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WORKING AS EQUAL MORAL AGENTS

Sabine Tsuruda*

Queen's University Faculty of Law, Kingston, Ontario, Canada

ABSTRACT

This article develops and advances a liberal ideal of equality for evaluating the lawful scope of employer control over employees. It argues that, in addition to attending to discrimination and bargaining power asymmetries, we should ensure that our laws treat workers as the moral equals of their bosses more broadly—as people with equally weighty claims to exercising agency over their own values and lives. To illustrate, the article explains that employer control over workplace expression can preclude colleagues from communicating with each other as moral equals and can compromise employees' abilities to exercise agency over their own characters. It then discusses how our agential interests in workplace expression can guide legal reform.

INTRODUCTION

Modern democracies hold out the promise of freedom and equality, purporting to guarantee freedom of speech and association, universal suffrage, equal protection under the law, and the like. Yet the conditions of working life belie such aspirations. Many people lack a living wage and labor under unsafe conditions. Workplaces have persistently been loci of racial, gender, and other status-based discrimination. Employers often lawfully demand

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allegiance to particular political and moral causes,[1] ask people to dress and act as servants, and discipline employees for "backtalk."[2] All the while, employers may ask so much of their workers' time and attention as to leave room for little else besides work. Working life thus offers a vivid illustration of the Marxist conviction that, although the modern democratic state has "abolishe[d] [political] distinctions based on birth, rank, education and occupation," it has failed to take adequate steps to prevent hierarchical social relations from structuring daily life.[3]

While egalitarian philosophy has illuminated our understanding of the moral significance of work, philosophical discussions of work are often limited in their scope and methodology for purposes of evaluating hierarchy in employment. Theories of workplace equality tend to be either more narrowly targeted at employment discrimination or procedurally focused on equalizing bargaining power between labor and management,[4] leaving it open whether any substantive moral principles (apart from antidiscrimination principles) bear on the lawful scope of employer control over employees.[5] This is an important question to ask. The workplace is one of the most central and pervasive legally constituted sites of social interaction.[6] Whether we can regard ourselves and one another "as free and equal . . . without

1. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) (holding that a custodial worker at a religiously affiliated gymnasium could be required to convert to Mormonism to keep his job); Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 739 (Idaho 2003) (holding that an employer could lawfully fire an employee for opposing a national forest development project).

2. *See* 26 A.L.R.3d §1333 (2018) (organizing legal findings of insubordination under a heading entitled "Profane language or backtalk").

3. KARL MARX, *On the Jewish Question*, *in* EARLY WRITINGS 219 (Rodney Livingstone & Gregor Benton trans., 1975).

4. For arguments about the centrality of bargaining power to labor law theory and jurisprudence, *see generally* P. L. DAVIES & M. R. FREELAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (3d ed. 1983); Hugh Collins, Gillian Lester & Virginia Mantouvalou, *Introduction: Does Labour Law Need Philosophical Foundations?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018); Brian Langille, *Labour Law's Theory of Justice*, *in* THE IDEA OF LABOUR LAW 101–19 (Guy Davidov & Brian Langille eds., 2011); Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 KAN. J. L. & PUB. POL. 71 (1999). For critical views of bargaining power theories of labor and employment law, *see, e.g.*, Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 52 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018); Brian Langille, *What Is Labour Law? Implications of the Capabilities Approach*, *in* THE CAPABILITIES APPROACH TO LABOUR LAW 122 (Brian Langille ed., 2019).

5. Labor republicanism is an exception in its general focus on objectionable hierarchy in employment. *See infra* note 98. Marxist critiques of work are similarly exceptional, but the substantive question of what we may reasonably ask of one another at work would arise even if production were completely socialized. Nevertheless, several of the major themes in this article—of mutual recognition, of not subordinating our moral lives to our working lives—are Marx-inspired, though grounded in liberal philosophy.

6. The paid workplace is of course not the only site in which we perform morally and socially significant work. We also make social, emotional, cultural, and intellectual contributions through participation in the family, volunteer work, membership in churches, political participation, and through participation in voluntary associations such as clubs.

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pretense and fakery"[7] therefore depends on whether the legal norms of employer control over employees are compatible with democratic values.[8]

This article develops a liberal conception of social equality that can guide evaluation and reform of employer control over employees. Commentators are often skeptical of liberalism's potential to offer resources for evaluating employment relationships, contending that liberalism's traditional focus on just distributions of goods has difficulty capturing the interpersonal character of employment.[9] While I do not disagree, underlying the liberal conception of distributive justice is a more general ideal of equality that can provide a fruitful starting point for evaluating hierarchy in employment. A central aim of a liberal democracy is to secure social conditions for its members to exercise meaningful agency over their own values, projects, and lives more broadly, in ways compatible with each member's equal moral claims to doing so. Distributive justice serves that egalitarian aim, but that aim is also directly implicated in legal norms of employer control over employees. A paradigmatic way we can fail to treat each other as equals is by legally authorizing a person or entity to act as a moral authority over the lives and choices of other adults. The employment relationship often treats employees as laboring precisely under such authority relations in the workplace.

To illustrate, my arguments center on two kinds of agential activity that are regularly submitted to the lawful control and direction of employers but tend to be overlooked in workplace equality theory: the expression of reactive attitudes, such as indignation at being morally wronged, and character development. Employers stand to gain financially by restricting disruptive speech and molding employees' personal values to the aims of the firm. Yet employees have agential interests in engaging in some potentially disruptive speech. For example, communicating indignation and other reactive attitudes in response to being wronged is a central way we hold others morally responsible and communicate that we are worthy of moral consideration. We also have interests in exercising agency over our own moral characters and value commitments, and our abilities to do so are compromised when employers foster social norms of inclusion and exclusion that reward and penalize employees based on employees' adherence to firm values.[10]

7. John Rawls, Justice as Fairness: A Restatement (Erin Kelly ed., 2001), at 4.

8. By "legal norm" I refer inclusively to both legal rules and legal principles that guide the development and application of legal rules. *See, e.g.*, Bhasin v. Hrynew, 3 SCR 494, para. 64 (2014) (explaining that the principle of good faith in performance is an "organizing principle" in contract law and, as such, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations"); R. M. Dworkin, *Is Law a System of Rules?*, *in* The Philosophy of Law 38 (R. M. Dworkin ed., 1977).

9. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 Law & Phil. 171 (2018); Sophia Moreau, *What Is Discrimination?*, 38 Phil. & Pub. Aff. 143, 144–46 (2010).

10. By "ability" I mean a realized capacity.

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Attending to work's agential significance thus reveals that lawful employer control over employees is not merely managerial, but often objectionably moral. Treating workers as equal moral agents will therefore tend to require reforms that erode at the traditional paradigm of employer control in employment,[11] such as by requiring that employers accommodate some indignant expression and morally critical speech, even when such expression is disruptive. At the same time, employment relationships are often long term and interactive, requiring people to coordinate their activity and rely on one another's support. While workplace relationships can likely tolerate occasional outbursts, disputes, and offense, the moral need for ongoing trust and cooperation can justify some employer control over workplace expression, at least when such expression causes irreparable harm to workplace relationships. A moral agency analysis of work thus points to a new cooperative paradigm of employment, one that both justifies and circumscribes the permissible scope of employer control over the workplace.

Liberal equality consequently demands more than antidiscrimination law, wage and hour law, and other traditional forms of employment legislation and redistributive policies. The employment contract itself—its central doctrines and animating paradigms—must also be responsive to liberal democracy's foundational commitment to equal moral agency. The ideal of working as equal moral agents accordingly offers a needed complement to antidiscrimination and bargaining power theories of workplace equality. More broadly, the ideal challenges—and offers a way of bridging—the traditional divide between the egalitarian values of public law in a democracy and contract law's seeming inattentiveness to those values in the ways it structures our private relations.

11. In the overwhelming majority of U.S. jurisdictions, an essential part of what it is, legally, to be an employee is to labor under the control of an employer. *See, e.g.*, 20 A.L.R. 684, §1. New Jersey and California are exceptions. *See, e.g.*, Hargrove v. Sleepy's, 106 A.3d 449 (N.J. 2015) (adopting the "ABC test," according to which an individual is presumed to be an employee unless all three of the following are met: "(1) the employer neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work; (2) the services provided were either outside the usual course of business or performed outside of all the places of business of the enterprise; and (3) the individual has a profession that will plainly persist despite termination of the challenged relationship"); Dynamex Operations W. v. Superior Court, 416 P.3d 1 (Cal. 2018) (adopting the ABC test for state wage orders); California Assembly Bill (AB) 5 (effective Jan. 2020) (codifying and extending the ABC test to all California Labor Code wage and hour violations). The British and Canadian paradigms of employment are similarly hierarchical. *See, e.g.*, Laws v. London Chronicle (Indicator Newspapers) Ltd., 1 WLR 698 (1959) (explaining that "willful disobedience of an order" violates an "essential" condition of the employment relationship, "namely, the condition that the servant must obey the proper orders of the master"); Stein v. British Columbia Housing Management Commission, 65 B.C.L.R. (2d) 181 (BC CA 1992) ("The employer is the boss and it is an essential implied term of every employment contract that . . . the employee must obey the orders given to him."); HUGH COLLINS, EMPLOYMENT LAW (2d ed. 2010), at 10 ("The paradigm of the employment contract thus contains an authority structure at its heart.").

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Finally, in making these arguments, I will occasionally draw on examples from U.S., Canadian, and U.K. law. The principle that we should treat workers as equal moral agents is not meant to be specific to any particular jurisdiction or region, so these examples are merely illustrative.

Section I locates a requirement to treat workers as equal moral agents in liberalism's basic conception of social equality. Sections II and III illustrate the moral force of that requirement by deploying it to evaluate employer control over employee expression. Section IV then elaborates on the role of the law in making it possible for people to work as equals.

I. A MORAL AGENCY APPROACH

In this section, I lay some groundwork for identifying and developing moral standards that can guide evaluation of employer control over employees. I begin by locating a general requirement to treat people as equal moral agents in liberalism's animating conception of substantive equality. I then explain how evaluating work through the lens of equal moral agency can complement distributive justice analyses of work.

