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IT'S NOT JUST CONTRACT, IT'S CAPITALISM: INEQUALITY AND THE *RESTATEMENT OF EMPLOYMENT LAW* CHAPTER ON TERMINATION

BY
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I. INTRODUCTION

It is the *Restatement*, not the Reformation nor the Best Practices, of Employment Law. I get that. Not even a Model Law. But the foundational arguments underlying its proposed adoption should be openly set forth and documented. And they should be valid in the modern world. The assumptions of this *Restatement* were birthed in the nineteenth century. The so-called default rule of at-will employment was fully formed when an Albany practitioner, H. G. Wood, mangled English common law precedents into the American rule in 1879.[1] It was justified economically without apology in the U.S. Supreme Court in a non-contract case involving an indefinite term employment contract in 1915 in *Coppage v. Kansas*.[2] But those times were not the good old days for workers.

What then slants this *Restatement* so radically? The *Restatement of Employment Law* is not "just contracts" in four senses, each separate but mutually reinforcing strategically:

First, it is not just contracts in the sense of justice. To speak of "just" contracts is a conclusion, not descriptive. Similarly, "just cause," "good cause," "bad cause" "abysmal cause," "really great

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1. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 282-83 (1877).
2. 236 U.S. 1, 13 (1915) (analyzing substantive due process as liberty of contract).

cause," "stinky cause" or "whatever cause" adds zero to the term "cause." At best the adjectives have an emotional or political content but add nothing to our understanding of legal cause. There is either cause or there is not for enforceable discharge.

Second, it is not just contracts in the sense of "merely" contracts. Throughout the comments on Chapter 2, the mantra repeats – employment contracts are just contracts, as if sprung full blown from nature. In the chapter on terminations, they are bargained between arms-length sophisticates entering the employment relationship with equal power. Note that not even the *Restatement of Contracts*, which the comments also continually invoke, assumes away completely the relevance of inequality of bargaining power:

> But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.[3]

Yet, despite having been recommended to do so,[4] there is NOT ONE mention of inequality of bargaining power in the chapter on terminations. At only one point is there an acknowledgement that state courts sometimes interpret good cause more protectively involving lower level employees[5] (although even here those employees realistically have to have enough at stake to justify hiring a lawyer). Of the twenty-two illustrations, all but one, with three or four others ambiguous, involve higher managerial or professional employees. This is a document by legal elites for elites. I get that too. As Robert Lee Hale explained in 1943, "There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract."[6]

Third, employment law is increasingly about the employment relation(s). Legislatively, myriads of employment relations are governed extra contract, from discrimination, to family, to health and

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3. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981); *see also id.* §§ 179, 516.

4. 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, 110 (2009).

5. RESTATEMENT OF EMP'T LAW § 2.04 (AM. LAW INST. 2015).

6. Robert L. Hale, *"Bargaining, Duress, and Economic Liberty,"* 43 COLUM. L. REV. 603, 628 (1943).

safety, etc. Particularly, state courts have refused to enforce formally perfect contracts that are against other social relations, or are incorporated into employment relations though those relations are instigated by contract. The obvious example is created by actions for discharge against public policy. Furthermore, the social relations of employment shape and reflect incremental and enormous historical changes in the economy and politics, as law both reflects and shapes society. Beyond doctrine or black letter, these socially defined employment relations in turn generate radically different actual employment experience; see the explosion of HR departments, record keeping, and regularized process spurred by Title VII. Employment law is employment relations, not employment contract.

Fourth, not all contracts are the same in the way in which they are read or subsequently characterized; thus, "just contracts" is not a fixed class of decisions. Whether based on bad research or the use of green tinted glasses, many of the cases cited in the comments either do not support the point argued, or do so equivocally.

The point is, this "*Restatement*" makes choices; of course it does.[7] Forty-nine states and D.C. have the at-will rule, but as of 1992, thirty-seven of those modify the rule in some way,[8] often by referring to inequality of bargaining power. This fact is somewhat deflected by putting modifications of employment contracts in a separate chapter from terminations. The comments also bracket their own relevance by noting collective bargaining law is beyond their object, which cleverly avoids the limit on employee termination of non-union, at-will workers by the statutory right of mutual aid and protection,[9] taken from a statute predicated on unequal bargaining power yet also predicated on contract law. The comments also fail to mention other forms of the employment relationship such as democratic worker cooperatives, where termination requires a vote and buyout of accumulated equity.[10]

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7. "[T]he ALI's conception of a restatement seemingly allows reporters to venture beyond describing the law (but cautiously). 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." Robert A. Hillman, *"Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*," 100 CORNELL L. REV. 1341, 1343 (2015).

