

1. Introduction

The theme of this special issue assumes a dichotomy between employees' free speech and employers' business interests. It comes as no surprise to labour lawyers to find the interests of employees and employers in tension, even fundamental conflict. But despite oceans of ink spilled in scholarship and media about 'safe spaces' and 'cancel culture', the nature and scope of this dichotomy remains underdefined. Far from being a fringe issue, a distraction from 'bread and roses' issues of material welfare,¹ the present article identifies the 'worker expression' problem as not merely a manifestation of the age-old conflict between workers and employers, but a contradiction at the heart of labour law itself: between what the article calls the 'whole self' approach on the one hand, and the 'work-self' approach on the other.

To briefly summarise what is to follow: protecting workers from sanctions for expression fits with the desire for 'freedom from work', and thus a 'work-life' (or 'work-self') balance. On the other hand, expression can be part of 'bringing one's whole self to work'. The worker expression problem creates conflict between *and within* these rationales – for one person's 'whole self' may turn out to be incompatible with another's. The 'whole self' attitude encourages people to both identify intersubjective dignitary harms in the workplace, *and* to engage in expressive acts which may generate such harms, potentially pitting workers against each other. This also drives the exclusion of the 'whole self' of a worker with beliefs to which managers, colleagues or customers object from the workplace, either through suspension or dismissal.

This is a problem for labour law theory, and inevitably for labour law in practice. But this article flags it as a problem for the public interest and the political system too. The nature of this problem is best appreciated by calling to mind the values underpinning worker expression and how these relate to broader politics. The article therefore proceeds by examining the relationship between 'work' and 'self' in labour law theory; and then by setting out the

¹ For a discussion of the normative priorities of labour law, see Alan Eustace, 'Labour Law's Hierarchy of Normativities' (book chapter, [forthcoming](#)).

philosophical values associated with worker expression in the theoretical model adopted by this paper. First, however, it is necessary to clarify the scope of the article itself.

2. Scope and aims of article

This article is not a doctrinal examination of how labour law deals with worker expression in any particular jurisdiction, though the theoretical discussion herein has been informed by doctrinal reflection the author has carried out elsewhere.² It is an attempt to bring a fresh perspective to the admittedly crowded field of philosophical approaches to disputes arising out of worker expression, which will inform further doctrinal scholarship the author intends to carry out in future. It identifies worker expression, particularly on matters of political controversy, as part of a practice of citizenship which is embedded in social and legal norms, and thus reflects both intimately personal characteristics of the worker and the constitutional context in which the worker exists as a citizen.³ As such, the article will not carry out a detailed ‘balancing exercise’ between such fundamental rights claims as may be advanced by employees and employers in the context of a discrete legal dispute.⁴

The sections which follow, particularly **Section 4**, rely on certain ethical assumptions about the value of democratic pluralism and the legitimacy of managerial authority under capitalism which not all readers, nor all legal systems, will share. Unfortunately, space precludes a full defence of the attitude adopted below.⁵ But in highlighting aspects of worker expression which are widely overlooked in law and commentary, the insights in this article should inform interpretation of legislation and judicial decision-making to the effect, broadly speaking, of increasing the level of protection afforded to worker freedom of expression. The extent to and manner in which this occurs will, of course, vary by jurisdiction, in light of doctrinal analysis which is beyond the scope of this paper but will be conducted elsewhere.

It is thus beyond the scope of this article, even taken alongside the many other valuable contributions to this special issue, to resolve this latent conflict at the heart of labour law at the level of doctrine, jurisdiction by jurisdiction. However, the necessarily brief establishment of

² Alan Eustace, ‘The Worker and the Constitution: A Theory of Constitutional Labour Law’ (PhD thesis, Trinity College Dublin 2023), in particular chs 7, 8 and 10.

³ For more on practices so embedded, see Alasdair MacIntyre, *After Virtue* (3rd edn, Bloomsbury 2014) 218ff.

⁴ For a critique of ‘balancing’ in this context, see Eustace (n 2) 59-76.

⁵ More of this work is carried out in Eustace (n 2).

a new theoretical approach to this problem in labour law ought to help guide future research and discussion of these issues.

