

ESSAY

DRAFTING CHAPTER 2 OF THE ALI'S EMPLOYMENT LAW RESTATEMENT IN THE SHADOW OF CONTRACT LAW: AN ASSESSMENT OF THE CHALLENGES AND RESULTS

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INTRODUCTION	1342
I. AN OVERVIEW OF “EMPLOYMENT CONTRACTS: TERMINATION”	1344
A. Section 2.01: Default Rule of an At-Will Employment Relationship	1344
B. Section 2.02: Agreements and Binding Employer Promises or Statements Providing for Terms Other than At-Will Employment	1346
1. <i>Was There a Promise?</i>	1348
2. <i>Did the Employee Rely on the Promise?</i>	1349
3. <i>Was the Reliance Reasonable?</i>	1350
4. <i>Was the Reliance Unforeseeable?</i>	1351
5. <i>Other Hurdles</i>	1351
C. Section 2.07: Implied Duty of Good Faith and Fair Dealing.....	1351
D. Other Exceptions to At-Will Employment in Brief...	1358
II. THE RESTATEMENT OF EMPLOYMENT LAW CHAPTER 2: AN EVALUATION	1358
A. What is the Purpose of the ALI Restatement of Employment Law?	1358
B. Does Chapter 2 Satisfy the Goals of a Restatement? .	1361
1. <i>Should the Restatement Have Presented a Unified Theory?</i>	1362
2. <i>Is Contract Law the Appropriate Conceptual Framework for Employment Agreements?</i>	1362
3. <i>Should ALI Have Embarked on a Restatement of Employment Law at This Time?</i>	1363

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III. WHAT IF THE PROJECT HAD BEEN “PRINCIPLES OF EMPLOYMENT LAW?” 1364
CONCLUSION 1368

INTRODUCTION

The American Law Institute (ALI) has just completed the Restatement of the Law, Employment Law (the Restatement). Chapter 2 is entitled “Employment Contracts: Termination.”¹ As the name suggests, the Chapter focuses on the law’s difficult challenge of applying contract law to distinguish lawful terminations of employees from wrongful ones.² The question is especially difficult because, on the one hand, employment law’s long-existing default rule allows employers to terminate employees “at will” and without cause.³ Advocates of the at-will doctrine present several policies to support it, including freedom of contract and efficiency.⁴ On the other hand, employers seek to attract talented employees and, once employed, establish an “orderly, cooperative and loyal work force.”⁵ Toward that end, numerous judicial decisions and scholarly research reveal unsurprisingly that employers design their communications to attract employees and create loyal workers.⁶ Further, as I have stated elsewhere, some communications

induce employees to change jobs, forgo job searches, accept job conditions, or otherwise change position. In the context of a plentiful labor supply, high costs of employee relocation, and material and psychic investments by employees in their jobs, non-union employees often lack the bargaining power, resources, information, and wherewithal to withstand employer inducements.⁷

It is no wonder, then, that contract law’s approach to indefinite-duration employment issues includes decisions policing employer

¹ RESTATEMENT OF EMP’T LAW ch. 2 (2015).

² The Restatement addresses tort theories for wrongful terminations in other chapters.

³ See Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 25 (1999) [hereinafter Hillman, *Unfulfilled Promise*] (“Employment at will has been the default rule for employment duration for more than 100 years.”).

⁴ See *infra* notes 19–25 and accompanying text; see also Hillman, *Unfulfilled Promise*, *supra* note 3, at 25–26 (“Several policies support the [employment-at-will policy]. The principle of freedom of contract means that employers should be free to hire and fire their labor force (and employees to quit their jobs) in the absence of agreement otherwise. In theory, employment at will is also efficient because, in the face of uncertain changes in technology and business, it allows parties to exit precisely when ‘total gains (to both parties) from continuing the relationship fall short of the total gains from termination.’” (footnotes omitted)) (discussing arguments in favor and in opposition).

⁵ See, e.g., Hillman, *Unfulfilled Promise*, *supra* note 3, at 4 (quoting *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)).

⁶ See *id.*

⁷ *Id.* at 4–5 (footnotes omitted).

overreaching and thereby creating counter-rules that limit employment at will.⁸

Given this clash of policies between termination at will and its limitations, the primary challenge for the reporters of the new Restatement in Chapter 2 was to search through the cases and identify the circumstances in which terminated employees should be entitled to legal protection, no easy task given the multitudinous and amorphous case law on employment discharge, the dynamic labor market atmosphere and, perhaps most important, contract law's lack of a unifying theory of its own.⁹ Related to this challenge, the ALI's conception of a restatement seemingly allows reporters to venture beyond describing the law (but cautiously).¹⁰ The reporters therefore had to decide what constitutes the appropriate mix of description and prescription in their efforts to assess the contradiction in employment policies.

This Essay focuses on Chapter 2's treatment of employment at will, on the one hand, and promissory estoppel and good faith, on the other, as examples of how Chapter 2 meets these challenges. The Essay concludes that Chapter 2 establishes a useful framework and helpfully identifies the issues for the courts. Because promissory estoppel and good faith (and other contract doctrines) are themselves indistinct, however, Chapter 2 often cannot resolve the principle and counter-principle dilemma in particular cases and therefore cannot fully satisfy ALI's goal of clarifying and modernizing the law through restatements. For the same reason, I doubt that a project in the form of a restatement will be particularly helpful to those who seek to enhance employee protection if the playing field is uneven.

⁸ In this Essay, I refer to principles favorable to employees in indefinite-duration contracts such as promissory estoppel and good-faith performance as counter-rules, not exceptions, to reflect the ambivalence on whether at-will or the counter-principles form the central core of employment-contract termination.

⁹ Stewart Schwab sees some coherence in termination law:

The life-cycle framework that courts have developed provides the parties in a career employment relationship a legal structure that checks opportunistic behavior. Its fundamental premise is that both employer and employees can act opportunistically. Consequently, a life-cycle analysis does not categorically condemn or celebrate employment at will. It supports, in broad outline, the contract law inroads that have been made on the at-will doctrine, particularly at the beginning and the end of an employee's career, and it explains the continued vitality of the at-will rule for mid-career employees. The current position of the courts is superior to a dogmatic insistence on the old at-will regime, which creates an excessive risk of opportunistic terminations for long-term, and sometimes beginning-career workers. Moreover, the current hesitant, intermediate position may also be superior to a general just-cause standard, which would lead to excessive shirking by midcareer workers.

Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 61 (1993).

¹⁰ See *infra* Part II.A.

Part I of this Essay focuses on Chapter 2's treatment of employment at will, promissory estoppel, and good faith. Part II evaluates the approaches and argues that the Chapter establishes a helpful framework. Part II also asserts that the Chapter leaves much for case law development, which is inevitable when drafting in the shadow of contract law. Part III ruminates on what a Principles of Employment Law: Termination could have looked like, freed from the strictures of a restatement.

I

AN OVERVIEW OF "EMPLOYMENT CONTRACTS: TERMINATION"

Section 2.01 of Chapter 2 of the Restatement presents the at-will principle and inventories the counter-rules treated in subsequent sections of the Chapter.¹¹ Here I focus on sections 2.01 (at-will default rule),¹² 2.02(b) (promissory estoppel),¹³ and 2.07 (implied duty of good faith and fair dealing).¹⁴ Many of the issues I identify are not unique to these sections, but instead illustrate the challenges of restating employment termination law in the shadow of general contract law.

A. Section 2.01: Default Rule of an At-Will Employment Relationship

Section 2.01 affirms the employment-at-will principle, but also references the counter-rules:

Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement (§ 2.02).¹⁵

Comment *b* conceptualizes the employment relationship as contractual, meaning that contract law's set of default rules apply unless displaced by the parties' agreement or other law.¹⁶ Comment *b* and the Reporters' Notes to Comment *a* point out that forty-nine states include some form of the employment-at-will default rule.¹⁷ Comments

¹¹ RESTATEMENT OF EMP'T LAW ch. 2 (2015).

¹² *Id.* § 2.01.

¹³ *Id.* § 2.02(b).

¹⁴ *Id.* § 2.07.

¹⁵ *Id.* § 2.01.

¹⁶ *Id.* § 2.01 cmt. b. For a discussion of employment agreements as contracts, see *infra* notes 89–94 and accompanying text.

¹⁷ RESTATEMENT OF EMP'T LAW § 2.01 cmt. b. (2015) ("The high courts in 49 states and the District of Columbia recognize as the default rule the principle that employment is presumptively an at-will relationship."). *Id.* at § 2.01, Reporters' Notes, cmt. a ("The at-will default rule is presently recognized in 49 states and the District of Columbia.").

c through *e* reference the series of counter-rules listed in section 2.01's boilerplate.¹⁸ Section 2.01 thus sets up the chasm between rule and counter-rule that the drafters address in the rest of the Chapter.

