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## Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place

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RESPONSE TO WORKING GROUP ON CHAPTER 2 OF THE  
PROPOSED RESTATEMENT OF EMPLOYMENT LAW: PUTTING  
THE RESTATEMENT IN ITS PLACE

BY  
RACHEL ARNOW-RICHMAN\*

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I. INTRODUCTION

Like most of the contributors to this symposium, I come to bury the *Restatement*, not to praise it.<sup>1</sup> A fair reading of the ALI’s proposed Chapter 2, on termination and employment at will, reveals a document deeply, if not irretrievably, flawed in both its conception and execution. Principal among my complaints is that the draft neither presents an integrated approach to contractual terms of employment, nor takes a position on the appropriateness of contract as a vehicle for creating employment terms.<sup>2</sup> Thus, in the most benign terms, the draft repackages the common law, adding nothing of value in the process.

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1. To that end, I have contributed modestly to Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL’Y J. 93 (2009), which I am charged, ostensibly, with critiquing in this response.

2. These sentiments are explored further in Finkin et al., *supra* note 1; *cf.* Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 300 (2005) [hereinafter Finkin, *Second Thoughts*] (urging that the ALI “summon up the courage to address [the question]: *What should the policy of the law be in the matter of employee discharge?*”).

It should be noted that such concerns are more intellectual than ideological. I share the view of my colleagues in the Chapter 2 Working Group that the current draft presents a narrow picture of worker contract rights, one centered on the at-will default and deferential to management interests.<sup>3</sup> Where I differ is in the degree to which I believe this poses a serious threat to worker's interests. The Working Group assumes both the importance of workers' common law contract rights in their current form and the value of unfettered judicial innovation in building on existing law. I am skeptical about both.

My argument is two pronged. First, I suggest that recent decisions, considered neither by the ALI Reporters nor the working group, suggest that worker contract rights are in jeopardy. If so, the law as set forth in proposed chapter 2 may ultimately prove more favorable to workers than the developing common law. Second, even if I am mistaken, it may not matter, because proposed chapter 2, and by consequence the Working Group's critique, focus almost exclusively on job security. In the transient and troubled labor economy that workers face today, the concept of job security is illusory, and any attempt to "restate" the law on the subject is destined to irrelevance. Meaningful and sustained protection of workers in the twenty-first century, I contend, will depend more on our legal regime's ability insulate and enable labor market transition than on the extent to which the common law preserves existing employment relationships.

## II. CAN THE RESTATEMENT DO GOOD? (OR AT LEAST FORESTALL EVIL?)

A primary concern of the Working Group's critique of chapter 2 and critics of the proposed *Restatement* generally is that the adoption of a *Restatement* will stymie the growth of the common law.<sup>4</sup> By encapsulating and disseminating current doctrine in a static document, the argument goes,

3. See Finkin et al., *supra* note 1, at 109-12 (asserting that "the structure of the draft as a whole – stating first the at-will rule and then narrowly cabining the exceptions" reflects an "overemphasi[s] on the at-will rule"); see also Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 27 (2006) ("The [draft *Restatement*] section on job security . . . manhandles doctrine in order to achieve a specific end – to permit employers to free themselves of what they might conceive in hindsight to be an undesirable commitment to job security."). In areas of legal uncertainty, proposed chapter 2 adopts the decidedly pro-employer position. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 (Council Draft No. 3, 2008) (allowing an employer to modify or revoke a "binding policy statement" unilaterally).

4. See Finkin et al., *supra* note 1, at 94-95 ("[T]he ALI's assertion today that the at-will rule 'is' the law, when, in fact, the law is in considerable flux, is not an accurate statement of the law, and state judicial acceptance of the assertion would be counterproductive to the common law process."); see also Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LAB. LAW. 405, 416 (2003) [hereinafter Finkin, *Law Reform*] (arguing that a *Restatement (Third) of Employment Law* "runs the risk, if taken as persuasive authority, of arresting the law's development").

we risk ensconcing status quo contract rights at the expense of further reform.<sup>5</sup>

Let us be clear about what underlies this critique. It is not a disinterested objection to interference with the natural common law process. It is an ideological position in support of greater worker protection.<sup>6</sup> Implicit in the Working Group's assertion that the proposed *Restatement* will entrench current common law is the assumption that future judicial decisions would otherwise favor workers' interests.

I share the Working Group's desire for greater protection for workers. The contract rights they currently possess are not only limited, but difficult to enforce. I do not share the working group's assumption that common law, left to its own devices, will achieve that end. I believe we have already seen the best of organic judicial innovation and should be concerned equally with the preservation of existing employee contract rights as we are about the effect of the proposed *Restatement* on the judiciary's instinct for further reform.

#### A. A Twenty-First Century View of Implied Contract Rights

There is no doubt that judicial innovation in the area of employment contract law has played a substantial and important role in limiting managerial discretion to terminate workers. The critique of chapter 2 speaks eloquently and accurately about the erosion of employment at will through decisions leveraging implied in fact contract theory and similar doctrines to the benefit of workers.<sup>7</sup> Through such exercises, courts imputed legal significance to employer assurances and practices, thereby vindicating workers' legitimate expectations of job security.

