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Moral Agency and the Workplace

A dissertation submitted in partial satisfaction

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Doctor of Philosophy in Philosophy

by

Sabine Juliette Tsuruda

2018

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## ABSTRACT OF THE DISSERTATION

Moral Agency and the Workplace

by

Sabine Juliette Tsuruda

Doctor of Philosophy in Philosophy

University of California, Los Angeles, 2018

Professor Seana Shiffrin, Chair

This dissertation examines understudied aspects of the relationship between work, law, and moral agency. Liberal egalitarianism conceptualizes a just society as a fair system of social cooperation in which members can regard themselves and one another as social equals. Perhaps because workplaces have traditionally been loci of economic and status-based inequality, liberal discussions of the morality of work have tended to center on fair wages and nondiscriminatory access to work. While wages and access are important, liberal theory has neglected the moral agential dimensions of work, such as work's influence over our personal identities and associational lives, and the law's role in securing and communicating our social equality at work. That neglect is regrettable. Workplaces are some of the most pervasive and life-shaping venues for social cooperation, and the liberal ideal of social equality is not merely material. We should also—through our laws and major social institutions—treat one another as equal moral agents, and thus, as equally entitled to the social conditions we need to craft meaningful and moral lives.

Through four case studies, this dissertation illustrates how our legal construction and regulation of work can both compromise and support our equal moral agency. Chapter 1 examines legal norms of managerial control and argues that paid workplaces exert systemic pressures on worker expression. Chapter 2 criticizes agricultural guest worker programs for subordinating nonresidents' agential interests in associational freedom to host countries' desires for cheap labor. The second half of this dissertation then argues that workplaces are not merely threats to moral agency, but are also important sites for moral agency. Through discussions of volunteer work and religious workplaces, Chapters 3 and 4 explore the associational interests people have in workplaces as possible venues for sustained cooperation organized around shared values. These interests can be compromised by skill-based specialization and the inegalitarian moral views of employers. While these cases are not exhaustive, they illustrate how workplace equality is not simply material and comparative, but is also a kind of social relation to be fostered through equal consideration of our agential interests in exercising a wide range of expressive liberties.

The dissertation of Sabine Juliette Tsuruda is approved.

Noah David Zatz

Barbara Herman

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University of California, Los Angeles

2018

*For Gary, Felicie, and Steve*

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A version of Chapter 2, "The Moral Burdens of Temporary Farmwork," was published in *The Oxford Handbook of Food Ethics*, edited by Anne Barnhill, Mark Budolfson, and Tyler

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## INTRODUCTION

Democratic constitutional orders hold out the promise of freedom and equality, purporting to guarantee freedom of speech, religion, and association, reproductive freedom, universal suffrage, freedom from involuntary servitude, equal protection under the law, and the like. Yet the relations and statuses that comprise modern working life belie such aspirations. Many people lack a living wage and labor under unsafe conditions. Workplaces have historically been loci of racial, gender, and other status-based discrimination. Employers often demand allegiance to particular political and moral causes, ask people to dress and act as servants, discipline employees for insubordination when employees express concern about workplace policies, and prohibit people from dating co-workers and employees of competitors. 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, while the modern aspirationally 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.<sup>1</sup>

Liberal theories of distributive justice purport to offer a solution to the Marxist worry. Principles of distributive justice are principles for a society's basic structure, which typically includes a society's political constitution, legal system, economy, and the like.<sup>2</sup> And what makes a social institution part of the basic structure is precisely its influence over people's prospects for

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<sup>1</sup> Karl Marx, "On the Jewish Question," in *Early Writings*, trans. Rodney Livingstone and Gregor Benton (London: Penguin Books, 1975), 219.

<sup>2</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), 7.

advancing their ends as equals.<sup>3</sup> Principles of distributive justice, in turn, identify and direct the members of a society to bring about social conditions of freedom and equality through the creation and regulation of the basic structure. Traditionally, such principles include a principle guaranteeing individuals equal basic rights and liberties—such as liberty of conscience, freedom of speech, and associational freedom—and principles guaranteeing fair access to socially generated goods—such as income and offices of social power—for making effective use of those rights and liberties. Distributive justice thus seems to take as its subject matter the legal and economic relations that compromise modern working life and that are hence subject to the Marxist worry, and aims to transform and integrate those relations into a cooperative scheme of equal liberty.

While a fruitful liberal egalitarian literature has emerged to address the morality of wages and access to work, liberalism has tended to neglect the moral agential dimensions of work, such as work's influence over personal identity and moral character, opportunities to form meaningful relationships with others, and work's influence over workers' expressive activity, both in and outside of the workplace. That is regrettable. The liberal ideal of social equality is not merely economic and comparative, but demands that, in our laws and major social institutions, we treat one another as equal moral agents, and thus, as equally entitled to the social conditions we need to craft meaningful and moral lives.<sup>4</sup> Workplaces are some of the most central and pervasive venues for ongoing social cooperation. How we work together—in particular, whether we treat

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<sup>3</sup> See Rawls, *Theory*, 7; A. J. Julius, "Basic Structure and the Value of Equality," *Philosophy & Public Affairs* 31, no. 4 (2003): 321–55.

<sup>4</sup> See John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: The Belknap Press of Harvard University Press, 2001), 23 (explaining that citizens in the liberally just society view themselves as "self-authenticating sources of valid claims[,] [t]hat is, they regard themselves as being entitled to make claims on their institutions so as to advance their conception of the good").

one another as moral equals or moral inferiors in our working lives—thus matters immensely for our ability to form and sustain the belief that we are in fact one another’s social equals. We should therefore take care that the principles that govern and guide how we work together are calibrated to our needs and vulnerabilities as moral agents.

Through a series of moral case studies about managerial control, guest worker programs, volunteer work, and religious workplaces, this dissertation aims to exhibit how neglect of the moral agency dimensions of work is evident in our legal construction and regulation of work. These cases do not exhaust the field, but they illustrate systematic connections between our moral agency and the structure of work that we are liable to miss by just focusing on wages and nondiscriminatory access to work.

For example, Chapter 1, “Working as Equal Moral Agents,” examines prevailing legal norms of managerial control and argues that, even if managerial control were not exercised in ways that exacerbated economic and status-based inequality, paid workplaces exert systemic pressures on worker expression. For example, employers often have financial interests in stifling disruptive but healthy expressions of moral indignation in order to make for a more efficient and manageable workplace. Employers also stand to gain financially by molding employees’ personalities to workplace aims and values, and thereby reducing agency costs. Employment relations can therefore be objectionably hierarchical along dimensions independent of economic and status-based inequality. In turn, clarifying how employment relations fail to treat us as full moral agents by requiring our silence and conformity in the service of employer aims can enrich our understanding of why, for instance, it is so pernicious for employers to require the passive obedience of their employees along lines of race, gender, class, and the like.



How work law structures moral agency exercised outside of work can also place employees and the people (and entities) for whom they labor in social relations of inequality. In Chapter 2, “The Moral Burdens of Temporary Farmwork,” an examination of the social and geographic isolation experienced by agricultural guest workers reveals that agricultural guest worker programs are not simply unjust because workers are paid low wages and subject to materially defective working conditions. The programs are defective in their very principle: in asking nonresidents to adopt a migrant lifestyle that systematically compromises opportunities for stable, diverse, and ongoing intimate and political associations, “host” countries treat their preferences for cheap labor as being more important than nonresidents’ associational liberty. Treating workers as equal moral agents thus requires not only attending to the value of equality in pay and working conditions, but also ensuring that our public justifications for work policies treat people as having equally weighty interests in exercising associational liberties.

In Chapters 3 and 4, I turn to the moral agential interests people have in developing and exercising their capacity for labor in cooperation with others. In Chapter 3, “Volunteer Work, Inclusivity, and Social Equality,” I explain that competitive pressures both within labor markets and in markets for goods and services create financial pressures for employers to organize paid workplaces around comparative skill and ability. While skill-based divisions of labor are not necessarily objectionable, they risk confining people to particular social roles based on their particular skills. Yet what values a person might reasonably adopt, who a person is, and how she might express those values and that personality through her social cooperation, far exceed the possibilities her skills may provide her with in the labor market. Opportunities for volunteer work, insofar as they are shielded from market pressures to specialize, can give those important aspects of moral personality further contexts for development and exercise, and can thereby

lessen some of the inegalitarian influence that labor markets (and specialization more broadly) have on people's identities and social roles.

Examining understudied aspects of the relationship between work, law, and moral agency thus underscores that the value of workplace equality is not merely material and comparative, but also grounded in our agential interests in a wide range of expressive liberties of speech, self-definition, and association. In Chapter 4, "Is There an Egalitarian Basis for a Ministerial Exception?," I explain that attending to the liberty values of workplace equality challenges our constitutional jurisprudence, which has a tendency to prioritize the exercise of basic liberties, such as religious liberty, when they ostensibly conflict with workplace equality. The ministerial exception to employment discrimination law, which shields employment relations between religious organizations and ministers from antidiscrimination law, offers an illustration of that tendency and its threats to the equal moral agency of workers.

Examining work through the lens of moral agency thus illustrates the Marxist insight that objectionable hierarchy and inequality in work can survive democratic political reform. At the same time, striving to concretely articulate and understand the needs we have as equal moral agents when we work together can point the way to legal reform for a more egalitarian scheme of labor and production.

## WORKING AS EQUAL MORAL AGENTS

Liberal egalitarians understand a just society to be “a fair system of cooperation” in which members can regard themselves and one another “as free and equal citizens . . . without pretense and fakery.”<sup>1</sup> The paid workplace is one of the most central and pervasive sites of ongoing social cooperation.<sup>2</sup> Yet it is, by social choice and legal design, a site in which we labor for one another as bosses and subordinates. Employment is presumptively “at will” and hence may be terminated for practically any reason. Commentators, such as Elizabeth Anderson and Samuel Bagenstos, argue that employment relations are therefore structurally susceptible to reproducing and exacerbating economic and group-based status inequality, as employers can use their control over the material and social goods of paid work to exercise arbitrary power over employees.<sup>3</sup> Egalitarian discussions of workplace hierarchy have accordingly tended to center on justifying and refining constraints on at-will employment, such as employment discrimination law, and

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<sup>1</sup> John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: The Belknap Press of Harvard University Press, 2001), 4.

<sup>2</sup> The paid workplace is of course not the only important site of social cooperation. 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. For a discussion of the often overlooked social and moral significance of volunteer work, see Chapter 3, “Volunteer Work, Inclusivity, and Social Equality.” For a discussion of the central yet peripheral status of labor in Rawls’s *justice as fairness*, see Seana Valentine Shiffrin, “Race, Labor, and the Fair Equality of Opportunity Principle,” *Fordham Law Review* 72, no. 5 (2004): 1662–75.

<sup>3</sup> See, e.g., Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)* (Princeton: Princeton University Press, 2017), 55 (summarizing the many ways in which employers can use their control over access to material resources to exercise power over the on- and off-duty lives of employees through the power to fire, discipline, and demote); Samuel R. Bagenstos, “Employment Law and Social Equality,” *Michigan Law Review* 112, no. 2 (2013): 227 (arguing that “individual employment law should be understood as targeting the threat to social equality posed by a boss’s ability to leverage her economic power over workers into a more general social hierarchy in and outside of the workplace”).

have argued that employment should be terminable only for “cause,” that is, only on the basis of reasonable instructions, rules, or policies.<sup>4</sup>

This Chapter argues that economic and group-based status inequality offer important yet incomplete characterizations of how workplace norms can be objectionably hierarchical. Attending to economic and status-based inequality can certainly yield standards for constraining employer power. But an exclusive focus on economic and status-based inequality does not address the more general question of whether workplace norms, such as policies banning disruptive and critical speech, can be in themselves objectionable, even when they do not reflect and exacerbate economic and group-based status inequality. Consequently, theorizing work through the lenses of economic and status-based inequality leaves open what positive standards an instruction or rule would need to satisfy in order to be reasonable.

In order to fill this philosophical gap, this Chapter advances both a methodology and a partial ideal of cooperation for evaluating hierarchical workplace norms. First, I argue that, rather than only ask how the law might constrain inegalitarian exercises of employer power, we should also ask what standards the *operative principles* of employment relationships must meet in order to count as treating employees as the moral equals of their employers. By “operative principles,” I mean the maxim-like principles that set and communicate the expectations and rights of parties to a relationship and the justifications for those expectations and rights. Reflecting on the operative principles of interpersonal and legal relationships reveals that background power asymmetries are neither necessary nor sufficient for failing to stand in relations of equality. We should therefore not only seek to limit the influence of such asymmetries on employment, but

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<sup>4</sup> See *infra* text accompanying notes 30–40 (discussing for-cause termination regimes); section II.A.

should also develop and implement operative legal principles that represent the parties to an employment relationship as moral equals.<sup>5</sup>

Second, and to that end, this Chapter advances a familiar but undertheorized liberal ideal of working as equal moral agents. A focus on moral agency complements the literature on workplace equality by offering theoretical resources to identify and evaluate systemic pressures in paid workplaces on worker expression that may be overlooked by an exclusive focus on economic and group-based status inequality. To illustrate, I explain that firms stand to gain financially by restricting disruptive speech and shaping employees' personalities to the aims of the firm. Yet employees have agential interests in engaging in some potentially disruptive speech. Expressing indignation and other reactive attitudes is a central way in which we acknowledge others as morally responsible and communicate that we are worthy of moral consideration. We also have interests in exercising agency over our moral characters, and our capacities for doing so are compromised when employers try to foster strong social norms of inclusion and exclusion in workplaces that reward and penalize employees based on employees' adherence to firm values.

Reactive attitudes and character development are, of course, not the only morally salient kinds of agential activity implicated by how we work. I turn to other dimensions of work and moral agency in the remaining chapters of this dissertation, including how work arrangements can shape our off-duty associational lives.

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<sup>5</sup> For an argument that democratic theory has regrettably ignored the role of the content of the law in communicating and constructing social equality, see Seana Valentine Shiffrin, "Speaking Amongst Ourselves: Democracy and Law," in vol. 37 of *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, forthcoming), \*1, <https://tannerlectures.utah.edu/Shiffrin%20Lecture%201.pdf> (pagination corresponds to online version) ("This self-imposed relegation of law and democracy to different intellectual compartments of inquiry does us a disservice. It encourages simplistic instrumental views of law and democracy as institutional devices that control untrustworthy agents and manage sub-optimal circumstances, whether by managing conflict and temptation on the one hand or by refereeing between warring interest groups on the other.").

Part I describes how workplace hierarchy is in tension with liberal democracy. Part II argues that our theoretical perspectives on hierarchical workplace norms (and the role of law in regulating those norms) are incomplete. Part III proposes evaluating work through the lens of moral agency and, through a discussion of bans on disruptive speech and internal branding campaigns, illustrates how expressive dimensions of moral agency can be imperiled by hierarchical workplace norms of quiet obedience and character control.

## I. WORK

Hierarchy in employment figures among our basic public assumptions of what it is to be in an employment relationship. Indeed, 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.<sup>6</sup> And that control extends to many dimensions of an employee's life. For example, managers and other higher-ups tell employees how to mop the floor,<sup>7</sup> what political causes to support,<sup>8</sup> when to get a haircut,<sup>9</sup> to take out the trash,<sup>10</sup> what employees can post on social

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<sup>6</sup> For an overview of the common law “right to control” test for employee status, see, e.g., Mitchell H. Rubinstein, “Employees, Employers, and Quasi-Employers: An Analysis of the Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship,” *University of Pennsylvania Journal of Business Law* 14, no. 3 (2012): 617–21. For a minority view, see, e.g., *Dynamic Operations West, Inc., v. Superior Court*, No. BC332016, \*66–67 (Los Angeles Cnty. Super. Ct., April 2018) (holding that a worker is an independent contractor and an employee if and only if the worker is free from the “control and direction” of the hiring entities, performs work “outside of the usual course of the hiring entity’s business,” and the worker is ordinarily engaged in an independent course of trade or business of the same nature as that performed by the hiring entity).

<sup>7</sup> E.g., *Sayers v. American Janitorial Service, Inc.*, 425 P.2d 693, 695 (Colo. 1967) (holding that directions on how to mop were reasonable orders and the plaintiff’s failure to follow those directions was cause for termination justifying the denial of unemployment benefits).

<sup>8</sup> See, e.g., *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 739 (Idaho 2003) (holding that an employee could not state a claim for wrongful discharge for quietly opposing a national forest development project supported by his employer). In contrast to private employees, public employees have some federal constitutional protection for their off-duty political speech. For example, a public employee may call upon the protection of the First Amendment if her employer retaliates against her for speaking on a matter of public concern. See *Pickering v. Bd. of Edu.*, 391 U.S. 563, 574–75 (1968). That right, however, is qualified and narrowly circumscribed. Off-duty public employee speech is typically not protected if it is about internal workplace matters, especially if the speech is perceived as an insubordinate response to “controversy with [the

media,<sup>11</sup> to wear makeup and uniforms,<sup>12</sup> where to eat a snack,<sup>13</sup> when to make personal phone calls,<sup>14</sup> and what procedures to follow before changing a patient's medical prescription.<sup>15</sup> If an

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employee's] superiors.” *Connick v. Myers*, 461 U.S. 138, 147–48, 151–52 (1983). For an argument in support of this principle, see Robert Post, “Participatory Democracy and Free Speech,” *Virginia Law Review* 97, no. 3 (2011): 482–86 (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). When public employees speak pursuant to their job duties, they are likewise unprotected from employer retaliation for that speech. 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 critical perspectives on the limited free speech rights of public employees, see, for example, Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton: Princeton University Press, 2014), 208–10; Cynthia L. Estlund, “Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category,” *George Washington Law Review* 59 (1990): 37–39.

State constitutional and statutory speech protections are sometimes more protective of employee speech, including private employee speech. Connecticut, for example, has extended by statute the same protections available to public employees to private employees, and has explicitly rejected the *Garcetti* principle that an employee's speech is not protected when pursuant to her job duties. See Conn. Code § 31-51q (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); *Trusz v. UBS Realty Investors, LLC*, 123 A.3d 1212, 1221–22 (Conn. 2015) (holding that the Connecticut constitution is broader than the First Amendment in its protection of employee speech, protecting employees even when they speak pursuant to their job duties). For an overview of state law free speech protections, see Eugene Volokh, “Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation,” *Texas Review of Law & Politics* 16, no. 2 (2012): 295–336.

<sup>9</sup> 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).

<sup>10</sup> E.g., *In re Jackson*, 275 A.D.2d 826, 826 (N.Y. 2000) (holding that employee's refusal to take out the garbage in accordance with her job duties because she did not like the way she was asked was insubordination justifying termination and the denial of unemployment benefits).

<sup>11</sup> E.g., *Chipotle Servs. LLC d/b/a Chipotle Mexican Grill & Pennsylvania Workers Org. Comm.*, A Project of the Fast Food Workers Comm., 364 NLRB No. 72 (Aug. 18, 2016), rev. denied, *Chipotle Servs., L.L.C. v. Nat'l Labor Relations Bd.*, 690 F. App'x 277 (5th Cir. 2017) (finding that a Chipotle employees' tweet of “nothing is free, only cheap #labor. Crew members make only 8.50hr how much is that steak bowl really?” in response to a customer's post stating, “Free chipotle is the best thanks,” was not “concerted activity” and thus that the employee could be lawfully required to remove the tweets by Chipotle).

<sup>12</sup> E.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110–11 (9th Cir. 2006) (holding that requiring female casino bartenders to wear makeup was insufficient to establish a prima facie case for sexual harassment under Title VII of the Civil Rights Act of 1964); *Mitchell v. Lovington Good Samaritan Ctr., Inc.*, 555 P.2d 696, 668–69 (N.M. 1976) (holding that an employee's wearing of gold pants in violation of hospital dress code, singing while counting pills, and calling her bosses “birdbrains” supported a finding that she engaged in misconduct barring unemployment compensation).

<sup>13</sup> E.g., *Walthall v. Dep't of Labor*, 497 N.E.2d 782, 783–84 (Ill. 1986) (holding that a former warehouse employee's refusal to eat his hardboiled eggs in the washroom or the cafeteria, on the ground that he felt humiliated

employer wants its employees to use a different kind of sewing machine, implement a certain sales pitch, post a new ad online, or use a new kind of building material, it is typically the employer's prerogative and employees are expected to follow along.<sup>16</sup>

A common explanation for such sweeping managerial discretion and control is that it is efficient, enabling firms to fluidly make and implement decisions in response to economic inputs while avoiding the potentially high transaction costs of having to renegotiate and then oversee each change in direction.<sup>17</sup> But an explanation is not a justification. Efficiency is itself a value, and the way in which we enable its pursuit through the employment relationship is a policy choice that, like any other policy choice, should be able to withstand scrutiny from the point of view of political justice. Hierarchical employment relations are not fixed or inevitable facts about our social universe; the scope and content of those relations are products of the laws that authorize them (and the people that enacted and implemented those laws). To pose the questions of whether and when hierarchical employment relations are compatible with democracy, we should therefore start by asking how the law structures those relations hierarchically.

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by his supervisor's suggestion to eat in the washroom, was cause for termination and thus for the denial of unemployment benefits).

<sup>14</sup> E.g., *In re Pasquarosa*, 260 A.D.2d 903, 904 (N.Y. 1999) (holding that initially refusing to end personal phone calls when asked and responding to such requests with "sarcastic comments" and by "slamm[ing] down the receiver was "insubordination" providing cause for termination and the denial of unemployment benefits).

<sup>15</sup> *Davis v. Unemployment Ins. Appeals Bd.*, 117 Cal. Rptr. 463, 466 (1974) (holding that a nurse's failure to consult a physician before reducing the amount of drugs administered to a patient was cause for termination and grounds for denying unemployment benefits).

<sup>16</sup> See, e.g., *Good Samaritan Hosp.*, 265 NLRB. 618, 626 (1982) (explaining that it is the employer's managerial prerogative to set higher-order managerial policies and company aims, and that federal labor law therefore does not protect collective action to change such aims).

<sup>17</sup> See, e.g., R. H. Coase, "The Nature of the Firm," *Economica* 4, no. 16 (1937): 386–405; Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," *Journal of Financial Economics* 3, no. 4 (1976): 305–60.



First, employment relations are presumed to be “at-will,”<sup>18</sup> meaning that those relations may be terminated for any reason by the employer and employee alike.<sup>19</sup> Through the power to “exile” and thereby disrupt people’s access to material resources and positions of status and power, employers can lend the force of a command to their instructions.<sup>20</sup> Of course, there are legal constraints on the at-will doctrine. For example, employment discrimination law prohibits employers from controlling the terms and conditions of work in ways that discriminate on the basis of race, gender, disability, and the like.<sup>21</sup> Labor law can offer employees a protected and effective voice in their wages, vacation time, and other terms and conditions of work.<sup>22</sup> An at-will employee can also have a legal claim for wrongful termination if the termination violates explicit public policy, such as when an employee is fired for refusing to commit perjury or for filing a workers’ compensation claim for an injury sustained on the job.<sup>23</sup> Tort, criminal, and constitutional law likewise constrain at-will employment.<sup>24</sup>

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<sup>18</sup> See “Master and Servant,” *American Jurisprudence*, 2nd ed. (West, 2018), § 43.

<sup>19</sup> See “Master and Servant.”

<sup>20</sup> See Anderson, *Private Government*, 39.

<sup>21</sup> See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2012) (making it an unlawful practice for employers to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

<sup>22</sup> See National Labor Relations (Wagner) Act of 1935 (NLRA), Section 7, 29 U.S.C. § 157 (2012) (establishing that employees have “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”). For a more detailed summary of exceptions to and constraints on at-will employment, see Cynthia Estlund, “Rethinking Autocracy at Work,” review of *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)*, by Elizabeth Anderson, *Harvard Law Review* 795 (2018): 802–06.

<sup>23</sup> See, e.g., *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25, 28 (Cal. 1959) (perjury); *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (workers’ compensation). New York is a notable exception in not recognizing a common law public policy exception to at-will employment. See *Murphy v. American Home Products*, 448 N.E.2d 86, 89–90 (N.Y. 1983); but see N.Y. Labor Law § 740 (creating a private cause of action for employees fired for “disclos[ing],” participating in an investigation of, or “object[ing] to” unlawful activity by the employer). Jurisdictions differ as to whether to treat wrongful discharge in violation of public policy as a tort or as a contract claim. Compare *Tameny v. Atlantic Richfield*

Even so, employers are still legally presumed to have control over “the ultimate direction, philosophy, and managerial policies” of their enterprises.<sup>25</sup> This means that, among other things, an employer’s larger aims and policies are not the subjects of collective bargaining,<sup>26</sup> and that open criticism of or failure to comport with the aims and policies of one’s job usually provides cause for termination,<sup>27</sup> which may in turn bar access to unemployment benefits.<sup>28</sup> The public policy exception to at-will employment is also typically quite narrow, often not extending to off-duty activity, such as political speech, that seems unrelated to the legitimate financial interests of an employer.<sup>29</sup>

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Co., 610 P.2d 1330, 1335 (Cal. 1980) (“[W]e conclude that an employee’s action for wrongful discharge is ex delicto and subjects an employer to tort liability.”); with *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (“The . . . action [for wrongful discharge] is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Tort actions cannot be maintained.”).

<sup>24</sup> See note 8 discussing limited federal and constitutional protection for employee speech.

<sup>25</sup> *Good Samaritan*, 265 NLRB at 626; see “Labor and Labor Relations,” *American Jurisprudence*, 2nd ed. (West, 2018), § 48A.

<sup>26</sup> See *Five Star Transportation, Inc.*, 349 NLRB. 42, 44–45 (2007).

<sup>27</sup> See, e.g., *Good Samaritan*, 265 NLRB at 626 (holding that speech about a hospital’s quality of medical care concerned the higher-order philosophy and policies of the hospital and therefore employees had no federally protected labor right to collectively complain about the quality of care administered by their employer).

<sup>28</sup> See, e.g., *Gatherer v. Doyles Wholesale*, 725 P.2d 175, 177–78 (Idaho 1986) (holding that employee’s open and vociferous disagreement with company policy was insubordination providing cause for termination and therefore precluded granting the employee unemployment benefits).

<sup>29</sup> In an exceptional decision, the Third Circuit indicated that Pennsylvania law might treat the First Amendment or its state constitution as a source of public policy protecting employees’ off-duty political speech and association, but noted that interference with the employee’s working relationships would be a factor counting against such protection. See *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894, 900 (3d Cir. 1983) (holding that former employee stated a claim for wrongful discharge in alleging that he was fired for refusing to support his former employer’s lobbying efforts and “privately” opposing his former employer’s political views). Pennsylvania has since backed away from that position. See *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 287 (Pa. 2000) (“An employee will be entitled to bring a cause of action for a termination of that relationship only in the most limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth.”).

Capacious managerial prerogatives are additionally reflected in what constitutes a good reason (and hence “cause”) for termination. Even when employment is not at will,<sup>30</sup> an employee’s refusal to follow one of her employer’s “reasonable” policies or orders normally provides cause for terminating an employment relationship, regardless of whether the order or the duty to comply with any such orders was expressly bargained for or agreed to by the employee. Employment contracts are notoriously incomplete and courts will imply a duty on the part of the employee to follow all of the employer’s reasonable orders and instructions.<sup>31</sup>

The right of an employer to control the details of performance of an employee’s duties is the central element in an employer-employee relationship, and an employee’s refusal to obey strikes at the very heart of the contractual relationship existing between an employer and employee. Thus an employee is bound to obey the instructions and follow the rules of the employer, subject to the requirement that the instructions not be unreasonable.<sup>32</sup>

What makes an order “reasonable” is that it bears some possible connection to the employer’s interests, which include efficient production, “maintaining order,” controlling its public image,<sup>33</sup> maintaining a safe and nondiscriminatory environment, and the like. In turn, “reasonable”

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<sup>30</sup> Employment is not at-will when the employment contract stipulates or otherwise represents that the employment is long-term or for some specified term. See Charles J. Muhl, “The employment at-will doctrine: three major exceptions,” *Monthly Labor Review* (January 2001): 1–11. Such representations may be implied from oral representations by the employer or based on representations of long-term employment in workplace policy documents, such as an employee handbook. See *ibid*.

<sup>31</sup> “Duty to obey instructions,” vol. 19, *Williston on Contracts*, 4th ed. (West, May 2018), § 54:23 (citations omitted) (explaining that an employee has a duty to obey all reasonable instructions by her employer except when restricted by the particular terms of the agreement or explicit law to the contrary).

<sup>32</sup> *Williston on Contracts*, vol. 19, § 54:23 (citations omitted).

<sup>33</sup> Perhaps no facet of business life is more important than a company’s place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer’s proper desire to achieve favorable acceptance. Good grooming regulations reflect a company’s policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.

*S. Pac. Transp. Co. v. Doyal*, 289 So.2d 882, 884 (La. 1974) (quoting *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115 (C.A.D.C., 1973)).

policies and orders range from custodial standards and medicine prescription procedures,<sup>34</sup> to random drug tests,<sup>35</sup> orders to cease sexually harassing employees, requests to refrain from extra-marital flirtation,<sup>36</sup> hair-length requirements,<sup>37</sup> dress codes,<sup>38</sup> requirements to participate in and listen to internal branding campaigns,<sup>39</sup> and requests to work overtime,<sup>40</sup> in addition to all the examples of workplace rules and instructions mentioned at the beginning of this section.

Meanwhile, courts frame employees' refusals to follow reasonable orders and instructions in terms of language laden with status-based connotations. Employees have a duty to "obey" reasonable orders;<sup>41</sup> refusing to cut your hair in accordance with company rules and your collective bargaining agreement is first and foremost "insubordination."<sup>42</sup> That is not terribly surprising, as employment law has its roots in the common law of master and servant that

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<sup>34</sup> *Sayers*, 425 P.2d at 693 holding that directions on how to mop were reasonable orders and the plaintiff's failure to follow those directions was cause for termination justifying the denial of unemployment benefits); *Davis*, 117 Cal. Rptr. at 465–66 (holding that a nurse's failure to consult a physician before reducing the amount of drugs administered to a patient was cause for termination and grounds for denying unemployment benefits).

<sup>35</sup> *Chiles Offshore, Inc. v. Adm'r, Dep't of Employment Sec.*, 551 So. 2d 849, 851 (La. 1989).

<sup>36</sup> *Hux v. Mississippi Employment Sec. Comm'n*, 749 So. 2d 1225, 1227 (Miss. Ct. App. 1999).

<sup>37</sup> E.g., *Stergas*, 673 N.Y.S.2d at 223.

<sup>38</sup> See *supra* n. 12.

<sup>39</sup> See Marion Crain, "Managing Identity: Buying Into the Brand at Work," *Iowa Law Review* 95 (2010): 1220–32 (explaining that there is empirical evidence that internal branding campaigns are highly effective in shaping employees' characterological identities); Kent Greenfield, "The Unjustified Absence of Federal Fraud Protection in the Labor Market," *Yale Law Journal* 107, no. 3 (1997): 719–20, 735–38 (explaining that employees have little if any legal protections from fraudulent employer representations except those concerning employee benefits, closures, safety risks, layoffs, and other conditions subject to collective bargaining).

<sup>40</sup> *Arizona Dep't of Econ. Sec. v. Valdez*, 582 P.2d 660 (Ariz. 1978).

<sup>41</sup> See *American Law Reports* 26, 3rd edition (West, originally published 1969, updated 2018), § 1333, for a summary of cases denying unemployment compensation on the ground that the employee was "insubordinate," generally "resistan[t] to authority," or refused to "obey reasonable rules or instructions."

<sup>42</sup> *S. Pac. Transp. Co.*, 289 So.2d at 884.

governed relations between feudal lords and domestic workers, farm laborers, and the like.<sup>43</sup> Yet such linguistic choices are not socially meaningless anachronisms; they can communicate that employment relations are not relations between equals but between moral superiors and inferiors.

This is admittedly a rough sketch of the employment relation, but it illustrates that many of us live and labor under ostensibly inegalitarian relations, regularly being subject to forms of employer control that we would likely find insulting, if not oppressive, in our relations with friends, family, and the state.<sup>44</sup> It of course does not yet follow that hierarchical employment relationships are morally objectionable. Norms and expectations can change depending on the nature of the relationship or project (it seems quite unobjectionable, if not healthy, that a person's relationship with her spouse would be different than that with her parents). But we should at least ask whether hierarchical employment relationships can be reconciled with a public commitment to liberal democracy. For the remainder of this Chapter, I discuss what such a commitment would look like and how hierarchical employment relationships can (and sometimes do) conflict with the fundamental liberal premise of the moral equality of persons.

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<sup>43</sup> For discussions locating status inequality in the employment relation see, for example, Stephen Nayak-Young, "Revising the Roles of Master and Servant: A Theory of Work Law," *University of Pennsylvania Journal of Business Law* 17, no. 4 (2015): 1223–56. 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 default contract rules inferring duties of obedience and loyalty in employment contracts. See Nayak-Young, 1238–51. Nayak-Young also seeks to justify status inequality in work law, whereas I argue here that we should altogether eliminate such a conceptualization of workplace relations. See Nayak-Young, 1252–56. For a similarly critical stance of master-servant status relations in employment law, see generally Aditi Bagchi, "Exit, Choice and Employee Loyalty," in *Contract, Status, and Fiduciary Law*, eds. Paul B. Miller and Andrew S. Gold (Oxford: Oxford University Press, 2016), 271–92. ("It is critical that employment law be responsive to status hierarchies in society and in the workplace or else it will fail in its essential purpose, i.e., mitigating the tendency of that hierarchy to entrench and suffocate.").

<sup>44</sup> See generally Anderson, *Private Government* (arguing that extant employment relations are authoritarian).

## II. THEORY

Of course, moral evaluation of hierarchical workplace norms requires a moral standard with which to perform the evaluation. Liberal egalitarian discussions of workplace equality have tended to focus on how and when employment relations objectionably reflect and exacerbate economic and racial, gender, and other status-based inequality. While these are urgent and important questions to ask, in this Part, I argue that they offer an incomplete perspective on workplace hierarchy, leaving it open what, exactly, should count as a reasonable workplace instruction or rule, and whether the law has any distinctive moral role to play in constructing egalitarian workplace relations.

### A. *A Missing Perspective*

Liberal egalitarianism has tended to conceptualize workplace equality in terms of nondiscrimination and freedom from economic domination.<sup>45</sup> Equality as nondiscrimination requires that employment relations neither foster, reflect, nor exacerbate differences in life prospects, material resources, opportunities for social and cultural contributions,<sup>46</sup> and access to

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<sup>45</sup> These are, importantly, complementary perspectives. In presenting nondiscrimination and freedom from economic domination as two perspectives, I do not mean to suggest that, either in practice or in theory, the social relations each perspective focuses on can be reduced to either discrimination or economic domination. History certainly suggests otherwise. Consider the possible causal and ideological connections between African-American slavery and the prosperity of American cotton (and Northern and British textile mills), women's traditional confinement to the home and their conscription into housework and the labor of care (and their overrepresentation today in caretaking, domestic, and other service industries), the political and social marginalization of immigrants from the Global South and the high demand for their cheap and often-unregulated labor, and, as G. A. Cohen has pointed out, the structural impossibility for the proletariat to be upwardly mobile en masse. G. A. Cohen, "The Structure of Proletarian Unfreedom," *Philosophy & Public Affairs* 12, no. 1 (1983): 3–33.

<sup>46</sup> See, e.g., Vicki Schultz, "Life's Work," *Columbia Law Review* 100, no. 7 (2000): 1881–1964 (arguing that a gender egalitarian society would not simply socially value and recognize the labor of care in the family, but would also structure work so as to make it practically possible for women to partake in the many personal and social goods of participating in the paid workplace). In Chapter 3, "Volunteer Work, Inclusivity, and Social Equality," I argue that the recognitional and agential values of cooperative work outside of the home also count in favor of creating legal space for nonmarket labor that enables people to associate around shared values rather than shared skills needed for efficient or competitive production. John Rawls also, at times, suggests that fair equality of opportunity extends beyond access to material resources and positions of power to include

positions of status and power along axes of class,<sup>47</sup> race, gender, national origin, sexual orientation, and other socially salient identity categories.<sup>48</sup> Equality as freedom from economic domination condemns work arrangements that permit some actors—principally, employers, but also clients and consumers—to leverage their greater economic power to arbitrarily direct or interfere with the activity, thoughts, and broader lives of workers, and to thereby dominate workers.<sup>49</sup>

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equal opportunities for “culture and achievement.” See John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), 73.

<sup>47</sup> See Rawls, *Theory*, 73 (explaining that fair equality of opportunity requires that people with roughly equal talents and willingness to work have the same chances of success to access positions of power and status). For a discussion on the intersection of class and social status inequality, see, e.g., William E. Forbath, “Caste, Class, and Equal Citizenship,” *Michigan Law Review* 98, no. 1 (1999): 1–91 (arguing that equal citizenship requires not only attentiveness to work as a caste-reinforcing site but also alleviating the influence of economic inequality over access to pay and meaningful work, since (economic) class intersects with and reinforces caste). I use the term “nondiscrimination” as opposed to “antidiscrimination” to reflect that this perspective is concerned with economic class as well as racial, gender, and other status-based discrimination. The nondiscrimination perspective is therefore broader than the traditional antidiscrimination approach in the United States, which does not treat class or economic status as a protected category.

<sup>48</sup> There are, to be clear, philosophically rich and deep disputes as to how, exactly, we should understand the animating values of nondiscrimination. For example, there is disagreement as to whether antidiscrimination norms take as their primary subject social status groups or the members of those groups. Compare, for example, Samuel R. Bagenstos, “‘Rational Discrimination,’ Accommodation, and the Politics of (Disability) Civil Rights,” *Virginia Law Review* 89, no. 5 (2003): 825–923 (arguing that employment discrimination law aims to ensure that workplaces neither stigmatize nor systematically disadvantage socially salient groups); with Sophia Moreau, “What is Discrimination?,” *Philosophy & Public Affairs* 38, no. 3 (2010): 143–79 (arguing that antidiscrimination law aims at insulating people’s deliberative processes about what projects to pursue and how to live from “pressures stemming from extraneous traits,” such as race and gender); and Noah D. Zatz, “Disparate Impact and the Unity of Equality Law,” *Boston University Law Review* 97, no. 4 (2017): 1357–1425 (arguing that employment discrimination law aims at preventing and remedying *status causation*: “suffering workplace harm because of one’s race, sex, disability, or other protected status”). I therefore do not mean to suggest that the “nondiscrimination perspective” or its doctrinal implications are uncontroversial or obvious. Rather, my point thus far is simply that what unifies this area of theorizing is its (justifiable) concern with the workplace’s role in reflecting and exacerbating status inequality.

