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Joseph R. Grodin

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CONTRACT, TORT, AND INDIVIDUAL RESPONSIBILITY: AN ANALYTIC FRAMEWORK

Joseph R. Grodin †

Professor Olson provided us with an amusing and fast moving dialogue. I would like to present an analytic framework focusing upon contract and its relation to tort within the theme of this conference on individual responsibility. To begin, I invite you to accept a series of propositions.

First, governments and private power centers oppress people. That is, employers, labor unions, and insurance companies may oppress. Second, such oppression is a legitimate subject of government concern and action. When private power centers oppress people, it is appropriate for government to intervene through law and address that oppression. Third, contract, while historically the handmaiden of liberty, can also be a tool of oppression. Sir Henry Maine talked about how the progress of the law evolved from status to contract but we know that contract can also be a form of status.¹

I used to represent labor unions. Labor unions have bylaws and, as their lawyer, I argued that a union's bylaws should be viewed as a contract among the members of the union or between the union and each member individually. Thus, when a person became a member of a union, he subscribed to a contract and was bound by it. If the contract authorized expulsion from union membership for any reason or by any process, the member agreed to such a provision and should have been held to it.

The courts, quite properly, rejected that proposition² and ruled that union bylaws are contracts in name only. They are contracts of adhesion. Such contracts exist when a party with superior bargaining strength imposes a contract upon an individual under circum-

† B.A., U.C. Berkeley; J.D., Yale University; Ph.D. Labor Law/Labor Relations, London School of Economics. From 1955 to 1972, Justice Grodin worked with a San Francisco firm specializing in labor law. The author taught at the U.C. Hastings College of Law from 1972 to 1979. In 1979 he became an Associate Justice on the California Court of Appeals, in 1982 a Presiding Justice of the Court of Appeals, and from 1982 to 1987 was an Associate Justice on the California Supreme Court. He returned to academia in 1987, first teaching at U.C. Berkeley and U.C.L.A., then returning to U.C. Hastings where he is still on the faculty.

¹ HENRY S. MAINE, *ANCIENT LAW* 170 (14th ed. 1891).

² See JOSEPH R. GRODIN, *UNION GOVERNMENT AND THE LAW* 54, 64-69 (1960).

stances where no market really exists—they are a form of status imposed in the guise of contract. Both courts and legislatures imposed limitations upon the union-member relationship that were not limited by the terms of any agreement.

In the employment relationship, similar limitations on contract exist. We cannot contract to sell ourselves into slavery. We cannot give up freedom in return for any amount of money such that a court will enforce the bargain. Legislatively imposed wage and hour laws exist. We also have worker's compensation, which overrides the terms of any contrary agreement. Professor Olson talked about the man at the baseball game.³ Do we want to live in a society in which a worker, as a condition of obtaining employment, may be required to relinquish any claim to employer liability through worker's compensation or negligence? Title VII, with its limitations upon contract, promotes nondiscrimination principles.⁴ The Occupational Safety and Health Act tells us that, as a matter of public policy, questions of safety will not be left entirely to the marketplace.⁵ The recent polygraph testing law tells us that a contract cannot determine when an employer may insist upon giving employees a polygraph test or when that employer may rely upon such tests as a basis for dismissal. These are all intrusions upon contract. The aforementioned intrusions are the result of legislative action rather than judicial creations. If what we are talking about is contract versus individual responsibility, however, the source of the incursion is irrelevant.

It is important to recognize that we are not talking about the Madisonian dilemma here. We are not talking about constitutional principles and the autonomy of an unelected judiciary imposing its will upon the democratically elected branches. We are talking about common law. We are talking about a set of legal principles that judges created. Judges may have created those legal principles with attention to standards that permeated the institutions of particular societies. They were created, nevertheless, by human beings and they were not a brooding omnipresence in the sky.

The common law, by definition, is subject to change. A continuing dialogue exists between the courts and the legislature. For example, in the field of labor union regulations, the exceptions to contract principles that courts developed in the adjudicative process came to be adopted by federal and state legislatures. Similarly, in California, the legislature adopted and codified the principles devel-

³ See Walter Olson, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 CORNELL L. REV. 1043 (1992).

⁴ 42 U.S.C. § 2000e-5 (1988).

⁵ 29 U.S.C. § 655 (1988).

oped by courts. When the legislature did not agree with those principles, it changed them. Thus, there is nothing peculiar about judge-made law with respect to the tension between contract and tort.

The question, then, is not whether we will have some abstract and sacrosanct notion of freedom of contract. The question is, under what circumstances is the law justified in limiting the use of contract by one party to impose conditions upon another that society may regard as oppressive. I suppose the answer is that the justification exists under those circumstances in which we think the market does not operate very well, either because we have some theoretical basis for believing that in particular contexts the market does not operate as the economists tell us it ought to operate—as, I suggest, in the employment context or in the insurance context—or because, as a pragmatic matter, we look at the results and we find them to be unacceptable. Look at the issue of safety in the work place. We are not prepared to tell a worker who is subjected to unsafe conditions, “If you do not like it, go get a job elsewhere.”

Finally, I have a comment on the question of remedies. I think it is important to distinguish between the question, “Under what circumstances should the law impose unwaivable contractual conditions?” and the question, “What kinds of remedies should be invoked for what kinds of obligations?” Again, these questions can be posed to legislatures and to courts. A legislature can readily include additional compensatory remedies and perhaps punitive damages for victims of discrimination. Unfortunately, the common law principles relating to remedies have rigidly developed. Thus, courts have available to them either contract principles or tort principles of recovery, both of which are rather rigid. Contract principles often yield inadequate recoveries for certain kinds of injuries (for example, when an insurance company not only fails to pay benefits provided for in the policy but engages in deceptive practices in the hope that policyholders will abandon their claims). Hiring a lawyer in such a case may not be worthwhile if all that can be recovered ultimately is the amount that was originally owed. In such circumstances, the tort remedy is an alternative that courts have available to them. There are problems with tort remedies, however, especially with respect to unlimited punitive damages. Perhaps the ideal solution does not lie either in the realms of contract or tort doctrine but in more creative remedies that the legislature might develop. That is hardly an argument, however, for holding their hands behind their collective backs and doing nothing.