

A CONFERENCE ON THE AMERICAN LAW INSTITUTE'S  
PROPOSED RESTATEMENT OF EMPLOYMENT LAW

BY  
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I. INTRODUCTION

In this volume, the *Employee Rights and Employment Policy Journal* presents the written reports of three working committees organized by the

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Labor Law Group on the American Law Institute's Proposed *Restatement (Third) of Employment Law*,<sup>1</sup> along with various written comments on and responses to these reports. These reports and comments were originally presented on February 7, 2009, at a conference on the American Law Institute's Proposed *Restatement (Third) of Employment Law* held at the University of California – Hastings School of Law and co-hosted by the School of Law and the Labor Law Group.<sup>2</sup> As the Chair of the Labor Law Group, it falls to me to provide the readers with some context on the working committees and their reports and the conduct of the conference. In this introductory essay, I will present a brief discussion of how the Labor Law Group came to appoint the working committees and undertake this conference with the law school, what we understand the American Law Institute (ALI) to be attempting to accomplish with its *Restatement*, what we are attempting to accomplish with the papers in this conference, and a brief summary of the working committee reports and conference comments on the proposed *Restatement*.

## II. HOW DID WE COME TO THIS POINT?

### WHY DID THE LABOR LAW GROUP AND HASTINGS LAW SCHOOL PLAN A CONFERENCE ON THE ALI'S PROPOSED RESTATEMENT?

At its 2000 annual meeting, the ALI's Council voted that the Institute

1. In particular, the comments were made on the RESTATEMENT (THIRD) OF EMPLOYMENT LAW (Council Draft No. 3, 2008).

2. The Labor Law Group is a non-profit trust dedicated to the production of instructional materials and scholarship on labor and employment law. The trust was originally formed after a national meeting of labor and employment law scholars in Ann Arbor Michigan in 1946 when the Group undertook its first project – a labor law case book. The Group currently has fifty-seven members, predominantly drawn from the faculties of U.S. Law schools, but also including members from law schools in Canada, Europe and Asia. These members currently have eight books in print that are Group projects: JAMES B. ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY (2007); ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (7th ed. 2004); LAURA J. COOPER ET AL., ADR IN THE WORKPLACE (2d ed. 2005); KENNETH DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE (2009); MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (3d ed. 2002); JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT (2003); PEGGIE R. SMITH ET AL., PRINCIPLES OF EMPLOYMENT LAW (2009); LABOR LAW STORIES (Laura J. Cooper & Catherine L. Fisk eds., 2004). The royalties from these books are paid directly to the Group which uses these proceeds to fund future meetings of the Group and Group projects. In addition to books, the Group also undertakes other projects related to labor and employment law instruction or scholarship. For example, the Group recently hosted a symposium on the problems of low-wage workers with the University of Minnesota Law Review, 92 MINN. L. REV. 1289-1538 (2008), and currently has a joint project with the Labor and Employment Law Section of the ABA to develop materials for "capstone" courses in labor and employment law. Co-hosting this conference on the proposed *Restatement (Third) of Employment Law* is another Group project. A brief history of the Group and a list of current Group members is attached in Appendix 1. The Group's website can be found at <<http://www.law.tulane.edu/tlscenters/LaborLawGroup/index.aspx?id=6724>>.

should begin work on a restatement of employment law and appointed four Reporters: Professors Samuel Estreicher, Michael Harper, Christine Jolls, and Stuart Schwab. Sometime after work began on the project, Christine Jolls resigned as a reporter, Sam Estreicher was elevated to Chief Reporter, and two other reporters were added, Professors Matthew Bodie and Andrew Morriss. After several years of work on the project, the Reporters presented their first draft of the first three chapters of the *Restatement* to the ALI Council at its 2006 annual meeting. Because some Labor Law Group members are also ALI members, this draft was made available to them. Having some concerns about the draft and realizing the potential importance of an ALI *Restatement of Employment Law* as an authoritative statement of the law, these members suggested that the Labor Law Group discuss the proposed *Restatement* at its June 2006 meeting in Saratoga, New York. Several of the Reporters were invited to attend this meeting at the Group's expense and Michael Harper did attend to discuss the proposed *Restatement* on a panel with Professors Matthew Finkin and Pauline Kim. Although Professor Harper was his usual, witty, well educated, and gregarious self and endeavored to explain and defend the *Restatement* draft, a majority of the members of the Labor Law Group still had serious concerns about the adequacy of the *Restatement* draft and/or the wisdom of undertaking a *Restatement of Employment Law* while the subject was in such flux in the courts. As a result, at the business portion of the Labor Law Groups' 2006 meeting, our membership voted to appoint a committee chaired by Matthew Finkin, to draft a petition to the ALI, expressing the concerns of the Group members and of other employment law scholars wishing to join in this statement.

The Petition Committee of the Labor Law Group spent the next few months drafting a petition and circulating it among our members and some close colleagues in labor and employment law.<sup>3</sup> On September 5, 2007, I sent this petition, signed by sixty-two professors of labor and employment law, to the ALI's Director Lance Liebman, asking that it be circulated to the ALI Council. Professor Liebman responded with a cordial phone call and letter assuring me the petition would be circulated. Despite our petition, the ALI Council unanimously approved the second draft of the proposed *Restatement* at its October 2007 meeting, and sent the proposed *Restatement* on for approval by the full membership of the ALI at its July 2008 annual meeting. Unsatisfied that our concerns had been properly addressed by the ALI Council, the Executive Committee of the Labor Law Group decided to circulate our petition to the membership of the ALI and

3. A copy of this petition and its list of signatories are attached as Appendix 2.

to urge our members who were ALI members to raise their concerns at the ALI's annual meeting. About May 20, 2008, I circulated the Labor Law Group petition to the entire membership of the ALI by e-mail and hard mail. At the July 2008 annual meeting of the ALI there was enough discussion and concern about the second draft of the proposed *Restatement* that final approval was put off until the May 2009 annual meeting. A proposal at the ALI's 2008 annual meeting to include the Labor Law Group in the drafting of the proposed *Restatement* was rejected. At its October 2008 meeting, the ALI Council approved the third draft of the proposed *Restatement* dated September 24, 2008. Nevertheless, the one year postponement in final approval of the proposed *Restatement* by the ALI membership gave the Labor Law Group a brief opportunity for our members to fully express their concerns about the proposed *Restatement*.

Shortly after the ALI's 2008 Annual Meeting, the Executive Committee of the Labor Law Group directed me, as the Chair of the Labor Law Group, to appoint working committees to examine each of the three chapters in the most recent draft of the ALI's proposed *Restatement*, and to plan a conference for the presentation and discussion of the committees' findings. Professor Martin Malin offered to seek publication of the conference proceedings in the *Employee Rights and Employment Policy Journal*. Following this charge, I appointed Professor Dennis Nolan Chair of the Working Committee on the Proposed Chapter 1, "The Definition of Employee," Professor Matthew Finkin Chair of the Working Committee on the Proposed Chapter 2, "Employment Contracts: Termination," and Professors Joseph Grodin and Paul Secunda Co-Chairs of the Working Committee on the Proposed Chapter 4, "The Tort of Wrongful Discipline in Violation of Public Policy." In conjunction with these committee Chairs, I then appointed the members of each working committee from among the members of the academy who work in labor and employment law, including both members and non-members of the Labor Law Group.<sup>4</sup> I also sought a conference venue in California, since a common complaint about