<sup>49</sup> While this nondomination principle is traditionally associated with republican political philosophy, liberal egalitarians, such as Elizabeth Anderson, have drawn on this principle as a means of implementing the broader egalitarian ideal that we should stand in relations of social equality. See Anderson, *Private Government*, 37–71. Some nondomination theories are more broadly concerned with the arbitrary deployment of any kind of power, including status-based power, such as men’s power over women under *couverture*. See, e.g., Iñigo González-Ricoy, “The Republican Case for Workplace Democracy,” *Social Theory and Practice* 40, no. 2 (2014): 232–54. When nondomination theory does not overlap with nondiscrimination, it targets people’s and entities’ use of their greater wealth or control over material resources to arbitrarily control some aspect of

The paid workplace is structurally susceptible to reflecting and exacerbating economic and status-based inequality, and so the philosophical focus on these dimensions of inequality is both unsurprising and immensely valuable. The paid workplace is one of the primary sites of access to material resources and positions of social power, and we attach substantial personal, moral, and cultural value to performing paid work.<sup>50</sup> Prestige (or stigma) in the paid workplace hence readily translates into social status. Accessing paid work is also often a matter of a person's social network and qualifications to compete in the labor market, both of which may be a function of larger class and status-based inequality.<sup>51</sup> Disparate access to education, exposure to violence and endemic poverty, and being subject to regular civil rights violations (such as excessive police force and public accommodations discrimination), are just a few examples of social inequalities that can produce differences in people's qualifications, leaving people with compromised chances to compete for jobs with even seemingly neutral and reasonable hiring criteria.

For liberal egalitarians, part of what it is to be free is to live under social conditions in which a person's class, race, gender, and so forth do not make it more likely that she will be

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workers' lives. As my arguments here are about the incompleteness of the theoretical perspectives, rather than against the substantive claims of the theories that deploy these perspectives (whether singularly or jointly), I will be more helpful to refer to nondiscrimination and freedom from economic domination separately.

<sup>50</sup> I discuss in more detail the personal, social, and agential salience of workplace roles and the exercise and development of one's capacity for labor in Chapter 3, "Volunteer Work, Inclusivity, and Social Equality."

<sup>51</sup> See, e.g., Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010) (arguing that ongoing de facto racial segregation has disadvantaged African-Americans along practically all dimensions of wellbeing, and that this provides our society with reasons to adopt integrative policies). For an argument that the United States lacks the moral standing to adopt policies for neighborhood integration, see, e.g., Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: The Belknap Press of Harvard University Press, 2016), ch. 2.



someone's servant or will otherwise play any particular role in social life.<sup>52</sup> Accordingly, liberal egalitarian discussions of employment relations center on justifying and refining constraints on the at-will doctrine, such as employment discrimination law,<sup>53</sup> minimum wage law,<sup>54</sup> labor law,<sup>55</sup> and other policies to ensure that the workplace does not entrench economic and status inequality, and instead conforms to the liberal principle that “nobody should enjoy lesser freedom because she is black rather than white, a woman rather than a man, and so on.”<sup>56</sup>

Theorists of economic domination, in contrast, reject the at-will doctrine as a matter of principle. Freedom from economic domination requires preventing employers from using their control over material resources, and over the status and recognition goods of participating in the paid workplace, to exercise arbitrary power over the lives of employees.<sup>57</sup> For nondomination

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<sup>52</sup> Liberal egalitarians thus hold that more than seemingly neutral hiring criteria are required to institute a scheme of fair equality of opportunity; we must also implement social policies and arrangements that lessen the influence of class and status on the development of talent, ability, and motivation. See, e.g., Rawls, *Theory*, 73; T. M. Scanlon, *Why Does Inequality Matter?* (Princeton: Princeton University Press, 2018), 57 (“One cannot ask individuals to accept and abide by the rules of a “game” that they did not have a fair chance of playing.”); Shiffrin, “Race, Labor, and the Fair Equality of Opportunity Principle,” 1649–50 (explaining that the liberal principle of fair equality of opportunity requires social arrangements to ensure that economic success and access to positions of social power do not depend on a person’s economic class or social identity status, such as a person’s race or gender).

<sup>53</sup> See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2012) (making it an unlawful practice for employers to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

<sup>54</sup> See, e.g., Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 206(a) (entitling covered nonexempt workers to a minimum wage of at least \$7.25 per hour).

<sup>55</sup> See National Labor Relations (Wagner) Act of 1935, Section 7, 29 U.S.C. § 157 (establishing that employees have “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”). For a more detailed summary of exceptions to and constraints on at-will employment, see Estlund, “Rethinking Autocracy at Work,” 802–06.

<sup>56</sup> Zatz, “Disparate Impact and the Unity of Equality Law,” 1359.

<sup>57</sup> See *supra* n. 3.

theorists, the at-will employment doctrine is paradigmatically and objectionably hierarchical. As Elizabeth Anderson explains,

[A]t-will employment, which entitles employers to fire workers for any or no reason, grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede all of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers' authority over workers, outside of collective bargaining and a few other contexts, such as university professors' tenure, is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal.<sup>58</sup>

As a legal doctrine licensing unprincipled employer power, at-will employment necessarily makes the employment relation one of domination. According to nondomination theorists, moving towards a regime in which employer power may only be exercised through reasonable instructions, rules, and policies—a “for-cause” regime, as opposed to an at-will regime<sup>59</sup>—is thus necessary for realizing workplace equality.

The principle that employees should be free from arbitrary employer power, however, does not on its own settle what should count as cause for terminating or significantly altering an employment relationship; we still need a principle for nonarbitrary employer action, some kind of standard by which we could determine whether the action in question was reasonable.

Commentators have sought to fill the gap by way of an analogy between the workplace and the state. For example, in *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)*,<sup>60</sup> Elizabeth Anderson argues that employment relationships are objectionably hierarchical because employers can exercise legal, economic, and other power over employees

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<sup>58</sup> Anderson, *Private Government*, 53–54. For an argument that Anderson has overstated the extent of employer control over workers' lives, see Estlund, “Rethinking Autocracy at Work,” 802–06.

<sup>59</sup> See *supra* text accompanying notes 30–40.

<sup>60</sup> Princeton: Princeton University Press, 2017.

and employees have little effective say in how that power is exercised.<sup>61</sup> Anderson's framing of the relationship as a kind of authoritarian government thus suggests that the principles that would make employer power nonarbitrary are the principles of political democracy, but applied in the workplace.

Peculiarly, Anderson rejects workplace democracy on grounds of efficiency.<sup>62</sup> After an argument that employment relations are tyrannical, concluding that efficiency values could justify hierarchical employment relations seems ad hoc. This is not to say that efficiency could not provide a basis for some forms of employer control over employee activity and expression. But because Anderson does not articulate a substantive moral principle for egalitarian workplace relations,<sup>63</sup> rejecting workplace democracy on grounds of efficiency feels unprincipled.

Even so, suppose that workplace democracy was the solution to ending workplace authoritarianism (as the republican political theorists that inspire Anderson argue<sup>64</sup>). A question would still remain: what policies should we enact? This is not a question that we can easily answer by just importing our preexisting theories of the just state. The state-firm analogy breaks down when we start to consider the kinds of substantive policies each might permissibly enact. For example, it would seem to violate the freedom of speech for the state to ban all discriminatory speech in all social settings. Yet prohibiting discriminatory speech in the paid

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<sup>61</sup> Anderson, *Private Government*, 45.

<sup>62</sup> Anderson, *Private Government*, 130–31.

<sup>63</sup> Anderson makes clear that her aims are primarily to reframe our approach to thinking and talking about workplace hierarchy, not to advance a substantive ideal of workplace relations. See, e.g., Anderson, *Private Government*, 70.

<sup>64</sup> See, e.g., González-Ricoy, "The Republican Case for Workplace Democracy," 232–54; Alex Gourevitch, "The Limits of a Basic Income: Means and Ends of Workplace Democracy," *Basic Income Studies* 11, no. 1 (2016): 17–28; Hélène Landemore and Isabelle Ferreras, "In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy," *Political Theory* 44, no. 1 (2016): 53–81.

workplace is generally thought to be permissible and indeed required by justice within egalitarian theory. This disanalogy suggests that workplaces and states may be engaged in different kinds of projects, and so the appropriate regulative principles for one do not carry over so easily to the other.<sup>65</sup>

Nondiscrimination and nondomination perspectives thus leave open whether and why it might be objectionable for employers to control employees' expression, dress, conduct, and the like, when that control does not arise from, reflect, or exacerbate economic and status-based inequalities. This is not just an idle theoretical issue, but, as I have been arguing, is an issue we have to confront when we develop standards for what should count as a reasonable instruction and what should count as cause for ending an employment relationship.

### *B. Egalitarian Law*

Much of the forgoing discussion of nondiscrimination and nondomination has focused on how relationships can go wrong when people have unequal power, whether that power be legal, economic, or a product of larger status inequalities of race, gender, and the like. In this narrative, the law has been both a generator of unequal power and a tool to wield and combat unequal power. An exclusive focus on nondiscrimination and nondomination may therefore lead us to conceptualize social equality as a relation of equal power, and to conceptualize the law as a mere causal force in constraining and shaping sources of power, such as relative wealth and social status, to bring that equal power about. Consequently, we may be led to conclude that the law has no morally significant role to play apart from redistributing power. If the market could be

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<sup>65</sup> The appropriate regulative principle for a thing depends on the thing's nature. See Rawls, *Theory*, 29.

structured to bring about the same results, then there would be no reason for the law to intervene.<sup>66</sup>

Before proposing a partial ideal of workplace equality, I want to pause and address why we should resist drawing these conclusions about the relationship between equality, power, and the law, since the way we conceptualize this relationship can affect both the object of the ideal and the method for its implementation. For shorthand, I will refer to the view that social equality is a relation in which our background economic and social statuses give us relatively equal power as “power reductionism.” I will similarly refer to the view that the law’s only morally significant role in fostering equality is to be a causal force in bringing about equal power as “power reductionism about the law.” Here, I will argue that both forms of reductionism are mistaken, and that what makes a relationship egalitarian is not equal power, but that the relationship is structured by a maxim-like principle—what I call an *operative principle*—that treats the parties to the relationship as moral equals. Law, in turn, I will argue, is not merely an instrument of and for power, but is needed to make it the case that, as a society, we labor under egalitarian operative principles, and thus, that we treat one another as moral equals, notwithstanding any underlying power asymmetries.

## 1. Operative Principles

To investigate the relationship between power, principles, and social equality, it may help to start by briefly considering some ordinary aspects of human action and relationships.

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<sup>66</sup> See Estlund, “Rethinking Autocracy at Work,” 811–19 (arguing that Anderson’s theory of authoritarian workplace relations does not offer a principled reply to the left-economist argument that domination would be better solved by making exit costless, but personally rejecting the view that exit is sufficient) (discussing Robert S. Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford: Oxford University Press, 2017)).

A familiar feature of human action is that we act on the basis of principles or maxims. The content of a person's maxims indicates much about how she understands her actions and projects—what her reasons are, how she regards others, what ends she values relative to other ends. Consider, for example, a person who acts on a maxim of helping others only when doing so aligns with her ends. Such a maxim suggests that she does not treat the needs of others as independent sources of reasons for action. Depending on what her particular ends are, her maxim may also indicate that she values helping primarily as a means to her career or looking good in front of her peers. A person's maxims can thus reveal much about how a person values herself and understands her relationships with others.

Relationships between people are also structured by maxim-like principles. Of course, we may not share minds or moral consciences, but our relationships can nonetheless exhibit stable patterns of activity, reactions, and modes of communication that are best explained by maxim-like principles—principles representing what we value in our relationship, how we regard one another, and why we value and treat one another the way that we do. I call these relationship-structuring principles “operative principles” to distinguish them from an individual's maxims.

The operative principles of a relationship are often what we discuss when we try to evaluate what kind of relationship people are in, such as whether they are friends, enemies, family, and what not. To borrow a phrase from Barbara Herman, operative principles govern “from within”—they do not merely function as constraints on activity within a relationship, but set standards, the existence of which is partly constitutive of the relationship.<sup>67</sup>

Operative principles are not just of descriptive and sociological interest. The operative principles by which we choose to govern our relationships can make it the case that we stand in a

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<sup>67</sup> Barbara Herman, “Morality Unbounded,” *Philosophy & Public Affairs* 36, no. 4 (2008): 333.

relation of equality, even when we start off in a position of inequality that gives us unequal power with respect to each other.

Imagine, for example, two friends, A and B. B lacks confidence in his moral abilities and is particularly susceptible to the moral advice and suggestions of others. A, sensitive to this fact, is careful to create discursive space in her relationship with B for B to think through his personal choices. For example, when talking to B about whether B should get married to so-and-so, A will tend to ask B questions to solicit B's feelings on the matter ("How do you feel about so-and-so?" "What does so-and-so think of marriage?"), rather than immediately blurt out her opinions and thereby risk pushing B to reach the same conclusions as A. As A values B as a friend, A will also come to B for moral advice. In asking B for such advice, A likewise tends to exercise more patience than she might with her hardnosed friend C, who has a penchant for debate and philosophical argument, in order to give B time to comfortably talk through what he thinks about A's questions. Over time, should B come to reciprocate and open up to A, A and B can form a friendship.

There certainly seems to be a power imbalance between A and B arising from B's lack of confidence and vulnerability; A could, if she wanted, exercise much greater control over the moral life of B than B could over A. But it is not clear that, in A and B's relationship, A acts as B's moral superior. While the power imbalance between A and B may, if extreme enough, make it difficult for A to interact with B as her intellectual equal, A can easily enough accommodate B's vulnerability to moral control by others by exercising a bit of patience and sensitivity. Thus, while the power imbalance between A and B is salient under the operative principles of their relationship, the operative principles—of patience and consideration, of reciprocal moral teaching and learning—do not permit that imbalance to taint A and B's relationship.

Moreover, and of particular importance here, A and B are able to relate to one another as equals through an exercise of their own agency. The operative principles do not come from above or outside to constrain A or empower B. It is through A's choices to accommodate, and B's efforts to open up and work through his own thoughts with A, that A and B interact with one another as moral equals, notwithstanding their relative vulnerabilities. As such, A and B's relationship is constituted as a friendship through operative principles of moral equality.

Operative principles can also create relations of inequality, even in the absence of preexisting asymmetrical vulnerabilities or economic, social, or other differences producing power imbalances. Recall A's hard-nosed friend, C. Suppose that A and C are, with respect to class, wealth, and social status, equally situated. And suppose that, at the start of their relationship, there are no relevant asymmetric personal or emotional vulnerabilities.<sup>68</sup> C is, nevertheless, a bit of an egoist. C likes to come to A with all of her problems and tends to ignore A when A tries to share as well. A, trying to be accommodating, begins their relationship by listening to C and trying to be sympathetic. Overtime, C not only over-shares but starts to take things out on A. A, in turn, having a tendency to infantilize rather than take people's anger seriously,<sup>69</sup> initially rolls her eyes and keeps silent. Over time, we could imagine that A begins to internalize C's treatment, never having stood up to or otherwise confronted C. A's self-esteem may start to drop; A may permit C to humiliate her in other circumstances. In time, A might find herself occupying a subordinate role in what has now come to be an abusive relationship with C.

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<sup>68</sup> The fact that this is so unlikely already suggests a reason for rejecting power reductionism about equality—that equality would be practically impossible if we had to have the same amount of power over or with respect to one another.

<sup>69</sup> See discussion of reactive attitudes in section III.A.



Of course, relationships are complex. There are many ways A's relationship with C might have gone. What I want to emphasize is that parties can create inequality in their relationships with each other through the operative principles they choose to implement over time. Relationships require care and, through our mutual negligence and moral imperfections, our relations can become relations of subordination, even in the absence of any initial power asymmetries.

## 2. Social Equality

With these points about operative principles in mind, we can now begin to see why power reductionism—both about relationships and the law—is an unattractive view. First, the view that a relationship must be one of equal power in order to be egalitarian is overly simplistic. A relationship can be egalitarian precisely because of the way in which the parties to that relationship respond to and accommodate each another's vulnerabilities (and hence, their unequal power), as A and B's friendship illustrates. Asymmetries in power and vulnerability can threaten social equality,<sup>70</sup> but we should not let our recognition of that fact lead us to overlook the constitutive role that operative principles play in creating relations of social equality.

Second, power reductionism is misguided in the focus of its analysis. In aiming to secure our social equality, we should not simply try to redistribute and equalize power, as if it were something like money to be taxed and transferred. Our social equality rather turns on the operative principles with which we structure our relationships. A theory of social equality should therefore offer resources for identifying and developing substantive moral standards for operative principles.

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<sup>70</sup> See Bagenstos, "Employment Law and Social Equality," 238.

Third, the way that we, as a society, together implement operative principles is through the law. The legal principles, holdings, and judicial explanations that comprise the legal meaning of a “reasonable” workplace rule, the violation of which can provide cause for termination,<sup>71</sup> indicate and communicate what kinds of rights and expectations employers and employees have of one another and why. Reflecting on the moral significance of operative principles thus underscores the need for normative standards for determining what counts as reasonable workplace instructions and policies, and not simply a set of principles for constraining employer power.

Finally, the moral power of operative principles can also offer a partial justification for sometimes creating law in currently unregulated zones of working life. As the case of A and C illustrates, negligence with respect to what we ask of one another and how we communicate with one another can permit a deeply inegalitarian relationship to arise from a starting point of social equality.<sup>72</sup> Consequently, corrupt operative principles in the law are not the only public source of threats to social equality. As many commentators have argued, the failure to create law can also be unjust. The potential for inegalitarian operative principles to emerge from even genuinely autonomous choices thus lends support to that familiar liberal position, and offers a reply to the right-leaning view that at-will employment doctrine is no threat to social equality when entered into by social and financial equals.<sup>73</sup>

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<sup>71</sup> See text accompanying notes 30–40.

<sup>72</sup> Negligence (and ill-will) can of course also recreate and exacerbate preexisting power imbalances. A’s relationship with B could have gone very differently; A might have paid insufficient attention to B’s vulnerability to moral control and inadvertently dominated B’s moral choices.

<sup>73</sup> See Richard A. Epstein, “In Defense of the Contract at Will,” *University of Chicago Law Review* 51, no. 4 (1984): 947–82 (arguing that at-will contracts between consenting adults are autonomy facilitating).

The law is, of course, not the only source of operative principles for employment relationships, just as family law is not the only source of operative principles for hierarchy in the family. Non-legal social norms can also influence the structure and content of workplace hierarchy, as religious and other concepts of femininity, sexuality, and the family can shape and structure spousal relationships.<sup>74</sup> But operative principles for the workplace contained in the law are worth investigating in their own right, even if they do not offer a complete picture of workplace hierarchy. A society's legal system is part of its basic structure, and thus compromises a part of the subject matter of liberal egalitarian justice.<sup>75</sup> Scrutinizing the operative legal principles of workplace hierarchy is thus directly relevant to the inquiry at hand, namely, whether workplace hierarchy is compatible with liberal democracy. We should also care about what the law communicates to employees and the broader society through the way the law frames and justifies workplace hierarchy.<sup>76</sup> It will be difficult for people to sustain the justified belief that they are each other's social equals if the law communicates that some people are the moral inferiors of others.<sup>77</sup> Given the workplace's historical significance as a locus of inequality, and its structural susceptibility to reflecting, reproducing, and creating unequal relations, it may be particularly important for work law to communicate an unambiguous commitment to egalitarian values.

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<sup>74</sup> See, e.g., Simone de Beauvoir, *Le deuxième sexe* (Paris: Gallimard, 1976), Conclusion (arguing that we need to give up the social concept of femininity for women to be liberated).

<sup>75</sup> Rawls, *Theory*, 7; Rawls, *Political Liberalism*, 257–58.

<sup>76</sup> See Shiffrin, "Speaking Amongst Ourselves," \*14–15 (arguing that democratic law plays a distinctive and constitutive role in our communicating to one another that we are equal members of society).

<sup>77</sup> See Rawls, *Justice as Fairness*, 4.

### III. MORAL AGENCY

In Part I, I argued that many of us labor under ostensibly inegalitarian relations at work, and that those relations—of employer control and managerial prerogative—are enabled by law.

Notwithstanding the pervasiveness of hierarchical workplace norms, liberal egalitarian theory has tended to neglect the question of what would make a workplace instruction or policy reasonable, and has instead tended to focus on how to prevent the workplace from reflecting and exacerbating economic and group-based status hierarchies. While such a focus has produced a thoughtful and important literature, in Part II I argued that securing our social equality also requires developing substantive principles for working together as moral equals, and operationalizing those principles through the law. In this Part, I aim to lay some groundwork for identifying and developing general moral standards that can guide evaluation of operative principles for employment relations.

First, in searching for general moral principles for cooperation in production, I do not mean to suggest that, in constructing and giving content to such principles, we should entirely abstract away from workplace hierarchy as we find it on the ground. It may well be that workplace hierarchy almost always (nonaccidentally) coincides with race, gender, national origin, class, and the like. There is much to learn from these cases, and here our intuitions about the morality of hierarchy may be the most stable and robust because of our repeated (though different) experiences with and testimonies of social status-based hierarchy. And so, in what follows, I aim to include such cases as among the paradigm cases of workplace relations that are objectionably hierarchical.

Nevertheless, our understanding of the particulars can be enriched by reflecting on the general and by attempting to systematize the particulars. Getting clearer on why, for instance,

servility is generally wrong can help us to better (though perhaps not completely) understand just why it is so pernicious to demand or expect servility on the basis of a person's class or race.

Thus, in evaluating workplace hierarchy, I will tend to move between the particular, on the one hand, and the abstract and general, on the other, using reflections on the one to inform the other, and vice versa.

In the spirit of this reflexive and legally oriented methodology, I will organize my investigation of a relational ideal for employment around a discussion of dimensions of employees' lives and relationships implicated by examples of workplace hierarchy found in the law. These dimensions include the expression of reactive attitudes and the cultivation of personal identity and character. While this list is far from exhaustive, it captures central exercises of moral agency that are regularly and systematically imperiled by how we work together, but that may be overlooked by a focus on economic and group-based status inequality. I will argue that, by often subordinating these dimensions of employees' moral lives to the control and aims of employers (and to the desires of consumers), a variety of hierarchical workplace norms treat employees as the moral inferiors of their bosses and employers. My aim is that through such a discussion, the contours of a partial ideal of cooperative production will emerge: that we should—through our laws, workplace relations, and interaction with employees—treat employees as equal moral agents.<sup>78</sup> The remaining chapters of this dissertation will continue to develop this partial ideal by examining other zones of working life, such as unpaid work and religious workplaces.

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<sup>78</sup> Attending to our needs and interests as equal moral agents is only one part of a just scheme of cooperation; principles of distributive justice are surely also part of an ideal of cooperative production. This is not to say that distributive justice is wholly distinct from the principle of treating people as equal moral agents. It seems plausible to me that distributive justice should serve that principle. Even so, framing the inquiry as one of moral agency changes the focus from the system-wide and general to the personal and particular. Thus, even if agency values underpin distributive justice, we should not conclude that distributive justice exhausts how we should conceptualize what we owe to one another as equal moral agents.

Finally, in making these arguments, I will take for granted and expand on the liberal egalitarian premise of the fundamental moral equality of persons: that treating people as moral equals constitutively involves treating people as if they have an equal claim to developing and exercising their moral agency (and, indeed, people do have such a claim).<sup>79</sup> While what I mean by “moral agency” will become clearer as the discussion unfolds and in the next chapters of this dissertation, generally, I mean to refer to a person’s capacity to understand, critically evaluate, and implement moral values and ideals of living well, and to take up a moral and social perspective on her relations to others.<sup>80</sup> The capacity for such a moral and social perspective includes having the potential to recognize others as having like capacities, and hence, as occupying an equal status as fellow moral agents. A society therefore fails to treat people as moral equals when it, without justification, subordinates some people’s development and exercise of moral agency to the ends of others. Nor can a society maintain its commitment to moral equality when it communicates that some people are of a morally inferior status. Workplace hierarchy is thus incompatible with democracy when it fails to treat workers as equal moral agents.

#### A. *Making Room for 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

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<sup>79</sup> See, e.g., Rawls, *Justice as Fairness*, 23–24.

<sup>80</sup> See Rawls, *Theory*, 19, 505–10 (explaining that people are moral equals “as moral persons, as creatures having a conception of their good and capable of a sense of justice”); Shiffrin, *Speech Matters*, 168–69 (“[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.”).

represent to ourselves and to others that we have been wronged. When a person responds with a reactive attitude, she thus represents herself as being worthy of moral consideration and represents others as morally responsible.<sup>81</sup>

Employment law neglects the moral significance of reactive attitudes, tending to penalize even their reasonable and non-disruptive expression by employees. For example, in *McClendon v. Indiana Sugars*,<sup>82</sup> the Seventh Circuit held that the plaintiff, Johnny McClendon, could not show he was fired in retaliation for filing an antidiscrimination claim because the evidence indicated he was terminated for insubordination.<sup>83</sup> McClendon worked as a warehouse manager for Indiana Sugars.<sup>84</sup> After being subject to random searches of his garage and truck, called a “black thief,” filing several antidiscrimination complaints, and then feeling (yet again) wrongfully singled out by a new kind of performance review, McClendon walked into his boss’s office angry and said that the new performance review was unfair.<sup>85</sup> Because McClendon was “loud” and did not “tone it down” in that conversation, McClendon was later reprimanded in a meeting with the company president.<sup>86</sup> In that meeting, McClendon said he had a “right to seek outside consultation” before complying with the review, apparently raised his voice, interrupted

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<sup>81</sup> See P. F. Strawson, “Freedom and Resentment,” in *Proceedings of the British Academy* 48 (Oxford: Oxford University Press, 1962): 1–25 (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).

<sup>82</sup> 108 F.3d 789 (7th Cir. 1997).

<sup>83</sup> *McClendon*, 108 F.3d at 799.

<sup>84</sup> *McClendon*, 108 F.3d at 792.

<sup>85</sup> *McClendon*, 108 F.3d at 792–93.

<sup>86</sup> *McClendon*, 108 F.3d. at 792–94.

the president, and replied that “he could talk when he wanted.”<sup>87</sup> Because of the “grossly insubordinate conduct during [this] meeting,” Indiana Sugars was able to fire McClendon with impunity.<sup>88</sup>

Framing McClendon’s expression of moral indignation as insubordination is infantilizing. One might have thought that upon reaching majority and leaving the home, one would be free from discipline for “backtalk” and would be taken seriously when expressing frustration and indignation.<sup>89</sup> Here, the court and Indiana Sugars failed to even consider McClendon’s indignation as a potentially healthy response of a developed moral agent. Prohibiting reasonable moral indignation at work is also demeaning and quasi-feudal, treating bosses as if they were above the moral evaluation of their subordinates. That feudal character is underscored by the fact that employers can often lawfully insult, humiliate, and “unfairly and harshly criticize their employees.”<sup>90</sup> And by cloaking the justification for such employer impunity in the moralizing language of obedience and insubordination, we risk publicly perpetuating a virtue ethics of work

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<sup>87</sup> *McClendon*, 108 F.3d at 794.

<sup>88</sup> *McClendon*, 108 F.3d at 794, 799 (holding that Indiana Sugars had a good faith belief that McClendon was insubordinate and, thus, that offering insubordination as the reason for firing McClendon was not a pretext for acting on discriminatory motives, but rather indicated that McClendon was fired for good cause); see also *Gatherer v. Doyles Wholesale*, 725 P.2d 175, 178 (Idaho 1986) (holding that an employee who raised his voice repeatedly at work and in front of other employees while criticizing new workplaces policies (such as the amount of hours people were required to work, the temperature of their warehouse, and new workflows) was insubordinate and fired for cause).

<sup>89</sup> “Employee’s insubordination as barring unemployment compensation,” *American Law Reports* 26, 3rd Edition, § 1333 (West, originally published in 1969, updated February 2018).

<sup>90</sup> *Thompson v. Tracor Flight Sys., Inc.*, 104 Cal. Rptr. 2d 95, 106 (2001). Upper management may find it easier to secure legal protection from humiliation and verbal abuse. *Compare* *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 799 (7th Cir. 1997); *Hollomon v. Keadle*, 931 S.W.2d 413 (Ark. 1996) (holding that employee could not state a claim for the tort of outrage against her employer, who regularly addressed her with expletives such as “white nigger” and “slut,” in part because she took several years to resign, notwithstanding her claim that she feared he “would have killed her” had she quit); *with* *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991) (“We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete.”).



that perpetuates the view that employers are moral superiors who are owed special respect and consideration *qua* superiors.

Treating workers as equal moral agents thus requires that employers and the law recognize and create space for the expression of reactive attitudes. That requires not only refraining from penalizing their reasonable expression, but also not framing their unreasonable expression in terms that communicate a moral hierarchy between employers and employees.

There is, of course, good reason to believe that more than general hierarchical norms were operative in *McClendon*. In particular, it seems quite plausible that McClendon's firing was pretextual, and that the refusal to acknowledge McClendon's communications as moral indignation was based on stereotypes about race and irrational anger.<sup>91</sup> Attending to the moral significance of reactive attitudes can add to this explanation of why discriminatory application of the doctrine of insubordination here is so pernicious. A discriminatory principle of insubordination reflects the ideology of white supremacy by constructing for black employees a status that treats them as moral inferiors on the basis of their race. Meanwhile, the operative concepts in the doctrine would have provided McClendon's employer (and the court) with a general language and moralizing ideology of worker servility to obfuscate racial animus.

While *McClendon* offers a clear illustration of how the legal concept of insubordination is incompatible with treating employees as equal moral agents, it is in many ways an easy case. McClendon's communications were private—behind closed doors and in writing—and hence non-disruptive. Indignation was entirely reasonable under the circumstances. To what extent should the disruptiveness of moral indignation (or any other reactive attitude) matter for its

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<sup>91</sup> For an argument that racial stereotypes concerning the appropriateness of anger taint doctrines of insubordination throughout labor and employment law, see generally Susan D. Carle, "Angry Employees: Revisiting Insubordination in Title VII Cases," *Harvard Law & Policy Review* 10 (2016): 185–227.

regulation by an employer? And by what standards is a court to judge the reasonableness of a reactive attitude?

In order to answer these questions, we need to take a broader view and ask whether other parties have interests in the organization of work, what those interests are, what weight they should be accorded. While I cannot list all relevant interests here, I will note a few to offer a sketch of how we might seek to harmonize employees' agential interests with other people's like interests in the organization of the workplace.

First, employees are not the only parties whose agential interests are implicated in how we organized paid work. The work we do in paid workplaces produces essential material and social conditions for moral agency, such as food security,<sup>92</sup> housing,<sup>93</sup> educational materials and institutions, roads, and the like. Firms—for-profit and non-profit alike—also produce goods and make possible modes of interaction that, though not necessary for the development of moral agency, make for a lively and diverse culture through which people can implement and cultivate a conception of living well and simply enjoy life. Art museums, concerts, fashion, literature, film are often created and maintained through the efforts of firms and employees.

To run any cooperative enterprise, the participants in that enterprise need to be able to do their part. To run a restaurant, people need to be able to cook and serve food. And for the enterprise to succeed, the participants must be able to perform their parts somewhat efficiently. Constant argument in the fields will compromise the possibility of a high crop yield. You

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<sup>92</sup> For a discussion of how food production and other dangerous forms of work can compromise workers' moral agency, and how those agential risks should limit our creating certain kinds of financial incentives to engage in such work, see Chapter 2, "The Moral Burdens of Temporary Farmwork."

<sup>93</sup> For a discussion of our moral interests in having a home, and what should count as a "home" in light of those interests, see generally Christopher Essert, "Property and Homelessness," *Philosophy & Public Affairs* 44, no. 4 (2017): 266–95.

probably will not want to frequent a restaurant where employees are regularly shouting at one another and working out their issues while you are trying to enjoy your pizza.

Valuing one another's equal moral agency more broadly, as members of a society and not just as employers and employees, may thus authorize us to ask and sometimes expect one another to exercise some degree of control over how and when we communicate reactive attitudes. But those limitations should be set to leave ample room for any moral interests we have in disruptive speech. We do not cease being moral agents simply because and when we go to work. While I cannot address the many ways in which expressing reactive attitudes may be disruptive in this Chapter, I want to discuss several cases that illustrate how a principle of employees' equal moral agency would guide where we locate that boundary and how we might justify its location.

First, in workplaces with a managerial hierarchy, bosses and employees should have reciprocal expectations of one another regarding how and when they express reactive attitudes. Bosses and managers can be just as disruptive in expressing resentment and the like, and employees should not be treated as having weaker moral interests than bosses in expressing reactive attitudes. One way we might implement such symmetry would be to not treat an employee's violation of a disruptive speech policy as cause for criticism (or termination) when the employee was responding to like expression by a manager. For example, if a manager becomes irritated with a clerk on the sales floor and raises her voice at the clerk, responding with a similar reactive attitude should not be cause for termination. If such speech on the part of the employee were to be banned, it would require a justification that could explain the asymmetry in expressive workplace rights.

Our agential interests in communicating reactive attitudes thus not only requires accommodating some disruptive speech, but also shifts the burden of justification. Under the extant regime, it is the employer's prerogative to control disruptive speech, and the employee's burden to show that she was not insubordinate in speaking up. Under a moral agency approach, it is the reverse. The legal regime must justify (or require employers to justify) to employees why employees are being asked to remain silent and follow orders.

Second, a moral agency approach should also lead us to regulate the relationships between employees and consumers. Consider, for example, a restaurant server who is called an idiot by a customer for mixing up an order. Under such circumstances, requiring the server to apologize or remain silent, or penalizing the server for refusing to be spoken to in such a manner, would require the server to act as if she had no moral right to hold the client responsible for the insult, and may leave her feeling complicit in her own humiliation.<sup>94</sup> To be sure, angry servers may make some customers feel uncomfortable and limit an employers' ability to create a certain kind of "old world" ambience of serving. But to the extent that that discomfort and ambience is incompatible with treating employees in accordance with their equal moral status, the preferences reflected in that discomfort and ambience must yield to our weightier egalitarian interest in working under conditions compatible with our moral equality.

This is not to say that workplaces should implement a tit-for-tat (or an eye-for-an-eye) code of conduct. What matters here is not, at bottom, how much expression bosses, employees, and consumers can engage in, or even how much relative to one another. Rather, what is important is that the policy be justified on the basis of principles that treat bosses, employees,

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<sup>94</sup> Here my position bears some similarities to Barbara Herman's view that self-defense may sometimes be required to preserve respect for one's own agency. See Barbara Herman, "Murder and Mayhem: Violence and Kantian Casuistry," *The Monist* 72, no. 3 (1989): 411–32.

and consumers as having significant—and equally significant—interests in expressing reactive attitudes. Thus, policies that aim to operationalize workers’ equal moral interests in expression do not preclude ending an employment relationship for harassing speech. Ongoing disrespect can evince a lack of good faith in performing your contractual duties, and so might reasonably count as a breach of an employment contract (or any other contract) justifying termination of that relationship.<sup>95</sup> Verbal harassment of another coworker imposes an unjustified burden on that coworker’s continued employment, and so a moral agency approach could not justify privileging the cathartic value of harassing speech (assuming it has any such value) over the coworker’s interests in equal opportunity. Harassment of clients and customers may also arbitrarily interfere with their ability to access public accommodations.

A moral agency approach nonetheless recommends interpreting harassment narrowly and permitting the occasional unreasonable outburst. Moral agents are not infallible. We make mistakes in our moral reasoning and we sometimes fail to articulate our concerns in the most considerate fashion. It seems to be equally a failure of good faith to deny someone an opportunity to repair the relationship merely because the outburst or communication was rude, and overly punitive to end someone’s access to the material and social goods of her job (even if she could easily find another). Treating employees as equal moral agents requires accommodating some moral imperfection.

Finally, speech that communicates reactive attitudes need not be the only form of disruptive speech. A variety of political and critical speech may also be disruptive and yet worthy of protection under a moral agency analysis. Similar considerations I have discussed

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<sup>95</sup> See *Restatement (Second) of Contracts* § 205 (American Law Institute, 1981) (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”).

here—about the burden and nature of justification—would consequently also apply to employer control over such speech (and laws authorizing that control).

### *B. Character and Identity*

So far, I have been advancing two kinds of claims about a moral agency approach to evaluating workplace hierarchy: a substantive claim about our agential interests in expressing reactive attitudes, and methodological claims about the burden of justification and where equality should be operationalized (namely, at the level of the justification for workplace policies and the laws that permit such policies). A moral agency approach shifts the burden of justification for stifling expression onto employers and the broader society, and the justification, whatever it is, must explain how the policy at issue accords equal value to affected parties' agential interests.

I now want to turn away from employees' own unsolicited speech to explore another facet of work that imperils our agency: the speech that our employers direct to us as employees. But first, I want to introduce and briefly sketch another important dimension of moral agency, apart from reactive attitudes, that will help us to see why we should be so concerned about what our employers say to us.

In addition to being able to represent oneself and others as moral agents, as one does when responding to wrongdoing with reactive attitudes, another central exercise of moral agency concerns our moral characters. This is not to suggest that a person can sit down and simply decide what kind of person to be. But, through reflection on various moral values, experimentation with them in practice, and through a person's deployment of those values to construct her maxims and ends, a person can cultivate a particular moral character.

While this all sounds rather individualist and intellectual, as social beings, we play important roles in supporting one another's autonomous character development. Two roles in

particular strike me as salient in the context of work. First, to continue a theme from the previous section, people are imperfect moral agents. That is in part because our moral knowledge is, like our knowledge of the material world, limited and something that needs to be learned and cultivated over the course of our lives. In managing those limits, we do better with the help of others. For example, people close to us can help us see our moral error when our personal desires or interests in a given case make it hard for us to stand back and evaluate. And an important way people help us do this is communicative—by, for instance, telling us and directing reactive attitudes towards us when we go wrong.<sup>96</sup> Of course, the resentment and indignation of others is not a perfect indicator of the morality of our actions. But insofar as those attitudes are the responses of adult moral agents, they are important data points to consider.

Second, in addition to helping a person discover and evaluate her own moral shortcomings, other people also support a person's autonomous character development by providing her with the information she needs to know when and how to act on the moral duties she has.<sup>97</sup> It is hard to be a compassionate friend, for instance, if your friend does not share her inner life with you. 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. It is not surprising that close friends should often come to like the same music and share similar pet peeves. So, in addition to helping a person see her own moral limits, a person's

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<sup>96</sup> See Shiffrin, *Speech Matters*, 9 (“Given our mutual epistemic limitations and the complexity of the environment in which we find ourselves, we depend upon one another’s beliefs, knowledge, and reactions to our beliefs to construct a reliable picture of our world, so that we can navigate through it and understand who we are and where we are situated. This mutual epistemic dependence . . . includes our ability to fully understand our moral and political duties.”).

<sup>97</sup> See Shiffrin, *Speech Matters*, 9.

relations with others are also sites for learning about different moral values and how to operationalize them, and for (often jointly) refining our personal tastes and dispositions.

Thus, in light of the social nature of our capacity for acquiring moral knowledge and developing our characters, it is crucial 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.<sup>98</sup> And then, finally, in morally immersive environments, it will be important for participants in those environments to have discursive space to challenge the ideas and values they are presented with. Such space is instrumental to ensuring that mutual influence can operate through a person's rational agency, rather than through manipulation of her socially sensitive moral emotions (of guilt, shame, and the like).

