

## ARTICLES

### SHORING UP THE CITADEL (AT-WILL EMPLOYMENT)<sup>†</sup>

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In 2002, the American Law Institute announced a project to restate the law of employment: not all of the law—so weltered has it become by a thick network of hundreds upon hundreds of state statutes, some sweeping, some of exquisite narrowness—but only the corner occupied by the common law, of contract and tort, and not even all of that, not defamation, misrepresentation (by employers or employees, intentionally or negligently), negligent hiring or supervision, the intentional or negligent infliction of emotional distress, but only parts of it, the two most salient being the common law of job security and privacy.

I found the project puzzling for the Institute had breathed no public hint of why these discrete choices were made or, more importantly, what end called for the effort.<sup>1</sup> My puzzlement was compounded when the first albeit decidedly rough draft of the part on job security appeared. After touching upon what seemed the draft's more problematic elements, two questions persisted: "*What purpose does all this serve? What demonstrable need does it satisfy?*"<sup>2</sup>

Now the redraft of that part has appeared, this time accompanied by

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<sup>†</sup> In debt to William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1965), and William Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960).

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1. Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LAB. LAW. 405, 409 (2003).

2. Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 298 (2005).

a statement by the Institute's Director that provides at least a partial response. "Employment law," he tells us, "is an excellent subject for Restatement work."<sup>3</sup> We are not told why. Instead we are told that although there is a good deal of legislation, federal and state, and "important" legislation at that, nevertheless,

major aspects continue to be governed by law developed by state appellate courts. Doctrine has changed significantly in recent decades. *Clarification, simplification, and adaptation to social conditions* are all needed. A Restatement will be influential.<sup>4</sup>

The Director's statement harkens back to the very origins of the Restatement process. The ALI was created, as the 1923 Charter put it, "to promote the clarification and simplification of the law and its better adaptation to social needs . . . ."<sup>5</sup> Ever since, the jurisprudential—and political—underpinnings of the process have been controversial.<sup>6</sup>

Should, for example, the aim of law reform be to cut down uncertainty and complexity? One might think it self-evident that they were unavoidable and, indeed, vital to any adjustment of the innumerable new and changing spheres of interaction between human beings. The "causes" of uncertainty and complexity which the [1923] Report deals with in some detail undoubtedly exist; but to believe, as the Committee did, that the answer to legal problems was simply to eliminate these causes, leaves far too much unsaid. We must plan but we must plan not in terms of the traditional legal dogma but with reference to social values and objectives which we can test and weigh impartially, without relying on a superstitious and unconfirmed belief in their validity. And to say this, of course, is not to say anything startlingly new: it is merely to draw on the sum total of social, political, scientific and legal thought

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3. Lance Liebman, *Foreword to RESTATEMENT OF THE LAW (THIRD) EMPLOYMENT LAW* (Discussion Draft 2006).

4. *Id.* (emphasis added).

5. American Law Institute, *Certificate of Incorporation*, (February 23, 1923), available at <http://www.ali.org/> (follow "Charter, Bylaws, & Rules" hyperlink; then follow "Certificate of Incorporation" hyperlink); HERBERT GOODRICH & PAUL WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE, 1923–1961*, at 7 (1961) (noting the history behind the Charter's adoption). The American Law Institute's 1923 Report, observing "general dissatisfaction with the administration of justice," and forming the foundation for the Charter, is set out in *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. PT. 1 (1923).

6. See Kristen Adams, *The Folly of Uniformity? Lessons From the Restatement Movement*, 33 HOFSTRA L. REV. 423, 440 (2004) (considering whether the Restatements have become politically biased).

over the centuries.<sup>7</sup>

This Article will address the question, the answer to which is assumed in the Director's statement, of whether these aspects of employment law *are* a fit subject for Restatement. To do so, we will need to engage with that process, not in the abstract, but in terms of the product we have been given, of its basic tendency. This requires that we take up the structure and elements of the two major portions of the redraft that emerge with clarity now that some of the questionable elements in the earlier effort have been eliminated or softened<sup>8</sup>: contractual job security and retaliation for a reason violative of public policy. These will be measured against the benchmarks we have now been given: of legal simplification, of doctrinal clarification, and of adaptation to social conditions. Only after we see how the process is shaping up can we ask whether we are likely to be well served by it should it prove as influential as its proponents expect.

### I. CONTRACTUAL JOB SECURITY

The draft opens with a restatement of the “at will” employment rule as “well established,”<sup>9</sup> as it surely is, both as a default rule absent agreement to the contrary and, more controversially today, as a judicial self-denying ordinance on the imposition of any common law limit on the employer's power to discharge; in the oft repeated nineteenth-century formula, to affirm the employer's power to discharge for “any reason, no reason, or even a morally repugnant reason.” In this the draft is quite right: the courts do repeat the formula, in opinion upon opinion, but perhaps a bit less robustly than a century ago, for the recitation is today usually prefatory to the further statement that there is a body of exceptions to the rule which the case at hand customarily seeks either to fit or to expand.

Having established the default rule, the draft next sets out four limits on the power of summary discharge, by (a) a collective agreement;

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7. Alan Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795, 797 (1959).

8. Gone from this version is the counter-factual assertion that the employer's ability to discharge for any reason, even a morally repugnant one, “best represents the joint intentions of [both of] the parties.” Gone is the draft's extraordinary, counter-historical assertion that the theory of contract “implied in fact” is wanting in any sound doctrinal grounding. Gone is the endorsement of employer good faith as the touchstone governing the definition of cause to dismiss under employer rules affording job security. And promissory estoppel now makes an appearance, but, inexplicably, only in the commentary and even then only passingly. *See infra* note 50.

9. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.01 cmt. a (Discussion Draft 2006).

(b) a bilateral agreement; (c) a “unilateral employer commitment,” and; (d) a duty of good faith and fair dealing. The first is beyond the Restatement’s scope. Not so the rest.

The critical sections of interest here, (b) and (c), erect a wall of separation between a bilateral contract and what the draft terms a “unilateral commitment.” At first blush, section (c) would seem to refer to a unilateral contract, in doctrinal counterpoint to a bilateral contract treated in section (b). The reader could well assume as much by the comment introducing this section:

Agreements may provide for other than at-will employment. This Section lists the various forms such agreements may take. Although other established contract doctrines, such as promissory estoppel, also may be applicable, an attempt has been made here to set out *the principal contractual variations* from at-will employment.<sup>10</sup>

But, as the draft proceeds we learn that a unilateral commitment is *not* a unilateral contract; and in fact, that the draft rejects any theory of unilateral contract as at all applicable to unilaterally promulgated employer commitments—offering instead a theory of “employer estoppel.”<sup>11</sup> More on that in a moment.

The reason the draft draws this distinction lies in the disparate effect it gives to each of the respective guarantees. When a commitment not to be dismissed except for just cause is contained in a bilateral contract it cannot be abrogated by the employer; but when the same commitment is contained in an employer policy applicable to the workforce generally, it can be abrogated vis-à-vis those currently governed by it.

An exception to this rule is carved out for those unilateral commitments that have “vested”; but vesting, we are told, occurs only “occasionally.”<sup>12</sup> The sole example given is a welfare benefit, such as severance pay, that does not vest under federal benefits law but might as a matter of contract—or, one might add, of promissory estoppel.<sup>13</sup> However, job security is not contemplated as meet for even so unusual an exemption.

Two justifications are offered for the distinction between bilateral *agreements* and unilateral *commitments*: the first doctrinal, the second prudential. Let us turn first to doctrine.

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10. *Id.* § 3.02 cmt. a (emphasis added).

11. *Id.* § 3.04.

12. *Id.* § 3.05.