4. The Working Committee on Chapter 1 "The Definition of Employee" consisted of: Dennis Nolan, University of South Carolina, Chair; Joseph Slater, University of Toledo and Theodore J. St. Antoine, University of Michigan, section 1.01; Alvin Goldman, University of Kentucky, sections 1.02 through 1.04. The working Committee for Chapter 2 "Employment Contracts: Termination" consisted of: Matthew Finkin, University of Illinois, Chair and section 2.06; Lea VanderVelde, University of Iowa, section 2.01; William R. Corbett, Louisiana State University, sections 2.02 and 2.03; Stephen Befort, University of Minnesota, sections 2.04 and 2.05; with additional commentary from James Brudney, Ohio State University. The working committee on Chapter 4 "The Tort of Wrongful Discipline in Violation of Public Policy" consisted of: Joseph Grodin, University of California-Hastings, and Paul Secunda, Marquette University, Co-Chairs and section 4.03; Pauline Kim, Washington University at St Louis, and Catherine Fisk, UC-Irvine, section 4.01; Roberto Corrada, University of Denver, and Richard Bales, Northern Kentucky University, section 4.02.

the proposed *Restatement* was that it did not properly account for California precedents, and found that Professor Grodin and Dean Nell Jessup Newton of the University of California Hastings School of Law were more than happy to work with the Labor Law Group in hosting the conference. Once the conference arrangements were set, I invited all of the *Restatement* Reporters to attend the conference, at the expense of the Labor Law Group, and respond to the Committee reports. All declined. Subsequently, I furnished the Reporters with copies of the Working Committee reports and invited them to contribute to the published proceedings. All expressed their appreciation for the comments. None provided a written contribution to the symposium. I also invited all of the ALI's advisors to the proposed *Restatement* to attend the conference at the expense of the Labor Law Group. Six of the ALI's advisors on the project accepted this invitation and attended and participated in the conference.

### III. WHAT IS THE ALI ATTEMPTING TO DO WITH ITS RESTATEMENT?

To evaluate the ALI's proposed *Restatement*, it is first necessary to understand what it is that the ALI is attempting to achieve through its Restatements. It is only after we have an understanding of the ALI's objectives that we can evaluate whether they have succeeded in meeting their goals. The ALI's documents set forth a pretty clear picture of the ALI's objectives in Restatement projects.

Through its Restatements, the ALI is trying to present an informed consensus on what the law in the examined area is, or should be, that simplifies and clarifies existing case law, and that is both internally consistent and consistent with the ALI's other restatements.<sup>5</sup> The ALI's 1923 Certificate of Incorporation states that "[t]he particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs."<sup>6</sup> Consistent with these intentions, the ALI's *Reporters' Handbook* states, "Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court,"<sup>7</sup> and the Institute's web page on the proposed *Restatement (Third) of Employment Law* states that the project's

5. THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 2 (2005), <<http://www.ali.org/doc/ALIStyleManual.pdf>> (last visited Mar. 7, 2009) [hereinafter ALI HANDBOOK].

6. AMERICAN LAW INSTITUTE, CERTIFICATE OF INCORPORATION 1 (1923), <<http://www.ali.org/doc/charter.pdf>> (last visited Mar. 7, 2009).

7. ALI HANDBOOK, *supra* note 5, at 2.

purpose is to “clarify and simplify the area of employment law.”<sup>8</sup> Although some may think consistency is the hobgoblin of small minds, the ALI thinks consistency is important enough to dedicate an entire paragraph to the subject in the introduction of its *Reporters’ Handbook*.<sup>9</sup> “It is important that Institute projects be not only internally consistent but consistent with each other.”<sup>10</sup> The ALI represents that the intended audience for its reports is “the legal community as a whole,”<sup>11</sup> while Restatements are particularly aimed at “courts and others applying the existing law.”<sup>12</sup>

The tension between the positive and normative restatement of the law is discussed in several places in the ALI’s *Reporters’ Handbook*. In its opening paragraphs, the *Handbook* states that ALI reports are to “explicate what the law is, or should be.”<sup>13</sup> In discussing Restatements, the *Handbook* cites *Webster’s Third International Dictionary* for the proposition that to “restate” means “to state again *or* in a new form”<sup>14</sup> and suggests that there are “two impulses” at the heart of a Restatement project, “the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.”<sup>15</sup> The ALI’s adopted role in normatively stating what the law *should be* is controversial, even among ALI members. In discussing the appropriate role for *Restatement* at the conference, Howard C. Hay persuasively argued that the primary value of Restatements was to clarify the current state of the law, providing predictability of results for those who had to make real life decisions under the relevant law.<sup>16</sup> In Mr. Hay’s view Reporters should endeavor to avoid normative pronouncements and merely report when there were competing views on the law among the various jurisdictions. The ALI’s *Handbook* provides a basis for limiting the normative role of the Reporters and ALI in drafting a Restatement to that of a “common-law court, attentive to respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a

8. THE AMERICAN LAW INSTITUTE, CURRENT PROJECTS, RESTATEMENT THIRD, EMPLOYMENT LAW, <[http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=11](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=11)> (last visited Mar. 7, 2009).

9. ALI HANDBOOK, *supra* note 5, at 2.

10. *Id.*

11. *Id.* at 1.

12. *Id.* at 4; THE AMERICAN LAW INSTITUTE, PROJECTS, OVERVIEW, <<http://www.ali.org/index.cfm?fuseaction=projects.main>> (last visited Mar. 7, 2009).

13. ALI HANDBOOK, *supra* note 5, at 1.

14. *Id.* at 4 (emphasis added by ALI, internal quotation marks omitted).

15. *Id.*

16. Labor Law Group, Conference on the American Law Institute’s Proposed Restatement of Employment Law, Video Disc (Feb. 7, 2009) [hereinafter *Conference Recording*], Comments of Howard C. Hay. A copy of the video disc is on file with the author.

whole.”<sup>17</sup> However, it is evident that some of the ALI’s past Restatements, and perhaps even the proposed *Restatement (Third) of Employment Law*, go beyond this fairly limited role in stating what the law should be.<sup>18</sup>

Another daunting hurdle in drafting a successful restatement is producing a consensus on the final draft. While the Reporters are producing drafts for the ALI, they represent merely reports *to* the ALI. However, once one of those reports is adopted by the ALI’s Council and its membership, it becomes a report *of* the ALI and an expression of its “official voice.”<sup>19</sup> As stated in the *Reporters’ Handbook*:

The official voice toward which the Institute aspires through its membership is that of an informed consensus of all components of the profession – practitioners, judges, and scholars – on what the law is, or should be, for a given subject. It aims to speak with an authority that transcends that of any individual, no matter how expert, and any segment of the profession, standing alone.<sup>20</sup>

Although not expressly stated by the ALI, it would seem to me that consensus is important to the ALI not only to insure the quality of its reports, but also to preserve their authority. With no legislative or constitutional mandate, the authority of the ALI’s Restatements, especially on normative issues, can derive only from the quality of its work as reflected in the agreement it generates among the members of the various components of the profession.

In reading over the ALI’s materials, I will admit more than a little sympathy for the Reporters on the proposed *Restatement (Third) of Employment Law*. The employment relationship is one of the fundamental building blocks of modern society with implications for everything from respect for individual autonomy and dignity to the distribution of social stature, wealth, and political power.<sup>21</sup> It is not by chance that many of the most important controversies concerning the interpretation of our Constitution and the organization of our society have revolved around the employment relationship.<sup>22</sup> Moreover, at this point in our history the

17. ALI HANDBOOK, *supra* note 5, at 5.

18. See, e.g., Robert M. Connallon, *An Integrative Alternative for America’s Privacy Torts*, 38 GOLDEN GATE U. L. REV. 71, 80-82 (discussing the ossification of privacy tort law in the face of the authority of the *Restatement (Second) of Torts*).