3. Work and self

Volumes have been devoted to the relationship(s) between work and ‘the self’, one’s ‘identity’, and similar concepts. So brief an article as this can barely dip a toe in these deep waters. While acknowledging that ‘self-identity is a contested concept not just within organization and management studies but throughout the arts, humanities, social sciences, and philosophy’,⁶ it is necessary to sketch out some version of the concepts relied on in this article. It follows the view of Brown that:

[I]dentity generally refers to the meanings that individuals attach reflexively to themselves... in order to address key questions such as “Who am I?”, “How should I lead my life?”, and “Who do I want to become?”... rendering our selves and social worlds comprehensible and practicable.⁷

Brown goes on to note that, within an organisational context like the workplace, people tend to have three ‘principal categories of identity’: **collective**, being their description of the organisation and industry in which they work; **role**, being their place within the functioning of that organisation or industry; and **personal**, which is a ‘unique, individual self-description’ and may be ‘based on [their own] gender, ethnicity, sexuality, etc’.⁸ The ‘identity work’ done by an individual to construct these senses of self is the project of a lifetime.⁹ An important insight from identities research for this article is that people routinely construct / adopt / experience different senses of self depending on social and organisational context. For the purposes of this article, the most relevant is the idea of there being a ‘work self’, the type of person one is in a professional setting. This, of course, is shaped by the norms and expectations of that workplace or industry.

⁶ Andrew D Brown (ed), *The Oxford Handbook of Identities in Organizations* (OUP 2020) 3; internal citations omitted.

⁷ *ibid*; internal citations omitted.

⁸ *ibid*; internal citations omitted.

⁹ *ibid* 4; internal citations omitted.

As far back as Aristotle, a close link has been observed between one's working life and one's sense of self. Crudely: the mere labourer, who works only to provide his own subsistence, is denied the individuality and autonomy that gives any sense of self; the *homo faber* is identified, by his craft, as occupying a valuable role within society and thus has a social self; and the 'gentleman', free from the necessities of work, helps to govern society, contribute to its scientific and cultural advancement, and truly express his own individual self.¹⁰ But we know that even workers who depend utterly and immediately on their labour for sustenance, or are otherwise exploited, frequently find or construct meaning in the work, and develop rich cultural norms and symbols associated with that work.¹¹ As such, even work which may appear menial or demeaning from the outside is not necessarily the preserve of 'fools and horses';¹² and the rhythms and rituals of one's working life are partly *constitutive* of one's sense(s) of self, not least because they help one find a community of common interest. Likewise, many people (particularly in advanced economies with widespread tertiary education) seek out work which is *expressive* of their identities; and the income derived from work enables people to engage in (further) self-development, whether through education, leisure activities, building personal relationships, *etc.*¹³

Of course, recognising the meaning that many people derive from their work does not deny that there is more to life than work. A well-lived life, according to most thinkers across the philosophical spectrum, is one which pursues a variety of incommensurably valuable goals, practices and relationships.¹⁴ Historically, a significant focus of effort in the establishment and development of labour law was the protection of what became known as 'work-life balance'. This has long held great cultural resonance: 'Our days shall not be sweated from birth until life closes / Hearts starve as well as bodies: Give us Bread, but give us Roses.'¹⁵ This constant (and ongoing) battle against the tendency of work to colonise all aspects and moments of life,

¹⁰ JE Penner, 'Aristotle, Arendt and the Gentleman: How the Conception of Remuneration Figures in our Understanding of a Right to Work and Be Paid' in Virginia Mantouvalou (ed) *The Right to Work* (Hart 2015) ch 5, 88-89. The use of gendered language here is deliberate – signifying the restrictive approach to the relationship between women's work and self in the source material.

¹¹ Often found in peasant folklore: see for Irish examples <<https://www.duchas.ie/en>> accessed 4 October 2024.

¹² Alan Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Mantouvalou (n 10) ch 9, 149-154; Hugh Collins, 'Is There a Human Right to Work?' in the same volume, ch 2.

¹³ See further Sierk Ybema, 'Bridging Self and Sociality: Identity Construction and Social Context' in Brown (n 6) ch 3; Patrizia Hoyer, 'Career Identity: An Ongoing Narrative Accomplishment' in the same volume, ch 6.

¹⁴ See, for example, John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011).