8. Martin Marieta Corp. v. Lorenz, 823 P.2d 100, 106 (Colo. 1992) (en banc).

9. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 18 (1962).

10. Coops often also have employees also. *See* Ft. Vancouver Plywood Co., 235 N.L.R.B. 635, 636 (1978).

II. INEQUALITY OF BARGAINING POWER AND EMPLOYMENT

> Employment relationships are perhaps the paradigmatic example of inequality of bargaining power in contract law. Workers are like consumers, the prototypical weaker party in commercial transactions, only more so. Their immediate access to income and benefits; their long term financial security and that of their families; and, in many instances, their personal identity and emotional well-being are all inextricably entwined with the "good" being offered – a paying job. For this reason, the law of employment contracts is replete with allusions to the risks of exploitation and overreaching by firms, and courts have articulated numerous idiosyncratic rules and exceptions to basic contract doctrine in the context of employment relationships.[11]

This inequality holds in a social and economic reality impacting any bargaining carried on by employers and employees. "Employers are an ambiguously defined and heterogeneous group. However, a number of facts suggest that they are wealthier than non-employers. First, small-business-owning households are "more than eight times as likely to be classified as high wealth (21.2 percent versus 2.5 percent)" as households not owning a business."[12] "Owners of private businesses represent just over 13 percent of the U.S. population but own almost half of the aggregate wealth."[13]

> Business owners also represent more than three-quarters of the richest 1 percent of households. One might argue that in publicly traded companies, shareholders are the true owners and are not characteristically wealthy. However, even if most shareholders are not wealthy, most shares are owned by the wealthy.[14]

"Finally, managers of businesses owned by others, whom employees may perceive as their employer or at least exercising the power of an employer, are also wealthier than non-managerial employees."[15]

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11. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 964 (2006).

12. GEORGE HAYNES & CHARLES OU, OFFICE OF ADVOCACY, U.S. SMALL BUS. ASS'N, SMALL BUSINESS RESEARCH SUMMARY NO. 276: HOW DID SMALL BUSINESS-OWNING HOUSEHOLDS FARE DURING THE LONGEST U.S. ECONOMIC EXPANSION? 1 (2006).

13. Marco Cagetti & Mariacristina De Nardi, *Entrepreneurship, Frictions, and Wealth*, 114 J. POL. ECON. 835, 839 (2006).

14. Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze* 43 (Levy Econ. Inst. of Bard College, Working Paper No. 502, 2007), <http://www.levy.org/pubs/wp_502.pdf> (noting that the wealthiest 20 percent own almost 90 percent of all stock); *see also* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2006/2007, at 78-79 (2007); Thomas W. Joo, Comment, *Corporate Governance and the "D-Word,"* 63 WASH. & LEE L. REV. 1579, 1588 (2006).

15. Howard Aldrich & Jane Weiss, *Differentiation Within the United States Capitalist Class: Workforce Size and Income Differences*, 46 AM. SOC. REV. 279, 280 (1981) (discussing variations in income and wealth among those who employ themselves and/or others);" *See also* Aditi

Numerous court decisions have recognized and relied on this inequality. Basic recognition of inequality in the employment relation by courts is not new. In the early Arizona case, *Ocean Accident & Guarantee Corp. v. Industrial Commission of Arizona*, upholding workers compensation, the court wrote::

> Our enlightened modern thought realizes that an equality of bargaining power between two such unequal parties is impossible, and has attempted to equalize the balance through the labor unions and state regulation of industry; but old ideas die hard, and the pathways of progress are strewn with the fragments of legislation designed for this purpose but wrecked on the insistence of court after court that the state must not interfere with the "'free right of contract."' The eight-hour day, protection for women and children in industry, and every reform which has lightened the burden and brightened the life of the workman has had to fight its way up against this insistence on applying a philosophy which was perhaps just enough at one time, to a civilization which has outgrown it as the grown man has the swaddling clothes of the babe.[16]

And from *State v. Coppage:*

> It is a matter of common knowledge, of which Legislatures and courts should take cognizance, that many individual laborers are unable to cope on an equal footing with wealthy individual or corporate employers as to the terms of employment; . . . To many the demands for housing, food, and clothing for their families and the education of their children brook no interruption of wages to the bread-winner. Necessity may compel the acceptance of unreasonable and unjust demands. The state is interested in healthful conditions for its wage-earners and in the moral and intellectual development of their children; also, that none should become dependent upon the state for support.[17]

From the classic case of *West Coast Hotel v. Parrish*, upholding minimum wage laws:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not

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Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (2009); *see also* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). For the law in Canada, see Alexander J. Black, *Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada*, 17 NEW ENG. J. INT'L & COMP. L. 47 (2011).