Returning now, to the workplace, consider the following 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.<sup>99</sup>

Internal branding campaigns should strike us as really disturbing in light of the social dimensions of how we develop our characters over time. The above passage depicts a kind of

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<sup>98</sup> See Seana Valentine Shiffrin, “What is Really Wrong with Compelled Association?,” *Northwestern University Law Review* 99 (2005): 862, 866, 869–70 (arguing that social associations are “sites where ideas are [cooperatively] developed and take root” through discussion, mutual influence, and shared projects, and that these features of social associations make it particularly important that people be free to associate with whom they want).

<sup>99</sup> Crain, “Managing Identity: Buying into the Brand at Work,” 1201 (quoting Pierre Berthon, Michael Ewing, and Li Lian Han, “Captivating Company: Dimensions of Attractiveness in Employer Branding,” *International Journal of Advertising* 24, no. 2 (2005): 153–54).



internal policy that, whether negligently or purposively, makes use of the social aspects of a person's capacity to exercise agency over who she is. Workplaces are immersive, putting us into close and repeated contact with others for most of our days. We often form friendships at work and meet our spouses at work. Internal branding campaigns foster strong social relations in the workplace organized around the company's values, and then predictably engage our general moral receptiveness to the judgment of our peers in the service of the employer's values.<sup>100</sup> 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 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 accordingly.

At the same time, by linking our social standing in the workplace to the brand, internal branding programs draw on the second role of others in our moral development that I discussed—our trust and reliance on others for cultivating moral knowledge and a view about how to live well. By putting its employees in immersive regular interaction with other employees who show support (or disdain) based on conformity to the company's values, a company is able to draw on the developed adult moral receptiveness to others, and learned patterns of reliance and trust, to control the personalities of its employees. Unsurprisingly, firms report tremendous

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<sup>100</sup> As Katherine Stone explains, the modern employment relationship has become increasingly characterized by a preference for flexibility and versatility, its consequent tendency towards precarity, and the proliferation of boundaryless jobs and careers. See Katherine V. W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004), 67–70, 94. Gone is the implicit promise of job security; instead, it has been replaced with an implicit promise to give employees marketable skills and access to professional networks. See *id.* at 92, 112. Job security has thus been effectively replaced with “employability security.” *Id.* at 114. Accordingly, as James Nelson argues, workplaces that manifest these features may make it less likely that employees will come to identify themselves with workplace norms. See James D. Nelson, “The Freedom of Business Association,” *Columbia Law Review* 115, no. 2 (2015): 461–514. At the same time, firms like Google and Facebook, which are well known for their flexible hiring and flat hierarchies, are also famous for their internal corporate branding campaigns. This is consistent with the phenomena Stone discusses, for with an effective corporate branding campaign companies do not need to make promises of job security to secure high performance; employees will already feel obligated to perform.

success in their internal branding programs, and employees report high levels of personal and moral identification with the firm.<sup>101</sup> Employees at Southwest Airlines, for example, have “compared [the airline’s] indoctrination program to a religious conversion.”<sup>102</sup>

The regulatory environment surrounding internal branding campaigns exacerbates these threats to autonomous character development. Except where internal branding campaigns involve employee benefits and union activity, such campaigns are subject to virtually no legal regulation, not even antifraud protection,<sup>103</sup> notwithstanding their effectiveness. All the while, the failure to show up at meetings and participate in training and activities that are part of such programs can easily constitute insubordination.<sup>104</sup>

The failure to regulate combined with employer rights to expect participation thus imperil employees’ abilities to engage in autonomous character formation. Such a hands-off legal stance also lends employment a tenor akin to a parent-child relationship, where employers are treated as having rights to subject employees to a rigorous kind of moral education with practically no public oversight with regard to the content of that education. 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”).<sup>105</sup> In principle, such a

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<sup>101</sup> See, e.g., Crain, “Managing Identity,” 1209–13.

<sup>102</sup> Crain, “Managing Identity,” 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 and Jackie Freiberg, *Nuts! Southwest Airlines’ Crazy Recipe for Business and Personal Success* (New York: Broadway Books, 1996), 10, 267).

<sup>103</sup> See Greenfield, “The Unjustified Absence of Federal Fraud Protection in the Labor Market,” 719–20, 735–38.

<sup>104</sup> See *supra* Part I.

<sup>105</sup> See Crain, “Managing Identity,” 1212.

relationship treats employees' agential capacities for shaping their characters and personalities as a tool for practically whatever purposes employers choose. Indeed, submitting the development of such capacities to one's employer is what an obedient worker would do.

Of course, to train employees, it will often be necessary to communicate to employees what kind of philosophy the employer aims to implement. That is particularly so when the employing entity is organized around a moral cause that shapes what and how it produces or offers services.

For example, training for work at a public defender's office might involve a discussion of the right to counsel, the social justice dimensions of criminal punishment, and moral justifications for the adversarial system. Exposing employees-in-training to such philosophical issues and moral values can reduce agency costs down the line by teaching employees the higher order principles that they can use to self-monitor their administration of public legal services. That is not just a plus for the public fisc, but also serves the interests of recipients in dire need of quality and effective legal representation.

Of particular relevance here, such training supports employees' moral agency, giving employees the space and epistemic resources to think reflectively and critically about their own work. The moral character of a workplace may make it particularly important that employees understand what mission they are being asked to further because they may occupy an office in which authenticity and sincerity are essential to provision of the service.<sup>106</sup> While I cannot fully explore the matter here,<sup>107</sup> a public defender's office's fight for social justice can be compromised when its attorneys communicate that they are just doing the work in hopes of

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<sup>106</sup> See Shiffrin, *Speech Matters*, 98–102.

<sup>107</sup> But I return to this issue through a discussion of religious workplaces in Chapter 4, "Is There an Egalitarian Basis for a Ministerial Exception?."

receiving a judicial nomination later on, or if they interact with or discuss other people's clients in a way that pokes fun at and demeans those clients on the basis of their indigence. Exposing employees to the values a workplace seeks to further can thus make the workplace an effective venue for exercising associational liberties by developing and implementing shared values.

An equal moral agency evaluation of training programs and workplace cultures can thus support efforts by employers to educate future employees about the nature of the project they will be furthering, and can sometimes permit employers to ask and expect their employees to act in ways consistent with that mission. Those employer efforts and claims are particularly strong in the nonprofit sector where authentic speakers and responsible administration are needed. In contrast, for-profit employers have weaker claims to demanding authenticity when authenticity is cultivated and sought as a means to reducing agency costs.<sup>108</sup>

Treating workers as equal moral agents thus does not require that our roles as employees be wholly detached from our character and personality. Employment relations can be fruitful contexts for cultivating character and personality through critical reflection on the content and aims of one's work, and the reasons that support performing such work, as in the public defender example. For training and other employer efforts at communicating workplace values to foster such reflection, employees must be able to engage in critical discussion about the values they are being asked to further. Accordingly, training programs that penalize nonconformity will be suspect on a moral agency approach. For example, employer policies under which new hires are "voted out" by co-workers for not fitting in with company culture circumvent employees'

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<sup>108</sup> See Crain, "Managing Identity," 1198–99.

rational processes by encouraging employees to internalize company norms through threats and the shame of social exclusion.<sup>109</sup>

Internal branding efforts are, of course, not the only ways in which employers may exert an illicit influence over employees' characters. Treating workers as having valuable interests in shaping their own characters will also require closely scrutinizing dress codes and grooming requirements, the ethics of advertising, and a variety of other dimensions of workplace cultures and practices. The broader point I have meant to make here, though, is that the immersive social character of work, coupled with firms' financial interests in reducing agency costs, make workplaces structurally vulnerable to being sites for indoctrination. Considering workers' equal moral agency should therefore lead us to search for and implement legal principles that are calibrated to the needs and vulnerabilities of employees as social beings who exercise agency over who they are through their relations with others.

## CONCLUSION

Workplace hierarchy poses systemic threats to our moral agency. That is not only because workplace hierarchy is structurally susceptible to reflecting and reproducing economic and group-based status inequality. Employer control over workplace policies and ends is exercised through asymmetrical legal rights and expectations of quiet obedience and moral deference, and those rights and expectations are deployed and justified through concepts that perpetuate the view that employers are superiors who are owed special respect and consideration *qua* moral superiors.<sup>110</sup> The public messages communicated and relationships fostered by extant hierarchical workplace norms of expression are accordingly incompatible with the liberal

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<sup>109</sup> See Tamara J. Erickson and Lynda Gratton, "What It Means to Work Here," *Harvard Business Review* (March 2007) (describing Whole Foods's policy for probationary workers).

<sup>110</sup> See *infra* Part I.

principle of treating one another as equal moral agents. Meanwhile, financial incentives to control disruptive speech and the characters and identities of employees further imperil employee agency, especially in light of the immersive and unregulated character of workplace cultures.

Although in making these arguments I have adopted a critical orientation, I have also sought to offer theoretical and methodological resources for evaluating how social inequalities might manifest in the workplace even when those inequalities do not track economic and group-based inequality. In particular, I have argued that we should not just target underlying asymmetries in vulnerability, wealth, and status, but should also seek to develop substantive moral principles for determining when a given workplace policy or rule is reasonable. I proposed that the value of our equal moral agency can serve as a helpful guide in developing egalitarian operative legal principles for reasonable workplace norms. In the next three chapters, I further develop and deploy the value of our equal moral agency to inquire how work arrangements can shape workers' expressive activity by structuring their off-duty lives and by making available different forms of association in the workplace.

## THE MORAL BURDENS OF TEMPORARY FARMWORK

Employers in wealthy countries seem to have difficulty attracting enough domestic workers to perform farmwork, either because wages are too low, or the work is simply too unpleasant.<sup>1</sup>

Farmwork can be physically and psychologically demanding. Farmworkers slice, pick, and bag under the hot summer sun.<sup>2</sup> The demand for agricultural labor may vary by season, thus making farmwork a potentially unstable and precarious line of work.<sup>3</sup> Farming is also often undertaken

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<sup>1</sup> See, e.g., Philip Martin and Douglas B. Jackson-Smith, “Immigration and Farm Labor in the U.S.,” SSWA Faculty Publications, paper 440 (2013), [https://digitalcommons.usu.edu/sswa\\_facpubs/440](https://digitalcommons.usu.edu/sswa_facpubs/440). (“Since farm work [in the United States] is more physically demanding and less well compensated than nonfarm jobs requiring similar skills, it is increasingly difficult to attract domestic workers willing to take farm jobs. This is one reason why farm employers have increasingly relied on foreign workers.”); see also Part I.

<sup>2</sup> See Eric Hansen and Martin Donohoe, “Health Issues of Migrant and Seasonal Farmworkers,” *Journal of Health Care for the Poor and Underserved* 14, no. 2 (2003): 153–64 (discussing the long-term health consequences of farmwork produced by the demandingness of the manual labor, exposure to pesticides and other chemicals, and social and geographic isolation).

<sup>3</sup> For a discussion of precarity and farmwork, see, for example, Janet McLaughlin and Jenna Hennebry, “Pathways to Precarity: Structural Vulnerabilities and Lived Consequences in the Everyday Lives of Migrant Farmworkers in Canada,” in *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, ed. Luin Goldring and Patricia Landolt (Toronto: University of Toronto Press, 2013), 175. Unstable and insecure employment patterns are certainly not limited to farmwork. See Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s* (New York: Russell Sage Foundation, 2011); Gillian Lester, “Careers and Contingency,” *Stanford Law Review* 51, no. 1 (1998): 78–86 (discussing challenges of analyzing “contingent” employment due to its heterogeneity). For an analysis of the social-political dimensions of widespread precarious employment, see Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury Academic, 2011) (discussing how neoliberal economic policies from the 1970s have given rise to a global social class characterized by livelihood insecurity).

in isolated rural areas, which may compromise farmworkers' access to healthcare<sup>4</sup> and leave farmworkers vulnerable to stress and depression due to related social isolation.<sup>5</sup>

The product of that hard work is, of course, absolutely necessary; food is a nonnegotiable basic need.<sup>6</sup> But instead of raising wages, reimagining food production, or encouraging permanent immigration to meet indefinite needs for food production, countries such as the United States have adopted agricultural guest worker programs to “import” foreign labor for short periods of time (normally one to two years) to perform farmwork.<sup>7</sup> In practice, the

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<sup>4</sup> See, e.g., Heidi Bircher, “Prenatal Care Disparities and the Migrant Farmworker Community,” *The American Journal of Maternal/Child Nursing* 34, no. 5 (2009): 303–07 (explaining that geographic isolation is one factor contributing to difficulty farmworkers face in accessing prenatal care).

<sup>5</sup> See, e.g., Ann E. Hiott et al., “Migrant Farmworker Stress: Mental Health Implications,” *The Journal of Rural Health* 24 (2008): 36 (explaining that social isolation, in comparison to other factors such as work conditions, family, and substance abuse by others, had the “strongest potential effect on farmworker anxiety”); Joseph D. Hovey and Cristina G. Magaña, “Suicide Risk Factors Among Mexican Migrant Farmworker Women in the Midwest United States,” *Archives of Suicide Research* 7, no. 2 (2003): 108 (identifying geographic and social isolation as a “stressor” for migrant farmworkers).

<sup>6</sup> For a discussion of the relationship between food and political and economic stability, see, for example, *Africa Human Development Report 2012: Towards a Food Secure Africa* (New York: United Nations Development Programme, 2012), [http://www.undp.org/content/dam/malawi/docs/general/Africa\\_HDR\\_EN\\_2012.pdf](http://www.undp.org/content/dam/malawi/docs/general/Africa_HDR_EN_2012.pdf). Food production is, of course, only part of responding to a society's need for food security. See “Implications of Economic Policy for Food Security: A Training Manual,” Food and Agriculture Organization of the United Nations, accessed April 23, 2018, <http://www.fao.org/docrep/004/x3936e/x3936e03.htm>. Famines, for example, may occur even in the absence of a food shortage. See Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981).

<sup>7</sup> U.S. Immigration and Nationality Act, 8 U.S.C. §§ 1188(a)(1) (2012) (specifying that the U.S. Attorney General may grant a “petition to import an alien as an H-2A worker . . . [when] there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the [agricultural] labor or services involved in the petition”); see also 8 C.F.R. § 214.2(h)(5)(viii)(C) (2014). The United States's agricultural guest worker program operates through the H-2A visa. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188; 8 C.F.R. § 214.2(h)(5). Former temporary farmworkers may reapply for temporary farmworker status after remaining outside the United States for an uninterrupted period of three months. See 8 C.F.R. § 214.2(h)(5)(viii)(C) (2015). There is no formal limit on how many times the worker can apply for readmission as a temporary farmworker, but there is no guarantee that the worker will secure readmission through the same employer, as the employer must show each time that the job is only temporary. See 8 C.F.R. § 214.2(h)(5)(iv). The employer must also show that the prospective temporary farmworker qualifies for that status, and hence, that the prospective worker has “a residence in a foreign country which he has no intention of abandoning.” See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 8 C.F.R. § 214.2(h)(5)(i)(D). This intent element likewise limits a temporary farmworker's ability to return. For a description of the H-2A program, see generally “H-2A Temporary Agricultural Workers,” U.S. Citizenship and Immigration Services,



programs are often riddled with civil and human rights violations.<sup>8</sup> The programs can be hard to enforce (and may even be purposefully underenforced),<sup>9</sup> and may have other features—such as linking lawful presence to continued employment—that leave guest workers vulnerable to abuse and exploitation.<sup>10</sup> Even so, commentators argue that the programs enable receiving countries to find willing workers to produce food at a low cost,<sup>11</sup> while giving people from poorer countries access to higher wages than they could command at home.<sup>12</sup> Agricultural guest worker programs may therefore seem like good solutions to agricultural labor shortages, so long as receiving countries can better protect workers from abuse.

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accessed October 8, 2015, <http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers>.

<sup>8</sup> See, e.g., “*I Already Bought You: Abuse and Exploitation of Female Migrant Domestic Workers in the United Arab Emirates*” (Human Rights Watch, October 22, 2014), <https://www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers-united> (describing human rights violations of domestic workers under the UAE’s *kafala* system).

<sup>9</sup> See *H-2A Visa Program: Meeting the Growing Needs of American Agriculture? Hearing Before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives*, 112th Cong. 1–2, 3–4 (2011) (statement of Rep. Zoe Lofgren) (explaining that there are “two signs at the [U.S.] border[:] [o]ne says ‘no trespassing,’ and the other says, ‘help wanted’ ” (citation omitted)) (hereinafter H-2A Congressional Hearing). Overstay risks in the United States may emanate from a longstanding practice of lax immigration enforcement. See Hiroshi Motomura, *Immigration Outside the Law* (New York: Oxford University Press, 2014), ch. 1 (explaining that immigration enforcement by deportation has historically been highly selective and discriminatory, in part because of competing political and economic pressures); Hiroshi Motomura, “Immigration Outside the Law,” *Columbia Law Review* 108 (2008): 2049–55.

<sup>10</sup> See, e.g., H-2A Congressional Hearing, 19–22 (statement of Arturo S. Rodriguez, President, United Farmworkers of America) (explaining how H-2A workers fear reporting unlawful employer behavior because their authorization status is tied to continued employment with their sponsoring employer, that H-2A workers have suffered from abuses “ranging from the minor to very serious trafficking in human beings,” and that the government has “rarely enforced the protections of the H-2A program”).

<sup>11</sup> See, e.g., H-2A Congressional Hearing, 35–36 (2011) (statement of Rep. Elton Gallegly, Chairman, Subcomm. on Immigration Policy and Enforcement, and written statement of James S. Holt, agricultural labor economist). Arguments for guest worker programs in the United States are complicated by historical and massive undocumented migration. For discussions of the potential for temporary admissions to operate as an alternative to undocumented migration in light of such a history, see Motomura, *Immigration Outside the Law*, ch. 7; Hiroshi Motomura, “Designing Temporary Worker Programs,” *University of Chicago Law Review* 80 (2013): 269–74.

<sup>12</sup> See, e.g., Javier S. Hidalgo, “An Argument for Guest Worker Programs,” *Public Affairs Quarterly* 24, no. 1 (2010): 25–26, 29–30.

Much of the critical commentary on such programs has accordingly focused on the extent to which genuine improvements are actually possible.<sup>13</sup> But we should also be asking a more fundamental question: why is it reasonable to ask nonresidents to repeatedly and temporarily relocate to perform farmwork to begin with? I argue here that relying on temporary workers for a nontemporary need is problematic because it asks nonresidents to disrupt their personal and political associations for the benefit of our own. Were we to ask our own residents to perform the same work, or invite nonresidents to permanently immigrate, those disruptions would be less severe. We could also understand our own farmwork as part of pursuing a larger shared project of producing the food security needed to maintain our society.

I begin by explaining that current agricultural guest worker programs are in some respects an improvement over their predecessors—agricultural guest worker programs that permitted unlimited stay within receiving countries without the option of applying for citizenship. Workers under such programs often spent most of their adult lives in receiving societies without the status and protections of lawful permanent residence or citizenship. Supporters of *temporary* farmworker programs thus argue that the temporary programs not only produce mutually beneficial financial arrangements, but also avoid creating an underclass of workers.

In Part II, I explain that an intuitive way commentators have resisted that conclusion is by arguing that temporary farmworker wages are always too low, either because of sector or employer restrictions, or because of inequality in bargaining power between wealthy receiving societies and prospective guest workers. Yet the wage is only one part of the bargain. An offer of work is not just an offer of money for some unspecified labor; it is a request to have a person do

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<sup>13</sup> See text accompanying n. 43–50.

a particular kind of work, to give her life a particular shape and content. I thus argue that whether temporary farmworker programs are morally sound depends not only on the wage, but on whether we are justified in asking nonresidents to perform migrant farmwork to begin with.

Hence, in Part III, I turn to the burdens and aims of the work itself. I argue that the physical demands, temporariness, and relative isolation of the farmwork compromise guest workers' moral interests in having stable access to networks of intimate, civil, and political associations.<sup>14</sup> Not only is this a burden for workers, but the programs risk impoverishing associational life in major sending countries. Performing farmwork within one's own society may admittedly produce some of the same moral burdens. But I argue that as citizens and residents of the same country, we likely share a duty to ensure a stable food supply for one another. Insofar as farmwork must be done to satisfy that duty, it may be reasonable to ask one another to perform farmwork.

In contrast, absent some further explanation, there is generally no relationship between citizens and residents of one country and those of another that can explain why the former may

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<sup>14</sup> In so arguing, I principally discuss the United States's temporary farmworker program, but my arguments also apply to countries with similar programs. Canada's Seasonal Agricultural Workers Program (CSAWP), for example, permits Canadian growers to hire Mexican and Caribbean nationals for temporary farmwork. See "Hire a temporary worker through the Seasonal Agricultural Worker Program - Overview," Government of Canada, last modified January 25, 2016, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html>. The program is negotiated through a number of bilateral "administrative" Memorandums of Understanding with sending countries. See, e.g., Agreement for the Employment in Canada of Seasonal Agricultural Workers From Mexico in British Columbia for the Year 2015, accessed October 8, 2015, [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/seasonal/sawpmc2015-bc.pdf](http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpmc2015-bc.pdf) (permitting Canadian growers to hire Mexican nationals for temporary agricultural work for up to eight months); Canada-Mexico Joint Action Plan 2010–2012, accessed October 8, 2015, <http://embamex.sre.gob.mx/canada/images/mexico-jap.pdf> (reaffirming both countries' commitment to the CSAWP). For a historical overview of CSAWP, see Laura A. Hernández, "The Constitutional Limits of Supply and Demand: Why a Successful Guest Worker Program Must Include a Path to Citizenship," *Stanford Journal of Civil Rights and Civil Liberties* 10, no. 2 (2014): 267–81. For an overview and comparative analysis of guest worker programs in a variety of countries and sectors, see Philip Martin, Manolo Abella, and Christiane Kuptsch, *Managing Labor Migration in the Twenty-first Century* (New Haven: Yale University Press, 2006), Part II; Ruth Levush, *Guest Worker Programs* (The Law Library of Congress, February 2013), <http://www.loc.gov/law/help/guestworker/2013-008925%20FINAL091013.pdf>.

demand that the latter grow the formers' food.<sup>15</sup> Rather, the primary motive for the programs seems to be receiving societies' unwillingness to perform farmwork or take on the (perceived) costs of permanent immigration. And such bare preferences are not enough to justify asking nonresidents to perform migrant farmwork. The request itself treats nonresidents' interests in associational life as less valuable than our own. In turn, incentivizing nonresidents to take on the life-shaping burdens of the work risks subordinating nonresidents and reifying global wealth inequality. Temporary farmworker programs are thus distinguishable from other types of guest worker programs motivated by a shared project or aim. In Part IV, I explain how, for example, visiting academic positions, student exchange programs, and the like, may be justified by the value of cultural and intellectual exchange between different societies.

I close by discussing policy implications of the moral problems with temporary farmworker programs. My objections to the programs recommend ultimately dismantling many extant temporary farmworker programs. But simply terminating the programs would likely yield continued compromised social conditions for nonresidents' moral agency, leaving nonresidents potentially more destitute and trapping them in seriously unjust societies. The moral defects of

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<sup>15</sup> In making these arguments I assume that a society has some interests in regulating the number and identity of the people it admits. Border regulation of course raises pressing philosophical issues of its own. For example, border regulation may be in tension with equality norms against national origin discrimination. See Howard F. Chang, "Guest Workers and Justice in a Second-Best World," *University of Dayton Law Review* 34, no. 1 (2008): 10–11 (explaining that the cosmopolitan norm of "equal concern" may imply that immigration restrictions unjustly discriminate on the basis of national origin). Immigration restrictions also pose pressing questions about the extent to which national identity may be a justification for regulating who to let in. See Samuel Scheffler, "Immigration and the Significance of Culture," *Philosophy & Public Affairs* 35, no. 2 (2007): 93–125 (recommending "that we avoid using culture and cultural preservation as central analytic categories in thinking about the challenges posed by immigration"); Charles R. Beitz, "Cosmopolitan Ideals and National Sentiment," *Journal of Philosophy* 80, no. 10 (1983): 591–600. For a discussion of the rights citizens may have against the presence of noncitizens within their borders, see generally Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41, no. 2 (2013): 103–130; David Miller, "Immigrants, Nations, and Citizenship," *The Journal of Political Philosophy* 16, no. 4 (2008): 371–390. For a comprehensive treatment of moral and policy issues raised by immigration, see Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013).

the programs would therefore be better remedied by creating a path to citizenship for temporary farmworkers.

## I. RATIONALES FOR AND COMMON CRITIQUES OF TEMPORARY FARMWORKER PROGRAMS

Societies have ongoing needs for food, but those needs are not always matched by a willing domestic workforce.<sup>16</sup> It is not that receiving societies do not have enough people to do the work;<sup>17</sup> indeed, countries that have agricultural guest worker programs may also have substantial unemployment rates.<sup>18</sup> The mismatch between need and labor is rather likely due to unwillingness to pay higher wages to attract domestic workers or residents' unwillingness to perform the work for a lower wage.<sup>19</sup>

It is not surprising that such a gap between need and will might exist in wealthy countries. Consider the United States. U.S. farmworkers typically “harvest and inspect crops by

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<sup>16</sup> See *supra* note 1. Such a gap between need and will is not unique to farmwork, but rather includes a variety of hard work that tends to be regarded as unprestigious. See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 56.

<sup>17</sup> Historically, however, genuine labor shortages—caused, for instance, by WWI and WWII—were used as public justifications for certain well-known guest worker programs. For a discussion of how the Bracero program and its predecessors were originally enacted out of labor shortage fears, see *Temporary Worker Programs: Background and Issues*, Congressional Research Service, *The Select Committee on Immigration and Refugee Policy*, 96th Cong., 1–15 (1980). But some scholars, have indicated that if the labor shortage explanation was ever valid, it was valid only for a short period of time, and eventually alleged labor shortages became a pretext for exploiting Mexican workers. See, e.g., Marsha Chien, “When Two Laws are Better than One: Protecting the Rights of Migrant Workers,” *Berkeley Journal of International Law* 28, no. 1 (2010): 15–63; Leobardo F. Estrada et al., “Chicanos in the United States: A History of Exploitation and Resistance,” *Daedalus* 110 (Spring 1981): 118–20.

<sup>18</sup> The mean unemployment rate in the United States, for example, has been approximately 6.8 percent over the last decade. See “Labor Force Statistics from the Current Population Survey, Unemployment Rate for Persons 16 Years and Over, January 2005 to September 2015,” Bureau of Labor Statistics, U.S. Department of Labor, data extracted October 8, 2015, <http://data.bls.gov/timeseries/LNS14000000>.

<sup>19</sup> See H-2A Congressional Hearing, 1–4; Joseph Carens, “Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy,” *The Journal of Political Philosophy* 16, no. 4 (2008): 431; Walzer, *Spheres of Justice*, 56.

hand,” “move shrubs, plants, and trees with wheelbarrows or tractors,” “spray fertilizer or pesticide solutions,” “irrigate farm soil and maintain ditches or pipes and pumps,” and “harvest . . . pack[,] and load crops for shipment.”<sup>20</sup> For their hard work, farmworkers are paid an estimated average of \$10.01 per hour, or \$20,820 per year,<sup>21</sup> less than half of the average wage for all U.S. workers.<sup>22</sup> Not to mention, much of the farmwork is seasonal, and the demand for labor may vary by year, depending on factors such as weather.<sup>23</sup> Consequently, farmwork is often short term and unstable. Farmwork in the United States is thus hard, precarious,<sup>24</sup> and low-paid relative to other U.S. employment opportunities.

To close the gap between need and will, many wealthy societies have, at one point or another, adopted agricultural guest worker programs.<sup>25</sup> These programs authorize noncitizens to reside in the “host” or “receiving” society for employment purposes. Guest workers are “guests”

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<sup>20</sup> “Occupational Outlook Handbook, 2014–2015 Edition, Agricultural Workers,” Bureau of Labor Statistics, U.S. Department of Labor, <http://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm#tab-2>.

<sup>21</sup> See “Occupational Employment and Wages: 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse (May 2014),” Bureau of Labor Statistics, U.S. Department of Labor, <http://www.bls.gov/oes/current/oes452092.htm>.

<sup>22</sup> The mean U.S. hourly wage is \$22.71, and \$47,230 for yearly wages. “May 2014 National Occupational Employment and Wage Estimates,” Bureau of Labor Statistics, U.S. Department of Labor, last updated March 25, 2015, [http://www.bls.gov/oes/current/oes\\_nat.htm#00-0000](http://www.bls.gov/oes/current/oes_nat.htm#00-0000). The Bureau’s Occupational Labor Statistics survey is a semiannual survey. In California, the state with the most farmworkers, the estimated average farmworker is \$9.59 per hour, or \$19,950 annually, compared with \$25.91 hourly and \$53,890 annually for all Californians. See “May 2014 State Occupational Employment and Wage Estimates, California,” Bureau of Labor Statistics, U.S. Department of Labor, last updated March 25, 2015, [http://www.bls.gov/oes/current/oes\\_ca.htm#45-0000](http://www.bls.gov/oes/current/oes_ca.htm#45-0000). For comparative data on the number of farmworkers employed in each state, see “Occupational Employment and Wages: 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse (May 2014),” Bureau of Labor Statistics, U.S. Department of Labor, <http://www.bls.gov/oes/current/oes452092.htm>.

<sup>23</sup> See Alex Nowrasteh, Cato Institute, “How to Make Guest Work Visas Work,” *Policy Analysis* 719 (2013): 6 (explaining that a variety of factors such as droughts can affect the need for labor each season).

<sup>24</sup> See *supra* note 3.

<sup>25</sup> See generally Levush, *Guest Worker Programs*.

in that they are not invited to permanently immigrate and indeed may be required to show that they maintain a “permanent” residence outside of the receiving society.<sup>26</sup> The programs thus permit societies to expand their search for qualified workers without adding to their permanent citizen population.

Guest worker programs that authorize unlimited stay are clearly in tension with democracy. First, the programs encourage typically poorer noncitizens to migrate to a receiving country to do work for higher wages (or under better conditions) than they could access back home. Over time, guest workers set down roots, forming families and joining communities,<sup>27</sup> working and living alongside receiving society citizens for perhaps the whole of their adult lives.<sup>28</sup> But the workers’ nonimmigrant status excludes them from the legal status that would entitle them to the full rights and benefits of membership: citizenship.<sup>29</sup> By denying such de facto members the full panoply of political liberties (such as the right to vote), the programs bring about a form of tyranny between citizens and guest workers.<sup>30</sup> “These guests experience

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<sup>26</sup> The United States’s and Canada’s temporary farmworker programs, for example, do not offer temporary farmworkers a path to citizenship. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) (explaining that eligible non-nationals must have “a residence in a foreign country which he has no intention of abandoning”); “Hiring Seasonal Agricultural Workers,” Employment and Social Development Canada, [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/seasonal//index.shtml](http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal//index.shtml).

<sup>27</sup> “[W]e asked for workers but people came.” Max Fisch, Überfremdung I, in *Schweiz Als Heimat?* 219 (1990) (describing workers of Turkish ancestry under Germany’s *Gastarbeiter* [guest worker] program).

<sup>28</sup> See Walzer, *Spheres of Justice*, 59.

<sup>29</sup> See Walzer, *Spheres of Justice*, 59.

<sup>30</sup> Walzer, *Spheres of Justice*, 58–59; see also Cristina M. Rodríguez, “Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another,” *The University of Chicago Legal Forum* (2007): 219–88 (arguing that the United States should not adopt a large-scale guest worker program in part because the programs risk creating an immigrant underclass). The force of the tyranny objection is even stronger in societies that also lack birthright citizenship. For example, during the era of Germany’s *Gastarbeiter* program, Turkish guest workers often remained in Germany not just for the whole of their adult lives, but their children also had no right to citizenship. *Gastarbeiter* thus created a multi-generational class of “guest workers” who had no voting rights and rights to stay in the country in which they were born and lived. For an overview of the program and parallels to the United States’s guest worker programs, see Nicole Jacoby,

the state as a pervasive and frightening power that shapes their lives and regulates their every move—and never asks for their opinion.”<sup>31</sup> Lacking an unconditional right to stay in the receiving society, the workers are also vulnerable to deportation, and hence, are at risk of being torn away from decades-old social ties.<sup>32</sup>

In contrast, guest worker programs with limited authorization periods may require workers to leave sometime before they manifest the full marks of membership in the receiving society.<sup>33</sup> The United States’s H-2A temporary farmworker program authorizes participants to stay for a maximum consecutive period of three years; Canada’s Seasonal Agricultural Workers Program provides for an eight-month authorization period.<sup>34</sup> Temporary farmworker programs thus seem to avoid the antidemocratic features of programs with unlimited authorization periods. In light of the substantial financial benefits the programs may provide both receiving societies and temporary workers, supporters urge that temporary farmworker programs are a morally and

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“America’s *De Facto* Guest Workers: Lessons from Germany’s *Gastarbeiter* for U.S. Immigration Reform,” *Fordham International Law Journal* 27 (2003): 1569–1662. *Gastarbeiter*-style programs are the central target of Michael Walzer’s critique of guest worker programs. See Walzer, *Spheres of Justice*, 56–61. The UAE’s *kafala* (visa sponsorship) system is a particularly disconcerting modern analogue of *Gastarbeiter*. See Human Rights Watch, “*I Already Bought You.*”

<sup>31</sup> Walzer, *Spheres of Justice*, 59.

<sup>32</sup> Hiroshi Motomura discusses a similar set of problems with deporting undocumented workers in the United States. See Motomura, *Immigration Outside the Law*, ch. 3; Hiroshi Motomura, “We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship,” *Virginia Journal of Social Policy & the Law* 14, no. 1 (2006): 103–18.

<sup>33</sup> Joseph Carens proposes that programs with authorization periods that last just several years fall within this category (although, as I explain in Part II, Carens thinks that limiting temporary workers to one sector, such as agriculture, can be problematic because such restrictions depress temporary worker wages). See Joseph Carens, *The Ethics of Immigration*, 113–15. David Miller likewise contends that guest workers that come to receiving countries on a truly temporary basis have no claim to citizenship. See David Miller, “Irregular Migrants: An Alternative Perspective,” *Ethics & International Affairs* 22, no. 2 (2008): 195–96; “Immigrants, Nations, and Citizenship,” *Journal of Political Philosophy* 16 (2008): 377 (suggesting that guest worker programs with definite and short time limits may be compatible with democratic values).

<sup>34</sup> See *supra* note 14.



economically attractive tool for societies to close the gap between their need for farmwork and their willingness to perform the work.<sup>35</sup>

Consider, for example, the potential merits of the U.S. H-2A visa program. The program permits domestic growers to hire noncitizens to perform farmwork when there are not enough U.S. workers “able, willing, qualified, and . . . available” to do the work,<sup>36</sup> thereby producing a mutually beneficial arrangement: The program gives nonresidents access to U.S. markets in which they may be able to command higher wages than in their home countries. For instance, in Mexico, one of the top “sending” countries,<sup>37</sup> average agricultural wages may be as low as \$1 per hour.<sup>38</sup> Mexican temporary farmworkers in the United States may therefore earn almost ten times as much as they would otherwise.<sup>39</sup> Meanwhile, the program provides domestic growers

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<sup>35</sup> See generally Hidalgo, “An Argument for Guest Worker Programs.”

<sup>36</sup> See 8 U.S.C. § 1188(a)(1)(A).

<sup>37</sup> In 2014 alone, Mexico sent over eighty-four thousand H-2A workers, the most of any eligible sending country. See U.S. Department of State, *Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY2014*, accessed October 8, 2015, <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY14NIVDetailTable.pdf>.

<sup>38</sup> See Nicole Akoukou Thompson, “50,000 Mexican Farmworkers Have Gone on Strike in Baja California, Demand Overtime Pay, Breaks, Healthcare and Water,” *Latin Post*, April 1, 2015, <http://www.latinpost.com/articles/45297/20150401/50-000-mexican-farmworkers-have-gone-on-strike-in-baja-california-demanding-overtime-pay-breaks-healthcare-and-water.htm>. Philip Martin and J. Edward Taylor have indicated that there is some evidence that Mexican farmworkers are becoming increasingly likely to say home, due to wages rising in agricultural and other sectors in Mexico. See Philip Martin and J. Edward Taylor, *Ripe with Change: Evolving Farm Labor markets in the United States, Mexico, and Central America* (Migration Policy Institute, 2013), 18.

<sup>39</sup> See text accompanying note 21. Indeed, temporary farmworkers may sometimes have a right to higher wages than domestic farmworkers. Under the United States’s temporary farmworker program, farmworkers must be paid “at least the highest of the following applicable wage rates in effect at the time work is performed: the adverse effect wage rate (AEWR), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage.” “Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA),” Wage and Hour Division, U.S. Department of Labor, <http://www.dol.gov/whd/regs/compliance/whdfs26.htm>. For a table of AEWRs, see “Adverse Effect Wages—Year 2015,” Wage and Hour Division, U.S. Department of Labor, <http://www.foreignlaborcert.doleta.gov/adverse.cfm>. The rationale for this baseline is to ensure that hiring temporary farmworkers does not depress domestic farmwork wages. Whether that measure accomplishes its goal is another matter.

with a flexible supply of agricultural workers without necessarily adding to the permanent population. The need for farmworkers may fluctuate from year to year,<sup>40</sup> and Americans often feel that adding to the permanent population strains public resources, such as social security.<sup>41</sup> Further, by keeping agricultural labor costs low, the program may enable Americans to keep their food prices relatively low.<sup>42</sup>

The enduring and wide base of support for temporary farmworker programs in aspirationally democratic societies is nonetheless troubling. A worker's authorization not only ends after she completes the work for which she was hired, but may also be terminated if she is fired. Wielding the deportation stick, employers have historically engaged in a variety of abuses, from wage theft to rape and battery.<sup>43</sup> Critics further explain that the risk of employer abuse is

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<sup>40</sup> See generally Nowrasteh, "How to Make Guest Work Visas Work." Hence there is neither a floor nor a ceiling on how many H-2A workers are to be admitted to the United States each year.

<sup>41</sup> See, e.g., Jens Hainmueller and Michael J. Hiscox, "Attitudes Towards Highly Skilled and Low-Skilled Immigration: Evidence from a Survey Experiment," *American Political Science Review* 104, no. 1 (2010): 61–84 (explaining that anti-immigrant sentiment as to low-skilled workers is in part motivated by fears of constraints on welfare benefits). It is not clear whether such fears are well-founded. Although immigrants with less than a high school education may have a long-term negative fiscal impact, those with a high school education may have a positive net impact, especially when the impact of both groups' descendants are taken into consideration. See National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, eds. James P. Smith and Barry Edmonston (Washington, DC: National Academy Press, 1997), 334.

<sup>42</sup> Of course, relying on agricultural guest worker programs is not the only way a society might ensure that all its members can pay for sufficient food. A society could decide to pay the higher wage to draw co-citizens and, through redistributive policies, ensure that all segments of society can still afford quality food notwithstanding higher farmworker wages.