But such exceptions developed over a generation ago now, and they were based on promises and understandings that accrued during the generation before that.<sup>8</sup> Since those days a quarter century ago, we have

5. See Finkin et al., *supra* note 1, at 95 (“[T]he evolutionary process necessarily involves the . . . state supreme courts as ‘little laboratories of state common law experimentation.’”); see also Finkin, *Law Reform*, *supra* note at 4, at 416 (noting that “the potential for ossification [that] inheres in all *Restatements* [which is] exacerbated when the target chosen to be codified is in the course of growth”).

6. See Finkin et al., *supra* note 1, at 100 (implying that absent the *Restatement* “the old at-will rule” will continue to be “chipped away and . . . reformed with the invention of new exceptions, rationalization of the exceptions, and perhaps ultimately, if the common law is left to its own justice-seeking processes, various states [will] invent substitute rules that permit some new sustainable theoretical rubric”); cf. Finkin, *Second Thoughts*, *supra* note 2, at 300 (stating in condemnation of the proposed *Restatement* that “[t]he whole thrust of th[e] draft is to shore up the at-will rule.”).

7. See Finkin et al., *supra* note 1, at 96-97.

8. *Pugh v. See's Candies Inc.*, 171 Cal. Rptr. 917, 918-19 (App. 1981) decided in 1981 is now twenty-eight years old, and the assurances on which Pugh based his claim dated to the 1940s.

seen precious little in the way of judicial innovation in favor of greater contract rights for at-will workers.<sup>9</sup> What we have seen is a widely documented trend toward short term employment, the rise of contingent labor, the rollback of employer sponsored health plans and benefits, a reversion to external labor market practices,<sup>10</sup> and, more recently, the most significant economic downturn since the Great Depression.<sup>11</sup>

These turns of events bode poorly for future judicial innovation to benefit workers. The normative pressures that inspired courts to enforce implicit commitments have been replaced by pressures to defer to businesses on their need to meet their bottom line.<sup>12</sup> Where the economy is in free fall, stalwart companies closing their doors, and jobs seen as transient in any event, it seems highly idealistic to believe that the twentieth century mode of judicial reform in favor of job security will persist, let alone flourish.<sup>13</sup>

### B. California Dreaming

Sadly, this is not mere pessimistic speculation. An endless stream of contemporary cases rubberstamping employer disclaimer language bears out my claim.<sup>14</sup> Notably, such cases are not limited to jurisdictions

9. In so stating, I respectfully but explicitly disagree with the contrary suggestion in Finkin et al., *supra* note 1, that the result in *Pugh v. See's Candies* has of late "been extended" by courts receptive to the notion of contractual employment security. See Finkin et al., *supra* note 1, at 103.

10. These labor market trends have been described extensively in the legal and business management literature. See, e.g., PETER CAPPELLI, *THE NEW DEAL AT WORK* 136-48 (1999); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 67-86 (2004); Rachel Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1198-1202 (2000).

11. For posterity, I refer here to the time beginning with the fourth quarter of 2008 up through and including the drafting of this essay (and likely beyond), during which the newspapers are replete with reports of mounting layoffs, and pundits and politicians repeatedly analogize to the 1930s. See, e.g., MARK JICKLING, CONG. RESEARCH SERV., *CAUSES OF THE FINANCIAL CRISIS 1* (2009) ("By early 2009, the financial system and the global economy appeared to be locked in a descending spiral and the primary focus of policy became the prevention of a prolonged downturn on the order of the Great Depression."); Catherine Rampell et al., *Layoffs Spread To More Sectors Of the Economy*, N.Y. TIMES, Jan. 27, 2009, at A1; Amol Sharma, et al., *Companies Accelerate Layoffs*, WALL ST. J., Dec. 5, 2008, at 1.

12. See Peter Cappelli, *What Will the Future of Employment Policy Look Like?*, 55 INDUS. & LAB. REL. REV. 724, 724 (2002) ("Employment policy in the United States clearly shifted in the 1990s . . . away from the goal of protecting employees from their employers . . . toward the very different goal of advancing the competitiveness of employers.").

13. While history shows that economic turbulence often spurs protective social legislation, as the Working Group critique correctly points out, see Finkin et al., *supra* note 1, at 105-06, it is far less clear that such a climate induces a comparable instinct on the part of the judiciary.

14. Some courts have been skeptical of employer efforts to disclaim obligations set out in personnel manuals through boilerplate statements and have found a jury question where a disclaimer is ambiguous, inconspicuous, or inconsistent with other statements in the handbook. See generally

historically inhospitable to workers' claims. Even the courts of California, the liberal-minded and employee-friendly jurisdiction that pioneered the implied-in-fact claim to job security, have of late issued decisions markedly skewed toward management interests.

