hard to digest that a legal rule is changed that way, even if it is not hard to explain why it so happens. In other words, if we assume a normative perspective we seem to be committed to recognize that the shift from  $C_1$  to  $C_2$  was not legitimate. Yet, remember that, using the framework outlined above, our social reality is *what we take it to be*. Therefore, when in  $C_2$  people think that Employment-at-Will is the rule, that is the rule. No doubt about it.

In this respect, notice the difference with natural or physical reality: there is no use taking a virus as a bacterium, it remains a virus. It won’t help fighting it with antibiotic drugs, they won’t be effective against a virus, even if you believe they will. Social reality is different: it is what we take it to be, because it is constitutively dependent on us.

Of course, the legal story we told is more complex than this. Wood’s rule was made even harsher (in the “updated” version) during the rugged years of the II Industrial Revolution. Later on it was used in a milder version admitting some Common Law exceptions. Therefore, the need of refining the rule and some legal disagreement about it have always accompanied the reception of Wood’s “invention”.

In any event, all of this testifies of the subtleties, intricacies and difficulties in the creation and application of law.

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<sup>61</sup> *Lochner v. New York*, 198 U.S. 45 (1905). But Justice Holmes wrote an important dissenting opinion in this case.

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