<sup>43</sup> See generally Etan Newman, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (Farmworker Justice, 2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>; Mary Bauer, *Close to Slavery: Guestworker Programs in the United States* (Southern Poverty Law Center, 2007), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf). Michael Walzer distinguishes problematic guest worker programs from permissible ones on more general vulnerability grounds. See Walzer, *Spheres of Justice*, 60. In the permissible cases—such as that of visiting professors—Walzer explains the participants have skills in higher demand, or simply are wealthier, and so are able to leave more easily if things go bad while abroad, or are "able to call upon the protection of their home states if they ever need it." Ibid.

exacerbated by the fact that, although temporary farmworkers may have practically the same substantive labor and employment rights as resident farmworkers, temporary farmworkers have substantially weaker enforcement and remedial rights.<sup>44</sup> And thus, even though temporary farmworkers may have a fairly robust set of rights on paper, the workers may lack a meaningful remedy for the violation of those rights.

Meanwhile, workers may stay beyond their authorization periods,<sup>45</sup> resulting in an even more vulnerable undocumented population, the members of which may resemble citizens in practically every respect besides their legal status. Temporary farmworker programs are therefore susceptible to producing the same kinds of problems that characterize guest worker programs with no authorization time limits.<sup>46</sup> And all of this—the abuse, poor remedial rights,

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<sup>44</sup> For a discussion of how exclusion from farmworker employment legislation undermines U.S. temporary farmworker rights enforcement, see Michael Holley, “Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights,” *Hofstra Labor & Employment Law Journal* 18, no. 2 (2001): 575–623. In addition to being excluded from key employment legislation, it is also not clear whether U.S. temporary farmworkers have a right to back pay for work performed after their authorization period ends. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that the National Labor Relations Board could not award back pay for labor rights violations to an undocumented worker who was never legally authorized to work in the United States).

<sup>45</sup> The fact that overstaying is common is not always an unintended consequence of temporary farmworker programs. Hiroshi Motomura, for example, explains that overstaying and other forms of “immigration outside the law” is common in the United States in part because of lax immigration enforcement, coupled with widespread domestic economic incentives and known historical migratory patterns. These factors, he explains, effectively amount to an informal policy of relying on the labor of undocumented immigrants. See Motomura, *Immigration Outside the Law*, ch. 1. Motomura explains that if temporary worker programs must be adopted as “second-best” measure, historically defective coercive enforcement (and countervailing incentives to stay) might be supplemented or replaced by a policy of providing non-coercive incentives—such as a “financial bonus” or creating “economic development initiatives” in sending countries—to entice workers to return to their home country. See Motomura, “Designing Temporary Worker Programs,” 285–86.

<sup>46</sup> See Motomura, *Immigration Outside the Law*, ch. 3 (discussing how undocumented persons in the United States might be understood as “Americans in Waiting” considering their contributions and social ties to the United States over many years and the United States’s de facto policy of tolerating undocumented persons to work and live within its borders).

and overstay risks—may be experienced through or in conjunction with pervasive racial,<sup>47</sup> national origin,<sup>48</sup> and sex discrimination.<sup>49</sup> It is hard to see how a policy that tends to leave people vulnerable in these ways could be compatible with democracy and its basic commitments to equality and the inviolability of the person.

Yet however persistent and predictable these problems may be, they are contingent problems that, at least in theory, could be eliminated. Supporters of the programs hence argue that better enforcement and monitoring mechanisms are possible and ought to be adopted, that the programs could radically minimize employer abuse by decoupling authorization from maintaining employment with a particular employer (or by making it easier to switch to a new employer), that labor and employment rights could be strengthened by extending federal labor and employment legislation to cover temporary farmworkers, and that overstay risks could be mitigated by creating noncoercive incentives to return home.<sup>50</sup> Regardless of whether these are workable solutions, they point to a moral limit of common criticisms of the programs: the criticisms leave it an open question whether, assuming the abuse, rights asymmetry, and overstay risks could be ameliorated, the programs are morally sound.

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<sup>47</sup> See, e.g., Paul Ortiz, “From Slavery to Cesar Chavez and Beyond: Farmworker Organizing in the United States,” in *The Human Cost of Food: Farmworkers’ Lives, Labor, and Advocacy*, eds. Charles D. Thompson Jr. and Melinda F. Wiggins (Austin: University of Texas Press, 2002), 249–76.

<sup>48</sup> See, e.g., *EEOC v. Global Horizons, Inc.*, 7 F. Supp. 3d 1053, 1069 (D. Haw. 2014) (holding that Global Horizons, a labor contractor that recruited Thai H-2A workers for farmers in the United States, discriminated in violation of Title VII of the Civil Rights Act of 1964 by harassing and abusing the workers on the basis of stereotypical beliefs that Thai workers were “more compliant” than H-2A workers from other countries, such as Mexico).

<sup>49</sup> See, e.g., Sara Obeidat, “Female Farm Workers Awarded \$17 Million in Florida Abuse Case,” PBS Frontline, September 15, 2015, <http://www.pbs.org/wgbh/pages/frontline/immigration-2/rape-in-the-fields/female-farm-workers-awarded-17-million-in-florida-abuse-case/> (discussing five migrant farmworkers’ victory in a sex discrimination suit and explaining that such sex discrimination is rampant on U.S. farms though rarely reported to law enforcement officials).

<sup>50</sup> See, e.g., Motomura, “Designing Temporary Worker Programs,” 285–86; Nowrasteh, “How to Make Guest Work Visas Work.”

## II. IS THE PROBLEM THAT WAGES ARE TOO LOW?

Even if the variety of abuses associated with temporary farmworker programs could be prevented, an intuitive way philosophers have tried to show what would still be wrong with temporary farmworker programs is by arguing that temporary farmworkers' wages are simply too low.

Joseph Carens, for example, explains that the problem with temporary farmworker programs is that they restrict the workers to one sector, effectively “forc[ing] foreign temporary workers to perform tasks for wages that are lower than they could command if they were free to compete on the entire [receiving society’s] labour market.”<sup>51</sup> Although I do not dispute that temporary farmworker wages may be too low, I have reservations about Carens’s explanation. First, I am not sure why temporary farmworkers would be able to command a higher wage if they were free to so compete. Why wouldn’t members of the receiving society simply be able to offer temporary workers similarly low wages in other sectors, given that nonresidents can be incentivized to accept offers of farmwork for wages lower than what residents would accept?

There is, admittedly, evidence that increasing guest workers’ labor mobility within their receiving society may raise their wages.<sup>52</sup> But that phenomenon may be limited to “incumbent” guest workers, workers who have already been working in the receiving society and who may plan to stay for a long time.<sup>53</sup> Increased temporary farmworker labor mobility may therefore not

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<sup>51</sup> Carens, *Ethics of Immigration*, 124.

<sup>52</sup> Recent reforms of the UAE’s *kafala* system no longer require migrant workers to obtain approval from their sponsoring employer in order to work for another firm in the UAE, and thus increase migrant workers’ labor mobility in the UAE. See Suresh Naidu, Yaw Nyarko, and Shing-Yi Wang, “Monopsony Power in Migrant Labor Markets: Evidence from the United Arab Emirates,” *Journal of Political Economy* 124, no. 6 (2016): 1738–39. While such reforms may increase wages for incumbent migrant workers, they may also decrease demand for, and hence, may decrease hiring and wages of new migrant workers. See *ibid.*

<sup>53</sup> See Naidu et al., “Monopsony Power in Migrant Labor Markets,” 1739.

produce increased wages, since a purported virtue of temporary farmworker programs is that they do not permit long-term residency in the receiving country.<sup>54</sup> Further, even if the programs did authorize working for longer periods, the wages of new guest workers may actually fall when guest worker labor mobility increases.<sup>55</sup>

Second, assuming that temporary farmworkers would be able to command higher wages but for their sector limitation, Carens's argument is incomplete without a theory of why it is morally wrong for receiving societies to offer nonresidents wages below the rate residents require to perform similar work. Further difficulties confront giving such a theory. For example, why would that rate be the morally relevant baseline? While it is possible that the rate might reflect whatever amount is objectively fair to pay, the rate may also reflect residents' choices to unreasonably withhold their labor and thereby drive up the price of agricultural labor.<sup>56</sup> And, perhaps more fundamentally, why would paying a higher wage justify asking nonresidents to take on burdens of hard work and transiency? This last question is, I think, absolutely central. The wage is not the only aspect of temporary farmworker programs that is open to criticism and in need of justification; it is but one part of the bargain.

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<sup>54</sup> See Part I.

<sup>55</sup> See Naidu et al., "Monopsony Power in Migrant Labor Markets," 1739.

<sup>56</sup> For a discussion of reasonable incentives, see G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), esp. Part I; Seana Valentine Shiffrin, "Incentives, Motives, and Talents," *Philosophy & Public Affairs* 38, no. 2 (2010): 111–42; Liam B. Murphy, "Institutions and the Demands of Justice," *Philosophy & Public Affairs* 27, no. 4 (1999): 251–91; A. J. Julius, "Basic Structure and the Value of Equality," *Philosophy & Public Affairs* 31, no. 4 (2003): 321–55; Joshua Cohen, "Taking People As They Are?," *Philosophy & Public Affairs* 30, no. 4 (2001): 363–86. For a discussion of what a society may do in response to citizens who unreasonably withhold their labor, see generally Lucas Stanczyk, "Productive Justice," *Philosophy & Public Affairs* 40, no. 2 (2012): 144–64. To be clear, this is not to say that resident farmworker wages are sufficiently high today. That they are, on some morally relevant measure or another, too low may well explain why so few residents are drawn to farmwork. See Part I.

Perhaps, however, the moral objection is not to the wage itself but to pressure to accept the bargain. The problem, one might argue, is that offers of temporary farmwork are accepted out of quasi-coercive pressure produced by indigence,<sup>57</sup> and the lower wage is a manifestation of that pressure. Yet many temporary farmworkers do not come from the very poorest strata of their society. Temporary farmworkers may already have access to living wages within their countries and may simply be seeking out the work to, for example, help support a family member's (or their own) university education.<sup>58</sup> Hence, temporary farmworker programs do not depend on people being rationally compelled on pain of survival (or, less dramatically, on pain of not having a living wage) to accept offers of temporary farmwork.

Further, even if there were quasi-coercive pressure to accept, the pressure cannot be doing the moral work. Without an explanation of why the content of the temporary farmwork offer is morally problematic, such an account would seem to condemn making any offers to indigent people if the offer would leave them better off—including offers of food, shelter, asylum, and citizenship—since their indigence would give them strong if not sufficient reason to accept.<sup>59</sup>

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<sup>57</sup> “Sufficientarian” accounts of guest worker exploitation are an example of such an approach. See Robert Mayer, “Guestworkers and Exploitation,” *The Review of Politics* 67, no. 2 (2005): 318–27.

<sup>58</sup> See Lea Ypi, “Taking Workers as a Class: The Moral Dilemmas of Guestworker Programmes,” in *Migration in Political Theory: The Ethics of Movement and Migration*, eds. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 163–65 (explaining that guest workers often already have a minimally decent standard of living, and hence, sufficientarian accounts of worker exploitation cannot explain in many cases what, if anything, is morally wrong with guest worker programs).

<sup>59</sup> Sufficientarian theories might respond to my objection by adding that what makes the content of the offer problematic is that it proposes something that the noncitizen would not accept if she already had a minimally decent standard of life. See Mayer, “Guestworkers and Exploitation,” 319–22. But a person who has a minimally decent standard of living might also reasonably decline to accept food or shelter, or even citizenship in another country, if she is happy where she is and does not want to take on the additional burdens of citizenship elsewhere.

Consequently, neither the wage on its own nor pressure to accept the wage seem to be able to fully explain what, if anything, might be morally wrong with temporary farmworker programs. Rather than further explore the possibility of a fair wage for temporary farmworkers, it may be more fruitful to inquire about the burdens involved in performing temporary farmwork. An offer of paid work is after all not merely an offer of a wage; it is a request to have a person do a particular kind of labor, to enlist her help by having her give her life a particular kind of shape and content. Instead of starting with the wage, I thus propose starting with the labor, and then asking whether the wage— or anything else— could justify asking another person to perform that kind of labor, in this case, temporary farmwork.

### III. WHAT'S WRONG WITH TEMPORARY FARMWORKER PROGRAMS

Temporary farmwork is physically exhausting, transient, and socially isolating. As such, I will now argue, temporary farmworker programs undermine temporary farmworkers' moral interests in having ongoing access to stable intimate, civil, and political associations. Asking nonresidents to take on such burdens can neither be justified by a receiving society's bare preference to avoid performing farmwork nor by the offer of a valuable wage. On the contrary, such a motive and incentive risks subordinating noncitizens to wealthier societies and reifying global wealth inequality.

#### A. *Compromised Associational Ties*

Although the length of stay permitted by temporary farmworker programs is substantially shorter than under programs with unlimited authorization periods, the length of stay is not trivial. Moving to a new place for a few years can challenge and compromise one's relationships back home. For example, intimate relationships may require regular face time and physical presence to remain stable and grow. While such relationships are not impossible to maintain while abroad,



not seeing one's child or partner for years at a time can be and often is damaging to those relationships. The risk of damage is compounded for the many nonresidents who perform repeated tours of temporary farmwork.

Of course, it is conceivable that family members could accompany temporary farmworkers. But then similar problems are reproduced for those members— what of their projects and attachments back home? Temporarily moving to another country can also destabilize other relationships that may require physical presence and regular interaction, such as relationships with civil organizations (worship at a particular church, for instance) and the relationship a person has to her state through her ongoing political participation.

A few years may also be ample time to form new meaningful relationships in the receiving society. It is not unreasonable for people to fall in love and to form friendships and community affiliations during such a time span. Thus, even if temporary farmworkers do not develop all of the marks of membership in the receiving society by the end of their service, workers may still form new meaningful ties in the receiving society, the severance of which may be quite painful.

Nor is it any consolation if temporary farmworkers tend to not form new relations. Migrant farmworkers are susceptible to social isolation. If a particular crop is especially exhausting or stressful to grow and harvest, workers may be left with little energy to pursue much of a social life at the end of the day.<sup>60</sup> The location of the work can also be a barrier to

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<sup>60</sup> Stressful working conditions are a substantial factor in producing a high (potentially 40%) rate of clinical depression among migrant farmworkers in the United States. See Hiott et al., "Migrant Farmworker Stress: Mental Health Implications," 37.

forming new relationships. Consider, for instance, California's San Joaquin Valley,<sup>61</sup> one of the most productive agricultural regions in the world<sup>62</sup>:

There are no rolling green hills, quaint farmhouses, red barns, or picturesque villages. It was once a vast desert, transformed into an agricultural mega-factory only when water was brought in by massive state and federally funded irrigation projects . . . . The farms and ranches throughout the valley are so vast, the land so flat, that as you gaze into the horizon, your line of sight only dissolves into the industrial haze, a by-product of large-scale farming.<sup>63</sup>

Geographic isolation can produce social isolation if it is difficult to access social centers in the receiving society. And even then, familiar social forms may simply not exist in the receiving society. "No longer is La Plaza—a central gathering place in town for community interaction and fellowship in their countries of origin—available to [Mexican and Central American migrant farmworkers]."<sup>64</sup> Further, temporary farmworkers and receiving society residents may not speak the same languages and farmworkers may accordingly suffer communicative isolation.<sup>65</sup> The life of a temporary farmworker can therefore be quite isolating along many dimensions of social life. Indeed, for migrant farmworkers in the United States, social isolation may be the single most important cause of anxiety.<sup>66</sup>

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<sup>61</sup> California employs the most farmworkers of any U.S. state. See "May 2014 State Occupational Employment and Wage Estimates, California," Bureau of Labor Statistics, U.S. Department of Labor, last updated March 25, 2015, [http://www.bls.gov/oes/current/oes\\_ca.htm#45-0000](http://www.bls.gov/oes/current/oes_ca.htm#45-0000).

<sup>62</sup> Craig Scharlin and Lilia V. Villanueva, in *Philip Vera Cruz: A Personal History of Filipino Immigrants and the Farmworkers Movement*, eds. Craig Scharlin and Lilia V. Villanueva (Los Angeles: UCLA Labor Center and UCLA Asian American Studies Center, 1992), xxii.

<sup>63</sup> Ibid.

<sup>64</sup> Eduardo González Jr., "Migrant Farm Workers: Our Nation's Invisible Population," Cornell University Cooperative Extension, October 5, 2017, <http://www.extension.org/pages/9960/migrant-farm-workers:-our-nations-invisible-population>.

<sup>65</sup> Temporary farmworkers may also not speak the same languages as each other.

<sup>66</sup> See Hiott et al., "Migrant Farmworker Stress: Mental Health Implications," 37.

Temporary farmworkers thus must rupture existing intimate, civil, and political relations, to then come to a place and either not establish new relations or rupture the new ones when their work authorization expires. And while they are in the receiving society, the workers perform hard, exhausting labor,<sup>67</sup> labor that because of its physical demandingness and geographic isolation may be detrimental to workers' health.<sup>68</sup> It is a lot to ask of people that they take on such burdens.<sup>69</sup>

It may at this point be objected that these burdens are not actually burdens for temporary farmworkers. Temporary farmworkers may come from countries or circumstances that are so awful as to make such temporary migration and work highly attractive. One might therefore conclude that for such people, participation in the programs is hardly burdensome. On the contrary, participation may be a welcomed improvement.

I agree that participating in the programs may indeed be better than staying at home.<sup>70</sup> Yet that fact does not negate or diminish the moral burden the programs place on temporary

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<sup>67</sup> James "Shorty" Spencer Jr., describing what it takes to be a good migrant farmworker:

Potatoes? If you can run to the truck every fifteen minutes with about seventy-five pounds of potatoes, then you's a good one. Cutting cabbages? If you can pick that cabbage up and sling it at that truck while the wagon's moving, I tell you, you's a good one. Orange picker? You reach out there and snatch your orange, grab the limb and shake it down to the ground, and fill that back up in fifteen minutes, you's a good one.

Daniel Rothenberg, *With These Hands: The Hidden Work of Migrant Farmworkers Today* (Berkeley and Los Angeles: University of California Press, 1998), 3.

<sup>68</sup> See *supra* notes 2, 4–5.

<sup>69</sup> The burden is especially acute for U.S.-style programs that permit former temporary farmworkers to reapply for temporary farmworker status indefinitely, so long as they leave the country for a few months. See 8 C.F.R. § 214.2(h)(5)(viii)(C).

<sup>70</sup> And this fact may generate duties on wealthier societies to provide asylum (in the worst cases), to adopt a more open stance on immigration, or to adopt development policies targeted at particular countries. See Motomura, "Designing Temporary Worker Programs," 285–86 (suggesting that the United States should help Mexico develop infrastructure and public services so as to minimize some of the incentive to migrate to or remain in the United States without lawful status).

farmworkers. Consider two respects in which something may be a burden for someone. First, something can be a burden insofar as it is an obstacle to satisfying a preference. For example, an employment law may burden the founders of Uber by making it difficult to classify Uber drivers as independent contractors, and thereby reducing Uber's revenue.<sup>71</sup> Temporary farmworker programs do not necessarily impose burdens with respect to a variety of temporary farmworkers' preferences—such as workers' preference for a higher income than that available to them back home—since the programs likely satisfy some of those preferences.

Second, something can also be a burden by undermining an interest she has as a person generally, regardless of whether she has a preference for protecting that interest. Consider a case of indentured servitude. Among other things, indentured servants in the colonial United States were not permitted to marry without the consent of their employer. Regardless of whether a particular indentured servant wanted to marry (not everyone wants to get married), that consent requirement compromised the fundamental interest indentured servants had as persons in being able to freely determine the form and composition of their intimate associations.

The hard work and risks of rupture required by temporary farmworker programs are burdens in this second sense. As persons, we have a fundamental interest in being able to access a network of intimate, civil, and political associations. Such networks are central

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<sup>71</sup> The California Supreme Court recently adopted a new test for independent contractors, according to which a person is an employee and not an independent contractor unless all three of the following conditions are met: (1) the worker is free from the “control and direction” of the hiring entities, (2) performs work “outside of the usual course of the hiring entity’s business,” and (3) the worker is ordinarily engaged in an independent course of trade or business of the same nature as that performed by the hiring entity. *Dynamic Operations West, Inc., v. Superior Court*, No. BC332016, \*66–67 (Los Angeles Cnty. Super. Ct., April 2018).

contexts in which we develop and exercise our moral agency. By “moral agency,” I mean a person’s capacity to craft and pursue a self-directed life, and to cooperate with others under fair terms of social cooperation (and to be moved by the fairness of those terms to do her part).<sup>72</sup>

First, we develop projects and life plans, and the values that inform the creation of those plans, through our cooperative and deliberative activity with others.<sup>73</sup> For example, we learn and develop our sense of morality in social contexts such as the family, religious and other civil organizations, and the larger legal-political structure of our society. We learn about history, social possibilities and the physical world by thinking and deliberating with others in a variety of formal (school) and informal (family, civil association, friendship) contexts. What we learn about our physical world and the limits of practical possibility in turn shapes our understanding of what it means to live well and what we owe to one another.<sup>74</sup>

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<sup>72</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), §§ 3–4; Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton: Princeton University Press, 2014): 168–69.

<sup>73</sup> See Rawls, *Theory*, § 77; Shiffrin, *Speech Matters*, 9–11 (arguing that we depend on sincere communication with one another to develop our understanding of our moral relations); Seana Valentine Shiffrin, “Race, Labor, and the Fair Equality of Opportunity Principle,” *Fordham Law Review* 72, no. 5 (2004): 1663 (“[W]hat is implicit behind the liberal starting point of social cooperation is the assumption that social cooperation is the necessary context in which [moral agency] may be developed and fully realized.”); John Stuart Mill, *Utilitarianism*, ed. Ben Eggleston (1861; repr., Indianapolis: Hackett Publishing Company, 2017), ch. 2 (explaining that a person’s capacity for enjoyment is a “very tender plant” that “speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favourable to keeping that higher capacity in exercise”); Immanuel Kant, “What Does It Mean to Orient Oneself in Thinking?,” trans. Allen W. Wood, in *Religion and Rational Theology*, eds. Allen W. Wood and George di Giovanni (Cambridge, UK: Cambridge University Press, 2001), 8:144 (“[H]ow much and how correctly would we think if we did not think as it were in community with others to whom we communicate our thoughts, and who communicate theirs with us!”); Aristotle, *The Nicomachean Ethics*, trans. David Ross (Oxford: Oxford University Press, 2009), Bk II (explaining that a person’s sense of morality and the good life is developed through both individual contemplation and interaction with others).

<sup>74</sup> John Rawls explains that “probing the limits of practical possibility” can enable us as citizens to develop an idea how to bring about a more just social order. See John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: The Belknap Press of Harvard University Press, 2001), 4. With such an idea in front of us, Rawls hopes we may be able to affirm our role as citizens in concretely striving toward such a “realistic[] utopia,” rather than resign ourselves to an unjust status quo. *Ibid.* at 3–4. Hence, such inquiries into the limits of practical social possibilities contribute to the development of a person’s sense of what it means to live well as a citizen.

Such associational networks are also central contexts in which we concretely exercise our moral agency. People realize values and aims through their activity in the world. Many people seek happiness and emotional enrichment through intimate associations of family, friendship, marriage, and the like. People also act on and express values like beneficence and gratitude by, for example, helping friends through difficult times and volunteering in their community. Social-moral concerns about, for instance, the environment and poverty may arise from and be acted on through political participation (voting, canvassing, protesting) and through voluntary associations (community beach cleanup projects, OXFAM). And we often pursue our private ends through educational and career choices. Networks of intimate, civil, and political associations are also potential contexts for developing and exercising cooperative capacities,<sup>75</sup> and thus, for developing the skills and understanding we need to relate to one another as equal moral agents.

Whether a person has access to a stable associational network, and the extent to and respect in which she is integrated in such a network, therefore shapes the development of that person's moral personality, the content of her life plans, and the extent to which she is able to advance those plans autonomously and as an equal.<sup>76</sup>

To be clear, I do not mean to suggest that we all develop the same values or realize them in exactly the same contexts. Some of us may need religion and politics; others may need family, seclusion, or private enterprise. My point is rather that having access to a stable network of

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<sup>75</sup> See Rawls, *Theory*, 474, 501 (discussing how the development of a person's capacity to cooperate with others under fair terms and to be moved by those fair terms depends in large part on how a person—through her experiences in her relations with others—comes to feel that her society supports and respects her as a person).

<sup>76</sup> The idea of autonomy advanced here is thus a social-political idea, not a metaphysical conception of freedom of the will. See Rawls, *Justice as Fairness*, 23.

intimate, civil, and political associations generally provides the rich set of opportunities and contexts for learning for yourself what you need for living a full moral life and acting on such aspirations.

Temporary farmworker programs ask noncitizens to compromise such interests in developing and accessing associational ties by asking (and incentivizing) noncitizens to perform hard and isolating work as a transient member of society. That temporary farmworkers may indeed prefer to put some of their associational ties at risk— or that some temporary farmworkers do not have any ties to such associational networks, as may be the case for truly migrant farmworkers— therefore does not change that fact.<sup>77</sup> And the moral burdens associated with such work are not limited to those incurred by the workers. Sending countries may also incur moral losses. Having many transient citizens may undermine political participation and the stability of political and other social ties in sending countries.

In response to my concerns, one might argue that the burdens of temporary farmwork would be lessened if authorization periods were really short, say, six months or just a growing season. Societies with temporary farmworker programs could also make farmwork less exhausting through wage and hour regulation and investments in labor-saving technology. And temporary farmwork might be less isolating if workers were placed at farms that were close to social centers, rather than in bleak industrial farming regions like California's San Joaquin Valley.

But the mutual financial benefit rationale for the programs sets a limit on the extent to which we can imagine such improvements without rendering the programs ineffective under that

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<sup>77</sup> One might object that it would be paternalistic to interfere and prevent noncitizens from performing temporary farmwork and thereby furthering their own preferences. But at this point, I have not yet argued that it is wrong to ask temporary farmworkers to compromise their agency in these ways. I discuss this paternalism objection in Part III.C., after so arguing.

rationale.<sup>78</sup> Making the programs much shorter would shorten the time growers have to recover the costs of training temporary farmworkers,<sup>79</sup> and implementing far-reaching changes to the structure of farmwork would likely be costly. At a certain point, it may be just as (if not more) costly to recruit and hire nonresidents to temporarily perform farmwork as it would be to hire residents for such work.

Moreover, shortening authorization periods may actually exacerbate the moral risks of temporary farmworker programs by creating pressure to migrate more frequently. Temporary farmworker programs are not “working holiday” programs,<sup>80</sup> nor are they cultural exchange or education or technical certification programs; the principal incentive to migrate and perform the work is the wage. Hence, it is not clear why people would be incentivized to perform only one or two tours of temporary farmwork; it is rather more likely that the many people who need the wages would be incentivized to migrate multiple times a year. Shorter authorization periods thus risk increasing the frequency of migration and making it even more difficult for temporary farmworkers to develop and maintain associational ties (whether abroad or at home).

Of course, such a migration pattern is unlikely to result if only one or two societies adopt a temporary farmworker program (and did not, as the United States does, permit former temporary farmworkers to reapply for temporary worker status<sup>81</sup>). But if we assume, as

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<sup>78</sup> See Anna Stiliz, “Guestworkers and second-class citizenship,” *Policy and Society* 29, no. 4 (2010): 296.

<sup>79</sup> See Nowrasteh, “How to Make Guest Work Visas Work,” 7 (explaining that increasing authorization periods for temporary workers in the United States would enable employers to “capture some of the benefit of migrants’ American-acquired skills”).

<sup>80</sup> Australia, for example, has a “working holiday” program that permits nonresidents between the ages of 18 and 30 to work in Australia for up to twelve months for purposes of “shar[ing] your culture, knowledge and skills whilst discovering [Australia’s] unique landscape.” See “Working Holiday in Australia,” Australian Department of Immigration and Border Protection, last accessed October 5, 2015, <http://www.border.gov.au/Trav/Visi/Visi-1>.

<sup>81</sup> See *supra* note 7.



supporters urge, that the programs are morally sound, we must also be prepared to assume that many societies might have temporary farmworker programs. It would be a problematic form of exceptionalism for a society to adopt a policy and yet hold that other similarly situated societies may not adopt like policies.<sup>82</sup> Thus, even if no one country's choice to implement such a program would facilitate more frequent migration, wide adoption of the programs likely would. Consequently, simply shortening authorization periods would likely not ameliorate the moral burdens of temporary farmworker programs. I now want to turn to whether asking people to take on those burdens can be justified.

### *B. Can Citizenship Make a Difference?*

So far, I have been arguing that temporary farmworker programs ask nonresidents to take on potentially agency-compromising burdens of hard work and transiency. But much of the work that we may need to perform even as citizens of the same society may be similarly compromising. We may need to mine for minerals in order to secure the raw materials to build homes, and manufacture plastics for medical supplies. And, of course, we need food, and hence, may need to perform farmwork. Even when such work does not involve temporary migration, the work may still be isolating and taxing. Yet it does not always seem unreasonable to ask fellow citizens to perform such hard work.<sup>83</sup> Why should it be any different to ask nonresidents to perform similar work?

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<sup>82</sup> For discussions of wrongfully making an exception of oneself in the interpersonal case, see, e.g., Immanuel Kant, *Groundwork of the Metaphysics of Morals*, rev. ed., trans. and ed. Mary Gregor and Jens Timmermann (Cambridge: Cambridge University Press, 2012), 4:424; Barbara Herman, "Making Exceptions," in *Kant Und Die Philosophie in Weltbürgerlicher Absicht: Akten Des XI. Kant-Kongresses*, eds. Stefano Bacin, Alfredo Ferrarin, Claudio La Rocca, Margit Ruffing (Berlin: de Gruyter, 2010), 245–62.

<sup>83</sup> This is not to say that mining and factory work are always and necessarily kinds of work to be avoided. It may well be that such work better fits some of our life plans than more stereotypically intellectual jobs, especially if it meant having more free time to engage in nonmarket projects than, say, being a surgeon would permit. Much may depend on how the work is organized and regulated. But the choice to perform work that

The difference, I propose, is that shared obligations may flow from a relationship of reciprocal citizenship that make it permissible to ask— perhaps even to expect— that co-citizens perform such socially necessary work. As citizens of the same society, we are plausibly each under a duty to do our part in ensuring that our society becomes or continues to be a fair cooperative scheme supportive of moral agency. Ensuring that everyone has a stable supply of food is a critical element of that goal. People need food not just to survive but also to have energy to develop skills and capacities, to take up a variety of projects and form stable social relationships. Malnutrition depletes people of such energy, and, in the absence of a secure food supply, the search for food risks eclipsing all other projects.<sup>84</sup> Having enough food is essential to the well-being and deliberative space needed for a full, self-directed life and is a precondition for sustaining the variety of institutions within which that life is lived.<sup>85</sup>

There are, of course, many ways a society might go about securing enough food. It might trade with other societies or it could automate its food production processes (or pursue some combination of the two). It might also grow some of its own food, particularly when it has

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involves taking on burdens similar to temporary farmwork is nonetheless a weighty one in light of the risks the work may pose to maintaining access to association.

<sup>84</sup> Consider Joseph Raz’s description of a woman “hounded” on a deserted island by “a fierce carnivorous animal”: “Her mental stamina, her intellectual ingenuity, her willpower and her physical resources are taxed to their limits by her struggle to remain alive. She never has a chance to do, or even to think of anything other than how to escape from the beast.” Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 374. A person’s own hunger can function much like such a beast. Ensuring food security is, of course, not the only morally significant aspect of collectively managing our need for food. Seana Shiffrin discusses moral challenges associated with relying on others—such as corporate entities—for our knowledge about the quality and source of our food, in “Deceptive Advertising and Taking Responsibility for Others,” in *The Oxford Handbook of Food Ethics*, eds. Anne Barnhill, Mark Budolfson, and Tyler Doggett (Oxford, Oxford University Press, 2018), 470–93.

<sup>85</sup> Hence Rawls suggested that moderate—rather than persistent and severe—resource scarcity is a precondition of justice. See Rawls, *Theory*, § 22.

neither the technology nor the resources to automate.<sup>86</sup> Hence, for some societies, a scheme in which everyone is doing their part may well be a scheme in which some citizens are performing farmwork. Under such circumstances, it may be reasonable to ask and expect that at least some co-citizens will actually do their part by performing some farmwork.

This is not to say that reciprocal citizenship is the only relationship that could justify asking people to grow food. For example, it may be that global inequality in natural resources, historical trade patterns, or colonial exploitation place some societies in relationships of dependency that recommend sharing productive burdens across borders and trading a variety of goods. But between receiving societies and nonresidents generally, there seems to be no relationship or shared project that explains why nonresidents may reasonably be asked to take on the moral burdens of temporary farmwork so that receiving societies can fulfill their food production aims.

Rather, the motive for asking noncitizens to perform temporary farmwork seems to amount to a preference on the part of the receiving society to not perform farmwork.<sup>87</sup> Such a bare preference cannot justify such a request. When we enlist someone's help in pursuing our projects, we shape some part of that person's life. When I ask you to do something for me because it would satisfy a desire of mine—to not have to grow my own food, for instance—I am asking you to give your life a particular content, to play a particular kind of role for my purposes

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<sup>86</sup> People might also want to perform agricultural labor because of that labor's cultural significance. See, e.g., Jan Douwe Van de Ploeg, *The New Peasantries: Struggles for Autonomy and Sustainability in an Era of Empire and Globalization* (London: Earthscan, 2008); "What Is La Via Campesina?" *La Via Campesina: International Peasant's Movement*, accessed October 9, 2015, <http://viacampesina.org/en/index.php/organisation-mainmenu-44/what-is-la-via-campesina-mainmenu-45>.

<sup>87</sup> Or a preference to not adopt other measures, such as raising wages or a universal basic income, that could give farmworkers a more attractive standard of living. See Part I. For a discussion of the possibilities of and liberal justifications for a universal basic income, see Philippe Van Parijs, "Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income," *Philosophy & Public Affairs* 20, no. 2 (1991): 101–31.

and to likely put other projects on hold. But the fact that your labor would serve my aims cannot independently justify asking you to shape your life to my aims. That we are moral equals means that my likes and dislikes do not have priority over your interests in developing and exercising moral agency, and hence, in having access to an associational life. In treating my preferences as having such a special standing, I risk subordinating others to my projects.

There are, of course, many contexts in which it seems morally sound to treat the fact that one does not want to do something as a reason to ask others to do something potentially burdensome, albeit often less burdensome than temporary farmwork. I might not feel like taking out the garbage tonight, and so might ask my husband to do it this time. You may not feel like hosting Thanksgiving this year, and so might ask your sibling to do so instead. I may not feel like representing the local unit of our labor union this year, and so may instead nominate you.

But a key feature of these cases is that the preference is expressed within a relationship that explains why communicating (and expecting responsiveness to) the preference may be reasonable, even valuable. For example, preferences expressed between intimates—between family, friends, spouses—occur within relationships and in the course of pursuing projects whose value depend in part on both parties being mutually sensitive to and supportive of each other's wants and needs. Part of being intimate with someone involves communicating your tastes and preferences to that person and feeling secure in your belief that your associate will treat at least some of those preferences as reasons for action (and your associate should be able to expect the same from you). A preference thus does not on its own permit asking you to take out the garbage, but rather, only in conjunction with a variety of facts about our relationship—that we

are living together, and that the nature of our intimacy recommends sharing household tasks in a way we feel is mutually supportive.<sup>88</sup>

The story is similar in the organizational case. As members of the same local labor union, it seems plausible that we are responsible for the effective administration of that unit and that we are each individually under a correlative duty to do our part.<sup>89</sup> Yet for each of us to satisfy that duty, we perhaps need not do exactly the same thing. Indeed, there may be good reasons to have a division of labor. We have limited time and personal resources to do work, so it may make sense for me to help with organizing activities this year while you represent us in negotiations with our employer. Further, who ought to do what may be underdetermined by the nature of our union duties and individual commitments. In such a case, a policy of relying on our preferences may be a perfectly good way to share the work. Some preference-sensitivity may even be required to ensure that union participation leaves ample room for each of us to pursue our own projects within and outside of the union.<sup>90</sup> In such an organizational context, it may therefore be permissible for me to ask you to be our union representative in part because I do not want to fill that role.

A relationship of reciprocal citizenship may likewise explain the salience of citizens' preferences to perform (or not perform) certain kinds of work. For each of us to do our part in ensuring that our society becomes (or continues to be) a fair cooperative scheme, we need not all

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<sup>88</sup> Of course, the particular features of our relationship and preferences are not the only considerations that bear on how to share household duties. There may, for instance, be political and social values that count strongly against having a traditional gendered division of labor in the home, even if no party to that division of labor personally objects.

<sup>89</sup> For a discussion of the relationship between joint and individual requirements, see A. J. Julius, "The Possibility of Exchange," *Politics, Philosophy & Economics* 12, no. 4 (2013): 369.

<sup>90</sup> For a related discussion of the need for the law to accommodate the exercise of moral agency, see Seana Valentine Shiffrin, "The Divergence of Contract and Promise," *Harvard Law Review* 120 (2007): 713–18.

perform the same kind of work. Some of us might grow food for a time, while some of us mine, while still others study the nature of the universe and take care of future generations. Similar to the union case, we might facilitate free choice of employment by adopting a preference-sensitive division of labor, to ensure that the labor-demands of citizenship do not wholly define what we leave behind as our life's work.<sup>91</sup>

The extent to which any scheme of sharing burdens can be sensitive to preferences has its limits. As between union members, if a preference-based system for satisfying union duties disparately impacts certain members of the union (say, women), or enables some members to systematically avoid doing their part, then that may be a reason for moving to some other scheme for sharing the work. Communicating preferences to your intimate associates also has its limits. Doing all the listening and cleaning may indicate that your friend or spouse exercises a problematic form of authority over your life, and hence, that you and your associate should probably rethink the ways in which you support one another. Similar considerations apply to a society's scheme of labor. If that scheme permits some people's preferences (those of the wealthiest people, or whose talents are in high demand) to dominate, and systematically leaves the least advantaged people performing dangerous or otherwise agency-compromising work, then that may be a reason for rejecting the scheme as incompatible with our equal moral status.

My point is thus not that citizenship, union membership, intimacy, and the like, license us to ask our compatriots and associates to take on burdens for us whenever we want and because it

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<sup>91</sup> See generally Vicki Schultz, "Life's Work," *Columbia Law Review* 100, no. 7 (2000): 1881–1964, for a discussion of the potential for the paid workplace to be a transformative context with respect to both an individual's conception of the good and whether people come to regard one another as equal citizens. See also Rawls, *Theory*, 417 ("[When] an individual decides what to be, what occupation or profession to enter, say, he adopts a particular plan of life. In time his choice will lead him to acquire a definite pattern of wants and aspirations (or the lack thereof), some aspects of which are peculiar to him while others are typical of his chosen occupation or way of life.").

is what we want. Rather, the relationships permit us to make certain requests of one another because of the nature of our shared projects, such as endeavoring to sustain our society, or living a life together. And it is the value of the project—fair cooperation, intimacy—and the ways in which our respective roles may express our equal moral status that ultimately set the standards for what demands we may reasonably make of one another, not any one person’s or group’s preferences.