The California Supreme Court's 2006 reversal in *Dore v. Arnold Worldwide, Inc.* is illustrative.<sup>15</sup> Dore was an advertising account manager who relocated from Colorado to California on the assurance that he would be employed long term.<sup>16</sup> The defendant told him he would "play a critical role in growing the agency," and that the company treated its employees like "family."<sup>17</sup> In addition, the defendant had a documented history of long term employment.<sup>18</sup> All of the officers and employees with whom Dore interviewed had worked for the firm for between five and twenty-five years, and previous terminations, about which Dore inquired during his interview, had all been for cause.<sup>19</sup>

Dore orally accepted the defendant's subsequent offer of employment by telephone.<sup>20</sup> Later that month he received a three-page "offer letter" from the defendant, which contained a recital that employment was at will.<sup>21</sup> Dore signed the letter.<sup>22</sup> Less than two years later, he was fired without explanation.<sup>23</sup>

The appellate court concluded that the offer letter along with all the other evidence created a jury question on whether Dore had an implied contract for job security absent cause.<sup>24</sup> The California Supreme Court reversed.<sup>25</sup> Disapproving numerous appellate court precedents, it held that language to the effect that the employer could terminate "any time" was

Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 348-49 (1993). However, that type of close examination of disclaimer language and deference to workers' expectations appear to be in decline, as the Working Group critique acknowledges. See Finkin et al., *supra* note 1, at 124 ("A substantial majority of U.S. courts find that a clearly stated disclaimer will serve to bar the enforcement of most employer policy statements."); see also Cynthia L. Estlund, *How Wrong Are Employees about their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 19-20 (2002) (opining that "courts generally . . . treat clearly worded and prominently displayed disclaimers of job security as dispositive").

15. 139 P.3d 56 (Cal. 2006).

16. *Id.* at 57.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. The defendant's letter purported to "confirm our offer to join us as Management Supervisor in our Los Angeles office." *Id.* at 57-58.

22. *Id.* at 58.

23. *Id.*

24. *Id.*

25. *Id.* at 62.

unambiguous and wholly inconsistent with a reading of the relationship that required cause for termination.<sup>26</sup>

This is a fairly stunning conclusion, given California precedent. The case set forth on summary judgment would appear to strongly support a jury question on the existence of an implied contract. Dore cited not only oral representations and assurances, but also evidence of employer practices. The brief disclaimer in the offer letter provided that Dore could be terminated at any time, but did not expressly state that he could be terminated absent cause.<sup>27</sup> Yet the state supreme court deemed this minimal language sufficient to support a ruling for the employer as a matter of law. In so concluding, it made no mention of the fact that the offer letter was second in time to Dore's acceptance and did not even consider whether a formal modification of terms was required.

*Levitan v. Apple Computer*, a California Appellate Court decision, offers another example.<sup>28</sup> *Levitan* involved the termination of a worker who had accepted employment with the understanding that the company would allow him to commute from Indiana for two years until he was ready to relocate.<sup>29</sup> Like Dore, Levitan signed a written offer letter reciting that his employment was at will.<sup>30</sup> Both before and after signing, Levitan had detailed discussions with his superior about his commuting arrangement.<sup>31</sup> Indeed, the employer agreed to allow him to use relocation funds to cover his travel costs.<sup>32</sup>

Just over a year later, the CFO of the company sat down with Levitan and told him his commuting arrangement created a morale problem in the office and asked him to relocate immediately.<sup>33</sup> When Levitan refused, invoking the explicit understanding he had with his direct supervisor, Apple terminated him.<sup>34</sup> In the subsequent case, the appellate court methodically rejected every contract claim that Levitan made in seeking to enforce the oral understanding.<sup>35</sup> It held that the employment letter constituted a fully integrated agreement foreclosing any showing of a

26. *Id.* at 60.

27. *Id.* at 58. The full disclaimer stated: "[A]s with all of our company employees, your employment with Arnold Communications, Inc. is at will. This simply means that Arnold Communications has the right to terminate your employment at any time." *Id.*

28. No. H024191, 2003 Cal. App. Unpub. LEXIS 3972 (Cal. App. Apr. 18, 2003).

29. *Id.* at \*5.

30. *Id.* at \*3-5.

31. *Id.* at \*3-4.

32. *Id.* at \*5.

33. *Id.* at \*7.

34. *Id.*

35. *Id.* at \*10-22.

collateral oral understanding, that no extrinsic evidence was necessary to explain any of the terms of that document, and that any notion of an implied good faith duty to honor the commuting arrangement was contradicted by express language.<sup>36</sup>

This result comes as a surprise, not only as a matter of California employment law, but also in the many ways in which the court deviates from general contract principles in reaching its conclusion. As in the employment arena, California is a well-established pro-plaintiff jurisdiction on matters of contract interpretation. It forged the “modern” approach to parol evidence, embodied in the *Restatement (Second) of Contracts*, which is extremely generous in allowing prior oral statements to go to a jury.<sup>37</sup> It also abides by a “subjective” approach to ambiguity which gives parties significant latitude in introducing extrinsic evidence to demonstrate latent ambiguities in an otherwise clear written document.<sup>38</sup> Beyond these peculiarities of California law, *Levitan* seemingly disregards widely accepted canons of interpretation, such as the mandate to read conflicting terms as consistent wherever possible,<sup>39</sup> and to always construe documents against their drafter.<sup>40</sup>

Plainly something is afoot in these cases. Just a cursory examination of background interpretation principles tells us that *Levitan* cannot be explained as an exercise in marshalling “real” contract law to achieve intellectually honest results.<sup>41</sup> At best it reflects an idiosyncratic

36. *Id.* at \*12, \*16, \*20.

