SECOND THOUGHTS ON A *RESTATEMENT OF EMPLOYMENT LAW*

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I. INTRODUCTION

The law of employment in the United States is a hotchpotch of constitutional provisions, legislative dictates, administrative rules, and common law—of tort and contract—that varies widely from state to state. Observers have called for major overhaul regarding such core matters as employee representation, job security and wrongful discharge, and key working conditions such as wages and benefits (especially for contingent workers), work time and "family friendly" policies, and the assurance of respect of employee dignity and privacy, among others.

The United States has no national Law Revision Commission. Service akin to what such a body might do is provided privately, by the American Law Institute (ALI). The ALI is a self-perpetuating body of lawyers, legal academics, judges, and government officials. From its inception the ALI has taken on the task of promulgating *Restatements* of whole bodies of the law that attempt to winnow out doctrinal detritus, to simplify and to modernize. The process involves a Reporter, who takes the laboring oar in drafting, and an advisory body of knowledgeable figures who comment on the Reporter's drafts. The final product must be voted on by the ALI's membership for official adoption. In 2002, the ALI announced a project anticipating the eventual promulgation of a *Restatement of Employment Law*.

A *Restatement* has come to assume a fixed form: it sets down blackletter rules, section by numbered section, each accompanied by an official *Comment* on the rule and often by hypothetical case illustrations to make the blackletter rule and glossing comments concrete. At the end, the Reporter may append notes providing the legal material canvassed in the process. Absent from the lot—the rules, *Comments*, illustrations, and notes—is much (if any) detailed discussion of the reasons for the choices made, of why one road was taken rather than another. The rules are justified by the fact of having been adopted. They are offered on authority.

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Nevertheless, these *Restatements* have proven highly influential before state judiciaries.

After reflecting on the announcement of the ALI's project—and, in advance of even a first effort at a draft to consider—I was skeptical of it.[1] First, the purpose of the *Restatement* was not explained. Was it to clarify the law in terms of accepted doctrine? Or was a broader effort contemplated, one devoted to genuine law reform, including the essaying of novel approaches (perhaps even by reference to experience abroad) in the most pressing areas? If the former, it hardly seemed worth the effort of so distinguished a group: the lawyers litigating cases in ostensibly backward (or wayward) jurisdictions were more than capable of arguing to the jurisdictions' deficiencies or pointing to persuasive authority from sister states (or foreign jurisdictions) without help from the ALI. If the latter, which seemed more needful, I was dubious that a *Restatement*, given the constraint of its form, was suitable. What was needed was not presumably self-evident blackletter pronouncements, but persuasive arguments in support of change and the presentation of analytically powerful alternatives.

My dubiety was compounded by ALI's decision to tackle not "the law" of employment but only "the common law" of employment, of contract and tort, despite the project's more all-encompassing caption of *Employment Law* writ large. Some areas of employment law are inextricably bound up with legislation or must call for legislation in order to effect thoroughgoing change. Consequently, the project's self-denying ordinance seemed odd if genuine reform were in its sights.

My skepticism was heightened even more by the ALI's decision to narrow the project to four areas: (1) *respondeat superior*–employer liability for employee torts; (2) covenants not to compete; (3) employee privacy; and, (4) the status of employer policies dealing with job security. The first might be a useful area for clarification; but it was on no one's list of pressing problems. The second seemed to offer a bit more. Students of intellectual property have drawn attention to this area; also, it has call on a body of economic thought on the relationship of job restriction to the velocity of technological innovation and, as business seeks both to impose restrictions (on departing employees) and to be relieved of them (in making new hires), it would not seem to constitute a monolithic, implacable interest group in the ALI's deliberative processes. The third, employee privacy, presented the converse of the second. It poses a wide, almost unmanageable range of genuinely pressing issues; but, as these require

1. Matthew Finkin, *Law Reform American Style: Thoughts on a* Restatement of the Law of Employment, *in* CHANGING INDUSTRIAL RELATIONS AND MODERNISATION OF LABOUR LAW: LIBER AMICORUM IN HONOUR OF PROFESSOR MARCO BIAGI 139 (Roger Blanpain & Manfred Weiss eds., 2003), *pre-printed in* 18 LAB. LAW. 405 (2003).

statutory treatment, restriction to the law of tort would seem to make the effort mostly pointless. The antecedently established categories of the ALI's *Restatement (Second) of Torts* are often irrelevant in the workplace and the law of tort is just too blunt a regulatory instrument.[2] What information an employer should be permitted to collect about an employee, for example, by what means, for what purposes, kept for how long, given access to whom and with what rights of notice, consent, and correction, can only be addressed or, less strongly, are best addressed legislatively. They cannot be efficiently addressed via the common law categories, *i.e.*, in terms of the employee's "reasonable expectations" of privacy or of "offensive" intrusions upon them.

By far, however, the fourth was the most vexing. Though job security and wrongful discharge are matters that call for attention, the project was to concern only the law of unilaterally issued employer policies. Even then, the product would most likely be a brokered set of rules reflecting momentarily achievable compromises. It promised for that reason to be unprincipled and yet bear the potential of becoming a drag on significant reform—an analgesic, as I saw it, for what needs be done.

On May 17, 2004, the Reporters of the proposed *Restatement* produced portions of their first draft. It is admittedly only that, a crude "first cut" subject to a protracted process of rethinking and revision. The first three portions confirm my initial reaction. *I.e.*, the first is extraneous to the most pressing issues; the second offers some helpful clarification (*e.g.*, between customer relations and employer goodwill as protectable interests); and the third (offering some modest improvement in tort terms) necessarily skirts the critical issues. This leaves what was to have been an engagement with employee handbooks and manuals. But here we find the topic has expanded and does now address the larger question of wrongful discharge which, as noted at the outset, is generally recognized as in need of attention.

When I considered this portion of the draft, I had to have second thoughts. Was my skepticism misplaced? A rash prejudgment? After a close reading of the draft, in many of its particulars and then taken as a whole, my second thoughts echo my first, and loudly.

In what follows, I will proceed through the draft noting its assumptions, distinctions, and consequences. I will then stand back to pose two questions that should be answered before the project continues. However, I hope to close on a more promising note.

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2. The point should emerge with clarity from MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW (2d ed. 2003).

II. THE DRAFT'S BASIC PRINCIPLES

The draft restates the at-will, or, "American rule," as it was called in the last quarter of the nineteenth century. The remainder treats exceptions to it. This treatment is bifurcated into contractual exceptions (sections 3.01-3.06) and tort limits imposed by public policy in general and by legislation in particular (sections 4.01-4.03). Each will be taken in turn.

A. *Contractual Exceptions*

Section 3.01 codifies the at-will rule: absent express agreement, an employee may be discharged or quit "at the will of either party," *i.e.*, at any time. That is all the blackletter rule provides, and rightly. The *Comment* appended to the rule explains that it is a default rule, *i.e.*, absent contract, the law presumes an at will relationship. The rule is then justified on two grounds: ubiquity (only Montana, it says, has a general law governing dismissal of at-will workers) and legitimate expectation – "it best accounts for the joint intentions of the parties." The latter may be correct if the rule is understood as one governing the contractual duration of the relationship alone. However, if the rule is also understood as being something more, as liberating the employer's exercise of the privilege to discharge from any legal scrutiny, the proffered basis, insofar as it speaks to the employee's intent, rather remains to be seen.[3]

The remaining *Comments* anticipate the treatment accorded subsequently to the contractual, statutory, and tort limits that constrain a discharge. The at-will rule acknowledges no constraint, but nowhere in this section is it stated that because the employment relationship endures only moment-to-moment as each party chooses, the employer may exercise its option to discharge for any reason, for no reason, or for a morally repugnant reason (not otherwise legally offensive). That is surely not what employees assume to be part of, to be their intention in, entering upon an employment relationship.[4] Nor, logically, does a non-limit on duration necessarily imply a non-limit on the exercise of the power to terminate. The two have been historically conjoined, but the accident of birth does not support a doctrinal connection. Nor does section 3.01 make the connection.