Advocates and critics of the at-will rule pronounce strong policy reasons in support of their positions.¹⁹ In brief, theorists in favor of the at-will rule cite freedom of contract and assert that the rule reflects the parties understanding of their relationship.²⁰ They question whether common-law courts have the authority to supplant such a long-established default rule.²¹ In addition, the rule arguably is efficient because "in the face of uncertain changes in technology and business, [the rule] allows parties to exit precisely" when the gains from doing so exceed the gains from continuing the employment.²² Further, based on their observation of relatively few for-cause employment contracts and their surmise that employees receive higher pay for at-will arrangements, proponents assert that the parties seek such agreements.²³ In addition, the threat of termination without cause arguably creates incentives in employees not to shirk or otherwise misbehave.²⁴ Finally, courts may apply employment at will most often to midterm employees, precisely when employee shirking is most prominent.²⁵

On the other hand, critics of the at-will rule refer to the adverse consequences of the principle because of employees' financial

¹⁸ *Id.* § 2.01 cmt. c–e.

¹⁹ Some of these arguments are found in comment *a* to section 2.01.

²⁰ RESTATEMENT OF EMP'T LAW § 2.01, Reporters' Notes, cmt. a (2015); *see also id.* (citing Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996) (employers have a property right in at-will employment)).

²¹ *See generally* Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343 (2014).

²² Hillman, *Unfulfilled Promise*, *supra* note 3, at 25–26 (citing Sherwin Rosen, *Commentary: In Defense of the Contract at Will*, 51 U. CHI. L. REV. 983, 983 (1984)).

²³ *See, e.g.*, Epstein, *supra* note 20, at 966–67 ("Matters are very different where the employer makes increased demands under a contract at will. Now the worker can quit whenever the net value of the employment contract turns negative. As with the employer's power to fire or demote, the threat to quit (or at a lower level to come late or leave early) is one that can be exercised without resort to litigation.").

²⁴ *Id.* at 965 ("These devices can visit very powerful losses upon individual employees without the need to resort to legal action, and they permit the firm to monitor employee performance continually in order to identify both strong and weak workers and to compensate them accordingly. The principles here are constant, whether we speak of senior officials or lowly subordinates, and it is for just this reason that the contract at will is found at all levels in private markets.").

²⁵ Schwab, *supra* note 9, at Part III.B.3; *id.* at 39 ("[E]mployers are especially vulnerable to opportunism at the employee's midcareer. The cases suggest that courts are sensitive to this life cycle. Courts are most likely to scrutinize firings at the beginning and end of the life cycle. Courts do not get involved during midcareer unless they see an obvious case of particular opportunism, such as a firing before a pension vests or a sales commission is due.").

dependence and lack of mobility.²⁶ In addition, contrary to the view of proponents of at-will employment, critics claim that employees expect for-cause termination and rightfully worry about inappropriate employer motives for terminating them.²⁷ Employees also may reasonably rely on employer communications that suggest for-cause employment, as the next subpart suggests.²⁸

B. Section 2.02: Agreements and Binding Employer Promises or Statements Providing for Terms Other than At-Will Employment

Section 2.02 provides in (a) that employment is not terminable at will if the parties have an agreement otherwise.²⁹ Subsections (c) through (e) refer to employer policy statements, good faith, and “other established principles” as also limiting employment at will.³⁰ Section 2.02(b), the focus here, states that “[t]he employment relationship is not terminable at will by an employer if . . . a promise by the employer to limit termination of employment reasonably induces detrimental reliance by the employee (§ 2.02, Comment c).”³¹

Section 2.02(b) and its reference to Comment *c* invoke the doctrine of promissory estoppel.³² Restatement (Second) of Contracts section 90 supplies the promissory estoppel rule that courts almost uniformly apply. It reads:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person

²⁶ See, e.g., Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 9 (2010) [hereinafter Arnow-Richman, *Just Notice*] (“Early just cause literature emphasized the inherent unfairness of an at-will system and the potential for employer abuse. Scholars cited workers’ financial dependence, minimal mobility, and emotional investment in their work as explanations for employee vulnerability to abusive terms and the threat of discharge.” (footnote omitted)).

²⁷ *Id.* at 10 (“Consistent with their exploitation critique, these advocates presented at-will employment as enabling arbitrary, malicious, and even socially harmful employer behavior. At-will termination was thus conflated with the condemnation of morally reprehensible employer motives.” (footnote omitted)).

²⁸ RESTATEMENT OF EMP’T LAW § 2.01, Reporters’ Notes, cmt. a (2015). But a just-cause rule may insufficiently protect employees who may be unable to prove employer arbitrariness. See Arnow-Richman, *Just Notice*, *supra* note 26, at 17–21 (“As employment at will defenders have argued, the effectiveness of a just cause rule depends on the likelihood that employees will pursue and prevail on legal claims of employer violation. In contrast to just cause in collective bargaining relationships, just cause in individual employment relationships generally requires that the aggrieved worker prove the absence of any cause for his or her termination and do so under a definition of cause highly deferential to management interests. This one-two punch of procedural and substantive hurdles significantly diminishes the value of a just cause rule to its intended beneficiaries.” (footnote omitted)).

²⁹ RESTATEMENT OF EMP’T LAW § 2.02(a) (2015).

³⁰ *Id.* § 2.02(c)–(e).

³¹ *Id.* § 2.02(b).

³² *Id.*

and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.³³

Initially, promissory estoppel supplied a remedy for a promisee's reasonable but uncompensated reliance on a gift promise.³⁴ Courts expanded the doctrine to enforce promises in contracts that were unenforceable for reasons such as indefiniteness or the lack of a writing,³⁵ and some courts now even apply it to negotiations before the parties reach an agreement.³⁶ Despite this expansion and although analysts surmised that promissory estoppel would dominate in the courts, it has not been very successful overall.³⁷ Part of the reason is that enforcing promises outside of the traditional theory of bargained-for exchange is controversial.³⁸ It is therefore not surprising that employees face formidable hurdles when bringing promissory

³³ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

³⁴ See Hillman, *Unfulfilled Promise*, *supra* note 3, at 3; see also RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b, illus. 3 (1979) ("A promises to make a gift of \$10 to B. In reliance on the promise B buys a book from C and promises to pay C \$10 for it. There is no consideration for A's promise. As to the enforcement of such promises, see § 90.").

³⁵ Hillman, *Unfulfilled Promise*, *supra* note 3, at 3–4 (citing Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 907 (1985)) ("[C]ourts expanded the theory [of promissory estoppel] to include not only gift promises, but commercial promises unenforceable because of some technicality such as the statute of frauds or indefiniteness.").

³⁶ See, e.g., *Hoffman v. Red Owl Stores*, 133 N.W.2d 267, 274–77 (Wis. 1965). The case is "the most famous of the cases that founded a new area of contract law by allowing recovery of reliance expenses incurred before a contract had been formed." William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801, 803 (2010).

³⁷ Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 588–96 (1998); *id.* at 588 ("Section A presents data on win rates, which are relevant to the question of the importance of promissory estoppel as a theory of obligation. The data show a very low success rate of promissory estoppel claims. The data further show that this low success rate is not attributable to a single or a few subject areas or a single or a few contexts. The conclusion is therefore inescapable that promissory estoppel has not become the dominant theory for the enforcement of promises.").

A subsequent empirical study of promissory estoppel cases reported a much larger success rate. See Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010). However, Professor Jimenez searched for cases that included the "as justice requires" language from the Restatement (Second) of Contracts because he wanted to test the influence of the Restatement on the cases. But by doing so, he created a strong filter that likely yielded more successes than accurately reflects the field. In short, courts may be much more inclined to use "justice" language in successful decisions. Professor Jimenez acknowledged this point in his article. See *id.* at 694 n. 91.

³⁸ See, e.g., Whitford & Macaulay, *supra* note 36, at 806 (suggesting that the Wisconsin Supreme Court's decision seemed controversial) ("After we have related our story in full, in the conclusion we will return to the benefits of storytelling, and indicate what we think we have learned from our study of the full facts of *Hoffman v. Red Owl Stores*. These findings suggest that the case reached a just result, and one that would be less controversial if facts not previously fully known had been understood in the many discussions of this famous case.").

estoppel claims. The following discussion considers and adds to the Restatement's treatment of promissory estoppel and inventories the significant hurdles employees face in bringing such a claim.