37. Under this approach, the prior oral statements alleged to be part of the written instrument can themselves be used to establish that the writing is not fully integrated and is therefore amenable to supplementation. *See Masterson v. Sine*, 436 P.2d 561, 563-64 (Cal. 1968); RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981) (“Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish that the writing is or is not an integrated agreement.”)

38. *See Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645-46 (Cal. 1968). The flexibility of this approach was roundly criticized in a famous Ninth Circuit opinion by Judge Alex Kozinski. *See Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988) (charging that *Pac. Gas & Elec. Co.* “chips away at the foundation of our legal system”).

39. *Cf. U.C.C. § 1-303(e)* (2004) (“[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other.”).

40. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

41. The proper method of interpreting contracts is, of course, a vast and contested subject that is beyond the scope of this response. For a more extensive treatment of the basic schools of thought on interpretative methodology, see generally Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How The Risk Of Opportunism Defeats A Unitary Default Rule For Interpretation*, 96 KY. L.J. 43 (2007-08). For my purposes it suffices to point out that there is a sufficient degree of contextualism inherent in the most basic rules of contract interpretation such that neither the result in *Dore* nor *Levitan* was doctrinally compelled.



misapplication of law; at worst, a disingenuous appeal to contract formalism to achieve a pro-employer outcome.<sup>42</sup>

Such cases offer a chilling picture of where some courts stand today on issues of workers' contract rights, and what might happen to current implied contract law even absent the draft *Restatement*.<sup>43</sup> If this is the world we have to look forward to, then proposed chapter 2 does not look half bad. Of course, it does not follow that chapter 2 *should* be adopted, and surely my observations do not justify any of the doctrinal choices or omissions made by its Reporters with which the working group legitimately takes issue. Rather, my intent here is to assuage fears that adoption will inevitably undo existing rights or suppress further growth. It is entirely possible that chapter 2's affirmation of the panoply of contract exceptions, coming at a time when both job security itself and judicial recognition of job security claims are on the wane, could have a modestly positive pro-worker effect. It will not reverse the trend I have described or push the envelope on the scope of these rights, but it might reify their underlying principles, forestalling a more complete undoing of the law.

### III. FROM JOB PROTECTION TO WORKER PROTECTION

I could be wrong. It could be that the cases I have described are aberrational, or that the leanings of the judiciary are cyclical.<sup>44</sup> It could be that notwithstanding such cases, courts, if left to experiment, will devise new and more generous theories of worker protection. But if that is to occur, and I sincerely hope that it will, it is unlikely to depend on the relative strength or weakness of the contract rights articulated in proposed chapter 2. That is because the focus of the chapter, like the case law on which it draws, is centered almost exclusively on the single issue of job security.

42. Lest I too be guilty of misuse of the law, I should acknowledge that *Levitan* is an unpublished decision, which, by California law, may not be cited or relied upon by courts or parties for any purpose. Thus, there is no reason to fear that *Levitan* itself will be used as precedent to negatively influence results in other employment contract cases. I offer the case here for what is – an illustration of how one contemporary court, in a liberal-minded jurisdiction, perceived and decided one worker's claim.

43. I have described this trend elsewhere, as have others. See Rachel Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. \_\_\_\_ (forthcoming 2009), available at <http://ssrn.com/abstract=1154082> (click download link) (“[C]ourts have demonstrated increased deference to private ordering, assigning legal significance to employer policies and practices, as well as their formal written agreements, often to the detriment of workers.”); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, \_\_\_\_ BERKELEY J. EMP. & LAB. L. \_\_\_\_ (forthcoming 2009) available at <http://ssrn.com/abstract=1015136> (click download link) (attributing this judicial trend to the power of employers to draft away the possibility of implied protections for workers).

44. See Arnow-Richman, *supra* note 43 (suggesting that these developments represent a swing of the pendulum back to contract after the status oriented common law and legislative trends of the late twentieth century).

In *Woolley v. Hoffman-La Roche*, the landmark case recognizing the contractual enforceability of a personnel manual, the New Jersey Supreme Court describes job security as “the single most important objective of the workforce . . . for without that all other benefits [wages, promotions, conditions of work] are vulnerable.”<sup>45</sup> I do not wish to suggest that job security is unimportant. The financial pain and the emotional loss workers suffer upon termination is well documented and keenly felt.<sup>46</sup> However, I believe that the practical value of job security as a contract right, given how it has been understood by both courts and scholars, is greatly overstated, especially in light of the changing expectations of both employers and workers in the current economy. To truly help workers going forward, it is incumbent on advocates and scholars not merely to protect jobs, but to devise new and creative ways to assist workers in the inevitable situation of job loss.