It is not until we reach section 3.06, on the covenant of good faith and fair dealing, that the at-will rule is recast as a right of either party to

3. Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997). Inasmuch as Professor Kim is a member of the Project's Advisory Committee, it is doubtful that this ground for the rule will be offered in the next draft.

4. *Id.*

terminate "without furnishing notice *or* cause" save to hinder the performance of the other party. Also, not until section 4.01, setting out the existence of a tort of discharge for a reason violative of public policy, is the at-will rule recast again and robustly in terms of the laissez-faire ideology in which the courts framed it in the late nineteenth century: "[i]n general, an employer can discharge an at-will employee for a good reason, a bad reason, or no reason at all." It may be that the draft merely assumed that the reader of section 3.01 would understand that the further condition made plain in section 4.01 was inherent in the blackletter rule. But that is not a necessary corollary of the rule simply as a default rule governing duration, which is all that section 3.01, soundly, provides.

Section 3.02 then lays out an "exhaustive list" of what will make an employment relationship contractually to be other than at-will: (a) a just cause provision in a collective bargaining agreement; (b) an express agreement governing duration (further explained in section 3.03); (c) a unilateral employer statement establishing its obligations in the matter of discharge (further explained in section 3.05); and, (d) the covenant of good faith and fair dealing (set out in section 3.06). This blackletter list is "exhaustive"; *i.e.*, preclusive of any other way in which a limit on the at-will rule can be found because, the *Comment* explains, the draft "rejects vague, contractually ungrounded doctrines such as the 'implied in fact' contract theory." In other words, the draft opts for a muscular legal positivism: what you get is what you see—the implication of any other contractual term importing some protection for job security being doctrinally "ungrounded."

Before proceeding further we should note that the positivist premise is more than questionable; indeed, as we will see, the draft is quite willing at some points to imply terms in fact. But at this point let us go to the horse's mouth. H.G. Wood's *A Treatise on the Law of Master and Servant* asserted categorically that "[w]ith us," meaning the United States (in contrast to Great Britain) "the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will"[5] and that the burden rests on the employee, the "servant," to make it out otherwise. By what means could that be done?

> [I]n order to show what the real understanding and intention of the parties was, all the facts and circumstances surrounding the parties and the transaction, may be shown, as that the plaintiff was, to the knowledge of the defendant, seeking a *permanent* situation, and any facts and circumstances that tend to establish

5. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 283 (2d ed. 1886).

> the *mutual* understanding of the parties.[6]

Or, as the Supreme Court of Ohio put it a century later:

> the "facts and circumstances" surrounding an at-will agreement should be considered to ascertain if they indicate what took place, the parties' intent, and the existence of *implied or express* contractual provisions which may alter the terms for discharge. . . . "[T]he character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question" can be considered by the jury in order to determine the parties' intent. Employee handbooks, company policy, and oral representations have been recognized in some situations as comprising components of evidence of the employment contract.[7]

Contrary to the draft, the doctrinal grounding of an "implied in fact" agreement was, and is, well established: there is nothing unusual, vague, or doctrinally ungrounded in seeking the terms of the relationship in this way.[8] (Nor did the seeming inflexibility of Wood's formulation pass unquestioned, even in the halcyon days of *laissez-faire*.[9]) There is, to take one example, a respectable body of decisional law implying a promise of employment for a "reasonable period" from the circumstances of the transaction;[10] in fact, this body of law is embraced by the ALI's *Restatement (Second) of Agency*.[11] But the draft would seem to rule that

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6. *Id.* n.5 at 283–84 (emphasis in original).

7. Mers v. Dispatch Printing Co., 483 N.E.2d 150, 154 (Ohio 1985) (emphasis added) (quoting Bascom v. Shillito, 37 Ohio St. 431, 434 (1882)).

8. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.10 at 251 (3d ed. 2004) ("Sometimes a contract that results from words is described as 'express,' while one that results from conduct is described as 'implied in fact,' but the distinction as such has no legal consequences.").

9. C. B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 160 at 519 (2d ed. 1913):

> [The at-will presumption] is so great that it is now scarcely open to criticism. But a commentator may perhaps be permitted to point out that, in many instances . . . it cannot be applied without entailing results different to those which may reasonably be supposed to have been within the contemplation of the parties.

Id.

10. *See, e.g.*, Harsco Corp. v. Zlotnicki, 779 F.2d 906, 910–11 (3d Cir. 1985) relying *inter alia* on S. WILLISTON & W. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1017A, 151 (3d ed. 1967).

11. AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF AGENCY § 442, Comment a (1958).

reasoning (and those cases) out of bounds. The preclusion of implied conditions governing duration coupled with an exhaustive taxonomy of only three possible durational commitments—fixed, at-will, and indefinite—combine to exclude the very idea of an implied agreement of employment for a "reasonable" period.[12]

As noted above, however, the draft is inconsistent in dealing with implied in fact conditions.[13] Section 3.05 would allow "the employer's course of conduct" to be taken into account in deciding when a commitment to job security (or other term of employment) contained in an employee handbook has "vested" so to preclude an employer from abrogating it. This is an implied-in-fact limit. If it is doctrinally sound to imply vesting from the employer's course of conduct, to preclude the abrogation of a commitment to fair dismissal, it would seem equally sound to look to the same circumstance to imply the establishment of such a commitment to begin with.

Further, section 3.03 deals with express agreements either of fixed duration or of indefinite term, *i.e.*, until a condition subsequent such as employee misconduct, neglect, or other circumstance gives the employer "cause" to discharge. The draft rejects the idea that an indefinite term is necessarily terminable at will, and it also observes that mutuality (actually meaning an exacting equality) of obligation is not required for there to be enforceability. Both propositions draw upon long-standing doctrine.[14] But because the draft requires an "express" agreement of indefinite service, in writing or orally, it would disallow such an agreement to be implied in fact, contrary to equally well-established doctrine. Given the *Restatement* format, the draft does not explain why an express oral promise of indefinite

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12. So, too, does this taxonomy preclude "satisfaction" contracts whereby the employee is to serve not at-will but for so long as the employer is satisfied with the employee's performance. In these cases, the employer's assertion of the ground of discharge must be in good faith. *See generally*, Annot., 6 A.L.R. 1497 (1920). *Compare* Golden v. Worldvision Enters., 519 N.Y.S.2d 1 (App. Div. 1987) (holding that the employer's evidence of the employee's missteps was sufficient to support a claim of bona fide dissatisfaction) *with* McKnight v. Simpson's Beauty Supply, Inc., 358 S.E.2d 107 (N.C. Ct. App. 1987) (holding that the *bona fides* of dissatisfaction are fact questions for the jury).