1. *Was There a Promise?*

A promise consists of "an assurance, in whatever form of expression given, that a thing will or will not be done. . . . [A promise is] meant to give an assurance as to a future event."³⁹ Courts must distinguish general statements such as compliments about work quality or positive statements about an employee's career from definite assurances of job security.⁴⁰ Comment *c* to section 2.02 specifically refers to this challenge: "The promise must be definite enough to reasonably induce the action taken in reliance on the promise and must in fact induce such reliance."⁴¹ Nevertheless, some courts find that an implied promise is enough. For example, one court found that an employer's listing of sanctions if an employee interviewed elsewhere meant that the employer "promised" not to increase the sanctions beyond those listed.⁴² Another employer told her employee that "she did not need to look for another job" and the court found that statement actionable.⁴³

The majority of courts, however, seem too willing to grant summary judgment against the employee on the question of whether the employer made a definite promise. Statements such as your "job was secure" and "there was no need . . . to look for other employment,"⁴⁴ "[you will] continue to have a career with [the employer] until age sixty-five,"⁴⁵ and "[you will] 'remain employed by the company'"⁴⁶ should be sufficient for an employee to defeat summary judgment on

³⁹ Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 664-65 (Minn. 1960).

⁴⁰ See Hillman, *Unfulfilled Promise*, *supra* note 3, at 12-14 (discussing cases where the court defeated a promissory estoppel claim due to a lack of a definite promise).

⁴¹ RESTATEMENT OF EMP'T LAW § 2.02 cmt. c (2015).

⁴² See Hillman, *Unfulfilled Promise*, *supra* note 3, at 20 (discussing Board v. Simmons Indus., Inc., No. C3-94-116, 1994 WL 454738, at *2 (Minn. Ct. App. Aug. 23, 1994)) ("[A] supervisor told at-will employee Board that if he participated in job interviews elsewhere he 'would receive either a written warning or a three-day suspension.' The court affirmed a jury finding that this statement constituted a promise that the stated repercussions would be the maximum penalty and that Simmons would not dismiss Board for attending the job interviews. Further, the court affirmed the jury's finding that Board would not have attended the interviews if the supervisor had 'threatened termination.'" (footnote omitted)).

⁴³ *Id.* at 21 (quoting Howard v. Kuehnert, No. 95APE09-1197, 1996 WL 145517, at *3 (Ohio Ct. App. Mar. 28, 1996)).

⁴⁴ Corradi v. Soclof, No. 67586, 1995 WL 322311, at *1 (Ohio Ct. App. May 25, 1995), *discussed in* Hillman, *Unfulfilled Promise*, *supra* note 3, at 13.

⁴⁵ Dickens v. Equifax Svs., Inc., No. 95-1217, 1996 WL 192973, at *5 (10th Cir. Apr. 22, 1996), *discussed in* Hillman, *Unfulfilled Promise*, *supra* note 3, at 14.

⁴⁶ *Dickens*, 1996 WL 192973, at *5. The court stated that the supervisor's statements "were not sufficiently definite to be legally enforceable promises for purposes of establishing promissory estoppel." *Id.* at *6.

the issue of whether the employer made a definite promise, but the courts considering these statements did not agree.⁴⁷

In addition, some courts too easily find on a motion for summary judgment that any promise made was too ambiguous to enforce. These courts look for unnecessary detail that the law should require only for enforcing a contract, such as a specific duration or compensation.⁴⁸ Comment *c* to section 2.02 appears to relax the need for such specificity at least in the case of an oral agreement: “If the conditions for promissory estoppel are present, then a promise may be enforceable even though an agreement itself would not be enforceable for lack of a written document.”⁴⁹

2. *Did the Employee Rely on the Promise?*

A prominent issue is whether the employer made the promise concerning job terms or retirement benefits before or after the employee agreed to the employment or decided to retire.⁵⁰ If the agreement or retirement came first, of course, the employee cannot show that the promise induced the reliance, a requirement made explicit in comment *c* to section 2.02.⁵¹ In addition, I have previously written that

[a]s a general matter, courts required employees to allege and establish more than that they accepted or continued a job or failed to look for a substitute job. Employees had to show that they rejected other distinct offers or opportunities. Courts ignored the fact that failing to enter the job market itself could constitute a distinct detriment that would severely undermine an employee’s ultimate prospect for career success.⁵²

Illustrations 1 and 2 to comment *c* follow the decisions that require employees to demonstrate that they turned down a distinct offer.⁵³

⁴⁷ See Hillman, *Unfulfilled Promise*, *supra* note 3, at 12–14 (noting that in *Corradi* and *Dickens*, the court pronounced summary judgment in favor of the employer, while in *Howard*, the court found for the employee).

⁴⁸ *Id.* at 15 (noting cases where the courts found the promise to be ambiguous); *see, e.g.*, Schoeneck v. Chicago Nat’l League Ball Club, Inc., 867 F. Supp. 696, 702–03 (N.D. Ill. 1994) (“[T]he evidence does not show that the alleged promise was unambiguous. The duration of the employment remains a matter of considerable speculation (as do any of the other contract terms, none of which were discussed in the conversation at issue).”).

⁴⁹ RESTATEMENT OF EMP’T LAW § 2.02 cmt. c (2015).

⁵⁰ See Hillman, *Unfulfilled Promise*, *supra* note 3, at 15–16 (discussing detrimental reliance).

⁵¹ RESTATEMENT OF EMP’T LAW § 2.02 cmt. c (2015) (“Section 2.02(b) makes clear that an employer’s promise that reasonably induces detrimental reliance by employees, or individuals about to become employees, is enforceable under the well-established doctrine of promissory estoppel, covered in § 90 of the Restatement Second, Contracts.”).

⁵² See Hillman, *Unfulfilled Promise*, *supra* note 3, at 16 (footnote omitted).

⁵³ RESTATEMENT OF EMP’T LAW § 2.02 cmt. c, illus. 1 & 2 (2015).

3. *Was the Reliance Reasonable?*

Although the Restatement (Second) of Contracts section 90 focuses on whether “the promisor should ‘reasonably expect [the promisee] to induce action or forbearance,’” most courts focus on the promisee and ask whether the promisee’s reliance was reasonable.⁵⁴ This is not a serious divergence from section 90 because a promisor should reasonably have expected the promisee to rely when the promisee’s reliance was reasonable. At any rate, demonstrating the reasonableness of the employee’s reliance may be the employee’s most difficult hurdle. Courts justifiably are troubled by the reasonableness of reliance if the parties have not yet nailed down a contract or an existing contract contradicts promises or representation made less formally.⁵⁵

Courts have found that employees who receive inconsistent messages about their employment cannot reasonably rely on the favorable one.⁵⁶ This, of course, disfavors employees if an employer makes promises to induce the employee to agree to employment only to disclaim the promised benefits in a subsequent written contract.⁵⁷ Courts have also held against employees in the opposite situation where the employee signs a written at-will agreement or even just receives notice of such, but then relies on a later contradictory communication promising job security.⁵⁸ In addition, courts find reliance unreasonable if the employer’s communication was vague or ambiguous.⁵⁹

⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 97 (3d ed. 2014) (noting that while the rule focuses on the promisor’s actions, courts focus on the promisee’s action).

⁵⁵ See generally Whitford & Macaulay, *supra* note 36, at 853–54 (presenting the difficulties with interpreting whether there was an actionable promise in precontractual-reliance cases).

⁵⁶ See, e.g., *Coll v. PB Diagnostic Sys., Inc.*, 50 F.3d 1115, 1124 (1st Cir. 1995) (“Where a written statement conflicts with a prior oral representation, reliance on the oral representation is generally held to be unreasonable.”), discussed in Hillman, *Unfulfilled Promise*, *supra* note 3, at 16–17 & n.57.

⁵⁷ See, e.g., *Coll*, 50 F.3d at 1124–25 (holding that employee could not have reasonably relied on conflicting discussions regarding benefits) (“Assuming arguendo that PB in fact promised Coll that it would create a LTIP worth \$1,000,000, Coll could not have reasonably relied on it. Coll’s employment offer was clearly at odds with his understanding of PB’s prior oral representations regarding long-term compensation. . . . In short, PB’s refusal to ‘firm up’ the language regarding long-term compensation rendered any reliance on prior oral representations unreasonable.”).

⁵⁸ See Hillman, *Unfulfilled Promise*, *supra* note 3, at 17 & n.60 (citing examples where such reliance was unreasonable).

⁵⁹ See, e.g., *Coll*, 50 F.3d at 1124, discussed in Hillman, *Unfulfilled Promise*, *supra* note 3, at 17 & n.64 (“Courts also pointed out the close relationship between the absence of a distinct promise and the lack of reasonable reliance. In short, any reliance on vague or conflicting utterances was per se unreasonable.”).