19. ALI HANDBOOK, *supra* note 5, at 1.

20. *Id.* at 2.

21. JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY AND VOICE* 1-2 (2004); WANJIRU NJOYA, *PROPERTY IN WORK: THE EMPLOYMENT RELATIONSHIP IN THE ANGLO-AMERICAN FIRM* 83 (2007).

22. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act against due process and commerce clause claims finding that the act constitutionally promotes the employees’ fundamental right to organize); *Lochner v. N.Y.*, 198 U.S. 45, 57-60 (1905) (striking down a New York statute limiting bakers’ work hours under the theory that the

employment relationship and employment law are in a state of constant change as our economy transitions from an industrial economy based on long-term employment relationships to a global information economy based on more transitory employment relationships.<sup>23</sup> It would seem an impossible task to undertake to draft a *consensus* restatement of the law governing such an important, controversial and rapidly changing relationship.

It would seem doubly impossible to draft a consensus Restatement of employment law if the reporters were largely identified with the interests of one side or other in the employment relationship--no matter how talented those reporters were as scholars or lawyers. The apparent lack of balance in perspective among the current ALI reporters on the proposed Restatement was a recurring subject of discussion at the Hastings conference. Sam Estreicher is respected in the academy as a skilled and consistent defender of management interests in the academic debate. The fact that he is currently retained "of counsel" to the labor and employment practices of the management firm of Jones Day is seen as consistent with these views.<sup>24</sup> Professor Morriss is also widely identified as one of the strongest defenders of the employment at-will doctrine.<sup>25</sup> Because of over-commitment to other duties, past relationship or a relative lack of experience, none of the other reporters currently working on the project are seen as an effective counter-weight to Professor Estreicher's often strong views on employment law. Concerns in this regard were only heightened by the resignation of Professor Christine Jolls from the project, since among all of the past and present reporters she appeared to have a view point that was most divergent from that of Professor Estreicher. The desire and ability to persuasively present employer perspectives in the academic debate is a laudable and desirable attribute. However, many participants at the conference worried that, absent more diversity of perspective among the reporters on the proposed Restatement, it would be impossible for the reporters to draft an adequate restatement of employment law.

statute infringed on the employers' and employees' constitutional due process "liberty" to contract for longer work hours).

23. See Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 1-2 (2001).

24. <<http://www.jonesday.com/sestreicher/>>.

25. See, Andrew P. Morriss, *Bad Data, Bad Economics & Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEXAS L. REV. 1901 (1996).



#### IV. WHAT ARE WE TRYING TO DO IN EVALUATING THE PROPOSED RESTATEMENT THROUGH THE WORK OF THESE COMMITTEES AND THIS CONFERENCE?

At the outset, I want to make it clear that our purpose in this project is *not* to make personal attacks on either the skills or integrity of the Reporters. In the process of distributing the petition and planning the conference, I have occasionally received e-mails from ALI members asking me “Why are you doing this to Sam Estreicher, why are you attacking him?” Nothing could be further from our intent. All of the ALI’s Reporters on this project are well respected within the community of labor and employment law scholars and even thought of with affection. I have known and respected Sam for years, having learned from his scholarship and presentations and being invited to present my own work at the colloquium for his Center for Labor and Employment Law. I have known, admired, and liked Stu Schwab even longer, having sat next to him in my labor economics class as a graduate student at Michigan.<sup>26</sup> The community of labor and employment law scholars is small enough that almost all of us have similar connections with the Reporters.<sup>27</sup> It is never fun to have one’s work scrutinized, especially by a room full of scholars, but a project as important as an *ALI Restatement* that can be cited as an authoritative summary of the law by parties and courts is a project that invites, even requires scrutiny. It is not enough that the ALI’s Reporters on this project are great scholars and wonderful people, the question is whether they have succeeded in simplifying and clarifying employment law by drafting a consistent *Restatement* reflecting a consensus on what this law is or should be.

Our purpose in this conference and these reports is to take the ALI’s aspirations for a *Restatement (Third) of Employment Law* seriously and examine how well they have succeeded. By the ALI’s own design the proposed *Restatement (Third) of Employment Law* is a scholarly undertaking and subject to scholarly analysis on the basis of the ALI’s own announced objectives. Have the Reporters produced a draft that simplifies

26. I have known both Stu and his wife Norma so long, I knew them before they had any children – eight children ago.

27. I have been so impressed with Mike Harper as a person and scholar, I invited him to present at the symposium celebrating my appointment to an endowed Chair. Andy Morriss is a co-investigator of mine on an empirical project on legal scholarship and just last year was one of my biggest supporters in trying to get me to move to the Illinois faculty. Matthew Bodie is somewhat newer to the legal academy, but I have seen him at many conferences and have always been impressed with his intelligence and enthusiasm, and his interest in my comments on his scholarship. It would be impossible not to admire and like such bright and welcoming scholars.

and clarifies the principles of employment law by reflecting an informed consensus on what those principles are, or should be, in a way that is both internally consistent and consistent with the ALI's other Restatements of law?

## V. A SUMMARY OF THE FINDINGS OF THE REPORTS AND CONFERENCE

### A. *On the Project of a Restatement of Employment Law in General*

Several conference participants made general comments regarding the drafting of the proposed *Restatement* and the wisdom of undertaking this project at this time. Professor Alan Hyde suggested that, in order to write a Restatement of employment law that was consistent with Restatements in other areas, the Reporters would have to discuss what is unique about the employment relationship and why it needs a Restatement apart from the general Restatements of tort and contract.<sup>28</sup> Professor Hyde suggested that such a discussion might also aid the ALI in reaching consensus on what employment law "should be."<sup>29</sup> For example, Professor Hyde noted that the employment relationship is often marked by a disparity in bargaining power in favor of employers, who unilaterally set the terms and conditions of employment. Based on this, Professor Hyde suggested that an underlying rationale for a distinct Restatement of employment law would be the protection of the rights of individual employees – supporting the interpretation of ambiguous employer representations such as handbooks against the employer or perhaps even supporting certain nonwaivable employee contract rights.<sup>30</sup>

Professor Matthew Finkin pointed out that protecting employees from exploitation because of inequity in bargaining power was indeed a guiding principle of employment law in many European countries.<sup>31</sup> There might be other facets of the employment relationship, for example the need of employers to make negative determinations against employees (sometimes even good employees), and their strong desire to avoid constraints or litigation over such decisions, that might support other underlying principles, for example efficiency, but Professor Hyde argued that, at the least, the Reporters of the proposed *Restatement* needed to discuss and set

28. Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 EMP. RTS. & EMP. POL'Y J. 87 (2009).

29. *Id.* at 89.

