

A Judicial Assessment of the Restatement of Employment Law Symposium: Assessing the Restatement of Employment Law: Transcript

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TRANSCRIPT

PANEL

A JUDICIAL ASSESSMENT OF THE RESTATEMENT OF EMPLOYMENT LAW

CORNELL LAW SCHOOL SYMPOSIUM
FEBRUARY 10, 2015

*Judge Marsha S. Berzon, Justice Christine M. Durham
& Judge Lee H. Rosenthal*[†]

JUDGE LEE ROSENTHAL: Thank you very much. It's a real pleasure to be here and to congratulate those who labored on the Restatement of Employment Law. It is the culmination of fourteen years of hard work and of a process that itself is worth thinking about and celebrating.

It's also a pleasure to meet with the law students tasked with putting together this symposium and the *Cornell Law Review* issue dedicated to assessing the Restatement. This afternoon, we want to talk about our views of the process and the product. We ask that you join in that conversation. Please do not hold your questions until the end. We recognize that your being here at a quarter to four on a Friday, close to exams, is really remarkable in itself, and we very much appreciate that.

Let me begin by going back to the topic that's been an undercurrent throughout the day and that we talked about briefly this morning.

The topic is really a series of questions. What is a Restatement? Why does it have the position it occupies in American law? To what extent are we constrained by that format? Or are we empowered with greater influence by that format? What are the benefits? What are the drawbacks? How did we decide on the Restatement model as

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opposed to a different approach for the topic of employment law in the first place?

First, what are the different approaches? What's the continuum on which we're operating?

Restatements are the most traditional work of the ALI. They are defined by the black-letter law that begins each section. When Professor Estreicher talks about "protecting the brand," I think that's really what the brand coalesces around. What a Restatement at its core provides is a statement of black-letter law. Think about how hallowed that phrase—"black-letter law"—has become.

Then there are the comments that provide explanation and the reporters' notes. The comments, of course, are what ought to be the law student's best friend. They contain the Illustrations that make clear how different facts and assumptions can generate different outcomes. They're terrific for understanding and for teaching. The package anchors and amplifies the black-letter law.

The focus on black-letter law suggests that all we are talking about is a statement—or a Restatement—of what the law *is*. But it is not so simple.

At the other end of the spectrum, or maybe somewhere in the middle, is what we have begun to do more of at the ALI: documents called "Principles of Law" as contrasted with "Restatements of Law." How are they different?

The boiled-down, oversimplified, unnuanced description is that a Restatement is a statement of what the law is, while a Principles Project is about what the law could or should be. A Principles Project is less tethered to existing cases or other common authoritative sources of the law.

Actually, the continuum goes even further out than that because, from time to time, the ALI, much like the cow, ruminates. When ruminations are going on we might produce something like a white paper. These are thoughtful discussions on a subject that is difficult, timely, and could benefit from the kind of perspective that we think the ALI offers. That perspective combines different voices from different parts of the legal profession critiquing the work of thoughtful reporters, scholars who devote time, expertise, and a passion for improving the law in the area at hand.

That process is similar in some ways, but very different in other ways, from that of a scholar writing by him or herself, perhaps with the benefit of some criticisms or helpful suggestions from colleagues but without the rigorous repeated back and forth that the ALI subjects its work to. The ALI provides a peer review process unlike others, and that provides a distinctive benefit.

So those are the three basic things. Restatements, Principles Projects, and what I'll call ruminations.

I would submit, however, that the stark distinction between what the law is, on the one hand, and what the law ought to be or could be, on the other—Restatement versus Principles—doesn't do either one of them justice at all. And in the context of employment law, the distinction doesn't even come close to capturing what either alternative could be or is.

We are coming up on the 100th anniversary of the ALI. For a century, it has been the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. If all we're doing is saying what the law is, we're not clarifying, we're not modernizing, and we certainly aren't improving.

What does it mean to say "what the law is" when we are dealing with not only federal courts but fifty state jurisdictions, each of which often may produce conflicting law in the same subject area on virtually any day you can name? Nowhere is that more true than in employment law.

The law is not so simple that we can say with confidence what it is at any given point in time. To those who fear that the production of a Restatement "freezes" the law, our answer is that we're just not that good or that powerful. We have not frozen the law in any field in which a Restatement has been written that I can think of, and that's not the goal.

Justice is done to neither Restatements nor Principles Projects by an oversimplified description.

One way to think about the difference between Restatements and Principles is by asking, "Who is the intended audience?"

The main intended audience for a Restatement tends to be judges, common-law judges like us. By contrast, a Principles Project has a broader audience that can include legislative drafters, administrative agencies, or those in charge of writing regulations. They can be private actors.

A Principles Project, for example, on corporate governance is largely directed at private actors.

JUSTICE CHRISTINE DURHAM: And they can also be judges.

JUDGE ROSENTHAL: Exactly. They are not mutually exclusive but it's the main target audience that is a bit different between a Restatement and a Principles Project.

A Restatement, in a way, goes through a process that is very much like what a common-law judge does, a really good common-law judge who never sleeps, and who has boundless energy and endless resources. Indeed, a Restatement can tap into the combined brains of

all the advisors, all the members' consultative group participants, the ALI Council, every member of the Institute at the annual meetings, and all who are part of the give-and-take that occurs throughout the process.

So a Restatement starts with the steps we judges use when we get a new case. We look at what most people who have dealt with this issue and with these kinds of facts have done. What's the majority rule? What's the way in which most courts deal with it?

JUDGE MARSHA BERZON: Can I interject . . . the first problem, though, is defining the project. It's important to look at how this project was defined and changed along the way as well.

JUDGE ROSENTHAL: Absolutely. That's an ongoing, evolutionary, dynamic process.

Once you frame the problem or project and figure out how most people—judges—have approached it, you have to figure out if there is a trend that is different, and if so, how prevalent? Where does it occur? What drives it?

Then you've got to figure out, perhaps, if there is a clear trend, in one way or another, different from what's been the majority rule, which is better. And then you have to figure out why it is better.

Which approach will lead to better coherence in the law? Is there a way to ascertain, within the competence of this imagined common-law judge, if this is an area in which a single rule may not, in fact, be the best?

There are lots of different things that a Restatement does that mimic or mirror what a great common-law judge does.

A Principles Project does something different. It is less trying to identify where we are and more emphasizing where we could be. It is less tethered to what the current cases say, to what virtually every jurisdiction does. That was a strong feature of the current Restatement.

But that doesn't mean that a Restatement is limited to the majority rule. Courts can deviate and often do.