¹⁵ James Oppenheim, 'Bread and Roses' (American Magazine, 1911).

through the economic pressures on workers – the pursuit of ‘freedom from work’¹⁶ –explains not only restrictions on working time and minimum leave requirements, but also minimum wages, insofar as these allow workers to support themselves with fewer working hours.

But even within the brief summary of the relationship(s) between work and self given above, we can already see the shape of two attitudes within the life of the worker, within workplace culture, and within labour law. One takes as given the multiplicity of ‘selves’, which includes the maintenance of a ‘work self’ distinct from one’s ‘personal life’. It assumes one’s various identities can be *complementary*, and sees the ability to inhabit each distinctively and separately at different times and in different social environments as potentially liberating. Building on the idea of ‘work-life balance’, this attitude seeks out ‘work-self balance’. This terminology is doubly meaningful: a balance between ‘work’ and ‘self’ is facilitated by the existence of a ‘work self’.

The alternative approach perceives these multiple ‘selves’ as *competitive*, and the ‘identity work’ needed to maintain the separation of selves as exhausting or even distressing.¹⁷ There is an understandable reluctance to ‘hide’ one’s ‘true self’ in a workplace context, which generates a demand that instead, the workplace accommodate the ‘whole self’ of the worker. While there has always been a school of thought in favour of ‘authenticity’ in the workplace,¹⁸ ‘bring your whole self to work’ became a clarion call over the past decade in particular, driven by (among other factors) the influence of social media and different cultural expectations of younger entrants to the workforce.¹⁹ Space precludes detailed consideration of the evolution of this trend and the ongoing debate about the merits of a ‘whole self’ approach for both individual and organisational success.²⁰ Suffice to say for present purposes that there is a large section of the (global) workforce for whom ‘bring your whole self to work’ resonates as a cultural norm. But even before ‘whole self’ language became commonplace, there were well-established labour laws in various jurisdictions which obliged employers to accommodate various aspects of their workers’ lives which are not strictly relevant to the productive activity carried on at work: for

¹⁶ Borrowing the trichotomy established by Nicolas Bueno, ‘Freedom *at, through* and *from* work: Rethinking labour rights’ (2021) 160(2) *International Labour Review* 311.

¹⁷ Sandra E Cha, Patricia Faison Hewlin, Laura Morgan Roberts, Brooke R Buckman, Hannes Leroy, Erica L Steckler, Kathryn Ostermeier and Danielle Cooper, ‘Being your true self at work: Integrating the fragmented research on authenticity in organizations’ (2019) 13(2) *Academy of Management Annals* 633, 645-51.

¹⁸ *ibid* 634.

¹⁹ See, for example, Mike Robbins, *Bring Your Whole Self to Work* (Hay 2018); Cha *et al* (n 17) 644ff.

²⁰ See further Cha *et al* (n 17).

example, the obligation of reasonable accommodation for workers with disabilities. Labour law has long insisted that labour is *inseparable* from humanity; one cannot purchase someone's labour without getting the person along with it.²¹

Extant labour law, in the sort of developed market-economy liberal democracies under discussion, generally acts on *both* of these rationales. Even the same provisions of labour law are capable of being rationalised as being about either 'work-self' or 'whole self': for example, protection against discrimination on the grounds of religious belief can be interpreted to allow workers a degree of flexibility in their work schedules to accommodate religious observances,²² *and* to wear religious symbols in the workplace.²³ This 'overdetermination' of the justification(s) for many specific labour laws, and the field of labour law in general, is a good thing. This author agrees with Collins *et al* that an attempt to justify every aspect of the regulation of people's working lives by reference to a single moral or political value is doomed to failure – labour lawyers will not find the 'philosopher's stone' of the entire discipline.²⁴

The virtues of labour law being a field characterised by normative pluralism are many, but there are costs if equally valuable perspectives on labour law point in divergent directions in their treatment of specific issues that arise in the workplace. These will be returned to below. First, it is worth interrogating whether it is the case that, as first appears, a 'work-self' approach to labour law suggests robust protection for worker expression, whereas 'whole self' advocates its restriction in the interests of those who are upset or offended by the expression in question.

Unfortunately, things are not so simple, for two reasons. First, the logic of 'work-self' suggests strong protection for worker expression where the expressive act takes place *outside* the workplace, but very weak protection for expression at work. Conversely, 'whole self' can be

²¹ Paul O'Higgins, "'Labour is not a Commodity" – an Irish Contribution to International Labour Law' (1997) 26(3) Industrial Law Journal 225.