16. 257 P. 644, 645 (Ariz. 1927).

17. 125 P. 8, 9, 10-11 (Kan. 1912), *rev'd*, 236 U.S. 1 (1915).

> only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.[18]

When to intervene in the distribution of property rights made by contract enforcement is a choice whether made by action or inaction. It is not *just* contracts, and the exemplars don't fit the descriptions and characterizations of these cases.

In the only case described in the comments dealing with discharge of a low-paid employee, that court made a different choice:

> The employer has long ruled the workplace with an iron hand by reason of the prevailing common-law rule that such a hiring is presumed to be at will and terminable at any time by either party. When asked to re-examine the long-standing common-law rule of property based on an ancient feudal system which fostered in a tenancy at will a relationship heavily weighted in favor of the landlord, this court did not hesitate to modify that rule to conform to modern circumstances. . . . In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.[19]

Unconscionability, based on inequality of bargaining power, was found to invalidate a mandatory arbitration claim in *Circuit City Stores, Inc. v. Adams*:

> Circuit City, which possesses considerably more bargaining power than nearly all of its employees or applicants, drafted the contract and uses it as its standard arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms – they must take the contract or leave it. *See Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 690 (noting that few applicants are in a position to refuse a job because of an arbitration agreement). . . . The provision does not require Circuit City to arbitrate its claims against employees. Circuit City has offered no justification for this asymmetry, nor is there any indication that "business realities" warrant the one-sided obligation. . . . Indeed, the Supreme Court has specifically mentioned unconscionability as a "generally applicable contract defense[ ]" that may be raised consistent

18. 300 U.S. 379, 399 (1937).

19. Monge v. Beebe Rubber Co., 316 A.2d 549, 551-52 (N.H. 1974).

with § 2 of the FAA. *Doctor's Assocs.*, 517 U.S. at 687, 116 S. Ct. 1652.[20]

III. BUSINESS CAUSE IN JUST CAUSE INDEFINITE CONTRACTS

The most obvious point at which the *Restatement* reinscribes a commitment to capitalism as an Ur-ground organizing principle of social organization and power is in section 2.04 on just cause for termination of indefinite term contracts containing just cause for termination of employees. The comment blithely accepts that employers using indefinite term contracts could not conceivably be expected to maintain employees to the point of bankruptcy. Why not? After all, these sophisticates bargained for a just cause provision that most American workers do not have and cannot get. And even those at-will workers have more expectation of continued jobs just by being employees than those who work as "independent" contractors, "dependent" contractors, or "giggers." And of course, the remedy for finding a breach under such circumstances could be some kind of severance, short of contributing to bankruptcy. One of the cases cited even holds that a continuation of two years of a term contract should not release the employer suffering business adversity.[21] The difference in treatment is a choice.

When business adversity counts as good cause to discharge under an indefinite term contract, that is a choice to subsidize employers. Florida does not hide its commitment to the default rule; in *Muller v. Stromberg-Carlson, Corp.*, a Florida Court declare: "

> It may well be —– and probably is —– that the "balance of power" frequently rests with the employer, as is argued by Mr. Muller. But mere unequal relative bargaining power of the parties in business relationships has never been a basis on which to either create or terminate contracts.... A basic function of the law is to foster certainty in business relationships, not to create uncertainty."[22]

In the handbook/permanent employment case relied upon by the comments, *Toussaint v. Blue Cross & Blue Shield of Michigan*, from Michigan, that court makes a very different choice because of the loyalty and productivity gain to employers who guarantee good cause even in indefinite term contracts:

> We see no reason why an employment contract which does not have a definite term the term is "indefinite" cannot legally provide

20. 279 F.3d 889, 893, 894, 895 (9th Cir. 2002).
21. Derosa v. Shiah, 421 S.E.2d 718, 723 (Ga. Ct. App. 1992).
22. 427 So. 2d 266, 269 (Fla. Dist. Ct. App. 1983).