One of the great challenges for a Restatement is how to deal with fields like employment that are a mix of common law and statutes. Employment is an area in which there are statutes that confer significant discretion on judges, filled in by common law, but that also have significant, detailed regulatory structures that define the legal standards and principles that apply.

Restatements began in fields that were dominated by common law. But as more and more areas of American law become a mix of statutes as well as common-law decisions, much of what a Restatement ends up wanting to do is a combination of, "Here's how we think that common law should best be defined, where we are now," and proposals for revising legislation, which is more akin to a Principles Project.

The ALI is working on how best to accomplish this kind of blended approach when the field demands it, without diluting the ability to generate black-letter law aimed primarily—though not only—toward judges.

In employment law, the reporters faced the complexities of fifty different state jurisdictions and federal statutes and common law. Employment law spans a huge range of fields, as was made clear in our last panel.¹ Employment law includes actors ranging from the most sophisticated people in the executive suite down to the kind of workers who we often see, whose focus is on their hourly rates, what overtime they didn't get paid, if they will still have a job next year, who are working in low-level jobs and who have little to no bargaining power, no leverage, no autonomy.

How does this Employment Restatement accommodate the jurisdictional variations, the different kinds of employment relationships, the different kinds of employees, and the mix of common-law and statutory approaches to all of those problems?

That was the small problem that Sam and his colleagues faced, with the added complication that, as Sam pointed out, this is a field divided at the “v.” It is very difficult to mediate the fundamental differences between those who habitually represent or advocate for the interests of plaintiffs, otherwise known as employees in most cases, and those who habitually represent or advocate for the interests of employers. The divide is deep and difficult to bridge.

We're going to talk more about the challenges of employment law in particular, and then talk a little bit more about the ways in which the Restatement met those challenges that are particularly useful for judges. Here I want to credit the *Law Review* for having the brilliance to bring before you a perfect range of perspectives on that subject.

We have a federal appellate court judge who deals with the range of cases the very large Ninth Circuit generates. We have a federal trial judge who has been on the bench for a very long time. And we have a distinguished state supreme court justice who deals with primarily state-law issues, of course, but who in that context sees the relationship between state and federal law.

We've all three seen how this field of law has evolved. When each of us took in law school what now is employment law, it was then called labor law and we were mostly worried about unions. The world has changed. We are in a good position to comment to you on how the ALI's Restatement of Employment Law contributes to the field,

¹ See generally Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 (2015); Michael Selmi, *Trending and the Restatement of Employment Law's Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369 (2015).

can influence what we do as judges, and we hope can support your work as well.

JUDGE BERZON: I want to talk briefly about one way in which the Employment Restatement differs from most others. That difference is the result of the fact that employment law is a statute-permeated area.

True, the enactment of a wide range of employment statutes is a relatively recent development as law goes—meaning the last fifty years or so. Still, it seems to me no accident that it didn't occur to the ALI to have a separate Restatement of Employment Law until this set of statutory protections for employees proliferated, beginning a bit in the 1930s but primarily starting in the 1960s. The statutes in the field now cover wage and hours; racial, religious, age, sex, and disability discrimination; occupational safety and health; whistleblower protection; and many other matters. Much of what we now think of as the common law of employment, unlike the usual sequence of common-law and statutory development, is really a mimicking of the statutory protections rather than the other way around.

For example, the creation of the tort of discharge against public policy, as well as the expansion of employee contract law to include contracts grounded in employee handbooks and implicit good faith and fair dealing provisions, came after the enactment of employment discrimination statutes, and reflected concepts of fairness within the employment relations first recognized in those statutes. These recent developments in the common law of employment relations came about because the statutory protections were so interstitial. The question arose, once those relatively narrow protections were in place—why isn't everybody else protected, too? Some common-law judges—preeminent among them my colleague and coteacher Joseph Grodin, in California, then a California appellate and Supreme Court justice—started developing, through the common-law process and drawing on tort law and contract law and other common-law sources, a broader set of protections for employees generally.

Given this close connection between the statutes and the common law governing the employment relationship, I was uncomfortable from the beginning, and to some degree remain uncomfortable, with modeling the Restatement of Employment Law on the usual, historical system of common-law Restatements, which do not directly take into account statutory developments and interpretations. The task is seen, and was seen in this instance, as compiling and synthesizing law in common-law areas. As a result, with regard to employment law, the Restatement covers some things and not others, even though they are right up against each other as a practical matter.

The next conversation we're going to have is about how we in our different kinds of courts do deal with common-law employment

concepts and therefore will be aided by the Restatement. But as you will see when I get to that subject, as a federal judge, I'm mainly dealing with statutes, although the statutes incorporate and refer to common-law concepts in various ways. We do hear state diversity cases, of course, and so do decide state common-law issues. But in those cases, we are fairly shy about inventing new legal principles that have not been adopted by the relevant state's courts.

Except as to state diversity cases, the common-law concepts come to us in employment cases indirectly rather than directly, as we consider whatever statutory problem we are addressing. Yet, the same issues do recur from statute to statute, and our interpretations—to a large degree, although not uniformly—draw on those reached with regard to similar questions under other statutes, as well as in common-law contexts. As a result, I question whether there isn't enough uniformity of problems among the various statutes that one couldn't have essentially developed a common law of federal employment statutes, as part of the Employment Law Restatement project. Of course, the various statutes have different histories, purposes, and wording—but still, there is a tendency for judges to transfer concepts from one to the other. I wonder whether that phenomenon shouldn't have been recognized more than it was in developing the Restatement.

JUSTICE DURHAM: What an interesting idea, a common law of federal employment statutes.

JUDGE BERZON: Not just federal employment statutes. State and federal statutes because state statutes tend to be similar to—or if not consciously different from—federal statutes covering the same matters.

JUSTICE DURHAM: But not exactly. A couple of things I forgot to ask my introducer to mention are that I did serve as an advisor on this project, and also as a member of the ALI Council that sent the draft to the membership of the ALI. I prepared to frame some of my remarks today in the context of Chapter Five of the Restatement, having to do with wrongful discharge in violation of public policy.

Because although I don't disagree with what Judge Rosenthal has said about the importance of statutes, there are portions of the Restatement, and Chapter Five is significantly one of them, where although we deal on a frequent basis with the interstices left between statutory regulations, state and federal, it's also an arena in which the purest kind of common-law development is still going on.

The other reason I'm interested in it is that twenty-five years ago I wrote the opinion in my state which adopted the common-law tort of

wrongful discharge in violation of public policy.² It's kind of nice to have seen it come full circle twenty-five years later, and to see what's happened in the interim.

When I was interviewed for my position on my court many, many years ago by the nominating commission, one of the lawyers on the commission said, "So tell me what you think about judges making law." Well, I'm sitting there looking at a nominating commission, and I say, "Oh no, judges don't make law."