13. *Id.*

### A. Doctrinal Grounds

The doctrinal distinction between a bilateral contract and a unilateral one—the distinction the draft eschews—is that the former contemplates an exchange of promises, one being consideration for the other, the latter contemplates the doing of the act requested as performing the dual function of acceptance and consideration, *e.g.*, by starting work on the terms expressly or implicitly offered without any words of promise having been uttered by the employee.<sup>14</sup> Not surprisingly, most of the courts that have held employers to be bound by the rules governing their working forces, including the rules affording job security, have done so as a matter of unilateral contract.<sup>15</sup> But at this point, the draft tells us that contract doctrine is “often analytically unsatisfying” because it would seem to require actual employee knowledge of the rule in order to find assent to it.<sup>16</sup> Where an individual worker is not personally aware of the policy, or where the policy has not been “closely studied,” it could not be binding as to that worker.<sup>17</sup> If that is so, the doctrine of unilateral contract would render an employer bound by its policy on job security vis-à-vis the studious employee, but not the ignorant one. In order to proceed along this path, however, the draft ignores doctrine of long-standing that would avoid the conundrum either by imputing knowledge to the workforce constructively<sup>18</sup> or by similar reliance on the law of custom and usage.<sup>19</sup> Instead, the draft opts for abrogability, not as driven by unilateral contract, but by drawing upon two public law analogies. The first is to tariffs filed with a regulatory agency that bind the seller of goods or services until modified tariffs are filed and approved.<sup>20</sup> Essentially, the draft would connect a regulatory device deployed to insure against a seller’s price discrimination in the market to the ability of an employer retroactively to abrogate its commitment to discharge its incumbent complement of employees only for just cause. The connection is less than pellucid.<sup>21</sup>

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14. The distinction, Alan Farnsworth said a generation ago, “plays a less important role in contemporary analysis of contracts” and, in fact, was abandoned in the Restatement (Second) of Contracts. E. ALLAN FARNSWORTH, *CONTRACTS* § 3.4, at 110 (1982).

15. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 3.04 (Discussion Draft 2006).

16. *Id.*

17. *Id.*

18. *Cf.* 1 C. B. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* § 208(d), at 652-53 & n.15 (1913).

19. Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 747-48 n.68 (1986).

20. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 (Discussion Draft 2006).

21. The Reporter’s Comments draw attention to the use of this analogy by the United States

The second and more important analogy is to what the draft terms “administrative estoppel,” *i.e.*, by reference to “rules of practice promulgated by administrative agencies to govern their operational decisions; as a matter of administrative law, such rules are treated as giving rise to a type of administrative estoppel and are held binding on the agency even though no statute or regulation requires their promulgation.”<sup>22</sup> The draft references *Vitarelli v. Seaton*<sup>23</sup> and other related cases decided by the United States Supreme Court in the 1950s.<sup>24</sup>

Because the analogy is critical to the draft’s categorical distinction, it need be treated in depth. This digression will be connected to the larger analysis in due course.

### 1. Administrative Estoppel

Let us turn to the leading decisional ground. *Vitarelli*, a Ph.D. from Columbia University, had for two years been a Training Specialist employed by the Department of the Interior to work in Palau, a Pacific Trust Territory.<sup>25</sup> He was suspended on suspicion of “sympathetic association” with the Communist Party or with those in sympathy with it.<sup>26</sup> He was an at-will employee, but the Secretary of the Interior had adopted rules providing for due process in the termination of an employee when the grounds asserted concerned national security.<sup>27</sup> These the Secretary flouted: *Vitarelli* was questioned on what the government’s agents took to be his unacceptable views on the rights of Jews and blacks, of whether he had voted for Norman Thomas or Henry

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Supreme Court in *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944), in struggling with the legal nature of a collective agreement. That question was novel at the time, and perhaps, is challenging still. See generally David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 *passim* (1973) (arguing that American law has never developed a definite theory on the rights created by a collective bargaining agreement). The provisions of a collective agreement terminate at the agreement’s termination unless the parties have agreed to the contrary. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991). But even as a provision assuring just cause to discharge may expire upon the agreement’s expiration, job security remains a mandatory bargaining subject that an employer must negotiate with the union and cannot act upon unilaterally until that bargaining obligation is exhausted. It is doubtful, to put it mildly, that having bargained to impasse with a union, the employer would be free unilaterally to implement a demand for employees to be placed on an at-will basis, *i.e.*, for standardless and unfettered discretion in the matter of discharge. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW § 21.9, at 711 (2d ed. 2004).

22. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 (Discussion Draft 2006).

23. 359 U.S. 535 (1959).

24. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 (Discussion Draft 2006).

25. *Vitarelli*, 359 U.S. at 536.

26. *Id.* at 536-37.

27. *Id.* at 538.

Wallace, of whether he supported the United Nations, and a good deal more—and was then dismissed.<sup>28</sup> His dismissal was held to be of no legal effect for want of the provision of a fair hearing as required by the rules.<sup>29</sup> Even though the Department was not obligated to afford him a fair hearing, it was bound by the rules it had adopted that did afford him that protection.<sup>30</sup>

So far, so good. But we are offered the case for the follow-on proposition that the Secretary could abrogate those hearing rules and proceed thereafter to discharge another incumbent employee suspected of disfavored political sympathies without affording any hearing at all. This is the analogy the draft draws: that a private employer is bound by its “rules of practice,” just as a public employer is, but like a public employer, the private employer is bound only for so long as it chooses to be.<sup>31</sup> It follows that a private sector employee can no more claim a vested right in her employer’s rule of practice, its “merely procedural” rules, than can a public employee.<sup>32</sup>

There is no doubt that the doctrine of administrative estoppel, as formulated in the 1950s, remains good law today; but there is good reason to doubt that, today, a public employer’s policy or practice that assures that an employee will be dismissed only for good cause (not only in those words, but perhaps even by such assurances of fair treatment or progressive discipline as would amount to the same thing)<sup>33</sup> can be made revocable vis-à-vis the incumbent workforce by the expedient of labeling that commitment as a mere “rule of practice” or “agency procedure.” It is important to note, just as the Court did, that Dr. Vitarelli’s job was held at-will—nothing in the rules of the agency adopted to deal with security risks was alleged or even thought to alter that status.<sup>34</sup> Nor even as to its incumbent complement of tenured employees is an agency bound in perpetuity by its extant rules governing standards of performance or evaluation: these have been considered to be procedural incidents of employment.<sup>35</sup> But a public employer’s underlying commitment to dismiss only for just cause—the commitment actually addressed by the draft—would scarcely be abrogable as such a

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28. *Id.* at 542-43 n.5.

29. *Id.* at 545.

30. *Id.* at 545-46.

31. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 (Discussion Draft 2006).

32. See, e.g., *Johnson v. Colo. State Bd. of Agric.*, 15 P.3d 309, 313 (Colo. Ct. App. 2000).

33. See *Butterfield v. Citibank of S.D., N.A.*, 437 N.W.2d 857, 859 (S.D. 1989).

34. *Vitarelli*, 359 U.S. at 539.

35. *Johnson*, 15 P.3d at 310, 313 (the addition of a system of post-tenure review to incumbent tenured faculty imposed no retroactive disability inasmuch as the requirement of just cause for dismissal was not affected in any way).

procedural incident.

More than a decade after *Vitarelli*, the Supreme Court made clear that a state employee's right to continue in his or her position, requiring the observance of procedural due process in order to dismiss as a matter of constitutional law, can arise from the employer's rules, words, or conduct—by the “common law of [the shop]”<sup>36</sup> that is, even by the public employer's practice in the absence of any rule, if such were recognized in state law. When, by any of these means, an expectation of job security is mutually engendered it cannot be revoked. Thus, the draft's reliance on *Vitarelli* is misplaced—and misleading.<sup>37</sup>

## 2. The Doctrinal Emptiness of the Bilateral Agreement/Unilateral Commitment Distinction

The draft wants to say that a commitment to permanence made in a bilateral contract—one made by an exchange of promises—is irrevocable, but one contained in a promulgated employer policy is revocable. The doctrinal vacuity lies in the fact that the commitment to job permanence in a bilateral lateral contract need not be made as an express promise—it may be implied from the circumstances of the transaction, including the employer's well-established policies and practices,<sup>38</sup> just as the draft otherwise recognizes.<sup>39</sup> Doctrinally, it is indistinguishable from a unilateral commitment.<sup>40</sup>

If the draft's treatment were sound, a public, as much as a private university, could abrogate the tenure of its incumbent tenured faculty

36. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

37. Today, and contrary to the state of constitutional law when *Vitarelli* was decided, a non-policy making public employee cannot be discharged because she voted for a Socialist or thought minority groups were getting a raw deal. As we will see, not only may a private sector employee be dismissed for those reasons, the draft approves of the common law's refusal to intervene in those cases. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 (Discussion Draft 2006).