#### A. New Expectations, New Terms of Employment

There is no doubt that the kind of employer assurances and company practices that gave rise to decisions like *Pugh v. See's Candies* and *Shebar v. Sanyo* are increasingly rare.<sup>47</sup> Consequently, fewer and fewer workers in today's economy are in the position to take advantage of the theories of employment security restated in proposed chapter 2. At the same time, employers' declining commitment to long term job security has necessarily recalibrated workers' expectations. To be sure, career models of employment persist in some industries and employers of all stripes continue to shoulder some degree of responsibility for their workers' welfare and security.<sup>48</sup> But for growing numbers of workers, no particular job is considered a permanent arrangement. They have come to expect regular layoffs and corporate reorganizations when markets decline, and similarly foresee leveraging their current employment situation to pursue

45. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1266 (N.J. 1985).

46. See, e.g., Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 5 n.13 (1993) (collecting data on the health effects of worker dislocation).

47. The plaintiff in *Pugh v. See's Candies* had been employed by the defendant for thirty-two years, during which time he worked his way up from dishwasher to vice-president. 171 Cal. Rptr. 917, 918 (App. 1981). The plaintiff in *Shebar v. Sanyo* was told that “he had a job for the rest of his life, and that Sanyo had never fired, and never intended to fire, a corporate employee whose rank was manager or above” and later that “he was ‘married’ to Sanyo and no divorce was allowed.” 544 A.2d 377, 380 (N.J. 1988).

48. See Sanford M. Jacoby, Kenneth M. Piper Lecture: *Melting Into Air? Downsizing, Job Stability, and The Future of Work*, 76 CHI.-KENT L. REV. 1195, 1219-20 (2000) (asserting that despite modest declines in job tenure in the 1990s, employers continue to offer career-type work that offered benefits, training and the prospect of continuity).

other opportunities during economic bubbles.<sup>49</sup>

Much has been written about the new social contract that governs these work relationships.<sup>50</sup> But we have yet to fully develop a theory of enforceable rights to support it, and have done even less toward integrating what we have theorized with actual contract doctrine. The indefinite just cause contract was a judicial translation of the old social contract of employment into a legally enforceable right.<sup>51</sup> I am not sure that it ever worked very well for that situation, but one would expect it to be even less effective in a time when economic terminations are proliferating and notions of employer obligation are significantly eroding.

*Levitan*, the previously discussed commuter case, is a good example of this. I think one of the reasons that claim failed was that it was litigated through the lens of job security. The employer's oral agreement to allow Levitan to commute from Indiana was spun as a limitation on the employer's right to terminate when it should have been recognized by the court as an affirmative obligation, a term of employment in its own right. It is fairly clear in that case that neither side had developed expectations of long term employment. The whole reason Levitan was commuting was to test the waters before committing more seriously to the job. The issue of job security, in the traditional sense of a contractual right to for-cause-only termination, was not on the table.

What we need going forward is a contract theory of worker protection that focuses on enabling continued labor market participation rather than preserving particular jobs. Such a theory would allow courts to feel they are respecting managerial prerogative to terminate, but explicitly and expansively compensate workers for the losses inherent in transition. How this can be done doctrinally has yet to be discovered. One possibility that I

49. See Edwin R. Render, *How Would Today's Employees Fare in a Recession?*, 4 U. PA. J. LAB. & EMP. L. 37, 48-49 (2001) (noting that "young people today are advised to prepare for many job changes over their working lives" and are more likely to voluntarily leave their jobs during their employer's hard economic times).

50. See, e.g., CAPPELLI, *supra* note 10, at 17-48 (depicting the "market-based employment contract" as one that creates a new set of individual obligations for employees in today's "new deal" labor market, including personal skill development and personal accountability for one's own career, and which decreases employer responsibility to provide reciprocal benefits, such as job security and predictable promotions); STONE, *supra* note 10, at 110-14 (defining the "new employment relationship" as one that includes employability security, general training, upskilling, networking opportunities, microlevel job control, market-based pay, and dispute resolution procedures); Arnov-Richman, *supra* note 10, at 1200-02 (noting that employer and employee expectations of their relationships have changed under the new model of employment relationships).