²² Although this has generally not found favour at the European Court of Human Rights: see, for example, *X (Ahmad) v UK* (dec) Application no 8160/78; *Kontinen v Finland* (dec) Application no 24949/94; *Stedman v UK* (dec) Application no 29107/95.

²³ Such an interpretation was previously rejected by the ECtHR (see, for example, *Dahlab v Switzerland* (dec) Application no 42393/98) but has more recently found favour: see *Eweida v UK* Application no 48420/10. The position of the Court of Justice of the European Union remains fraught: compare C-157/15 *Achbita*, C-188/15 *Bougnaoui* and C-804/18 *IX and MJ*. For further discussion, see Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) and Eustace (n 2) 311-16.

²⁴ Harry Arthurs, 'Foreword' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018); Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33(1) International Journal of Comparative Labour Law and Industrial Relations 7.

just as easily construed as affording strong protection for expression at work. Indeed it assumes that whatever is said or done ‘outside’ work is capable of being ‘brought to work’. This means that in truth, ‘whole self’ is *internally conflicted* on the issue of worker expression. This conflict manifests as follows. One worker may have deeply-held political, philosophical or religious beliefs which form a meaningful part of her identity and which, if she is to bring her ‘whole self’ to work, she feels compelled to express (perhaps in response to a workplace decision or the expressive activity of a colleague). Note that the expression need not necessarily take place in a workplace setting for the ‘whole self’ approach to be relevant, albeit indirectly: for example, she may post some expressive content online, expecting her employer or colleagues to accept this as part of her ‘self’, without professional repercussions. But simultaneously, another worker may have equally deeply-held beliefs, or ‘meanings [attached] reflexively to themselves’,²⁵ which are incidental to work, but conflict with the expressive activity of his colleague. He expects his employer and colleagues to safeguard *his* ‘whole self’ too.

The ‘whole self’ approach thus encourages people to both identify intersubjective dignitary harms in the workplace, *and* to engage in expressive acts which may generate such harms, potentially pitting workers against each other. It is becoming readily apparent from case law across various jurisdictions that, in a workplace context, one person’s ‘whole self’ may turn out to be incompatible with another’s.²⁶ As such, the standard response to such conflicts is a perversion of the ‘whole self’ logic itself: the sanction often reached for by employers is the exclusion of the ‘whole self’ of one employee from the workplace, either through suspension or dismissal. Thus we see a sort of ‘HR hokey-cokey’ taking place in workplaces all over the world: you bring your whole self into work, and then they keep your whole self out...

Above it was mentioned that this conflict at the heart of labour law theory has costs for individual workers (obviously), but also for employers and the public. The rest of this paper will focus on the latter. It was mentioned above that uncertainty in the law generates social and legal problems. These are inevitable where a field of law’s underlying normative rationales point in opposite directions; they are made even worse if even single rationales are internally

²⁵ See n 6.

²⁶ For a smattering of recent cases from Ireland and the UK (without commenting on the merits of each decision, nor the substance of the views expressed by each worker), see: *Glynn v Carlow Dental Centre* [2024] ADJ-00043734; *A Doorman v A Food and Beverage Business* [2019] ADJ-00017100; *Thomas v Surrey and Borders Partnership* [2024] EAT 141; *Higgs v Farmor’s School* [2023] EAT 89; *Mackereth v Dept of Work and Pensions* [2022] EAT 99; *London Borough of Hammersmith and Fulham v Keable* [2021] EA-2019-000733-DA; *Gibbins v British Council* [2017] 2200088/2017.

conflicted on an issue. Among these problems are the efficiency costs to employers, workers themselves, and the public which arise in the course of giving advice and settling disputes about ‘worker expression’, including through legal adjudication. But there is another cost to the public worth discussing, a cost associated with the restriction of worker expression specifically – the ‘spillover’ into political life of such restrictions. The next section of this article will address this issue by examining the value of worker expression to a democratic political system, the threat posed by employer restrictions on such expression, and the normative values underpinning a generally permissive approach to worker expression.