I've now been a judge for a very long time, and I'm perfectly comfortable, especially just having won another retention election, to tell you that state judges in particular are lawmakers, and in the context of the common law, we shape, on the basis of numerous principles. Now, we try to do that on a principled basis. But that is the function of the common law. It is judge-made law.

The benefits of a project like the ALI's Restatements, and this Restatement in particular, are numerous in that undertaking, and they've been mentioned by many here today—the doctrinal organization, the identification of issues, the bringing of order to the process, and the identification particularly of areas which are open and evolving. I was one of the ones that tried to get Sam to jettison employment at-will at the beginning, and failed at that project, along with others.

PROFESSOR SAMUEL ESTREICHER: I wish I had such power.

JUSTICE DURHAM: The point that I want to make about that is that I do not agree with many of the critics of the Restatement who claim that it is freezing employment law in a bad place because some of the underlying common-law doctrines have a vast history behind them, starting with the concept of at-will employment. In fact, it's my impression that any freezing phenomenon, that any slowness in the direction of the development of the law in this arena, has been arguably due more to the caution of state-court judges in moving into new arenas and in being more creative about their thinking.

Restatements are more descriptive than prescriptive. They're intended, I think at least as I use them, to be a collection of the judicial thinking on a subject in the United States, which as Judge Rosenthal suggested, is where the common-law judge starts. They are black letter. They've become the classic definition of black letter.

But when I look at the black letter of the Restatement, that's the beginning of my engagement with the subject matter and the beginning of my inquiry. Common-law judges have the option of citing or not citing any Restatement. I can't tell you how many times even I, a longtime member of the ALI, can get all the way through a case, and

² Peterson v. Browning, 832 P.2d 1280 (Utah 1992).

sometimes finish with a case, before it occurs to me, “Nobody mentioned any Restatements,” or, “I wonder if there are any in this area.”

Lots of lawyers don’t know about them, and lots of lawyers don’t rely on them. It is true that judges are a primary audience, but sometimes we are conduits, and we need others to do the research to help us get where we need to go. The lawyers have a key role to become aware that Restatements exist, to study their contents, and to bring them to us, so we can adopt them or not adopt them in the most sensible ways.

The judicial literature is littered with opinions in which judges have said, “We know what the Restatement says; we don’t agree with it. That’s not a principle that is consistent with our precedent in our jurisdiction.” All the lawyers who practice in our court tend to start with our precedent. That’s the trouble with our federalist system; you’ve got fifty sets of precedent in the common-law arena.

Even if we decide to adopt a Restatement, we may adopt it in full or in part. My own court has struggled in various arenas with the contents of a Restatement rule and come to the conclusion that the rationale underlying some part of it is not where we want to go with the law in our jurisdiction, and so we don’t adopt the whole thing.

I think it’s important to assess this new Restatement at the outset, before anybody has really used it. It will be so interesting to come back in ten years and assess the impact it has had. But it’s important to recall, as we’re in this process of trying to decide its likely impact, that there’s judicial restraint and all kinds of other reasons for caution affecting judges. Common-law judges are, as a rule, extraordinarily cautious, and in the employment law arena, they have sometimes been perhaps more cautious than they need to be.

I wanted to say one more thing, and that has to do with history. Some history has been discussed today; but one of the things that I wanted to point out is that there was a point in time in the nineteenth century and the early twentieth century when you had the development of a partnership between common-law traditionalism and *laissez-faire* constitutionalism in the state and federal courts. You had, first, a very slow and incremental elaboration on a traditional common-law system, and this is particularly true in the employment law area.

How old is the concept of at-will employment? Do any of my scholars know?

PROFESSOR STEWART SCHWAB: Many would date it to Horace Gay Wood’s treatise of 1877.³

³ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

JUSTICE DURHAM: Then you also had laissez-faire constitutionalism going on in the state courts around their state constitutions, and in the federal courts around the federal Constitution. Reformers actually saw the common law as a barrier to necessary economic and social reforms, particularly in the employment area. Cooley, in his treatise on state constitutional law in 1868, pointed out that the common law's sacred right to property antedated even the adoption of state constitutions, and the federal implementation, and so limited the power of legislators to enact remedial legislation.⁴

In 1913, another state-law scholar, William Dodd, pointed out that, "[T]he greater number of our state courts are illiberal and, under our present constitutional and judicial organization, are able to block needed social and industrial legislation."⁵ Again, much of it was directed to the workplace. We had this whole revolution that subsequently went on in a very interesting form, which few people know much about, and that's the revolution occurring in and through state constitutional amendments.

We know all these labor law reforms are being incorporated into state constitutions in an effort to force judges to develop common-law principles that would be more progressive in their interpretation. One of the things I'm very interested in, particularly in the arena of wrongful termination in violation of public policy, is the degree to which state constitutional affirmative rights, and state constitutional language, have implications as material for state common-law judges, and arguably federal common-law judges, in interpreting their statutory schemes and in moving their common-law principles forward. Not to constitutionalize the common law. That's not the purpose. But to see that history, and that evolution, as part of our interpretive base.

JUDGE BERZON: I am now going to get a little more specific as to the ways in which, in my judicial work as a federal appellate judge, employment common-law issues arise and how we handle them. But I want to begin by reporting that I may be the first federal appellate judge who has cited the Restatement of Employment Law—actually, the final draft of the Restatement—in a published decision.⁶

JUSTICE DURHAM: Did you call it the Restatement Third?

JUDGE BERZON: I called it the Restatement, parenthesis Third, citing the draft. The opinion was issued on November 7th. I've been having a discussion with Stewart Schwab about whether it needs to be revised in light of the actions of the ALI plenary body in May 2014

⁴ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

⁵ W. F. Dodd, *Social Legislation and the Courts*, 28 POL. SCI. Q. 1, 5 (1913).

⁶ See *Tamosaitis v. URS, Inc.*, 771 F.3d 539, 556 n.9 (9th Cir. 2014).

adopting the draft and the change in the ALI system of numbering Restatements.

JUDGE ROSENTHAL: Can I say just one word about the numbering issue? Sixty years ago, the decision was made within the American Law Institute, that every Restatement project within a series would be given the number of that series. When the second series was started, every Restatement within that series was the Restatement Second of X.

That kept going for sixty years. The result was that when this Restatement was in progress over eleven years, as a matter of sixty years' habit we called it the Restatement Third of Employment Law, even though there was no Restatement First or Second of Employment Law.

This was the project that made us stop and think, "You know what, this is really dumb."