13. Section 3.03, dealing with express agreements, posits an offer of a "secure career" paying an annual salary (and stock options based on performance targets) and entailing a geographical move. The draft here holds that, upon acceptance, a contract of "indefinite career-based duration" will have been made and, should there be any ambiguity about it, the trier of fact may have recourse to bargaining history. *I.e.*, it would allow the trier of fact to imply a term not unequivocally expressed in the offer, but, apparently, it would not allow the trier of fact to imply employment for only a "reasonable" period from it.

14. *See, e.g.*, Carnig v. Carr, 46 N.E. 117, 118 (Mass. 1897) ("[S]o long as the defendant was engaged in enameling, and had work which the plaintiff could do, and desired to do, and so long as the plaintiff was able to do his work satisfactorily, the defendant would employ him, and that in that sense the employment would be permanent .... So construed ... there would be no want of mutuality").

employment would support an enforceable claim to job security, when suitably phrased, but resort to business usage, custom, the nature of the employment, and the situation of the parties—absent certain talismanic words—would not.

The draft goes on to stake out a categorical position on what "cause" is in the two cases of express contract—of fixed and indefinite duration respectively—and of the standard and burden of proof in each. On the former, the draft would not allow changed economic or business circumstances to permit a termination. That is a risk the employer presumably assumes by contracting for a fixed period. However, in the latter, it would allow economic circumstances to govern discharge. This distinction is also in keeping with established doctrine. Indeed, it is well accepted in the case of the archetypical express agreement for indefinite employment, the industrial collective bargaining agreement limiting discharge to just cause, that business decisions resulting in layoffs are exempt from the application of what is a rule of industrial discipline.

However, the draft takes the further position that the "for cause" requirement in agreements of indefinite duration allows for "termination based on the employer's reasonable belief in good faith that the employee engaged in such conduct," not on a determination by the finder of fact that the employee actually engaged in such conduct. This, the draft asserts, rests upon "the likely intentions of the parties."

There is no more evidence that the latter is so regarding employee intentions here than that the at-will rule allowing discharge for morally repugnant reasons represents employee intentions there.[15] The "objective good faith" standard of "cause" has been fashioned as a rule governing job security clauses in employer handbooks and policy compendia to accommodate the employer's business interest. As the Supreme Court of Oregon put it: "the meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether the facts constituting cause for termination exist."[16] This rule, in derogation of the maxim favoring contractual interpretation *against* the interest of the drafting party—a maxim endorsed by the ALI[17] but which makes no appearance in this draft—bolsters management's prerogative, lest, in the words of the California Supreme Court, "the workplace be transformed into an adjudicatory arena [where] effective decisionmaking will be thwarted."[18]

15. *See supra* note 2.

16. Simpson v. W. Graphics Corp., 643 P.2d 1276, 1279 (Or. 1982).

17. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

18. This from what has become the leading case for this position, Cotran v. Rollins Hutig Hall Int'l., Inc., 948 P.2d 412, 421 (Cal. 1998). The holding in *Cotran* has been followed in several jurisdictions; *see, e.g.*, Thompson v. Associated Potato Growers, 610

The disposition of this question may turn out to be of little practical importance insofar as all employers need do is couple an "objective good faith" standard to their handbook rules assuring just cause for discharge and plead thereafter to the employee's having consented to the rule, expecting the courts will not find the employer's reservation of power unconscionable. Nevertheless, the rule's purport should not pass without notice. As Justices Lent and Linde pointed out, dissenting in the Oregon decision, an employee discharged for persistent absenteeism under an employer's attendance rules (but guaranteed just cause for discharge under them) would not be permitted to prove that her time records, on which the employer relied in perfect good faith, were wrong.[19] To allow that would thwart "effective management decisionmaking," say these courts. But in the case of the archetypical provision for indefinite employment, the collective bargaining agreement, the burden of proof rests on the employer to prove not that it had good reason to believe the employee was a malingerer (unless the union had agreed expressly to cede such power), but that she was in fact malingering. If the administration of thousands of collective agreements under this standard has not created an adjudicatory arena "where effective managerial decisionmaking is thwarted," why would it when applied to job security policies that attempt to further much the same end as collective agreements (and are often issued in order to avoid unionization)?[20] To be sure, the "objective good faith" standard does embody the view of the half-dozen or so courts most recently to have

N.W.2d 53, 57–59 (N.D. 2000) (holding that the trial court, in evaluating the employer's decision to terminate Thompson, failed to apply the objective good faith standard promulgated in *Cotran*); Life Hall Care Ctrs of Am., Inc. v. Dexter, 65 P.3d 385, 392–93 (Wyo. 2003) (adopting a slightly modified *Coltran* standard of review). *See also* Baril v. Aiken Reg'l Med. Ctrs, 573 S.E.2d 830, 837–38 (S.C. Ct. App. 2002) (holding that the factfinder must focus on whether the employer reasonably believed in good faith that termination was necessary). A federal district court in Arizona, observing that the issue had not been addressed in that jurisdiction, also followed *Cotran*. Almada v. Allstate Ins. Co., 153 F. Supp. 2d 1108, 1114 (D. Ariz. 2000). However, contrary to that court, the case was not quite one of first impression. Where the Musical Director of the Tucson Boys Choir had a written contract of indefinite duration allowing for termination for "neglect of duty or inappropriate behavior," the Arizona Court of Appeals rejected a "good faith" test: whether the employer "had cause is a question of fact." Davis v. Tucson Arizona Boys Choir Soc'y, 669 P.2d 1005, 1010 (Ariz. App. 1983).

19. *Simpson*, 643 P.2d at 1279–80 (Lent and Linde, J.J., dissenting).

20. In the unionized workplace, the union commonly attempts to winnow out (or settle) the weak or unpromising discharge cases; and employers know beforehand that they may have to justify their discharge decisions on the merits to a neutral arbitrator. If fairness *and* efficiency were dual policy objectives, and if these are bolstered by the role of the employees' representative, one would expect a reform of the law of discharge would consider making provision for such a role. But because of the ALI project's self-denying ordinance, employee representation, not being a matter of common law right, must pass without consideration.

considered the question. However, one does not need the ALI if the purpose of the project is merely to capture the prevailing judicial sentiment, based on small sample size on an issue as yet unfolding and whose policy basis (or bias) passes without mention.

The draft then moves on to treat unilateral employee statements establishing employer obligations. These may provide for job security or otherwise limit the employer's right to terminate. When these documents "reasonably establish" such obligations, they are binding, we are told, until modified or revoked. The draft emphasizes that this principle is not the result of traditional contract law; indeed, the draft opines that these principles "might not easily apply." "Traditional principles of consideration and bargained-for exchange would also seem difficult to invoke in this context because it is unlikely that employers make particular promises in these unilateral statements in response to expressed employee concerns, let alone threatened employee resignations."[21] The better analogy, it argues, is to administrative rules that, once adopted, bind an agency by "administrative estoppel," but which the agency is free thereafter to abrogate, though the ability to abrogate does not extend to "vested" rights.