4. The value(s) of worker expression²⁷

Some preliminary remarks are needed to introduce this section. First, in keeping with the expressed scope and aims of this article,²⁸ this section will draw attention to important philosophical aspects of the ‘worker expression’ problem. Space does not permit an application of the theory constructed here to doctrinal examples. The author has done some of that work elsewhere,²⁹ and this field is ripe for future doctrinal research. Second, this section makes contestable claims about normative objectives and assumptions in the field of labour law; not all readers nor jurisdictions will afford these the same level of priority as they are given here, but all should recognise them. Space again precludes a ‘balancing’ of these normative priorities with others, but it is this author’s view that the values identified below are broadly underappreciated in the field, and many jurisdictions would be well-served to adjust whatever ‘balance’ they have drawn between these and other values in favour of those set out below.

Finally, it is also necessary to give a brief clarifying note on ‘worker expression’ for the purposes of this section. What follows will inevitably focus on *political* formation, expression and advocacy. But it is trite to acknowledge that one’s political views are ‘downstream’ from general morality and personal and community values. We can see, therefore, inherent

²⁷ What follows is based on Eustace (n 2) in particular chs 5, 9 and 10. Some clarity and nuance have been sacrificed for brevity. It also benefitted from Stephen Hurley, ‘Teaching and debating the legal protection of philosophical belief in the workplace in a university law school’ in Stephen Hurley and Chris Monaghan (eds), *Teaching of Rights and Justice in the Law School* (Routledge, forthcoming) and the following conference presentations by that author: ‘Connecting the “why” with the “how”: Should non-religious philosophical belief be protected by law in the British workplace? If so, what is the appropriate theoretical justification for doing so?’ (Society of Legal Scholars, September 2022) and ‘Protecting political speech for the public good’ (Society of Legal Scholars, June 2023).

²⁸ See **Section 2** above.

²⁹ Eustace (n 2) ch 10.

connections between (for example) privacy, religion or conscience, and freedom of expression. Each relates to the other in the contribution made to personal moral (and therefore political) formation and expression. As such, this article will use broad language like ‘expression’ and ‘civil liberties’ rather than (say) specific articles of the European Convention on Human Rights. It will also rely on a conception of ‘citizenship’ broadly in line with the scope of political *discourse* in liberal democracies (even if not reflected in, say, the electoral franchise), roughly captured by the following passage from Pettit:

I take citizens in this discussion to comprise, not just citizens in the official sense, but all the more or less settled residents of a state who, being adult and able-minded, can play an informed role at any time in conceptualizing shared concerns and in shaping how the state acts in furthering those concerns.³⁰

It is beyond the scope of this short article to defend the claim that one’s conditions at work and the power exercised by one’s employer have ‘spillover effects’ into how one conducts oneself, and the role one is able to play, as a citizen.³¹ It takes as given that:

...an employer [may use] its economic power over its employees as leverage to obtain greater power in the political sphere. Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse...³²

Playing a meaningful role as a citizen in a democratic society necessarily implies bringing *one’s own judgment* to bear on decisions in which one participates, and therefore making up one’s own mind on political, social and moral issues including the freedom to join with others in groups or organisations for the purposes of advancing causes one believes in and putting one’s beliefs into action. This article refers to the foregoing as ‘political independence’. Given the inherent threat to political independence of citizens who work in hierarchical workplaces under capitalist modes of production, there are four values which must condition the

³⁰ Philip Pettit, *On The People’s Terms* (Cambridge University Press 2012) 75.

³¹ As observed in the minority decision in *Palomo Sánchez and others v Spain* Applications nos 28955/06, 28957/06, 28959/06 and 28964/06, [18]: ‘Many people... economically dependent as they are upon their employer, hesitate to speak out not because they are afraid of getting arrested, but because they are afraid of being fired. And they are right.’

³² Samuel R Bagenstos, ‘Employment Law and Social Equality’ (2013) 112 Michigan Law Review 225, 256.

managerial prerogative in order to protect political independence of worker-citizens, and thus the integrity of the democratic constitutional order. These are: contestation; diversity; moral formation; and integrity. Each will be examined briefly in turn.

4.1 Contestation

Expressing one's views is all well and good, but the essence of democratic decision-making is being able to *contest* the views of others, to engage in argument and deliberation. Contestation, like other characteristics of the 'democratic mindset' is a muscle – if it is not used regularly, it can atrophy. As such, contestatory expression in the workplace, even if 'just' about the workplace itself, is excellent practice for participation in democratic decision-making in the public square. Of course, contestation about 'the workplace' can be about the very limits placed on contestation, and expression, by employers – and is therefore capable of encompassing various other social and political issues, insofar as the employer tries to define 'the workplace' as distinct from these issues, or conversely tries to adopt a particular workplace policy on such questions.