A. Liberal Equality

In evaluating the morality of employer control over employees, I will take for granted and expand on the following liberal theses about moral equality and the law: First, according to the *basic equality thesis*, people are moral equals in virtue of being moral agents.[12] While what I mean by "moral agency" will be developed more concretely in the sections that follow, I refer to the capacity to understand, critically evaluate, and implement values and ideals of living well, and to take up a moral perspective on one's relations to others and thereby recognize that others have similarly valuable lives.[13] As Seana Shiffrin explains,

> [W]e are equals in virtue of our each having a life that we should and do care about, one that we can exert agency over and can direct at what we judge to be important, and in virtue of our capacity to act morally and justly by treating others' lives as valuable and, politically, as equally important to our own.[14]

Second, according to liberalism's *substantive equality thesis*, as moral equals, we each have equally weighty claims to developing and exercising agency over our values, projects, relationships, and lives more broadly.[15] And third, according to liberalism's *institutional equality thesis*, a society is

12. *See* John Rawls, A Theory of Justice (1971), at 19, 505–10.

13. *See id.* (explaining that people are moral equals "as moral persons, as creatures having a conception of their good and capable of a sense of justice").

14. Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law (2014), at 68–69.

15. *See, e.g.*, Rawls, *supra* note 7, at 23–24.

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required, as a matter of justice, to secure social conditions that realize substantive equality and, hence, social conditions for each member of society to develop and exercise agency over their own values and lives in ways compatible with other people's equal moral claims to doing so.[16]

Importantly, the substantive and institutional equality theses do not merely articulate comparative standards, such that they could be satisfied by a society that equally oppressed all its members. Rather, these theses rest on a particular view of human freedom, according to which to be free, as a social and political matter,[17] is to live under social conditions that support "the adequate development and full exercise" of one's moral agency over the course of one's life.[18] The institutional equality thesis thus directs us to realize substantive equality by making it the case that each of us is free, and equally so.

As a society, we fail to treat people as moral equals when we, without justification, subordinate some people's development and exercise of moral agency to the ends of others.[19] Nor can we maintain a public commitment to moral equality when, through our laws, we communicate that some people are morally inferior.[20] Legal norms of employer control are accordingly incompatible with liberal democracy when they fail to meet that communicative standard or fail to treat workers' agential interests as equally valuable to those of a boss, shareholder, client, consumer, or other relevant party.

B. Beyond Distributive Justice

Attending to our needs and interests as moral agents is, to be sure, only one among other aspects of a liberal scheme of employment. Regulation by principles of distributive justice, such as a principle of equal employment opportunity, would also be a feature of such a scheme. This is not to say that distributive justice is wholly distinct from the principle of treating people as equal moral agents; it seems plausible that distributive justice should serve that principle given liberalism's basic commitment to the moral

16. *See id.*

17. As opposed to freedom of the will.

18. JOHN RAWLS, POLITICAL LIBERALISM (1996), at 293.

19. As Jonathan Quong and Seana Shiffrin have argued, paternalism is also a paradigmatic way we can fail to treat each other as moral equals. *See, e.g.*, JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011), at 101–06; Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 218 (2000).

20. *See* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2008) (describing the "public character of the law" as including its ability to "deal with matters . . . in a way that can stand in the name of public"); Seana Valentine Shiffrin, *Speaking Amongst Ourselves: Democracy and Law*, *in* 37 THE TANNER LECTURES ON HUMAN VALUES 150–52 (Mark Matheson ed., 2018) (arguing that social affirmation of our moral equality is often part of what it is to treat one another as equal members of our society). For a skeptical view about the law's communicative potential, *see, e.g.*, Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 LEGAL THEORY 185 (2000).

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equality of persons.[21] But even if agency values underpin distributive justice, distributive justice need not exhaust how we conceptualize what we owe to one another as moral equals.[22] Framing the inquiry into workplace equality in terms of equal moral agency changes the focus from the system-wide and general to the personal and particular, and so may encourage us to attend to interpersonal aspects of legal relationships that we are liable to overlook by focusing on the justifiability of broader distributions of goods.

For example, suppose that, as is often the case, private employees lack a general legal right to engage in political expression—such as tweeting in favor of environmental regulations or attending a rally in support of a political candidate—free from employer retaliation.[23] Such a legal regime will likely render a society distributively unjust, as wealthier individuals will, by virtue of their ownership of the means of production, have a more powerful and effective political voice than people who sell their labor to earn a living.[24]

21. *See, e.g.*, QUONG, *supra* note 19, at 316 ("By offering each person certain fundamental rights and liberties, liberalism affirms citizens' moral right to direct their own lives consistent with a similar right of others."); RAWLS, *supra* note 18, at Lecture VIII, §3.

22. While Dagan and Dorfman are skeptical of distributive justice having much, if anything, to say about how private parties ought to relate to one another, they nevertheless argue that liberal justice generates requirements of "relational justice" to realize substantive equality. *See generally* Dagan & Dorfman, *supra* note 9. Seana Shiffrin also contends that distributive justice does not settle all that we owe one another as equal moral agents in our legal arrangements. *See, e.g.*, Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 716–17 (2007).

23. Private employees in the United States cannot call upon the protection of the First Amendment to engage in political expression without fear of employer retaliation. *See, e.g.*, Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 739 (Idaho 2003). Some local jurisdictions, such as Connecticut, have nevertheless extended free speech protections to private employees by statute. *See* Conn. Code §31–51q (West 2005) (granting private employees the same free speech rights as public employees under federal and state constitutional law and creating a private cause of action for damages for violations of those rights); *infra* note 81.

Even though the First Amendment is a source of protection for public employees' political expression, public employees' rights to engage in such expression are highly circumscribed. Public employee speech is often not protected if it is about work, especially if the speech is perceived as a response to an interpersonal "controversy with [the employee's] superiors." Connick v. Myers, 461 U.S. 138, 147–48, 151–52 (1983). When public employees speak pursuant to their professional duties, they are likewise not protected from employer retaliation. *See* Garcetti v. Ceballos, 547 U.S. 410, 422 (2006) (holding that a district attorney "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case" because he was speaking in his capacity as a "government employee"). For a defense of the limits of First Amendment protections for public employees, *see* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–86 (2011) (arguing that public employers must be able to exercise substantial control over speech in and about the "managerial domain" in order to effectively implement public policy). For criticism of this jurisprudence, *see, e.g.*, SHIFFRIN, *supra* note 14, at 208–10; Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37–39 (1990).

24. *See* RAWLS, *supra* note 12, at 224–27 (arguing that distributive justice requires not just the formal equality of political liberties, but also their equal worth); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 256 (2013) (arguing that employer control over employees' off-duty political speech is morally objectionable because it results in "a skewed political discourse" where "employers' voices are amplified and workers' are squelched"); *cf.* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94

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While the conclusion may be true, the explanation feels incomplete because it treats the resulting distribution of political power as the moral locus of the objection to the employer control. But what about the relationship between the employer and the employee? In the absence of political spending restrictions, the same unequal distribution of political power could result from wealth inequality generally. A distributive explanation thus seems to accord little moral significance to the fact that the resulting distribution of political power is effectuated through employer control over an important aspect of the lives of employees.

In contrast, a moral agency analysis can enrich our explanation of the distributive injustice by accounting for the interpersonal significance of the employer control. A regime that gives private employers largely free rein to fire employees for their political activity is also incompatible with liberal equality because it effectively requires employees to submit one of the most important exercises of their moral agency to the authority and ends of their bosses.[25] The wrong suffered by the employee is thus not simply a comparative loss of political power; the wrong is also one of subordination. A moral agency approach can accordingly capture interpersonal aspects of the employment relationship that a focus on broader distributions of goods and liberties can miss, and so may encourage us to think more concretely about what a scheme of equal liberty would look like under the conditions of modern working life.

Finally, the principle of treating workers as equal moral agents is not itself a complete theory; it is rather a starting point for theory, requiring further argument to be applied to evaluate particular dimensions of working life. The rest of this article illustrates how the agency-centered conception of equality introduced in this section can be developed and used to evaluate and reform the employment relationship. It does so through an analysis of employees' agential interests in expression during and about their work. While not exhaustive, employer authority to regulate and silence such speech is part of the core of the traditional paradigm of employer control over employees and, as I will explain, is often presumed to be a permissible, if not inescapable, dimension of the employment relationship.

B.U.L. REV. 669 (2014) (arguing that a commitment to constitutional democracy requires legislative action to prevent social and economic inequality from coalescing into oligarchy). There is no state action doctrine in liberalism. Securing social conditions of equal liberty also requires regulating the interactions of private individuals. *See, e.g.*, RAWLS, *supra* note 12, at 203 ("Not only must it be permissible for individuals to do or not to do something, but government *and other persons* must have a legal duty not to obstruct.") (emphasis added).

25. For arguments for the agential importance of political liberties, *see, e.g.*, RAWLS, *supra* note 18, at 293–99; Frederick Schauer, *Free Speech and Obedience to Law*, 32 CONST. COMMENT. 661 (2017) ("[F]reedom of political speech is normatively justifiable as a necessary component of a normatively justifiable form of governance in which citizens have substantial input by voting and otherwise into the decisions that will affect them and that will control their activities."). It does not, however, follow that all legal norms permitting an employer to regulate employees' moral and political expression are objectionable. *See infra* Sections II.B and III.C (discussing possible grounds for employers to dismiss employees for communicating inegalitarian beliefs).

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Employee expression on and about the job thus offers a good set of test cases for illustrating the practical value of a moral agency approach to theorizing workplace equality.

II. COMMUNICATING AS EQUALS

Employer control over employees' off-duty political expression is, in some respects, an easy case for a moral agency analysis. Censoring an employee's political expression is often disconnected from the legitimate business purposes of employers. That is not typically true of other types of employee speech. For example, employers often have good reasons to regulate disruptive speech and harassment. Yelling should be circumscribed in the operating room and the orchestra pit, and it will be hard for people to enjoy a museum if employees are loudly bantering with each other. Further, employment relationships are often long term, requiring people to work together for a majority of their waking hours to achieve common projects and ends. Offensive and harassing speech, even when it is not based on race, gender, and the like, can surely make it difficult for people to work together on terms of equal respect.