For a group of people dominated by academics, great lawyers, and terrific judges, the one thing we are sensitive about is looking stupid. We don't mind controversy.

So, in a refreshing and, for us, quite revolutionary act, we decided to forget this going forward. We're not going to go back and renumber things, but going forward, if this is the first work in a particular subject area, it is called "The Restatement," here, of Employment.

PROFESSOR ESTREICHER: Judge Berzon, what is the name of the case you referred to?

JUDGE BERZON: The name of the case is *Tamosaitis v. URS, Inc.*⁷ I think the case as a whole is instructive as to the ways in which common-law and statutory concepts cross in employment law.

Tamosaitis concerned an esoteric statute—the Energy Reorganization Act, which includes a whistleblower section.⁸ To decide the case, we needed to construe the whistleblower section. As it turned out, the issues we addressed under the ERA whistleblower protection provision arise in a variety of employment law contexts.⁹

In brief, the Department of Energy hired Bechtel, which hired a group called URS Corp., which hired Mr. Tamosaitis to run a cleanup project at the former Hanford Nuclear Project in Washington. Mr. Tamosaitis was in charge of aspects of the cleanup project, but he was working under these various entities. URS Corp. and Bechtel were supposed to clear the cleanup project by a certain date. Mr. Tamosaitis concluded that the cleanup wasn't done, and he objected to stating that it was. He didn't get fired, but, according to his evidence on summary judgment, the Department of Energy and Bechtel told URS to get rid of him, and he was in fact terminated from

⁷ *Id.*

⁸ 42 U.S.C. § 5801 (2012).

⁹ *See Tamosaitis*, 771 F.3d. at 551.

Hanford and initially given a job in a basement somewhere. He was then later offered jobs in various places that he didn't want to be, although URS did not fire him. So one of the issues was whether the antiretaliation provisions of the whistleblower sections protect against retaliatory nondischarge, so to speak—that is, adverse treatment by an employer short of discharge. The parallel question, it turns out, the one whose resolution kept changing, probably more than any other, during the development of the Restatement, in the context of retaliatory treatment against public policy. After the plenary session last May, the conclusion was that the ALI is not taking a position as to whether nondischarge discipline can be the basis for a public policy discharge common-law cause of action.

PROFESSOR SCHWAB: The action you're describing is very close to constructive discharge.

JUDGE BERZON: We did not need to reach whether there was constructive discharge because in the context of this statute, there was little doubt that the retaliation was sufficient by itself. As I shall explain shortly, the question of the common-law status of retaliatory nondischarge, as I am calling it, was debatable in the *Tamosaitis* case for quite a different reason.

PROFESSOR DEBORAH DEMOTT: My view would be that I'm just as glad the Restatement is not taking a position on that. I'm afraid they might take the wrong position.

JUDGE BERZON: Well, right. I understand that.

So here is what we said in what I do think is the first appellate decision citing the Restatement: "Although the majority of state courts do not recognize adverse employment claims falling short of actual or constructive discharge," we said, and then quoted from and cited the Restatement: then "two state supreme courts have explicitly sustained 'wrongful demotion' claims, and a few intermediate appellate courts have either sustained claims of this type or indicated their approval of such claims." We went on: "Those courts that do allow such claims emphasize that they are analogous to wrongful discharge claims," citing a California case and a Nebraska case.¹⁰

Now, what's interesting is, how did this question come into the *Tamosaitis* case? It was not because we needed to decide whether the statute applied to what happened to the plaintiff because that was clear in the statute. Instead, the matter arose because there was a discrete issue in the case aside from interpreting the statute—namely, whether the plaintiff was entitled to a jury trial on his retaliatory whistleblower claim in federal court. This question was complicated by the fact that there is an agency-exhaustion requirement in the

¹⁰ *Id.* at 556 n.9.

statute, and, if the agency had gotten around to deciding this case within the prescribed statutory period, Tamosaitis wouldn't have gotten a jury trial.¹¹ But our conclusion was that once he was able to opt out of the administrative procedure and file a judicial case because the agency hadn't decided in time, he could get a jury trial.¹²

To come to that conclusion, we had to decide—because the Seventh Amendment jurisprudence so requires—whether the ERA's whistleblower remedy was a tort-like common-law legal right, as opposed to an equitable or statutory or regulatory, non-tort-like right. That distinction explains why we needed to determine whether nondischarge discipline sufficiently partook of the characteristics of a common-law tort that is analogous to a tort-like common-law legal remedy.

This Seventh Amendment problem is illustrative of one of many ways in which federal appellate judges come across employment common-law problems. Another obvious example of such instances is diversity cases. But, as I said earlier, we tend to be shy about developing novel legal principles in diversity cases.

One interesting example of federal common-law employment issues arising in federal court cases is that in the last three or four months, there have been three different cases about FedEx drivers and whether they're employees or independent contractors. There was also one case in the D.C. Circuit somewhat earlier.¹³ The D.C. Circuit case was under the National Labor Relations Act, as was one before the National Labor Relations Board that was decided in October.

There were also two cases in the Ninth Circuit, one arising under California state law¹⁴ and one under Oregon state law.¹⁵ And there was one in the Seventh Circuit, which certified the issue to the state supreme court, saying “[w]e’re not doing this. We don’t know the answer under state law.”¹⁶

Certification to a state supreme court is a common method for my court as well when we have an important issue of state law. However, my colleagues—I was not involved in the two FedEx cases—did not do that. They were of the view that the California standards for who is an employee and who is an independent contractor were not at issue, as state law is clear as to the applicable standards. Instead, the FedEx cases, the two Ninth Circuit cases held, concerned the

¹¹ See 42 U.S.C. § 5851(b)(4) (2012).

¹² *Tamosaitis*, 771 F.3d at 559.

¹³ *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009).

¹⁴ *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981 (9th Cir. 2014).

¹⁵ *Slayman v. FedEx Ground Package Sys.*, 765 F.3d 1033 (9th Cir. 2014).

¹⁶ *Craig v. FedEx Ground Package Sys.*, 686 F.3d 423 (7th Cir. 2012).

application of established state law, so there was nothing to certify. California law, the Ninth Circuit held, is based on a fairly traditional right-to-control standard, with not a lot of the entrepreneurial factors included.¹⁷ The Restatement of Employment Law adopts a similar standard.

Diversity cases, then, are the most direct instances in which federal appellate courts get into the issues covered by the Restatement of Employment Law. But there are others as well. First of all, there's the principle that Michael Harper alluded to earlier, sometimes honored in the breach, that if a federal statute uses a term with a common-law history, the presumption is that Congress used it in that common-law sense. But there are various exceptions to and deviations from that principle.