4. *Was the Reliance Unforeseeable?*

If an alleged employer's promise was indistinct or uncertain, it is an easy step for courts to find any employee reliance unforeseeable. For example, in one case, an employee relied on the employer's failure to give the employee a scheduled job appraisal as indicating that his job was secure. The court found that the employer "had no reason to expect" the employee to rely on this omission.⁶⁰

5. *Other Hurdles*

Employees face additional hurdles to proving promissory estoppel. I have summed these up elsewhere:

Courts dismissed employee promissory estoppel claims for an assortment of additional reasons. These included the speculative nature of the damages, the lack of injustice because the employee did not have sufficient education for the position promised, the statute of frauds, and the preemption by ERISA. In addition, claimants faced long odds when the employer was a public agency: "[C]ourts have consistently refused to give effect to government fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel."⁶¹

This brief assessment of promissory estoppel in the employment context shows that the Restatement's recognition of the theory does not tame the doctrine in the employment termination context. In addition, employees will continue to have an uphill battle attempting to prevail on the theory. But, in the tradition of an ALI Restatement, section 2.02(b) contributes by affirming promissory estoppel's availability in the at-will termination setting despite some jurisdictions that do not recognize or narrow its use.⁶²

C. Section 2.07: Implied Duty of Good Faith and Fair Dealing

Under section 205 of the Restatement (Second) of Contracts, every contract includes an obligation of good faith.⁶³ According to section 2.07 of the Restatement, employment contracts are no exception, notwithstanding the section's recognition of the conflict among

⁶⁰ See *Dunn v. NPM Healthcare Prods., Inc.*, No. 53-06-82, 1994 WL 468281, *2 (Conn. Super. Ct. Aug. 24, 1994) (citation omitted) (holding that "plaintiff [] failed to allege that the defendant had reason to expect that the plaintiff's reliance . . . would lead the plaintiff to discontinue pursuing a possibility of employment"), discussed in Hillman, *Unfulfilled Promise*, *supra* note 3, at 18.

⁶¹ Hillman, *Unfulfilled Promise*, *supra* note 3, at 18–19 (footnotes omitted).

⁶² See RESTATEMENT OF EMP'T LAW § 2.02(b) (2015) (an employment relationship is not terminable at will if a promise by the employer "reasonably induces detrimental reliance by the employee").

⁶³ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) ("Every contract imposes upon each party a duty of good faith dealing in its performance and its enforcement.").

jurisdictions on whether a good faith obligation exists in employment-at-will circumstances.⁶⁴ Undaunted, section 2.07 provides that each party to an employment contract owes the other “a nonwaivable duty of good faith and fair dealing.”⁶⁵

What is the nature of the good faith obligation adopted by the Restatement? Although the obligation of good faith has many roles in contract law, including good-faith purchase and good-faith modification,⁶⁶ good-faith *performance* is the subject of section 2.07. Good-faith performance has a long history and writers have spilled lots of ink explaining it.⁶⁷ Briefly, good-faith performance “excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”⁶⁸ Courts identify such violations through the process of contract interpretation and gap filling.⁶⁹ A court can interpret the content of a contract to include an implied good-faith obligation consistent with the parties’ reasonable expectations.⁷⁰ In so doing, the court may draw on its view of what “decency, fairness or reasonableness” requires,⁷¹ based on the theory that the parties must have intended to include such principles in their agreement: “Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable.”⁷² Alternatively a court can simply conclude that good faith is a mandatory term that imports the community’s view of decency and fairness regardless of expectations.⁷³ Typically, a party is in bad faith, however, only if its motive in

64 RESTATEMENT OF EMP’T LAW § 2.07, Reporters’ Notes, cmt. a (2015).

65 *Id.* § 2.07(a).

66 HILLMAN, PRINCIPLES OF CONTRACT LAW, *supra* note 54, at 297–98.

67 For one treatment of its history, see Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL’Y J. 93, 135–36 (2009) [hereinafter Finkin, *Working Group*] (“The implied obligation of good faith in carrying out the obligations of a contract has roots in Roman law, found expression in the medieval *jus commune*, and became a major feature in the civil law, notably in Germany—in the implied obligation of ‘fidelity and faith,’ *Treu und Glauben*, under section 242 of the German Civil Code (BGB) of 1900—and elsewhere on the continent.”).

68 RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979).

69 “[T]he source of good faith lies on the border between contract interpretation and gap filling.” HILLMAN, PRINCIPLES OF CONTRACT LAW, *supra* note 54, at 300.

70 According to Judge Richard Posner, “The concept of the duty of good faith . . . is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute.” *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991).

71 RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979).

72 *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

73 *See Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977) (explaining the “requirement . . . that parties to contracts and commercial transactions must act in good faith”).

performing the contract is to deprive the other party of what it reasonably expected or community standards require.⁷⁴

Section 2.07(a) of the Restatement expressly identifies two kinds of “nonwaivable” bad faith.⁷⁵ The section provides that the good-faith obligation “*includes* a party’s obligation not to hinder the other party’s performance under, or to deprive the other party of the benefit of, their contractual relationship.”⁷⁶ This language suggests that the Restatement’s good-faith obligation is a mandatory gap filler and does not require a reasonable-expectations inquiry, although in actuality each path would most often lead to the same result.⁷⁷ Section 2.07(a) does not bar other instances of bad faith, although depriving the other party of the benefits of the contract goes a long way towards remedying much of the employer excesses identified in the cases.⁷⁸

Section 2.07(b) seeks to situate the good-faith obligation within the context of employment at will.⁷⁹ Here things get dicey. Subsection (b) suggests that the at-will default rule applies notwithstanding “nonwaivable” good faith: “As in all contracts, the implied duty of good faith and fair dealing serves as a supplementary aid in implementing the parties’ reasonable expectations and should not be read as a means of overriding the basic terms of, or otherwise undermining the essential nature of, their contractual relationship.”⁸⁰ Does this suggest that good faith is waivable after all if the parties agree to an at-will arrangement? The challenge for the drafters, of course, was to harmonize these seemingly contradictory principles. Perhaps this is not impossible, at least if examined through the lens of the reasonable-expectations approach to good faith. As one court said, “[t]hese two concepts can coexist if careful attention is paid to the objectively reasonable expectations of the parties to a contract of employment at-will.”⁸¹ But what are the parties’ reasonable expectations in at-will cases? More specifically, when is an employer in bad faith for terminating an employee notwithstanding the employer’s right to terminate without cause?⁸²

⁷⁴ See, e.g., Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980) (“When a discretion-exercising party may determine aspects of the contract, such as quantity, price, or time, it controls the other’s anticipated benefits. Such a party may deprive the other of these anticipated benefits for a legitimate (or good faith) reason. The same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason.” (citation omitted)).

⁷⁵ RESTATEMENT OF EMP’T LAW § 2.07(a) (2015).

⁷⁶ *Id.*

⁷⁷ See *supra* note 69 and accompanying text.

⁷⁸ RESTATEMENT OF EMP’T LAW § 2.07(a) (2015).

⁷⁹ *Id.* § 2.07(b).

⁸⁰ *Id.*

⁸¹ E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 448–49 (Del. 1996).

⁸² “[I]t is difficult to distinguish a ‘bad faith’ discharge from a no-cause discharge” Metcalf v. Intermountain Gas Co., 778 P.2d 744, 749 (Idaho 1989).

Section 2.07(c) attempts to answer this question.⁸³ Drawing on employment cases that have found bad faith, subsection (c) reveals two mandatory exceptions to the employers' right to terminate an at-will employee.⁸⁴ Under (c)(1), an employer is in bad faith if it "terminate[s] or seek[s] to terminate" an employee in order to prevent the employee from realizing rights or benefits that the employee would otherwise receive under the employment contract.⁸⁵ An employer is also in bad faith under subsection (c)(2) if its motive for terminating an employee is to retaliate against the employee for lawful conduct under the employment contract or other law.⁸⁶ The Restatement therefore ultimately finds limitations on the employer's right to terminate without cause—an employer is in bad faith if motivated by the desire to deprive the employee of its benefits or to retaliate.

Illustration 1 to section 2.07 reveals the Restatement's approach in section 2.07(c)(1).⁸⁷ Based on *Fortune v. National Cash Register Co.*,⁸⁸ the illustration posits that an employer fires its sales employee, who had executed a sale of equipment, without cause. The result of the termination was that the employee lost twenty-five percent of a commission that would have been due according to the express contract if the employee had remained employed when the employer delivered the equipment and thirty days had elapsed without a customer complaint. The illustration concludes that the employee "has an action against" the employer for the commission lost as a result of the termination. The illustration leaves unanswered whether the employee can recover additional expectancy damages.

In the actual *Fortune* case, the court affirmed a jury verdict that the employer's termination was in bad faith.⁸⁹ Because *Fortune* only sought compensation for the lost commission, the case is not authority for the conclusion that the employee has no other rights after the termination.⁹⁰ Other decisions support that conclusion, however.⁹¹

⁸³ RESTATEMENT OF EMP'T LAW § 2.07(c) (2015).

⁸⁴ *Id.*

⁸⁵ *Id.* § 2.07(c)(1).