Perhaps for all of these reasons, "backtalk" and other forms of indignant expression are paradigmatic examples of insubordination recognized in law.[26] Under the common law of employment, an employee is traditionally subject to a legal duty to comply with her employer's lawful orders.[27] Failure to obey constitutes "insubordination" and often supplies sufficient cause for an employer to lawfully fire an employee.[28] Insubordination does not merely include failures to carry out orders to do particular things, such as following prescribed procedures or complying with grooming policies, but can also include communication of indignation at the orders or policies themselves (or at the party issuing the orders or policies).[29]

While it can certainly be sensible for an employer to regulate indignant communication in the workplace, as I will now argue, indignant communication can be a component of egalitarian patterns of communication—in particular, patterns in which the communication and subsequent recognition of indignation are constitutive of treating each other as morally responsible and worthy of moral consideration. While we do not always need to express (or feel) indignation to communicate as equals, nor do we always

26. *See* 26 A.L.R.3d §1333 (2018).

27. *See, e.g.*, 19 Williston on Contracts §54:23 (4th ed. 2018); Collins, *supra* note 11, at 9–11.

28. The legal concept of "cause" is still relevant even when employment is at will, as it often is in the United States. For example, being terminated for cause often precludes an employee from securing unemployment benefits. *See, e.g.*, In re Stergas, 673 N.Y.S.2d 223, 223 (1998) (finding that a video store employee's refusal to keep his hair shorter than two inches above his collar per company policy was cause for firing him and denying him unemployment benefits).

29. *See* 26 A.L.R.3d §1333 (2018).

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need to communicate as equals, the denial of such communicative opportunities in the workplace can treat employees as morally inferior.

A. The Egalitarian Value of Reactive Attitudes

As moral and social beings, it matters and should matter to us how our peers treat us—whether we are humiliated, disrespected, or otherwise wronged. The experience and expression of indignation, resentment, sorrow, and other like reactive attitudes are central ways in which we represent to ourselves and others that we have been wronged. When a person responds with a reactive attitude, she accordingly represents herself as being worthy of moral consideration and represents others as morally responsible.[30] Communicating one's indignation at being wronged, and having that indignation in turn taken seriously by the putative wrongdoer, can thus constitute a pattern of equality-supporting communication between moral persons.

Anger, indignation, and resentment can of course be destructive. Plato describes anger as a form of "madness" that pulls us toward vice.[31] In Seneca's *Thyestes*, anger fuels Atreus's plan to exact revenge upon his brother, Thyestes, by feeding Thyestes his own children. More recently, Martha Nussbaum argues that anger is destructive of love and trust.[32] No doubt anger can be damaging in these ways. A cold withdrawal of intimacy can be punitive;[33] yelling and needlessly harsh words can be demeaning, harassing, and generally abusive.

Yet such antisocial features of anger seem contingent on the way the attitude is communicated and acted on. Indignant expressions—such as "I was counting on you," "I thought we were friends," "How could you say such a thing"—though sometimes hard to hear, do not always communicate a desire for distance and retribution. Such expressions can instead communicate outrage at the breach of a duty and, in turn, fidelity to particular moral values and the relationships implicated by those values. By directing such exclamations to the believed wrongdoer, the speaker may be implicitly asking the listener whether they, too, believe that a duty or other moral value was breached (or that the duty or value even exists). Indignant speech directed to a wrongdoer can thus initiate cooperative exercises of moral agency in which people jointly practice moral judgment and negotiate their individual and shared understandings of what they owe to one another.

30. *See* P. F. Strawson, *Freedom and Resentment*, *in* 48 PROCEEDINGS OF THE BRITISH ACADEMY 1, 1–25 (1962) (arguing that reactive attitudes of, for instance, resentment are natural and morally healthy responses to ill will or the unjustified indifference of others, and are ways in which we interact with one another as morally responsible beings).

31. *See Laws* 649d-e, 863b, 869a, 934d.

32. MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016).

33. *See* R. Jay Wallace, *Trust, Anger, Resentment, Forgiveness: On Blame and Its Reasons*, 27 EUR. J. PHIL. 537, 540–42 (2019).

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Indignant expression can also be relationship supporting. Such expression can communicate that the speaker trusted the listener and that, notwithstanding evidence of a betrayal of such trust, the speaker is open to an explanation (hence the speaker's attempt to initiate a difficult conversation). The invitation to explain occasioned by indignant expression can, in turn, evince a desire to continue and strengthen the relationship. By drawing attention to a wrong, the speaker provides the listener with an opportunity to repair damage done to the relationship, such as by showing compassion or apologizing.[34] Were the aggrieved party to keep her feelings to herself, the wrongdoer might never come to see that she wronged her associate. The persistence of such an unacknowledged wrong can be corrosive of trust and, depending on the wrong, make it the case that the wronged party occupies a subordinate position in the relationship.[35]

Anger therefore need not be irrational or destructive; on the contrary, it can be a warranted response whose communication facilitates repair in the wake of a wrong and supports the cooperative development of individual and shared values.[36] Indignant expression can thus be an important exercise of our capacities for taking up a social and moral perspective on our relations to others, regarding ourselves and others as morally responsible and worthy of moral consideration.

Of course, workplace relationships are typically not intimate relationships. Employment relationships nevertheless present similar opportunities for wrongdoing and offense. People may be in close and regular contact with one another, and workplace policies may also occasion resentment and anger. For instance, a warehouse could adopt a policy that requires employees to ask a manager for permission before making a personal phone call, leading employees to feel infantilized and accordingly indignant.

Under such interactive and morally evaluable working conditions, the lack of meaningful opportunities to communicate moral indignation to a perceived wrongdoer and have that communication taken seriously can preclude employees from relating with colleagues and bosses as moral equals. Consider, for example, the plaintiff's experience in McClendon v. Indiana

34. On the moral power of apology, *see generally* Jeffery S. Helmreich, *The Apologetic Stance*, 43 Phil. & Pub. Aff. 75 (2015).

35. Even if the wrongdoer realizes that she wronged someone, refusing to share indignation with the wrongdoer can deprive her of essential information needed to take steps to repair the relationship. Anger is often an authentic indication of how seriously a person feels she has been wronged and can accordingly provide the wrongdoer with information needed to determine how best to respond. Perhaps a longer discussion is needed before a meaningful apology can be issued, or perhaps a promise to undertake some kind of personal change is needed. Even when a person's anger is not warranted, the communication of that anger can prompt discovery of points of moral disagreement upon which agreement urgently needs to be sought. Communication of indignation, when directed to a believed wrongdoer, can thereby support moral progress and lend stability to relationships going forward.

36. For a discussion of warrant to blame, *see* Pamela Hieronymi, *The Force and Fairness of Blame*, 18 Phil. Persps. 115 (2004).

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Sugars.[37] The plaintiff, Johnny McClendon, worked as a warehouse manager. After being subject to random searches and called a "black thief," filing several antidiscrimination complaints, and then feeling wrongfully singled out by a new kind of performance review, McClendon walked into his manager's office angry.[38] Because McClendon was "loud" and did not "tone it down," McClendon was later reprimanded in a meeting with the company president.[39] In that meeting, McClendon apparently raised his voice, interrupted the president, and replied that "he could talk when he wanted."[40] Because of the "grossly insubordinate conduct during [this] meeting," Indiana Sugars was able to fire McClendon with impunity.[41]

Framing McClendon's indignation as insubordination is, to say the least, infantilizing. One might have thought that as an adult, one would be free from discipline for "backtalk" and would be taken seriously when expressing anger and frustration. McClendon may have reasonably believed that the new performance review was retaliation for filing antidiscrimination complaints, and that the manager and president were aware of racist comments on the job but were unwilling to do anything about it. Under such conditions, anger at his superiors would be warranted. And by communicating that anger, McClendon might have sought to draw attention to and reject such morally objectionable workplace practices.

Yet his employer and the court failed to consider that McClendon's indignation might have been a healthy and responsible response of a developed moral agent.[42] Instead, according to the court, McClendon was legally obligated to comply with his superiors' requests to refrain from communicating his outrage at their role in permitting what he believed was a discriminatory work

37. 108 F.3d 789 (7th Cir. 1997).

38. *Id.* at 792–93.

39. *Id.* at 792–94.

40. *Id.* at 794.

41. *Id.* at 794, 799 (holding that Indiana Sugars had a good faith belief that McClendon was insubordinate and, thus, that firing McClendon was not a pretext for acting on discriminatory motives). It may be objected that I should not use cases of discrimination to illustrate a more general wrong of failing to treat workers as equal moral agents. Discrimination is, after all, surely a distinctive kind of wrong. Yet we can recognize that fact while also noticing that examples of discrimination are among our most compelling and carefully studied paradigms of objectionable hierarchy. It would consequently be a mistake to inquire into the nature of objectionable workplace hierarchy with a methodology that takes these paradigms off the table. The mistake appears all the more egregious when one considers whose experiences we would risk treating as paradigmatic were we to try to evaluate workplace hierarchy by analyzing away any potential discrimination: those of white, heterosexual men in the workforce. *Cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989) (arguing that treating the experiences of white men as a theoretical baseline for equality encourages a discrimination analysis along single axes of race, gender, and the like that results in the theoretical erasure of Black women).

42. There is, of course, much more to be said about *McClendon*. In particular, the duty of obedience may have been deployed as a pretext for discrimination. For a discussion of such problematic uses of the duty of obedience, *see generally* Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL'Y REV. 185 (2016).

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environment. Such a legal relationship places people like McClendon in a servile relationship to their superiors, requiring them to submit to moral mistreatment and act as if they had no moral entitlement to demand treatment as an equal.[43]

The servile character of being under such a legal duty of silent obedience is underscored by both the framing language of the doctrine and its history. Ordinarily, the duties that contracting parties owe one another are duties of performance, not obedience; failure to perform is a breach, not insubordination. The law of employment contracts is exceptional, deploying moralizing language that suggests that the performance of an employment contract is, for the employee, an act of submitting to the moral authority of an employer, as opposed to the performance of a contractual promise agreed to between equals.