One example that came to mind, in another employment case in which I was on the panel, now pending on rehearing, was an ERISA case, *Gabriel v. Alaska Electrical Pension Fund*.¹⁸ The question was, "What kind of equitable remedies are available in ERISA cases after *Cigna Corp. v. Amara*,¹⁹ where the Supreme Court opened up the range of equitable remedies?" I wrote the dissent to the original opinion. The majority took the reference to the remedy of surcharge in the *Amara* opinion, which cited the Restatement of Trusts, as referring to the particular circumstances in which the surcharge rules apply.²⁰

I said in dissent that the facts of *Amara* and the Supreme Court's use of the term "surcharge-like" did not meet the requirements for the most traditional uses of surcharge.²¹ I was arguing that the *Amara* holding was at a higher level of generality than the traditional common law, and so than the Restatement of Trusts. [The original panel opinion has now been superseded by a unanimous opinion that no longer maintains that the details of the common law of surcharge necessarily apply under ERISA.²²] Certainly, sometimes the Supreme Court—*Amara* is an example—uses common-law concepts as reflected in the Restatements in interpreting federal statutes, but then draws out its own version of those concepts for the particular statute that it's working with.

Then there's the phenomenon that I was calling earlier "the federal statutory common law,"—that is, issues that in general, and in employment law in particular, recur over statutes. In *Tamosaitis*, for example, several such questions arose.

¹⁷ See *Alexander*, 765 F.3d at 988–89.

¹⁸ 755 F.3d 647 (9th Cir. 2014), *reh'g granted*, 773 F.3d 945 (9th Cir. 2014).

¹⁹ 563 U.S. 421 (2011).

²⁰ *Gabriel*, 755 F.3d at 658–59.

²¹ *Id.* at 667 (Berzon, J., dissenting).

²² *Gabriel*, 773 F.3d at 962–66.

One such question in *Tamosaitis* was a joint employer-like issue. Another arose because URS, the employer-contractor, had a customer, Bechtel, telling URS to get rid of Tamosaitis. URS's argument was, "Well, we had no choice. We didn't have a retaliatory motive. We were just doing what we had to do under our contract with Bechtel."²³ The argument is not dissimilar, as we say in the opinion, from a Title VII case in which a customer says, "I don't want any black people serving me."

In Title VII cases, that doesn't work, and we said in this opinion that it doesn't work in the ERA whistleblower context either. Although we did mention the Title VII cases, we also relied on the particular language of this particular statute.²⁴ I understand the tension between those two approaches—that is, there is commonality among the statutes, but there are also differences, so that it's difficult to encompass what I would call statutory common law in a Restatement. As a result, there are whole chunks of issues that come up recurrently in interpreting employment statutes that are not covered in the Restatement, including the one I just mentioned.

Overall, I tend to use a Restatement in the common-law areas with which I'm least familiar, like trust law. These are areas that are somewhat buried in the past, haven't changed a lot, and aren't going to change much in the future. For me, the Restatements are very useful as compendia in those areas. They are useful to get a bearing, to begin to know what the common-law concepts are. But we need to be very cognizant of the fact that it is our job as judges not just to buy them whole, and therefore not to freeze the development of the law. This is particularly so in the more usual ways that federal courts encounter common-law concepts—that is, embedded in other doctrines, rather than directly, as I hope I have illustrated.

JUSTICE DURHAM: I kind of want to change the subject, though not exactly.

JUDGE ROSENTHAL: Do you want to talk about the state-court perspective?

JUSTICE DURHAM: I actually want to elaborate on a theme Judge Berzon just mentioned of how Restatements generally are used, and how this one in particular should be used. I mentioned that I've been thinking about this event today through the prism of the tort for wrongful discharge. It is an example of what I said earlier about the real caution and timidity that a lot of common-law judges express, and, of course, Judge Berzon just described it on the federal side where it has, perhaps, more justification. Comment *d* for section 5.03

²³ See *Tamosaitis v. URS Inc.*, 771 F.3d 539, 551 (9th Cir. 2014).

²⁴ See *id.* at 553.

in Chapter Five talks about the fact that one of the available sources for determining public policy in the arena of public-policy discharge claims is decisional laws from other jurisdictions.

The comment says it may be persuasive evidence of a well-established principle of public policy. It then goes on to observe, quite accurately, that some courts are reluctant to predicate a tort action entirely on judge-made law, although they will predicate it on a legislative assertion. They will predicate it on an administrative rule and in some jurisdictions even a local ordinance or statute.

It struck me as particularly odd when you realize that the tort of wrongful discharge in violation of public policy is a judicial creation. Why should it be difficult in answering the question of “whence cometh the public policy” for a common-law judge to look to what’s going on in the common law in other jurisdictions as a potential source? That’s just illustrative of the problem I was describing earlier.

I also wanted to quickly mention, looking back on today’s discussions, in terms of the legitimacy—within indeterminacy—that state judges have in dealing with common law, particularly in an arena like public policy and wrongful discharge.

When we were talking about autonomy earlier today, we heard Sam Estreicher talk about background assumptions. When we were talking about reasonableness, it came up several different times. The whole issue of the indeterminacy of reasonableness as a concept of the law was discussed when we were talking about the question of what to do about employer notices in the privacy area.²⁵ It was pointed out that courts are on their own here because the Restatement doesn’t give them much guidance.

Then, of course, in the public-policy sources, you’ve got this issue of decisional law from other states. The issue that I’m interested in having to do with state constitutional language, I happen to have under advisement right now, so I can’t talk very much about it other than to say it has to do with whether the right to self-defense is sufficiently well established as a matter of public policy that discharge for exercising self-defense in the employment context should be a basis for a wrongful-discharge claim.

There are, I think, three relevant decisions. I’m very grateful that the Restatement reporters found them all for me. I can go and read them myself, and I can think about them. I can compare them with what else is going in this section, this chapter, and the comments. I find that very helpful.

²⁵ See Charles A. Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391 (2015); Steven Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423 (2015).

PROFESSOR ROBERT HILLMAN: Question. To what extent do you wait for the lawyers to furnish Restatement provisions through their briefs? It sounds, from what I heard in the discussion so far, that you're all doing a lot of research on your own.

JUDGE BERZON: Just talking generally?

PROFESSOR HILLMAN: Just in general.

JUDGE BERZON: In general? We do our own research. We have to.

JUDGE ROSENTHAL: First, we do our own reading. That is, we don't rely on how the lawyers characterize the cases that they cite. Then we don't limit ourselves to the cases that they cite. There is a reason for both.