But the prime example of contestatory expression in the workplace is that of trade union activity. Bogg and Estlund discuss trade union activity and industrial action in the context of 'contestatory citizenship',³³ with trade unions being just one instantiation of a broader 'right to contest' implicit in freedom of association. The value of contestation goes beyond recognised unions: Bogg and Estlund point out that formalised systems of worker representation are only possible *after* workers have the opportunity to contest and discuss, among themselves and in public, employer decisions and their own grievances. This broader 'right to contest – question, criticize, disagree with – employer decisions about the organization, terms, and conditions of work without risking employer reprisals' is a necessary precondition to trade union activity in the first place. But it is easier to focus on union officials in the space available.

Trade union officials often need to speak critically of management and, in some cases, other workers who are undermining the efforts of the union. Particularly in the context of an industrial dispute or recruitment drive, where tempers are running high and significant stakes

³³ Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper no 13-81, 3; and 'The Right to Strike and Contestatory Citizenship' in Collins *et al* (n 24), ch 13.

are on the line for both workers and employers, trade union leaders have to ‘rally the troops’, which may require evocative, even inflammatory, language.³⁴ General restrictions on expression have a ‘chilling effect’ on trade union activity, and provide employers with cover to dismiss troublesome trade unionists.³⁵ Employers may be itching to fire trade unionists, but know (in most jurisdictions) they are legally prohibited from dismissing a worker for trade union activity. ‘Disrupting workplace harmony’ by insulting management or colleagues, however, provides the perfect cover for a dismissal that is really motivated by the trade union activity. As such, the theoretical approach advanced in this article is sceptical of even restrictions on expression which seem well-meaning, as they may still be capable of being weaponised to restrict contestation in the workplace and other trade union activity.

4.2 Diversity

Estlund has demonstrated that workplaces are frequently the most diverse places where adults socialise, and how socialising in diverse environments is generally good for democracy.³⁶ Of course, we have discrimination laws that tend to foster at least some diversity of identity or certain personal characteristics – here is not the place to examine these. Sometimes the ‘worker expression’ question is answered through (usually indirect) discrimination, such as on the ground of religion. But the present theory goes further in advocating protection of worker expression generally by reference to the value of diversity.

There are two reasons why workplace diversity is good for democracy, both of which lead us towards also protecting the exercise of civil liberties as well as identity characteristics. First, daily interaction with fellow citizens unlike oneself in some socially-salient respect under the ‘norm of civility’ that pervades the workplace is likely to reduce fear of or prejudice against ‘the other’, which makes it easier to participate in a political community with those ‘others’. Second, these social interactions with ‘the other’ leads to a sharing of differing experiences and views on social and political issues, and a drawing of attention to issues that need to be addressed politically, that would not otherwise occur. As regards the first of these, it is surely the case that democracy is damaged just as much by unfamiliarity with those of other *beliefs* as it of those with other *characteristics*. There is evidence that political polarisation and

³⁴ See, for example, *Palomo Sánchez* (n 31).

³⁵ Dave Smith and Phil Chamberlain, *Blacklisted* (2nd edn, New Internationalist 2016).

³⁶ Cynthia Estlund, *Working Together* (OUP 2003).

partisanship, and distrust of people with alternative lifestyles or values, is doing serious harm to some democracies.³⁷ Some legal systems prohibit discrimination on the grounds of political or philosophical beliefs as a characteristic, which may well be a valid way to pursue the value at stake here, but clearly what we are really looking for is a prohibition (however framed) on employers enforcing *ideological conformity* among their workforce, as well as *identitarian uniformity*. As regards the second, this benefit of identitarian diversity is premised on the assumption that identity is a good proxy for experiences and beliefs. This may very well be the case: it is certainly likely that an immigrant has a certain set of experiences of and views about immigration that it would be valuable for non-immigrants to be exposed to in the course of social interaction; that a woman has a certain set of experiences of and views about sex discrimination that it would be valuable for men to be exposed to, *etc.* But one's beliefs, although liable to be shaped by one's 'lived experience', do not necessarily correspond to it: partly because individuals can draw various lessons from similar lived experiences, but also because one's experience includes one's prior socialisation – including at, for example, previous jobs. It is particularly difficult to reduce overarching beliefs about political systems, or issues of which few people ever have specific personal experience, to the sort of identitarian characteristics that are typically protected by anti-discrimination law; as such, these are poor proxies for diversity of moral or political belief.