To the extent the implied-in-fact contract theory requires actual knowledge of, and so reliance on, an employer's policy on job security, the draft is quite correct that extending the theory to the employee who had no actual knowledge of the policy would be a stretch of, perhaps even a "radical departure" from, traditional contract doctrine.[22] A radical departure, but not necessarily a total break, for employer policies and practices have been held to create implied in fact contractual obligations where the openness of the policy or frequency of the practice has been such that knowledge and reliance can reasonably be presumed, as, for example, with respect to the payment of bonuses.[23]

The draft rejects what the majority of courts have done via the extension of implied-in-fact contract theory as doctrinally ungrounded. However, it creates instead a new rule out of an analogy to federal administrative law even though the result it produces would seem to be identical to that produced by the approach it rejects. The purpose of the exercise thus seems a bit perplexing until one reads the draft's further pronouncement that:

21. RESTATEMENT OF EMPLOYMENT LAW § 3.04 (Preliminary Draft No. 2, May 17, 2004).

22. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.14a at 292 (3d ed. 2004).

23. Herbert B. Chermside, Jr., Annotation, *Master and Servant: Regular Payment of Bonus to Employee, Without Express Contract to do so, as Raising Implication of Contract for Bonus*, 66 A.L.R. 3d 1075 (1975).

> Even when the employer does not expressly retain the ability to modify or revoke such policies, the employer is presumed to have retained this ability. In the context of promises contained in unilateral employer statements altering the at-will nature of the employment relationship, the general rule is that terminations that occur while the policy is in place are governed by that policy, and terminations that occur after the policy has been modified or revoked are governed by the new policy.

I.e., the draft assumes that as an employer would be permitted expressly to retain the privilege of abrogating its commitment to job security, there would be no point other than mere formalism to require the words reserving that power expressly to have been uttered: the condition of abrogability is to be implied. And to imply abrogability, by an extension of an administrative law analogy, the idea of job security as an implied contractual commitment must be rejected as "doctrinally ungrounded."

The draft does acknowledge that some employer policies may "vest," precluding unilateral abrogation: welfare benefits might well be understood to have been provided "on an irrevocable non-modifiable basis." The "controlling factors" to decide that question are, the draft tells us, "the language used in the unilateral employer statement, other employer policies and the employer's course of conduct." These may be resorted to in establishing an *implied* irrevocability; and even here, there well may be more to consider than the sources the draft supplies to guide that decision, *e.g.*, the very purpose of the benefit and the expectancy of employee reliance on it. Bonuses, severance pay, and like benefits are afforded because they tend "to better employee morale, improve performance and lessen turnover, all the distinct advantage of the employer."[24] The draft makes the same point: employers may make assurances of job security to "advance productivity, employee welfare, or some other organizational objective." Inasmuch as an employer is not presumed to have the power retroactively to abrogate a benefit instituted to bolster morale, increase productivity, and encourage long service, why should the law presume a power to abrogate a commitment to job security promulgated toward the

24. Anthony v. Jersey Cent. Power & Light Co., 143 A.2d 762, 765 (N.J. Super. Ct. App. Div. 1958). The court went on:

> The employer was not gearing its plan to tangible, measurable bettered performance by employees as individuals but to the amelioration of the conditions mentioned for the employer's benefit on a mass or plant basis. It is to be presumed that the employer's objectives were realized and that the services of all the employees, collectively, contributed thereto.

Id.

very same end? The draft explains that it applies a concept of "administrative estoppel" to bind employers to the rules they have promulgated, until they abandon them; but it eschews any mention of the doctrine of "promissory estoppel" in considering the ability to exercise that power.

The draft tells us that its approach obviates the prospect of two groups of otherwise fungible employees hired at different times from laboring under different conditions of job security. Also, even more important, it obviates the prospect of forcing employees "to quit their jobs so that they can apply as new hires under the changed terms," which would be the consequence of requiring a bargained-for exchange in order to place the old employees under the new, non-commitment.

The first ground will be treated momentarily, but the second is perplexing insofar as it assumes that employees would give up secure jobs and seek to be rehired for the same but now insecure jobs. Why would they do that? The draft explains using an illustrative case: an employee, Z, hired under the prior policy but who continues to work under the superseding policy is governed by the new insecurity.[25] "There is no requirement that . . . [the employer] threaten Z with discharge in order to wrest from Z a formal bilateral agreement" to the amended term. Now we understand. The *reductio* the draft actually avoids is not that of employees quitting to accept lesser terms, but of employers threatening to fire them if they don't. It should be patent that an employer does not have the power to threaten an action that he or she contractually could not do. As the employees could not be dismissed except for cause under the old policy, they could not be dismissed for refusing to give up that protection. Nor could the employer threaten to reduce pay or worsen working conditions to exact such a concession for such would surely trigger the concession's unenforceability under either the doctrine of duress or of unconscionability—two legal theories that, like promissory estoppel, fail to make an appearance in this draft.

Consequently, the only persuasive reason for the draft's approach is that it would conduce toward uniformity of treatment. But if an employer may abrogate vested benefits only prospectively, non-uniformity of treatment would necessarily exist regarding two otherwise fungible coworkers—one hired under the old benefit, one hired under the new one —yet the draft does not blink at that fact. And even where employer policy can be made uniform there may well be variation: companies have negotiated with unions to provide for two-tier wage structures that

25. "[A]bsent facts supporting the creation of a vested employee right to 'job security' running in her favor." The idea that job security can vest contrary to the presumption of revocability is nowhere expressed save by resort to the implied in fact circumstances that the draft would allow to govern all "vesting" allegations.

differentiate new hires from incumbents doing the same work. In the face of all this, the draft never explains why uniformity on job security is so very needful that it should drive a "general rule" implying a presumption of retroactive abrogability.

Chapter 3 of the draft concludes with the content of the contractual covenant of good faith and fair dealing. The ALI's *Restatement (Second) of Contracts* states that all contracts contain such an implied obligation, but no question has produced quite so much confusion in the modern context of at-will employment as whether the covenant is to be applied in this setting and, if so, of what it means. Inasmuch as the covenant questions the prerogative of the employee to discharge for just *any* reason, most jurisdictions have simply abjured the existence of such a covenant in the at-will relationship; in these jurisdictions an employer can discharge an employee to "cheat" him out of earning a bonus,[26] or to avoid the exercise of a stock option.[27] Some jurisdictions have acknowledged the covenant, but cabin it variously.

The courts that have accepted the existence of a covenant agree that it cannot limit the prerogative of the employer to discharge an at-will employee at will, as a general proposition. The question becomes one of scope. Delaware limits the covenant to four categories, but it would include a notion of duplicity as one of them.[28] Alaska also speaks categorically but more broadly, distinguishing "good faith" (a subjective component) from "fair dealing" (an objective component):

> The employer commits a subjective breach "when it discharges an employee for the purpose of depriving him or her of one of the benefits of the contract." The objective aspect of the covenant requires that the employer act in a manner that a reasonable person would regard as fair.[29]

This would require employers to apply their policies evenhandedly to those

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26. Edelman v. Franklin Iron & Metal Corp., 622 N.E.2d 411 (Ohio Ct. App. 1993).

27. Gallagher v. Lambert, 549 N.E.2d 136 (N.Y. 1989).

28. Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 203 (D. Del. 2004):

> (1) where the termination violated public policy; (2) where the employer misrepresented an important fact and the employee relied on that fact to either accept a new position or remain in a present one; (3) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation earned through the employee's past service; and (4) where the employer falsified or manipulated employment records to create fictitious grounds for termination.

Id.

29. Charles v. Interior Reg'l Hous. Auth., 55 P.3d 57, 62 (Alaska 2002) *quoting* Finch v. Greatland Foods, Inc., 21 P.3d 1282, 1286–87 (Alaska 2001).

similarly situated.