⁸⁶ *Id.* § 2.07(c)(2).

⁸⁷ *Id.* § 2.07 cmt. c, illus. 1.

⁸⁸ 364 N.E.2d 1251 (Mass. 1977).

⁸⁹ *See id.* at 1258.

⁹⁰ *See id.* at 1253.

⁹¹ *See, e.g.,* *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041–42 (Ariz. 1985) ("The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee, such as the sales commissions in *Fortune* . . . but not the tenure required to earn the pension and retirement benefits Thus, plaintiff here has a right to receive the benefits that were a part of her employment agreement with defendant Hospital. To the extent, however, that the benefits represent a claim for prospective employment, her claim must fail. The terminable-at-will contract between her and the Hospital made no promise of continued employment. To the contrary, it was, by its nature, subject to termination by either party at any time,

This seems inconsistent with the finding of bad faith or at least too limiting of its effect. If the employer's conduct violated norms of "decency, fairness, or reasonableness,"⁹² there seems little reason to insulate the employer from liability for the employee's lost future income as well (subject to the usual limitations of expectancy damages), notwithstanding the at-will relationship. Put another way, good-faith performance and at-will employment are not in conflict and "coexist" under these circumstances because the employee's "objectively reasonable expectations," notwithstanding the employee's at-will status, are that the employer will not terminate the employee to deprive the employee of commissions and that the employer will be liable for expectancy damages if the employer does so.⁹³

Illustration 1 to section 2.07 and, for that matter, the *Fortune* case itself do not sufficiently underscore additional difficult hurdles employees face in establishing a bad-faith termination even under section 2.07's framework. Perhaps most challenging, the employer may point to express contract language that seemingly permits termination. How can an employee reasonably expect a commission, for example, if the contract expressly excludes one under the circumstances? Section 3.05 of the Restatement, dealing with the good-faith obligation in the context of compensation and benefits, appears to narrow employee rights in the face of just such express contract language.⁹⁴ Comment *b* to the section says "the implied duty does not override the express terms of the parties' agreement or alter the essential nature of their contractual relationship."⁹⁵ Illustration 2 to section 3.05, building on the *Fortune* case, posits that a term of the employment contract expressly states that if the employee is not on the payroll thirty days after the customer receives the equipment without complaint the additional twenty-five percent commission goes to the employee "servicing the customer account," not the terminated employee.⁹⁶ Illustration 2 concludes that the terminated employee "has no claim" against the employer for the commission.⁹⁷

Comment *b* to section 3.05 and Illustration 2 seem too restrictive of employee rights. In fact, the court in *Fortune* expressly stated that

subject only to the legal prohibition that she could not be fired for reasons which contravene public policy.").

⁹² See *supra* note 68 and accompanying text.

⁹³ This conclusion satisfies the instruction set forth in *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 448–49 (Del. 1996) (asserting that good faith and at-will employment "can coexist if careful attention is paid to the objectively reasonable expectations of the parties to a contract of employment at-will."), quoted *supra* in text accompanying note 81.

⁹⁴ RESTATEMENT OF EMP'T LAW § 3.05 (2015).

⁹⁵ *Id.* § 3.05 cmt. b.

⁹⁶ *Id.* § 3.05 cmt. b, illus. 2.

⁹⁷ *Id.*

“[a]ccording to a literal reading of the contract, NCR [the employer]” did not breach the contract, but it still found for the employee because of the employer’s bad faith.⁹⁸ Other courts facing just such circumstances also reason that courts should interpret express terms with the view that the parties likely intended a fair and just interpretation of them. For example, in *Tymshare, Inc. v. Covell*,⁹⁹ an employer expressly enjoyed “sole discretion” to alter sales quotas of its employees.¹⁰⁰ The employer raised the sales quotas, which deprived the employee of certain commissions.¹⁰¹ Then Judge Scalia nonetheless stated:

[A]greeing to such a provision would require a degree of folly on the part of these sales representatives we are not inclined to posit where another plausible interpretation of the language is available. It seems to us that the ‘sole discretion’ intended was discretion to determine the existence or nonexistence of the various factors that would reasonably justify alteration of the sales quota. Those factors would include . . . an unanticipated volume of business from a particular customer unconnected with the extra sales efforts of the employee assigned to that account; and . . . a poor overall sales year for the company, leaving less gross income to be expended on commissions. . . . But the language need not (and therefore can not reasonably) be read to confer discretion to [increase] the quota for any reason whatever—including . . . a simple desire to deprive an employee of the fairly agreed benefit of his labors.¹⁰²

Under the facts of illustration 2, it would be unusual if either the employer or the sales employee reasonably expected that the term giving twenty-five percent of the commission to the servicing employee applied in situations where the employer’s sole reason for terminating the sales employee was to deprive the sales employee of the commis-

⁹⁸ *Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251, 1255 (Mass. 1977) (“According to a literal reading of the contract, NCR is correct. However, Fortune argues that, in spite of the literal wording of the contract, he is entitled to a jury determination on NCR’s motives in terminating his services under the contract and in finally discharging him. We agree. We hold that NCR’s written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract.”).

⁹⁹ 727 F.2d 1145 (D.C. Cir. 1984).

¹⁰⁰ *Id.* at 1150 (“We think, moreover, that the permissibility of such adjustment is the most plausible estimation of the contract’s intent. The language, to begin with, is unqualified: ‘management reserves the right to change . . . individual quota and reserve payments at any time during the quota year within their sole discretion.’”).

¹⁰¹ *See id.* at 1149.

¹⁰² *Id.* at 1154; see Robert A. Hillman, *Good Faith Performance of Contracts in Late Twentieth-Century American Law*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS* 330–31 (1994). Some courts agree with this reasoning because it appeals to a sense of justice and invokes the parties’ likely intentions, thereby theoretically preserving contractual freedom. Other courts show concern that such an approach bends and stretches the notion of consent. *Id.* at 331 & nn.27, 28.

sion. Further, such conduct, I would argue, contradicts the community's view of fairness and decency.

Employees must also show that the employer's motivation was to deprive the employee of its just deserts. In a way, *Fortune* is an unfortunate precedent in this regard, at least from the perspective of those interested in employee rights. This is because the evidence appears almost a slam dunk for Fortune. As the court says, "[w]e think that the evidence and the reasonable inferences to be drawn therefrom support a jury verdict that the termination of Fortune's twenty-five years of employment as a salesman with NCR *the next business day after NCR obtained a \$5,000,000 order . . .* was motivated by a desire to pay Fortune as little of the bonus credit as it could."¹⁰³ Under the facts of *Fortune*, therefore, the court likely felt little contrition about interpreting the express terms of the contract to disapprove of such a termination. Employees likely will not have such striking evidence in the typical case.

The approach in section 2.07 raises additional difficult questions.¹⁰⁴ The Restatement leaves open the possibility that section 2.07(c) is not meant to preclude other instances of bad-faith termination.¹⁰⁵ Those exceptions, if any, await common-law development, which will entail the difficult challenge of further harmonization of at-will employment and good faith. Obviously, if examples build up, the at-will principle necessarily will recede in importance, and courts must remain aware of the importance of balancing at-will and other principles.¹⁰⁶

In sum, the Restatement's move to place good-faith performance within the province of employment at will is a useful affirmation in the employment setting of the Restatement (Second) of Contracts' recognition of the obligation. Inevitably, as with the Restatement's nod to promissory estoppel, additional clarification awaits case law development.

¹⁰³ 364 N.E.2d at 1258 (emphasis added). But NCR paid the commission to another employee so NCR did not gain from its actions. *Id.* at 1254 ("NCR did pay a systems and installations person the remaining 25% of the bonus commissions due from the First National order although contrary to its usual policy of paying only salesmen a bonus. NCR, by its letter of November 27, 1968, had promised the services of a systems and installations person; the letter had claimed that the services of this person, Bernie Martin (Martin), would have a forecasted cost to NCR of over \$45,000. As promised, NCR did transfer Martin to the First National account shortly after the order was placed.").

¹⁰⁴ RESTATEMENT OF EMP'T LAW § 2.07 (2015).

¹⁰⁵ See *infra* notes 106, 162.

¹⁰⁶ Comment c to section 2.07 states that "[t]his Section sets out two principal (though not necessarily exclusive) applications of the implied duty of good faith and fair dealing in the employment context." RESTATEMENT OF EMP'T LAW § 2.07 cmt. c (2015).

D. Other Exceptions to At-Will Employment in Brief

I have chosen to focus on promissory estoppel and good-faith performance as examples of the Restatement's approach to accommodating at-will employment termination and its counter-principles. Additional sections of Chapter 2 follow a similar approach. Concepts such as mutuality of obligation¹⁰⁷ and material breach,¹⁰⁸ for example, are helpfully situated within an employment contracts framework, but the drafters largely leave development of their content to future cases.¹⁰⁹ This is not meant as a criticism. As with promissory estoppel and good-faith performance, drafting in the shadow of contract law makes this strategy inevitable.