JUDGE BERZON: There are many, many examples of why we cannot be bound by what the lawyers tell us. But one of my favorite examples, and one that has something to do with this area, is a Federal Arbitration Act case I had once. There was one common ground among the district court and the parties: all said that the Federal Arbitration Act didn't apply to our case because the arbitration agreement was entered into only after the dispute arose. Of course, the Federal Arbitration Act says exactly the opposite—arbitration agreements are enforceable whether entered into before a dispute arises or after it does. When the lawyers stood up to argue the case, one of the judges said, "Where are you getting that from?"—that is, that the Federal Arbitration Act did not apply because the arbitration agreement was post-dispute.

They say "Oh, a Ninth Circuit case."

We say, "No, there is no Ninth Circuit case. But there is a district court case."

"Well, it's from the district court."

"But the district court is wrong. Have you read the statute?" The answer was, no, they hadn't. That's why we don't rely on the lawyers.

PROFESSOR SCHWAB: But just to follow up because the point's so interesting. At the extreme, the question is what can you take judicial notice of or do in your background research. It's fine to go read all your own cases because that's clearly acceptable; we'd be shocked if you wouldn't be doing that. Checking up, second guessing the lawyers, not believing on face value the briefs, we all hope you're doing that, too.

But I guess I would put it, to what extent do you feel comfortable in looking at a Restatement on your own before you look at other things?

JUDGE BERZON: I have no problem at all.

JUSTICE DURHAM: Absolutely.

JUDGE BERZON: No problem at all. It's a place to start research, just like you'd go to Am. Jur. [*American Jurisprudence*] in the old days.

JUDGE ROSENTHAL: Yes, exactly. Or C.J.S. [*Corpus Juris Secundum*.]

PROFESSOR ESTREICHER: Are there particular aspects of what's been done here that you find especially helpful? I'm thinking, for example, what Professor Harper, who, by the way, is my coauthor of our labor law book. I just want you to know that I've shown some flexibility over the course of my career. The first casebook was by Harper and Estreicher, although the second was Estreicher and Harper. Or vice versa.

You have many federal statutes and state statutes that are based on employee status and cover employees only. Michael Harper looked at the definition of the word "employee"— "person employed by an employer." It's obviously not a very complete definition.

JUDGE ROSENTHAL: Or very helpful.

JUSTICE DURHAM: Or rounded out.

PROFESSOR ESTREICHER: We have the Supreme Court saying in *Nationwide Mutual Insurance Co. v. Darden*,²⁶ that the definition of employee is based on the common law. We went to the Restatement (Second) of Agency; we didn't have Deborah DeMott's current volume available. In the Restatement of Agency definition, the first part is about "right of control."²⁷ The second part has nine other factors, and two parts don't really connect up. What Michael Harper has done is taken those nine other factors and made it part of the black letter, as it were.

In most cases, right of control will spell employee status. Those are the easy cases. But there are hard cases involving very skilled employees whom the employer controls because the discipline controls the work. We're talking about mobile workers who are judged on how many miles they travel and how long it takes them. That's an alternative ground for employee status. Michael made a heroic effort in Chapter One to unpack all that and lay it out. What do you think of how helpful it is?

JUDGE ROSENTHAL: I can take a stab at that, Sam. It's a great question. I agree with you that that's a wonderful example, particularly from the perspective of the beleaguered trial judge. I am trying to rule on the motions and get or keep the cases moving. And I'm in trial. There's a lot going on in any given day. The pace is a little bit different from what some of the appellate courts enjoy. A huge recurring issue is whether a particular individual is an employee or an independent contractor. It can come up in a lot of different ways.

²⁶ 503 U.S. 318 (1992).

²⁷ RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

It comes up under the Fair Labor Standards Act because only employees are covered by it. It comes up in lots of different statutory and common-law contexts, and it's vital. I'm in a jurisdiction, Texas, in which I can look to some of the guidance provided by state law, but there are factors often not fleshed out in the state decisions.

The Restatement does a marvelous job of providing some flesh. It gives me the starting point to research not only how Texas has handled this issue in a variety of fact contexts, which is critical, but also if there are open areas that Texas hasn't addressed, in which I'm not bound by the precedent of either Texas or the Fifth Circuit if those are the governing law sources. If there's some uncertainty about which way to go, I also have the beginning points of where to look for how other courts have addressed the issue.

Another great example is in privacy, which is a very different set of circumstances. Unlike the independent-contractor versus employee question, the privacy issues that are presented most often now have been greatly affected by changes in technology. The advent of virtual workplaces and social media and other forms of communication requires reexamination of privacy concepts that were formulated in different times and contexts.

So what does the Restatement do that's particularly helpful to a trial judge in an area in which, although there used to be a fair amount of common law, that common law either doesn't work well anymore or it simply doesn't apply?

Here again, it's very helpful. The privacy sections are not as tethered to the existing law because there is not as much existing law to tether to. But the privacy sections are a great starting point because they frame the way in which I ought to be thinking about what the important questions are, and that's enormously helpful.

And here I just want to give you a sense, very briefly, of how important the Employment Restatement will be to trial judges everywhere. I sit in a big city. Employment cases are roughly, at any given time, probably thirty percent of my civil docket. They cover a huge span of issues.

In some of those cases, the Fifth Circuit will have clearly spoken, and I don't have the freedom that my two distinguished colleagues to my left have of being able to say, "You know what? I don't like that rule. I don't care if my court came up with it before. I'm going to call for an en banc," which you have the ability to do, or, as Justice Durham can say, "We're not doing that anymore. . . ."

JUDGE BERZON: If you can get your colleagues to agree.

JUSTICE DURHAM: If you hang around for thirty years, often you can.

JUDGE ROSENTHAL: That's true. I'm working on that. I'm a one-judge court, which gives me some autonomy. But I am bound by limits that appellate courts are not subject to; it's a different enterprise. So if the Fifth Circuit has spoken, I can engage in what I refer to as judicial moaning, otherwise known as whining. But that's about it. If the Supreme Court of Texas has spoken, ditto, only they don't grade my papers. I can whine a little bit more loudly.

But as is often the case, Texas law or the law of another state applies because lots of employment contracts have choice-of-law clauses. Even in a nondiversity case there may be a contract that will say I've got to look to Utah law, I've got to look to California law, or I have to look to the law of New York. And I have to figure out what that law is. Enter the Restatement!

Or if it is a case in which I don't have an answer clearly provided under the applicable governing law, enter the Restatement. It is amazing how many gaps remain open that specific cases require me to dig into and figure out.

I am daily reminded about how little I know in an area that I deal with every single day, over and over again. It's amazing. Just as Judge Berzon rightly says, the Restatement is most useful, perhaps, in areas where we don't have familiarity. But what I daily understand is that there are lots of those kinds of areas within subjects that I think I know pretty well.