The draft accepts the presence of such an implied covenant, but it proceeds to cabin it in three ways: (1) the covenant is an implicit agreement each party makes not to "hinder" the other's performance; (2) it must be "read consistent with the at-will term"; and, (3) terminations of employment breach the covenant when they issue in order to (a) prevent the vesting of an employee right or (b) retaliate against an employee for faithful performance under the contract.

Consistent with the format, no explanation is given for this formulation, of why it was chosen as opposed to that of Delaware, Alaska, or some other. Note also that there is an inherent inconsistency between the covenant, howsoever framed, and the at-will rule, at least in its strong form, which is why most jurisdictions have blinked at it. To impose an implied obligation of good faith and fair dealing in discharge cannot be squared with the Hobbesian worldview the at-will rule embodies. So, if limits are called for, those who would impose them would seem to be called upon to explain why they would impose some limits but not others.

This draft declines to do. Instead, it frames the rule in words of categorical limitation rather like Delaware's "four categories" (except here there are fewer) and rather unlike Alaska's more open-ended formulation. According to the draft, if a discharge is not for either of these reasons—to prevent vesting or to retaliate for faithful performance—it cannot violate an implied obligation of fair dealing. Under this formulation, a saleswoman, Z, may not be discharged in order to prevent her accrual of a commission; but, it is far from clear that the draft would prevent the company from exercising a reserved right to modify the commission formula downward on the eve of accrual or from demanding that Z accept a reduced amount on pain of discharge immediately after the commission is paid in full. ("You may have the job but no commission, or the commission but no job, the choice is yours.") Both might be acts of opportunistic behavior, but neither falls under either of the two categories the draft lays out. Z is not being discharged to prevent the commission from accruing, nor is she being "hindered" in her performance. The commission will be paid in full and as her status continues to be at-will her future performance is incapable of being "hindered" by discharge. It could be argued that she is being retaliated against for faithful performance. However, as the draft sees nothing amiss in a threat of discharge to compel employees to give up their job security, it is far from clear how the draft could find anything amiss in the threat of post-payment discharge to persuade her to accept a reduction in the commission. (After all, in lieu of demanding that Z give back the commission, the employer could simply reduce her compensation prospectively as a condition of continued at-will employment until it recaptures the sum.) A limit on such opportunism could be imposed by

doctrines of duress or unconscionability, but, again, these never make an appearance. A limit could also be reached by means of a legal utensil ready-to-hand, by application of a covenant of good faith and fair dealing,[30] but not necessarily under the draft's categorical formulation of it.

B. Limits Imposed by Public Policy

Chapter 4 of the draft, following the weight of judicial decisions, provides for a tort action for a discharge for a reason violative of public policy. The gravamen of the wrong is the harm "to third parties and society as a whole" that a discharge works in contradistinction to a wrong done the individual alone. The draft further acknowledges that the courts are more or less receptive to being shown how such a harm might come about. Some require the employee to ground the claim in a specific constitutional, legislative, or, perhaps, administrative provision. Others are more open-ended; for example, allowing recourse to codes of ethics, where a public protective purpose can be shown, or to judge-made doctrine.

Section 4.02 of the draft opts for an exhaustive list of three categories. A discharge violates public policy for an employee who reasonably and in good faith: (a) refuses to commit an unlawful act; (b) fulfills a public obligation; or, (c) reports an employer's unlawful conduct. As the list is exhaustive, if the reason for discharge fails to fit into one of these categories, the discharge is inactionable, presumably because it would fail to demonstrate sufficient injury to the common weal. "Presumably" because, again, given the format the draft does not explain why these and only these three categories are chosen; why, that is, given the legal theory of societal harm, a more open-ended examination of the societal impact would not be warranted.

Interestingly, the draft rejects the approach taken in a number of jurisdictions that require a plaintiff to point to a specific law in order to locate public policy. The draft terms that approach "distracting"—treating the role of statutes separately in section 4.03—and argues that the formulation it offers faithfully reflects the approach taken by a "majority of courts" and "sufficiently constrains the inquiry into public policy." The majoritarian claim represents the question earlier presented, of whether a *Restatement* is needed if it is merely to rehearse the "majority" rule. But more important, the draft's assertion that its formulation is "sufficient" unto the day is a bald conclusion for which no foundation is laid.

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30. Brozo v. Oracle Corp., 324 F.3d 661, 667 (8th Cir. 2003) (asserting that reserved power quotas on which commissions were paid is traditionally reveiwable for "bad faith"); *cf* Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984) (holding that employer discretion over monthly sales quotas on which commissions were computed was not unlimited, despite language in the contract).

The draft illustrates the imperative of its categories by positing the discharge of an employee who volunteers in an AIDS clinic. As that activity fits in none of the draft's three pigeon holes the employer is free to discharge for the employee's having engaged in it.[31]

A difficulty the draft confronts is inherent in the public/private distinction which, not surprisingly, has vexed the courts; that is, to distinguish that which affects the larger society from that which affects the individual alone.[32] The line can be more tenuous than first would appear. Can there not be an "intimate relationship between an habituation to authority [in the workplace] and the formation of tolerant, autonomous citizens"[33] such that restraints on off-duty behavior having no connection to legitimate business need may inure in the aggregate to our common detriment? Would the common weal not suffer, for example, when employees are discharged for engaging in such socially beneficial activities as volunteering to aid the infirm?

It is worth noting that the Supreme Court of Washington, collecting its cases and categorizing them very much like the draft, has been willing to examine whether employee conduct falling in none of these categories has "socially redeemable aspects" nevertheless.[34] Coming to the aid of a woman, held hostage and being attacked with potentially lethal force, could be capable of demonstrating such a public connection.[35] In the state of Washington, the dismissal of this good Samaritan would violate public policy even when the employee, a security employee, violated his employer policy—by leaving an armored car unattended—to do it; but not in the draft's categorical formulation. This is not to argue that the disposition of

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31. However, the right to associate with persons protected by the Americans with Disabilities Act is singled out for protection under that Act. 42 U.S.C. § 12112(b)(4) (2000). The role of legislatively-mandated limits on the at-will rule is dealt with separately in the draft and will be treated separately here.

32. In *Maw v. Advanced Clinical Communications, Inc.*, 846 A.2d 604 (N.J. 2004), for example, the New Jersey Supreme Court held that a discharge for refusal to sign a covenant not to compete implicated no "clear mandate of public policy." But the two dissenting Justices were hard-pressed to see how that can be so when the impact of a covenant on the public interest is one of the factors to be weighed in deciding the covenant's lawfulness:

> Simply put, for centuries the courts of England and of this State have stated repeatedly stated that covenants-not-to-compete implicate important public-policy interests. If there is any continuing truth to that notion, then a plaintiff who claims that she resisted signing an agreement that she believed to violate that public policy cannot be summarily cast out of court on the ground that her concerns constitute only a private dispute with her employer.

Id. at 615 (Zazzali, J. dissenting).

33. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 269 (1996).

34. Gardner v. Loomis Armored, Inc., 913 P.2d 377, 382 (Wash. 1996).

35. *Id.*

the Washington Supreme Court was so obviously correct; indeed, there was a vigorous dissent. The point is that whether that conduct should be insulated from employer sanction—whether, that is, the connection to the common weal is such as to justify judicial intervention—would be, given the infinite variety of potential factual scenarios, grist for the judicial mill under a general test of "public policy" whatever the outcome, but that the draft's categorical treatment would truncate that very consideration at the outset.