Perhaps unsurprisingly, the moralizing language of employment contracts has its roots in the law of master and servant that governed relations between feudal lords and domestic workers, farm workers, and the like.[44] As Hugh Collins explains,

43. Similar servility objections apply to a lack of legal protection from termination for communicating indignation at clientele. Consider, for example, Frank Rollins's experience as a Pullman Porter. At the end of the American Civil War, the Pullman Company recruited former slaves and, later on, Southern Black workers to serve its luxury sleeper cars. *See* National Public Radio, "Former Pullman Porter Subtly Confronted Racism" (May 8, 2009), https://www.npr.org/templates/story/story.php?storyId=103945861. Frank Rollins, who worked as a porter for Pullman in the 1940s, recalls that the company preferred "Southern boys," believing that "they had a certain personality and certain demeanor that satisfied the Southern passengers better than the boys who came from Chicago." *Id.* Rollins's job training specially addressed how to respond to discriminatory remarks by clientele. *Id.* Rollins recalls his trainer explaining,

> Look you're going to run into some indignities. And you don't have to accept them. Whenever any passenger makes you unhappy about anything, you can just speak your mind—you don't have to take that stuff—but you wait until you get back to the men's room by yourself.

Id. (quotation marks omitted). Similar to McClendon's experience, Rollins was asked to submit to subordinating relationships as a condition of his employment, and that subordination was accomplished in part through a requirement that Rollins refrain from communicating indignation to individuals in response to those individuals' wrongful treatment of him. The moral significance of communication is underscored by the transformative character of Rollins's response. Unwilling "to be humiliated," Rollins eventually started greeting new passenger cars with the following:

> May I have your attention please. My name is Frank Rollins. If you can't remember that, that's OK. You can call me porter — it's right here on the cap, you can be able to remember that. Just don't call me "boy" and don't call me George.

Id.

44. *See* Stephen Nayak-Young, *Revising the Roles of Master and Servant: A Theory of Work Law*, 17 U. Pa. J. Bus. L. 1223 (2015). Whereas Nayak-Young argues that status inequality in work law is distinct from contract law, I argue here that that status inequality is constituted in part by implied contractual duties of obedience and loyalty. *See id.* at 1238–51. Nayak-Young also seeks to justify status inequality in work law, whereas I argue that we should be skeptical of such a conceptualization of workplace relations. *See id.* at 1252–56. For a similarly critical stance, *see generally* Aditi Bagchi, *Exit, Choice and Employee Loyalty*, *in* Contract, Status, and Fiduciary Law 271–92 (Paul B. Miller & Andrew S. Gold eds., 2016).

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> [British] judges drew upon the former legal tradition of status obligations to insert authority relations into [employment] contracts. The economic relation between employer and worker was described in the same terminology, a contract between master and servant, and into this contract the courts implied legal obligations that preserved an authority relation.[45]

Among the "key ingredients" of that authority relation was the implied duty of obedience.[46]

To be sure, it may now be the case that terms such as "obedience" and "insubordination" have taken on new meanings distinct from their historical ones. But given the history, and the kind of communication to which the terms apply, the common law of employment is liable to send, at best, mixed messages (and, at worst, the feudal message that employees are the moral subordinates of their bosses). The common law of employment would therefore do well to make a break with this terminology.

B. Accommodating Indignation

It may be objected that such moralizing language is at least more authentic than contract's formal conception of free and equal parties, given the various forms of subordination that inhere in employment. I agree. But I am not just arguing that we should change the language; we should change what is communicated by changing employment law norms of interaction. In particular, in addition to replacing the moralizing language of obedience and insubordination with promissory fidelity and breach, employment law should accommodate indignant expression and the communication of other reactive attitudes.[47] This is a principle of accommodation, rather than mere permission, because, as I will now argue, to create sufficient space for reactive attitudes, it is not enough that they merely be permitted; employers will sometimes also need to absorb costs associated with the communication of those attitudes. To illustrate, I will compare two alternative approaches that a society might adopt to protect indignant employee expression.

As I have been arguing, a blanket rule that treats all indignant expression by employees as cause for termination is incompatible with treating workers

45. COLLINS, *supra* note 11, at 34; *see also* ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS (1974), at ch. 4.

46. COLLINS, *supra* note 11, at 34.

47. Similar to Dagan and Dorfman, I argue here that employers sometimes need to absorb the costs of, and hence accommodate, their employees' agential activity. Whereas Dagan and Dorfman focus on the needs to accommodate employees' traits and choices to pursue various conceptions of the good, such as religion, I focus on the need to accommodate expressive activities that are partially constitutive of egalitarian communication. *See* Dagan & Dorfman, *supra* note 9, at 190–94. The principles of accommodation I present here are thus distinct from principles of accommodation in employment discrimination law. Further, while Dagan and Dorfman present their principles of accommodation as legal duties, the requirements of accommodation I argue for here are not themselves legal duties, but rather should be implemented as second-order legal principles to guide the development of legal doctrine. On the possibility of such second-order legal principles, *see supra* note 8.

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as equal moral agents. In advancing this position, my primary example has been of an employee communicating warranted indignation in a minimally disruptive fashion. One may therefore be inclined to conclude that the principle of equal moral agency recommends carving out exceptions for such warranted and relatively costless indignant expression. I will refer to this approach as the *warranted indignation approach*.

The principle of equal moral agency does not support the warranted indignation approach. First, whether someone believes she was morally wronged can depend on her particular moral values. Whether a person believes she was wronged by a lie, for instance, can turn on whether she is a utilitarian or a Kantian. Similarly, whether a person believes she is warranted in feeling anger, as opposed to some other attitude, such as sorrow (or no attitude at all), might turn on her religious commitments. Part of the agential value of communicating reactive attitudes lies precisely in making these kinds of moral assessments for oneself. The warranted indignation approach would therefore be self-undermining, vesting final say over the moral warrant of indignation in courts rather than in the moral authority of the individuals the exception seeks to support.

Second, people are not infallible. We make mistakes in our moral reasoning and sometimes fail to articulate our concerns in the most considerate fashion. A warranted indignation approach would leave little room for ordinary moral imperfection, authorizing employers to fire someone for making any moral mistake about when or how she expresses indignation. Such an approach is particularly unfair in light of the fact that having a hierarchical organizational structure is a choice. And having made such a choice, it is foreseeable that adults will occasionally chafe under the ongoing control and direction of others. A warranted indignation approach would require employees to absorb practically all the foreseeable costs of their employer's choice to adopt such an organizational structure.

Instead of protection turning on an employee's warrant for feeling indignation, protection might turn on whether the communication of indignation is destructive of mutual trust and cooperation. To see why this is an attractive alternative, it will help to first recall the purpose of creating legal space for employees to communicate indignation to their bosses (and other colleagues) in response to perceived wrongdoing. In creating such legal space, the aim is not simply to create a channel for expressing indignation and to thus avoid leaving the indignant employee "isolate[d] . . . in [her] mind."[48] After all, the employee could communicate her indignation to friends while off duty, to a human resources department, and to many others besides the party she believes wronged her. Rather, the goal is to create legal space for an employee to resist and remedy inegalitarian elements in her relationship with her boss (or colleague) by communicating that resistance to her boss.

48. Shiffrin, *supra* note 14, at 114.

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Second, how the law should create legal space for such equality-supporting forms of indignant communication depends on the relational context in which the communication occurs. In the context of employment, the appropriate legal standard for accommodating indignant communication should be responsive to society's interests in the production of quality goods and services. That is not just because production is economically valuable, but also because by working together we create a variety of necessary and discretionary means for pursuing meaningful life projects, forming and sustaining relationships, and maintaining our society. The agency values that underpin the value of communicating indignation thus also require attending to our agential interests in production.

Third, although working relationships can likely tolerate the occasional outburst or disagreement, serious betrayals, regular humiliation and offense, and subordinating communications—such as insults and racial epithets—can erode, if not altogether destroy the trust we may need to work together, and can make it practically impossible to continue collaborating on terms that treat us as moral equals. For shorthand, I'll refer to collaborating on such egalitarian terms as *cooperation*.

To operationalize a liberal principle of accommodating the communication of reactive attitudes, we should accordingly search for a legal standard that circumscribes accommodation by the need for ongoing trust and cooperation in employment. To that end, we might adopt a legal rule that permits employers to dismiss employees for indignant expression, but only when the expression is irreparably destructive of mutual trust and cooperation.

In some respects, the proposed rule resembles the American contractual doctrine of material breach, typically applied to settings outside of employment. Under that doctrine, not all breaches of contract permit the aggrieved party to bring the contractual relationship to an end.[49] Rather, breaches are material only when the failure to perform is really severe—a breach that, for instance, deprives the aggrieved party of substantially the whole benefit of the contract.[50] And even then, the aggrieved party must still give the party in breach a chance to "cure" their defective performance.[51] Thus, under the doctrine of material breach, the party in breach must be given a chance to fix the damage, provided that such a fix is

49. *See* RESTATEMENT (SECOND) OF CONTRACTS §§237, 241 (Am. L. Inst. 1981).

50. *See id.* at §241. The doctrine of material breach resembles but should be distinguished from the Anglo-Canadian doctrine of repudiatory breach. *See, e.g.*, Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., 2 Q.B. 26 (1962) (holding that a breach is repudiatory and hence entitles the aggrieved party to bring the contract to an end when the breach deprives the party of "substantially the whole benefit" of the contract). Whereas repudiatory breach automatically gives rise to a right in the aggrieved party to terminate the contract, material breach requires that the aggrieved party give the party in breach a chance to "cure" their defective performance. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 49, at §237; JOHN D. MCCAMUS, THE LAW OF CONTRACTS (2d ed. 2012), at 685–86.

51. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 49, at §237.

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possible. The structure of contractual obligations under the doctrine of material breach accordingly discourages punitive or retaliatory responses to breach, and instead encourages parties to collaborate to repair the relationship.

The collaborative structure of the doctrine of material breach is well suited for accommodating indignant communication in employment, but with some important modifications. An employer could successfully bargain for terms that require an employee's quiet obedience to an employer's lawful orders and policies.[52] Instead, to ensure accommodation of indignant expression, the doctrine could be modified to hold that a breach of an employment contract is material only when it is irreparably destructive of mutual trust and cooperation. Such a rule would give an employer a limited right to dismiss an employee for communicating anger, but only after giving the employee a meaningful opportunity to repair the damage, provided that repair is possible. I will refer to this rule as the *irreparable breach rule*.[53]

The irreparable breach rule is already a feature of some current legal regimes. For example, in Canada and England, although an employer can fire an employee for largely the same kinds of reasons as under the U.S. at-will doctrine so long as the employer gives the employee reasonable notice, an employer can summarily dismiss an employee only if the employee's speech or conduct meets the same kind of severity threshold as under the proposed irreparable breach rule.[54] (The irreparable breach rule is

52. *Cf. infra* text accompanying notes 86–92 (discussing efforts to contractually silence employees' moral criticism through nondisclosure agreements and secret arbitration).