II

THE RESTATEMENT OF EMPLOYMENT LAW CHAPTER 2: AN EVALUATION

A. What is the Purpose of the ALI Restatement of Employment Law?¹¹⁰

It is fair to say that the Restatement and Chapter 2 were not received favorably by some academic critics during and after the drafting process.¹¹¹ I will discuss some of the criticism shortly. Some of the fireworks can be attributed to the ambiguous role of ALI Restatements. At bottom is the question of whether Restatements literally are supposed to "restate" existing law or whether they have a normative goal as well. To evaluate Chapter 2, some clarity about the project's purpose is necessary. This part therefore briefly discusses ALI's charge to the drafters of their Restatements.

The ALI lays out its overall goals on its website: "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law."¹¹² According to the website, the work of the restatements was originally conceptualized as an effort to clarify the law:

¹⁰⁷ *Id.* § 2.03 cmt. f.

¹⁰⁸ *Id.* § 2.04(a).

¹⁰⁹ Chapter 2's treatment of "cause" is much more detailed and is very helpful. *See id.* § 2.04.

¹¹⁰ I understand that ALI is in the process of reworking its definitions of Restatements and Principles. The discussion here is based on the formulation by ALI at the time the reporters drafted the Restatement of Employment Law.

¹¹¹ *See, e.g.,* Finkin, *Working Group*, *supra* note 67, 138–41 (identifying limitations of the draft's reach). But ALI's membership present at the May 2014 annual meeting approved the final three chapters of Restatement by a voice vote (after having approved the rest of the Restatement earlier). *See ALI Approves Final Restatement Third of Employment Chapters, with Samuel Estreicher as Chief Reporter*, NYU LAW, <http://www.law.nyu.edu/news/Estreicher-ALI-third-restatement> (last visited July 31, 2015).

¹¹² ALI Overview: Overview, ALI, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited July 31, 2015).

“The founding Committee had recommended that the first undertaking of the Institute should address uncertainty in the law through a [R]estatement of basic legal subjects that would tell judges and lawyers what the law was. The formulation of such a [R]estatement thus became ALI’s first endeavor.”¹¹³ Today, a Handbook for Reporters and others involved in projects describes Restatements as “aim[ing] at clear formulations of common law and its statutory elements or variations and reflect[ing] the law as it presently stands or might plausibly be stated by a court.”¹¹⁴ The main goal of restatements, it is therefore fair to say, is to clarify the law. According to ALI’s website, the ALI intends another type of project, ALI’s “Principles of the Law,” to do the main normative work: “The Institute also engages in intensive examination and analysis of legal areas thought to need reform. This type of study generally culminates in extensive recommendations for change in the law and usually is published as Principles of the Law.”¹¹⁵

Strictly speaking, then, the Restatement’s foremost goal should be to consider the ever-increasing, overly amorphous body of law and to boil it down into a clearer, coherent set of rules.¹¹⁶ But, of course, that is easier said than done. Reporters have to pick and choose among conflicting rationales and holdings especially where there is no sense of a “majority rule” among courts or a consensus among experts on what is the better rule.¹¹⁷ They must employ standards such as good faith and reasonableness to capture the essence of some cases, which often only raises issues as to the meaning of such standards in various contexts.¹¹⁸ Reporters also must restate rules they fear may be over- or under-inclusive, which, of course, is not much of a

¹¹³ ALI Overview: Projects, ALI, <http://www.ali.org/index.cfm?fuseaction=about.institute.projects> (last visited July 31, 2015).

¹¹⁴ AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, 3–4 (2005), available at <http://www.ali.org/doc/ALIStyleManual.pdf> [hereinafter ALI HANDBOOK].

¹¹⁵ ALI Overview: Projects, *supra* note 113. “Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.” ALI HANDBOOK, *supra* note 114, at vii. Maureen O’Rourke and I were the Reporters of the “Principles of the Law of Software Contracts.” We chose to write “Principles” instead of a Restatement in large part so that we could illuminate what we thought the law should be. *Publications Catalog: Principles of the Law of Software Contracts*, ALI, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=121 (last visited July 31, 2015).

¹¹⁶ Sources of information about rules include published and unpublished opinions, court orders, court dockets, legal briefs, and scholarship, adding to the challenge for restaters. Thanks to David Hoffman for this point.

¹¹⁷ See Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 400 (1933) (“The meaning of Restatement becomes still more ambiguous when one looks at the diverse theories as to the interpretation of precedents.”).

¹¹⁸ See James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 147 (1981) (“Consequently, the drafters may have only two alternatives. They may formulate a rule that is cloudy and does not clearly describe which cases should come out which way. Or they might formulate a rule that is clearer but is too broad

clarification of the law at all.¹¹⁹ In addition, it is no secret that Restatements often delve into what the law should be despite the demarcation between Restatements and Principles projects.¹²⁰ In fact, the Reporters Manual licenses such activity, albeit at a modest pace:

Restatements—“analytical, critical and constructive”—accordingly resemble codifications more than mere compilations of the pronouncements of judges. . . . Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case. A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. . . . A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles. Restatements are instruments for innovations of this sort. Nevertheless, the improvements wrought by Restatements are necessarily modest and incremental, seamless extensions of the law as it presently exists. An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law.¹²¹

With the hurdles to clarification mentioned in Part I of this article, and keeping in mind the charge to ALI Reporters, I evaluate the Restatement in the next subpart. I focus on the latter part of the statement in the Reporters’ Manual, which appears to harmonize ALI’s somewhat conflicting descriptions of what Restatements are designed to do. In short, is Chapter 2 of the Restatement a “precise and internally consistent articulation[]” of employment termination and are the improvements suggested “modest and incremental, seamless extensions” of present law?

or too narrow. It sweeps in some cases that call for the opposite result or leaves out some that call for the same result.”).

¹¹⁹ *Id.* at 150–51 (citing Restatement (Second) of Contracts section 90’s admonition to apply it only “if injustice can . . . be avoided by enforcement of the promise” as an example of a rule which the drafters realized could be overly broad or overly narrow, and which they qualify as to give notice that the rule should be applied as written).

¹²⁰ The Restatement’s foray into the law of good faith is an example. RESTATEMENT OF EMP’T LAW § 2.07 (2015).

¹²¹ ALI HANDBOOK, *supra* note 114, at 5.

B. Does Chapter 2 Satisfy the Goals of a Restatement?

Chapter 2 of the Restatement satisfies the goals of a Restatement. The Chapter is largely a helpful and accurate framework of current law with incremental normative extensions.¹²² For example, the Restatement situates at-will employment and the counter-principles without a heavy hand in either direction.¹²³ Moreover, it affirms the use of promissory estoppel notwithstanding remaining tension in the case law.¹²⁴ Chapter 2 also suggests that promises can be enforceable without the specificity demanded of enforceable contracts.¹²⁵ In addition, Chapter 2 not only recognizes the good-faith performance principle in the employment setting but also adopts it as a mandatory term despite the jurisdictions that still debunk the theory.¹²⁶ In addition, the Restatement helpfully identifies the two most prominent kinds of bad faith in the cases.¹²⁷

Another manner of evaluating Chapter 2 is by considering some of the criticism of the Chapter. One complaint often heard was that the project lacked a unifying theory,¹²⁸ but instead employed a “balkanized approach.”¹²⁹ Doubters also suggested that contract law was not a useful vehicle for analysis.¹³⁰ Further, critics regretted the timing of the drafting of the Restatement, worrying that it would “freeze” unsettled or developing law.¹³¹ So, should the Restatement have

¹²² It is more than a “repackaging” of common law. *But see* Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place*, 13 EMP. RTS. & EMP. POL'Y J. 143, 143 (2009) [hereinafter Arnow-Richman, *Response*] (“Thus, in the most benign terms, the draft repackages the common law, adding nothing of value in the process.”).

¹²³ *See* RESTATEMENT OF EMP'T LAW §§ 2.01, 2.02 (2015).

¹²⁴ *Id.* § 2.02(b).

¹²⁵ *Id.* § 2.02 cmt. c.

¹²⁶ *Id.* § 2.07.

¹²⁷ *Id.* § 2.07(c)(1)–(c)(2).

¹²⁸ “In assessing parties’ rights and obligations, some courts, in some contexts, veer toward contract formalism, emphasizing issues of assent, consideration, and narrowly defined contract defenses. Other courts in the same contexts (or the same courts in different contexts) place greater emphasis on bargaining disparities, relational norms, and policy considerations, often bending contract rules to achieve larger goals. Thus, a Restatement of employment law could comprise a meaningful contribution to the field if it were to expose or suggest a governing theory of employment contracts.” Rachel Arnow-Richman, *Arnow-Richman Critiques Chapter 2 of the Proposed Restatement*, WORKPLACE PROF BLOG (May 15, 2009), http://lawprofessors.typepad.com/laborprof_blog/2009/05/arnowrichmans-critique-chapter-2-of-the-proposed-restatement.html [hereinafter Arnow-Richman, *Critique*].