So, too, the draft insulates the employee against reprisal by the employer for reporting the employer's illegal conduct. Consequently, the draft would allow reprisal for reporting illegal conduct not the employer's, for example, that of co-worker unconnected to the employer's work.[36] If the public weal is furthered by the good faith reporting of unlawful activity to the proper authorities, it would seem anomalous that an employee could be discharged because the report did *not* concern the employer.

The draft breaks out for separate treatment, in section 4.03, the discharge of an employee for exercising a statutory right. It would allow the statute to serve as a statement of public policy, and allow a tort action for retaliation for having invoked it, unless the statute itself provides an adequate remedy. This approach is more protective than that afforded in those jurisdictions that take the remedy provided by the legislature to be preclusive of any other resort *per se*. And it rightly is at pains to distinguish the role of the statute as a statement of public policy from that in implying a right of action directly under it. But earlier, in section 4.01, the draft would preclude a claim of violation of public policy where a statute has "occupied the field" irrespective of the inadequacy of the statutory remedy under it. The only guidance given on what that means is by reference to limits in anti-discrimination law to the timing of an action and to the size of the employee complement necessary to bring an action. *I.e.*, the draft says that because Title VII does not apply to employers with fewer than fifteen employees, the legislature has decided that the law's anti-discrimination policy does not apply to them; and, by occupying that field, claims of sex or like discrimination cannot be brought against these employers as a matter of public policy "for discrimination covered by Title VII." A state tort cannot be "based on the same underlying public policy."

Section 4.01 is susceptible of alternative readings. It could be read as saying that irrespective of the adequacy of the statutory remedy, where a statute "occupies the field" it cannot supply a public policy from which the state is permitted to abstract an independent tort of wrongful discharge. Or, that where a statute "occupies the field" the field it occupies cannot be regulated by a separate tort grounded in the same policy the statute

36. Vorpagel v. Maxwell Corp. of Am., 775 N.E.2d 658 (Ill. App. Ct. 2002).

addresses – is "covered by" the statute – even if the tort is not grounded in the statute. Obviously, the latter is broader than the former; but, in either case, and in sharp contrast to the rules laid down to decide whether a private cause of action is to be implied by a statute, no guidance is given on how the question of occupation (*i.e.*, preemption) is to be decided. If the statute had a preemption clause, there would be no issue; so we are necessarily concerned with situations of statutory silence. Legislative history could supply a guide, but such is almost invariably lacking at the state level. So we are left with little more than an inchoate theory capable of accordion-like expansion.

Take the case of jury duty. Under section 4.02(b), the discharge of an employee who, against her employer's orders, absents herself from work in order to obey a summons for jury service would be actionable in tort, as a discharge for "fulfilling a public obligation." But most states have dealt with this situation by statute and some, New York, for example, do not allow private rights of action under it.[37] Where the legislature has not stated that the remedy it has provided, sometimes only a criminal offense, preempts the availability of (more effective) individual relief, how is a court to decide whether or not the law has so "occupied the field" as to preclude it from doing so? May the state judiciary afford relief for a wrongful act "covered by" the jury duty law? More than fifty years ago, Justice Frankfurter cautioned that the phrase "occupied the field" has "done service for close analysis."[38] Here it passes without any analysis at all and bids fair to eviscerate the application of public policy altogether whenever a statute is in the picture, as they so very often are.

To return to section 4.03, the tort engendered under it is not for retaliation for the exercise of a statutory right *per se*, but only of an "employment-related" statutory right. Apparently, no other statutory right applies. As the illustration the draft sets out makes clear, one may have a right to marry under the state's family law, but the discharge of an employee for marrying a co-worker—or anyone else, for that matter—would not implicate a statutory *workplace* right and so would be inactionable. This restriction is crafted, the draft tells us, to "prevent judicial interference with routine employer-employee conflicts." The explanation begs the critical question: ought employers be permitted to regulate an employee's private life, or any other aspect of his or her membership in civil society, that may have no supervening connection to the workplace or to the employment relationship? This is an authentic question of public policy, but the draft assumes the answer to it. Under the

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37. DiBlasi v. Traffax Traffic Network, 681 N.Y.S.2d 147, 149 (App. Div. 1998) (noting that the Governor had vetoed a bill providing for a civil remedy).

38. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 782 (1947).

draft's formulation, there could be no constraint on an employer's ability to tell an employee to desist from, or to engage in, political activity.[39] Apart from the right to vote free of employer dictate, political speech and participation is not an employment-related statutory right in most jurisdictions; and, as one is not legally obligated to express one's political sentiments or to engage in political activity, a discharge predicated on this ground could not constitute a violation of "public policy" as set out in section 4.02, as infringing upon the performance of a legal obligation. Accordingly, under the draft's approach, there could be nothing amiss in permitting employers to exercise such power.

But there is more. One of the draft's Illustrations deals with the discharge of an employee for consulting counsel with respect to a statutory right. This the employer should not be permitted to do, the draft explains, because the employee's "statutory rights . . . include the right to receive counsel" regarding such a right even though the statute might not say so expressly. This reasoning is by no means accorded universal judicial acceptance, though the proposition— "we do not believe we have done you a statutory wrong, but if you consult counsel to find out if we have we will fire you"—should seem a bit difficult to defend. Nevertheless, the draft would not extend that protection to consultation with counsel over a non-statutory workplace right, or, it would seem, any other. Were employee Z, given the ukase discussed above regarding the treatment of her sales commission, to consult counsel before she decided what to do, under the proposed draft she could be fired for that without recourse; so, too, of Z were she to consult counsel about her desire to marry a co-worker.

At the close, the draft emphasizes the rigor of its categories by positing an employee who, as a shareholder in her employer-company, joins in a shareholder derivative suit against it. As her right to participate in the suit is not based upon an employment-related statutory right, she may be dismissed for it.

Here the draft enters a weltered world: the courts are at sixes and sevens on whether participation in a lawsuit, absent anti-retaliation treatment by positive law, should be insulated from discharge.[40] The draft would draw the line at participation in lawsuits invoking statutory workplace rights, in the face of legislative silence on point, but not

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39. *See, e.g.*, Edmondson v. Shearer Lumber Prods., 75 P.3d 733 (Idaho 2003) (holding that an at-will employee could not establish wrongful termination against his employer who terminated the employee for exercising his right to free speech).

40. *See generally* Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 338–340 (1999) (summarizing the law with respect to employee participation in lawsuits). In *Chicago Commons Ass'n v. Hancock*, 804 N.E.2d 703 (Ill. App. Ct. 2004), for example, discharge for an employee's appearance in court to defend against his employer's suit for overpayment of wages was held inactionable.

participation in others, presumably not even lawsuits invoking the common law rights the draft would vouchsafe. No reason appearing, the reader is left to surmise that the justification would be the same as the draft gives to distinguish the actionable discharge for asserting a statutory workplace right from the inactionable discharge for asserting a statutory non-workplace right. To allow the latter to be actionable would countenance "judicial interference with routine employer-employee conflicts." Much this rationale was given judicially to draw a line between actionable discharge for consulting counsel about one's common law rights and inactionable discharge them for suing to assert them: "permitting an employee to file suit against his employer would disrupt the balance of employer-employee relations."[41]

Absent explanation, this would seem to be the assumption of the draft's distinction. If the assumption were to be examined, the examiner would have to consider the thousands of unionized employments where workers press and unions adjudicate non-statutory contractual claims as part-and-parcel of the workaday world without any significant disruption whatsoever. The balance of power the draft would maintain must rest therefore on some other, unarticulated ground.