30. Comments of Professor Alan Hyde, *Conference Recording*, *supra* note 16.

31. Comments of Professor Matthew W. Finkin, *Conference Recording*, *supra* note 16.

forth the assumptions behind their project for a separate Restatement of employment law. Without this discussion, he argued it would be hard to make a Restatement of employment law consistent with the ALI's work in contract and tort.<sup>32</sup>

Several conference participants suggested that now was a particularly bad time to draft a Restatement since employment law doctrines among the various jurisdictions are particularly unstable. Professor Theodore St. Antoine argued that the evolution of employment law was in response to the evolution of the employment relationship as the economy changed, and that to “freeze” employment law doctrine in a Restatement now would frustrate the ALI's purpose of using its clarifications and simplifications to adapt the law more to “social needs.”<sup>33</sup> Professor Alvin Goldman asserted that, because the current draft of the proposed *Restatement* did not adequately discuss the rationales behind the examined opinions, it was more likely to have a chilling effect on the development of the law.<sup>34</sup> Without an adequate discussion of rationale, the courts cannot discern whether the reasons for a given precedent apply to newly evolved cases or indeed hold any relevance in the new economic order. As an example of the speed with which employment law is evolving, Alan Hyde noted that the concept of “joint employment” was not even discussed in the 1981 landmark decision of *First National Maintenance Corp. v. NLRB*,<sup>35</sup> and now is a commonly examined subject even included in the proposed *Restatement*.<sup>36</sup> Professor Catherine Fisk suggested that if the current economic downturn got significantly worse, the proposed *Restatement* might become a “white elephant” within a short time after its adoption, standing for the proposition that employers can discharge employees without reason while massive layoffs work hardship on the population as a whole.<sup>37</sup> However, Professor Rachel Arnow-Richman argued that, because the underlying economics of the employment relationship was shifting against employees, it might be good to “freeze” employment law doctrine to slow the erosion of employees' legal rights as we move to more transient employment relationships.<sup>38</sup>

Several participants expressed the opinion that, even if a Restatement

32. Hyde, *supra* note 28, at 89.

33. Comments of Professor Theodore St. Antoine, *Conference Recording*, *supra* note 16; see also Dennis R. Nolan et al., *Working Group on Chapter 1 of the Proposed Restatement of Employment Law: Existence of Employment Relationship*, 13 EMP. RTS. & EMP. POL'Y J. 43,45, 47 (2009).

34. Comments of Professor Alvin Goldman, *Conference Recording*, *supra* note 16.

35. 452 U. S. 666 (1981).

36. Comments of Professor Alan Hyde, *Conference Recording*, *supra* note 16.

37. Comments of Professor Catherine Fisk, *Conference Recording*, *supra* note 16.

38. Comments of Professor Rachel Arnow-Richman, *Conference Recording*, *supra* note 16.

of employment law were possible at this time, the draft chapters presented were not ready for adoption. Some participants suggested that the proposed *Restatement* draft was internally inconsistent in that some of the black letter text was inconsistent, and sometimes comments and examples did not match the black letter text. As Professor Marley Weiss said in arguing that the text of the *Restatement* was often more generous to employee interests than the comments and examples, “What they give with the right hand they take away with the left.”<sup>39</sup> Professor Goldman noted that, although the black letter rule of section 1.04 consistently applied the test for employment set forth in section 1.01, it seemed that some of the comments on this section limited the breadth of section 1.04 and, as a result, the section as a whole lacked consistency and clarity.<sup>40</sup> Professor Finkin called the black letter text of section 2.06 “discordant” noting that paragraph (a) of that section establishes that the implied obligation to act in good faith and fair dealing extends to the at-will contract but paragraph (b) of the same subsection asserts that the obligation “must be read consistent with the at-will nature of the relationship.”<sup>41</sup> Several participants thought that the current draft needed more careful attention to existing precedent. Professors Richard Bales and Roberto Corrada reported that several of the cases cited as examples in section 4.02 were not accurately cited as to the pertinent facts or their holding.<sup>42</sup> In particular they argued that the Reporters’ Notes to Comment c misstate the holding of the Third Circuit in *Novosel v. Nationwide Insurance Co.*,<sup>43</sup> in that the court did not hold that the discharge violated the employees’ constitutional “right,” but rather, the court held that the constitution created a public policy favoring free speech, and that the discharge violated that public policy.<sup>44</sup> More careful treatment of the common law precedents is needed.

### *B. On the Proposed Restatement’s Chapter 1: “The Definition of Employee”*

In its first chapter, the Reporters deal with the “threshold question” for

39. Comments of Professor Marley Weiss, *Conference Recording*, *supra* note 16.

40. Nolan et al., *supra* note 33, at 70.

41. 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, 134, 188, (2009).

42. Joseph R. Grodin et al., *Working Group on Chapter 4 of the Proposed Restatement of Employment Law: The Tort of Wrongful Discipline in Violation of Public Policy*, 13 EMP. RTS. & EMP. POL’Y J. 159, 184-85 (2009).

43. 721 F.2d 894 (3d Cir. 1983).

44. Grodin et al., *supra* note 42, at 188.

the overall coverage of the proposed *Restatement*: when is a person an “employee” for the purposes of the various employment laws providing protections and benefits or imposing obligations on such persons.<sup>45</sup> The basic definition of an employee set forth by the Reporters is an elaboration of the traditional tort distinction between employees and independent contractors based on whether the individual renders services as an independent business. The chapter is divided into four sections: section 1.01 setting forth the general conditions for the existence of an employment relationship; section 1.02 distinguishing volunteers; section 1.03 excluding owners; and section 1.04 discussing joint employment.<sup>46</sup>

Our working committee on chapter 1 offered some general critiques of the Reporters’ work on chapter 1. Although the Reporters acknowledge the origin of the common law distinction between employees and independent contractors in the limited purpose of determining vicarious liability in tort and the broader purposes of employment law, our working committee thought that the *Restatement* should specifically state that the definition of employee can vary from statute to statute according to the statute’s language and purpose, even when allusion has been made to the common law definition.<sup>47</sup> For courts to limit themselves to the common law tort definition of employee when statutory purposes were much broader, for example in protective legislation and antidiscrimination statutes, would be inappropriate and frustrate legislative intent. Our working committee also thought that the introductory note to chapter 1 should contain an express statement that employment law has been in ferment in the last few decades and that nothing in the *Restatement* should foreclose desirable future common law or statutory developments.<sup>48</sup>

With respect to section 1.01, our working committee reports that they are generally satisfied with the language of the text in outlining the tort law distinction between employees and independent contractors, but reiterate their concern that this definition will be used by courts inappropriately to limit the definition of employee when the purposes of the examined statute or doctrine are broader than the purposes of the common law doctrine in determining vicarious liability.<sup>49</sup> Our working committee recommends that Illustration 16, using a case of union “salting” to demonstrate the

45. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, at xi.

46. *Id.* at 3, 29, 41, 51.

47. Nolan et al., *supra* note 33, at 44-45, 46-47.

48. *Id.* at 45.

49. *Id.* at 46-47. This limited purpose of the common law distinction between employees and independent contractors is noted by the Reporters in the proposed *Restatement*. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §1.01 cmt. a.

irrelevance of employee misrepresentation to consent, be omitted since a union supporter applying for a job is not a case of misrepresentation.<sup>50</sup> The working committee also recommends that the Reporters broaden their citations on the multi-factor right to control test to make it clear this is not a regional aberration and to update their citations to *Larsen's Workers Compensation Law* to the most recent edition.<sup>51</sup> Finally, the members of our committee recommend more careful citation to the *Lauritzen* case and Judge Easterbrook's concurrence.<sup>52</sup>

Our working committee found the Reporters' broad exclusion of volunteers from the definition of employee in section 1.02 to be without adequate rationale or support in the cited case law. The only rationale for the exclusion given in the proposed *Restatement* is the extent of commitment to the principal, a rationale that ignores the modern move toward more transitory relationships and does not distinguish between employment laws in which commitment may be important, for example on pensions, and laws that may not need commitment to invoke their purposes.<sup>53</sup> The working committee cites other rationales on the subject that exist in the literature and case law that argue for the inclusion of volunteers as employees, including benefits that accrue to the principal and the encouragement of volunteer work.<sup>54</sup> The working committee argues that the three cases cited by the Reporters in support of the proposition that volunteers are not treated as employees actually stand for the more limited proposition that volunteers are not employees for the purposes of the statutes examined in those cases.<sup>55</sup> In determining whether someone receives "material inducement" and is therefore not a volunteer, the working committee argues that the Reporters need to take account of the common law doctrines of forbearance and benefit to third parties.<sup>56</sup> The working committee argues that it is misleading for the Reporters to present it as a matter of settled case law that student interns, assistants and athletes are excluded from the protections of employment laws because this issue

50. Nolan et al., *supra* note 33, at 48. Union "salting" is where a union encourages adherents or agents to seek employment at non-union shops for the purpose of organizing that shop. This practice is allowed under the National Labor Relations Act, and since employees cannot be required to disclose union support as a condition of employment, there is no misrepresentation in union adherents or agents applying for jobs.