53. The irreparable breach rule is in some respects both broader and narrower than the warranted indignation approach. The former rule permits a broader range of expression because the mere fact that indignation is not warranted does not deprive it of protection. Rather, protection turns on the degree to which the communication (or course of communication) is injurious to ongoing trust and cooperation. The irreparable breach rule is also for this reason potentially narrower than the warranted indignation approach, for it is at least in theory possible that the communication of warranted indignation could be destructive of ongoing trust and cooperation. More often, it will likely be the case that when warranted indignation compromises ongoing trust and cooperation, it is not in the first instance because of the communication of that indignation, but rather because of the act by the employer that occasions the indignation. Although I cannot fully develop the point here, the irreparable breach rule points to a ground for employees to have a symmetrical right to end an employment relationship—and thus a claim for wrongful (constructive) dismissal—when a supervisor's communications irreparably damage ongoing trust and cooperation. Such an application of the irreparable breach rule thus resembles the U.K. implied duty of mutual trust and confidence. *See, e.g.*, Bournemouth University v Buckland [2010] EWCA Civ 121 (upholding a tribunal's decision that a professor-complainant had been constructively dismissed when his employer accepted another professor's remarking of the complainant's exams and thereby "destroy[ed] the relationship of trust and confidence which is implicit in all employment contracts").

54. *See, e.g.*, McKinley v. BC Tel, 2001 SCC 38; Henry v. Foxco Ltd, 2004 NBCA 22; Donovan v. New Brunswick Publishing Co., 1996 CanLII 4832 (NB CA); Bennett v. Cunningham, 2006 CanLII 37516 (ON SC). The irreparable breach rule is also similar to the U.K. rule requiring a fundamental breach of contract to warrant summarily dismissing an employee without reasonable notice. *See, e.g.*, Wilson v. Racher [1974] ICR 428 (CA) (holding that the owner of an estate wrongfully dismissed his head gardener when he summarily fired the gardener for telling him to "Go and shit yourself" in response to a barrage of abusive and unreasonable criticism, and

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simply broader in its scope, applying to any dismissals and not simply to summary dismissals.)

For example, in Henry v. Foxco Ltd., Gerald Henry was fired following a verbal altercation with his supervisor.[55] Henry had been employed as car repair technician.[56] The morning of the day he was fired, Henry was asked to remove decals from several vans.[57] That afternoon, Henry's supervisor asked him what was taking so long.[58] Henry quickly became "loud and [verbally] abusive."[59] Although the supervisor tried to "defuse the situation," Henry refused to calm down, repeatedly "daring" his supervisor to fire him if he was not satisfied with his work,[60] to which the supervisor ultimately replied, "OK, you're fired."[61] The court found that Henry's conduct was insolent and insubordinate. Nevertheless, it held that Henry was wrongfully terminated because the employer did not show that Henry's conduct led to "irreparable harm to the working relationship" between Henry and the supervisor.[62] For an isolated incident to warrant summary dismissal, the incident would have to make it "impossible or impracticable" for the involved parties to continue working together.[63]

While not a focus of the court's analysis, Henry claimed that his supervisor was "smug" and that the supervisor had regularly insinuated—including on the day of the altercation—that he "always knew a better way to do" things than Henry.[64] From Henry's point of view, anger after being told yet again that he was inferior could have seemed warranted. Even if Henry's manner of communication could have been calmer and more respectful, after years of working under such circumstances such an outburst may have been inevitable, and Henry may have even reasonably felt that an outburst was needed to get through to his supervisor. Had Henry's supervisor acted in accordance with the irreparable breach rule, Henry would have had an opportunity to return to the autobody shop and work out his differences with his supervisor, possibly resulting in a more mutually respectful mode of interaction going forward.

This is, of course, not what happened. But the value of a legal rule is not exhausted by the consequences of its breach. As action guiding, legal rules should also be evaluated in light of the kinds of relationships they facilitate when they are followed. The value of the irreparable breach rule lies

noting that a "Czar-serf" relationship no longer animates service contracts); *see also* COLLINS, *supra* note 11, at 164–65.

55. *Henry*, 2004 NBCA 22, at paras. 1, 5.

56. *Id.* at paras. 39–41

57. *Id.* at para. 38.

58. *Id.* at para. 40.

59. *Id.* at para. 40.

60. *Id.* at paras. 40, 129.

61. *Id.* at para. 40.

62. *Id.* at para. 130.

63. *Id.* at para. 130.

64. *Id.* at para. 5. The Court of Appeal ultimately deferred to the trial court's finding that Henry's recounting of the facts were less credible than Foxco's. *See id.* at paras. 5, 26.

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primarily in the kind of space it creates for authentic communication when the rule is followed and in the cooperative norm it sets for responding to conflict.

Henry thus illustrates the basic mechanics of the irreparable breach rule and an instance of a protected attempt to use indignant, albeit imperfect, communication to resist a morally subordinating relationship. But what standards should bear on how courts determine what kinds of indignant speech are sufficiently serious betrayals of trust or preclude ongoing cooperation between equals? After all, judges are not marriage counselors, nor, as the flaws of the warranted indignation approach suggest, should judges seek to impose their personal vision of healthy relationships on individuals.

Judges, however, do not need to resort to paternalism or to adjudicate beyond their competence to apply the irreparable breach rule. First, what counts as a sufficiently serious breach of trust depends on the nature of the work. For example, Henry's outburst in response to perceived belittling did not show that he could no longer be trusted to repair cars, or that he could no longer be trusted to work with his supervisor on terms that treat his supervisor as a moral equal. In contrast, engaging in a repeated course of indignant speech that interferes with the timely completion of work or abuses colleagues could supply warrant for holding that the speaker-employee can no longer be trusted to do his part at work. Breaches of trust are thus to be evaluated in terms of the parties' expectations of promissory fidelity and the nature of the work.

Second, the idea that a repeated and unwelcome course of expression can be destructive of ongoing trust and cooperation at work is not novel, even in jurisdictions, such as the United States, that do not deploy a version of the irreparable breach rule. For example, adjudicating sexual harassment claims engages courts in a similar inquiry, requiring them to distinguish between merely "offensive utterance[s]" and communication that is so "threatening or humiliating" as to "unreasonably interfere with an employee's work performance."[65] Like the irreparable breach rule, whether a given utterance or set of utterances is actionable is highly context-specific and not susceptible to "a mathematically precise test."[66] Courts thus already engage in context-sensitive assessments to determine whether an instance (or instances) of communication seriously compromises conditions for ongoing trust and cooperation in employment.

There are, to be sure, a number of nuances in the proposed standard that I have not yet explored. For instance, what would make an opportunity to cure a meaningful one? Should the rule be applied to expression beyond the communication of reactive attitudes? These are matters that, as with other common law doctrines, would need to be worked out over time.

65. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).
66. *Harris*, 510 U.S. at 22.

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III. ASSOCIATIONAL DIMENSIONS OF EMPLOYMENT

As the case of indignant expression illustrates, moral agency is often developed and exercised through social interaction. Here, I argue that in addition to being an important context for egalitarian communication, paid workplaces can be sites for moral influence and the deployment of moral values in ways that parallel voluntary associations. This feature of paid workplaces can enrich people's lives, providing people with opportunities to engage in sustained and effective moral projects with others. The associational dimensions of working life can also be manipulated by employers, compromising employees' abilities to exercise meaningful agency over their characters and identities.

A. Interdependent Agency

To appreciate these ways in which workplaces can be morally immersive, it may help to pause and consider some more general respects in which moral agency is a social capacity.

By reflecting on various moral values, and deploying and experimenting with those values in choices and relationships, a person can shape her character, defining what kind of person she wants to be through what ends and values she affirms and acts on. As social beings, we play important roles in supporting these processes. First, people are imperfect moral agents. Our moral knowledge is, like our knowledge of the material world, limited and something that needs to be learned and refined over the course of a lifetime. As with our other epistemic limitations, we do better in managing our individual moral limits with the help of others.[67] And an important way we help one another is communicative: we call one another out when we go wrong, we engage in moral debate, we direct reactive attitudes toward one another.

Second, in addition to helping one another discover and evaluate our moral shortcomings, we often support one another's moral development by sharing information needed to know when and how to act on the moral duties we have.[68] It is hard to be a compassionate friend, for instance,

67. *See* SHIFFRIN, *supra* note 14, at 9.

68. *See id.* It may be objected that the legal protection of indignant expression argued for in Section III is in tension with this point. How to communicate indignant expression in respectful ways is surely something we rely on one another for learning, and it may be argued that the status quo, which gives employers broad latitude to terminate employees for indignant expression, furthers this end. In response, first, it should be noted that the irreparable breach rule does not preclude an employer—or colleagues—from telling the inappropriately indignant employee that she is wrong, rude, or offensive. Second, the rule actually does serve to establish shared norms of respectful communication. The rule communicates that what makes indignant expression problematic in zones of public life is not a matter of the particular ethical views of the parties, but rather a matter of whether such communication compromises our ability to work together on terms of equality. In contrast, the status quo risks publicly communicating a false, problematic ground for norms of respectful communication: namely, that an employer is owed respect qua employer, and that that respect is not equally owed to the employee.

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if your friend does not share her inner life with you.[69] In addition to communicating personal information, our social relations with others also serve as venues for exchanging and jointly implementing ideas about how to live well and, relatedly, for mutual influence. (It is not surprising that close friends often come to like the same music and share similar political orientations.)

In light of the social nature of our capacity for acquiring moral knowledge and developing our characters, it is essential that a person be able to trust that her close peers speak sincerely. It will also be important that a person have some control over what kinds of immersive environments she finds herself in, given our general openness to influence by others.[70] And then, finally, in morally immersive environments, it will be crucial for participants in those environments to have discursive and emotional space to challenge the ideas and values they are presented with. Such space is required to ensure that mutual influence can operate through people's rational agency.