In contrast, there is no value or background relationship between temporary farmworkers and receiving societies generally that can help explain either the salience of the receiving society’s preferences to not perform as much farmwork (or to avoid the (perceived) costs of immigration),<sup>92</sup> or why it might be reasonable to expect nonresidents to share the burdens of growing the receiving society’s food. Nonresidents generally are strangers for purposes of growing the receiving society’s food.<sup>93</sup> Just as I may not reasonably ask you, a mere passerby strolling through my neighborhood, to take out the garbage when I am not in the mood, so it seems I cannot reasonably ask a nonresident to grow tomatoes for me because I do not like that sort of work. In the absence of any justifying relationship or project, it therefore seems unreasonable to ask nonresidents to take on the burdens of temporary farmwork. And when nonresidents are not “strangers”—say, because of a colonial past of the receiving society

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<sup>92</sup> See Part I.

<sup>93</sup> To be sure, some temporary farmworker programs are created through bilateral agreements between receiving and sending societies, such as Canada’s Seasonal Agricultural Workers Program. See *supra* note 14. The noncitizens targeted by the programs may therefore not be “strangers” to the receiving society. Although I cannot fully explore how bilateral agreements can make a difference, I will note a few moral problems that such agreements may nonetheless pose. If, for instance, the terms of the agreement are merely the product of each society’s relative bargaining power, then the terms of those agreements may simply serve to express and reify wealth inequality between the receiving and sending societies. In such a case, although the citizens of sending societies may not be strangers to the receiving society, it may still be unreasonable to ask those citizens to do temporary farmwork, as the resulting bargain may arbitrarily favor the preferences of the receiving society.

exploiting the sending society—there the relationship would seem to count especially against continuing to draw on the (labor) resources of the sending society while denying members of the sending society the benefits of citizenship in the receiving society, for such a relationship would seem to reproduce colonial exploitation.

### *C. Wages and Wealth Inequality*

Of course, temporary farmworkers do not work for free. From the worker's point of view, the reason to perform temporary farmwork is surely not to further the receiving society's goals, but rather to access a valuable wage. Hence, even if nonresidents have no reason to grow receiving societies' food, they may certainly have a reason to accept offers of money to grow receiving societies' food. Indeed, commentators have contended that temporary farmworker programs might be understood as antipoverty policies because of the financial benefits that redound to poorer noncitizens.<sup>94</sup> As mutually beneficial antipoverty policies, might not a temporary farmworker program be understood as a shared project of meeting one another's basic needs, and thus, as creating a reciprocal relationship that could justify requests for farmwork?

First, as intuitively appealing such a characterization may be, it may be misleading to characterize temporary farmworker programs as antipoverty policies. An initial difficulty is that the programs do not target the truly indigent. It takes resources and time to seek out the temporary work opportunities and to pay the costs of travel.<sup>95</sup> Further, even if the programs were designed to make it easier for the poorest of the poor to access temporary farmwork, the programs would create a dilemma for such noncitizens: either they must live with insufficient

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<sup>94</sup> See, e.g., Hidalgo, "An Argument for Guest Worker Programs."

<sup>95</sup> Ypi makes a similar point in "Taking Workers as a Class," 163–65.



money at home, or with a compromised moral life abroad. Either way, the noncitizens are left with compromised access to critical social and material conditions for moral agency.

Second, the wage offer itself may further problematize temporary farmwork. Temporary farmworker programs are premised on wealth inequality. The programs can fulfill their gap-bridging function only if there are nonresidents who are substantially poorer than receiving society residents, and hence, nonresidents who can be incentivized to perform the work for substantially less than receiving society residents.<sup>96</sup> Offers of paid temporary farmwork therefore create a state of affairs in which poverty supplies a compelling reason for nonresidents to perform the work and to thereby compromise their moral agency. The wage offer thus transforms a merely unreasonable request for work into one that exploits and expresses wealth inequality.<sup>97</sup>

Even so, one might accept the exploitative character of the programs and yet still endorse the programs on anti-paternalism grounds. It should be largely up to the person to decide how best to advance her particular aims, and deciding whether to relocate for work to seek better financial opportunities—even at the cost of personal and political associations—seems to fall within the scope of that authority. It may therefore seem objectionably paternalistic to deny nonresidents the opportunity to continue making such choices to improve their material wellbeing out of concern for their moral wellbeing.

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<sup>96</sup> Notice that this is still compatible with paying temporary farmworkers potentially more than some resident farmworkers. The residents performing farmwork may have so few employment opportunities that they are willing to accept substantially lower wages than paid to residents working in other sectors. The key for temporary farmworker programs is that the wage is lower than that needed to incentivize enough residents—not merely some residents—to perform the farmwork.

<sup>97</sup> This kind of exploitation thus differs from standardly discussed forms of exploitation, according to which an agreement between A and B is exploitative when A benefits disproportionately or when B is effectively coerced into accepting. For a thoughtful discussion of both conceptions of exploitation, see Stiliz, “Guestworkers,” 299–302.

I agree that nonresidents (and people generally) have moral authority over choices about where to live and what kind of work to perform, but deny that this paternalism objection applies to my concerns with temporary farmworker programs. First, this paternalism objection assumes an unwarranted binary: that receiving societies must either offer temporary farmwork or close their borders. But the universe of possibilities is not so small. Receiving societies could extend a path to citizenship to temporary farmworkers or adopt broader policies for permanent immigration, in which case nonresidents could continue to perform migrant farmwork if they so choose. Indeed, it would be a perverse kind of moral formalism for receiving societies to simply terminate their programs and close their borders in response to the concerns articulated here if doing so would further imperil nonresidents' moral agency.<sup>98</sup> Adopting such expanded immigration policies are certainly not politically easy options. It may take social mobilization and a change in political will. But the fact that these alternatives are challenging does not justify turning a blind eye to the moral defects of temporary farmworker programs, nor does it justify giving up on aspiring to a better state of affairs.

Second, this paternalism objection misunderstands the target of my objections to the programs. It is the receiving society's request and offer of migrant work that is unreasonable, not a nonresident's acceptance of that offer. My criticisms do not deny that nonresidents may have perfectly good reasons to perform temporary farmwork.

Finally, although I cannot fully develop a theory of paternalism here, I understand paternalism to involve an exercise of power over an aspect of another person's life that is

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<sup>98</sup> For a similar point, see Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996), 51; Stilz, "Guestworkers," 297.

properly within the scope of that other person's authority.<sup>99</sup> So, for instance, I suspect it is paternalistic to require someone to quit smoking because deciding whether to smoke is something within the legitimate scope of a person's authority over herself. But I do not think it is paternalistic to ask people to refrain from smoking in public spaces because exposing other people to smoke is not within a person's legitimate authority. Just as it is paternalistic for me to decide for you not to smoke, so it is wrong for you to decide for me to effectively become a smoker.

It is likewise not within the legitimate authority of receiving societies to use their greater wealth to shape nonresidents' choices about where to live and what kind of work to do. As receiving societies have no reasonable basis to ask nonresidents move to their country and grow their food, they surely have no right to leverage nonresidents' relative poverty to encourage them to accept that request. It is therefore not paternalistic to claim that receiving societies should not request and incentivize temporary farmwork, as receiving societies never had the authority to do so to begin with.

#### IV. IMPLICATIONS FOR OTHER GUEST WORKER PROGRAMS

To be sure, many apparently permissible immigration, education, and work policies involve people taking on burdens similar to those of temporary farmworkers. Emergency relief workers take on extraordinary burdens of dangerous work and transiency. Student exchange programs require that students temporarily migrate to a new country and then leave once their visas expire. Visiting professors and ambassadors likewise are at risk of rupturing a variety of their personal and social relations because of their temporary (and potentially quite long) visit to and stay in a

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<sup>99</sup> This is not meant to be a sufficient condition for something's being paternalistic. For a discussion competing accounts of paternalism and a view of paternalism to which I am sympathetic, see Seana Valentine Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29, no. 3 (2000): 211–21.

new country. And the work that exchange students, visiting professors, and ambassadors do may be quite difficult and stressful, albeit for different reasons than temporary farmworkers.

But temporary farmworker programs are not programs for cultural exchange, nor are they (at least in their current form) programs for sharing skills and knowledge. There is nothing inherent in producing food that recommends inviting nonresidents to play that productive role. Temporary farmworker programs are also quite unlike emergency relief programs, as the temporary farmworker programs are motivated largely by preference rather than exigency, and the need for farmwork that motivates temporary farmworker programs is indefinite.

Recognizing the moral defects of temporary farmworker programs thus does not entail a repudiation of guest worker programs and cross-border cooperation more broadly. The moral problems with temporary farmworker programs do, however, recommend scrutinizing the motives for and structure of guest worker programs.

Consider, for example, a hypothetical visiting academic position. Under the terms of the position, a nonresident academic is invited to temporarily join the department of a university in a receiving society for purposes of sharing research and perspectives across borders. For such a program to be responsive to those purposes, it seems reasonable to expect that the visiting professor will do more than work on her research in the isolation of her lab or office. It may be reasonable to ask that the visitor teach a class so as to learn from and share ideas with the student body and other members of the receiving society who might sit in on the course. It may also be reasonable to ask that the visitor interact with faculty by, for instance, participating in workshops or giving a departmental talk.

A policy of temporarily employing academics may also unreasonably burden participating nonresidents. Universities might, for example, create short-term (one to two year)

academic positions that require participants to teach heavy course loads—without any guarantees that participants will have time or opportunities to develop relationships with or learn from members of the department and larger academic community—in order to reduce the costs of providing tenure. Similar to temporary farmworker programs, such a short-term hiring practice may create market pressures for nonresidents (and residents) to adopt a transient lifestyle that compromises their access to stable associational networks.<sup>100</sup> The transiency likewise seems unrelated to any shared project or value between receiving universities and participants. Indeed, a policy of short-term hiring may be in tension with university values of intellectual freedom and education if the policy compromises the security of employment needed to freely explore a variety of subjects and opinions and to mentor students.

Rejecting temporary farmworker programs is thus compatible with embracing cross-border cooperation and exchange, but the moral defects of the programs should lead us to critically examine those relationships and the policies that foster them.

## CONCLUSION

I began this Chapter by explaining that common criticisms of temporary farmworker programs target morally objectionable but contingent features of the programs, such as workers' vulnerability to employer abuse. I argued that even if such features could be eliminated, temporary farmworker programs would still be morally defective. The programs ask and incentivize poorer nonresidents to compromise their existing intimate, civil, and political ties to perform work in a new country, and to then rupture the new ties they form when they are forced

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<sup>100</sup> Of course, for residents the character of the burden on associational life is distinguishable from temporary farmworkers. Residents have a right to stay, unlike temporary farmworkers. For a discussion of competing theories of what produces contingent work more broadly, see generally Lester, "Careers and Contingency," 73 (arguing that "New Keynesian" accounts of underemployment in labor markets can help explain the rise of contingent employment notwithstanding that category's heterogeneity).

to leave (if they can form any new ties at all). Adopting such programs to avoid having to perform as much farmwork, or to avoid the (perceived) costs of permanent immigration, treats guest workers' interests in associational life as less valuable than the like interests of host-country residents. As such, the programs are incompatible with the fundamental democratic principle that people are equal moral agents.

My objections to temporary farmworker programs thus reveal that reform is an inadequate aim. Societies should instead strive to move toward a state of affairs where they no longer have temporary farmworker programs. I want to close by briefly discussing how the agency values that underpin my objections might guide transitioning away from temporary farmworker programs.

First, many people have come to rely on temporary farmworker programs to help further their aims—to help educate a family member or escape poverty (or mitigate the risk of future poverty). Ending those programs by closing borders would likely have the perverse effect of further imperiling the moral agency of nonresidents by seriously compromising their livelihood and potentially trapping them in failed (or failing) states. The moral defects of temporary farmworker programs therefore recommend abandoning or radically revising current programs by extending to guest workers a path to citizenship.

Second, societies that have historically sent their citizens abroad to perform temporary farmwork may have become so economically enmeshed with the receiving society as to have a claim to continued cooperation with the receiving society. While I cannot fully explore the matter here, such circumstances may provide further reason to transition away from current temporary farmworker programs by adopting open borders policies, such as permanent immigration programs for sending-country citizens. Long-standing relationships between

receiving and sending countries may also limit the extent to which a receiving country may legitimately and unilaterally modify those relationships. Such unilateral action may not only be unfair but might also reenact historical colonial patterns of the colonizing society exercising a kind of authoritarian power over the colonized population. Transitioning away from current temporary farmworker programs may thus need to be a joint effort between receiving and sending countries.

Third, dismantling temporary farmworker programs should be responsive to the potential effect on food prices, both domestically and abroad. If receiving societies were to extend a path to citizenship to guest workers, such societies may eventually have to pay the higher wage to incentivize new and other residents to perform farmwork. It is therefore possible that food prices in those societies (and in international markets) would increase. In the absence of domestic and global redistributive policies, such a consequence would be especially hard on poorer populations. Abolishing the programs out of a concern for the moral interests of temporary farmworkers may hence have the paradoxical effect of undermining the like interests of similarly situated (if not the same) people. The project of remedying the defects in temporary farmworker programs is thus likely much broader than changing labor and immigration policies, and may require adopting domestic and global redistributive policies.

Finally, there remains the problem of receiving-society residents' willingness to perform farmwork. Even if receiving societies extend a path to citizenship to guest workers, if guest workers immigrate they may become less interested in performing farmwork in light of the availability of better economic opportunities. Thus, the economic challenge that motivated temporary farmworker programs would reemerge.

In the course of my arguments, I have suggested that even between citizens of the same society, the choice of how to share the burdens of farmwork is morally fraught. There still must be a non-arbitrary basis for asking co-citizens to take on the burdens of farmwork, and the preferences of dominant social classes to perform other kinds of work cannot provide that basis.<sup>101</sup> Citizens must be able to understand themselves as doing their part as moral equals, and not as doing their part as subordinates of others. While simply raising farmworker wages may attract enough people to perform farmwork, in a society with substantial wealth inequality it may still be the case that the burden of performing farmwork falls disparately and unreasonably on the shoulders of the less privileged.

In light of all the moral risks involved in having people grow food, should a society simply aim to mechanize and industrialize as much food production as possible? I am not sure, but I have some reservations. Industrial farming, because of its current reliance on fossil fuels, may not be sustainable.<sup>102</sup> Farmwork may also be tied to particular conceptions of the good and rural cultures. Rather than aim to eliminate manual farmwork, a society might consider revising the way it encourages people to perform farmwork. For example, a society might consider making farmwork temporary (such as by restricting people's freedom of employment to perform farmwork for more than a year) or voluntary. Making farmwork temporary is a (though I do not claim the only) way of ensuring that people do not ask or incentivize one another to undermine their health or devote their professional life to an activity that may compromise their moral agency. Making the work wholly voluntary is also a way of mitigating the risk that financial

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<sup>101</sup> See section III.B.

<sup>102</sup> See generally Tony Weis, "The Accelerating Biophysical Contradictions of Industrial Capitalist Agriculture," *Journal of Agrarian Change* 10, no. 3 (2010): 315–41.



incentives will systematically induce the least advantaged members of society to perform farmwork.

Of course, the problem of people's willingness to perform the work would remain. Must a society then resort to conscription schemes? Perhaps not.<sup>103</sup> Ensuring that enough people perform the work is a problem only if we assume that the primary motive to perform farmwork is private—that people will only be motivated to perform farmwork by, for instance, their desire or need for money. That need not be the case. Many people volunteer and perform work for much lower wages than they might otherwise be paid for extended periods of time. Consider Doctors Without Borders and the Peace Corps. People might come to understand performing farmwork in a way analogous to such civic, humanitarian, and voluntary work.

To be sure, such a farming ethos is unlikely to arise anytime soon and societies are unlikely to create a path to citizenship for guest workers any time soon. But in the interim, there is a lot we can do to improve conditions for farmworkers, domestic and temporary alike. We could improve internal labor mobility for temporary farmworkers by decoupling their right to stay from employment with their initial sponsor.<sup>104</sup> We could also raise farmworker wages and engage in social activism to raise awareness about the challenges of migrant work. We could support farmworker unions to enable farmworkers to combine their economic and political power to have a meaningful voice in the policies that affect their life prospects.<sup>105</sup> And we could,

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<sup>103</sup> But if it did, it is not clear that a coercively enforced conscription scheme would be impermissible. Indeed, if a voluntary scheme, as in the union example (see section III.B.), disproportionately burdened one class of people, conscription might be one way to ensure that farmwork was shared on a fair basis. For an argument that some limits on freedom of occupation may be required to ensure the provision of socially necessary goods and services, see generally Stanczyk, "Productive Justice."

<sup>104</sup> See, e.g., Stilz, "Guestworkers," 304.

<sup>105</sup> Unionization may also empower contingent workers more broadly. See Lester, "Careers and Contingency," 143–44.

of course, work on all the improvements that the standard critiques of employer abuse, remedial insufficiency, and overstay risks suggest.

## VOLUNTEER WORK, INCLUSIVITY, AND SOCIAL EQUALITY

Employment law abounds with questions about employee status—about what makes someone an employee as opposed to, for example, an independent contractor or a volunteer. How the law settles these questions determines the scope of many workers’ rights and protections. For example, under U.S. federal law, volunteers have no right to minimum wage<sup>1</sup> and are not protected by employment discrimination law.<sup>2</sup> The law then directs courts to determine employee status by examining the relationships between particular workers and employers. Seemingly narrow issues about workers’ financial and hierarchical relations to employers are thus familiar and pervasive in employment law. Less appreciated are the larger moral and political values implicated by where the law locates the boundaries of employment.<sup>3</sup> By

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<sup>1</sup> See, e.g., *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985) (explaining that the wage and hour provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. (2012), do not reach “ordinary voluntarism”).

<sup>2</sup> See, e.g., *O’Connor v. Davis*, 126 F.3d 112, 113–16 (2d Cir. 1997), cert. denied, 552 U.S. 1114 (1998) (holding that the plaintiff, who worked part time without remuneration at a psychiatric hospital to complete her social work degree, was a volunteer and therefore not an employee for purposes of employment discrimination law). Volunteers also do not have a right to engage in “concerted activities for purposes of collective bargaining.” National Labor Relations Act (NLRA), Section 7, 29 U.S.C. § 157 (2012); see *Wbai Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (finding that volunteers at a radio station were not NLRA employees because “[t]hey receive no wages or fringe benefits”). This Chapter discusses volunteers under minimum wage and employment discrimination law. For a discussion of perspectives on how volunteers should be treated under the NLRA, see Mitchell H. Rubinstein, “Our Nation’s Forgotten Workers: The Unprotected Volunteers,” *University of Pennsylvania Journal of Labor and Employment Law* 9, no. 1 (2006): 147, 171–79.

<sup>3</sup> A notable exception is the literature on the labor of care within the family, which addresses questions such as who should be recognized as a worker for purposes of a variety of social benefits. For a few examples of this substantial and rich literature, see generally Martha M. Ertman, “Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements,” *Texas Law Review* 77 (1998): 17–112; Martha Albertson Fineman, “Contract and Care,” *Chicago-Kent Law Review* 76, no. 3 (2001): 1403–40; Gillian Lester, “A Defense of Paid Family Leave,” *Harvard Journal of Law & Gender* 28 (2005): 1–83; Dorothy E. Roberts, “The Value of Black Mothers’ Work,” *Connecticut Law Review* 26 (1994): 871–78; Hila Shamir, “Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of

examining volunteer status under U.S. minimum wage law, this Chapter argues that how the law defines employment not only shapes the terms and conditions of people’s jobs, but also implicates public ideals of social cooperation and the moral significance of work.

The volunteer-employee boundary is of particular interest because our understanding of volunteer work—of what it is and why it is valuable—is surprisingly undertheorized and yet the stakes are high with respect to how we fix that boundary.<sup>4</sup> Courts typically distinguish volunteers from employees on the basis of a principle of economic dependency: a person has a right to minimum wage only if she depends for her livelihood on the organization for which she works; otherwise, she is a volunteer.<sup>5</sup> Such an approach can protect against obvious cases of economic exploitation,<sup>6</sup> but leaves it mysterious why we should have volunteers to begin with. That is an important burden to carry. Volunteers often perform the same kinds of work as paid employees.

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Care,” *Berkeley Journal of Employment & Labor Law* 30, no. 2 (2009): 404–60; Noah D. Zatz, “What Welfare Requires From Work,” *UCLA Law Review* 54, no. 2 (2006): 373–464. This Chapter complements this literature by examining the question of who should count as an employee for labor undertaken outside of the home.

<sup>4</sup> In discussing volunteer status for purposes of minimum wage law, this Chapter focuses on the sort of work for which a person is normally owed a minimum wage. Professional volunteerism, such as volunteer legal services, is thus not a subject of this paper, as licensed professionals have no right to federal minimum wage when they work in their capacity as professionals. See 29 U.S.C. § 213(a)(1) (explaining, *inter alia*, that “any employee employed in a bona fide . . . professional capacity” is not entitled to minimum wage under the FLSA); 29 C.F.R. § 541.304 (2004) (explaining that “employee employed in a bona fide professional capacity” under 29 U.S.C. § 213(a)(1) includes licensed attorneys and physicians practicing within their respective fields).

<sup>5</sup> See, e.g., *Tony & Susan Alamo Foundation*, 471 U.S. at 301 (explaining that whether someone is a volunteer for purposes of federal wage and hour law turns on whether, as a matter of “economic reality,” she depends for her livelihood on the organization for which she volunteers); *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 352–54 (6th Cir. 2011) (holding that whether a volunteer firefighter was an employee for purposes of protection from employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012), turned on whether the firefighter was an employee under the common law agency test (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992))).

<sup>6</sup> See *Tony & Susan Alamo Foundation*, 471 U.S. at 292–93, 299–303 (finding that “associates,” who were recovering from drug addiction and formerly homeless, were entitled to minimum wage for their work at a religious organization’s commercial hog farms and gas stations, even though the associates felt that they were religiously-motivated volunteers, because the associates were given room and board while they performed such work).

Volunteers cook, perform clerical work, teach, build homes, and so forth. Employees and volunteers alike can also be vulnerable to discrimination that compromises equal employment opportunity.<sup>7</sup> Thus, as recent policy debates surrounding unpaid internships have brought to light,<sup>8</sup> how we fix the volunteer-employee boundary can affect the number of paid jobs and the kinds of barriers people face to accessing the labor market. Volunteering also has a historically gendered character. Women have tended to (and continue to) volunteer at higher rates than men<sup>9</sup> and women tend to perform different kinds of volunteer work than men—women are cooking, cleaning, and performing administrative work, while men are more likely to mentor and coach.<sup>10</sup> While these trends may not necessarily be morally problematic, they suggest a risk that the largely unregulated voluntary sector may be reinforcing social inequality.<sup>11</sup> Given all that is at stake, we need an account of why we want to make space for volunteer work—why it is valuable

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<sup>7</sup> See, e.g., *O'Connor*, 126 F.3d at 113–16 (finding that a plaintiff who worked at a hospital did not have a sexual harassment claim even though her supervisor called her “Miss Sexual Harassment,” suggested that she participate in an orgy, regularly made remarks about her attractiveness and sex life, and was working at the hospital to complete her degree, because the hospital did not pay the plaintiff).

<sup>8</sup> See, e.g., Alex Williams, “For Interns, All Work and No Payoff,” *The New York Times*, February 14, 2014, <https://www.nytimes.com/2014/02/16/fashion/millennials-internships.html> (describing how unpaid internships are replacing entry-level positions); “Do Unpaid Internships Exploit College Students?,” *The New York Times* February 4, 2012, <https://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students> (sharing perspectives from a variety of scholars and practitioners on the legality of unpaid internships).

<sup>9</sup> See, e.g., Bureau of Labor Statistics, “Volunteering in the United States, 2015,” U.S. Department of Labor, accessed February 25, 2016, <https://www.bls.gov/news.release/volun.nr0.htm> (explaining that in 2015, “[a]cross all age groups, educational levels, and other major demographic characteristics, women continued to volunteer at a higher rate than men”).

<sup>10</sup> See Bureau of Labor Statistics, “Charts by Topic: Volunteer Activities,” U.S. Department of Labor, accessed December 20, 2016, <https://www.bls.gov/TUS/CHARTS/VOLUNTEER.HTM> (explaining that according to the findings of the 2015 American Time Use Survey, women were more likely than men to do volunteer activities such as “food preparation, presentation, and cleanup activities,” in addition to “organizing and preparing activities,” whereas men were more likely than women to do “teaching, leading, and mentoring activities”).

<sup>11</sup> Volunteer organizations may also be less racially diverse than paid workplaces. See section II.A.

in ways that employment tends not to be—to fix the volunteer-employee boundary in the best place.

To that end, this Chapter investigates whether a compelling account of volunteer work's value can be found and deployed to justify not paying would-be volunteers a minimum wage. While courts tend to take the value of volunteer work for granted, commentators typically applaud volunteerism on the basis of the work's civic, humanitarian, and charitable character. Although these aspects of volunteer work may be valuable, as bases for legally distinguishing volunteer work from employment they either overlook the many ways in which volunteer work is meaningful to volunteers or imply an unappealing dichotomy between volunteer work as moral work and employment as amoral work. Many paid employees perform civic, humanitarian, and charitable work as part of their jobs, and the paid workplace's centrality in social life and regulation by antidiscrimination law should make the paid workplace well suited for such publicly oriented projects. Volunteer work can, at the same time, fail to be civic, humanitarian, or charitable. A person may, for example, want to volunteer at a museum simply because she loves art. The defects in these familiar accounts of volunteer work are nonetheless instructive, as they reveal that how we distinguish volunteers from employees not only shapes the material conditions of work, but also implicates our public understanding of the aims of the paid workplace and the moral significance of work more broadly.

In this Chapter, I propose that volunteer work's potential to be inclusive with respect to skill and ability offers a compelling set of reasons for carving out legal space for volunteerism. I refer to such inclusivity as *merit inclusivity*. Often all that is required to volunteer is to sign up or show up at a designated location. The animating purposes of volunteer work can also facilitate merit inclusive cooperative relations. For example, the urgent need for help may move

neurosurgeons to administer emergency relief alongside nurses and students. Volunteer work is also voluntary—one does not need to volunteer to secure a livelihood—and often performed outside of standard employment hours. As neither a substitute for nor in competition with employment, volunteer work can reduce the costs of trying something new, and can thereby encourage people to work beyond their professional expertise.

In contrast, a person's opportunities for paid work typically depend on her comparative skill and ability. By providing access to forms of social cooperation that reflect shared interest rather than comparative skill and ability, volunteer work opportunities can mitigate the risk that a person's skills will confine her to certain social roles or arbitrarily limit her opportunities to participate in valuable social projects. A person's skill and ability can also be a product of her educational opportunities, wealth, and the like. Competitive, meritocratic workplaces and labor markets may accordingly reproduce the same kinds of status-based hierarchies antidiscrimination law aims to lessen. Volunteerism's merit inclusivity can thus complement employment's potential to foster social equality along lines of race, gender, and other socially salient statuses by lessening the influence of skill and ability on social organization.

Thus, even if paid workplaces sometimes instantiate aspects of merit inclusivity, the world of employment—because of its skill-sensitivity and the competitive pressures firms often face—is not a stable environment for merit inclusive work. Merit inclusivity can hence justify taking public steps to create space for merit inclusive work outside of paid employment. Insofar as permitting organizations to not pay volunteers accomplishes that aim, merit inclusivity recommends excluding volunteers from minimum wage law.

Merit inclusivity also supplies a standard for criticizing existing practice. If merit inclusivity justifies volunteer minimum wage exclusions, then competitive unpaid internships at

film studios, the White House, and the like, will be in tension with the justification for that exclusion and should accordingly not fall within its reach. It will also be hard for volunteer work to be merit inclusive if disability discrimination is rampant, and volunteer work will fail to complement work's potential status-based inclusivity if volunteer organizations have free reign to discriminate on the basis of race, gender, and other socially salient statuses. Merit inclusivity thus has implications outside of the minimum wage context, providing a basis for extending antidiscrimination protections to volunteers.

I begin in Part I by arguing that common approaches to conceptualizing volunteer work in terms of its civic, humanitarian, and donative character fail to provide a principled basis for the volunteer-employee legal boundary. In Part II, I argue that merit inclusivity can provide such a basis. Part III then addresses how merit inclusivity might help us to better locate the legal boundary between volunteerism and employment.

## I. TWO FAMILIAR ACCOUNTS OF VOLUNTEER WORK'S VALUE

### A. *Civic Duty and Humanitarianism*

Volunteer work's civic and humanitarian character is a popular basis for valuing volunteer work.<sup>12</sup> Volunteers serve food at shelters,<sup>13</sup> offer emotional support to hospital patients,<sup>14</sup> and

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<sup>12</sup> See, e.g., 29 C.F.R. § 553.101(a) (explaining that public sector "volunteers" are not employees so long as they neither expect nor are promised compensation for their work, and work for "civic, charitable, or humanitarian reasons"); *Memorandum for the Heads of Executive Departments and Agencies: Expanding National Service Through Partnerships* (The White House, Office of the Press Secretary, 2013), [http://www.nationalservice.gov/sites/default/files/page/2013\\_national\\_service\\_memo\\_release.pdf](http://www.nationalservice.gov/sites/default/files/page/2013_national_service_memo_release.pdf) ("National service and volunteering can be effective solutions to national challenges and can have positive and lasting impacts that reach beyond the immediate service experience.").

<sup>13</sup> See, e.g., "Adopt-A-Meal," Los Angeles Mission, accessed May 16, 2016, <https://losangelesmission.org/give/adopt-a-meal/> ("The Adopt-a-Meal program allows volunteer groups to take charge of a meal as though it were their own event. The volunteers will prepare and serve the designated meal for approximately 500 Mission guests.")

<sup>14</sup> See, e.g., "POOCH Volunteers," Cedars-Sinai Medical Center, accessed May 16, 2016, <http://www.cedars-sinai.edu/About-Us/Volunteer-Opportunities/Programs/POOCH-Volunteers.aspx> (explaining that POOCH



rebuild homes in the wake of a disaster.<sup>15</sup> Volunteer work is a central part of how we care for one another, of how we act on and express beneficence and civic duty.

Although I do not deny that volunteer work may be valuable in these ways, civic and humanitarian work is not performed only by volunteers. Employees at Save the Children and the U.S. Equal Employment Opportunity Commission also perform humanitarian and civically-minded work. It seems plausible that they might understand themselves as working to help others. And it is not only work at nonprofits that may be so understood: Agricultural workers employed by a regional grower might work to support local governance and cultural solidarity.<sup>16</sup> More broadly, we might be moved to join the paid workforce “to feel that we are contributing to something larger than ourselves and our own families.”<sup>17</sup>

Of course, some descriptive overinclusiveness is not necessarily a reason for rejecting a civic-humanitarian model of volunteer work’s value. Overinclusiveness may simply indicate that we have historically erred in sorting work that should be done by volunteers from work that should be done by employees. But I do not think that is the case here. As familiar as the civic-humanitarian model may be as a description of volunteer work’s importance, as a normative

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volunteers provide “supportive experiences [with dogs] to patients” by, for example, helping patients play with and walk dogs).

<sup>15</sup> See, e.g., “Disaster Response Volunteer Opportunities,” Habitat for Humanity, accessed May 16, 2016, <http://www.habitat.org/disaster/volunteer>. For other like examples of volunteer organizations and data about the extent and type of volunteer work in the United States from 2013 and 2014, see generally “Volunteering in America, Frequently Asked Questions,” Corporation for National Community Service, accessed February 23, 2016, [https://www.volunteeringinamerica.gov/about/research\\_faqs.cfm](https://www.volunteeringinamerica.gov/about/research_faqs.cfm).

<sup>16</sup> Consider, for instance, members and proponents of La Via Campesina, an international organization that aims to facilitate “small-scale sustainable agriculture” to promote agricultural worker rights and protect agrarian ways of living. “The International Peasant’s Voice,” La Via Campesina, February 9, 2011, <http://www.viacampesina.org/en/index.php/organisation-mainmenu-44/what-is-la-via-campesina-mainmenu-45>.

<sup>17</sup> Vicki Schultz, “Life’s Work,” *Columbia Law Review* 100, no. 7 (2000): 1928. Of course, we might also be moved to join because we simply need the money.

basis for distinguishing volunteer work from employment it is premised on an impoverished view of employment's moral potential. The model suggests that civic and humanitarian values are not properly at home in employment. Yet why should that be so? To be sure, if the paid workplace were predominantly a forum for self-interested activity, then perhaps civic and humanitarian values—because of their cooperative, social character—would best be realized outside of employment. Yet we might also understand employment as a project of harnessing our talents to realize a diversity of public and private aims,<sup>18</sup> as providing a “stable foundation [of repeated interaction] for a democratic order”<sup>19</sup> and embracing our interdependency through mutual aid and support.<sup>20</sup> Civic and humanitarian values would be welcome in such a social world of employment.

Further, as Cynthia Estlund has argued, the paid workplace's centrality in social life makes it an especially urgent and promising site for diversity—for racial integration, for undoing gendered relationships of subordination, and, more generally, for facilitating social bonds between people from different backgrounds.<sup>21</sup> The paid workplace can facilitate social ties

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<sup>18</sup> John Rawls suggests such a vision for the paid workplace:

[E]ven when work is meaningful for all, we cannot overcome, nor should we wish to, our dependence on others. In a fully just society persons . . . rely upon their associates to do things they could not have done, as well as things they might have done but did not . . . . It is a feature of human sociability that we are by ourselves but parts of what we might be . . . . The division of labor is overcome not by each becoming complete in himself, but by willing and meaningful work within a just social union of social unions in which all can freely participate as they so incline.

John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), 529.

<sup>19</sup> Schultz, “Life's Work,” 1928. See generally Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (Oxford: Oxford University Press, 2003), 118.

<sup>20</sup> Estlund, *Working Together*, 110–12 (discussing Émile Durkheim's position that the division of labor can facilitate solidarity); Rawls, *Theory*, 529.

<sup>21</sup> Estlund, *Working Together*, 4–5, 138–39.

between people who, but for their workforce participation, might never have encountered one another.<sup>22</sup> If employment manifested such inclusivity, the paid workplace would be well-suited for civic and humanitarian projects, given the values of equality and mutual recognition that underlie such projects. By treating civic and humanitarian aims as better pursued through volunteer work than employment, the civic-humanitarian model thus suggests an unappealing dichotomy between volunteer work and employment, according to which publicly-minded work is best done outside of the world of employment.

The civic-humanitarian model is also overly narrow in its vision of volunteerism. Many instances of volunteer work are neither civic nor humanitarian. For example, people might volunteer at the opera because of their love of music. Volunteering is a pluralistic practice, as diverse as the associations we might form with one another and the conceptions of the good life we might pursue. By taking such a narrow view on volunteerism's value, the civic-humanitarian model risks overlooking the many ways in which volunteering is meaningful for people. We should at least inquire whether these other forms of volunteering are valuable before we endorse a model of volunteerism that marginalizes them.

### *B. Volunteering as Gift Giving*

Perhaps it is not volunteerism's civic and humanitarian character but its donative character that makes volunteer work a special moral arena. Volunteer work is typically done without expectation of a wage and volunteers often describe their own work as "giving back."<sup>23</sup> Giving a

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<sup>22</sup> See Estlund, *Working Together*, 4–5, 138–39.

<sup>23</sup> Joyce Rudolph, "Community: Three Seniors Honored for Their Volunteer Work," *LA Times*, December 16, 2015, <http://www.latimes.com/socal/burbank-leader/community/tn-blr-me-community-presidents-call-to-service-award-20151216-story.html> ("The feeling that one gets out of volunteering and giving back to the people in your community — the rewards are indescribable . . . [.]"); see Rubinstein, "Our Nation's Forgotten Workers," 149.

gift of *labor* is, of course, not the only way to communicate beneficence and gratitude to others. Money and goods often suffice. But sometimes gifts of money are inappropriate,<sup>24</sup> and people may not have enough money to purchase the relevant gift. Although a person may not be able to buy someone a new home, she might still be able to help build one. Volunteerism can thus make gift giving more inclusive and provide a wider range of expressive contexts.

I agree that volunteer work is a valuable part of gift giving, but doubt that that fact can offer a principled basis for legally distinguishing volunteerism from employment. If what makes volunteer work donative is its being performed from a donative motive, then a gift-giving model runs into one of the same problems as a civic-humanitarian model: the model is underinclusive of volunteering and may therefore overlook many meaningful forms of volunteering. A person might join her neighborhood association, helping to run regular meetings and organize local events, not because she wants to give back to her community, but because she feels she has a civic duty to participate in local governance. Similarly, another person might lead religious liturgies as a form of worship, while yet another might set up tents and cook food to occupy Wall Street out of social protest. This is not to say that acting from duty and donative motives are mutually exclusive; we may sometimes be morally required to give gifts. My point is rather that volunteering need not be performed from donative motives. Volunteering provides contexts for acting from a variety of motives. A theory of volunteer work's value should be able to explain that diversity.

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<sup>24</sup> For a discussion of duties of gratitude and the potential moral difficulties of giving someone a gift and thereby placing them under a debt of gratitude, see generally Barbara Herman, "Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality," *Journal of Philosophy* 109, no. 5 (2012): 391–411.

A donative model of volunteerism may also be overinclusive. Lawyers often speak in the register of gift when they describe pro bono work,<sup>25</sup> even though pro bono hours are often treated as billable hours for purposes of salaries and bonuses.<sup>26</sup> Employees at charitable and humanitarian institutions, such as Save the Children, may also be motivated by a desire to give to others, even though they are paid a salary for their work. In such cases, a donative motive may still be possible because the work ultimately produces a gift—legal services, food—for the recipient. It would be regrettable if this were not the case, because then perhaps only the very rich would have the opportunity to make it their life’s work to help others.

Employment’s potential to be inclusive as to race, gender, and other socially salient social statuses may also make the paid workplace’s involvement in philanthropy particularly important. White people are historically overrepresented in donor populations, and donor priorities and values may differ along racial lines.<sup>27</sup> Status inclusivity in the paid workplace can

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<sup>25</sup> See, e.g., Scott L. Cummings and Deborah L. Rhode, “Managing Pro Bono: Doing Well by Doing Better,” *Fordham Law Review* 78, no. 5 (2010): 2361–65 (describing large law firms that perform pro bono work as “businesses with a professional mandate to give back” and suggesting that lawyers understand pro bono work they perform as employees (or partners) of the firm as “volunteer work” and “public service”).