51. *Id.* at 48 n.18.

52. *Id.* at 49.

53. *Id.* at 50-51.

54. *Id.* at 52-53.

55. *Id.* at 54-55 (discussing *Tawes v. Frankford Volunteer Fire Co.*, 16 Am. Disabilities Cas. (BNA) 660 (D. Del. 2005); *Mendoza v. Town of Ross*, 27 Cal. Rptr. 3d 452 (App. 2005); *City of Fort Calhoun v. Collins*, 500 N.W. 2d 822 (Neb. 1993).

56. Nolan et al., *supra* note 33, at 52-53.

has not been extensively litigated and the cited cases do not stand for such a general proposition.<sup>57</sup> They also note that, at least in the case of scholarship athletes, this runs counter to the proposed *Restatement's* general rule that those who are offered material inducement to perform are considered employees.<sup>58</sup> Finally, on the issue of the coverage of coerced laborers, the working committee notes that the proposed *Restatement's* exclusion of prison labor that is performed for the purposes of rehabilitation or punishment is offered without adequate rationale or support in the case law. The relevant cases require a much more nuanced analysis taking account of both the purposes of the labor, the benefit to the principal and whether the employing principal is a private entity or the state.<sup>59</sup>

With respect to the Reporters' draft of section 1.03, the working committee found that the exclusion of owners from the definition of employee on the basis of ownership attributes, rather than employment attributes, was unsupported by rationale or case law.<sup>60</sup> The working committee members note that in the case of *Goldberg v. Whitaker House Cooperative, Inc.*,<sup>61</sup> the Supreme Court examined the economic realities of work effort and vulnerability to determine that coop members were employees for the purposes of the Fair Labor Standards Act.<sup>62</sup> The committee members argue that the Reporters' reliance on *Clackamas Gastroenterology Associates P.C. v. Wells*,<sup>63</sup> to support their rule is misplaced in that the case does not announce such a simple rule and the default rules announced by state courts for the interpretation of state employment laws often exceed *Clackamas*.<sup>64</sup> The working committee asserts that the test set forth by the Reporters in Comment a is not strictly consistent with the black letter rule set forth in section 1.03, in that people with an ownership interest in a firm (for example partners) may have control over their remuneration and activities, and thus would not be

57. *Id.* at 56. The working committee also proposes a definition of "intern" to be used in the *Restatement*. Further, they offer an extensive discussion of the cases relied on by the Reporters: *Land v. Workers' Compensation Appeals Board*, 125 Cal. Rptr. 2d 432, 435 (App. 2002); *Rensing v. Indiana State Univ.*, 444 N.E.2d 1170, 1173 (Ind. 1983); *Waldrep v. Texas Employers Ins. Ass'n*, 21 S.W.3d 692, 702 (Tex. App. 2000); *University of Denver v. Nemeth*, 257 P.2d 423, 426-27 (Colo. 1953).

58. Nolan et al., *supra* note 33, at 58.

59. *Id.* at 13-16.

60. *Id.* at 16.

61. 366 U.S. 28 (1961).

62. Nolan et al., *supra* note 33, at 64-65.

63. 538 U.S. 440 (2003).

64. Nolan et al., *supra* note 33, at 67-69. It should be noted that ALI Advisor Michael Delikat vigorously disagreed with the working committee's reading of *Clackamas* at the conference. That disagreement was taken into account in the final revision of this portion of the report.

employees under the Comment a test, yet might have no effective control over core enterprise decisions such as the purchase of property or hiring, and thus be employees under the language of section 1.03.<sup>65</sup>

Finally, on the issue of joint employment raised in section 1.04, our committee reiterated its concern that an overly narrow definition of “employee” based on common law principles developed to apply the doctrine of *respondeat superior* would frustrate the broader purposes of protective legislation and leave vulnerable both the public and workers who could benefit from such legislation.<sup>66</sup> Our working committee also found that, although the black letter rule of section 1.04 consistently applied the test for employment set forth in section 1.01, it seemed that some of the comments on this last section limited the breadth of section 1.04 and, as a result, the section as a whole lacked consistency and clarity.<sup>67</sup> With respect to Comments a and b, the committee wondered whether the Reporters were right to assume that persons who work for more than one person often do so in different time slots.<sup>68</sup> Comment c suffers from lack of clarity in the application of its two factor test of looking for control of performance and pay in finding employment.<sup>69</sup> The committee also found that Comment c could be interpreted in a manner inconsistent with the Supreme Court’s opinion in *Kelley v. Southern Pacific Co.*<sup>70</sup>

*C. On the Proposed Restatement’s Chapter 2: “Employment Contracts: Termination”*

In Chapter 2 of the proposed *Restatement*, the Reporters present their draft on the basic contractual law governing termination of the employment relationship.<sup>71</sup> In section 2.01 the Reporters set forth the employment at will rule as the default contractual interpretation, and then outline various exceptions in section 2.02.<sup>72</sup> The exceptions are presented in four provisions: section 2.02, Comment c, discussing promissory estoppel; section 2.03 discussing agreements for a definite term or that otherwise limit terminations; section 2.04 on employer policy statements limiting termination, for example in an employee handbook; and section 2.06 on

65. *Id.* at 67.

66. *Id.* at 70-71.

67. *Id.*

68. *Id.* at 72.

69. *Id.* at 72-73.

70. *Id.* at 74-75.

71. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, at xii (citing *Kelley v. S. Pac. Co.*, 419 U.S. 318 (1974)).

72. *Id.* at 61, 67.



applications of the implied covenant of good faith and fair dealing.<sup>73</sup> The statement of the implied covenant of good faith and fair dealing presented in section 2.06 is limited to cases in which the employer uses termination to deprive the employee of vested benefits or fires the employee for performing his or her duties. In section 2.05 the Reporters discuss the employer's power to modify or rescind unilateral contract commitments allowing such modification upon reasonable notice as long as it does not adversely affect vested employee interests.<sup>74</sup>

On the Reporters' presentation of the employment at will rule as the default rule in employment contracts in section 2.01, the working committee argues that this is the wrong time to construct a general Restatement in this regard because there is significant diversity among the jurisdictions on default rules and because this doctrine is in flux.<sup>75</sup> The committee members worry that a Restatement enshrining such a simple statement of the employment at will rule will chill further development of the law.<sup>76</sup> The working committee also argues that any restatement on employment contracts should begin with a discussion of general contract theory within the context of the employment relationship.<sup>77</sup> In particular, this discussion should take account of the fact that in the employment relationship terms are generally unilaterally determined by the employer and that employment terms are communicated in multiple ways and at various times.<sup>78</sup> Absent a clear statement of theory in section 2.01 or section 2.02, sections 2.03 to 2.05 are not likely to succeed in providing depth and clarification on the examined doctrines.

With respect to those contractual arrangements that modify the at-will rule, the working committee found that the Reporters appropriately set forth the doctrine of contractual modification, the covenant of good faith and fair dealing, and promissory estoppel in section 2.02, but failed to articulate an adequate theory of how employment contracts that modify at-will employment are formed.<sup>79</sup> Rather than beginning with a discussion of contract principles, section 2.02 begins with the employment-at-will doctrine and states that the at-will relationship may be varied by a definite term of employment or a requirement of cause for termination. This is an incomplete statement of available at-will rules, and it is unnecessary for the

73. *Id.* at 67, 70, 83, 95.

