

THE RESTATEMENT OF EMPLOYMENT LAW IS THE WRONG
PROJECT

BY
MICHAEL J. ZIMMER*

[Editors' Note. Professor Zimmer submitted this essay after the Hastings conference. Professor Dau-Schmidt, on behalf of the Labor Law Group, and Professor Malin, on behalf of *Employee Rights and Employment Policy Journal*, agreed to include it in this issue.]

When the American Law Institute's Council announced that the Institute would begin work on a *Restatement of Employment Law*, it, like all other projects since I have been an ALI member, sprang forth with no input from the general membership about undertaking the project in a particular area, what type of project it should be and who should be its Reporters and its Advisory group. I suppose the best that can be said about how this happened is that the principle of never doing anything the first time appeared to rule: The ALI is an institution with very strong traditions and they were followed. Although I had no input in how the project was framed or staffed and disagreed with the decision to start work in the labor and employment area with a *Restatement*, I thought it was my duty as a member to get involved and so I joined the only role available to the general membership before participation at the annual meeting and that was to join the Consultative Members Group. It is open to all members. As the project has progressed, I am only further convinced that a *Restatement* of the common law was the wrong place for the ALI to start work in the labor and employment law area.

Given my position, I signed a petition by the Labor Law Group calling for a halt to the project. My purpose for doing that and my purpose for this

* Professor of Law, Loyola University Chicago School of Law. My comment should not be taken as criticism of the project's Reporters, the Advisory Group or the Members Consultative Group. They have together done an enormous amount of work to bring the Restatement as far as it has come. As for my own involvement as a member of the Members Consultative Group, it has been enjoyable and quite interesting.

comment is to try to make my basic point that I have had from the beginning: A *Restatement* of the common law of employment is the wrong project for the ALI to start its work in the area of employment law. I very much welcome the ALI undertaking action in labor and employment law but I think it should start with a project on the principles of labor and employment law. The goal of a principles project would be to answer two questions: First, what are, and what should be, the overarching purposes of constitutional, statutory and common law approaches to labor and employment law? Second, how can the law be developed in ways to best serve those purposes?

At present these question have not been asked at a general level for a very long time, if ever. Our present labor and employment law lacks a coherent structure where the policy goals are reasonably clear and the law is designed and administered to achieve those goals. In short, labor and employment law in this country is a mishmash. To make an analogy to land use planning, U.S. labor and employment law is urban sprawl. Not only does the law lack a coherent structure but it is bereft of the theoretical underpinnings sufficient to construct an architecture that might better serve the public good. A principles project would look at all labor and employment law, federal and state, collective and individual, constitutional, statutory and common law, in order to develop a sensible foundation of principles and purposes that the law should serve and to lay out a path for the development of labor and employment law to better serve those principles and purposes. If, as I hope, Congress and the President have the courage to take on the mishmash of our health care “system,” I think the ALI should be up to the task of taking on the unruly area of labor and employment law at a general level. And that is through a principles project.

I would be a Pollyanna if I expected a principles project to develop a consensus about those principles and purposes. At this time in our society, labor and employment policy issues are too contentious to expect that or even anything close to consensus. But the hard work that the ALI has done in a number of areas that are at least as contentious has paid off, if not in the development of complete consensus but in the articulation of those principles that are supported by a consensus and, more importantly, a limitation on the range of difference among those principles where consensus has yet to be achieved.

The problem with starting with a *Restatement* of the common law governing employment is that the black letter rules are fundamentally floating free of any basic theoretical grounding. This is no surprise because, while important, the common law plays only one part in a complex system,

or perhaps more accurately, non-system, of labor and employment law. Focusing on a slice of all labor and employment law inevitably leads to the failure to articulate basic norms the law in general is serving or should serve. Looking at the whole, ugly and disorganized as it appears, will be of great help in the analysis of any particular part. A *Restatement* would be much better grounded and understood if it would be developed as part of an overall ALI project on labor and employment law that starts with a principles project.

A good example of how the *Restatement* as developed so far lacks a normative grounding – an almost inevitable consequence of starting with just the common law – is its failure to address the relation of U.S. employment law with the labor and employment law of the rest of the world. Granted, labor and employment law has historically been paradigmatically domestic law. But times have changed and will continue to change in the future. The failure to frame U.S. law within the larger context of international and comparative law will result in a *Restatement* that comes into being as a newborn but is really a reproduction of a quaint antique of the 20th century. This is surprisingly at odds with other recent ALI projects that are focusing on transnational legal issues in a number of different areas.

Since the general membership of the ALI has, as far as I know, never been asked to participate in the development of what projects the Institute will undertake, I have not been privy to the discussions as to why a *Restatement* was the first labor and employment project undertaken by the Institute. My surmise is that the current fetish among some legal academics to value only what can be counted, preferably counted digitally, may have played a role. The ALI pays close attention to how often its publications are cited and that is a good thing to know. But the notion that a *Restatement* is somehow more valuable because common law courts will cite it more often than they might a principles project is a weak rationale for foregoing a more important and potentially more meaningful project. Failing to do first things first is a mistake. In the area of labor and employment law, the first thing for the ALI to do is to undertake a principles project. Once that is accomplished, a project restating the common law would not only be easier to do but the resulting product would have the potential to become much more significant.