III. TWO AS YET UNANSWERED QUESTIONS

To reiterate, the foregoing has engaged with only a first draft not approved by the ALI; a draft which may be abandoned in significant measure or be modified drastically. What is of concern is less the details than the general thrust, which surely poses the following: *What purpose does all this serve? What demonstrable need does it satisfy?*

At the outset I noted that doctrinal coherence might be sought. However, the draft is anything but. It repudiates the very idea of "implied in fact" terms as doctrinally "ungrounded" in the establishment of job duration, when such is historically well-established, but then would create a non-contractual presumption of abrogability, based on an analogy fashioned for this very purpose, while nevertheless allowing resort to surrounding circumstances to imply in fact the vesting of certain terms potentially including job security. At some points it rejects what the majority of courts have done (for example, by positing a covenant of good faith and fair dealing even in the at-will relationship) and at others it relies on what it takes to be majority acceptance (for example, of its formulation of how public policy should limit discharge or in its definition of "cause" as "objective good faith"). Some of what is given as justification is based

41. Taylor v. Volunteers of Am., 795 N.E.2d 716, 719 (Ohio Ct. App. 2003) (ruling that employee may be discharged for suing his employer in fraud and promissory estoppel over its life insurance benefit).

on assumptions that remain to be seen—do employees *really* "intend" to have their dismissal turn on their employer's good faith?—or on assumptions of managerial prerogative that are offered as self-evident when they are anything but. For example, that for the sake of non-interference in "routine employer-employee conflicts" the courts should stand aside when an employee is dismissed for reasons having no demonstrable connection to the employer's business interest, so that an employee who reports having been raped by her supervisor cannot be discharged but one who reports having been raped by her husband can.[42] None of this strikes the reader as particularly coherent.

Alternatively, the project may be predicated on the need to streamline and simplify. If so, the draft does accomplish that: in defining the two and only limits the covenant of good faith and fair dealing imposes on discharge; in defining the three and only categories of public policy that might constrain employer action; in setting out the one and only category of statutory rights the invocation of which insulates an employee from discharge; in setting out the three and only ways contractual commitments to job security can be grounded; in setting out the three and only forms of contractual job security; in adopting employer good faith as the standard for cause to dismiss a permanent employee; in creating a legal presumption in favor of the abrogability of employer policies assuring job security; and, in omitting to incorporate (or to make any even passing mention of) such potentially protective bodies of law as economic duress, unconscionability, and promissory estoppel, the draft might well make the law simpler. But it would also narrow and ossify it.

The at-will rule, in the late nineteenth century's imperative form of it, was both simple and coherent: an at-will employee could be dismissed at any time for any reason and any reason meant *any* reason—the good, the bad, and the ugly. The rule began to erode in 1935 with the first federal anti-discrimination law, the National Labor Relations Act, and statutory exception grew apace starting in the 1960s. However, the common law did not begin significantly to erode the at-will rule much before 1980. Given the general conservatism of the judiciary and the slow pace of legal change, the law is still very much in the course of growth, with advances and retreats—decisions (and legislation) variously sensible and risible—that will only be sorted out as such over the course of time. Once exceptions start to be made, anomalies emerge. The greater the texture of exceptions, the more anomalous it becomes to insist upon the at-will rule, not as a default rule governing duration, but as a rule predicated on the assumption

42. Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002). *Cf.* Imes v. City of Asheville, 594 S.E.2d 397 (N.C. Ct. App. 2004) (finding no violation of public policy for bus line to discharge employee of twenty-seven and one-half years' service for being a victim of domestic violence).

that the right to discharge is incapable of being abused, or, less strongly, that the law shouldn't intervene when it is.

The whole thrust of this draft is to shore up the at-will rule, to harden the categories. It seems at first blush a rather progressive document. It accepts every limit the courts have crafted, but then it proceeds to cabin them: to channel the breaches, to patch up the leaks, to shore up the ranks. This draft is an analgesic, and a harmful one at that to the extent it might lull the courts into complacent acceptance of its categories and so into routine recitation of its blackletter rules, as the history of the *Restatement of Torts* effect on the law of workplace privacy amply evidences. The point is assuredly not that four rather than three categories of one, or three rather than two exceptions to the other would be more defensible. The point is that it is wrong to continue along this path at all.

IV. ONE STEP BACK, TWO STEPS FORWARD

There are two complementary courses of action yet open to the ALI. First, it could step back and devote its intellectual resources to the question of what it should be doing. Second, in the process of considering how a more useful (and even enduring) contribution might be made, the ALI could identify what the issues are that press upon us now and will be even more likely to do so in future, of what transdisciplinary resources the law should have call upon to confront them, and by what tools in our legal arsenal. It should not shrink from—indeed, it ought be eager to—engage with what other advanced industrial democracies have done and are doing, for surely the issues of moment to us are unlikely to be novel in the global, post-industrial experience. Apropos the law of workplace privacy, for example, the European Union and the laws of several of its member states are rich in experience, as is Canada at the both federal and provincial level, and as are New South Wales and Victoria in Australia. The British Institute of International and Comparative Law has a distinguished working group on employee data protection. In the United States, the National Academies—the nation's most prestigious scientific body—has a project underway on privacy, including the law. Yet the ALI is poised to proceed hermetically, path-dependent and tort-bound, without any connection whatsoever to other bodies of thought or with other thoughtful bodies.

The ALI has identified wrongful discharge as an issue whose time has come, and rightly so. But the "American rule" is not like the yard stick in the House of Commons, unchanging and unchangeable. Rather than assume it to be so, and attempt to shore up the exceptions to it, further begging questions and compounding anomalies, the ALI should summon up the courage to address it: *What should the policy of the law be in the matter of employee discharge?*

The case for employee protection against wrongful disciplinary dismissal rests upon both moral and economic grounds.[43] Morally, the just employer does not dismiss an employee without good cause, not what the management believes it to be, even in all honesty, but what is in fact so. Purity of purpose is no defense to the employee, to his or her co-workers, or to the public. Further, a law that requires employers to behave this way may have positive economic outcomes: to conduce toward greater job satisfaction, lower turnover, a greater willingness to invest in job-specific skill training and so result in higher productivity. The refusal of employers adequately to ensure job protection as a matter of contract would be a form of market failure, which theory also explains why employees do not purchase insurance against wrongful discharge.[44]

Equally theoretical arguments have been mounted on the other side. Employment stability, favorable to protected insiders, may be purchased at the cost of the unemployment of outsiders; higher costs associated with fair dismissal law depresses job creation because having to demonstrate cause to discharge satisfactory to an adjudicatory body may either encourage shirking and underproductivity or require higher wages in order to get better performance (and *nota bene* the presence of job security enables employees to make stronger wage demands which, if granted, may be paid at the price of greater societal unemployment). Finally, the inflexibility inherent in job protection law may be an obstacle to allocative efficiency and a hindrance to the modern workplace's ability nimbly to adapt to changing market conditions.