And that's part of the joy of the work, but it is also a source of the need by judges and law clerks, who are doing much of this initial information gathering for us, thank goodness. One reason this Restatement will be so useful is that employment law is a huge amount of our dockets. We've got to be as current as we can. The Restatement is, even with electronic research, the most efficient gatherer of the widest range of background law and of sources that we will find useful to consult.

JUSTICE DURHAM: My only complaint is that they won't do updated editions.

JUDGE BERZON: I was about to say that as a case-gathering process, it just gets quickly out of date. For example, the four recent FedEx cases all came out after the May draft.

JUDGE ROSENTHAL: That's true, but it's a starting point, and we know what to do to figure out what's happened to cases.

In addition to the black-letter formulation, the illustrations and the comments are useful explications of concepts that might be both unfamiliar and complicated to unpack, and that are not intuitive.

A related way in which the Restatement may be most useful over and over is in writing summary-judgment opinions and jury instructions. Employment cases generate motions for summary judgment

more reliably than any other single kind of case that I have on my docket. And when we deny summary judgment and we have to go to trial, we have to instruct the jury.

The Supreme Court has not yet adopted my idea that before they announce a new rule in an employment case, they need to see it written in the form of an instruction to the jury.

JUDGE BERZON: No, they have not.

JUDGE ROSENTHAL: I worked recently to put the “but for” causation standard announced by Justice Alito for the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*²⁸ into a clear jury instruction. After years of law school, we all know what “but for” means. It’s harder for jurors, who don’t talk or think in those terms.

Not only do I instruct juries in cases that I try but I spent a good part of last year on a committee rewriting jury instructions in employment law for the district judges in the circuit. It was a heavy responsibility.

It brought home how useful this Restatement is. I would go to the earlier drafts and look at the way in which the black-letter law formulated the standards that I was trying to boil down and present in a clear way.

I would go to the illustrations because they focused me on the different facts that would make a difference with respect to different formulations. I would go to the collection of cases in the reporters’ notes to look at how other courts had instructed juries, to find recently approved jury instructions.

I hope and predict that trial judges and their law clerks will find this Restatement enormously useful to decide and to write opinions in employment cases, and to instruct jurors when those cases are tried. Lawyers ought to be citing it to us because the best thing lawyers can do as an advocate for their client is to give the district judge what is most helpful to the judge to rule in that client’s favor.

That’s my pitch.

JUDGE BERZON: One of my reactions to lawyers citing the Restatement is that this is one area where it doesn’t much matter if they cite it because it’s there and you know where to look. It’s not that difficult. But there is a gap the lawyers will find if they do go looking through the Restatement now that it’s finished. It relates to the particular example that Lee gave, which is how you prove motive. The problem is not covered in the Restatement, I believe. Is that right?

PROFESSOR MICHAEL HARPER: Can I say something about that? It relates back to what you were talking about with the common law and statutes. Early on, we were uncertain how to deal with this area be-

cause of the overlays with statutes. I think that we realize that we were going to deal with questions that come up under the statutes, if they also came up under the common-law cases.

JUDGE BERZON: What I'm saying is that this one does come up, in the public-policy tort directly.

PROFESSOR HARPER: Yes, it does in terms of the different reasons for acting and the consequences. But in general we don't address how you prove motive.

JUSTICE DURHAM: I'm not sure whether the proof-offering phenomenon would be well suited to being addressed in a Restatement. It's something we do deal with all the time. We deal with it in the criminal law and we deal with it across the civil-law process, in a range of different kinds of claims.

PROFESSOR ESTREICHER: One problem is that much of the *McDonnell Douglas [Corp. v. Green]*²⁹ verbal formulation is just gibberish.

JUDGE BERZON: I'm not talking about the mode of proof of causation but of the concept. We were talking before about the retaliation cases. In the case I was describing, the statute actually says something like a "contributing factor," so the language is not "but for" cause.

PROFESSOR ESTREICHER: I actually think we should have done more on causation. It's hard to do. We have the Restatement (Third) Torts projects and we didn't want to step on their toes.

What I was saying is if you could suggest to the Council that if there's an opportunity in an upcoming project such as the Restatement of Torts, that it actually deal with causation. That would be very helpful. It's enormously important.

JUDGE ROSENTHAL: I think that's a great suggestion. There are parts to this Restatement that are not included that perhaps could have been. It did need to get finished. Eleven years is actually relatively short for any Restatement and for this one in particular, when you think about the scope of what it did address, which is pretty breathtaking, and the complexity of what it did address.

We should also note the process involved in producing this work. I wish all of the students here could see this process.

It's a process of deliberation and exchange that is remarkable. It did not achieve a product that reflects agreement by everyone on every point. Far from it.

It instead produced something that everybody can look at and see its sources, that is workable for people on both sides of the "v," while the developments in the law and the debates continue. That in itself is quite an achievement.

²⁹ 411 U.S. 792 (1973).

How do you do that? You bring together advisors chosen because they have views at all points along the spectrum. They talk to each other. They react to the work without holding back, and that's fine. You add members who volunteer and provide similar feedback.

Those gathered talk about the revisions that their comments result in. That process, that iteration, and reiteration, and revision, and reaction, and re-revision take place over and over. And the work goes to the Council over and over.

The Council, which is not a subject-area specific group at all, reads it in preparation for each meeting and comes prepared to go over the text with the reporters. "This section, this section, this section, here are the comments. Here are the suggestions, large and small."

That goes back to the reporters. They revise again.

JUSTICE DURHAM: Your comments remind me that this project, assuming there are enough employment law wonks out there, could be a new process for historians in the sense that there was so much scholarly engagement with the project throughout.

There were several symposium conferences and law review articles critiquing drafts. You can go from what's been published in that connection, to what actually happened to the drafts in the revision process, and see that evolution.

JUDGE ROSENTHAL: I would add one point to the description of the dynamic in the evolution of the text. The ALI provides one of the very few frameworks in which members of the academy, practicing lawyers, and judges come together.

JUSTICE DURHAM: We all have a stake.

JUDGE ROSENTHAL: We all have a stake, and we all participate. There are too few opportunities for that to occur. We don't get the benefit as judges from a lot of what you guys in the academy do.

JUSTICE DURHAM: Much as we love to read all of your articles.

JUDGE ROSENTHAL: Right.

JUDGE BERZON: I was entirely new to this process, and I did find it quite exhilarating. I get so frustrated by the fact that when I encounter something new or interesting, that I can't call up Larry Gold or other people that I've worked with over the years, or people who are experts in an area that I don't know, and say, "Give me the lay of the land."