B. Character and Identity at Work

Whether intentionally or not, employers often make use of the social nature of our moral agency, drawing on people's receptiveness to moral influence to bring employees' values into line with firm values. Consider, for example, Marion Crain's description of internal branding programs:

> The typical internal branding program consists of several elements: communicating and explaining the brand to employees, convincing employees of its value, linking every job in the organization to delivery of the brand promise, establishing performance standards to measure fulfillment and support of the brand promise, and "ruthlessly align[ing] all people practices to support and reinforce the brand promise" by selecting, training, rewarding, and punishing employees according to their level of on-brand behavior.[71]

The above passage depicts a kind of internal program that makes use of the social aspects of a person's capacity to exercise agency over who and what kind of person she is. Workplaces are immersive, putting us into close and repeated contact with others for much of our waking hours. We often form friendships and rivalries, meet our spouses, and celebrate achievements and mourn losses at work. Punishments and rewards in socially rich settings like workplaces are not just pleasures and pains; just as interpersonal punishment may lead us to believe that we have done

69. *See supra* note 35.

70. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 Nw. U. L. Rev. 839, 862, 866, 869–70 (2005).

71. Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 Iowa L. Rev. 1179, 1201 (2010) (quoting Pierre Berthon, Michael Ewing & Li Lian Han, *Captivating Company: Dimensions of Attractiveness in Employer Branding*, 24 Int'l J. Advert. 151, 153–54 (2005)).

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something morally wrong, so may punishment in the workplace lead us to form moral judgments about ourselves and others, and we may revise our maxims and value commitments accordingly.

By putting its employees in immersive regular interaction with other employees who show support (or disdain) based on conformity to the company's values, an employer is thus able to draw on the developed adult moral receptiveness to others, and learned patterns of reliance and trust, to shape the personalities of its employees.[72] Unsurprisingly, firms report tremendous success in their internal branding programs, and employees report high levels of personal and moral identification with the firm.[73] Employees at Southwest Airlines, for example, have "compared [the airline's] indoctrination program to a religious conversion."[74]

Internal branding campaigns are, of course, not present in every workplace. But even when an employer does not have an internal branding campaign, employees can be subject to similar influences and pressures to conform. Workplaces are not morally neutral; employers often aim to publicly further a moral mission through the work of their employees. Employees at the U.S. Equal Employment Opportunity Commission are supposed to further equal opportunity values; White House aides are supposed to act and speak in furtherance of the President's political vision.[75] Private sector employers can also have an explicit moral culture that employees are encouraged to adopt and further. Consider the Gates Foundation's private humanitarianism, and the ACLU's and NAACP's respective visions of equal liberty. Employers can also have well-known, public political commitments to which employees may feel pressure to conform to simply do well in their jobs or be appreciated by colleagues.[76]

Finally, ways of doing business can have their own moral character. Employees at Wells Fargo may rightly feel they are furthering different values than employees of a university credit union. Some servers may reasonably believe their work furthers the objectification of women.[77] Over time,

72. *See id.* at 1220–32.

73. *See id.* at 1209–13.

74. *Id.* at 1212 ("'The real secret to Southwest's marketing is its almost religious fervor to maintain and perpetuate the core values of the [corporate] culture.' Southwest's philosophy is that employment at the airline is not a job, it's a 'crusade.'") (quoting KEVIN FREIBERG & JACKIE FREIBERG, NUTS! SOUTHWEST AIRLINES' CRAZY RECIPE FOR BUSINESS AND PERSONAL SUCCESS (1996), at 10, 267).

75. In the United States, government employers generally may not take adverse employment actions against their employees on the basis of their political affiliation; such actions are presumptively unconstitutional under the First Amendment. *See* Rutan v. Republican Party of Ill., 497 U.S. 62 (1990). But that presumption does not apply where "party affiliation is an appropriate requirement for the effective performance of the public office involved," such as for a presidential speechwriter. Branti v. Finkel, 445 U.S. 507, 518 (1980); *see also* Elrod v. Burns, 427 U.S. 347, 366 (1976).

76. *Cf.* Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 739 (Idaho 2003).

77. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110–11 (9th Cir. 2006) (holding that company policy requiring female casino bartenders to wear makeup did not constitute sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012)).

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through repeated outward endorsement and immersion in such workplace environments, employees may actually come to accommodate and adopt those values personally.[78]

Like voluntary associations, workplaces can be sites of ongoing and morally robust interaction that engage employees in the joint implementation of (often value-laden) projects. The potential for mutual influence on employees' characters and values can be as strong in the paid workplace as in voluntary associations, if not stronger given the economic significance of employment and the amount of time we spend at work. Just as compelled association and speech may be experienced as a kind of "illicit influence" over "character and autonomous thinking,"[79] so may the workplace.

C. Accommodating and Protecting Critical Speech

In pointing out threats to autonomous character development posed by workplaces, I do not mean to suggest that we should seek to eliminate morality in the workplace. Such a change would not only likely be impossible, but also undesirable. If work were to be somehow stripped of its moral character, most of us would be left with little time to pursue morally animated projects in association with others. That paid workplaces might sometimes be moral workplaces can make it possible for a person to make racial justice, the development of religious doctrine, the dissemination of the arts, and other like moral projects her life's work.[80] To be sure, whether the good life is to include paid work is question that liberalism leaves to individuals to settle for themselves. Even so, preserving some legal space for morally animated paid workplaces can help harmonize the demands of production with our general agential interests in associating with one another, interests that our liberal constitutional commitments to associational freedom underscore.

So how should employment be structured to ensure that employees can exercise meaningful agency over their own characters while leaving space for moral workplaces? I will not attempt a comprehensive answer here, but will advance one possible reform to illustrate what a more liberal employment contract would look like.

Similar to indignant expression, a moral agency approach recommends operationalizing a principle of accommodation with respect to critical speech. The risk of illicit influence over character in the workplace is not just a product of the moral richness of work (or of aggressive internal

78. *Cf.* Shiffrin, *supra* note 70, at 851–73.

79. *Id.* at 840; *but see* Boy Scouts of America v. Dale, 530 U.S. 640, 655–56 (2000) (suggesting that the wrong of compelled association has more to do with the ability of the association's group to have control over the message that it outwardly communicates).

80. Making workplaces sites for moral association may, in addition to the reforms discussed here, also require creating legal space for religious workplaces. I address the complexities of creating such legal space while also giving appropriate weight to workers' rights against discrimination elsewhere, in *Disentangling Religion and Public Reason: An Alternative to the Ministerial Exception*, 106 Cornell L. Rev. (forthcoming).

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branding). Rather, the risk becomes one of *illicit* influence when people labor under working conditions that permit employers to influence employees by circumventing employees' rational agency. In countries such as the United States, an employer often has broad legal authority to fire employees for their morally critical speech, especially speech about an employer's larger philosophy (as opposed to typical subjects of bargaining, such as wages and hours).[81] Such control rights enable employers to foreclose discursive opportunities for employees to understand and possibly distance themselves from workplace values through debate and contestation, or to adopt those values through rational reflection.

Under such a legal regime, employers are effectively given rights to subject employees to a moral education with practically no public oversight.[82] In practice, such a relationship can be infantilizing for employees, who may be asked to sing songs, participate in cheers, adopt certain moral dispositions (wearing "flair" and being a "team player").[83] Of course, as with employer control over indignant expression, not all employers may seek to exercise the full extent of their control rights. Employers may even aim to cultivate an egalitarian workplace culture. But such practices, though perhaps praiseworthy, do not overcome the basic hierarchy in the legal relationship of employment. Without legal protection for morally critical speech, the legal norms of the employment relationship will still treat employees' agential capacities for shaping their characters and personalities as possible tools for practically any nondiscriminatory purposes employers choose. Such a legal relationship could therefore not be justified on grounds that treat workers as equal moral agents.

In a liberal democracy, employees should thus have more expansive rights to engage in critical speech about their workplaces. But how much more expansive? As with indignant expression, morally critical speech can sometimes constitute a serious betrayal of trust or can otherwise be so hurtful or humiliating as to irreparably damage ongoing trust and cooperation. For instance, suppose A, a known sexist, is disappointed about learning that A's employer has promoted B, a woman, in part to diversify leadership within the company.[84] A accordingly tells B, "You only got that promotion because you're a woman," and continues to make remarks to and around B

81. To be sure, labor law can offer employees a protected opportunity to voice criticism of their wages, vacation time, and other terms and conditions of work. *See* National Labor Relations Act, 29 U.S.C. § 157 (2012). But that protection is limited by the legal presumption that employers are to have control over their broader aims and philosophy. *See* Good Samaritan Hosp., 265 N.L.R.B. 618, 626 (1982). Consequently, open criticism of or failure to comport with the aims and policies of one's job usually provides cause for termination. *See, e.g.*, Five Star Transp., Inc., 349 N.L.R.B. 42, 44–45 (2007); *Good Samaritan*, 265 N.L.R.B. at 626.

82. *See, e.g.*, Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 719–20, 735–38 (1997).

83. *See* Crain, *supra* note 71, at 1212. Workplace cultures can also be discriminatory in ways that are difficult to regulate through antidiscrimination law. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

84. I am indebted to an anonymous reviewer for this example.

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that B is incompetent, that B's talents would be better used in administrative work or at home, and the like. Under such circumstances, B's working conditions have arguably been altered by A. If their employer does nothing, B must either express disagreement and resistance to A, or else work under circumstances in which B acts as if she has acquiesced to A's views. Either way, B, on account of her gender, faces an unjustified barrier to interacting at work with others as an equal. Under such circumstances, regardless of whether A's speech rises to the level of actionable employment discrimination, A and B's employer can be warranted, under the irreparable breach rule, in firing B.