51. See Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 750-51 (suggesting that courts recognizing the enforceability of job security promises in personnel manuals were engaged in the legitimate use of contract doctrine to conform to the internal labor market practices adopted by firms in the post-war era).

have advocated for is the reinvigoration of the theory of good faith, deriving from it a contractual right to notice of termination, and more importantly, reasonable severance pay absent notice, which would underwrite the inevitable transition costs of job loss.<sup>52</sup>

This is not the place to fully conceptualize such theories.<sup>53</sup> The point rather is that there are any number of ways that the common law might still evolve, yielding theories of worker protection that are more judicially palatable in the current economy, and certainly more factually accurate, than any effort to expand the known tracks for establishing long-term job security contracts. The proposed *Restatement* simply does not speak to the possibility of such approaches. It does nothing to advance such ideas, but it does not foreclose them either.<sup>54</sup> From this perspective, the proposed *Restatement* is an unnecessary, perhaps even unfortunate, tangent in the discourse over worker rights, but not an obstacle to creative use of the law

52. Such an understanding would be consistent with how courts interpret good faith in indefinite contracts outside the employment context as codified in the Uniform Commercial Code. *See* *Pharo Distrib. Co. v. Stahl*, 782 S.W.2d 635, 638 (Ky. App. 1989) (explaining that although the right to terminate is inherent in an at-will contract, the failure to provide reasonable notice of termination constitutes a breach); U.C.C. § 2-309(3) (“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party.”). There is limited support for such an approach in employment relationships under the law of Alaska. *See, e.g., Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1136-37 (Alaska 1989) (suggesting that failure to provide reasonable notice of drug test requirement to incumbent employees would violate implied duty of good faith). As both the Working Group and the ALI drafters acknowledge, reasonable notice and/or severance pay is required upon termination in a number of foreign jurisdictions. *See, e.g., 29 P.R. LAWS ANN. tit. 29, § 185a* (2006) (mandating severance of at least two month’s pay plus one week per year of severance upon termination without cause); Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 AM. BUS. L.J. 205, 207 (2004) (explicating the “well-established principle in Canadian common law that there is a contractual obligation implied in indefinite-term employment contracts that an employer must provide reasonable notice of termination”); *see generally* Finkin, *Second Thoughts*, *supra* note 2, at 303 (noting viability of alternative systems not seriously considered by the proposed *Restatement*, such as in Puerto Rico and the Virgin Islands, which treat wrongful discharge “in terms of scheduled compensation”).

53. I pursue this analysis extensively in a forthcoming article, Rachel Arnow-Richman, *Fair Termination in an At-Will World* (2009) (unpublished manuscript, on file with author).

54. Consistent with its overriding emphasis on just cause exceptions to at-will, proposed chapter 2 says almost nothing about notice of termination or severance pay. Thus, in setting out its admittedly narrow understanding of the implied duty of good faith, section 2.06 merely describes two *reasons* for termination that the implied duty constrains. It recognizes a breach only in the case of a termination based on an employee’s performance of a contractual obligation or a termination to deprive an employee of a contractual benefit, see RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06, both of which identify prohibited *causes* for termination. Indeed, in commenting on how the implied duty of good faith relates to the rest of the employment agreement, proposed chapter 2 explains, “[T]he implied covenant must be understood so as to be consistent with the at-will nature of the relationship – namely . . . either party may terminate the relationship *without cause*.” *Id.* § 2.06 cmt. b (emphasis added). A severance and/or notice requirement is fully consistent with such a view. Indeed, proposed chapter 2 significantly declines to incorporate in its statement of the at-will default rule the notion that an employer can terminate a worker at any time, with or without notice, as some jurisdictions have. *See id.* § 2.01.

to pursue meaningful reform.

### *B. Reclaiming the Debate*

If the potential for positive legal change persists, the next question is how to marshal it. A first step might be to set loose the collective wisdom and energy of those contributing to this Symposium from the task of responding to the proposed *Restatement*. Surely the Working Group is correct that there is much to be criticized here, and as scholars and advocates it is incumbent on us to articulate and memorialize those objections. But there is also a significant limitation to the ends that can be wrought through that process. The proposed *Restatement* is what it is – a restatement of existing law. It cannot legitimately be criticized for failing to imagine more novel theories of worker protection.<sup>55</sup> That is not its project; but it can be ours.

In taking up that task, we might begin with a hard look at the stakes of the doctrinal battles at issue in proposed chapter 2, lest we allow them to frame the limits of the debate. This includes assessing whether such battles can be won and the risks that they pose. For instance, there would appear to be little value in expending political capital over whether employment at will is in fact the default rule, a decided point, regardless of the number and scope of exceptions.<sup>56</sup> Arguing for the incorporation of exceptions into the rule *in toto*, I believe, is a semantic exercise that at best has only symbolic value.

In other areas, there may be a more legitimate argument to be made about the governing law, but relatively little to be gained by advocating for what has been accepted as the pro-worker version of a disputed rule. Handbook modification is an example. The question of whether an employer can unilaterally alter a contractually enforceable personnel manual has yielded a genuine jurisdictional split, and only a minority of

55. Indeed, it is for that reason that many have argued that such a project is ill conceived. See Finkin, *Second Thoughts*, *supra* note 2, at 280 (objecting to the ALI *Restatement* project as a vehicle for reform on grounds that “what [is] needed [is] not presumably self-evident blackletter pronouncements, but persuasive arguments in support of change and the presentation of analytically powerful alternatives.”); Finkin, *Law Reform*, *supra*, note 4, at 407 (suggesting that the “better course would provide the intellectual framework for bold reform where needed”).