A comprehensive review of the economic literature has summed it up this way:

> EPL [Employment Protection Legislation] may help to foster stable employment relationships conducive to investment in human capital, cooperation and adaptation to change. On the other hand, it may stifle dynamism and adaptation to change. The theoretical literature provides little guidance on which of these effects is likely to dominate.[45]

And the teaching of the empirical evidence is equally equivocal.[46]

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43. The economic arguments are canvassed by Christoph F. Buechtemann, *Introduction: Employment Security and Labor Markets*, *in* EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR 3 (Christoph F. Buechtemman ed., 1993).

44. David Young, *Employment Protection Legislation: Its Economic Impact and the Case for Reform*, E.C. Directorate-General for Economic and Financial Affairs, Economic Papers No. 186 (July, 2003).

45. *Id.* at 18–19.

46. *Id; see also* DAVID AUTOR ET AL., THE COSTS OF WRONGFUL-DISCHARGE LAWS (Nat'l Bureau of Econ. Research, Working Paper No. 9425, 2002) (investigating the effects

However, three points emerge from a review of the literature. First, EPL, which covers a broad range of legal protections, is concerned predominantly with the treatment of job loss by economic shocks, market dislocation, and technological change; *i.e.*, mass layoffs, downsizing, outsourcing, and relocation. Disciplinary discharge has only a small, perhaps an almost inconsequential macroeconomic effect.[47] Second, economic institutions (including EPL) function in a complex milieu: job generation (and wage levels) may be affected negatively by EPL in the short term, but the magnitude is unlikely to be large, the long-term effect is far from certain, and these are in any event also affected by the legal, economic (and cultural) environment for new product development, venture capital, and start-up enterprises.[48] *I.e.*, the positive effects of the latter may well dwarf the negative effects of the former, such as they may be.[49] Third, we must attend closely to the structure of the EPL system: who benefits, who pays, and with what transaction costs. As David Young has pointed out, "[c]ostly administrative procedure and a high degree of uncertainty cannot be optimal if one of the key benefits of EPL is [a kind of] insurance for employees."[50]

Our system (if such can be called) is, as Clyde Summers pointed out a decade ago, a lottery whose primary beneficiaries are the trial lawyers engaged in the process on both sides.[51] The point was made by David Autor, John Donohue, and Stewart Schwab more recently: "[T]he wrongful-discharge doctrines recognized in the United provide no . . . formal employment security. Rather, they make it feasible for certain

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of wrongful-discharge protections on employment and wages); DAVID AUTOR ET AL., THE EMPLOYMENT CONSEQUENCES OF WRONGFUL-DISCHARGE LAWS: LARGE, SMALL, OR NONE AT ALL? (American Economic Review: Papers and Proceedings, 2004) (analyzing and comparing several studies on the economic impact of wrongful-discharge laws).

47. *See supra* note 45 and accompanying text; *see also* NORBERT BERTHOLD & RAINER FEHN, UNEMPLOYMENT IN GERMANY: REASONS AND REMEDIES (Ctr. for Econ. Studies and Inst. for Econ. Research, Working Paper No. 871, 2003).

48. *See generally* ALAN KRUEGER & JÖRN-STEFFEN PISCHKE, OBSERVATIONS AND CONJECTURES ON THE U.S. EMPLOYMENT MIRACLE (Nat'l Bureau of Econ. Research, Working Paper No. 6146, 1997) and the commentary on it at *The U.S. "Employment Miracle": Employment Protection and Job Generation*, 19 COMP. LAB. L. & POL'Y J. 278–329 (1998).

49. Much of the literature has been devoted to European EPL systems which tend to function in less entrepreneurial environments. *See* KRUEGER & PISCHKE, *supra* note 47. Even so, it ought be noted that in 1992, the U.S. had a trade *surplus* with what is now the E.U.'s fifteen countries of almost $9 billion; but as of June 2004, the U.S. enjoys a trade *deficit* with those countries of almost $100 billion, mostly due to the import of high quality good manufactured by employees working under EPL systems. Floyd Norris, *Campaign Tactic: Blame Foreigners and Ignore the Trade Deficit*, N.Y. TIMES, Aug. 20, 2004, at C-1.

50. Young, *supra* note 43, at 41.

51. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

workers to litigate after termination at considerable monetary and psychic cost, and with limited certainty of redress."[52] Summers' conclusion is also confirmed by more recent data.[53]

In other words, our current system has none of the economic benefits of wrongful discharge protective law precisely because it eschews protecting employees from wrongful discharge; but it does have all the high transaction costs and uncertainties that have been singled out as negative aspects of such systems. This state of affairs, these moral and economic issues, pass unaddressed by the ALI. Instead, the whole thrust of the project is to maintain a malfunctioning system.

There *are* other models. The draft mentions Montana's statute as the single exception to the at-will rule in the United States. But Puerto Rico has a statute treating wrongful discharge in terms of scheduled compensation.[54] (It meets most of the desiderata just discussed—low administrative cost and a high degree of certainty in the employer's financial exposure, even if its pay-out is relatively modest, which may be a necessary trade-off to make such a system efficient.) So, too, does the U.S. Virgin Islands.[55] There are a variety of European models, including that of the United Kingdom; and there is Canadian experience to draw upon as well.

V. CONCLUSION

Revenons à nos moutons – let us return to our sheep. The American Law Institute has embarked upon a project to "restate" the law of wrongful dismissal, presumably as a facility for a beleaguered state judiciary. Toward that end, it would recommend that the courts disallow an employer

52. AUTOR ET AL., THE COSTS OF WRONGFUL-DISCHARGE LAWS, *supra* note 45, at 21. They also advert to the economic consequence: "[b]y raising expected employment costs of senior workers without providing them formal job security, U.S. wrongful-discharge laws may make it more likely that employment of protected groups is ultimately reduced." *Id.* at 20–21.

53. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 539 tbl.4 (2003). Plaintiffs (in California) bringing suit under tort and contract wrongful discharge theories have won about sixty percent of the time with a median verdict of under $300,000. *Id.* This does not account for reversals on appeal or remittitur, nor of the lawyers' contingency fees; *i.e.* after the dust has settled, appeals exhausted, fees and costs paid, substantial sums will have been paid out to defendant lawyers in 100% of the cases and to plaintiff lawyers in more than 50% of them for the prevailing employee to take home on average perhaps a year or two of pay.

54. 29 P.R. LAWS ANN. §§ 185a–185m (2001).

55. The Virgin Islands Wrongful Discharge Act provides for reinstatement (by order of the Commissioner of Labor after hearing) as well as for a private right of action. 24 V.I. CODE ANN. §§ 76–79 (2004 Supp.).

the power to discharge an employee because she reported having been raped by her supervisor, because he consulted counsel about his liberty to help out in an AIDS clinic,[56] or because she is suing her employer to assert a statutory wage claim, *i.e.*, to secure her sustenance. But it would defend the right of an employer to fire that employee because she reported having been raped by her husband, because he consulted counsel about his liberty to marry a coworker, or because, as a stockholder, she is suing her employer for pillaging the source of her sustenance. And the drawing of these and similar distinctions contemplates a more or less continuous process of litigation probing the margins of the categories. One cannot but be bemused: would not the considerable intellectual resources of the American Law Institute better be devoted to devising a fairer, more coherent, and more efficient legal address to the problem of wrongful discharge?

56. Inasmuch as one may have a statutory right to associate with AIDS victims as persons protected by the American With Disabilities Act, *see supra* note 30, the draft should insulate consultation with counsel about that potential statutory right from employer reprisal.