38. In the case of a bilateral agreement of employment, where the written terms are silent or where an oral statement is ambiguous, the courts will look to all the surrounding circumstances—the nature of the particular employment, whether permanence or a fixed duration would be a common condition in the trade or profession, the special situation of the employee and his or her actions taken in reliance, and the like. RESTATEMENT (SECOND) OF AGENCY § 442 cmt. a (1958). *See, e.g.*, *Tucker v. Zapata Indus., Inc.*, 848 P.2d 26, 28-29 (Okla. Civ. App. 1992).

39. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.02 (Discussion Draft 2006).

40. Note that the Supreme Court of West Virginia is cautious in its requirement of definiteness, but clear in the nature of the inquiry:

[W]here an employee seeks to establish a permanent employment contract or other substantial employment right, *either* through express promises by the employer *or* by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence.

*Adkins v. Inco Alloys Int'l, Inc.*, 417 S.E.2d 910, 916 (W. Va. 1992) (emphasis added).

simply by rescinding its tenure rules. The draft anticipates and attempts to foreclose that result by treating tenure as an “unusual” case of bilateral contract rather than as a “unilateral employer commitment”:

Although ordinarily a bilateral agreement requires an exchange of express promises, an offer contemplating acceptance by the employee’s performance, or some other promissory statement by the employer to which the employee indicates assent, there may be unusual circumstances where the well-established practices of the employer indicate conduct manifesting a promise by the employer that the employee accepts by continuing employment. Such circumstances are said to be present in the tenure system of modern universities. See generally Restatement Second, Contracts § 4 and Comment a, at 14.<sup>41</sup>

This will not do. It is the *usual* circumstance of both unilateral *and* bilateral contracts that “well-established practices of the employer” can manifest the terms and conditions of employment,<sup>42</sup> and the Restatement (Second) of Contracts’ provision cited says exactly that.<sup>43</sup> So, too, does the draft when it says earlier that “typically”—*not* unusually—“bilateral agreements involve an exchange of express promises . . . or conduct manifesting a promise by the employer,”<sup>44</sup> *i.e.*, conduct that manifests an employer’s commitment to observe a specific term or condition of employment.

Academic tenure means that the tenured faculty member cannot be dismissed except for just cause.<sup>45</sup> There is no exchange of promises between the professor awarded tenure and the institution.<sup>46</sup> The terms of

41. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.03 (Discussion Draft 2006) (emphasis added).

42. See HOWARD A. SPECTER & MATTHEW W. FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* §§ 1.23, 2.07 (1989) (citing cases where conduct of the employer can be used to determine the otherwise unstated terms and conditions of employment).

43. The provision cited states in its entirety:

*Express and implied contracts.* Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance. See Uniform Commercial Code § 1-201(3), defining “agreement.”

RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981). Nothing here suggests that there is anything at all unusual in judicial resort to an employer’s well-established practice to give meaning to its obligations.

44. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.03 (Discussion Draft 2006) (emphasis added).

45. MATTHEW W. FINKIN, *THE CASE FOR TENURE* 3 (1996).

46. Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65

the appointment are customarily set out in a set of institutional rules or policies that may not even be expressly incorporated into the institution's notice or letter awarding tenure; nevertheless, these are routinely resorted to by the courts to define the institution's obligations.<sup>47</sup> Consequently, the draft's effort to somehow differentiate tenure as an "unusual" case of bilateral contract in contrast to a "unilateral employer commitment," only emphasizes the doctrinal emptiness of the distinction.

### 3. Vesting

If more is needed, take a look at how the draft treats the question of vested rights—those unilateral employer commitments that the draft concedes are insulated from abrogation. Some rights we are told (severance pay is the one the draft refers to), are capable of vesting and the draft lays out a set of considerations to guide a court in deciding what vests and what does not.<sup>48</sup> These include "detrimental reliance" by the employee and an assessment of the employees' "reasonable expectations" in the matter.<sup>49</sup> (If detrimental reliance need be shown, many jurisdictions would apply the doctrine of promissory estoppel—a doctrine that makes virtually no appearance in this draft.<sup>50</sup>) Oddly, the former would bind the employer only as to the studious or "reliant" employee and not the ignorant or indifferent one. This implicates the very conundrum the draft lays out to eschew; namely, contract doctrine in favor of its theory of administrative law estoppel. The latter avoids that result by resting on the reasonable expectations of the workforce as a whole, which is fair enough. But the reasonable expectations of the workforce as a whole would seem equally applicable to a policy

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IOWA L. REV. 1120, 1146 (1980).

47. *Id.* at 1146 & n.120 (citing cases where "Faculty Manuals" were used to define employment contracts).

48. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.05 cmt. b (Discussion Draft 2006).

49. *Id.*

50. The comment to the section laying out the four categories of contractual job security says that promissory estoppel "may be applicable." *Id.* § 3.02 cmt. a. However, the Reporter's Notes state only that the courts are divided on whether promissory estoppel can be involved when what is at stake is a promise of an at-will job. *Id.* § 3.02 cmt. a., reporter's note. Be that as it may, promissory estoppel can apply both to the abrogation of a unilaterally promulgated benefits policy and to promises of job security contrary to at-will employment. See *Furrer v. Sw. Or. Cmty. Coll.*, 103 P.2d 118, 123 (Or. Ct. App. 2004); *Enriques v. Nofsiger Mfg. Co.*, 412 F. Supp. 2d 1180, 1183 (D. Colo. 2006). It is puzzling, to put it mildly, that the draft would rest content to make merely passing mention of a body of law that would seem to call for black-letter treatment. Promissory estoppel may well be a controverted doctrine vis-à-vis an at-will job, but the draft is not otherwise reticent about coming down hard on other, equally controversial matters.

affording job security. And there's the rub: If the draft were to concede that the reasonable expectations of the workforce could prevent the abrogation of the employer's commitment to job security, the analogy to administrative estoppel, upon which the draft's insistence on abrogability rests, would collapse; for under that doctrine, *nothing* can prevent a public agency from abrogating a mere rule of "practice," which the draft asserts is all a unilateral commitment to job security is.

In other words, the conditions the draft lays out to govern vesting are like the jaws of a vice that come within an inch of one another, but cannot quite close; and the draft does not even try to close them.<sup>51</sup> Instead, it offers two practical considerations that it takes to support the result. Let us turn to them.

### *B. The Practical Justifications*

We are told first that, "[i]t is not reasonable to assume that an employer intended permanently to circumscribe its operating policies"<sup>52</sup>—which ignores the principle, embodied in the Restatement (Second) of Contracts, requiring the courts to construe contracts *against* the interest of the drafting party.<sup>53</sup> We are told second that "due weight [should be given] to the employer's interest in maintaining uniform terms of employment for similarly situated employees."<sup>54</sup> However, this consideration is of no concern to the draft when it comes to the vesting of some welfare benefits. The logical outcome of accepting employee reliance or reasonable expectations there would mean that incumbent employees would enjoy greater benefits than their recently hired counterparts, and the draft does not blink at this result. In fact, employers seem to have no difficulty today in freezing their guaranteed benefits pension plans vis-à-vis incumbent workers and hiring new workers under defined contribution plans (sometimes employer non-contributory) or affording them no pension benefits at all.<sup>55</sup> Nor are employers apparently troubled by having the same work done in the same workplace by both regular and agency workers who work side-by-

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51. As much can be said as well for its treatment of promissory estoppel. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.02 (Discussion Draft 2006).

52. *Id.* § 3.05 cmt. a.

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

54. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.03 cmt. b (Discussion Draft 2006).

55. See Matthew W. Finkin, *Bearing the Burdens of Decisions Made by Others: The Corporate Reallocation of Employee Risk in the United States*, in PERSPEKTIVEN DER CORPORATE GOVERNANCE (Ulrich Jürgens et al. eds., forthcoming 2006) [hereinafter Finkin, *Bearing the Burdens*].

side under vastly different wage and benefits policies.<sup>56</sup> Uniformity of treatment does not seem to be of much concern to employers in these cases. It is never explained why uniformity of treatment should drive in the opposite direction when it comes to job security.