74. *Id.* at 89.

75. Finkin et al., *supra* note 41, at 94-95

76. *Id.*

77. *Id.* at 110.

78. *Id.* at 112-13.

79. *Id.*

proposed *Restatement* to say that parties can agree to terms other than at-will employment. The committee members argue that, by limiting the terms to which an employer and employee can agree to “a definite term of employment” and a requirement of cause to terminate, the Reporters foreclose the possibility of contracts terminable for other than cause, such as satisfaction contracts, or contracts not terminable at all.<sup>80</sup> Section 2.02(a) should state that employment contract terms that depart from employment at-will can be created by specific statements (written or spoken), nonspecific statements, conduct, or operation of law. By so stating, the section would recognize what are termed express contracts and implied contracts and be consistent with well established law and literature on the subject.<sup>81</sup> “Implied terms” are mentioned in the proposed *Restatement* only in Comment f to section 2.03.<sup>82</sup> The omission of a full discussion of implied contract doctrine when this doctrine is recognized by a significant number of American jurisdictions is a major defect of chapter 2.

The working committee found that section 2.03 continues the problematic approach of sections 2.01 and 2.02 in focusing first on the at-will doctrine rather than general employment contract principles.<sup>83</sup> The working committee argues that the important issue of what constitutes “good cause” should have been dealt with in the black letter rules of the proposed *Restatement* rather than being relegated to the commentary.<sup>84</sup> The proposed *Restatement* appropriately abandons the idea of mirror image mutuality and provides that if an employer is bound, an employee is not similarly bound unless there is an express agreement.<sup>85</sup> Consistent with principles of free contract, the proposed *Restatement* also appropriately states in Comment g that good cause restrictions can be agreed upon in indefinite term contracts.<sup>86</sup> A related issue that should be addressed by the *Restatement* is whether an employer’s promise not to fire an employee, even for good cause, is enforceable. Comments h(i) and (ii) provide different default meanings of good cause for definite term and indefinite term agreements, but no explanation is offered for this distinction.<sup>87</sup>

The working committee agrees with the Reporters’ finding in section 2.04 that the majority of American jurisdictions recognize that employer

80. *Id.* at 114.

81. *Id.*

82. *Id.*

83. *Id.* at 117.

84. *Id.*

85. *Id.*

86. *Id.* at 118.

87. *Id.* at 118-19.

policy statements made in documents such as employee handbooks can be legally binding on the employer, however the committee expresses questions about the Reporters' rationale for this rule.<sup>88</sup> The Reporters cite a promissory estoppel theory while the majority of jurisdictions rely on a unilateral contract theory.<sup>89</sup> Although a theory of promissory estoppel offers some advantages, it also has the drawbacks of being inconsistent with current precedents in most jurisdictions, requiring a showing of individualized reliance with its attendant proof problems, and limiting remedies.<sup>90</sup> The committee also recommends that the Reporters clarify and discuss more completely the impact of disclaimers on the enforceability of employer policy statements, especially in light of the Reporters' theory for enforcement.

Similarly with respect to section 2.05, the working committee believes that the Reporters have correctly stated the majority rule but again question the Reporters' rationale.<sup>91</sup> The Reporters set forth an appropriate statement of the doctrine in most jurisdictions that employers can modify their binding policy statements upon reasonable notice, as long as there is no adverse impact on vested employee interests. However, the working committee does not know of any jurisdiction that adopts the Reporters' announced rationale for this rule of "administrative agency estoppel."<sup>92</sup> At a minimum the Reporters need to produce a more complete discussion on why they have abandoned the majority rationale of unilateral contract in favor of the novel theory of administrative agency estoppel and the implications of this new rationale for future cases that would allow employers to defeat the mutually-engendered expectation of fair treatment created by their prior policies.

Finally, the working committee believes that section 2.06 on the implied covenant of good faith and fair dealing is unclear and not supported by the cases. Although in section 2.06(a) the black letter rule states that the implied obligation to act in good faith and fair dealing extends to the at-will contract, it is immediately followed by the assertion in section 2.06(b) that the obligation "must be read consistent with the at-will nature of the relationship." The two propositions seem fatally discordant. Section 2.06(c) does not adequately resolve this conflict. This section states that the obligation embodies a duty not to terminate or to seek

88. *Id.* at 120.

89. *Id.*

90. *Id.* at 122-23.

91. *Id.* at 130-33.

92. *Id.* at 132

to terminate an employment relationship for one of two reasons: (1) to prevent the vesting or accrual of a right or benefit; or, (2) to retaliate against the employee for performing a contractual or legal obligation.<sup>93</sup> How these two cases, and only these two cases define the contours of the implied obligation “consistent with the at-will nature of the relationship” is not adequately explained. Moreover this limitation of the doctrine is without adequate justification in the case law or the Reporters’ proffered rationale. The working group concluded that the current draft of this section is likely to stifle the growth of a body of law that is yet only in its infancy.

*D. On the Proposed Restatement’s Chapter 4: “The Tort of Wrongful Discipline in Violation of Public Policy”*

In chapter 4, the Reporters present their draft of the tort of employer discipline in violation of public policy.<sup>94</sup> In section 4.01, the Reporters set forth the general rule for this tort stating that an employer who discharges or takes “other material adverse action” against an employee for protected activity is subject to tort liability unless the statute that gives rise to the public policy precludes tort liability or provides an “adequate alternative remedy.”<sup>95</sup> Employee “protected activities” are defined in section 4.02 to include: (a) refusing to violate a law or code of ethics protective of the public interest; (b) fulfilling a duty of cooperation or other obligation imposed by law; (c) filing a charge or claiming a benefit in good faith under an employment law; (d) refusing to waive a nonwaivable right under an employment law; (e) reporting employer activity that violates a law or code of ethics protective of the public interest; or (f) engaging in other activity directly furthering a substantial public policy.<sup>96</sup> The sources of public policy are discussed in section 4.03 and include federal and state constitutions, statutes, administrative rules, common law rules, and codes of ethics protective of the public interest.<sup>97</sup>

The working committee expressed the general concern that adoption of a proposed *Restatement (Third) of Employment Law* should not preclude further development of the tort of wrongful discipline in violation of public policy.<sup>98</sup> The committee members agree with the Reporters that the basis

93. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06(c).

94. *Id.*, at xiv-xv.

95. *Id.* at 115.

96. *Id.* at 133.

97. *Id.* at 148-49.

98. Grodin et al., *supra* note 42, at 160.

for this tort is well established in American law, but point out that there are still significant differences among the jurisdictions on subsidiary issues related to the doctrine and that the law on these issues is still developing in significant ways.<sup>99</sup> In addition to this general concern, the working committee had particular comments on each of the three sections of chapter 4.