<sup>26</sup> E.g., “Akin Gump Strauss Hauer & Feld LLP,” *Vault Guide to Law Firm Pro Bono Programs*, ed. Matthew J Moody (Vault 2016), 14 (reporting that Akin Gump gives billable hour credit for pro bono hours, considers pro bono hours for purposes of yearly bonuses, and has no limit on how many pro bono hours may be applied toward the target amount of billable hours); see also Alan Gutterman, *Hildebrandt Handbook of Law Firm Management* (LegalWorks, 2015), § 12:10 (“A survey of major law firms conducted by the Pro Bono Institute in 2005 found that the majority of law firms now provide billable hour parity [for pro bono work] . . . for purposes of meeting billable hour targets.”).

<sup>27</sup> See Emmett D. Carson, “Diversity in Giving: The Changing Landscape of American Philanthropy,” *The Nonprofit Times*, February 2015, <http://www.thenonprofitimes.com/wp-content/uploads/2015/03/Diversity-in-Giving-Study-FINAL.pdf>.

help make philanthropy more sensitive to the situation of recipients,<sup>28</sup> and may lessen risks of stereotyping or pressuring recipients to conform to disempowering victim tropes.<sup>29</sup>

But perhaps I have been overly focused on donative motives rather than the donative structure of volunteer work. Borrowing from the idea of a donative promise under U.S. contract law, what makes volunteer work donative, one might argue, is that volunteer labor is not supported by consideration—the work is not exchanged for money or some other bargained-for good,<sup>30</sup> service, forbearance, or promise of later performance.<sup>31</sup> In contrast, even when a given paid position involves producing or providing a gift, the work is not donative in this contractual sense because the worker is paid by an employer, and the fact that she is paid at least in part explains why she is performing that work for her employer.

Even if such a contract view of volunteer work as donative can avoid the over- and underinclusiveness worries, I am not sure the view adds much to the doctrinal proposition we started with: that volunteer work is simply some kind of work that is not performed for securing a livelihood. What seems to make volunteer work donative on this contract view is that the work is simply unpaid or otherwise unremunerated. But that provides little guidance as to what kind of work we should include in that category. Should we, for instance, treat prestigious unpaid

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<sup>28</sup> See *ibid.*

<sup>29</sup> For a discussion and illustration of such pressures, see generally Jasmine Phillips, “Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States,” *UCLA Law Review* 62 (2015): 1642–75. Similar issues surround Northern giving to the Global South. See, e.g., Teju Cole, “The White Savior Industrial Complex,” *The Atlantic*, March 21, 2017, <https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/>. For a related discussion of how international human rights discourse and practice may similarly reflect race-based victim stereotypes, see generally Makau Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201–45.

<sup>30</sup> “To constitute consideration, a performance or return promise must be bargained for.” *Restatement (Second) of Contracts* § 71(1) (Washington D.C.: The American Law Institute, 1981).

<sup>31</sup> See *Restatement (Second) of Contracts* §§ 71(3), 75.

internships at government agencies the same way that we treat part time soup kitchen volunteers? And why should we have any volunteers to begin with? What would be lost if all labor had to be paid? The fact that volunteer work is unbargained for seems to say little about what values are at stake in such questions.

## II. INCLUSIVITY

As the shortcomings of the civic-humanitarian and donative models of volunteer work illustrate, workforce participation is a major way in which people develop ideas and values, form relationships, understand themselves, and implement conceptions of the good life. Indeed, workforce participation may be one of the most central and pervasive contexts for social cooperation.<sup>32</sup> People spend much of their waking hours in the paid workplace and form lasting relationships with co-workers.<sup>33</sup> This is not simply because most people need to work to earn a living, but also because employment has personal and cultural significance. Workforce participation can “provide[] people with a sense of belonging and contributing to something of value to a group larger than ourselves or our loved one[s] . . . .”<sup>34</sup> Hence, a person may feel a concomitant loss of self-esteem with a loss of employment.<sup>35</sup> Workforce participation is also tied

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<sup>32</sup> See Estlund, *Working Together*, 4–5, 12, 125.

<sup>33</sup> Such a potential for ongoing relationships may be eroding through rising temporary work and underemployment. See Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s* (New York: Russell Sage Foundation, 2011); Gillian Lester, “Careers and Contingency,” *Stanford Law Review* 51, no. 1 (1998): 73, 78–87 (discussing challenges of analyzing “contingent” employment due to its heterogeneity, and suggesting instead that lawmakers refocus reform efforts on underemployment—“employment in a job that undervalues one’s labor relative to that of other workers with the same abilities, availability, and desires”). For an analysis of the international and political dimensions of precarious employment, see Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury Academic, 2011).

<sup>34</sup> Schultz, “Life’s Work,” 1888.

<sup>35</sup> Schultz, “Life’s Work,” 1888–90.

to conceptions of equal citizenship<sup>36</sup>—with rejections of feudalism,<sup>37</sup> emancipation from slavery,<sup>38</sup> and women’s freedom from being destined to domestic work within the family.<sup>39</sup> A person’s workforce participation may, of course, also be demeaning and stigmatizing, but that is further evidence of the social and personal salience of work.<sup>40</sup>

Because of its social significance, the paid workplace is an especially important place for social inclusion.<sup>41</sup> Making the paid workplace inclusive of race, gender, and other socially salient statuses helps ensure fair access to a livelihood and that our primary ways of interacting with one another are not structured by status-based (such as patriarchal or racist) hierarchies. Status inclusivity in our major social institutions is also a way of publicly repudiating the idea that race, gender, and the like, may arbitrarily limit opportunities for pursuing meaningful life projects and accessing positions of power. Fostering status inclusivity in employment can thus be understood

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<sup>36</sup> See generally Kenneth L. Karst, “Coming Crisis of Work in Constitutional Perspective,” *Cornell Law Review* 82, no. 3 (1997): 523–71; Schultz, “Life’s Work,” 1886–88.

<sup>37</sup> See, e.g., Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford: Oxford University Press, 2010), 23–24.

<sup>38</sup> See Schultz, “Life’s Work,” 1887–89 (discussing the “complex legacy” of identifying the freedom to sell one’s labor—rather than, say, freedom to own “productive property”—with social and political “independence”); Allegra M. McLeod, “Prison Abolition and Grounded Justice,” *UCLA Law Review* 62 (2015): 1188–92 (linking the U.S. post-Civil War history of prison labor to attempts to reproduce de facto slavery).

<sup>39</sup> See generally Schultz, “Life’s Work” (arguing in favor of policies collectivizing housework rather than to paying women for care to their own families); Vicki Schultz and Allison Hoffman, “The Need for a Reduced Workweek in the United States,” in *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, eds. Judy Fudge and Rosemary Owens (Oxford: Hart Publishing, 2006), 131–51.

<sup>40</sup> See, e.g., Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 2nd ed. (London: Routledge, 2000, 2014), 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); Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: The Belknap Press of Harvard University Press, 2016), 199 (explaining that often the work available to poor black women is “domestic service in the homes of affluence white families” that reinforce the “ideological image of the ‘mammy’ . . . used to justify the exploitation and subordination of black women under slavery”).

<sup>41</sup> See Estlund, *Working Together*, 34, 125.



as a continuation of the larger projects of emancipation that made wage labor—as opposed to forced labor or labor compensated in-kind—such an important step forward.

#### A. *Volunteer Work's Merit Inclusivity*

Part of what makes the paid workplace a promising site for status inclusivity is that workforce participation is regulated by antidiscrimination law and typically nonvoluntary.<sup>42</sup> We ordinarily have to work in order to secure a living,<sup>43</sup> and even if sustenance were not conditioned on participation in the labor market, some substantial percentage of the population would still need to produce the many goods and services we need to live healthy, thoughtful, and otherwise flourishing lives. Volunteer work, in contrast, is voluntary and not subject to employment discrimination law.<sup>44</sup> And in practice, volunteer work may actually be less diverse with respect to status than paid work.<sup>45</sup> The composition of neighborhood-based volunteer organizations may reproduce the racial composition of the neighborhood. Women tend to perform different kinds of volunteer activities than men.<sup>46</sup> Compared to employment, volunteer work thus seems rather ill-suited to realize status inclusivity.

Yet even if volunteer work is presently less status inclusive than employment, volunteer work may still be inclusive in ways that employment systematically tends not to be. In particular,

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<sup>42</sup> See Estlund, *Working Together*, 13–15.

<sup>43</sup> Or we need to form an economic unit with someone who performs paid work, such as through marriage. For a discussion of how welfare could give single women opportunities to take care of family members similar to those of married women, see, for example, Carole Pateman, “Another way forward: welfare, social reproduction, and a basic income,” in *Democracy, Feminism, Welfare*, eds. Samuel A. Chambers and Terrell Carver (London: Routledge, 2011), 48. See generally Noah D. Zatz, “Revisiting the Class Parity Analysis of Welfare Work Requirements,” *Social Service Review* 83, no. 3 (2009): 313–50, for an argument that more recent welfare work requirements tend to require single women recipients to work more than women married to wage earners.

<sup>44</sup> See *supra* note 2.

<sup>45</sup> See Estlund, *Working Together*, 8–9,

<sup>46</sup> See *supra* note 10.

volunteer work may instantiate *merit inclusivity*—inclusivity with respect to people of different skills and ability. A remarkable and underemphasized feature of volunteer work is that it can be quite easy to volunteer. Often all that is required to, for example, help build houses for Habitat for Humanity or serve food at a local shelter, is to sign up and show up. So long as you can serve food, it may not matter whether you can serve twenty or ten people per hour to volunteer at a local shelter. And if you do not have the requisite skills, training may be provided,<sup>47</sup> someone may be assigned to help you,<sup>48</sup> or the organization may try to find some other way for you to be present and engaged.

In contrast, a person’s employment opportunities are normally a product of pre-existing skills and how that person compares to others in the labor market. Paid workplaces may, of course, be diverse with respect to skill and ability. A person does not need to be a physician to work at a hospital, or a career politician to help run a campaign. But for a workplace to also be inclusive, it must be more than numerically diverse. An inclusive workplace evinces a willingness to welcome and accommodate difference. A workplace may, for instance, be diverse with respect to women based on the number of women it employs, yet not inclusive if it is insensitive to the distinctive social pressures women face to be primary caretakers.<sup>49</sup> Similarly, paid workplaces may be diverse as to skill and talent, but generally fail to be inclusive on that

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<sup>47</sup> See, e.g., “Adult Volunteers,” Cedars-Sinai Medical Center, accessed May 31, 2016, <http://www.cedars-sinai.edu/About-Us/Volunteer-Opportunities/Programs/Adult-Volunteer-Program.aspx> (indicating volunteers need not have prior hospital experience and that volunteers will be provided with “[j]ob-specific training” for their volunteer work if needed).

<sup>48</sup> See, e.g., “Volunteers,” Chelsea Opera, accessed May 30, 2016, <http://www.chelseaopera.org/volunteers.html> (describing opportunities to volunteer in the Chelsea Opera’s management and production activities with “[n]o prior experience,” and explaining that the Opera “will provide any necessary guidance and/or training”).

<sup>49</sup> See generally Schultz and Hoffman, “The Need for a Reduced Workweek” (arguing that a 35-hour work week could relieve such pressures).

basis. To access the factory floor or a campaign headquarters as an employee, a person ordinarily must go through a competitive hiring process. Even when work is denominated as “unskilled,” it can still be done better and worse, and employers may still select and promote on that basis.<sup>50</sup> It is precisely on the basis of skill and ability that a candidate is typically welcomed to be present and participate in a paid workplace and any role therein.

But to be welcomed as a volunteer, it is often because you satisfy some other, non-meritocratic criteria. To volunteer to help organize my neighborhood’s annual Fourth of July Parade, I need only show that I am a local resident and pay the low yearly neighborhood association fee.<sup>51</sup> And indeed such inclusivity may be an aim of the association—to facilitate community ties between retirees, retail workers, stay-at-home parents, professors, teenagers, and people who, for whatever the reason, never have been able to (or never will be able to) enter the paid workforce.

There are, of course, zones of volunteering that require specialized skill. Emergency medical relief should be provided by qualified people; there seems to be no good reason not to give Ebola patients, or earthquake victims, anything less than the best medical care available. But even then, the relief efforts may lack a rigid skill-based division of labor. Cardiothoracic surgeons might administer vaccines alongside general practitioners and college students.<sup>52</sup> Volunteer legal work may similarly engage attorneys from a variety of backgrounds in the

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<sup>50</sup> I am indebted to Seana Shiffrin for this point.

<sup>51</sup> See “Join OPA!,” Ocean Park Association, accessed May 20, 2016, <http://www.opa-sm.org/join>.

<sup>52</sup> I am indebted to Noah Zatz for this example.

provision of the same legal services—a partner at a business law firm may volunteer alongside a junior public interest attorney in the same landlord-tenant case.<sup>53</sup>

To be clear, this is not to say that professional volunteerism ought to be merit inclusive. Indeed, merit inclusive professional volunteerism should give us pause, as the often-short term and welcoming character of professional volunteerism may compromise the ongoing attention and expertise that proper legal and medical services require. But professional volunteerism is typically not the sort of work excluded from minimum wage law as volunteer work; licensed attorneys and physicians, for example, already lack a right to minimum wage whenever they work in their capacity as professionals.<sup>54</sup> The account of volunteer work's value needed to make sense of the minimum wage exclusion therefore must be targeted at a zone of volunteering that is liable to be mistaken for work for which a minimum wage is owed. These examples of professional volunteerism are nonetheless instructive, for they illustrate that merit inclusivity operates along a continuum, and that the aims of a volunteer organization (such as supplying an emergency need) can produce merit inclusive access and cooperative structures even when the work is fairly specialized.

The flexible and voluntary character of volunteer work can also foster merit inclusivity. Volunteer work is often part-time, after typical workday hours, on weekends, or for limited tours of service. Employment is typically fulltime, indefinite, and immersive. To be sure, paid work may be part-time and during weekends and evenings. But how flexible the work is and when one works is usually dictated by the amount and type of work the employer needs, and employees face economic pressure to conform to those needs to remain employed or advance in their

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<sup>53</sup> See “Volunteer Opportunities for Attorneys,” Legal Aid Foundation of Los Angeles, accessed June 16, 2017, <https://lafla.org/volunteer/pro-bono-attorneys/>.

<sup>54</sup> See 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.304.

workplaces. In contrast, when people do not need to volunteer to access a living,<sup>55</sup> there is little economic pressure to volunteer at the same organization indefinitely or regularly. By complementing rather than competing with employment, volunteer work can enable people to try new forms of work that they might not want to do long term, and can encourage people to work outside of their professional background without the fear of compromising their livelihood. Volunteer work's flexible and voluntary character can thus draw people from a wide range of skill and ability by lowering the costs of trying something new.

### *B. Opportunity, Identity, and Recognition*

Although employment can and should provide opportunities for acting from moral motives—such as civic and humanitarian ones—not everyone may have the background to compete for a fulltime position as, for example, a litigator for the NAACP (and not everyone may want to perform such work fulltime). But it does not follow that people should have to forgo the chance to further racial justice even if they cannot (or choose not) to make such a project their fulltime job. Volunteer work's merit inclusivity thus helps to explain why we might have thought that volunteer work's value consisted primarily its civic-humanitarian and donative character: it is not that civic-humanitarian or donative values are best realized through volunteer work, but rather that merit inclusive volunteer work can make civic-humanitarian and donative projects (and a variety of other projects) widely available.

Opportunities for merit-inclusive volunteer work can thereby help to lessen the risk that a person's skills will silo a person in any particular cooperative role. Workforce participation can encourage us to hone particular skills to the exclusion of others and to hence narrow our real

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<sup>55</sup> Purportedly “volunteer” work performed to access certain sectors of the labor market offers a contrast. See, e.g., *O'Connor*, 126 F.3d at 113–16 (holding that a student performing unpaid work for hospital to complete degree was not an employee for purposes of federal employment discrimination law).

employment opportunities. That is not necessarily regrettable; the refinement of one's skills can be a joy for oneself and others.<sup>56</sup> But while the jobs we do may sometimes be an expression of our own tastes and personality, occupations and workplaces often have distinctive cultures. We may reasonably feel pressure to conform to that culture and tailor our self-presentation accordingly. Over time, a Google employee may come to see herself as a Googler;<sup>57</sup> a teacher's status as an educator may become the dominant lens through which she understands herself.<sup>58</sup> In the more pernicious cases, an employee may come to feel alienated from her gender identity or ethnicity after years of trying to fit into a white, patriarchal workplace.<sup>59</sup>

Volunteer work's merit inclusivity can, in contrast, provide people with opportunities to occupy social roles that are unrelated to the professional (or interpersonal) roles they have come to occupy. Mary does not need to be only a Googler,<sup>60</sup> or mother to Omar and wife to Jean; she can also be a political activist and an amateur astronomer. This is not to suggest that simply being just one of those would be regrettable. Rather, volunteer work's merit inclusivity can

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<sup>56</sup> See Rawls, *Theory*, 429–31, 471.

<sup>57</sup> For a discussion of how firms, including Google, aim (often successfully) to shape and bring their employees' personalities and characters into line with company aims, see Marion Crain, "Managing Identity: Buying into the Brand at Work," *Iowa Law Review* 95 (2010): 1179–1258.

<sup>58</sup> See Christine M. Korsgaard, *The Sources of Normativity*, ed. Onora O'Neill (Cambridge: Cambridge University Press, 1996), 101 ("[A practical identity] is a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking . . . . You are a human being, a woman or a man, an adherent of a certain religion, a member of an ethnic group, a member of a certain profession, someone's lover or friend, and so on.").

<sup>59</sup> See generally Devon W. Carbado and Mitu Gulati, "Working Identity," *Cornell Law Review* 85, no. 5 (2000): 1259–1308 (explaining that employees who are "outsiders" with respect to their workplace's conception of a successful person will tend to put on "identity performances" to counteract stereotypes attached to their race, gender, and the like, and may also relatedly feel pressured to engage in self-denial); Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006) ("To cover is to tone down one's disfavored identity to fit into the mainstream.").

<sup>60</sup> For an argument that employees should have legal protections against internal branding campaigns, see Ch. 1, "Working as Equal Moral Agents," section III.B.

provide people with opportunities to express the many dimensions of their personality, and to cultivate a personal identity that is not limited to the form of their workplace contribution or their roles at home (both of which may be a matter of accident and happenstance, or the outcome of inequalitarian social forces, although of course that need not be the case).

In turn, volunteer work can welcome people into roles that value their contributions independently of their employability. For many people, employment relationships and workplace cooperation is mediated through meritocratic hierarchies. To be sure, we may form workplace friendships, and admire of our co-workers' ways of thinking and acting even when they have little to do with how well their filing system works, or how quickly they can toss a bag of vegetables into the bed of a moving truck. Even so, a person's status within her workplace as a *cooperator*—as evidenced by promotions, her leadership roles, bonuses, and the like—typically depends on how she displays the skills for which she was hired. Thus, although the paid workplace may be uniquely situated to facilitate relationships of mutual respect across race, gender, and other status-based lines, meritocratic structures may encourage valuing one another's capacity for labor primarily on the basis of its instrumental qualities, such as how quickly we can perform tasks.

In contrast, by de-emphasizing comparative performance, volunteer work can create cooperative contexts for acknowledging the non-instrumental qualities of people's capacity for labor. As volunteers for our neighborhood association, we might value the elaborate dishes you cook for our meetings because they express that you are a thoughtful and creative person, even if the dishes sometimes taste a little peculiar, and accordingly you may continue to play that role in our organization. Should we decide to paint a mural, our community might find our work beautiful even if it reveals our lack of training because the mural communicates our backgrounds

or the fun we had making it. Similarly, a volunteer might be welcomed to help tend a garden, not because she can skillfully prune rose bushes, but because her work communicates care for her community.

To be clear, this is not to say that volunteer work is valuable as an arena for low-quality production. I raise these examples where market standards and the basis for recognition diverge to highlight that people's labor can be valuable for reasons beyond the quality of what they produce. A person might also value her own capacity of labor as more than just a tool for efficient production, but as a moral capacity for implementing and communicating moral values in solidarity with others. While some people may have the opportunity to value and understand their labor as valued in these ways through their participation in the labor market, not all of us have a sufficiently broad and desirable set of skills to ensure that we land a position that makes it possible to sustain that belief without pretense. Many of us may find ourselves performing repetitive and dull work whose value is wholly instrumental to the value of the good produced.

Volunteer work can thus provide expanded opportunities for expression, self-definition, and mutual recognition. In addition to having independent value, such opportunities complement the paid workplace's ability to, through its status inclusivity, facilitate relations of social equality. Underlying the democratic ideal of social equality is an ideal of moral equality. A person's claim to the social conditions of equality arises from her moral personality—her capacity to responsibly form, revise, and pursue a conception of the good, and to cooperate with and regard others as having like capacities. Part of what it is to regard a person as a moral equal is to value those aspects of her moral personality. By "value" here, I mean to treat as important (not simply to like or endorse), and hence, to give those aspects of a person contexts for development and realization. For a parent to value her child's potential for knowledge, it is not



enough that she enjoys talking to her child; the parent must strive to develop that potential through education and by equipping the child with the confidence to pursue knowledge throughout her life. Similarly, to value one another as moral equals, we must provide one another with contexts for developing and realizing our moral personality.

The paid workplace's status inclusivity goes a long way in providing such contexts, such as by creating fair access to all-purpose means for developing our moral personality, such as income. But what values a person might reasonably adopt, who a person is, and how she might express those values and that personality through her labor with others, far outstrip the expressive and cooperative possibilities her skill sets may provide her with through employment. Opportunities for volunteer work can give those important aspects of moral personality further contexts for development and exercise, and thereby complement the aims of status inclusivity that properly animate regulation of the paid workplace.

### III. IMPLEMENTING THE VALUE OF VOLUNTEER WORK

It is, of course, conceivable that a paid workplace might manifest aspects of merit inclusivity. An employer could loosen or altogether set aside meritocratic hiring criteria to welcome people back into the world of employment after prison sentences, or periods of homelessness and drug addiction. A paid workplace could also be organized without any kind of skill-based hierarchy; workers might take turns performing different roles and be paid roughly the same wage. The mere fact that a position is paid need not, in principle, preclude the work from realizing many of the values of merit inclusivity.

Notwithstanding these possibilities, the world of paid employment is not a stable home for merit inclusive work. Firms often face competitive pressures to hire and promote (or demote) on the basis of skill. And some kinds of work may, as a moral and legal matter, demand a high

level of skill and skill-based organization. Consider surgical work and legal services. These needs and pressures thus count against taking a wholly laissez-fair approach to the creation of merit inclusive work.

Even if merit inclusivity—because of cultural norms or other social forces—were likely to arise in paid workplaces, there would still be value in taking public action to explicitly create space for merit inclusive work. If the reasons for creating space for merit inclusive work were made public, such an action could communicate a shared commitment to the idea that each person, regardless of the social desirability of her skills, has an equal claim to general social conditions for self-definition and for exercising her moral capacities through her labor.

#### *A. Minimum Wage Exclusions and Unpaid Internships*

Excluding volunteers from minimum wage law can count as an effort to publicly create space for merit inclusive work. Pay threatens the voluntariness that can encourage people to work outside of their area of expertise. Meanwhile, and perhaps more importantly, a minimum wage exclusion can create legal space for nonmarket yet cooperative productive activity. As I have been discussing, competitive market pressures may lead employers to deploy comparative skill as a criterion for inclusion or exclusion in the workplace. By permitting cooperative productive activity to be performed outside of the market, a minimum wage exclusion can thus create social arrangements that recognize people's equal agential interests in cooperative production organized around shared moral values—a kind of activity that people with less socially desirable skills systematically have difficulty accessing in the labor market, but that all people nonetheless have interest in accessing.

Much depends, however, on the standard by which we determine whether a given kind of work is excluded. Unless that standard reflects the features and values of merit inclusivity, that

standard will neither guarantee nor communicate that the exclusion has created a protected space for merit inclusive work. The current U.S. federal approach to determining whether someone is a volunteer in the private sector illustrates both this potential and limitation. Under that approach, a person is an employee and not a volunteer if she depends for her livelihood on the organization for which she purportedly volunteers.<sup>61</sup> In applying this test of economic dependency, courts consider not only expectations of compensation, but all of the economic circumstances surrounding the relationship, including factors that seem clearly probative of whether the work is meritocratic, such as whether the volunteer is “hired,” the degree of skill required to volunteer, the length of time and regularity of the work, and the impact of performance on the volunteer’s livelihood.<sup>62</sup>

But the test suffers from one significant ambiguity: it is unclear how weighty the compensation factor is, and hence, whether pay is required for employee status. The U.S. Supreme Court has suggested that it might be open to a remuneration requirement for distinguishing volunteers from employees, noting that federal wage and hour law was “obviously not intended to stamp all persons as employees who, without any express or implied

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<sup>61</sup> *Tony & Susan Alamo Foundation*, 471 U.S. at 301 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).

<sup>62</sup> See, e.g., *Evers v. Tart*, 48 F.3d 319, 320–21 (8th Cir. 1995) (finding that certain poll workers were volunteers for purposes of the FLSA in part because the workers had “worked from as few as no days during the year to eight days during the year, depending on the number of elections held in a given year[,] [and did] not apply for their jobs”). See also Katherine V.W. Stone, “Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers,” *Berkeley Journal of Employment and Labor Law* 27, no. 2 (2006): 251–86 (explaining that, in applying the economic reality test, “courts look beyond the question, central to the common law agency test, of who controls the employee’s work, and look[] instead to whether, as a matter of economic reality, the individual is dependent on the entity”). For a list of other factors considered in the economic realities test, see Stone, *id.*, at 257–58.

compensation agreement, might work for their own advantage.”<sup>63</sup> But just because a position is unpaid does not mean that it is merit inclusive. Consider, for example, prestigious unpaid internships at the White House and film studios. While these positions may be unpaid, they are typically fulltime and span several months, and are highly competitive. They may also be instrumental to accessing occupations within the labor market, and hence, because of their impact on future livelihood, are not truly voluntary.

By permitting merit *exclusive* work to fall within the legal category of volunteerism, such an approach would fail to guarantee a protected space for merit inclusive work. A remuneration-based standard for excluding volunteers from minimum wage law leaves it open whether the world of volunteerism is supposed to be an adjunct of the labor market—a space where people acquire qualifications or are submitted to rites of passage to access sectors of the paid labor market. A remuneration requirement would thus compromise the minimum wage exclusion’s communicative potential, leaving it unclear whether the exclusion served merit inclusivity, let alone why it should serve that value.

Second, the legal standard for volunteer status can also compromise merit inclusivity by distinguishing volunteer work on the basis of the particular ends or motives for performing the work. Our agential interests in merit inclusive cooperative production derive in part from the opportunity to pursue a plurality of different values through that productive activity. Were we to restrict the projects in volunteerism to say, only humanitarian work, volunteer work would fail to be a venue that treated people as having equal agential interests in cooperative production

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<sup>63</sup> *Tony & Susan Alamo Foundation*, 471 U.S. at 302 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)). The Ninth Circuit has treated this suggestion as the legal standard for employee status for purposes of federal minimum wage law. See *Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996) (holding that a participant in a six-month work therapy program administered by the Salvation Army was not an employee entitled to federal minimum wage because he had “neither an express nor implied compensation agreement with the Salvation Army”).

generally, and would treat people with less socially desirable skills as having only equal interests in such activity when the activity is humanitarian. Given that our moral interests in merit inclusive work are a species of associational interests, we should be especially wary of any legal definitions of volunteerism that require that volunteers pursue specific kinds of moral projects. The U.S. federal test for public sector volunteers is potentially defective in these respects, permitting people to volunteer for the government for only “civic, charitable, or humanitarian reasons.”<sup>64</sup> This is not to say that volunteers in the public and private sector should be treated exactly alike, but rather to make the more modest point that, however we legally define volunteers, it should be in a way that leaves it largely open-ended what values volunteers might pursue through their work.

Searching for an account of volunteer work’s value can thus help us better understand the limitations of and potential for different standards for employee status to be more responsive to our equal agential interests in cooperative production, and to in turn fix the boundaries of employment to ensure that they are compatible with those interests.

To be sure, merit inclusivity need not be the only moral basis for excluding certain kinds of work from minimum wage law. But whatever further values inform volunteer exclusions, they should not compromise those exclusions’ ability to create space for merit inclusive work and communicate the values of merit inclusivity. Thus, even if there were sound moral reasons for permitting competitive internships to be unpaid, such internships should at least be excluded in a way that marks them out as importantly different from volunteer work. And whatever standards are used to pick out lawfully unpaid internships, we should inquire what those standards communicate about the paid workplace.

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<sup>64</sup> 29 C.F.R. § 553.101(a).

To briefly illustrate these methodological principles, consider a recently developed approach to legalizing unpaid internships. Some lower courts exclude unpaid internships from minimum wage law when and because the intern is the primary educational and professional beneficiary of the position.<sup>65</sup> For example, in *Wang v. Hearst Corporation*,<sup>66</sup> six former interns at magazines such as *Harper's Bazaar* claimed that their unpaid internships violated federal minimum wage law.<sup>67</sup> While the interns performed work similar to paid employees, such as data entry, the court also noted that some of the interns received educational credit for some of their work, received informal career counseling, “learned tangible skills” for sales and advertising, and “gained the intangible value of exposure to the practical realities of jobs in their respective fields.”<sup>68</sup> The court concluded that the unpaid internships had educational value that “tip[ped] decidedly . . . toward the conclusion that the Plaintiffs were properly classified as interns.”<sup>69</sup> Although I cannot fully explore the matter here, such an educational model suffers from defects similar to the civic-humanitarian and donative models of volunteer work. By distinguishing unpaid internships on the basis of educational value, the exclusion seems to suggest that employment is not an appropriate or stable arena for learning new job skills and developing an understanding of an occupation. Not only does that seem false, but even if it were true, why shouldn't practical education be a major part of paid work? Having an ongoing understanding of the kind of work you do is a precondition for making personally and socially responsible choices

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<sup>65</sup> See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016).

<sup>66</sup> 203 F. Supp. 3d 344 (S.D.N.Y. 2016).

<sup>67</sup> *Wang*, 203 F. Supp. 3d at 348–49.

<sup>68</sup> *Wang*, 203 F. Supp. 3d at 351, 354.

<sup>69</sup> *Wang*, 203 F. Supp. 3d at 354–55

about what kind of work to do, how to work with others and interact with consumers, and manage environmental impact and other larger social risks of production.

### *B. Antidiscrimination and Associational Freedom*

As the case of unpaid internships illustrates, the normative standards with which we locate the volunteer-employee boundary have both substantive and methodological implications for the boundaries of employment more broadly. Those standards also have application outside of the minimum wage context. In particular, while excluding certain volunteers from minimum wage law can create space for merit inclusive work, merit inclusivity may also recommend extending antidiscrimination norms to volunteers. Antidiscrimination law can require organizations to make reasonable accommodations for physical and mental disability.<sup>70</sup> Volunteer work's value seems to require making precisely such accommodations to make volunteer work genuinely welcoming of people with different skill and ability.

Second, volunteer work may fail to operate as a complement to status inclusivity in the workplace if it is organized around principles of racial, gender, and other status-based exclusion and subordination, and may even be self-undermining. Part of the point of creating legal space for volunteerism is to recognize the equally weighty associational interests that people with less socially desired skills have in engaging in cooperative productive activity organized around shared values. Were volunteerism to be, in practice, a social space dominated by projects of

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<sup>70</sup> See, e.g., Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(b)(5)(A) (2012) (explaining that it is discrimination “on the basis of disability” to fail to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”).

exclusion, or of instilling and constructing status-based social hierarchies,<sup>71</sup> volunteerism would compromise the very moral interests that recommend its protection.

The extent to which volunteerism should be regulated by antidiscrimination law is nevertheless a hard question. Volunteerism, as I have been arguing, is paradigmatically a kind of activity organized around shared values. Forced inclusion of members by operation of antidiscrimination law can compromise that feature of volunteer work when the admission of that person would be in tension with those shared values.<sup>72</sup> Forced admission of an unwanted person might also leave volunteers uncomfortable discussing and working through the animating values of their work, and may even compromise the authenticity of their project if the unwanted person did not share the organization's values.<sup>73</sup> Subjecting religious voluntary organizations to antidiscrimination law may also violate the free exercise rights of adherents.<sup>74</sup>

Even so, these constitutional limits might still leave ample room to regulate secular volunteer work because the aims of many voluntary associations seem compatible with antidiscrimination norms. For instance, why would a hospital need to sexually harass its volunteers? Further, the values underlying merit inclusivity suggest a moral limit on

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<sup>71</sup> Consider the Boy Scouts's justification for not waiting to permit an openly gay man from being a Scout Master: that his inclusion would compromise the association's ability to teach children a "morally straight" and "clean" ethical lifestyle. *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).

<sup>72</sup> See *Dale*, 530 U.S. at 648 (explaining that "forced membership [in a voluntary association] is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints," even if that membership is "forced" by application of antidiscrimination law). For an argument that such an interpretation of associational freedom is misguided, see generally Seana Valentine Shiffrin, "What Is Really Wrong with Compelled Association?," *Northwestern University Law Review* 99, no. 2 (2005): 839–88.

<sup>73</sup> See Shiffrin, "Compelled Association," 862, 866, 869–70.

<sup>74</sup> Cf., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (holding that applying employment discrimination law to the employment relation between a "called" teacher and a religious school that offered a religiously infused but otherwise general education to the public violates the free exercise rights of adherents). In Chapter 4, I discuss in more detail tensions between antidiscrimination law and religious associations in the context of paid work.



constitutional defenses of discriminatory volunteerism. I have argued that creating space for volunteer work is a part of producing conditions and relations of social equality, and that volunteer work can produce such conditions when and because it provides for a special kind of association—association that values a person’s cooperative contributions independent of the comparative skill with which those contributions are made. If I am ultimately correct, merit inclusivity is itself an associational value and, accordingly, we may want to look for ways to harmonize merit inclusivity with other associational values, rather than subordinate merit inclusivity to those other values. Merely claiming that volunteer work happens within a voluntary association should therefore not be treated as a trump card for avoiding antidiscrimination law.

## CONCLUSION

While courts tend to take the value of volunteer work for granted, it is surprisingly difficult to identify what, if anything, about “ordinary volunteerism” recommends that it be unpaid. Yet the risks of job replacement and the often non-diverse character of volunteerism demand an explanation, and popular accounts conceptualizing volunteer work as civic-humanitarian work and donative work are unsuccessful. These accounts, I have argued, either fail to capture the many ways in which volunteering is meaningful for people or suggest a view of employment as paradigmatically amoral work. But they illustrate an important feature of the volunteer-employee boundary: where we locate that boundary not only shapes what values and relations we have in the world of volunteerism, but also our public understanding of the aims of the paid workplace.

Instead of asking what kinds of substantive aims make volunteer work an important moral arena, I have proposed that volunteer work’s potential to be a protected space for an overlooked but important form of association can justify excluding volunteers from minimum

wage law—merit inclusive association. Opportunities for performing merit inclusive work can provide expanded opportunities for developing and implementing moral values, self-definition, and for valuing our capacity for labor as a moral and social capacity, and not merely an instrument for production. Creating protected space for merit inclusive work can thus complement employment’s status inclusivity in helping to make it the case that our major social arrangements value one another’s agential interests in cooperative production equally, regardless of the social desirability of our talents. That potential is compromised when we include merit *exclusive* work in the legal category of volunteer work, such as unpaid internships, and also when we enact blanket exclusions from antidiscrimination law for volunteers. The inclusivity values that underpin the volunteer-employee boundary accordingly recommend reexamining constitutional limitations on antidiscrimination regulation in the voluntary sector. The boundaries of employment thus not only implicate values within the world of employment, but also how we order and conceptualize broader associational and equality values.

## IS THERE AN EGALITARIAN BASIS FOR A MINISTERIAL EXCEPTION?

The U.S. Supreme Court and every federal Court of Appeal have held that the First Amendment shields the employment relationship between a church and its ministers from employment discrimination law.<sup>1</sup> Employment discrimination law protects employees from being disadvantaged in or excluded from the paid workplace on the basis of race, gender, religion, disability, and other socially salient statuses.<sup>2</sup> According to the U.S. Supreme Court, requiring a church to comply with employment discrimination law would interfere with the church's free exercise rights to determine who will embody its values and minister to the faithful.<sup>3</sup> In turn, permitting the state to adjudicate employment discrimination claims would permit the state to

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<sup>1</sup> “[T]he [U.S.] Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (citing *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800–01 (4th Cir. 2000); *Combs v. Central Tex. Annual Conference*, 173 F.3d 343, 345–50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362–63 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1100–04 (9th Cir. 2004) (per curiam); *Bryce v. Episcopal Church*, 289 F.3d 648, 655–57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301–04 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 460–63 (D.C. Cir. 1996).).

<sup>2</sup> See, e.g., Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2012) (making it an unlawful practice for employers to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

<sup>3</sup> See *Hosanna-Tabor*, 565 U.S. at 188; U.S. Const. amend. I (protecting the “free exercise” of religion).

substitute its judgment about such matters of faith for that of the church.<sup>4</sup> Giving the state such power would violate the Establishment Clause of the First Amendment, “which prohibits government involvement in such ecclesiastical decisions.”<sup>5</sup> The First Amendment therefore requires a “ministerial exception” to employment discrimination law to insulate a church’s selection of its ministers from such improper state control.

“Churches” and “ministers” are legal terms of art for purposes of the ministerial exception to employment discrimination law. “Churches” include not only churches, such as the Catholic Church,<sup>6</sup> but also religiously-affiliated organizations, such as university campus Christian fellowships, and even the pastoral care department of a secular hospital.<sup>7</sup> Meanwhile, courts typically determine who counts as a “minister” by examining whether the employee functions as a minister, such as whether she “leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”<sup>8</sup> Thus, while janitors and receptionists may not count as ministers under the ministerial exception,<sup>9</sup> ministers are not just ordained members of the clergy and other people occupying

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<sup>4</sup> *Hosanna-Tabor*, 565 U.S. at 188–89.

<sup>5</sup> *Hosanna-Tabor*, 565 U.S. at 189; U.S. Const. amend. I (protecting the state “establishment” of religion).

<sup>6</sup> See, e.g., *Rweyemamu*, 520 F.3d at 209–10 (holding that the ministerial exception barred a Roman Catholic Priest’s race discrimination claim against the Roman Catholic Diocese).

<sup>7</sup> *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)); see also *Penn v. New York Methodist Hosp.*, 884 F.3d 416, 424–26 (2d Cir. 2018) (holding that secular hospital historically affiliated with the United Methodist Church was a “church” with respect to its employment of chaplains in its pastoral care department).

<sup>8</sup> 565 U.S. at 199 (Alito, J., concurring); see Douglas Laycock, “*Hosanna-Tabor* and the Ministerial Exception,” *Harvard Journal of Law and Public Policy* 35, no. 3 (2012): 848.

<sup>9</sup> See, e.g., *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (holding that a former facilities manager at a synagogue was not a minister because his “primary duties—maintenance, custodial, and janitorial work—were entirely secular” and he had “no religious training or title, and had no

formal religious leadership positions. Schoolteachers and principals,<sup>10</sup> theology professors,<sup>11</sup> music directors,<sup>12</sup> and press secretaries<sup>13</sup> can also be ministers.