It does not follow, however, that any critical expression that reflects A's sexist views lacks protection. Under the principle of treating workers as equal moral agents, employers should not attempt to change employees' moral values except through deliberation and other forms of rational persuasion. If B and other women know about A's sexist beliefs—perhaps A has made a sexist remark in the past, or has posted about reverse gender discrimination on Twitter—it may of course be, in some important sense, impossible for B and other women to trust A as a friend or other intimate associate in light of A's beliefs. But for purposes of working together, B might still be able to trust that A will, for instance, do his part and not interfere with B's performance of her job, or that A will communicate respectfully with B. It may therefore be possible for A and B to relate under terms of equality as colleagues notwithstanding A's known and previously communicated sexist values. The irreparable breach rule, and the more basic imperative to treat workers as equal moral agents, can thus require accommodation of illiberal views, even when those views are communicated at work.[85] The irreparable breach rule is therefore well suited to accommodating morally critical speech so as to create discursive space for employees to exercise autonomy over their values and characters, notwithstanding morally rich interactions and projects at work.

The power to fire is, to be clear, not the only means an employer can use to improperly stifle moral expression. Consider, for example, the use of "hush contracts" by employers to prevent employees from disclosing information about sexual misconduct.[86] Under such agreements, employees who suffered from sexual harassment, assault, or other sexual misconduct by their superiors are given financial incentives to refrain from disclosing information about that misconduct to the public or third parties.[87] Critics argue that such contracts prevent the public and future employees from

85. *Cf.* Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* Reason and Value: Themes from the Work of Joseph Raz 270 (Philip Pettit et al. eds., 2004) (arguing that we may sometimes need to accommodate one another's morally flawed activity to preserve deliberative space to reflect on the values that directly bear on that activity).

86. *See* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 Wash. U. L. Rev. 165 (2019).

87. For descriptions of a variety of such contracts, *see, e.g.*, *id.* at 166–67, 174–77.

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accessing valuable information about the scope of sexual misconduct,[88] that they may make perpetrators and would-be perpetrators "more likely to prey on potential victims,"[89] and that, by denying the victims of a public forum for vindicating their complaints, they deprive victims of sexual misconduct of the opportunity to reassert their status as equals in their political community.[90]

A full treatment of hush contracts is not possible here. But to illustrate how the principle of treating workers as equal moral agents can be applied to evaluate such contracts, I want to briefly sketch how the principle can support these criticisms and justify legal prohibition (whether through legislation or defenses to enforcement) of hush contracts. Communicating moral condemnation of employment discrimination and sexual assault—actions that are paradigmatically matters of public concern—is plausibly an exercise of moral, political agency. In communicating such condemnation, an employee may be acting on shared values of mutual respect and equal status, and attempting to do her part in bringing about social conditions of equality.[91] For the victim herself, communicating moral condemnation of the wrongdoing she suffered in a public forum can be a way of resisting any injury to her equal status occasioned by the wrong, and thus resisting the perpetrator's efforts to relegate her to a subordinate status. Much like the denial of an opportunity to communicate moral indignation to one's wrongdoer, denying a victim the opportunity to engage in such communication is potentially subordinating, for it requires the victim to act as if her rights against discrimination or to bodily integrity—rights that are surely partially constitutive of equal membership in a society—are not entitled to protection.[92]

IV. TOWARD A COOPERATIVE PARADIGM OF EMPLOYMENT

A moral agency analysis of the workplace thus reveals that we do not leave our moral lives at home when we go to work. The interactive and social aspects of work, along with the morally evaluable character of our jobs, create regular opportunities for developing and implementing values, for moral influence, and for moral conflict and wrongdoing. In light of the various ways work implicates our status and activity as moral agents, I have argued that employers should be legally obligated to accommodate employees' indignant expression and moral criticism as part of a broader

88. *See id.* at 198.
89. *Id.* at 179.
90. *See* Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855 (2020).
91. *Cf.* RAWLS, *supra* note 12, at 334 (explaining that individuals are under a duty of justice to uphold and maintain just institutions).
92. *See supra* Section II.B.

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effort to ensure that, in one of our most pervasive and socially significant domains of social life, we treat each other as equals.

The specific reforms to legal rules I have advanced are, in several respects, quite modest, requiring only that employees have a protected voice at and about their work, but not an effective voice in how they labor. Reforming the employment relationship to accommodate indignant expression and morally critical speech thus leaves intact a paradigmatic way in which employment is hierarchical: namely, that the employer determines how production is to be undertaken to begin with. Moreover, even with such legal protections in place, the desire to fit in, to be appreciated by one's colleagues, and the like may still influence employees to conform to workplace cultures and to stifle some indignant expression. The reforms advanced here are accordingly not intended to eliminate all possible pressures on employees to tailor their expression. Rather, they in part aim to free employees from having to depend on their employers' good will to bring their own values about their work and relations to others to bear on how to communicate anger and moral criticism.

But the underlying conceptual changes advanced here are potentially much more radical. In the course of advancing employee speech protections, I have argued that the concept of obedience should be replaced with that of promissory fidelity, and that employer rights to control employees should not be regarded as basic, but rather as derivative of the shared need for mutual trust and cooperation in workplaces. Such a shift from a paradigm of control to one of cooperation reflects the fact that how we work together is not a purely private matter. Because work is not just a means to the material conditions for exercising moral agency, but also unavoidably a site for exercising such agency, how we work together determines how and whether we relate to one another as equals. Employee speech rights are only one kind among possibly many facets of a more liberal employment relation because communication does not exhaust the ways in which employment engages us as moral agents. As the potential for our work to influence our characters illustrates, what we do in our jobs—and not just what we say—is morally rich, engaging us in the pursuit of a variety of values, ranging from economic growth to social justice and aesthetic values. Given our equal entitlement to exercise meaningful agency over our lives, it is therefore not obvious that owning the means of production entitles someone (or some entity) to unilaterally determine how we work and for what ends.

This is, of course, not an argument for the conclusion that a liberal democracy must implement procedural democracy in the workplace, or that the means of production must be socialized. Arguing for such claims would require a fuller elaboration of the cooperative paradigm that takes into account the purposes of property rights, the role of production in society, and other like matters. Rather, the point is that the cooperative paradigm of employment, with its underpinning ideal of substantive equality,

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offers a liberal starting point for challenging hierarchy in employment more broadly.

A more comprehensive analysis of the agential dimensions of work would also have to include employment's influence on the exercise of basic liberties outside of work. For example, unpredictable shift scheduling may make it difficult to coordinate shared free time with others, and so may sometimes unreasonably limit our opportunities to participate in political life and join voluntary associations.[93] Further, as Brian Langille has argued, the quality of our jobs—what we spend our days doing, how our work engages our minds—can also affect our broader human capabilities for labor in ways that can similarly require justification.[94] Of course, it does not follow that all such aspects of employer control are morally objectionable. Rather, I point them out here to indicate that treating workers as moral agents requires asking these questions and challenging the assumption that employers are to have largely complete control over "the ultimate direction, philosophy, and managerial policies" of their enterprises.[95]

A. Substantive Freedom of Contract

Before concluding, in order to clarify the law's role in securing social equality at work, I want to briefly raise and respond to several objections to the kinds of legal reforms I have proposed. First, the workplace is not unique as a site for moral influence and conflict. Friendships, clubs, religions, and the like also present such opportunities for mutual influence and moral disagreement, yet liberals typically hold that we should be cautious in imposing legal norms of interaction on those relationships. Workplaces are, of course, not voluntary associations, as many of us have to work in order to earn a living and social injustice limits many people's employment opportunities. But in light of this distinguishing feature of paid work, why isn't the solution to make employment more like a voluntary association? A society might reduce the costs of exit,[96] such as by having a single-payer public healthcare system, by providing unemployment insurance for voluntary quits, and by providing fully subsidized educational and retraining

93. On the moral importance of shared free time, *see generally* JULIE L. ROSE, FREE TIME (2016).

94. *See, e.g.*, Brian Langille, *Human Development: A Way out of Labour Law's Fly Bottle*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 87 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018). Langille also argues that work law should support the development of human capabilities more broadly. Examples of such capabilities include health, skills, and meaningful opportunities to participate in public and political life. *See id.* at 91–94. Social conditions for moral agency will thus often overlap with the kinds of capabilities Langille identifies, and so a moral agency approach will typically condemn the same forms of control as a capabilities approach, such as unfettered employer control over employees' off-duty political activity or workplace policies that compromise employee health. A moral agency approach can complement Langille's theory of work law by supplying a standard for determining when employment unreasonably restricts the exercise of our capabilities.

95. Good Samaritan Hosp., 265 N.L.R.B. 618, 626 (1982).

96. For a skeptical view that exit rights are sufficient to protect the basic liberties of members of voluntary associations, *see* Les Green, *Rights of Exit*, 4 LEGAL THEORY 165 (1998).

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opportunities. A society could also enhance people's ability to exercise agency over the terms of their employment relationships by adopting policies to equalize bargaining power between employers and employees, such as by making it easy to come together to strike or bargain collectively.

I agree with these proposed reforms to increase worker freedom of contract, but they are incomplete. The liberal objections to employer control over workplace values and expression are not objections to particular employers; they are objections to employers generally being legally vested with such power. If it were the former, then perhaps freedom of exit would suffice, since once could escape an objectionable employer to find an acceptable one. But here I have been arguing that the problem is with the legal relationship itself—that a defining feature of the employment relationship, as it currently stands, is that it gives employers legal authority to shape the values of their employees and to silence indignation and criticism in ways that treat employees as morally inferior. It is the institution that needs changing, not just the mobility conditions within that institution.[97]

In response, one might point out that it does not follow that the only way to change the institution is to adopt mandatory duties. In addition to adopting policies for greater worker mobility, a society might simply excise the substantively defective principles by eliminating implied duties of obedience and the like, leaving the terms of the employment relationship largely up to bargaining (subject to the constraints of antidiscrimination law, labor law, and the like).

But the liberal requirement of treating workers as equal moral agents is not merely a prohibition against interference.[98] In particular, it is not

97. I thus agree with Hugh Collins's point that it is not submission but rather subordination that constitutes the "crucial subversion" of liberal values. Collins, *supra* note 4, at 63.

98. The liberal principle of treating workers as equal moral agents thus offers an alternative to labor republicanism, which tends to characterize objectionable employment relationships as ones in which employers can arbitrarily interfere in the lives of employees. *See, e.g.*, Alex Gourevitch, From Slavery to the Cooperative Commonwealth (2015), at 11; Iñigo González-Ricoy, *The Republican Case for Workplace Democracy*, 40 Soc. Theory & Prac. 234 (2014). Of course, it may be that, for labor republicans, the only state of affairs in which employers do not arbitrarily interfere in the lives of employees is one that, among other things, treats people as equal moral agents. Even so, the emphasis and animating ideals remain different: whereas the republican ideal is one of independence, substantive liberal equality, as I have developed it here, is an ideal of cooperative interdependence.