56. The Working Group critique argues that “at-will may not be an accurate statement of the operative legal rule in part because the many exceptions so dominate the jurisprudence that there have rarely been recent judicial decisions completely non-suited a productive employee who has been discharged in circumstances that seem unfair.” Finkin et al., *supra* note 1, at 101. This seems a slim reed upon which to base a conclusion that “a much more accurate statement of the state of the law is that at-will was the dominant rule, rather than that it is the dominant operative rule.” *Id.* What is more, proposed section 2.01 and the Working Group critique are not inconsistent on this point. The former states that the at-will default applies “unless an agreement, statute or other law or public policy limits the right to terminate.” See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01.

states have weighed in.<sup>57</sup> Yet how much do workers stand to gain from the adoption of a rule requiring the employer to provide separate consideration in addition to mere notice of a change in handbook terms? It is easy enough for the employer to grant the worker an extra vacation day, or some other peppercorn, in satisfaction of that requirement. Indeed, that is what any employer with access to decent employment counsel is doing anyway, notwithstanding the growing judicial consensus in favor of unilateral modification. In the meantime, the critique of chapter 2 takes no position on the critical open question inherent in the pro-management rule – what constitutes reasonable notice? We might ultimately do more for workers by urging adoption of a meaningful notice period than advocating for what is fast becoming the minority position.<sup>58</sup>

Finally, we should take stock of the big picture. The legal end of all of the theories espoused in proposed chapter 2, and the one which the Working Group would make more accessible, is the recognition of an indefinite just cause contract. Just how much job security does such a contract grant workers?

It is well established that an indefinite just cause contract limits employer discretion only insofar as the employer acts arbitrarily.<sup>59</sup> While

57. Compare *Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999) with *Asmus v. Pac. Bell*, 999 P.2d 71 (Cal. 2000).

58. Proposed Section 2.05 takes the position that notice must be “reasonably calculated to alert employees to any modification or rescission” of terms and will ordinarily be met “when the manner of giving notice is the same [as] the manner in which the original statement was provided.” See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 cmt. d. This would seemingly permit an employer to give as little as a day’s notice so long as it did so conspicuously. A better reasoned approach, and one more accommodating of workers, would require notice sufficient to allow objecting workers to find alternative employment. This would be consistent with the commercial law concept of reasonable notice, the purpose of which is to enable the non-terminating party to prepare for the end of the relationship. See *Pharo Distrib. v. Stahl*, 782 S.W.2d 635, 638 (Ky. App. 1989) (“The obvious object of the reasonable notice requirement is to afford the party losing the contract an opportunity to make appropriate arrangement in lieu thereof by dispersing inventory, adjusting work force, exploring probable alternatives, and in general, ‘getting his house in order’ to proceed in absence of the former relationship.”). It would also make more realistic the premise that workers are free to quit in response to adverse terms of employment.

59. See, e.g., *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 948 P.2d 412, 422 (Cal. 1998) (defining cause as “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, *unrelated to business needs or goals*, or pretextual”) (emphasis added). Proposed chapter 2 incorporates this definition. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 cmt. h(ii) (commenting that in the case of an indefinite-term agreement “the reasonable presumption is that the parties intended not only that the employee’s misconduct, malfeasance, inability to perform the work . . . may constitute cause for termination, *but also*. . . *significant changes in the economic circumstances of the employer*.”) (emphasis added). The Working Group critique questions the support offered by the proposed *Restatement* in distinguishing between the narrower definition of cause (performance-based only) applied in the case of a definite term contract and the broader definition (including economic-based termination) applied in the case of an indefinite term contract. See *Finkin et al.*, *supra* note 1, at 118-19. Indeed, the illustration offered by proposed chapter 2 of an indefinite term contract permitting economic-based terminations is factually inapposite. See RESTATEMENT (THIRD) OF

arbitrary terminations are certainly worthy of condemnation, they are hardly the most significant problem facing contemporary workers. No good data exists from which to determine how often arbitrary termination occurs, though a widely cited source estimates that about 150,000 workers per year are fired without discernable cause.<sup>60</sup> If that figure is even remotely accurate, arbitrary terminations are far from the most ubiquitous form of non-performance based terminations. In just the first month of 2009, payroll employment fell by almost 600,000 jobs,<sup>61</sup> of which nearly 238,000 alone (more than the number of estimated arbitrary discharges per year) were the result of mass layoffs.<sup>62</sup> These workers feel the pain as much as any other terminated worker and stand to gain nothing if the sentiments of the Working Group prevail on any of the contested issues embraced by proposed chapter 2.

Aspiring to make implied contract claims more accessible to workers remains a laudable goal. But we are engaged in “a battle of inches.”<sup>63</sup> There are far bigger fish to fry.