The nub of the draft's rationale is contained in the assertion that we should not assume that employers wish forever to constrain their flexibility in the matter of discharge, for the draft is candid about why employers provide these assurances in the first place. "Employers make such statements in their self-interest because they believe the policies . . . will advance productivity, employee welfare, or some other organizational objective."<sup>57</sup> In other words, when employers, acting in their self interest, decide that fear of job loss might be a better motivator than job satisfaction, they should be free to disregard their prior commitments. This logic elides the fact that the loyalty the employer's policy sought to instill rested upon creating reasonable employee expectations about how they will be treated in the future. The labor of a human being is a non-durable good. The individual's dwindling supply is expended, other opportunities ignored or foregone, at least partly because of the expectation of fair treatment the employer has engendered. If expectations of deferred income could estop the employer from abrogating retroactively its commitment to severance pay, it would seem much the same should apply in the matter of job security; or, less strongly, that the draft rather badly needs to explain why it would not, by reason other than that abrogability better serve an employer's interest.

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56. See, e.g., JACKIE KRASAS ROGERS, *TEMPS: THE MANY FACES OF THE CHANGING WORKPLACE* 25 (2000) (discussing how temporary workers perform the same tasks as "permanent" employees, but get unequal compensation and treatment).

57. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 cmt. b (Discussion Draft 2006). *Accord* *Small v. Springs Indus., Inc.*, 352 S.E.2d 452 (S.C. 1987):

Unquestionably, [the employer] was under no obligations to write and distribute the employee handbook or the bulletin. Once Springs voluntarily chose to publish the handbook and bulletin and orally assure the employees that the provisions of those publications would be followed, there were "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice."

*Id.* at 454 (quoting *Walker v. Westinghouse Elec. Corp.*, 335 S.E.2d 79, 83 (N.C. 1985)). "Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory . . ." *Id.* (quoting *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 895 (Mich. 1980)).

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Let us return to the outset of this discussion. We have been told that job security is an excellent subject for restatement—more on that later—and we have been given three benchmarks against which to measure the effort: simplicity, doctrinal clarity, and adaptation to social change. Let us take the measure of this restated rule accordingly.

*Simplicity.* This seems to be the rule we have been offered: An employer may not abrogate a commitment to job security made in a bilateral agreement, even where the obligation is implied from the employer's conduct (which would *seem* to include its established policies), but an employer may abrogate the same commitment when made as a unilaterally promulgated employer policy.<sup>58</sup>

As the draft's treatment of tenure illustrates, the distinction does not seem all that simple insofar as it requires the court to decide, by reference to the same employer conduct, whether it forms part of a bilateral agreement or constitutes merely a "unilateral commitment." In the event, the value of the rule's simplicity, *if* it is simple, has to be determined with reference to its "social values and objectives."<sup>59</sup>

*Doctrinal clarity.* From the foregoing, it is enough to observe that the rule does not flow from any clear or even coherent doctrinal exposition. The basis for it must rest instead in the need to adapt to economic or social conditions.

*Adaptation to social conditions.* This really is the heart of the matter, but we are incapacitated in addressing it for the simple reason that the restatement process does not discuss or even advert to what the conditions are that call for the draft's approach. All we are told is that employers might no longer see it in their interest to build employee loyalty and productivity by assuring job security, and that the law should not be an obstacle to a retroactive restructuring of their policies accordingly—to favor insecurity and fear of job loss as a better motivator. Because the draft never discusses the social or economic realities and trends it is supposedly adapting the law to, we must look elsewhere. When we do, we learn that for workers of long service, job security is not being abandoned in wholesale;<sup>60</sup> and we next encounter

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58. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW §§ 3.03, 3.04 (Discussion Draft 2006).

59. Milner, *supra* note 7, at 797.

60. Ann Huff Stevens, *The More Things Change, the More They Stay the Same: Trends in Long-Term Employment in the United States, 1969-2002*, at 10-11 (Nat'l Bureau of Econ. Research, Working Paper No. 11878, 2005), available at <http://www.nber.org/papers/w11878>. "[L]ong-term employment is an important feature of the labor market experience for most U.S. workers." *Id.* at 11. The Bureau of Labor Statistics reported that for the period 2003-2005, 3.8 million workers of

strong arguments that the erosion of job security, when it has occurred, is short-sighted and destructive, not only of individual lives<sup>61</sup> but socially and economically as well.<sup>62</sup> Others doubtless disagree, encouraged by the benefits of creative job destruction. This is scarcely the place to resolve the debate. It is enough to note that the sole social ground the draft would adapt the law to is strongly contested, and that the draft resolves the law's role in it without breathing a hint that the contest exists.

## II. DISMISSAL FOR REASONS VIOLATIVE OF PUBLIC POLICY

The draft surveys what the courts have done with the public policies they have found to limit an employer's power otherwise to discharge (or retaliate) against an employee for any reason, no reason, or even a morally repugnant reason. The draft picks and chooses from among these, creating four compact categories of protected action: (a) refusing to do an act that the employee believes, reasonably and in good faith, to require him or her to violate the law or a code of ethics; (b) fulfilling a legal obligation; (c) claiming (or refusing to waive) a workplace benefit or right; and (d) reporting an employer's misconduct or cooperating in a governmental investigation of it.<sup>63</sup> Each is well established across a number of jurisdictions. What troubles is the categorical character of the combination: we are told that "the list of categories . . . sufficiently constrains the courts' inquiry into public policy."<sup>64</sup> That is to say, this and only this, so far and no further; but we

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three or more years of longevity were displaced in contrast to the 5.3 million displaced in the period 2001–2003, this in a civilian labor market of more than a hundred million. U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., WORKERS DISPLACEMENT, 2003-2005, USDL 06-1454, at 1 (2006), available at <http://www.bls.gov/news.release/pdf/disp.pdf>. See generally Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHL-KENT L. REV. 1195 (2000) (explaining that career-type employment practices continue to be the norm in the U.S. and that long-term employment relationships remain an important feature of the U.S. labor market).

61. See generally LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN* (2006) (discussing the negative effects of layoffs on individuals and society).

62. Most of the studies are of lay-offs or "downsizing." See, e.g., WILLIAM J. BAUMOL, ALAN S. BLINDER & EDWARD N. WOLFF, *DOWNSIZING IN AMERICA: REALITY, CAUSES, AND CONSEQUENCES* (2003). But it seems ineluctable, given the draft's rationale, that the abrogation of job security is intended to and will conduce toward heightened job *insecurity*. And it is at least arguable that heightened job insecurity, however it might serve to "discipline" the workforce, also has negative economic effects. *Id.* at 22; STEVEN A. HERZBERG, JOHN A. ALIC & HOWARD WIAL, *NEW RULES FOR A NEW ECONOMY* 122 (1998).

63. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 (Discussion Draft 2006).

64. *Id.* § 4.02 cmt. a. "The approach of §4.02," the Reporter's Note tell us, "side-steps the controversial issue of how to find public policy by focusing instead on whether the discharge fits into one of the four categories . . ." *Id.* § 4.02 cmt. a, reporter's note.

are not told why. Nor are the categories without internal difficulty. Let us take up but three before returning to their preclusive character.

1. Retaliation by the employer for the *employee's* action: The black letter rules we have been given are crafted with considerable care and close attention to detail, as the many illustrative cases set out in the draft demonstrate.<sup>65</sup> The draft would insulate the employee against retaliation for something he or she has done that he or she can situate in one of the categories the draft sets out.<sup>66</sup> But none of these insulate retaliation against an employee for what another, such as the employee's spouse, son, or close relative has done. "To retaliate against a man by hurting a member of his family," Judge Posner reminds us, "is an ancient method of revenge."<sup>67</sup> It is a recurring fact pattern in the common law of employment and the courts are at sixes and sevens about what to do about it.<sup>68</sup> The draft comes down on the side of non-protection, but it does not tell us why.

2. The employee who reports his or her *employer's* misconduct: It serves the public weal, effecting a better enforcement of the law, that employees not be subject to retaliation for reporting an employer's conduct which the employee reasonably believes to be unlawful. So far, so good. Note, however, that the rule insulates the employee from retaliation only if the report is of conduct attributable to the *employer*, not the unlawful conduct of another for which the employer has no responsibility.<sup>69</sup> Accordingly, it should follow that an employee cannot be discharged for reporting that a customer raped her,<sup>70</sup> for dealing with the customer was part of her job and his assault on her was part of her working conditions; but, the draft tells us, she can be discharged for reporting that her estranged husband raped her,<sup>71</sup> although she could not be discharged for absenting herself from work in order to cooperate in his prosecution as that would be the observance of a public obligation, *if*

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65. See *id.* § 4.02 cmts. a-g, illus. 1-21 (providing illustrations that are modeled after real cases).