Section 4.01 prescribes a tort remedy for discipline in violation of public policy “unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or provides an adequate alternative remedy.”<sup>100</sup> The working committee felt that, for the most part, section 4.01 captures the doctrine of the public policy tort in a coherent manner, but the committee was concerned about the ambiguity of the term “adequate alternative remedy” and the apparent conflation of the principles of federal preemption with the issue addressed by section 4.01, which is when a state statute should be deemed to be the exclusive remedy.<sup>101</sup> The committee recommends that the Reporters avoid reliance on the nebulous concept of “implied intent” in determining a statute’s preclusive effect and that the reporters not use federal preemption cases or analogies to this doctrine to explain when statutory remedies are exclusive of tort claims.<sup>102</sup> The working committee provides at least five reasons for not conflating the doctrines of federal preemption and exclusive remedies, and several examples.<sup>103</sup> The working committee proposes an additional subsection (c) for section 4.01 to clarify when courts determine when statutory remedies have made the common law tort remedy unnecessary to protect the public interest and the affected employee.<sup>104</sup>

The working committee also thought that section 4.02 captures the nature of activities protected under the public policy tort in a reasoned fashion, except that it should expressly state that the tort can protect employees against discipline for private and off-duty activities and protect attorneys for discipline related to reporting ethical issues.<sup>105</sup> It is not clear that the Reporters intended to exclude off-duty conduct and the emerging cases in privacy, since the language and rationale of the section is broad enough to include them and some of the examples in the comments discuss off-duty activity; nevertheless the working committee thought the section

99. *Id.*

100. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01.

101. Grodin et al., *supra* note 42, at 161.

102. *Id.* at 162-63.

103. *Id.* at 169-70.

104. *Id.* at 163-64.

105. *Id.* at 184.

would be clearer if these issues were expressly resolved in the black-letter rule. The working committee also notes that between the last two drafts, the Reporters dropped a separate subsection in the black letter rule for unwaivable rights and unenforceable conditions. The members of the committee recommend that the reporters return to the prior language in this regard, especially because several remaining comments seem dependent on this language.<sup>106</sup> It would also add clarity to section 4.02 if subsection d used the common vernacular “whistle blowing” to describe the activity that is protected. Finally, the committee members believe that in Comment f the Reporters should drop the word “reasonable” and merely require that the whistle-blower have a good faith belief of illegality.<sup>107</sup> The addition of a reasonableness requirement in the comment seems to add a requirement that is not in the language of section 4.02 and is not required by existing case law.

Turning to the last section of chapter 4, the working committee believes that section 4.03 accurately states the sources of law that courts have relied upon over the years for public policy torts, but believes that there are some subsidiary issues that should be addressed.<sup>108</sup> For instance, this section makes unsupported assertions about the ways in which public policy must be clearly established and clearly formulated, makes incomplete assertions about decisional law, fails to back up some assertions with case citations, and either improperly discusses some topics, or discusses some topics which are better suited for exploration in other sections of this chapter.<sup>109</sup> Case law does not necessarily support the proposition that the public policy has to be both “clearly established and clearly formulated.” Although there are a number of courts which look disapprovingly on vague statements of policy to support public policy torts, other cases, including many listed in the Reporters’ Notes to Comment a, permit broad, open-ended statements for public policy. Because no consensus exists on this issue, the working committee suggests that the sentence, “The key requirement is that the public policy be clearly established and clearly formulated,” should be deleted or at the very least, softened to take into account the approach to public policy taken by some states.<sup>110</sup> The working committee also suggests that this section make it clear that, in appropriate cases, both international sources of law and recognized private standards for the protection of public health or safety can be used as sources of public

106. *Id.* at 187-88.

107. *Id.* at 189.

108. *Id.* at 195.

109. *See id.* at 195-203.

110. *Id.* at 197.

policy.<sup>111</sup> Because of the increased importance of international law and treaties to the regulation of our labor market, the working committee thought it particularly important that any Restatement recognize treaties to which the U.S. is a signatory as federal law and principles of international law as appropriate principles of common law. The working committee recommends two new subsections (e) and (f) in this regard.

## VI. CONCLUSION

Among the members of the working committees there was a strong consensus that the current drafts of the three chapters of the proposed *Restatement* are not ready for adoption. Several committee members expressed the view that the notion of a Restatement in this area as a whole needed a fundamental rethinking, with greater attention given to the underlying reasons for having a separate Restatement of employment law. It was persuasively argued that, without such a fundamental discussion in the proposed *Restatement*, it would be hard to make it consistent with the other ALI Restatements on contract and tort or to determine what the Restatement of employment law “should be” in choosing among competing precedents. Others argued that, even with a better theoretical foundation, the project of a Restatement of employment law was fundamentally flawed and could not be cured. Several committee members expressed the belief that employment law doctrine is too contentious and too much in flux at the current time for a useful comprehensive Restatement. These committee members worried that a premature Restatement, based on an inexact snapshot of the current law that is blind to historical roots and indifferent to the trajectory of change will either be rendered irrelevant by economic and social change or else serve as an obstacle to the law’s continued evolution to accommodate those changed conditions. Even among the committee members that were the most optimistic about the current draft there was a consensus that the proposed *Restatement* needed further work to promote (1) greater consistency within the *Restatement*; and (2) a more careful Restatement of existing case law. The reports of the working committees are replete with examples of how the current draft needs to be clarified and reworked. There was also broad agreement that, to build a consensus among employment law academics on what a Restatement of employment law should be, it would be useful to engage a broader array of perspectives than is represented among the current reporters.

111. *Id.* at 195.

## APPENDIX 1: A HISTORY OF THE LABOR LAW GROUP THE LABOR LAW GROUP<sup>112</sup>

The Labor Law Group had its origins in the desire of scholars to produce quality casebooks for instruction in labor and employment law. Over the course of its existence, the hallmarks of the group have been collaborative efforts among scholars, informed by skilled practitioners, under a cooperative non-profit trust in which royalties from past work finance future meetings and projects.

At the 1946 meeting of the Association of American Law Schools, Professor W. Willard Wirtz delivered a compelling paper criticizing the labor law course books then available. His remarks so impressed those present that the "Labor Law Roundtable" of the Association organized a general conference on the teaching of labor law to be held in Ann Arbor in 1947. The late Professor Robert E. Mathews served as coordinator for the Ann Arbor meeting and several conferees agreed to exchange proposals for sections of a new course book that would facilitate training exemplary practitioners of labor law. Beginning in 1948, a preliminary mimeographed version was used in seventeen schools; each user supplied comments and suggestions for change. In 1953, a hard-cover version was published under the title *Labor Relations and the Law*. The thirty-one "cooperating editors" were so convinced of the value of multi-campus collaboration that they gave up any individual claims to royalties. Instead, those royalties were paid to a trust fund to be used to develop and "provide the best possible materials" for training students in labor law and labor relations. The Declaration of Trust memorializing this agreement was executed November 4, 1953, and remains the Group's charter.

The founding committee's hope that the initial collaboration would bear fruit has been fulfilled. Under Professor Mathews' continuing chairmanship, the Group's members produced *Readings on Labor Law* in 1955 and *The Employment Relation and the Law* in 1957, edited by Robert Mathews and Benjamin Aaron. A second edition of *Labor Relations and the Law* appeared in 1960, with Benjamin Aaron and Donald H. Wollett as co-chairs, and a third edition was published in 1965, with Jerre Williams at the helm.

In June of 1969, the Group, now chaired by William P. Murphy, sponsored a conference to reexamine the labor law curriculum. The

112. For a more extensive history of the Labor Law Group, see, Laura J. Cooper, *Teaching ADR In The Workplace Once And Again: A Pedagogical History*, 53 J. LEGAL EDUC. 1 (2003).



meeting, held at the University of Colorado, was attended by practitioners and by full-time teachers including nonmembers as well as members of the Group. In meetings that followed the conference, the Group decided to reshape its work substantially. It restructured itself into ten task forces, each assigned a unit of no more than two hundred pages on a discrete topic such as employment discrimination or union-member relations. An individual teacher could then choose two or three of these units as the material around which to build a particular course. This multi-unit approach dominated the Group's work throughout much of the 1970s under Professor Murphy and his successor as chairman, Herbert L. Sherman, Jr.