Given the potential breadth of “churches” and “ministers,” the ministerial exception raises urgent questions about what should count as a church and who should qualify as a minister. But the resolution of these questions depends on the purposes and values that justify having the exception, and is therefore downstream of a more philosophical inquiry concerning

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decision-making authority with regard to religious matters”); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (holding that a “receptionist-typist” was not a minister for purposes of the constitutional ministerial exception to Title VII). For a discussion of how non-ministerial employees at religious nonprofits may nevertheless lose the protection of employment discrimination law on similar grounds as the ministerial exception, see section III.A.

<sup>10</sup>565 U.S. at 192 (holding that the plaintiff, a Lutheran 4th grade teacher who taught the same subjects as non-Lutheran teachers at a Lutheran school, was a minister for purposes of the ministerial exception); *Stately v. Indian Community School of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 869 (E.D. Wis. 2004) (holding that a teacher at an Indian elementary and middle school was a minister for purposes of the ministerial exception because she participated in Indian “religious ceremonies and cultural activities” and served as a mentor for students’ “spiritual health”); *Fratello v. Roman Catholic Archdiocese of New York*, 175 F. Supp. 3d 152, 166–67 (S.D.N.Y. 2016) (holding that a Catholic school principal was a minister because her job duties included religious matters such as leading daily prayer and she was charged with the “vocation” of Catholic education). But see *Redhead v. Conference of Seventh-day Adventists*, 566 F. Supp. 2d 125, 132 (E.D.N.Y. 2008) (finding that a teacher’s Title VII claim for being fired for being pregnant and unmarried not barred by ministerial exception because teacher’s primary duties were secular).

<sup>11</sup> *Catholic Univ.*, 83 F.3d at 460–63. But see *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (“The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine.”); *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132, 1145–46 (D. Or. 2017) (finding that a faculty member at a religious university was not a minister because her title and primary duties were secular and she did not undergo any “specialized religious training”).

<sup>12</sup> *Sterlinski v. Catholic Bishop of Chicago*, 203 F. Supp. 3d 908, 914–15 (N.D. Ill. 2016) (holding that the former music director of a Catholic church had been employed as a minister because the music and programs he organized were “integral part[s] of the Catholic tradition” and thus the director played a central role in communicating the Church’s message); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1181–83 (E.D. Wis. 2001) (finding that a choir director for a church was a minister because of the religious significance of the music she arranged for services).

<sup>13</sup> *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703–04 (7th Cir. 2003) (holding that a “Hispanic Communications Manager” for a church was a minister because she acted as a “press secretary” by writing and posting articles on behalf of the church, and thus was responsible for communicating the church’s message).

the nature of religious freedom and its relationship to employment. In this Chapter, I will argue that our understanding of that relationship is incomplete.

First, the ministerial exception is clearly in tension with workplace equality, permitting employers to discriminate on practically any basis for any reason in its employment of ministers, and prohibiting the state from even asking religious organizations to justify their discriminatory employment practices. Meanwhile, when religious groups do offer a reason for discriminatory employment practices, that justification risks perpetuating subordinating ideologies by moralizing exclusory employment practices.

Nevertheless, courts and commentators tend to assume that the liberty interests of religious organizations and their adherents should trump workplace equality. For example, the U.S. Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>14</sup> explained that since the First Amendment expressly picks out religion as deserving “special solicitude,” the Constitution has “struck the balance for us” decidedly in favor of religious freedom.<sup>15</sup> Such an assumption is regrettable, as it ignores the liberty values furthered by workplace equality itself. Participating in the paid workplace is a means to securing the material conditions we need to exercise a variety of liberties outside of work. Drawing on my arguments from Chapters 1 and 3, I explain that the paid workplace is also an important venue for self-definition and for implementing a variety of moral values. Regulating the paid workplace with antidiscrimination law is thus an essential component of ensuring that our scheme of labor and production does not undermine our equal liberty. Thus, although it does not follow that the ministerial exception is unjustified, defending the exception requires explaining why religious

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<sup>14</sup> 565 U.S. 171 (2017).

<sup>15</sup> *Hosanna-Tabor*, 565 U.S. at 196.

liberty should have priority over the many liberty interests directly implicated by workplace equality, and this is not an easy thing to do.

Second, courts and commentators take for granted that the right to select ministers either entails or morally requires the right to *employ* ministers. Applying employment discrimination law to ministerial employment does not preclude religious organizations from selecting their ministers. Ministers might also be volunteers, and thus outside of the technical reach of employment discrimination law.<sup>16</sup>

Of course, a ministerial exception might still be justifiable, if not morally required, but acknowledging an argumentative gap between ministerial selection and ministerial employment should lead us to ask a different kind of question: rather than ask why religion is special, we might instead ask why employment matters for religion. In particular, by shifting our focus from religious selection to religious employment, we should ask what purposes *employing* ministers might serve and whether religious organizations would be disadvantaged by not being able to employ people who embody or otherwise share the organizations' values.

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<sup>16</sup> See, e.g., *O'Connor v. Davis*, 126 F.3d 112, 113–16 (2d Cir. 1997), cert. denied, 552 U.S. 1114 (1998) (holding that the plaintiff, who worked part time without remuneration at a psychiatric hospital to complete her social work degree, was a volunteer and therefore not an employee for purposes of employment discrimination law). In suggesting that ministerial volunteerism may be an alternative to ministerial employment, I do not mean to suggest that ministerial volunteerism should in fact happen in a space free from antidiscrimination norms. As I discussed in Chapter 3, although volunteers are typically not protected by antidiscrimination law, we may have reason to extend antidiscrimination law to volunteer work. Volunteer work, I argued, is a form of social association in which we can contribute to cooperative projects on the basis of the moral qualities of our labor (such as what our labor communicates to others about our motives to perform the work), rather than on basis of the instrumental qualities of our labor (such as how skilled we are at producing a product as compared to others). Fostering morally motivated inclusivity on the basis of skill and ability may require extending antidiscrimination protection to volunteers, particularly protection from disability discrimination. My point here, in this Chapter, is rather that, as a legal matter, the power to select does not require the power to employ. Since I ultimately contend that there are egalitarian reasons, grounded in fair treatment of religious associations as compared to secular associations, that support a narrow ministerial exception, I do not reach the issue of religious volunteerism and whether it should be regulated by antidiscrimination law.

Examining the moral basis for a ministerial exception through this new lens in turn yields a possible egalitarian basis for a ministerial exception, albeit a narrower one than the exception articulated in *Hosanna-Tabor*: Requiring religious organizations to advance their aims through only or largely a voluntary workforce would make it more difficult for members of religious organizations to engage in a variety of expressive activity than for members of similar secular organizations. Secular nonprofit associations often hire on the basis of shared moral beliefs in order to secure authentic representatives and make possible sincere interaction and cooperation organized around shared values and mutual interest. In order to treat religious associations on a par with secular organizations, we may therefore need to adopt a narrow ministerial exception that permits non-profit religious organizations to employ people on the basis of their religious beliefs. Such an exception would thus permit religious organizations to sometimes require its employees to share its religious beliefs, but would otherwise require that religious organizations comply with any applicable antidiscrimination law.

Offering such an egalitarian basis for a narrow religious ministerial exception is not without its challenges. I close by exploring one set of challenges concerning how to decide whether a religious organization has a justification for discriminating on the basis of religious belief without supplanting that organization's own moral judgments about its religious tenets.

Part I reconstructs the main legal arguments for the ministerial exception. Part II discusses how the exception crucially depends for its justification on (1) the priority of religious liberty over workplace equality and (2) showing that religious organizations' right to select ministers includes (or requires) the right to hire ministers. Part III then explores a possible egalitarian basis for permitting religious nonprofit organizations to hire people on the basis of their religious beliefs.



## I. THE MINISTERIAL EXCEPTION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>17</sup> the U.S. Supreme Court unanimously held that the First Amendment barred a disability discrimination suit brought on behalf of a former elementary school teacher, Cheryl Perich, against her religiously-affiliated employer,<sup>18</sup> Hosanna-Tabor Evangelical Lutheran Church and School.<sup>19</sup> In reaching this conclusion, the Court proceeded in two steps, first upholding the ministerial exception on general First Amendment principles, and then applying the exception to Perich’s situation. Here I will follow roughly the same steps, not to remain faithful to the structure of the opinion, but because the facts of the case diverge significantly from the historical and philosophical paradigms of the exception, and thus help to show the potential limits of the exception.

Justice Roberts, writing for the Court, explained that the Free Exercise Clause of the First Amendment centrally “protects a religious group’s right to shape its own faith and mission through its [ministerial] appointments.”<sup>20</sup> That right is not just of abstract philosophical importance, but is of particular legal importance in light of the historical threats that the state has posed to churches’ ability to govern themselves.<sup>21</sup> Roberts explained that the English predecessors of the “founding generation” in America consistently sought to resist monarchical control over the church.<sup>22</sup> Dating as far back as the Magna Carta, Roberts explains that the

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<sup>17</sup> 565 U.S. 171 (2012).

<sup>18</sup> *Hosanna-Tabor*, 565 U.S. at 196. Hosanna-Tabor was an affiliate of the Lutheran Church—Missouri Synod, one of the largest Lutheran denominations in America. See *Hosanna-Tabor*, 565 U.S. at 177.

<sup>19</sup> *Hosanna-Tabor*, 565 U.S. at 196.

<sup>20</sup> *Hosanna-Tabor*, 565 U.S. at 188.

<sup>21</sup> See *Hosanna-Tabor*, 565 U.S. at 182–85.

<sup>22</sup> See *Hosanna-Tabor*, 565 U.S. at 182–83.

English monarchy sought to control religious life by making itself the head of the English Church and, crucially, by controlling religious appointments and setting the criteria for continued service as a minister.<sup>23</sup> It was precisely to escape this kind of religious control that people fled from England (and presumably from many other parts of the world) to come to America.<sup>24</sup>

According to the Court, employment discrimination law would impose similar, though of course not identical, pressures on the free exercise of religion as the Crown's historical control of the English Church.<sup>25</sup> Generally speaking, employment discrimination law prohibits employers from hiring, firing, promoting, paying, and otherwise structuring the terms and conditions of work in ways that exclude or otherwise disadvantage people on the basis of their race, gender, disability, religion, and other socially-salient statuses.<sup>26</sup> According to the Court, applying employment discrimination law to ministerial employment would "depriv[e] the church of

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<sup>23</sup> See *Hosanna-Tabor*, 565 U.S. at 182.

<sup>24</sup> See *Hosanna-Tabor*, 565 U.S. at 182–83. I think there are serious egalitarian objections to justifying the content of basic liberties in terms of the particular struggles of one historically dominant social group, namely, white Protestants from Northern Europe. These objections include marginalizing the experiences of other social groups in resisting religious oppression (consider women throughout history and Muslims in present day America) and the risk of taking a myopic view about what kinds of "religious" activity deserve support and protection. (Justice Thomas hints at some of these concerns in his concurring opinion to *Hosanna-Tabor*, where he argues that courts should defer to a religious organization's good faith understanding of who counts as a minister in order for courts to avoid importing an overly narrow view of what counts as "ministering," and thereby "disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 196–7 (Thomas, J., concurring).) It also strikes me as similarly problematic to privilege the point of view of a "founding generation" that was slave-owning and, again, of a particular social group, to give content to basic liberties. Such a privileging seems to give little moral significance to the major political revolution effectuated by the 13th and 14th Amendments, making slavery unconstitutional and securing for all the equal protection of the law, and subsequent incorporation of the Bill of Rights against the states. As stated here, these are, of course, mere contentions that I cannot develop in this Chapter. But I note them here to register that I object to a certain kind of methodology that may be implicit in the Court's explanation of the content of the First Amendment, and thus, that in describing the historical framing of the arguments in *Hosanna-Tabor*, I do not mean to endorse that framing or its possible methodological underpinnings.

<sup>25</sup> See *Hosanna-Tabor*, 565 U.S. at 188–89.

<sup>26</sup> See note 2 above.

control over the selection of those who will personify its beliefs” by imposing unwanted ministers on churches, and would thus violate the Free Exercise Clause.<sup>27</sup>

Of course, a person who was wrongfully discharged in violation of employment discrimination law need not be reinstated;<sup>28</sup> monetary relief may also be awarded.<sup>29</sup> Nevertheless, Roberts contended that offering plaintiffs monetary relief in lieu of reinstatement would operate as a “penalty . . . for terminating an unwanted minister,” and hence would effectively punish churches (and religious adherents) for exercising their constitutionally protected rights to select their own ministers.<sup>30</sup> Thus, the very act of adjudicating whether a minister was wrongfully terminated would impermissibly involve the state in the same kind of activity that James Madison hoped the Establishment Clause would prevent: namely, state “election and removal” of church ministers.<sup>31</sup>

Notwithstanding the traditional and historical framing of the argument, the controversy at issue in *Hosanna-Tabor* did not involve women suing to be ordained as Catholic priests or the state enjoining a synagogue to permit a Protestant person to lead Shabbat services.<sup>32</sup> The “church” in question was a private Lutheran school that offered a “Christ-centered” yet “core

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<sup>27</sup> *Hosanna-Tabor*, 565 U.S. at 188.

<sup>28</sup> See, e.g., 42 U.S.C. § 2000e-5(g) (describing courts’ discretion in ordering injunctive relief, such as an order of reinstatement, as a remedy for employment discrimination).

<sup>29</sup> See, e.g., Civil Rights Act of 1964, Title I, 42 U.S.C. § 1981a (outlining the different forms of monetary damages that may be awarded for employment discrimination and other civil rights violations).

<sup>30</sup> *Hosanna-Tabor*, 565 U.S. at 194.

<sup>31</sup> *Hosanna-Tabor*, 565 U.S. at 185 (quoting James Madison, 22 *Annals of Cong.* 983 (1811)).

<sup>32</sup> At least one woman has, however, brought a gender discrimination claim against the Catholic Church for refusing to ordain her as a priest. See *Rockwell v. Roman Catholic Archdiocese of Boston, MA*, No. 02–239–M, 2002 WL 31432673 (D.N.H. Oct. 30, 2002) (holding that the plaintiff’s claim was barred by the ministerial exception). Here I do not mean to suggest that such a suit would be unreasonable.

secular curriculum to the general public for a fee.”<sup>33</sup> The “minister” was Cheryl Perich, a Lutheran fourth-grade teacher who, although “called to [her] vocation by God through a congregation,”<sup>34</sup> taught exactly the same subjects as non-Lutheran teachers.<sup>35</sup> And the activity that purportedly threatened the “faith and mission” of the church was Perich’s suit to enforce a provision of the Americans with Disabilities Act (ADA),<sup>36</sup> an Act whose antidiscrimination aims the school openly and expressly supported.<sup>37</sup>

Perich had been teaching fourth grade at Hosanna-Tabor when she was diagnosed with narcolepsy.<sup>38</sup> After several months of disability leave, Perich’s physician said she could return to work.<sup>39</sup> Hosanna-Tabor refused to let her return, having already hired a replacement, and expressed “concern” that Perich’s condition might frighten the children and leave her otherwise unfit to teach, notwithstanding Perich’s doctor’s prognosis (and Perich’s insistence) to the contrary.<sup>40</sup> The school instead offered to pay Perich a portion of her health insurance costs in exchange for her resignation.<sup>41</sup> Perich refused and indicated that she might sue for disability discrimination.<sup>42</sup> The school then fired Perich for her “insubordination and disruptive behavior”

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<sup>33</sup> *Hosanna-Tabor*, 565 U.S. at 177; Brief for Respondent Cheryl Perich at 36, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

<sup>34</sup> *Hosanna-Tabor*, 565 U.S. at 177.

<sup>35</sup> *Hosanna-Tabor*, 565 U.S. at 193.

<sup>36</sup> *Hosanna-Tabor*, 565 U.S. at 180, 190.

<sup>37</sup> See Brief for Respondent Cheryl Perich at 6.

<sup>38</sup> See *Hosanna-Tabor*, 565 U.S. at 178.

<sup>39</sup> See Brief for Respondent Cheryl Perich at 6.

<sup>40</sup> *Hosanna-Tabor*, 565 U.S. at 178; Brief for Respondent Cheryl Perich at 11.

<sup>41</sup> See *Hosanna-Tabor*, 565 U.S. at 178.

<sup>42</sup> See *Hosanna-Tabor*, 565 U.S. at 178–79.

in attempting to return to work and for the “damage she had done to her working relationship with the school by threatening to take legal action.”<sup>43</sup>

Perich subsequently filed a claim with the U.S. Equal Employment Opportunity Commission, alleging that Hosanna-Tabor had fired her in retaliation for threatening to file a disability discrimination claim under the ADA.<sup>44</sup> The main legal issue in Perich’s case, however, was not the merits of her retaliation claim, but whether Hosanna-Tabor could be sued for firing her at all. Although Perich taught exactly the same subjects as the school’s non-Lutheran teachers,<sup>45</sup> Perich was hired as a teacher “called” to her vocation by God after formal theological coursework and a vote of support by her congregation.<sup>46</sup> She also understood herself to be a minister, claiming tax benefits for employees paid to perform activities “in the exercise of the ministry,” and led several liturgical services per year at the school.<sup>47</sup> Because of her job title, training, self-representation, and the religious aspects of her work, the Court held that Perich was a minister for purposes of the ministerial exception, and so could not sue Hosanna-Tabor for disability discrimination.<sup>48</sup>

Notably, it was of no importance to the Court that the church with which Hosanna-Tabor was affiliated, the Lutheran Church—Missouri Synod (LCMS), explicitly condemned

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<sup>43</sup> *Hosanna-Tabor*, 565 U.S. at 179 (internal quotation marks and citations omitted).

<sup>44</sup> See *Hosanna-Tabor*, 565 U.S. at 178–79. The ADA not only establishes substantive rights against disability discrimination in employment, but also protects employees in exercising those rights by prohibiting employer retaliation (such as being fired or demoted) for bringing or even threatening to bring an ADA disability discrimination suit. See, respectively, 42 U.S.C. §§ 12112(a), 12203(a).

<sup>45</sup> See *Hosanna-Tabor*, 565 U.S. at 191–94.

<sup>46</sup> See *Hosanna-Tabor*, 565 U.S. at 191.

<sup>47</sup> See *Hosanna-Tabor*, 565 U.S. at 191–92.

<sup>48</sup> See 565 U.S. at 192, 196.

employment discrimination (including disability discrimination).<sup>49</sup> Consider, for example, a section from the LCMS’s employee handbook:

There are many rules and regulations in the ADA. Churches need to understand the legal restrictions about discriminating against disabled individuals. Even when these rules are not technically applicable to a church, as a Christian organization the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.<sup>50</sup>

It was also irrelevant to the Court that Hosanna-Tabor told Perich that part of why they wanted her to resign was to enable the school to “fill the position responsibly,” and that the school hoped to amend its employee handbook to state that “anyone who has a disability extending for longer than six months would be encouraged to resign their call” so as to smooth the process.<sup>51</sup>

Thus, although there was evidence that Hosanna-Tabor fired Perich largely out of administrative convenience, in addition to unfounded concerns about her former bout with narcolepsy,<sup>52</sup> the Court nonetheless held that the ministerial exception precluded Perich and the EEOC’s suit. As applied in *Hosanna-Tabor*, the ministerial exception—an exception designed to

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<sup>49</sup> Brief for Respondent Cheryl Perich at 6 (quoting LCMS Personnel Manual Prototype, § 2.200 (June 2003), [http://www.mns.lcms.org/LinkClick.aspx?fileticket=IMILvY-QnBA%3D &tabid=99&mid=469](http://www.mns.lcms.org/LinkClick.aspx?fileticket=IMILvY-QnBA%3D&tabid=99&mid=469).) The url link cited in the Brief is no longer functional.

<sup>50</sup> The passage from the manual is quoted in Perich’s Supreme Court Brief. Brief for Respondent Cheryl Perich at 6, (citing LCMS LCMS Employment Resource Manual at 6, <http://classic.lcms.org/graphics/assets/media/LCMS/EmploymentResourceManual2003.pdf>.) The url link cited in the Brief is no longer functional.

<sup>51</sup> Brief for Respondent Cheryl Perich at 8–9.

<sup>52</sup> To be sure, Perich might have also been fired for indicating that she would not adhere to “the Lutheran doctrine that disputes among Christians should be resolved internally.” *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring). But before she threatened to sue, Perich had already been told that she could either resign and take the health insurance money offered or that the school would “take [her] Call away.” See *Hosanna-Tabor*, 565 U.S. at 178; Brief for Respondent Cheryl Perich at 9. Alito’s contention that Perich was indeed fired for religious reasons therefore requires further justification, for Hosanna-Tabor had already decided to end her employment for non-religious reasons and had already communicated that to Perich.

protect the free exercise of religion—thus permitted Hosanna-Tabor to fire Perich for non-religious discriminatory reasons, including reasons that were contrary to express religious policy.

At first blush, the non-traditional facts of Perich’s controversy with Hosanna-Tabor seem to make *Hosanna-Tabor* a peculiar case for the U.S. Supreme Court to choose as its first case for upholding the ministerial exception. Yet it is also a particularly good case for this purpose because it illustrates a striking feature of the ministerial exception: namely, that the

purpose of the [ministerial] exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical” [citations omitted]—is the church’s alone.<sup>53</sup>

Thus, as Douglas Laycock explains, the “fundamental religious activity” protected by the ministerial exception is not religiously-motivated discrimination, “but rather the church’s evaluation and selection of its own ministers.”<sup>54</sup> The state deprives religious groups of the right to engage in such a fundamental religious activity merely by reviewing a church’s employment decision with respect to one of its ministers.<sup>55</sup> Accordingly, it was of no legal importance that Hosanna-Tabor may have actually lacked religious reasons for firing Perich. “The church’s reasons for the [employment] decision are legally irrelevant.”<sup>56</sup>

## II. THE LIBERTY VALUES OF WORPLACE EQUALITY

In Part I, I explained that the ministerial exception permits churches to discriminate in their employment of ministers, not only in the service of religious values, but for any reason

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<sup>53</sup> *Hosanna-Tabor*, 565 U.S. at 194–95.

<sup>54</sup> Laycock, “The Ministerial Exception,” 850.

<sup>55</sup> Laycock, “The Ministerial Exception,” 851. The Court in *Hosanna-Tabor* was, however, careful to restrict its holding to the employment discrimination context, and stated that *Hosanna-Tabor* should not be read to create a ministerial exception for contract, tort, and other law. See *Hosanna-Tabor*, 565 U.S. at 196.

<sup>56</sup> Laycock, “The Ministerial Exception,” 852.

whatsoever. As such, the ministerial exception grants religious organizations a degree of insulation from antidiscrimination law rarely if ever afforded to secular but morally-oriented organizations. For example, it is no defense to the Republican Party’s racially discriminatory firing of a spokesperson that the Party must have complete control over its hiring and firing decisions to define and implement its conservative values. The power to engage in arbitrary employment decisions is not included in the Republican Party’s right to associate around shared values.

Acknowledging the differential treatment that the ministerial exception accords religious organizations, proponents of the ministerial exception often argue that religion is special—for constitutional or for moral reasons—in ways that justify taking a more “hands off” approach to religious organizations. In this Part, I explain that even if religious organizations are distinguishable from secular ones, it does not follow that religious organizations should be exempted from employment discrimination law. Commentators must also argue that, whatever values the ministerial exception furthers, those values should be given priority over workplace equality. That is a heavy burden to carry, since we also have liberty interests in workplace equality.

#### A. *The Priority of Liberty*

According to the Court in *Hosanna-Tabor*, the text of the Religion Clauses of the First Amendment justifies showing religious associations “special solicitude” by insulating their ministerial employment decisions from judicial scrutiny.<sup>57</sup> While Justice Roberts in *Hosanna-Tabor* noted that “[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important,” he concluded that the “First Amendment has struck the

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<sup>57</sup> *Hosanna-Tabor*, 565 U.S. at 189.



balance for us,” without offering any express argument as to why religious freedom trumps that interest.<sup>58</sup>

While the Religion Clauses may expressly pick out religion as deserving constitutional protection, it does not follow that that protection must be greater than that afforded to similarly constituted secular associations. The Religion Clauses may instead serve as a needed public reminder to leave space for religious institutions.<sup>59</sup> Religious groups are often highly institutionalized and exercise moral jurisdiction over the whole of a person’s life. As a kind of comprehensive moral institution, religious groups may be perceived by a state as a threat to the state’s efforts to morally shape its citizens. Offering alternative fora to the public sphere, religious organizations may thus serve as “critical buffers between the individual and the power of the State.”<sup>60</sup> Our global history of state-sponsored religious oppression and persecution is therefore not surprising. And so, in light of the special moral and institutional character religious associations have come to develop, and our history of treating some dissident organized religions as threats to be squelched, it may be eminently reasonable for our Constitution to expressly pick out religious persons, activity, and association as deserving protection, though not necessarily more protection than secular moral institutions.<sup>61</sup>

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<sup>58</sup> *Hosanna-Tabor*, 565 U.S. at 196.

<sup>59</sup> I am indebted to Seana Shiffrin for this point.

<sup>60</sup> *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)); see Paul Horwitz, “Defending (Religious) Institutionalism,” *Virginia Law Review* 99, no. 5 (2013): 1049–63. For a critical reply, see Richard Schragger and Micah Schwartzman, “Against Religious Institutionalism,” *Virginia Law Review* 99, no. 5 (2013): 917–85.

<sup>61</sup> So while I agree with religious institutionalists that the institutional features of religions make them constitutionally salient, I disagree that the institutionalism is either unique to religious groups or that institutionalism justifies giving religious groups more support than other like secular associations. To be sure, few secular analogues exist, but that may be because we have taken care to permit religiously animated moral institutions to flourish.

A proponent of the ministerial exception might nonetheless argue that, while religious freedom is marked out as deserving “special solicitude,”<sup>62</sup> the Constitution says nothing about workplace equality. Employment discrimination law is largely statutory. A proponent of the ministerial exception might thus argue that it follows that religious associational freedoms are of a higher constitutional order than workplace equality, and therefore can justify an exception to employment discrimination law.<sup>63</sup>

To put the point more philosophically, one might notice that within the liberal tradition, freedoms of speech, association, and conscience have priority over principles of economic equality when the two kinds of principles ostensibly conflict. John Rawls’s *justice as fairness*, for example, locates these freedoms in his first principle of justice, which is lexically prior to the principle that positions of material advantage, social status, and power should be open to all under conditions of fair equality of opportunity.<sup>64</sup> That lexical priority may therefore suggest that liberty should win in the contest with workplace equality.<sup>65</sup>

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<sup>62</sup> *Hosanna-Tabor*, 565 U.S. at 189.

<sup>63</sup> See, e.g., Berg et al., “Religious Freedom, Church-State Separation, and the Ministerial Exception,” *Northwestern Law Review Colloquy* 106 (December 2011): 175–90; Laycock, “The Ministerial Exception,” 848–49.

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*First Principle*

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

*Second Principle*

Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 302.

<sup>65</sup> See Seana Valentine Shiffrin, “Race, Labor, and the Fair Equality of Opportunity Principle,” *Fordham Law Review* 72, no. 5 (2004): 1643–75 (arguing that Rawls’s justice as fairness could be amended to include rights against discrimination in Rawls’s first principle of justice).

While a full exploration of the priority of liberty and the constitutional underpinning of workplace equality law is beyond the scope of this Chapter, I think it is a mistake to interpret the priority of liberty in such a way as to require that workplace equality be subordinated to the exercise of basic liberties.

First, liberal theories of justice define partial ideals for bringing about schemes of *equal* liberty. As I have been discussing throughout this dissertation, a basic premise of liberal democracy is that, as moral equals, people have equal moral claims to the social conditions for exercising basic liberties and for developing the agential, emotional, and cognitive capacities needed for exercising those liberties. Those social conditions include, among other things, access to material resources like food and housing, epistemic resources of knowledge and learning, positions of power and influence over culture and social life, and hence, in our society, money and jobs. Thus, the fact that a person is white, Protestant, or born wealthy cannot, on the liberal view, justify treating that person as if she were entitled to a better education, to leadership positions at work, to higher pay, and the like.<sup>66</sup>

Employment discrimination law is an instrumental part of aspiring to a scheme of equal liberty. First, employment discrimination law helps to ensure fair access to material resources and positions of power while combatting ideologies that serve to moralize the subordinate status

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<sup>66</sup> See Rawls, *Theory*, 73. T. M. Scanlon has recently pointed out that fair equality of opportunity can be understood narrowly to condemn employment discrimination only with respect to positions to which “special rewards or privileges are attached.” T. M. Scanlon, *Why Does Inequality Matter?* (Oxford: Oxford University Press, 2018), 56–57 (Scanlon does not, however, endorse this narrow view). For arguments that fair equality of opportunity condemns employment discrimination more broadly, regardless of whether the position in question includes special advantages, see, for example, Norman Daniels, “Mental Disabilities, Equal Opportunity and the ADA,” in *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions*, ed. Leslie Pickering Francis and Anita Silvers (New York: Routledge, 2000), 255–68 (arguing that the Americans with Disabilities Act is required by fair equality of opportunity); Shiffrin, “Race, Labor, and the Fair Equality of Opportunity Principle,” 1649–50 (“[E]mployment discrimination is obviously incompatible with the principle of fair equality of opportunity.”). Here I take the view that fair equality of opportunity does indeed condemn employment discrimination, broadly speaking, regardless of whether the position at issue is one to which special advantages are attached.

of women, people of color, and other historically oppressed and marginalized groups.<sup>67</sup> For example, legal prohibition of gender discrimination in the workplace helps to ensure that women do not face barriers to accessing positions of power merely because they are women. Employment discrimination law can thereby counteract stereotypes that women are principally homemakers (or objects of male sexual desire) who are supposed to be financially cared for by (and dependent on) a man. Employment discrimination law can thus foster equal opportunity for women and combat stereotypes (and broader ideologies, such as patriarchy) deployed to justify the subordination of women to the power and aims of men. Legal prohibition of sexual harassment in particular can also lessen and publicly repudiate relations of gender-based<sup>68</sup> subordination in the workplace.<sup>69</sup> Employment discrimination law can thus ensure fair access to

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<sup>67</sup> Fair equality of opportunity should be distinguished from “anticlassification theory” (also known as “equal treatment” theory), according to which antidiscrimination law more broadly requires “equal treatment,” understood superficially to condemn or mark out as suspect any race, gender, or other status-based classifications, even when those classifications aim at eradicating a status-based barrier to success, such as in affirmative action policies. For a discussion of the role of anticlassification principles in U.S. antidiscrimination jurisprudence, see, for example, Jack M. Balkin and Reva B. Siegel, “The American Civil Rights Tradition: Anticlassification or Antisubordination?,” *University of Miami Law Review* 58, no. 1 (2003): 9–34. For a critical view of anticlassification theory, see, for example, Catharine A. MacKinnon, *Butterfly Politics* (Cambridge, MA: The Belknap Press of Harvard University Press, 2017), ch. 11.

<sup>68</sup> I do not mean to suggest that gender discrimination is either monolithic or wholly distinct from racial and other forms of discrimination. For analyses of how gender, racial, and other forms of discrimination (such as sexual orientation discrimination) can intersect, and critical discussions of the law’s insensitivity to that intersectionality, see Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,” *Stanford Law Review* 43, no. 6 (1991): 1241–99; Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum*, no. 1 (1989): 139–67. See also Symposium on Intersectionality: Theorizing Power, Empowering Theory, *Signs: Journal of Women and Culture in Society* 38 (2013).

<sup>69</sup> For a seminal discussion of sexual harassment as a form of subordination, see Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979). In suggesting that employment discrimination can be a form of group-based subordination, I am not claiming that the wrong of employment discrimination is best understood as a form of group disadvantage. For such a view, see, for example, Owen Fiss, “Another Equality,” *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory*, art. 20 (2004) 1–25. For a critical perspective, see Noah D. Zatz, “Disparate Impact and the Unity of Equality Law,” *Boston University Law Review* 97, no. 4 (2017): 1357–1425.

essential social conditions of equal liberty and lessen the risk that inegalitarian ideologies will persist in compromising those conditions.

Second, as I discussed in Chapters 1 and 3, workplaces—even paid workplaces—are important sites for exercising moral agency. Through the aims of our work and the ways in which we cooperate with others at work, we often implement our ideals about how to live and how to treat one another, in addition to developing our personal identities and moral characters. That we be able to do so under conditions of equality is particularly urgent since many of us have to work in order to earn a living. Even if we did not condition individual access to a livelihood on working, many of us would still have to work together to produce the goods and services we need to eat, create housing, share knowledge with one another, administer medical care, and offer one another a vibrant and enjoyable public culture. Employment discrimination law can accordingly help to ensure that our often nonvoluntary participation in the paid workplace is compatible with treating one another as equal moral agents.

The thought that liberty is something that can win out over workplace equality is therefore misguided; workplace equality also serves liberty values. A better way, then, to interpret the priority of liberty might be to use the goal of equal liberty to guide how we structure our economic lives. To illustrate, we might, as I argued in Chapter 1, seek to temper our pursuit of economic efficiency in the workplace to permit a variety of worker expression—even disruptive expression—that help to ensure that work does not compromise our moral agency.<sup>70</sup>

The Constitution offers support for seeking to harmonize religious liberty with workplace equality, rather than prioritizing the former over the latter whenever the two ostensibly conflict. Although I cannot fully develop such an argument here, I will offer a rough outline to challenge

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<sup>70</sup> See Chapter 1, “Working as Equal Moral Agents,” section III.A.

the view, suggested in *Hosanna-Tabor*, that the Constitution obviously requires that religious liberty trump workplace equality.<sup>71</sup>

First, as I argued in Chapter 1, the workplace has historically been a locus of subordination along lines of race, gender, disability, and the like, and the law has played a major role in making the workplace structurally susceptible to reflecting and reproducing status-based inequality.<sup>72</sup> In light of this nexus between the law, work, and pervasive social inequality, we, as a society may have a duty to repair that history and prevent workplaces from continuing to be such inegalitarian sites.<sup>73</sup>

Second, as Lawrence Sager has argued in a related context about gender equality legislation, the Fourteenth Amendment lends support to the idea that such a duty exists and that it should be executed in part through equality legislation.<sup>74</sup> The Fourteenth Amendment guarantees people the “equal protection of the laws” and authorizes Congress to legislate to enforce the substantive provisions of the Amendment.<sup>75</sup> To the extent that the law has played a historical and central role in reflecting and exacerbating status inequality through work, the Fourteenth Amendment can support the idea that we ought to take public steps to remedy and prevent social inequality from continuing to pervade working life.

Third, as I also discussed in Chapter 1, a significant way in which we have publicly repudiated and sought to remedy the workplace’s role in fostering social inequality is by

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<sup>71</sup> *Hosanna-Tabor*, 565 U.S. at 196.

<sup>72</sup> See Chapter 1, “Working as Equal Moral Agents,” Part I.

<sup>73</sup> See Lawrence G. Sager, “Congress’s Authority to Enact the Violence Against Women Act: One More Pass at the Missing Argument,” *Yale Law Journal Online* 121 (2012): 631–33.

<sup>74</sup> See generally Sager, “One More Pass at the Missing Argument,” 629–38.

<sup>75</sup> U.S. Const. amend. XIV, §§1, 5.

constraining the at-will employment doctrine with employment discrimination law.<sup>76</sup>

Employment discrimination law can therefore be understood to have a constitutional source. It is thus not obvious that religious liberty, even if it is implicated in discriminatory ministerial employment, requires an exception to employment discrimination law.

### *B. Public Concern and Spillover Effects*

To be clear, none of this is yet an argument for how exactly religious liberty should be harmonized with workplace equality. It may be that, in the end, egalitarian values demand the ministerial exception. My aim in this Part has instead been to point out that even if religious liberty conflicts with workplace equality, further argument is needed to resolve that conflict in favor of religious liberty. To underscore this point, I will now discuss how the ministerial exception does not merely pose a hypothetical risk to workplace equality.

First, the exception by its very terms appears to contravene equal opportunity. The exception expressly permits religious groups to deny people access to the material benefits of employment and positions of potentially tremendous social power on the basis of race, gender, disability, sexual orientation, and the like, without having to offer any justification whatsoever. Sadly but perhaps unsurprisingly, there remains a persistent and substantial gender pay gap among the clergy;<sup>77</sup> the Lutheran Church-Missouri Synod—the second largest Lutheran church in America and employer of thousands of “called” teachers, formerly including Cheryl Perich<sup>78</sup>—is 95% white.<sup>79</sup> And when justification is offered by religious organizations for

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<sup>76</sup> See Chapter 1, “Working as Equal Moral Agents,” section II.A.

<sup>77</sup> See, e.g., Emily Lund, “Minding the Gap: Gender and Compensation in Churches and Ministries,” *Church Law & Tax*, March 2017, <https://www.churchlawandtax.com/web/2017/march/gap-gender-and-compensation-in-churches-ministry.html> (explaining that wage gaps between women and men clergy are larger than the national gender pay gap averages).

<sup>78</sup> See Brief for Respondent Cheryl Perich at 5.

discriminating, the discrimination takes on an ideological cast—an unmarried teacher is let go because of the moral taint of her pregnancy;<sup>80</sup> a religious staff supervisor is fired because her failing marriage shows she is morally defective.<sup>81</sup>

Of course, we do not ordinarily think of the pulpit and the confessional as workplaces. But the ministerial exception is not limited to traditional ministering in traditional places of worship.<sup>82</sup> The rising corporatization of churches—especially of so-called “megachurches”—may dramatically increase the number of people who “serve as a messenger of the faith,” as churches undertake massive PR, advertising, and programming efforts to compete for new congregants.<sup>83</sup> In light of such changes, the scope the ministerial exception may have pervasive and deleterious effects on people’s ability to access material resources and positions of social power free from race, gender, religious, and other status-based discrimination (if it does not have such effects already). Ministerial employment decisions are therefore not simply “internal” matters of church governance;<sup>84</sup> the principles that govern those decisions implicate critical and pervasive social conditions for equality, both in principle and practice.

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<sup>79</sup> See Michael Lipka, “The Most and Least Racially Diverse U.S. Religious Groups,” *Pew Research Center*, July 27, 2015, <http://www.pewresearch.org/fact-tank/2015/07/27/the-most-and-least-racially-diverse-u-s-religious-groups/>.

<sup>80</sup> See *Redhead*, 566 F. Supp. 2d at 132.

<sup>81</sup> See *Colon*, 777 F.3d at 833–34.

<sup>82</sup> See *supra* text accompanying notes 6–13.

<sup>83</sup> See Robert T. O’Gorman, “Corporate Takeover of U.S. Catholic Education and the Effect on Catholic Identity: Models from the Church’s 19th-Century Schools and 21st-Century Hospitals,” *Religious Education* 110, no. 2 (2015): 212–30; George Sanders, “Religious Non-Places: Corporate Megachurches and Their Contributions to Consumer Capitalism,” *Critical Sociology* 42, no. 1 (2016): 71–86 (describing how “megachurches” will run services like rock concerts (with a staff to match), open stores to sell church branding merchandize, open religiously themed amusement parks, and the like).