66. *Id.* § 4.02.

67. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987).

68. Compare *Gabler v. Holder & Smith, Inc.*, 11 P.3d 1269, 1278 (Okla. Civ. App. 2000) (finding no violation of public policy where an employer discharged a wife because her husband was a whistleblower) with *Fortunato v. Office of Stephen M.S. Silston, D.D.S.*, 856 A.2d 530, 533 (Conn. Super. Ct. 2004) (holding that a discharge of a mother because of her daughter's contemplation of a lawsuit against the employer was a violation of public policy).

69. *Contra Vorpapel v. Maxell Corp. of Am.*, 775 N.E.2d 658, 659 (Ill. App. Ct. 2002).

70. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967-68 (9th Cir. 2002).

71. The draft cites *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995), with approval on just those facts. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. a, reporter's note (Discussion Draft 2006).

she had been subpoenaed.<sup>72</sup> As with the limit of protection to only the employee's action, how the public weal is advanced by this distinction is not explained. Under the draft's rules, a circus' animal handler who reports his employer's mistreatment of an animal—a lion—in violation of federal law, could not be discharged for it.<sup>73</sup> But an employee of a company providing service to the circus who reports that abuse to federal authorities could be discharged by his employer for want of that employer's responsibility. The mistreated lion would be hard pressed to see the distinction.

3. Asserting a right "*arising from employment*": It follows from this rule, as the text and illustrations make clear, that one *can* be discharged for asserting a legal right when that right does *not* "arise from" one's employment, *i.e.*, adverse job action *is* permissible because the right exercised is *not* job-related.<sup>74</sup> By this logic, an employer is free to regulate all manner of employees' off-duty associations, political expressions, and other lawful activities because those expressions and activities are not connected to the job. Some of these activities surely can be connected to the public weal,<sup>75</sup> but the draft would deny the courts the open-ended power to find society better served by the insulation of the exercise of a legal right or privilege when it is not connected to the workplace.<sup>76</sup> Accordingly, the draft sees nothing amiss, of any concern to our once and future common law, were Dr. Vitarelli to be discharged today because his views on blacks, Jews, the President, or

72. See *Dunwoody v. Handskill Corp.*, 60 P.3d 1135, 1137 (Or. Ct. App. 2003).

73. See *Hagan v. Feld Entm't, Inc.*, 365 F. Supp. 2d 700, 710 (E.D. Va. 2005).

74. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e (Discussion Draft 2006).

75. See *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377, 382 (Wash. 1996) (discussing the importance of public-policy-linked conduct); *Korslund v. Dyncorp Tri-Cities Serv., Inc.*, 125 P.3d 119, 131 (Wash. 2005). The draft rejects *Loomis* on its facts and adopts the proposition that the exercise of political free speech outside the workplace is not a matter of public policy because the courts have not come to a consensus that it is. *But see Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733 (Idaho 2003) (Kidwell, J. dissenting):

Allowing employers to terminate employment based on an individual's association and speech regarding public issues that may have little or nothing in connection with the employer's business, invites employers to squelch the association, speech, and debate so necessary to our system of government. This is particularly true in the context of the myriad of small Idaho communities with only one or two prominent employers. Thus, I would hold it against public policy to discharge an employee for constitutionally-protected political speech or activities regarding a matter of public concern, provided that such speech or activity does not interfere with the employee's job performance or the business of the employer.

*Id.* at 742. A dissent has the capacity to become a majority view over time, depending upon its power to persuade. But the draft's categorical imperative, fixing the law into only its four rules, would urge the Idaho Supreme Court to reject Judge Kidwell's opinion in the future because it (and others) had in the past.

76. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. a (Discussion Draft 2006).

the United Nations displeases a corporate manager, howsoever robust political debate might be thought to contribute to the public weal.

The attempt to cabin protection to job rights—to license retaliation when the victim’s lawful activity has no apparent bearing on job performance—seems strange and artificial. The draft states, for example, that as the right of self-defense does not “arise from” employment, its exercise is not insulated from employer reprisal.<sup>77</sup> Does it not seem strange that an employee who is assaulted by her supervisor cannot be discharged for reporting him, but she can be discharged for resisting him?<sup>78</sup>

We are also told that an employee who consults counsel about compensation wrongfully withheld, perhaps the proceeds of a profit-sharing plan, cannot be discharged for that, nor for asserting that right in court, as these are rights that arise from employment.<sup>79</sup> But we are also told that if she consults counsel in her capacity as a shareholder over that company’s depletion of the assets that would have gone *into* her profit-sharing plan, she can be discharged.<sup>80</sup> She can also be discharged for exercising her proxy rights or for joining in a shareholder derivative suit, because all of these rights are shareholder rights that do not “arise from” her employment.<sup>81</sup> It is not clear how the distinction would play out in a company operated as a trust for the employees,<sup>82</sup> or one that is employee-owned, or one in which stock is held as a result of an employer-sponsored stock purchase plan. One is hard pressed to see why it should make a difference that the employee sought to protect her interest in the company’s long-term profitability by purchasing shares in the open market and exercising her rights as a shareholder to protect her job instead of holding them as an employee-owner or via an employer-sponsored plan. In a case of discharge because employee-shareholders refused to vote their stock as management dictated, the Supreme Court

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77. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e, illus. 13 (Discussion Draft 2006).

78. In West Virginia, however, the discharge of an employee who faced “lethal imminent danger” or, in California, one who is “backed into a corner by his attacker, with no means of escape” would or might be actionable, respectively, as a violation of public policy. *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 715-16 (W. Va. 2001); *Escalante v. Wilson’s Art Studio, Inc.*, 135 Cal. Rptr. 2d 187, 193 (Cal. Ct. App. 2003). It appears that the draft rejects these scenarios because they fall outside the “four categories.” RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e, illus. 13 (Discussion Draft 2006).

79. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e (Discussion Draft 2006).

80. *Id.*

81. *Id.* § 4.02 cmt. e, illus. 15.

82. *Farlow v. Adams*, 474 So. 2d 53, 58 (Ala. 1985) (protecting employees of a company on trust law and employment contract principles without addressing the “arising from employment” issue).

of Virginia put the question as “whether this employer can, with absolute immunity, discharge these employees in retaliation for the proper exercise of rights as stockholders, a reason which has nothing to do with the employees’ job performance.”<sup>83</sup> The answer it gave was a categorical “no.” This the draft rejects.

There is more. The draft tells us that nothing in public policy should speak to the discharge of an employee for marrying someone contrary to a manager’s dictate.<sup>84</sup> Dismissal might be the consequence of a legitimate anti-nepotism rule<sup>85</sup> or it might be an act of jealous vengeance,<sup>86</sup> but the draft maintains that the courts should have no business drawing any such distinction. As the at-will rule allows an employer to discharge for a morally squalid reason, and as one’s right to marry does not “arise from” one’s employment, we are to content ourselves with the proposition that in the eyes of the law the loss of one’s job is a price one can be made to pay for love.

Love, as a recent discussion of German law puts it, is a private thing—*Liebe ist Privatsache*.<sup>87</sup> In Germany, the judge-made law prohibits employers from interfering in the private lives of their employees absent some supervening legitimate business reason.<sup>88</sup> But the draft tells us that such is not, and should not be public policy here. One might not be distressed to see that marriage is not insulated from the vengeful action of a jealous manager as a matter of public policy were it to be protected as a matter of privacy. But as freedom of intimate association is not recognized anywhere in the common law of privacy it will make no appearance in this Restatement. It could seek shelter under the covenant of good faith and fair dealing which the draft tells us is

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83. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 800 (Va. 1985). The employees had also alleged that the employer’s action violated corporate and securities law, but the gravamen of the wrong, as the court saw it, was less that, than the bank’s seeking “to influence the exercise of protected shareholder rights by bringing pressure to bear on the vulnerable employee relationship . . . [T]he employment-at-will rule does not protect the defendants from such conduct.” *Id.*

84. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e, illus. 11 (Discussion Draft 2006).

85. *See Bulman v. Safeway, Inc.*, 27 P.3d 1172, 1177 (Wash. 2001).