As the 1970s progressed and teachers refined their views about what topics to include and how to address them, some units were dropped from the series while others increased in scope and length. Under Professor Sherman's leadership, the Group planned a new series of six enlarged books to cover the full range of topics taught by labor and employment law teachers. Professor James E. Jones, Jr., was elected chair in 1978 and shepherded to completion the promised set of six full-size, independent casebooks. The Group continued to reevaluate its work and eventually decided that it was time to convene another conference of law teachers.

In 1984, the Group, now chaired by Robert Covington, sponsored another general conference to discuss developments in the substance and teaching of labor and employment law, this time at Park City, Utah. Those discussions and a subsequent working session led to the conclusion that the Group should devote principal attention to three new conventional length course books, one devoted to employment discrimination, one to union-management relations, and one to the individual employment relationship. In addition, work was planned on more abbreviated course books to serve as successors to the Group's earlier works covering public employment bargaining and labor arbitration.

In 1989, with Alvin Goldman as Chair, the Group met in Breckenridge, Colorado, to assess its most recent effort and develop plans for the future. In addition to outlining new course book projects, the Group discussed ways to assist teachers of labor and employment law in their efforts to expand conceptual horizons and perspectives. In pursuit of the latter goals, it co-sponsored, in 1992, a conference held at the University of Toronto Faculty of Law at which legal and nonlegal specialists examined alternative models of corporate governance and their impact on workers.

When Robert J. Rabin became Chair in 1996, the Group and a number of invited guests met in Tucson, Arizona, to celebrate the imminent fiftieth anniversary of the Group. The topics of discussion included the impact of

the global economy and of changing forms of representation on the teaching of labor and employment law, and the impact of new technologies of electronic publishing on the preparation of teaching materials. The Group honored three of its members who had been present at the creation of the Group, Willard Wirtz, Ben Aaron, and Clyde Summers. The Group next met in Scottsdale, Arizona in December, 1999, to discuss the production of materials that would more effectively bring emerging issues of labor and employment law into the classroom. Among the issues discussed were integration of international and comparative materials into the labor and employment curriculum and the pedagogical uses of the World Wide Web.

Laura J. Cooper became Chair of the Group in July, 2001. In June, 2003, the Group met in Alton, Ontario, Canada. The focus there was on labor law on the edge – looking at doctrinal synergies between workplace law and other legal and social-science disciplines, and workers on the edge, exploring the legal issues of highly-compensated technology workers, vulnerable immigrant employees, and unionized manufacturing employees threatened by foreign competition. The Group also heard a report from its study of the status of the teaching of labor and employment law in the nation's law schools and discussed the implications of the study for the Group's future projects. Members of the Group began work on a case book on international labor law at this meeting. During Professor Cooper's term the Group also finished its popular reader *Labor Law Stories*, which examines the stories, behind many of the most important American labor law cases.

In July 2005, Kenneth G. Dau-Schmidt became the Chair of the Labor Law Group. Shortly after his election, the Group held a meeting in Chicago with nationally recognized practitioners to discuss how best to teach students about the practice of labor law in the new global economy of the information age. The outline that resulted from this meeting served as the basis for, *Labor Law in the Contemporary Workplace*. Since the Chicago meeting, the Group has met twice to discuss and work on new editions of its books and new projects: June 2006 in Saratoga Springs, New York, and June 2007 in St. Charles, Illinois. Other Group projects that grew out of or benefited from these meetings include *International Labor Law: Cases and Materials on Workers' Rights in the Global Economy* and *A Concise Hornbook on Employment Law*. The Group has also hosted a symposium on the problems of low-wage workers, the proceedings of which were published in the *Minnesota Law Review*, and planned this symposium on the American Law Institute's Proposed *Restatement of Employment Law*.

2009]

*A CONFERENCE ON THE PROPOSED RESTATEMENT*

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At any one time, roughly twenty-five to thirty persons are actively engaged in the Group's work; this has proven a practical size, given problems of communication and logistics. Coordination and editorial review of the projects are the responsibility of the executive committee, whose members are the successor trustees of the Group. Governance is by consensus; votes are taken only to elect trustees and to determine whom to invite to join the Group. Since 1953, more than eighty persons have worked on Group projects; in keeping the original agreement, none has ever received anything more than reimbursement of expenses.

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APPENDIX 2: TEXT OF THE PETITION BY THE LABOR LAW  
GROUP TO THE ALI COUNCIL ON THE PROPOSED *RESTATEMENT*  
*(THIRD) OF EMPLOYMENT LAW*

To the Council of the American Law Institute:

The undersigned are professors of labor and employment law in accredited schools of law in the United States. Institutional affiliation is given for identification purposes only; American Law Institute membership is denoted by an asterisk.

We have followed the development of the proposed *Restatement of the Law of Employment* – notably Parts 3 (on contractual job security), 4 (on public policy as a limit on discharge), and 5 (on employee privacy) – with increasing concern. As with all *Restatements*, the purpose is to provide simple blackletter rules that better adapt the law to changing social and economic conditions. However, we believe the *Restatement* methodology, in this setting, to be not only inadequate but counterproductive.

When the idea of restating the law was proposed in 1923, the Report admonished that contentious issues of “social and industrial . . . policy,” such as the improvement of the “relations between labor and capital,” were not suitable for restatement: the ends to be achieved were too much in controversy, the law too much in flux. The 1923 Committee’s insight has continuing vitality today. The velocity of change in the areas of the common law addressed in Parts 3 and 4 has been rapid, the law is still very much in flux. Yet the project proposes to take a firm stand, projecting its rules into an indefinite future.

No doubt the law of employment should adapt to demonstrable social or economic change; but the project fails to engage in any analyses, or even description, of what the changes are that summon the need for the rules it proposes. Part 3 states, for only one example, that an employer should be free retroactively to abandon its unilateral contractual commitment to job security. This is done without any acknowledgement that the role of job security in the labor market of the future is a subject of intense economic and ethical debate. Undeterred, the draft proposes to have the law come down on one side of this contentious issue without acknowledging the existence of that debate, let alone its terms of reference. Part 4 states, for one further example, that an employer should be able to discharge an employee for the exercise of his or her rights as a stockholder in the employing company because these rights do not arise out of employment. This without acknowledging the rich and intense debate worldwide on the



role of employees in corporate governance. Again, the draft would have the law come down on one side of a highly controversial economic and ethical question without acknowledging that the controversy exists let alone what the stakes in it are.

The point we wish to emphasize by these two illustrations – only two of a great many more we could essay – is not that we disagree with one or another of the draft's blackletter rules, comments, or illustrations. The reason we approach the Council is that we believe the whole thrust of the project to be misplaced. We submit that the velocity and direction of legal change in the employment relationship is incapable of being addressed by a *Restatement*; that the *Restatement* method, if it proves influential (as the Institute would surely wish it to be), *will stultify legal experimentation and growth*.

This consequence is evident in the *Restatement (Second) of Torts'* provision on privacy, which Part 5 adopts. Although the *Restatement of Torts* expressly anticipated the growth of the law transcending the categories of privacy it set out, that has not happened. The categories have hardened. As a result, the tort of invasion of privacy has almost no purchase on the critical privacy issues that have emerged in contemporary society generally, nor does it address the most pressing issues in the workplace: deploying sophisticated methods of screening prospective employees; monitoring employee behavior and performance by advanced technology; collecting, collating, and disseminating personal data by electronic means; imposing controls on private life. Of course, these may be ill suited for resolution by tort; but if so, we fail to see any purpose served by restating a body of law that, in the work setting, is largely irrelevant.

There is a need to think afresh about the role of law in the workplace. But the methodology of restatement is unsuited for, and can actually retard what should be a serious effort at law reform. As scholars who have thought deeply about these issues, we strongly urge the Council to terminate this project.

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