What I want is an off-the-wall check. If I said this, would I be off-the-wall? Not would I be right or wrong, but would it be off-the-wall? We don't have that engagement on a daily basis in our decision making. Personally, I think it's a loss.

When I was an appellate law clerk, when the ethical rules were a lot less rigid, the judge I clerked for told me to get in touch with my

labor law professor and give him our problem and ask him what he thought about it.

I don't get brainwashed easily. If I ask people something, I'm not going to believe what they say, but I'm going to be helped in understanding the problem. This process in which judges and lawyers and academics were able to talk through issues without those constraints seems, to me, to be not only an enjoyable one but also a productive one.

JUDGE ROSENTHAL: And an important one. That's part of the unique contribution of the Restatement in an area in which judges need daily guidance to know that they are not going to be off-the-wall, that they are not going to be doing harm, large or small, by the results that they reach. It is enormously reassuring for judges to know that the results are going to be within where most courts that have looked at similar issues have come out and safe, in that sense, but not frozen.

Every fact set is different. Every case is different enough to make the work both challenging and interesting. We need all the help we can get. When it is good help, when there is no other help like it, it really is a contribution.

The one question I do have for all of those in the academy, professors in particular, is whether you would view this as a boon to your teaching, whether in employment law or agency law. How might you work the Restatement into your own day jobs in trying to make a subject area that has a whole lot of subtopics and a whole lot of complication a little clearer for the students?

This is a booming area. It's a huge area for lawyers. When other areas of litigation have, because of influences ranging from tort reform to other things, declined a little bit, this area has exploded. The practitioners have good steady work here.

PROFESSOR SCHWAB: Just to comment on that. I think every casebook editor and professor of employment law teaching in this area is going to have to figure out in the next year or two to what extent and how to get the Restatement into their casebooks and teaching.

It's not dissimilar to what you're saying. As a casebook editor, we're not going to accept it wholesale and just sort of change our casebook to this, but we'll be selective. The goal of the casebook is quite different than the goal of a Restatement.

PROFESSOR STEVEN WILLBORN: This project has been going on a long time. It's already in casebooks.

PROFESSOR SCHWAB: True.

PROFESSOR WILLBORN: I just wanted to say something in thinking about this and thinking about Ted St. Antoine and about how incredibly difficult it is to assess the success of this Restatement. Ted St.

Antoine spent probably ten years of his life doing a Model Employment Termination Act. The project involved another entity very similar to the ALI, over 100 years old, which also brings judges and academics together. The metric there is much easier. That model statute got enacted nowhere. In a way the audience is much less complicated. Here even the discussion among you three judges is complicated.

Another thing is that it is one product. The Restatement of Employment Law has fifteen or twenty products, and some of them, I think, will definitely impact and others probably won't, just by the law of probabilities.

One other thing you made me think of, Judge Rosenthal, in jury instructions, for example, you don't see very much about instructions in Ted's project. It's right there or it's not right there. The metrics for judging how successful a project like this is seem incredibly complicated.

PROFESSOR HARPER: Karl Llewellyn's UCC project for the Uniform Commissioners was really successful.

PROFESSOR ESTREICHER: I wish we could all have the luck of Karl Llewellyn here. That's why you have to cite the Restatement in your decisions. Once you cite it, the lawyers will cite it. Even if you dump on it, cite it. Bring in some of our academic critics. That's fine.

For the students in the room, there are a lot of nuggets in here for your journal notes that could have a good deal of influence in some areas where the law is incomplete. For example, bad-faith reasons for enforcing a noncompete covenant. That's a really hard issue. Can an employer fire a worker and still insist on enforcing a noncompete? We can really benefit from a fifty-state survey on whether an employer can do that.

Employees as fiduciaries in a position of "trust and confidence"—that is another area that needs work. Reinstatement as a remedy in common-law cases? Charlie Sullivan is not here, but he says that you can actually get reinstatement under the common law. There are a lot of great topics here, better than writing about "geshrei," which is a Latin/Gaelic word that means, "I hate that decision and I will tell you how bad it is," which is what many articles and notes end up doing. That is despite the fact that the Supreme Court or an appellate court is unlikely to change its ruling because of the article or note. The best kind of writing is about issues that have not been fully resolved yet.

PROFESSOR HILLMAN: I can't let the discussion end without defending Ted St. Antoine. I think there are other ways to judge that contribution. I don't know this for a fact, but it could be that many of those ideas were incorporated into other works or even into cases or new articles. I would guess that there are great ideas in there.

MR. LAURENCE GOLD: To say that that was ten years well spent or wasted on the basis of how many state legislatures chose to adopt it seems to be the absolutely wrong test. That's like saying all the people who worked forever to have a federal civil rights act spent their time on the wrong thing.

PROFESSOR WILLBORN: Let me try to make amends for that. We dedicate our casebook to Ted St. Antoine. He's a mentor to us.

My only point was that it's much more complex to evaluate the success of this Restatement. Things are less visible here and the audiences are more diverse.

PROFESSOR HILLMAN: Steve, I didn't take your comments that way at all.

JUSTICE DURHAM: We don't usually look to state legislatures as necessarily the best judges of the quality, sensibility, humanity, and sanity of a piece of legislation. That's just not what happens in a state legislature.

JUDGE ROSENTHAL: Particularly during campaign season.

PROFESSOR ESTREICHER: That is an example about why we didn't touch the at-will rule because in most countries the at-will rule has been changed by statute. Those statutes have their own limited remedies.

JUDGE ROSENTHAL: There's lots of ways to measure the success of a Restatement. One way to measure failure is by its irrelevance. A quick way to become irrelevant is to take a position that ninety-eight percent of the jurisdictions will reject.

PROFESSOR DEMOTT: I would also like to say that I think one of the responsibilities that we have as senior academics at very stable institutions is sometimes to be willing to take a longer view. There's almost a panic sometimes for mechanical measurement of success in one way or another. This can create perverse consequences for how people choose to use their time, which is the gift that we've been given by indefinite tenure.

PROFESSOR WILLBORN: And good health.

PROFESSOR DEMOTT: And good health. I'm always disturbed when people start with citations. I believe the ALI used to publish annual citations to each particular Restatement. Torts always win. Agency always ends up third. And poor old suretyship!

I think that's so deeply misguided as to all the kinds of reasons it can be important for academics to do serious scholarship. It is a neat idea that you never fully know what influence you might have. It may be sometimes easy to lose sight of that fact.

PROFESSOR SCHWAB: I really thank everybody for the participation. It's been a great day. I like the way we ended it. How are we going to

assess this Restatement? There's no metric, but this discussion, I believe, has been extremely useful.