86. *See, e.g., Cunningham v. Dabbs*, 703 So. 2d 979, 981 (Ala. Civ. App. 1997); *Barrett v. Kirtland Cmty. Coll.*, 628 N.W.2d 63, 73-74 (Mich. Ct. App. 2001).

87. Tina Kolle & Olaf Deinert, *Liebe ist Privatsache: Grenzen einer arbeitsvertraglichen Regelung zwischenmenschlicher Beziehungen* [Love is a Private Thing – Borders of a Work-Contractual Regulation of Interhuman Relations], [AuR] 177 (2006) (F.R.G.).

88. *See* Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL’Y J. 577, 583 (2002) [hereinafter Finkin, *Menschenbild*]; Matthew W. Finkin, *Life Away From Work*, 66 LA. L. REV. 945, 948 (2006). For a jurisprudential basis of the law, see generally Finkin, *Menschenbild*, *supra*, comparing the development of legal attitudes towards workers’ personal rights in German and American law.

instinct even in an employment held at-will.<sup>89</sup> If, as the draft maintains, good faith means that one cannot be fired for doing one's job, fair dealing might mean one shouldn't be discharged for engaging in a lawful activity that has no significant relationship to the doing of one's job.<sup>90</sup> But the draft's treatment of the covenant precludes that possibility as well. And so, the exercise of any lawful right that does not "arise from" employment—no matter how beneficial to civil society and harmless to any legitimate business interest—is denied any prospect of the common law's protection.

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We have been told that public policy as a limit on retaliatory acts is an excellent subject for restatement, and we have been given three benchmarks against which to measure the effort. Let us take them up.

*Simplicity.* As with the distinction we are given between bilateral contracts and unilateral commitments, the four canonical categories appear to be simple; but they, too, leave room for dispute.<sup>91</sup> And even so, the value of simplicity has to be measured against other ends.

*Doctrinal clarity.* Interestingly, the approach here differs radically from that taken to contractual job security. That section attempts to cobble together *some* doctrinal ground. This section makes no such effort. We are told only that some courts have searched for an explicit grounding of public policy in positive or constitutional law and that others have been more "open-ended" in weighing how the public weal is or might be affected by the employer's action.<sup>92</sup> We are then told that the draft rejects both of these.<sup>93</sup> Instead, "it follows the courts that require that a successful claim of wrongful discharge in violation of public policy fall within the list of categories enumerated . . . ."<sup>94</sup> It "side-steps the controversial issue of how to find public policy by

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89. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.06 cmt. a (Discussion Draft 2006).

90. See *Miller v. Safeway, Inc.*, 102 P.3d 282, 295 & n.74 (Alaska 2004) (dictum suggesting that the covenant of good faith and fair dealing could well encompass the protection of employee privacy).

91. The draft tells us that absence from work for a valid personal reason, *e.g.*, seeking medical aid as the result of an automobile accident, implicates no public policy. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. c, illus. 7 (Discussion Draft 2006). It should follow that one could be discharged for leaving the job to seek medical assistance, for example, because of a severe intestinal attack. If the employee absenting himself were a food service worker, would the employer's order to remain at work and the ensuing discharge for the employee's refusal to obey, be actionable nevertheless? See *Silver v. CPC-Sherwood Manor, Inc.*, 84 P.3d 728, 729 (Okla. 2004).

92. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. a (Discussion Draft 2006).

93. *Id.*

94. *Id.*

focusing instead on whether the discharge fits into one of [these] four categories . . . .”<sup>95</sup> In other words, the draft takes an operational approach: Just as time is whatever is measured by a clock, public policy is whatever these—and only these—four categories capture, because they represent a current consensus of the courts that have accepted a role for public policy as a limit on the at-will rule howsoever derived. The common denominator *circa* 2006 thus defines both the current content and the future limit of the public good.

This seems difficult to reconcile with the forward-looking justification offered for the restatement process: to adapt the law to changed—and changing—social conditions. That purposive element could be dealt with by adding a fifth category, to allow intervention when the circumstances of the discharge fall into none of the preceding categories but so implicate the public weal as to justify it. Alas, that would be the very “open ended” approach that some courts have taken and that the draft rejects. Alternatively, the draft could add a fifth operational category allowing for intervention when a future class of cases falling into none of those set out has achieved a judicial consensus. But such a black-letter rule would lack simplicity and clarity as the courts would have to look elsewhere to find what the law is.

Ironically, the draft need not be expressly preclusive of the growth of law: it could anticipate and indeed welcome new categories of public policy—just as the Restatement (Second) of Torts anticipated and welcomed new categories of privacy protection—and still achieve its preclusive end. The judicial reception of the privacy Restatement’s operationalism supplies a sobering study in legal stultification foreshadowing the influence the instant draft’s approach to public policy is most likely to have. Let us look briefly at it.

The draft restating privacy law was in the hands of William Prosser, who, in 1967, asked that the draft be held in abeyance pending the elaboration of constitutional doctrine by the United States Supreme Court.<sup>96</sup> In 1974, his successor deemed the matter ripe; the section was published in 1977.<sup>97</sup> Much as the instant draft, it sets out four categories of privacy invasion about which the courts had come to agreement.<sup>98</sup> Unlike the instant draft, the official comment saw these as non-preclusive.<sup>99</sup> “Other forms” of actionable privacy invasion, the

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95. *Id.*

96. Herbert Wechsler, *Introduction* to RESTATEMENT OF THE LAW (SECOND) TORTS (1977).

97. RESTATEMENT OF THE LAW (SECOND) TORTS (1977).

98. *Id.* § 652A cmt. c.

99. *Id.*

Comment said, “may still appear.”<sup>100</sup> Apropos of this, it adverted to evolving constitutional law and other references to a right to privacy made in connection with the rise of computerized dossiers and the like.<sup>101</sup> These “may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms. Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.”<sup>102</sup>

Despite the explosion in privacy invasive technology and its deployment in the workplace, despite the growth, modest, to be sure, in privacy-protective constitutional law, there has been no responsive development in the common law. “The [four] categories have become canonical. In court after court, if what is presented is not one of the litany of four, it is not privacy”<sup>103</sup>—which, incidentally, is what makes the proposal to restate the common law of employee privacy today so very pointless<sup>104</sup>—and which should come as no surprise. An operational approach, for the want of a theory, is incapable of extension or refinement. When a case not contained in any of its categories is presented a court is left bereft of guidance on how to decide. The autonomic reaction is accordingly to reject the case as presenting an inauthentic issue—there of privacy, here of public policy—precisely because it is not contained in any of the categories the court has been given.<sup>105</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 259 (1996).

104. The most pressing issues of employee privacy concern job screening and testing; workplace monitoring; the collection, dissemination, and use of data; and all manners of control of employees on the job and off. In virtually none of these does the common law of tort play a significant role. *See generally* MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (2d ed. 2003) (discussing how the common law of employee privacy is limited). In any event, it probably is the case that workable solutions to these issues have far better call upon legislative and, perhaps, follow-on administrative action than on tort litigation.

105. Thus far, only a partial first draft on workplace privacy has appeared. Though a reformist end is quickly apparent, the draft inevitably is drawn back by the gravitational pull of what spins off from, a tort concerned with offensive employer behavior, not employee privacy. *Id.* To take but one example, the draft sees no privacy issue to be posed—none at all—by video surveillance of work stations open to view because, as employees are aware that they are being observed, they “have the opportunity to alter their behavior in response.” RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 5.03 cmt. h, illus. 7 (Preliminary Draft No. 3, 2005). In contrast, German law has a well developed theory of privacy that includes one’s right to control one’s presentation of oneself to others (*das Recht am eigenen Bild*—literally “the right to one’s own picture”). *See* Finkin, *Menschenbild*, *supra* note 88, at 582 & n.25. In German law, the installation of these cameras must be agreed upon with the works council, the employees’ shop floor representative, because of the threat they pose to the right of self-presentation. The very fact that one must alter one’s conduct

*Adaptation to social conditions.* Just as in the case of contractual job security, we cannot evaluate whether what we are offered is a better adaptation to social conditions because it does not tell us what the conditions are that call for this approach. The foreclosing of any growth in the law is surely in need of some explanation; even the categories we are given call for a reasoned exposition. We are told, for example, that an employee's action as a shareholder of the employing company must be distinguished categorically from her role as an employee.<sup>106</sup> This at a time when the role of employees in corporate governance is being broadly debated,<sup>107</sup> when strong arguments have been mounted that employees should be regarded as stakeholders in the employing enterprise.<sup>108</sup> This is not the place to begin to attempt to resolve the debate. It is enough to note that the draft charts a course that comes down hard on one side of it without breathing a hint that a debate exists.