<sup>84</sup> *Hosanna-Tabor*, 565 U.S. at 188.



That the ministerial exception compromises workplace equality is further underscored by the exception's spillover effects onto non-ministers. Although the target of employment discrimination is often a single person or discrete group of employees, discrimination in the workplace can taint the experiences of other workers, even if that taint does not rise to the level of, say, a Title VII violation for all exposed workers. For example, suppose a manager regularly and openly propositions one of his subordinates and makes sexual and objectifying remarks about her body and dress.<sup>85</sup> Even if other workers are not subject to the same treatment, they might reasonably feel anxiety over being possible future targets and accordingly tailor their dress and adopt self-effacing demeanors to stay out of sight. Paid work is also often immersive, taking place in enclosed physical spaces for long and regular hours for indefinite periods of time. Employment discrimination in even religious workplaces can thus construct a social world for employees—even non-ministers—infused with patriarchal (or, white supremacist,<sup>86</sup> homophobic, disablist, anti-Semitic) ideology.

The ministerial exception to employment discrimination law thus conflicts with workplace equality in theory and in practice. In light of the liberty values that underpin workplace equality, and the possible constitutional source of those values, further argument is

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<sup>85</sup> See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 59–61, 73 (1986). While courts are divided on whether the ministerial exception precludes holding an employer vicariously liable for sexual harassment by one of its managers, that divide arises only when the harassment does not result in a change in the victim's employment status; thus, courts agree that the ministerial exception bars sexual harassment suits when the harassment produces a change in the terms and conditions of the minister's employment. Compare *Alicea-Hernandez*, 320 F.3d at 703 (7th Cir.2003) (explaining that "the 'ministerial exception' applies without regard to the type of claims being brought"); with *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999) (holding that a minister's sexual harassment claim was not barred by the ministerial exception because the minister did not allege that the harassment resulted in a tangible employment action); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004) (holding that a minister's sexual harassment claim against her religious employer was barred by the ministerial exception because the minister alleged that she was terminated in connection with the harassment).

<sup>86</sup> Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (describing how a religious university taught religiously-motivated anti-miscegenation).

therefore needed to conclude that religious freedom should be given priority over workplace equality.

### *C. Conscience Formation at Work*

Richard Schragger and Micah Schwartzman offer a different and more compelling, but, I will argue, ultimately incomplete, basis for a hands-off approach to the internal affairs of the church. Drawing on Seana Shiffrin's theory of associational freedom,<sup>87</sup> Schragger and Schwartzman explain that religious organizations, like other secular associations, are venues for conscience formation—for “shap[ing] the content of [members'] moral and religious views.”<sup>88</sup> Public regulation can interfere with such conscience formation by “regulating the internal affairs of those groups” and by taking a stand on “the plausibility of competing religious and moral views.”<sup>89</sup> The ministerial exception thus serves conscience formation by shielding religious organizations from external meddling (at least in the form of antidiscrimination law) and by operating as a prophylactic to judgmental judicial probing for a rational connection between religious employment decisions and religious doctrine.<sup>90</sup>

While I agree that cooperative conscience formation is a valuable part of associational life, I have reservations that conscience formation supports our capacious ministerial exception. First, the fact that something is a venue for conscience formation can sometimes count in favor of government regulation. To illustrate, consider a paradigmatic venue for conscience formation:

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<sup>87</sup> See Seana Valentine Shiffrin, “What is Really Wrong with Compelled Association?,” *Northwestern University Law Review* 99, no. 2 (2005): 862, 866, 869–70 (arguing that so-called expressive associations are not simply “amplification devices” for individual free speech rights, but “sites where ideas are [cooperatively] developed and take root” through discussion, mutual influence, and shared projects).

<sup>88</sup> Schragger and Schwartzman, “Against Religious Institutionalism,” 977–79.

<sup>89</sup> Schragger and Schwartzman, “Against Religious Institutionalism,” 978–79.

<sup>90</sup> See Schragger and Schwartzman, “Against Religious Institutionalism,” 979.

schools. In finding racial segregation in public schools unconstitutional, Justice Warren, writing for a unanimous court in *Brown v. Board of Education*, explained that public education is “perhaps the most important function of state and local governments” because such education is the “foundation of good citizenship[,] . . . awakening the child to cultural values” and equipping her with skills and confidence to participate in social life.<sup>91</sup> Racial segregation in schools is antithetical to that mission, communicating to and inculcating in children a message of race-based inferiority that is not only inherently objectionable but compromises conditions conducive to learning and mutual respect.<sup>92</sup> The morally formative character of schools can thus provide a powerful (though certainly not the only) reason for federal regulation of state and local schools.<sup>93</sup>

To be sure, Schragger and Schwartzman do not contend that all sites of conscience formation should enjoy a constitutional presumption against state regulation, just voluntary associations.<sup>94</sup> Public school attendance, in contrast, is often compulsory. And being *public*, such

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<sup>91</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493–94 (1954).

<sup>92</sup> *Brown*, 347 U.S. at 495. Justice Warren stressed that segregation hurt the educational and moral development of black children. He might have (indeed should have) also emphasized that such an education teaches white supremacy, a message that also compromises the prospects of white children developing the egalitarian sensibilities needed to cooperate on fair and respectful terms with others. For a discussion criticizing this kind of pathologizing of the victims of racial discrimination, see, for example, Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: The Belknap Press of Harvard University Press, 2016), Introduction (“Just as physicians take basic human anatomy as given when treating patients, policymakers working within the medical model treat the background structure of society as given and focus only on alleviating the burdens of the disadvantaged.”).

<sup>93</sup> Steven Shiffrin argues that the formative influence of schools over pre-adolescent children actually counts against some forms of public regulation of primary school, such as compulsory public education for pre-adolescents. See Steven H. Shiffrin, “The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers,” *Cornell Journal of Law and Public Policy* 11, no. 3 (2002): 523–24 (explaining that compulsory public education may deprive pre-adolescents of a coherent world view when the parents’ values conflict with those of the schools, and can thereby compromise the pre-adolescent’s “educational and emotional development”). Nothing turns in my argument here on whether compulsory public education is morally sound policy. My related and less controversial points are that schools do have a formative influence over children (a point Shiffrin accepts), and that that influence can sometimes justify regulation to ensure that the influence is not a vehicle for inculcating white supremacy.

<sup>94</sup> Schragger and Schwartzman, “Against Religious Institutionalism,” 978.

schools are administered by an entity in which membership is not voluntary, namely, the state. Even so, while these facts about the schools in *Brown* may render application of equal protection especially urgent, the underlying principle applies to private schools as well. While private school racial discrimination may not communicate public endorsement of racial inequality,<sup>95</sup> it can still inculcate a message of race-based inferiority through example and student immersion in an environment that teaches white supremacy. This is not to say that the risk of such conscience formation is a sufficient reason for government regulation, but rather that it *a* reason for such regulation, and certainly not a sufficient basis for a clear presumption against such regulation.

Second, even if conscience formation sometimes provided a sufficient reason to bar application of antidiscrimination norms to voluntary associations,<sup>96</sup> religious associations may sometimes actually fail to be relevantly voluntary. To see why, I first want to revisit how conscience formation figures into associational freedom. Our interests in autonomous conscience formation help to ground associational freedom because what we say to one another and what we do together can shape our moral values and outlook on the world and our place in it.<sup>97</sup> That potential for influence is not merely psychological, but is “a product of admirable qualities”—of mutual understanding and trust, mutual enjoyment, reciprocity, a willing to make oneself

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<sup>95</sup> However, granting tax-exempt status to such institutions can communicate such a public message. See *Bob Jones*, 461 U.S. at 604 (holding that nonprofit schools that practice religiously-motivated racially discriminatory admissions are not IRS tax-exempt nor charitable giving to such institutions tax-deductible because racial discrimination is not a purpose to which the public can permissibly lend its support).

<sup>96</sup> While the Court has compelled nondiscriminatory admission in private religious schools (at least on the basis of race), it has resisted regulating discriminatory teaching by private religious schools. See *Bob Jones*, 461 U.S. at 604 (observing that while revoking tax-exempt status will have a negative impact on the schools, the schools can still teach and otherwise observe their religious tenets); *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (upholding a statutory prohibition on racially discriminatory school admissions standards while stressing that the prohibition did not entail a “challenge to the subject matter which is taught at any private school”).

<sup>97</sup> See Shiffrin, “Compelled Association,” 868.

vulnerable—“that serve our moral ends.”<sup>98</sup> The development and exercise of those qualities will thus tend to flourish in environments where trust and sincere, candid communication come easily.

Religious organizations, at as we find them today, can lack some of the indicia of voluntariness needed to foster autonomous conscience formation. A person is often born into and raised within her religion. Should her values ultimately converge with the values of fellow adherents and religious leadership, she may find her religious association offers a venue for candid communication and mutual understanding. And that venue may play a particularly valuable role in offering a community of people the chance to form lasting cooperative ties and a safe and accepting place. But, perhaps because of the potential for religious association to be such a central site of personal development and moral relations in a person’s life, religious associations can wield much power over what adherents do and say. A person’s fear of being shunned, shamed, or otherwise jeopardizing such an important set of relations in her life may reasonably lead her to ignore her own disagreement with religious doctrine (or keep it to herself), and to suppress aspects of her personality (such as her sexual orientation, or the race of the person she is dating) that do not cohere with the morals of her congregation. Thus, the very features of religious organizations that may mark them out as special (though perhaps not unique) social associations also provide some of the conditions for religious organizations to be oppressive.

Making one’s religious association an employment relation exacerbates some of the nonvoluntary features of religion. When your spiritual leader is also your boss, you may be particularly reluctant to candidly express your religious or moral views. Not only may you be at

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<sup>98</sup> Shiffrin, “Compelled Association,” 868.

risk of being shunned by an important moral community in your life, even your authentic respectful communications, if ill-received, can compromise your access to material goods and future career prospects.<sup>99</sup>

Further, given the role that religions often play in regulating all aspects of a person's life, a person's otherwise private decisions may result in the loss of a livelihood when they conflict with the moral judgment of the religious group. When religious employment is shielded by the ministerial exception, a failing marriage may mean being fired,<sup>100</sup> and so may pressure people to stay in unhealthy intimate relationships. Interracial friendships can similarly leave a person jobless.<sup>101</sup> The totalizing character of religion, when coupled with the ministerial exception, can therefore also exert a corrosive influence over other forms of association, such as friendships and marriages, in addition to compromising the conditions for healthy conscience formation within religious associations.

This is not to say that a conscience formation argument cannot be made in favor of the ministerial exception. My points thus far are rather that a complete conscience formation argument for a ministerial exception would need to show why, notwithstanding the threats to

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<sup>99</sup> For a critical discussion of how the workplace stifles expression of reactive attitudes, see Chapter 1, "Working as Equal Moral Agents," section III.A.

<sup>100</sup> *Conlon v. InterVarsity Christian Fellowship/USA*, 13 F. Supp. 3d 782 (W.D. Mich. 2014), *aff'd sub nom. Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) (holding that the ministerial exception barred employment discrimination claim brought by a "spiritual director" at a non-profit corporation for allegedly being fired for "failing to reconcile her marriage").

<sup>101</sup> In *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, the plaintiff, a white woman, was fired (and evicted) by her church-employer (and landlord) for maintaining a "casual social relationship" with a black man, and the court sustained her Title VII claim in part because she was not a minister, but rather, a "receptionist typist." 401 F. Supp. 1363, 1366, 1368 (S.D.N.Y. 1975). Under *Hosanna-Tabor*, had she been in the same position as Cheryl Perich—a religious school teacher—the court would have dismissed her Title VII claim.

conscience formation that employment may pose, the power to employ is essential for safeguarding the interests that members of religious associations have in conscience formation.

Finally, it need not be the case, as Schragger and Schwartzman contend,<sup>102</sup> that evaluating whether appointments choices violate employment discrimination law requires taking a stand on a controversial matter of faith. Courts become entangled in matters of religious doctrine only if we assume that religious reasons cannot also be discriminatory on the basis of race, disability, gender, and the like. It is only when courts have to ask, for instance, whether being a woman is a religious reason or a discriminatory reason for not ordaining a woman as a priest that courts have to interpret religious doctrine and make rulings on the doctrine's meaning and requirements. But why would the fact that a reason is religious preclude its being discriminatory? In order for an action to be discriminatory, the actor need not specifically intend to discriminate. An employer can commit employment discrimination by having policies that unreasonably disparately impact members of certain protected classes, by aiming to improve its bottom line by catering to racist clientele, and by engaging in well-intentioned paternalism that reflects gendered stereotypes about pregnant women's needs to stay at home and rest.<sup>103</sup> There is therefore no need for a court to take a stand on what a given religious doctrine requires when adjudicating a minister's employment discrimination claim; even if the employment action was religiously motivated, it can still be discriminatory.

In response, Schragger and Schwartzman might argue that a central way in which religious associations define their faith is through their ministerial appointments. For example,

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<sup>102</sup> Schragger and Schwartzman, "Against Religious Institutionalism," 978–79; see also Berg et al., "Religious Freedom, Church-State Separation, and the Ministerial Exception," 188–90.

<sup>103</sup> See, e.g., *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (holding that an employer's "beneficent[t]" blanket policy prohibiting pregnant women from working in lead-exposing jobs was discriminatory).

the Catholic Church might quite plausibly define itself through its employment of only male priests. Applying employment discrimination law to ministerial employment would thus deprive the Catholic Church of that communicative and moral power, requiring, for instance, that the Catholic Church restrict itself to hiring criteria that communicate (or are at least compatible with communicating) egalitarian norms.

As I discuss in the next Part, I think this kind of argument that links the value of employment to the equal liberty interests of religious adherents can offer a partial basis for a ministerial exception. But as it is stated here, it is missing an argument for an essential premise: that religious associations in fact have liberty interests that extend to *employing*, rather than merely appointing, ministers.

Applying employment discrimination law to ministerial employment does not preclude religious organizations from selecting their ministers. Ministers might also be volunteers, and thus outside of the reach of employment discrimination law.<sup>104</sup> Requiring religious organizations to comply with employment discrimination law therefore does not entail that the organizations could no longer control who they select to minister to the faithful. To be sure, ministers have historically been employees, at least in mainstream institutionalized religions. But historical path-dependency is not itself a justification; the fact that a practice has been ongoing is not, on its own, a sufficient reason to create legal space for that practice to continue. For example, the fact that women have tended to be primary caretakers is surely not a reason—let alone a sufficient

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<sup>104</sup> See, e.g., *O'Connor v. Davis*, 126 F.3d 112, 113–16 (2d Cir. 1997), cert. denied, 552 U.S. 1114 (1998) (holding that the plaintiff, who worked part time without remuneration at a psychiatric hospital to complete her social work degree, was a volunteer and therefore not an employee for purposes of employment discrimination law). See *supra* note 16.



one—to refrain from adopting legislation to encourage men to share in primary caretaking responsibilities.<sup>105</sup>

Of course, confronting such religious organizations with the choice of either have only volunteer ministers or not discriminating in ministerial employment would of course be burdensome, and would bring about substantial changes in religious life. But if the practice was unjustified to begin with, we may still want to seek ways to transition to a more egalitarian society. And in making that transition, I see no reason why the extent of the burden should not guide reform (assuming reform is required). Thus, I do not mean to suggest that history cannot make a moral difference for how to transition to new regimes. For example, the fact that, here and now, ministering is often performed through employment is surely relevant to how we might transition away from the ministerial exception (if it turns out that such a transition is warranted).

Nevertheless, the path that has led us here may have been unjust, and so in defending the ministerial exception we should, as a society, have something to say about why the freedom to select ministers morally and in principle requires the freedom to employ. If we continue to have a ministerial exception and the freedom to select does not morally require the freedom to employ, we should confront that fact and then be prepared to justify to one another why historical path-dependency should trump workplace equality. For instance, we should be ready to explain to Cheryl Perich why the fact that the Lutheran Church has always had the power to employ whomever it wants, and on whatever basis, permits the Church to fire her because she temporarily suffered from narcolepsy.

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<sup>105</sup> See, e.g., “Why so many Dutch people work part time,” *The Economist*, May 12, 2015, <https://www.economist.com/the-economist-explains/2015/05/11/why-so-many-dutch-people-work-part-time> (explaining that the Netherlands enacted a right to part-time work to encourage men to help with caretaking responsibilities at home).

### III. TOWARD AN EGALITARIAN BASIS FOR A MINISTERIAL EXCEPTION

In Part II, I explained that even if religious organizations are morally distinguishable from similar secular organizations, it does not follow that they should be exempted from employment discrimination law. Proponents must also argue that, whatever constitutional or moral values the ministerial exception furthers, those values have priority over the values that underpin workplace equality legislation. That burden is not easy to carry, as workplace equality is itself a central part of a scheme of equal liberty. To make matters more difficult, to offer a complete argument based in the liberty interests of religious adherents, proponents must also show that the right to select ministers entails, or morally requires, a right to employ ministers. Employment discrimination law does not, in principle, require religious organizations to relinquish their rights to select ministers; it requires religious organizations to either engage in nondiscriminatory hiring (and firing, and the like), or to rely on volunteers.<sup>106</sup> Rather than ask only whether religion, or religious associations, are special, we should therefore also ask why employment is special for religion.

My arguments so far have challenged the permissibility of our ministerial exception, but I do not think there is a clear case against having a ministerial exception. In this Part, I explain that the agential significance of paid work, while posing a challenge for *Hosanna-Tabor*, also points to a possible egalitarian basis for a narrow ministerial exception that would permit a religious organization to sometimes hire people who share in its religious beliefs.

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<sup>106</sup> See *supra* note 16.

### A. *Hiring for Authenticity*

While “it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination,”<sup>107</sup> applying antidiscrimination norms to religious organizations’ employment of ministers would make it more difficult for religious organizations to shape, share, and publicly communicate their values than for secular organizations.

First, in communicating a message, organizations often rely on spokespersons to represent their values and beliefs to the world. Sometimes, for the message to be effective, it does not really matter whether the spokesperson means what she says. Consider television commercials for products like deodorant: the commercials can still be highly effective in imparting Old Spice’s message regardless of whether the actors think the product smells nice or will attract good looking people.<sup>108</sup>

In other circumstances, the values that underpin the message (or the context in which it is made) will be compromised if the speaker either does not believe what she says or if the audience feels she is inauthentic. While I cannot fully develop why here, when, for example, a political candidate speaks to us about her values, she invites us to trust that she will remain faithful to those values in the future, perhaps even in the face of hard choices and political opposition, in part by showing us—through debate, through her past record of action, and the like—that those values (of racial justice, of social equality) are a central part of her character and vision for social life. And should we elect her, we will ultimately entrust her with important domains of our social lives (with racial justice, social equality, and the like).

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<sup>107</sup> *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 700 (2010) (holding that a public law school’s “all-comers policy” for accessing student club funds did not discriminate against religious viewpoints) (Stevens, J., concurring).

<sup>108</sup> See Shiffrin, “Compelled Association,” 871–73 (discussing detached roles).

For what she does later on to be an expression of our collective will, our support for the candidate needs to be based on some reasonable belief that what she said while campaigning was what she planned to do (and in fact later aimed to do in office). That is in part because we depend on what candidates tell us to make reasoned judgments about who will support our interests later on. Thus, when we have reason to believe candidates are insincere (perhaps we have reason to believe they are corruptly beholden to corporate interests), or when we simply do not know (perhaps the Democratic Party put forward the candidate because she was a great actor), the connection between our reasoned judgment and actual governance is disrupted since we no longer are secure in our beliefs about what or who it is we are voting for. Moreover, insincerity and uncertainty can breed cynicism, which may in turn exert a further corrosive influence over the democratic process.

Perhaps for all of these reasons, when a political candidate speaks about her values, we take—or at least should be able to take—the candidate to be truthfully communicating the contents of her mind. In order for listeners to be able to sustain the justified belief that candidates speak truthfully, political parties must be able to select their candidates on the basis of the values that the candidates actually support. Moreover, given that the candidate is generally understood to be saying something truthful, we should seek to avoid creating economic incentives for people to inhabit such roles who do not in fact have the beliefs they are asked to purport to have. Speakers may therefore also have interests in being selected for their authenticity. I will thus refer to an organization's employment practice of hiring people who share its beliefs as "hiring for authenticity."

Noticing the moral character of paid workplaces more broadly also reveals some of the broader risks and moral potential of hiring for authenticity. Paid workplaces are not morally

neutral. Many jobs, particularly in the nonprofit sector, are organized in the service of moral values, such as humanitarian aid, racial justice, and the like. And that is, as I argued in Chapter 3, a proper part of a free society that values the moral agential dimensions of people's capacity for labor.<sup>109</sup> Permitting a workplace whose activity is organized around moral values to sometimes hire for authenticity can thus help to foster the trust and shared commitment that support an open exchange of ideas. For example, it may be hard to not just pursue but to open up and discuss ways of implementing racial justice if you have reason to believe that one of your co-workers thinks the project is bogus, especially when you work with that person in developing a plan to implement racial justice (such as an educational campaign). Permitting some paid workplaces to hire for authenticity can therefore also support paid workplaces as sites for conscience formation, offering people opportunities to engage in a long-term and sustained efforts to understand, contest, and implement a set of common moral values.

Employment discrimination law leaves ample room for secular nonprofits to hire for authenticity, except, of course, for when those organizations seek to implement discriminatory values. In contrast, without a ministerial exception, religious nonprofits cannot hire on the basis of shared religious values. Thus, while secular nonprofits can hire on the basis of shared moral beliefs, the absence of a ministerial exception leaves members of religious associations with impoverished opportunities to engage in sustained and morally oriented cooperative projects. That is particularly regrettable given the kind of close and intimate relationships that tend to characterize the internal life of religious associations. As Lawrence Sager argues, the relationship between members of a congregation and their minister(s) is often personal and intimate.<sup>110</sup>

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<sup>109</sup> See Chapter 3, "Volunteer Work, Inclusivity, and Social Equality," Parts I and II.

<sup>110</sup> See Lawrence Sager, "Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate," in *The Rise of Corporate Religious Liberty*, eds. Micah Schwartzman, Chad Flanders, and

Catholic priests, for example, “function . . . in close relationship to their congregants, acting as religious guides, moral advisors, sources of consolation, role models, best friends, and mentors.”<sup>111</sup> As with the candidate, having reason to believe that a priest was insincere in his beliefs about such spiritual and moral matters can have a destructive effect on the ability of priests to play such roles. It may be hard to confess your greatest sins to a person you do not trust, or to put your spiritual salvation in the hands of someone who is of a different faith.

In order to avoid the inegalitarian position of making it more difficult for people to organize cooperatively around religious beliefs on account of the religiosity of those beliefs, it therefore seems that we must recognize a narrow ministerial exception, permitting at least non-profit employers to hire for authenticity and to thus hire certain employees on the basis of their religious beliefs.

### *B. Justification*

So far, in this Part I have been arguing that in order to avoid discriminating against religious associations on account of the religiosity of their beliefs, a society may need to have a narrow ministerial exception permitting those associations to hire employees who share their religious beliefs. In so arguing, I have intentionally left it open-ended which kinds of employees maybe hired for authenticity, and now want to turn to that question.

Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, gender, religion, and other protected categories,<sup>112</sup> includes an exception that permits

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Zoë Robinson (New York: Oxford University Press, 2016), 87 (arguing that the ministerial exception protects the right of close association, but that secular groups should also be recognized as having such a right and so should sometimes be exempted from antidiscrimination law).

<sup>111</sup> Sager, “Why Churches,” 87.

<sup>112</sup> See 42 U.S.C. § 2000e-2.

religious organizations to discriminate on the basis of religious belief when employing someone to perform religious activities.<sup>113</sup> The U.S. Supreme Court has held that it would not unconstitutionally privilege religious organizations over secular ones to apply this ministerial exception to *all* of the employment decisions of non-profit religiously affiliated employers, regardless of whether the employees were actually engaged in religious activities.<sup>114</sup>

For example, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>115</sup> a religiously affiliated gymnasium fired Arthur Frank Mayson, one of its building engineers, after 16 years of service because he was not Mormon.<sup>116</sup> The Court held that it was not unconstitutional to apply Title VII's exemption for religious organizations to the "secular nonprofit activities of religious organizations" in part because such an application would avoid an "intrusive inquiry into religious belief."<sup>117</sup> Elaborating, Justice Brennan, in his concurrence, explained that,

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.<sup>118</sup>

Were courts to instead adjudicate whether an activity was sufficiently religious to warrant application of the exception, the state would burden religious organizations by requiring them,

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<sup>113</sup> See 42 U.S.C. § 2000e-1.

<sup>114</sup> See *Amos*, 483 U.S. at 330, 336.

<sup>115</sup> 483 U.S. 327 (1987).

<sup>116</sup> *Amos*, 483 U.S. at 330.

<sup>117</sup> *Amos*, 483 U.S. at 339.

<sup>118</sup> *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

“on pain of substantial liability, to predict which of [their] activities a secular court will consider religious.”<sup>119</sup> Fear of such liability might in turn shape how religious organizations define and implement their own values,<sup>120</sup> and would thus undermine the very interest in religious self-definition that the exception to Title VII aims to further. Consequently, the Court suggested that courts could not restrict the exception to only “religious” activities, as such an inquiry would compromise the purpose of the exception.

It seems dubious that the values of conscience formation and Mormon adherents’ agential interests in a sustained, religiously infused cooperative project would have been compromised by having a non-Mormon building engineer. The scope of the exception therefore seems to arbitrarily burden Mayson’s (and other similarly situated employees’) agential interests in workplace equality,<sup>121</sup> in addition to compromising Mayson’s own interests in religious liberty.

Sympathetic to these concerns, Justice Brennan acknowledged that a ministerial exception for religious nonprofit activity would, as it did in Mayson’s case, put a person “to the choice of either conforming to certain religious tenets or losing a job,” and “put at the disposal of religion the added advantages of economic leverage in the secular realm.”<sup>122</sup> Brennan then contended that the benefit of avoiding judicial interference with the self-definition of religious organizations was worth the cost of such admitted inequalities between employees and religious employers.<sup>123</sup>

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<sup>119</sup> *Amos*, 483 U.S. at 336.

<sup>120</sup> *Amos*, 483 U.S. at 336.

<sup>121</sup> See section II.A. above.

<sup>122</sup> *Amos*, 483 U.S. at 340–41, 343 (Brennan, J., concurring).

<sup>123</sup> See *Amos*, 483 U.S. at 343–44.



While I cannot fully discuss the matter here, I want to briefly explore how one might resist Brennan's worries about imposing on religious groups' rights of self-definition. First, suppose that in order to avail themselves of the exception, religious nonprofits were required to offer proof that the activity the employee performed was religious. One way such a requirement would "chill" free exercise is if "religious activity" were so vague as to leave it unclear to religious organizations whether, in hiring for authenticity, they were acting lawfully. The requirement might also compromise religious rights of self-definition by deploying a moral conception of religiosity. Courts might try to avoid both worries by deferring to religious organizations to explain what counts as religious, and then to evaluate the fit between the job in question and the organization's explanation. For example, in *Amos*, the Court might have asked the Mormon Church what activity a building engineer needed to perform that required him to share the Church's faith. If the Church could not offer more than a conclusory explanation, or an explanation that bares little rational connection to the work of a building engineer, then that gives us a reason to believe that the Church was acting pretextually and hence unlawfully.

Of course, in reviewing the fit between a justification and a job, courts will necessarily reach a judgment about whether a job is sufficiently religious. One might therefore object that such a review for fit would improperly involve the state in supplanting a religious organization's own judgments about its tenets.

In response, I think there are nevertheless better and worse ways a court might review for fit, and that the better way might offer a reasonable compromise between the free exercise rights of religious persons and the liberty interest of employees. One clearly problematic way a court might review for fit would be to ask whether the reason offered for hiring for authenticity is a morally good reason. We might describe such a method of review as one that deploys a thick

conception of justification. Such a justification would involve a court in reaching conclusions such as “religious tenet X is morally wrong and therefore could never justify hiring for authenticity.”

Alternatively, a court might deploy a thin conception of justification, according to which the court instead asks whether hiring for authenticity could, under the circumstances, serve as a means—not a necessary means, just *a* means—to the employer’s religious ends. For example, a court might deploy a thin conception of justification by asking the question, “could hiring for authenticity nontrivially further religious tenet X?” In reaching such a conclusion, a court therefore need not take any substantive stand on the moral goodness of the tenet or even the moral advisability of hiring for authenticity under the circumstances of the case. Instead, the court would be assessing the rough means-end rationality of the organization’s justification, with an eye to whether the reason offered by the organization could be intelligible as a reason for hiring for authenticity.

To be sure, under a thin justification regime, a religious organization might seek to proceed with caution in deciding which employees to ask to share its religious beliefs. But that outcome might not be problematic. Proceeding with such caution is a way of exercising care with respect to when the organization requires its employees to share its religious beliefs. And religious organizations should exercise such care. If a religious organization is going to condition access to the many agential and material goods of a job on religious belief, and thus put a person “to the choice of either conforming to certain religious tenets or losing a job,” then why should the organization not be prepared to offer such a person an intelligible and thoughtful explanation?<sup>124</sup> In light of our public interests in workplace equality and the interests of

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<sup>124</sup> For a discussion of the egalitarian value of interpersonal justification, see G. A. Cohen, “Incentives, Inequality, and Community,” in vol. 13 of *The Tanner Lectures on Human Values* (Salt Lake City: University

particular employees in egalitarian workplaces,<sup>125</sup> it seems that the least a religious organization could do is offer a justification for its practices that others could understand as a justification, even if the parties to whom the justification is directed ultimately do not agree with the religious view that supplies the justification.

In turn, courts might impose similar justificatory requirements on secular nonprofits when they seek to hire for authenticity. Such a justificatory requirement might be implemented by permitting employees at secular nonprofits to have a claim for wrongful termination for being unjustifiably required to share in the moral views of the organization. (For an argument that employers should always have to offer a nonarbitrary justification for its hiring and firing practices, see Chapter 1, “Working as Equal Moral Agents,” Part II.)

None of this is to suggest that there is an obvious or easy route to a ministerial exception that harmonizes religious liberty with workplace equality. I rather offer this sketch of an alternative to complete deference to religious organizations to suggest that our concerns about asking religious organizations for a justification may be exaggerated, especially in the publicly important context of employment.

## CONCLUSION

Commentators have neglected the liberty values of workplace equality and, as a consequence, have tended to overlook how the ministerial exception requires more than an argument that religious adherents have significant liberty interests in ministerial employment. While I have

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of Utah Press, 1991), Lecture I. For a discussion of how that value might be deployed in the paid workplace, see Elizabeth Anderson, “What is the Point of Equality?,” *Ethics* 109, no. 2 (1999), 322 (“In regarding the economy as a cooperative venture, workers accept the demand of what G. A. Cohen has defined as the principle of interpersonal justification: any consideration offered as a reason for a policy must serve to justify that policy when uttered by anyone to anyone else who participates in the economy as a worker or a consumer.”).

<sup>125</sup> See section II.A. above.

argued that attending to the agential values of employment complicates the policy and philosophical questions posed by the ministerial exception, that complication is fruitful. In particular, the moral significance of paid work as a sustained cooperative effort organized around shared values can offer a reason for permitting religious nonprofits to hire for authenticity—that is, on the basis of shared religious belief—much like a secular nonprofit organized around moral values may sometimes permissibly hire people who share its moral beliefs.

## CONCLUSION

This dissertation opened with the Marxist worry that working life problematically diverges from the egalitarian promise of our constitutional order. By investigating and giving content to the liberal value of social equality and its underlying conception of the person, I have argued that we can both vindicate and begin to articulate a solution to this Marxist worry. To make working life compatible with liberal democracy, we must treat one another as equal moral agents. Through a series of case studies, I have sought to give content to the principle that we should treat one another as equal moral agents by identifying and examining facets of our moral agency that tend to be regularly imperiled by how we work together. Before concluding, I want to briefly highlight some of the results of these case studies in order to identify other dimensions of moral agency and working life that require attention.

First, in Chapter 1, I explained that, in light of work's historical relationship to social inequality, it is particularly important that our work laws clearly communicate that, as employees, we are still moral equals. I concluded that legal principles of managerial control are insufficiently attentive to the pressures of working life on expression and autonomous character development. While my discussion focused on the expression of reactive attitudes and the influence of workplace culture on personal character and identity, reactive attitudes and character formation are not the only exercises of moral agency potentially compromised by managerial control. For example, employee speech that criticizes workplace policies and practices poses a direct threat to workplace hierarchy, yet being able to criticize one's workplace may be an important part of maintaining sincere relations with one's co-workers and one's peers outside of work. Raising an objection to a workplace practice can also initiate moral progress and enable

workplaces to be self-governing. Attentiveness to the moral agential dimensions of work should therefore lead us to inquire whether protected rights for critical speech about the workplace are needed for morally responsible cooperation and to ensure that work does not foster insincerity.<sup>1</sup>

Second, through an exploration of the content and public justifications for guest worker programs, in Chapter 2, I argued that offering people access to higher wages does not justify asking people to compromise their access to personal and political associations. Indeed, creating economic incentives to engage in such work risks inaugurating a state of affairs where the least advantaged members of societies are systematically provided with (economic) reasons to compromise their own agency. The risk that we will create economic incentives that disparately pressure people to perform agency-compromising work is not limited to guest worker programs. Dangerous and exhausting work may pose like problems. Examining work through the lens of moral agency thus recommends taking a closer look at how the work we ask people to do structures their opportunities for exercising moral agency, and should lead us to try to think creatively about how we might share the burdens of agency-compromising (but perhaps socially necessary) work through means other than the labor market.

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<sup>1</sup> As I discuss in Chapter 1, federal labor law protects some critical speech, but only when it is narrowly about the terms and conditions of the speaker's job—and so, not about other people's job or managerial philosophy—and only when the speech can be understood to be “concerted activity” with or on behalf of others. See National Labor Relations Act (NLRA), Section 7, 29 U.S.C. § 157 (2012) (guaranteeing covered employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”); *Chipotle Servs. LLC d/b/a Chipotle Mexican Grill & Pennsylvania Workers Org. Comm., A Project of the Fast Food Workers Comm.*, 364 NLRB No. 72 (Aug. 18, 2016), rev. denied, *Chipotle Servs., L.L.C. v. Nat'l Labor Relations Bd.*, 690 F. App'x 277 (5th Cir. 2017) (finding that a Chipotle employees' tweet of “nothing is free, only cheap #labor. Crew members make only 8.50hr how much is that steak bowl really?” in response to a customer's post stating, “Free chipotle is the best thanks” was not “concerted activity” and thus that the employee could be lawfully required to remove the tweets by Chipotle); *Good Samaritan Hosp.*, 265 NLRB 618, 626 (1982) (holding that hospital employees' speech about quality of care was not protected under the NLRA because it was not about the terms and conditions of those employees' work).

The first two chapters of this dissertation thus examined how working life can compromise moral agency. A central theme of this dissertation, however, is that workplaces are also important sites for exercising moral agency with others. In the second half of my dissertation, I explored the workplace's potential to be a morally distinctive agential forum through critical examinations of the way paid work is legally distinguished from volunteerism, and how our constitutional jurisprudence sometimes exempts religious organizations from employment discrimination law.

In Chapter 3, I argued that creating legal space for nonmarket labor is needed to ensure that our productive needs do not overwhelm our identities and opportunities to implement moral values through our labor. I proposed that volunteer work could be, and often is, such a space. But even with widespread volunteering opportunities, many of us will likely still spend most of our time in paid workplaces. Attending to our agential interests in the quality our labor should therefore also lead us to reconsider the extent to which we pursue skill-based specialization in paid workplaces. In particular, we might inquire whether it demeans people's capacity for labor to ask people to occupy roles in which their labor—a central moral capacity—is treated as having only instrumental value.

Finally, in Chapter 4, I raised a handful of philosophical challenges to the ministerial exception to employment discrimination law, according to which the Free Exercise and Establishment Clauses of the First Amendment shield a religious organization's relationship with its ministers from employment discrimination law. I argued that a common flaw in jurisprudential and philosophical arguments for this exception is that they assume that religious liberty and associational freedom should be prioritized over workplace equality. These arguments, I argued, overlook the many agential interests we have in workplace equality, which

include interests in self-definition, in exercising our capacity for labor to implement moral values, and in accessing material resources that support the exercise of basic liberties outside of work. Attending to the liberty values of workplace equality thus reveals that it is not obvious that religious liberty is of a higher moral and constitutional order.

At the same time, it is hard for the workplace to be a venue for moral activity if workplaces cannot engage in some degree of selectivity with respect to who they hire and what values the people they hire support. I thus suggested that religious organizations might be granted a narrow ministerial exception, one that would let them hire people who share their beliefs when the organization is engaged in religious activities. I want to close by discussing a shortcoming of this narrower exception and philosophical implications of that shortcoming for the limits of what we can practically achieve under nonideal social conditions.

An important difference between a nonprofit secular organization hiring people who, for example, share its passion for combatting racial injustice, and a nonprofit religious association's hiring for authenticity is that, much like race and gender, differential treatment along religious fault lines is morally suspect. As Christopher Eisgruber and Lawrence Sager explain, "Americans are keenly sensitive to distinctions in religious identity. Though most American faiths are reconciled to the fact of religious pluralism . . . , they nonetheless continue to insist on the unique truth of their beliefs and the special significance of their religious identity."<sup>2</sup> Consequently, a risk posed by the narrower ministerial exception is that the exception will lead religious workplaces to reflect and exacerbate religious status-based inequality. This risk might lead us to conclude that there is a deep and intractable conflict between liberty and equality in the workplace.

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<sup>2</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 126.



In response, I want to propose that, rather than reveal any deep tensions, the difficulties surrounding the ministerial exception indicate that individuals have an important role to play in bringing about a just society. Liberal egalitarianism distinguishes between a society whose major social institutions conform to principles of justice and a society whose members all fully accept liberal principles of justice and their underlying justification (what Rawls calls a “well-ordered society”).<sup>3</sup> The tensions between liberty and equality that underpin the ministerial exception may help us refine our understanding of the relationship between a just basic structure and a well-ordered society. Although there may be a conceptual distinction between a society with a just basic structure and a well-ordered society, we should not infer that a society’s basic structure can be just while its members remain committed to illiberal ideologies. So long some religions are organized on the basis of principles that treat people of other faiths as less entitled to the goods of social life, we may be unable to fully implement a liberal commitment to workplace equality through our laws. For our laws to succeed in treating us as equal moral agents, we may also, as individuals, need to treat one another as equals in our workplaces.

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<sup>3</sup> See, e.g., John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), 453–54 (explaining that a well-ordered society is one in which “everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy those principles”).

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8 C.F.R. § 214.2(h) (2015).

29 C.F.R. §§ 541.304, 553.101(a) (2004).