#### IV. CONCLUSION

In short, much work lies ahead. Scholars and advocates contributing to this Symposium are engaged in a critical but modest portion of the large and lofty task of protecting American workers. We must take care to acknowledge this in setting down our objections to the proposed *Restatement*, lest the claim that a *Restatement* will chill broader

EMPLOYMENT LAW § 2.03 illus. 9 (involving a promise by an employer to retain a worker permanently unless he “screwed up badly”). However, it is clear that the Working Group critique is concerned primarily with limiting employers’ ability to terminate for no reason or a morally reprehensible reason. See Finkin et al., *supra* note 1, at 106. (“Circumstances of economic downturn, reductions in force, and business closings are cause . . . [But will the at-will rule] maintain in those cases where an employee is discharged without justification, not even the accepted just cause of the need for a reduction in force. Will the employer prerogative of being able to discharge a productive person without justification, other than the employer’s ability to demonstrate power over the individual continue to be seen as contributing to stable positive growth of the economy?”).

60. See Jack Steiber, *Recent Developments in Employment-at-Will*, 36 LAB. L. J. 557, 558 (1985).

61. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: JANUARY 2009, available at <[http://www.bls.gov/news.release/archives/empsit\\_02062009.pdf](http://www.bls.gov/news.release/archives/empsit_02062009.pdf)> (reporting that in January 2009 employers cut nonfarm payrolls by 598,000 jobs, the most for a single month since 1974).

62. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, MASS LAYOFF STATISTICS: JANUARY 2009, available at <[http://www.bls.gov/news.release/archives/mmls\\_02252009.pdf](http://www.bls.gov/news.release/archives/mmls_02252009.pdf)>. The Bureau of Labor Statistics defines a “mass layoff” as one yielding at least fifty unemployment claims in a consecutive five week period. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, MASS LAYOFF STATISTICS, FREQUENTLY ASKED QUESTIONS, available at <<http://www.bls.gov/mls/mlsfaqs.htm>>.

63. Cappelli, *supra* note 12, at 727.

engagement with the law become a self-fulfilling prophecy.<sup>64</sup>

The task of restating the law is relatively circumscribed; the task of those responding to a restatement is self-defined. By taking issue with the letter and verse of what proposed chapter 2 sets forth, we implicitly buy in to the way in which that document frames the debate. The goal of safeguarding workers' livelihood must not be lost in the dichotomous rhetoric that twenty-five years of judicial common law has wrought – at will verses just cause, implied contract verses default terms, separate consideration verses unilateral modification. It cannot be limited to accepting the lesser evil from between two largely ineffectual rules. It should be about devising better ways altogether to leverage the common law on behalf of workers.<sup>65</sup>

This requires that we act affirmatively. By necessity those contributing to this Symposium are engaged in a defensive undertaking, albeit an important one. We should not let that posture consume our energy for more positively focused projects that can expand the horizon of worker protection – supporting impact litigation that triumphs novel theories of common law protection; lobbying for the expansion of the Worker Adjustment & Retraining Notification (WARN) Act, or new legislation to protect laid off workers;<sup>66</sup> or drafting a revised Model Employment Termination Act (META), one that establishes a default rule requiring employers to provide meaningful notice or severance upon termination unless they “opt in” to a just cause regime.<sup>67</sup> Such projects, would be more

64. See Finkin, *Law Reform*, *supra* note 4, at 415 (arguing that the *Restatement* project “distracts” from a “sustained, serious engagement with how [U.S. law] plays out in the employment relationship of the next several decades”).

65. See Finkin, *Second Thoughts*, *supra* note 2, at 303 (arguing that the “whole thrust of the [ALI’s *Restatement*] project is to maintain a malfunctioning system” that imposes high transaction costs on employers and offers limited benefits to workers).

66. The WARN Act, 29 U.S.C. §§ 2101-09 (2000), requires large employers to provide sixty days advance notice to workers who will be affected by a plant closing or mass layoff, defined as more than fifty employees or one-third of the workforce. *See id.* §§ 2102, 2101(3). The Act is generally perceived as being too narrow to meaningfully help workers and a wide number of expansions have been recommended. *See, e.g.*, McHugh, *supra* note 45, at 64-70 (proposing longer notice period, expanded coverage, administrative enforcement and enhanced remedies, among other improvements).

67. META was proposed by the National Conference of Commissioners on Uniform State Laws in 1991 as a compromise between employee and business interests. *See* Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 370 (1994) (“The premise of [META] is that both employees and employers have valid, if sometimes competing, interests . . . Employees are entitled to freedom from arbitrary treatment . . . Employers are entitled to maintain efficient and productive operations.”) The thrust of the model law is to grant workers protection against termination absent good cause, subject to important limits on remedies. *See* MODEL EMPLOYMENT TERMINATION ACT §§ 3(a), 7 (1991). However, in a less noted provision, META permits employers to “buy-out” of the default good cause regime by agreeing in writing to provide one month’s severance per year of service (up to thirty months pay) upon termination for any reason other than willful misconduct. *See id.* § 4(c). For an article arguing in favor of the adoption of mandatory severance statute or model law, see Daniel Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111 (2006).



effective, more fruitful, and ultimately more fun.