### III. "AN EXCELLENT SUBJECT FOR RESTATEMENT"?

The 1923 Committee cautioned that highly contentious issues of "social or industrial or any other policy," the legal disposition of which is not generally accepted—such as "a method of improving the relations between capital and labor"—are not suitable for restatement.<sup>109</sup> In the Committee's view the legal changes a restatement should propose "would be either in the direction of simplifying the law where it is

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*because* one is being observed works an infringement of one's right of privacy. What the draft offers as the basis of escaping a privacy analysis in the United States, for want of a theory, constitutes the gravamen of the privacy infringement in German law.

106. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 cmt. e, illus. 15 (Discussion Draft 2006). Under the proposed Restatement, an employee fired for taking part in a shareholder derivative suit cannot claim wrongful termination because a shareholder's right does not "arise from employment." *Id.*

107. *See generally* PERSPEKTIVEN DER CORPORATE GOVERNANCE (Ulrich Jürgens et al. eds., forthcoming 2006) (demonstrating the worldwide debate on the role of employees in corporate governance); RICHARD MITCHELL, ANTHONY O'DONNELL & IAN RAMSAY, SHAREHOLDER VALUE AND EMPLOYEE INTERESTS: INTERSECTIONS BETWEEN CORPORATE GOVERNANCE, CORPORATE LAW AND LABOUR LAW (Melbourne Legal Studies Research Paper No. 128, 2005) (discussing employee ownership and employees roles in corporate governance); PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT 146-78 (1999) (discussing corporate governance and the shift in the balance of power between employers and employees); Symposium, *Employees and Corporate Governance*, 22 COMP. LAB. L. & POL'Y J. 1 (2000) [hereinafter Symposium] (discussing the contested and controversial issue of corporate governance).

108. *See generally* Symposium, *supra* note 107 (discussing employees as stakeholders).

109. American Law Institute, *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute* reprinted in THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 23-24 (1973) [hereinafter 1923 REPORT].

unnecessarily complex or in the direction of the better adaptation of the details of the law *to the accomplishment of ends generally admitted to be desirable.*"<sup>110</sup>

The extent to which a rule is grounded in a generally accepted end *vel non* has been a persistent conundrum in the restatement process.<sup>111</sup> Some aspects of the instant draft do reflect the center of gravity after decades of change in the at-will rule; most jurisdictions do accept the principle that an employer's policies affording job security can be contractually binding; most accept the idea that public policy can limit an employer's power to discharge.<sup>112</sup> But the follow-on issues addressed in the draft are both critical and controversial, yet the draft comes down on them, categorically.

This incites two closely related inquiries: First, whether, given the velocity of economic and social change, controverted aspects of employment relations law are any more meet for restatement today than in 1923. And second, given the trajectory of legal change, whether the direction the draft takes can be justified nevertheless.

#### A. *The Velocity of Change*

The historian Simon Middleton, writing of Colonial New York, reminds us that

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110. *Id.* at 24 (emphasis added). It prefaced that admonition thusly:

[T]here can be little doubt that the law is not always well adapted to promote what the preponderating thought of the community regards as the needs of life. The limitation on the character of any reformation of the law by an organization formed to carry out the public obligation of the legal profession to improve the law is reasonably definite. *Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth,* in any restatement of the law such as we have in mind. Changes which do not fall under the ban of this limitation, and which will carry out more efficiently ends generally accepted as desirable are within the province of the restatement to suggest.

*Id.* at 23 (emphasis added).

111.

*Assuming* that there is now a need for a restatement of the common law in the form of a system of new generalizations from the welter of individual decisions, is the Institute sufficiently taking into account the recent variations already evidenced in court decisions and also the social mores and business practices that are already ripe for new variations that must inevitably take place? The answer to this is easy; most certainly the answer is No.

Arthur Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 27 (1929) (emphasis added).

112. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.04 (Discussion Draft 2006); 82 AM. JUR. 2D *Wrongful Discharge* § 53, at 645 & n.1 (2006).

work has ever been more than a material and technical pursuit bounded by considerations of location and resource. The organization of productive capacities and employment of skills is also a social process that requires the justification of authority and interests in terms of norms and expectations that change over time, norms and expectations that are only fully intelligible when set within the wider context of contemporary political and legal discourses.<sup>113</sup>

In a scant two centuries, the United States moved from an overwhelmingly rural people in an agricultural economy to an urban people in an industrial economy to an increasingly suburban people in a service economy; participation rates in the labor market, especially by women and minorities, changed radically; employment shifted from small to large, highly bureaucratic enterprises, from precariousness and high turnover to longer job tenures, and then to ever greater labor market segmentation; union density rose from perhaps 10% before the Wagner Act to 37% in the post-War period then to decline to under 8% today; corporate welfare policies suffered birth, death, and transfiguration;<sup>114</sup> and a good deal more.

These drastic changes were followed by equally strong shifts in legal discourse, albeit with the law's customary lag time<sup>115</sup>: from the Colonial Period, which was a mixture of free labor, mercantilism—where stringent local regulation was imposed upon free labor (in a labor market that included a significant component of unfree labor as well, not abolished until 1865), and the law of master and servant, the latter regnant from the Federal Period up through the first half of the nineteenth century (parts of which are with us still) in which the respective rights and obligations of the parties were set by judge-made law, to the judiciary's more wholehearted embrace of *laissez-faire* in the

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113. SIMON MIDDLETON, FROM PRIVILEGES TO RIGHTS: WORK AND POLITICS IN COLONIAL NEW YORK CITY 3 (2006).

114. See generally SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1997) (describing the evolution of the U.S. economy).

115.

What must be grasped is that change [at the beginning and end of the twentieth century] was discontinuous. It did not simply intensify existing practices and trends. It was as much qualitative as quantitative, and at both ends of the century eventually reconfigured the nation's economy and society. Whatever the pace of revolutionary change, however, the break with the past is never clean, immediate, or total. Americans therefore lived with a tension between what their nation was and what it was becoming. Social, economic, and demographic transformation, as is often the case, proved swifter than intellectual regrouping. *Americans confronted a transforming world with old ideas whose underpinnings had been exploded.*

MICHAEL B. KATZ & MARK J. STERN, ONE NATION DIVISIBLE: WHAT AMERICA WAS AND WHAT IT IS BECOMING 5 (2006) (emphasis added).

last quarter of the nineteenth century, captured by the at-will rule, to the legislative reaction to the asperities of the at-will rule, commencing with the New Deal and accelerating ever since, on to the realization by the judiciary that the social and economic situation of the last quarter of the nineteenth century should not drive the law of employment in the last quarter of the twentieth, signaled, if a signpost were needed, by the Supreme Court of New Hampshire in 1974.<sup>116</sup>

Obviously, an effort to restate the common law of employment from cases generated by a largely agricultural workforce would have had little bearing upon the industrial workforce two generations later; nor would the law fashioned out of those industrial conditions necessarily have been responsive to a white collar workforce in bureaucratized service settings two generations on. If this project had been undertaken in 1973,<sup>117</sup> it would certainly have had to adopt the then prevailing position that a commitment to job permanence had to be supported by additional consideration other than acceptance of the job,<sup>118</sup> and to announce, were it to adopt the same operationalism it applies here, that the categories of a discharge wrongful by reason of public policy were limited to two—the refusal to do an unlawful act<sup>119</sup> and the making of a workers' compensation claim<sup>120</sup>—any further extension then being

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116. See *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974).

117. This benchmark was chosen not only because it was the year preceding *Monge v. Beebe Rubber*, but was the year in which this writer first assumed to profess labor law.

118. At that time, a contract of permanence assuring that discharge would only be for just cause was considered to be so unusual, that additional consideration was required independent of the services performed to support it. Robert A. Brazener, Annotation, *Validity and Duration of Contract Purporting to be for Permanent Employment*, 60 A.L.R. 3D 226, 244-45 (1974). The doctrine was in decline a decade later.