¹²⁹ *Id.*

¹³⁰ *Id.* “Absent a clear theory of the relationship between contract and employment, the Restatement cannot serve as a comprehensive or even useful account of how the law treats recurring factual problems.” *Id.*

¹³¹ *See, e.g.,* Finkin, *Working Group, supra* note 67, at 94–95 (2009) (“Certainly, the action of a reputable organization such as the ALI issuing a document that this particular statement of the at-will rule is the law, in fact it is not accurate, would be damaging to the long-term common law process of refining rules by evolution.”).

presented a unified theory? Is contract law the appropriate conceptual framework, notwithstanding its pluralism? Should ALI have embarked on a Restatement of Employment Law at this time?

1. *Should the Restatement Have Presented a Unified Theory?*

Some analysts criticized the Restatement for lacking an underlying, unifying theory,¹³² as if such a thing would magically explain employment (and termination) law and protect employees under the appropriate circumstances. Indeed, Chapter 2,¹³³ although denominated Employment Contracts: Termination, does lack such a theory but, as with general contract law, there is no underlying theory that would capture the richness of the law of termination of employment contracts.¹³⁴ For example, promissory estoppel is an independent theory of obligation and in truth is closer to tort law than contract.¹³⁵ Good-faith performance depends on fairness and justice and thus introduces elements that are independent of assent and agreement. Because general contract law has no overarching theory of its own it is no surprise that a treatment of employment law would not either. By identifying the issues and situating the diverse legal principles that arise in the termination context, the Restatement will be helpful to courts. This is all that an attempt to corral the law of employment termination can hope for.

2. *Is Contract Law the Appropriate Conceptual Framework for Employment Agreements?*

Notwithstanding contract law's heterogeneity, dissenters worried that it is unfit to regulate employment arrangements: "Can a relationship really be deemed a contract at all if it's unbreachable?"¹³⁶ Technically, under contract law's mutuality-of-obligation requirement, the critics have a point.¹³⁷ Employment-at-will arrangements are illusory if the parties have no obligation to each other.¹³⁸ But if employers have an obligation to give notice of termination, the employment contract would be enforceable.¹³⁹ In addition, if an employee has supplied consideration to support an employer's promise of just-cause employment or employment of a certain duration, such as by leaving another

¹³² See, e.g., *supra* note 128 and accompanying text.

¹³³ RESTATEMENT OF EMP'T LAW ch. 2 (2015).

¹³⁴ See generally ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997) [hereinafter HILLMAN, RICHNESS OF CONTRACT LAW].

¹³⁵ *Id.* at 43–77.

¹³⁶ See Finkin, *Working Group*, *supra* note 67, at 110.

¹³⁷ *Id.* at 117.

¹³⁸ *Id.*

¹³⁹ See, e.g., Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 958 n.20 (2006).

job at the request of the employer, contract law enforces the employer's promise.¹⁴⁰ These examples meet all of the requisites of an enforceable contract.¹⁴¹

More important, to deny employment termination the contract imprimatur would only impoverish the analysis. In its broadest conception, a contract is "a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty."¹⁴² Of course, such a definition does not tell us very much because it only leads to the question of when is a promise enforceable.¹⁴³ But by calling employment termination a contract problem in Chapter 2, the Restatement thereby invokes the whole body of precedent establishing what promises are enforceable and why. Such an inquiry encompasses agreements supported by consideration, detrimental reliance on a promise, quasi contracts and more and, as shown, applies to the mutuality problem discussed above. If contract was replaced as an analytical tool, the existing framework for examining theories such as promissory estoppel and good-faith performance would also be lost at little or no gain.

3. *Should ALI Have Embarked on a Restatement of Employment Law at This Time?*

The law and the society it governs do not stand still, and I doubt that there is ever an optimal time to restate the law. This is especially true of employment termination law because of the dynamic nature of labor markets and because of the effect of new technologies on the nature of business activities. Still, a plausible argument can be made that the common law has not moved very much on employment at will and its counter-principles in the last twenty years or so.¹⁴⁴ Whatever the trend, the Restatement performs a useful service now by identifying issues and presenting a framework for future development. In

¹⁴⁰ See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 & n.74 (1967) ("If the employee in addition to his services has given other 'good' consideration, such as foregoing a claim against the employer or giving up a business to accept the employment, the agreement will be enforced on behalf of the employee even though he is free to quit at any time."). But many courts are reluctant to accept this approach. See, e.g., STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, *CONTRACTS: LAW IN ACTION* 440 (3d ed. 2010) ("However, few courts have been willing to protect an employee whose 'additional consideration' consisted of leaving a good job to take one with a new employer, relying on a promise of permanent employment. You cannot just find something that you can label as consideration and assume that a promise of permanent employment will be enforceable. This is a very limited exception to the general at-will rule.").

¹⁴¹ See, e.g., Blades, *supra* note 140, at 1419.

¹⁴² *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 664 (Minn. 1960).

¹⁴³ See *id.*

¹⁴⁴ E-mail from Stewart Schwab to Robert Hillman (Sept. 27, 2014) (on file with author).

addition, because employment termination relies on broad principles such as reasonableness and good faith, it can hardly “freeze” the law. Perhaps a helpful analogy to the Restatement’s role is the use by lawyers of preliminary agreements that memorialize terms in negotiation and form the outline for future agreements.¹⁴⁵ The Restatement and preliminary agreements share a common goal of seeking to organize and simplify an ongoing project once an abundant amount of data has been amassed.

Further, future development of the common law of employment termination is hard to predict. Are courts going to whittle away at at-will employment or, on the other hand, narrow counter-principles? So those in favor of greater employee or employer rights cannot confidently prefer the common law to what the Restatement has to offer.¹⁴⁶

III

WHAT IF THE PROJECT HAD BEEN “PRINCIPLES OF EMPLOYMENT LAW?”

In this part, I ponder the following question: Suppose the ALI project on employment termination in Chapter 2 had been part of a “Principles” project instead of a restatement. What might “Employment Termination Principles” look like? I should disclose that my efforts for the ALI as reporter of *Principles of the Law of Software Contracts* freed me, my associate reporter, and my advisors from the restraints of a restatement and allowed us to ponder more directly what the law should be.¹⁴⁷ As the introduction to the *Principles* states, “[i]nstead of restating the law, a ‘Principles’ project accounts for the case law and recommends best practices, without unduly hindering the law’s adaptability to future developments.”¹⁴⁸ Because the nature of a restatement is different from a principles project, however, I do not mean to suggest that the drafters of the Restatement necessarily should have

¹⁴⁵ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS: EXISTENCE OF CONTRACT WHERE WRITTEN MEMORIAL IS CONTEMPLATED § 27 (1979) (suggesting that under certain circumstances “manifestations of assent” may serve as preliminary negotiations setting up a framework for later written memorials of agreement).

¹⁴⁶ See Arnow-Richman, *Response*, *supra* note 122, at 145 (“I share the [w]orking [g]roup’s desire for greater protection for workers . . . I do not share the working group’s assumption that common law, left to its own devices, will achieve that end. I believe we have already seen the best of organic judicial innovation and should be concerned equally with the preservation of existing employee contract rights as we are about the effect of the proposed Restatement on the judiciary’s instinct for further reform.”).

¹⁴⁷ See *supra* notes 113–16 and accompanying text.