Although a full critique of labor republicanism is not possible here, to highlight a further difference between a moral agency approach and labor republicanism, it may help to point out one kind of difficulty that tends to confront labor republicanism. In order to generate principles for evaluating when employer power is arbitrary, labor republicans often rely on an analogy to the state. For example, Elizabeth Anderson argues that employment relationships are forms of authoritarian governments because employers can exercise legal, economic, and other power over employees and those employees have little say in how that power is exercised. *See* Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) (2017), at 37–74. Anderson then proposes drawing on our understanding of the just state to develop a "workplace constitution" to restrict employer power. *See id.* at 65–71; Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, 31 Soc. Phil. & Pol'y 48 (2015) (arguing that we should draw on a Lockean conception of justice to guide legal reform of employer control). While I am sympathetic, states are relevantly

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enough that we refrain from granting employers de jure authority over important moral dimensions of employees' lives. Treating people as equal moral agents also requires that society positively secure social conditions for "the adequate development and full exercise" of moral agency on terms that treat each person as equally morally entitled to such conditions.[99] This requirement can not only be violated by policies that explicitly create inegalitarian relationships, but also by the failure to regulate employment contracts.

In the case of employment, even if labor and management had equal bargaining power,[100] it would be negligent for a society to leave it up to bargaining whether indignant or morally critical speech will be sufficiently accommodated. Attempts at controlling such expression are predictable whenever we work together to produce goods and provide services. We have efficiency interests in quieting disruptive and critical speech, and aligning individual values with those of the group can reduce agency and other monitoring costs. In light of these predictable pressures on expression, the principle of equal moral agency requires that we adopt legal standards for ensuring that, in producing the many goods and services that make for a flourishing society, we do not accidentally undermine the very agential values that our productive activity is supposed to serve.[101]

different from workplaces (as Anderson herself notes). *See* ANDERSON, *supra*, at 66–68. For example, it would seem to violate the freedom of speech for the state to ban all discriminatory speech, yet prohibiting a wide range of discriminatory speech in the paid workplace is surely a requirement of justice. Consequently, it is not clear how principles limiting state action are to guide principles limiting employer control over employee expression, and other like substantive dimensions of employment. We need some other ideal, apart from political justice, to develop moral standards for the workplace. For another skeptical view of the use of workplace-state analogies, *see* Collins, *supra* note 4, at 60.

99. RAWLS, *supra* note 18, at 293.

100. I am skeptical that bargaining power could ever truly be equalized. Even in a world of widespread social equality, people would still have differences in emotional dispositions, personal needs, and the like that may give some of us greater ability to advance our ends in negotiations than others.

101. Given the existence of such predictable pressures on expression, even if it were possible to somehow get rid of the legal institution of paid work more broadly, and to simply produce through volunteer work, we would still have reason for employment law and hence for employment relationships. Even under such idealized and distant circumstances, some and likely many of us would still need to teach, farm, build shelter, care for one another, and the like. Working together makes possible ways of living that are not dominated by the pressure to survive. *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), at 374 (describing a fictional situation in which a person is "hounded" by a "fierce carnivorous animal" and "never has a chance to do or even to think of anything other than how to escape from the beast"). Further, as epistemically and morally limited beings, we depend on one another to acquire and develop knowledge, and to create a flourishing culture for realizing and experimenting with various conceptions of happiness and the good life. Producing for moral agency can thus require a lot of labor. If, under such idealized circumstances, we found that, to provide for our needs and interests as moral agents, we needed to work together regularly, for many hours, we would be justified, if not required, to publicly regulate how we work together to prevent the very kinds of predictable and objectionable control—over character, over egalitarian communication—discussed here from arising in our working lives.

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Further, workplaces have historically been sites of social inequality.[102] That fact, along with pressures to adopt hierarchical managerial structures, can leave it ambiguous to people as to whether hierarchy in their workplaces treats them as morally inferior. It is hard to see how we could understand ourselves as being publicly committed treating one another as moral equals if it were reasonable to end one's workday with the lurking suspicion that one had been subordinated by one's boss. The history and tendency to organize work hierarchically thus makes us liable to communicate (at best) mixed messages about our statuses at work, and that history and tendency makes it imperative that we make a break with the past by having an employment relation that is clearly compatible with our moral equality.[103]

To be sure, not all employers exercise their powers—whether de jure or de facto—to silence indignant employees or to bring employees' values into line with workplace aims. Secure in their position at work, highly desired employees may also feel comfortable speaking out against their bosses notwithstanding the absence of legal protections for doing so.[104]

While egalitarian employer practices may be salutary, and such privileged employees may be fortunate, both illustrate how, in the absence of legal protections for indignant and critical expression, whether a person must occupy a servile position at work is contingent on the good will of employers, or on morally arbitrary market dynamics. Given the social and economic significance of work, people's real opportunities to work as equals should not depend on their academic or professional prowess, or on the moral predilections of the owners of the means of production. A scheme that left it up to the market and up to employers whether a person must labor in silent obedience for a boss would thus fail to implement the liberal commitment to substantive equality—that we are all entitled to social conditions for exercising meaningful agency over our values, relationships, and projects as equals.[105]

102. *See, e.g.*, Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (2d ed. 2000, 2014), at 48–64 (describing how Black women's work after the Civil War has repeatedly recreated relationships of "interpersonal domination" and domestic service reminiscent of slavery and American apartheid); *see also* Catharine A. MacKinnon, Butterfly Politics (2018), at 110–25 (describing the law's role in supporting and obscuring subordination in employment); Tommie Shelby, Dark Ghettos: Injustice, Dissent, and Reform (2016), at 199 (explaining that the work available to poor Black women is often "domestic service in the homes of affluent white families" that reinforces the "ideological image of the 'mammy' . . . used to justify the exploitation and subordination of black women under slavery").

103. To be sure, the government could make public announcements through, say, its department of labor, to the effect that everyone is an equal in their workplace relationships. But without legal change on the ground, such messages risk being inauthentic and obfuscating.

104. This is in contrast to low-wage workers, workers in nonunionized workplaces, as well as women, Black, and Indigenous workers, and other workers of color or from historically marginalized and oppressed groups more broadly. Even when such individuals occupy prestigious jobs, they may still have reason to believe that because of racism and other forms of bias, their positions are less secure than those of their more socially privileged colleagues.

105. One might also object that the reforms argued for here risk having the perverse consequence of further marginalizing already marginalized and historically disempowered individuals. Giving employees greater protection from termination for their indignant and morally

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Of course, whether the legal changes I have advocated for here are effective will depend on the willingness of employers to comply with the law, and on employees to know about and enforce their rights. Such concerns about access to justice and reform of de facto power dynamics have accordingly driven much of the workplace equality literature on increasing the bargaining power of workers, such as through expanded rights of collective action, to prevent employers from being able to use their economic and social power to subordinate and dominate the lives of employees, notwithstanding legal protections to the contrary.[106] The reforms advanced here are accordingly not intended to be implemented in isolation, but rather in conjunction with efforts already under way to increase access to justice and workers' rights to band together to resist unfair and unlawful workplace practices.

A moral agency approach thus does not deny that having the freedom to contract—or not to contract—with a given employer is a necessary condition of treating workers as equal moral agents. Nor does a moral agency approach seek to minimize or otherwise do away with the contractual character of employment. Rather, a moral agency analysis recommends rethinking what an employment contract is for to begin with. Liberal equality recommends moving toward a paradigm of employment that justifies contractual rights and duties in terms of the need for ongoing trust and cooperation. Control, if it is to be a part of that relationship, is merely instrumental to those more egalitarian aims.

In reimagining employment contracts as oriented around cooperation rather than control, a moral agency analysis thus yields a conception of substantive freedom of contract: not only should we be substantively free to enter (or exit) employment relationships, and to set the terms of those relationships in ways untainted by background inequalities, but those relationships should, once formed, themselves constitute social relationships of freedom and equality.

critical expression may lead employers to preempt possible conflicts by hiring on the basis of a variety of pernicious stereotypes, treating race, religion, or other protected statuses as proxies for antisociality.

In response, such employer backlash may simply be an unavoidable part of transitioning to a more egalitarian legal and employment culture. *Cf.* Faisal Bhabha, *"Islands of Empowerment": Anti-Discrimination Law and the Question of Racial Emancipation*, 31 WINDSOR Y. B. ACCESS JUST. 65 (2013) ("[R]ather than being cause for alarm and retreat of the rights agenda, what is characterized as 'backlash' may in fact be part of a longer process of attitude and norm shifting."). As such, the risk of backlash may caution against an abrupt transition, or may signal that the transition needs to be undertaken in conjunction with other reforms, such as better enforcement of employment rights against indirect discrimination. But given the importance of the proposed reforms to our equal status, it may be that initial backlash is an is an acceptable cost of bringing about a more egalitarian scheme of labor and employment.

106. *See, e.g.*, Alex Gourevitch, *The Limits of a Basic Income: Means and Ends of Workplace Democracy*, 11 BASIC INCOME STUD. 17 (2016); Hélène Landemore & Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 POL. THEORY 53 (2016); *supra* note 98.

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CONCLUSION

Hierarchy in employment poses systematic threats to our moral agency and social equality. Employer control over employees is often exercised through legal rights to quiet obedience and moral deference, and those rights are deployed and justified through concepts that perpetuate the view that employers are owed special respect and consideration qua moral superiors. Evaluating employment relationships through the lens of moral agency thus illustrates the Marxist insight that objectionable social hierarchy in our basic legal institutions can survive democratic political reform, and that this is a problem that should concern Marxists and liberals alike.

Attending to our agential needs and interests at work also suggests a way forward. By questioning the limits of justifiable employer control, a moral agency analysis yields a new paradigm of employment, one in which the need for ongoing trust and cooperation is a regulative end of employment relationships. Workplace equality is thus not merely secured by restricting employer power to interfere with the lives of employees, but by publicly implementing legal norms of cooperative production that accommodate our needs and interests as moral agents and make possible mutual recognition and communication as equals.

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