The law is not ordinarily concerned with the adequacy of consideration. Commitments to permanence in employment are less unusual today than in the decades before the Second World War; indeed, the history of employer policy from the turn of the century until the present is characterized by a shift from treating employees as expendable to inducing long service. Thus, the "second consideration" rule produces anomalous results and a pattern of conflicting decisions on just what such adequate consideration is, when the thrust of the inquiry is better directed at deciding what the terms of the contract are.

SPECTER & FINKIN, *supra* note 42, § 2.12, at 196-97.

119. The then leading case was *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959). Wanda Ellen Wakefield, Annotation, *Liability for Discharging At-Will Employee for Refusing to Participate in, or for Disclosing, Unlawful or Unethical Acts of Employer or Coemployees*, 9 A.L.R. 4TH 329, 336 (1981) [hereinafter Wakefield, *Unethical Acts of Employer*].

120. The "landmark decision," according to the annotator, was *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973), *quoted in* Theresa Ludwig Kruk, Annotation, *Recovery for Discharge from Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R. 4TH 1221, 1224 (1984).

contested terrain.<sup>121</sup> Yet into this vortex of economic, social, and legal change, the American Law Institute would now codify when employees are to be secure in their jobs and when they might be able to turn to the courts for relief when they claim their employers have acted against them contrary to the public interest.

These subjects might be met for restatement if the positions staked out were rooted in the demonstrable direction of social and economic change. But the draft makes no effort to persuade us that that is so—nor could it.

### B. *The Trajectory of Change*

The project is at pains largely to ignore legislation—save insofar as the adequacy of relief under a protective law can be taken to preclude an action at common law. But the employment relationship is increasingly caught up in a skein of legislation, much growing out of the very inadequacy of the common law. When one looks at the trajectory of legal change as a whole, looking at the social conditions of the employment relationship from the end of the Second World War to the present, one cannot escape the bald fact that the ideological basis for the nineteenth century's commitment to *laissez-faire* has been thoroughly undermined. Nevertheless, the draft concludes that some courts have gone too far and have been insufficiently appreciative of employer prerogative. Maybe so. But upon what basis is that judgment predicated?

Presumably, the judgment of “an organization formed to carry out the public obligation of the legal profession”<sup>122</sup> should be grounded in what it knows best, *i.e.*, the better understanding of legal doctrine. Indeed, the American Law Institute was created in response to the challenge to doctrinal formalism mounted by Legal Realism—or so we have been told<sup>123</sup>—its work rooted in the idea that doctrine was not mere words on paper, putty in the hands of those who apply it, but had meaning, that could generate predictable and desirable results. The rules under discussion here are an exercise in Legal Realism.<sup>124</sup>

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121. For examples of contested discharge of at-will employees see, e.g., Theresa Ludwig Kruk, Annotation, *Liability for Discharge of At-Will Employee for In-Plant Complaints or Efforts Relating to Working Conditions Affecting Health or Safety*, 35 A.L.R. 4TH 1031 (1985); Wakefield, *Unethical Acts of Employer*, *supra* note 119; R.D. Hursh, Annotation, *Discharge from Private Employment on Ground of Political Views or Conduct*, 51 A.L.R. 2D 742 (1957).

122. 1923 REPORT, *supra* note 109, at 23.

123. Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1368-70 (1934).

124. This would come as no surprise to our observer. *Id.* at 1368 (citing Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 708 (1931) (“To [the new juristic realists]

The section on job security claims to be grounded in doctrine when, as we have seen, it 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. The section on public policy eschews any doctrinal grounding. It takes four propositions operationally to define both the current content and the outer limit of judicial intervention; anything more receptive to social change would be the “open-ended” approach the draft rejects. So much for the states as laboratories of legal experiment; so much for the capacity of the law to evolve.

There are surely precedents for a Restatement staking out a position intended to give direction to legal change, a provision that opts for the “better” result even if not the then prevailing one. The classic case is of section 402A of the Restatement (Second) of Torts, the subject of William Prosser’s equally classic articles (which give rise to the title of this piece) that opted for a seller’s strict liability to consumers or users of a product even when they had not purchased the product from the seller, *i.e.*, who were not in privity with the seller.<sup>125</sup> The citadel of privity was under assault and the defense bar mounted a vigorous counter-attack asserting that as only a minority of jurisdictions had abandoned privity the ALI would be exceeding its authority by endorsing its abandonment.<sup>126</sup> The ALI was unpersuaded.<sup>127</sup> The number of jurisdictions didn’t matter, the ALI’s then Director argued, for the section represented the weight of opinion “as to the direction that the law was taking.”<sup>128</sup> It should have been obvious to almost any sentient being at the time that the doctrine of privity made no modern sense.

The provisions discussed here are to an opposite effect. The nineteenth century citadel of at-will employment is falling. That should be plain for all to see. What will replace it will have to respond to the unfolding economic and social circumstances of *this* century. The draft’s response is not to anticipate the direction of that change, but to shore the citadel up.<sup>129</sup>

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the significant feature of law is as a body of devices for enabling business and industry to achieve certain purposes.”).

125. See generally William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1965); William Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) (discussing section 402A of the Restatement (Second) of Torts).

126. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969).

127. *Id.*

128. *Id.*

129. One of the deans of the arbitral profession recently called for the United States to enact an unfair dismissal law, as has so much of the world. George Nicolau, Address at the National Academy of Arbitration Annual Meeting: Is It Time for a National Unfair Dismissal Statute? (May

## IV. "A RESTATEMENT WILL BE INFLUENTIAL."

It is unlikely that the Texas courts will abandon their refusal to accept that the public weal might be implicated in an employee's discharge for other than an actual refusal to do a criminal act,<sup>130</sup> or that California's courts will curtail the broad protections the state's constitution affords individuals vis-à-vis private centers of power.<sup>131</sup> The influence of a Restatement will most likely be felt in jurisdictions whose law is relatively undeveloped either because too few cases have yet been presented or because the courts are divided on how to approach them. For them, the simplicity and clarity of a Restatement's rules ease a burdened judiciary of the struggle of decision; the imprimatur of the Institute substitutes for independent thought—just as the history of the judicial reception of the Restatement on privacy evidences. That this Restatement might prove influential is no cause for celebration.

Are we really so confident that an employer should be able to revoke its commitment to fair dismissal with impunity?<sup>132</sup> That an employer should be able to discharge an employee because she resisted her ex-husband's rape?<sup>133</sup> Or because she sought to protect her job by voting her stock against a merger that would line executive pockets but be disastrous to the workforce?<sup>134</sup> So very confident, in fact, that we should welcome the legal establishment's categorical assertion that it would be error for a court to reach a different result?

Obviously, much work needs to be done in the reform of American employment law; and the American Law Institute is surely well situated to play an important role in it. But restating a body of law much in flux, some of it immoral, seems particularly perverse. Justice Jackson once

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27, 2006). A prominent management lawyer demurred, pointing to the evolution of the law of discharge to be wrongful as a matter of public policy. Jack Gallagher, Address at the National Academy of Arbitration Annual Meeting: The Case Has Not Been Made for a National Unfair Dismissal Statute (May 27, 2006) ("Such evolution is the tradition of our common law system, and is sure to continue. Some states may lead the way in responding to new issues as they arise, and the experience of these states will be instructive. The most compelling rationales will naturally spread to other states. I submit that this evolution has worked well to date."). Whether it has worked well or not is beside the point because, to the draft, no new responses are to be desired.

130. See, e.g., *The Ed Rachal Found. v. D'Unger*, No. 03-1101, 2006 WL 1043081, at \*3 (Tex. Apr. 21, 2006).

131. See, e.g., *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 71 (Cal. Ct. App. 1996).

132. *Contra Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1145 (Ill. 1999).

133. *Green v. Bryant*, 887 F. Supp. 798, 800 (E.D. Pa. 1995); see *Imes v. City of Asheville*, 594 S.E.2d 397, 398, 400 (N.C. Ct. App. 2004) (finding that the Plaintiff, who was fired for being a victim of domestic violence, failed to allege a cause of action for wrongful termination).

134. *Contra Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 799-800 (Va. 1985).

observed that we avoid certain ends by avoiding certain beginnings.<sup>135</sup>  
This is one.

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135. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).