¹⁴⁸ AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS 2 (2009). Other Principles projects include Principles of Corporate Governance: Analysis and Recommendations and Principles of the Law of Family Dissolution: Analysis and Recommendations. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000); AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1992).

adopted any of the following suggestions. Nor do I want to suggest that the following “Principles” are anything more than my own view of the path that employment termination should take. (I must admit it is a luxury to make suggestions without having to balance the rather adamant views of opposing interests.) But I would argue that the following suggestions, although mainly bolstering employee protections, also preserve the important role of employment at will. My focus is again on Chapter 2’s use of promissory estoppel and good-faith performance as counter-principles to the default rule of at-will employment.¹⁴⁹

As part of a “Principles” project, the Reporters could have elaborated on how promissory estoppel *should* operate in the context of at-will employment. As I described in Part I, crucial are whether the employer made a promise and whether the employee should have reasonably relied on the promise.¹⁵⁰ For purposes of evaluating whether a communication constituted a promise, contract law’s rules of interpretation should apply. First, courts should examine the words of the communication to see whether under their dictionary meaning they constitute an assurance as to future job security. Looking at the plain meaning of language such as your “job was secure” and “there was no need . . . to look for other employment,” or “[you will] continue to have a career with [the employer] until age sixty-five,” or “[you will] remain employed by the company,”¹⁵¹ it is difficult to see how these communications can be anything other than “an assurance” of a secure future with the employer. The absence of more detail, such as a specific duration, should not matter when examining the dictionary meaning. As already noted, comment *c* to section 2.02 of the Restatement, although dealing with the statute of frauds, arguably reinforces this approach: “If the conditions for promissory estoppel are present, then a promise may be enforceable even though an agreement itself would not be enforceable for lack of a written document.”¹⁵² In a “Principles” project the language of the Comment could have read more broadly that a promise may be enforceable although not definite enough to be an *enforceable contract*.¹⁵³ For that matter, section 2.02(b) in a Principles project could have invoked a broader conception of estoppel, for example, to include *conduct* that induces reasonable reliance.¹⁵⁴

Next, a Principles project could focus on the circumstances in which the employer made the assurance, including the presence of an

149 See *supra* Part I.B.–C.

150 See *supra* notes 39–40, 54 and accompanying text.

151 See *supra* notes 44–49 and accompanying text.

152 RESTATEMENT OF EMP’T LAW § 2.02 cmt. c (2015).

153 See *Hoffman v. Red Owl Stores*, 133 N.W.2d 267, 275 (Wis. 1965).

154 Section 2.02(d) helps fill the void.

express or default rule of at-will employment. As with general contract law's use of trade custom, course of dealing, and course of performance to fill out the reasonable meaning of agreements, employment-termination principles could look to these sources of meaning to supplement the plain meaning of a communication and to determine whether the employee's reliance was reasonable. As for the issue of reasonable reliance, if an employer tells an employee that "your job is secure" and employees regularly rely on such a statement in the particular trade, that should be strong evidence that the employee's reliance was reasonable.¹⁵⁵ Similarly, if the employer has made such statements in the context of previous employment relationships with the employee and the employee relied on them, this course of dealing suggests the employee is reasonable to rely once again.¹⁵⁶ Finally, if the issue involves a cluster of positive communications from the employer, this course of performance would be relevant in determining the reasonableness of reliance.¹⁵⁷

In assessing the reasonableness of an employee's reliance, a Principles project could also devote more attention to the often uneven relationship between employer and employee. To review, many employees have invested their time, money, and psyche in their job. Further, they may have few or no alternatives and believe the employer will look out for their welfare. These employees lack the wherewithal to withstand employer inducements designed to create a loyal work force.¹⁵⁸ Contract law evaluates the reasonableness of a party's actions by taking into account the attributes and circumstances of the relying actor.¹⁵⁹ To determine whether an employee reasonably relied on the employer's inducements, therefore, a court should ask what a reasonable party *in the shoes of the employee* would have done.

A Principles project on employment termination could also reject cases that dismiss an employee's reasonable reliance when it consists of failing to enter the job market. If the evidence reveals that the employee could have secured other work but was induced not to test the market and the evidence proves with sufficient certainty what the employee's new salary would have been, there is little reason to bar such evidence or reject that theory of recovery. In fact, under the avoidable-consequences rule, courts use such evidence *against*

155 U.C.C. § 1-303(c) (2014) (defining a "usage of trade").

156 *Id.* § 1-303(b) (defining a "course of dealing").

157 *Id.* § 1-303(a) (defining a "course of performance").

158 *See supra* notes 6–7 and accompanying text.

159 *See* HILLMAN, PRINCIPLES OF CONTRACT LAW, *supra* note 54, at 48–49 (2014) ("Contract law determines what a reasonable person would believe by examining the circumstances, including the language of the alleged agreement, the length of negotiations, the subject matter of the contract, the setting of negotiations, the previous conduct of the parties, the relationship of the parties, and anything else that may be relevant.").

employees to diminish their damages for wrongful termination if the employee does not accept reasonable alternative employment.¹⁶⁰

As for the good-faith obligation, a Principles project on employment termination could follow the lead of then Judge Scalia in the *Tymshare* case and clarify that courts should not automatically allow express language to trump the good-faith obligation.¹⁶¹ Instead, courts should interpret express terms in light of the likelihood that the parties intended performance to be fair and reasonable.

A Principles project also could be more attentive to how courts determine the motives of an employer who fires an employee. The test should be objective as in general contract law: based on the circumstances, what would a reasonable person believe was the employer's motive? And the project could enumerate additional examples of possible bad faith motives. Such motives may include personal animosity toward a highly functioning employee or retaliation for the employee's reasonable conduct outside of employment.¹⁶² Firing an employee for such reasons belies the employee's reasonable expectations or the community's view of fairness even in an at-will employment arrangement. In addition, an employer who justifies termination by fictionalizing the grounds for dissatisfaction with the employee's performance is in bad faith because an employee or the community would not reasonably expect such conduct even in an at-will contract.¹⁶³

For the reasons already discussed, a Principles project could establish that an employer who terminates an employee in bad faith to deprive the employee of commissions should be liable for the employee's commissions, but also a fair quantum of expectancy damages notwithstanding the at-will relationship.¹⁶⁴ This result, although likely contrary to the prevailing view,¹⁶⁵ improves the law by creating an additional employer incentive not to terminate in bad faith.

Finally, ambitious drafters of a Principles project could account for today's reality of employees increasingly at risk of termination and

¹⁶⁰ See *id.* at 174.

¹⁶¹ See *supra* notes 99–102 and accompanying text.

¹⁶² RESTATEMENT OF EMP'T LAW § 2.04 (2015). Reporters' Notes to comment *b* cites cases that support such additional bad-faith examples. See also Finkin, *Working Group*, *supra* note 67, at 138 (2009) (arguing that a limitation of the draft of the Restatement of Employment Law was its foreclosure of "any judicial inquiry into dishonesty, malice, or more" that may motivate an employer to fire an employee). But see *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 438 (Del. 1996) ("What constitutes malice or bad faith depends on the intent of the persons effectuating the termination.").

¹⁶³ See *Pressman*, 679 A.2d at 443–44.

¹⁶⁴ See *supra* notes 88–93 and accompanying text. The theory would be that but for the bad-faith termination employment would have continued for a reasonable amount of time.

¹⁶⁵ See, e.g., *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041–43 (Ariz. 1985).

facing frequent job searches. According to one analyst, “[w]hat we need going forward is a contract theory of worker protection that focuses on enabling continued labor market participation rather than preserving particular jobs.”¹⁶⁶ One approach to this problem in a Principles project would be to find that good-faith performance requires meaningful notice before termination and severance pay if notice is not feasible because of unforeseen conditions.¹⁶⁷ Perhaps this is not too much of a stretch under the reasonable-expectations or community-standards approaches of good-faith performance. But such an approach obviously raises significant issues, including whether such protection makes economic sense and, if so, how to implement the strategy. As to the former issue, the benefits of protecting employees may be greatly outweighed by the costs to employers of creating an obligation in the context of negative business circumstances. As to the latter, questions arise such as when must notice be given and how should severance pay be calculated? Relatedly, would employers pass on the costs of such a program to employees in the form of reduced wages?¹⁶⁸ Perhaps any such strategy in favor of employees terminated in poor economic times would best be handled in a statute that lawmakers could model after existing efforts.¹⁶⁹

CONCLUSION

Contract law is useful and succeeds in guiding exchange transaction largely because it is multidimensional and practical.¹⁷⁰ It lacks a dominant vision, but instead embraces disorder and contradiction. This is a good thing because no single theory could encompass the entire set of social and economic forces that are implicated in exchange agreements.¹⁷¹

Chapter 2 of the Restatement on termination embodies a subset of contract-law issues, so it should be no surprise that the Chapter reflects contract law’s heterogeneity. So the problem of sorting out lawful terminations of employees from wrongful ones cannot be resolved; it can only be tempered by establishing a useful framework. Based on an analysis of Chapter 2’s treatment of at-will, promissory estoppel, and the obligation of good faith, and based on the goals of an ALI Restatement, the Restatement of Employment Law largely meets this challenge.

¹⁶⁶ Arnow-Richman, *Response*, *supra* note 122, at 152.

¹⁶⁷ See Arnow-Richman, *Just Notice*, *supra* note 26. Notice is not required in many at-will jurisdictions. See Finkin, *Working Group*, *supra* note 67, at 108.

¹⁶⁸ For possible responses to these questions, see Professor Arnow-Richman’s fine article, *Just Notice*, *supra* note 26.

¹⁶⁹ See, e.g., 29 U.S.C. § 2102 (2012).

¹⁷⁰ See HILLMAN, *THE RICHNESS OF CONTRACT LAW*, *supra* note 134, at 268–69.

¹⁷¹ See *id.*