> job security. When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause).[23]

Whether the default rule is even economically efficient is subject to great controversy. Contrary to the cases that rely on business efficiency rationales, Mayer Freed and Daniel Polsby explain why the rule may not even be efficient regardless of the employer subsidy.[24] While they conclude that "just cause" would increase administrative costs of employment beyond what *might* be gained through productivity and loyalty gains and agency bargaining cost reductions, they acknowledge they cannot disprove it.[25] Additionally, part of their skepticism about union data on productivity gains discounts market gain because the bargaining unit rule compels union agency dues on all employees of the unit. Their view assumes a neutral background rule of law[26] and ignores the subsidy of employers affecting bargaining *beyond* what they see as "good" "wealth maximizing" inequality of bargaining power.[27] Most importantly, they do not discuss what is inexplicable on their terms: judicial nullification of bargained-for good cause provisions in indefinite term contracts. Finally, they concede good normative arguments might exist for a just cause rule.[28] Something more is going on here than *just* contracts or *just* economically efficient redistribution of wealth to employers.

Some of the cases cited by the comments on business need as just cause are inapposite because a good cause term was not found.[29] In another cited case, the court found good cause but added gratuitously:

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23. 492 N.W.2d 880, 890 (Mich. 1980).

24. *See generally* Mayer G. Freed & Daniel D. Polsby, *"Just Cause for Termination Rules and Economic Efficiency,"* 38 EMORY L.J. 1097 (1989).

25. *See id.* at 1142-44 (citing RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984)).

26. Contracting parties, in full possession of their faculties and their own interests, would not voluntarily move from this apportionment of legal rights and liabilities because *ex hypothesis* employers systematically value discretion to fire employees more highly than workers value the substantive right to work and the associated procedural apparatus that might protect them from arbitrary firing.

Id. at 1098.

27. "If this is the sense in which inequality of bargaining power is thought to exist between employers and employees, it demonstrates not market failure but market success. A market is successful when it moves resources from lower-value to higher-value uses." *Id.* at 1100.

28. *Id.* at 1144.

29. *Eg.*, Joanou v. Coca-Cola, 26 F.3d 96, 99 (1994).

> We accept that an employer could bind itself to continue employment of an employee despite the fact the employer is not making a profit. See *Stull v. Combustion Eng'g, Inc.*, 72 Ohio App.3d 553, 595 N.E.2d 504, 507 (1991). In view of the grave consequences of such a policy and the impossibility of compliance in serious economic difficulties, see Restatement (Second) of Contracts § 261 (1981) (contract may be discharged by supervening impracticability), we will require such a promise to be clear and specific."[30]

Again Why? Remember we are dealing with interpretation of a bargained for term. Unless a business subsidy is a public policy choice by the court, "[a]ttempting to second-guess these shifts would be self-defeating as well as an inappropriate interference in managerial discretion."[31] In the lead case cited, *Ohanion v. Avis Rent A Car System, Inc.*, only in dicta the court opines, "[f]rom defendant's standpoint that too would force Avis to make a change in its business strategy, perhaps reducing or closing an operation. That is, there would be just cause for plaintiff's dismissal."[32]

In short, this line of good cause based on business need is not quite so certain as portrayed. Further, those cases never explain why the good cause rules should be opposite in definite and indefinite term contracts.

IV. CONCLUSION: WELCOME TO THE TWENTY-FIRST CENTURY

Thus choices of enforcing or not "default rules" distribute bargaining power. It is not just, and certainly not automatically *just, contracts*. When employment contract terminations do not follow the *Restatement of Contracts*, the policy of promoting return to capital via rights of employers cannot be hidden by stock phrases. Thus, the chapter on terminations of the *Restatement of Employment Law* is neither a truthful restatement, nor a projected best practices. If state courts or legislatures choose to use it, they will do so from the same ideological choices and commitments of the nineteenth century as the Reporters.

Our society and law graduated from status to contract in the employment relation in the nineteenth century.[33] It is time to graduate from "just contract" in the twenty-first. From contract to social

30. Taylor v. Nat'l Life Ins. Co., 652 A.2d 466, 473 (Vt. 1993).

31. *Id.* at 472.

32. Discharge was invalid because good cause was implied orally and by consideration of a cross-continent move. Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 108 (2d Cir. 1985).

33. *See* 1 WILLIAM BLACKSTONE ch. 14 (1765).

relation. Perhaps then legalized employment can be refocused further from allocation to distribution. From production for wants to production for needs.[34]

34. Kenneth Casebeer, *Community Syndicalism, for the United States: Democratic Production in Resisting Hegemonic Globalization and Law*, 17 EMP. RTS. & EMP. POL'Y J. 237 (2013); Kenneth Casebeer & Charles Whalen, *Taking Interdependence, and Production More Seriously: Toward Mutual Rationality and a More Useful Law and Economics*, 66 UNIV. OF MIAMI. L. REV. 141 (2011).