It is also important to recognise that the exchange works both ways: the sort of social and economic ostracism that comes from dismissing people for their political or religious beliefs is less likely to change minds than inclusive sharing of experiences and sympathetic exchange of views.³⁸ Strossen refers to this as 'inter-group contact theory', arguing it is the 'most effective way' to combat prejudice³⁹ – much better than if we fire everyone with views we may not like, and thereby reduce their exposure to diverse environments.⁴⁰

4.3 Moral formation

³⁷ Amy Chua, *Political Tribes* (Penguin Random House 2018); Milan W Svobik, 'Polarization versus Democracy' (2019) 30(3) *Journal of Democracy* 20.

³⁸ Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (OUP 2018) 8, 34ff, 139, 149.

³⁹ *ibid* 177.

⁴⁰ What is true in respect of colleagues is also true for exposure of customers to workers, *etc.*

The flip side of acknowledging the interdependence of beliefs and their ability to be shaped by socialisation, is that the model in this article must protect that process from undue influence or control.⁴¹ Organic moral formation should be distinguished from what we might call ‘moral tutelage’, the idea that a hierarchical management structure can take it upon itself to direct the formation, expression and exchange of individuals’ moral, social and political views. One can reasonably object to the imposition of a particular moral viewpoint by an employer, or the requirement of adherence to certain moral norms as a condition of employment, without necessarily disagreeing with the norm itself. Generally, workers do not look to their employers for moral and political guidance, nor seek opportunities for moral development in employment, and democracies do not expect private companies to play a formative role in public opinion.⁴²

There is ample evidence of ‘moral tutelage’ in a broad sense: we frequently see dismissals or other sanctions for petty criminality, drug use, or sexual immorality;⁴³ some cases specifically relate to what we have included in worker expression: the profession of objectionable views like racism or other forms of bigotry, distasteful or controversial actions or expressions,⁴⁴ or recruitment practices based on psychological profiling or medical examination, *etc.* We also see the adoption of moral, social or political ‘charters’ by corporations, purporting to express the company’s ‘values’, according to a certain moral creed held by management.⁴⁵ In other circumstances, we see requirements that workers disclose certain information, and monitoring by employers of workers in such a way as to uncover such information, that leads to ‘strategic adaptation’ by workers to avoid discovery or sanction.⁴⁶

⁴¹ For a general discussion, see Neil Richards, *Intellectual Privacy* (OUP 2015).

⁴² Of course, some employers do explicitly pursue ‘moral missions’ – particularly religious organisations, political parties and NGOs. But space precludes examination of such ‘ethos employers’.

⁴³ Again, this article does not express a view on the merits of employer decisions, nor on the conduct in question, in any specific case. Already mentioned was the legitimate concern of employers for the safety of other workers, customers, *etc.* – which may be particularly acute where there has been behaviour by a worker which amounts to a criminal offence. I am grateful to Christopher McMahon for pointing out that employers basing their disciplinary decisions on the criminal law may be less worrisome from the perspective of ‘moral tutelage’, as these standards of behaviour have at least been endorsed by the community as a whole by means of democratic legislative decisions. On the other hand, the appropriate means of meting out punishment for breach of criminal law is, of course, the criminal process itself. From this perspective, the imposition of additional sanctions by a private employer, implicitly with lower evidentiary standards and procedural protections, remains of some concern. To fully explore this issue lies beyond the scope of this article; further research is needed on the appropriate relationship between the criminal process and employment discipline.

⁴⁴ Virginia Mantouvalou, ‘“I Lost my Job Over a Facebook Post – Was that Fair?” Discipline and Dismissal for Social Media Activity’ (2018) University College London Working Paper Series, no 2/2018.

⁴⁵ Edward T Walker and Christopher M Rea, ‘The Political Mobilization of Firms and Industries’ (2014) 40 *Annual Review of Sociology* 281.

⁴⁶ David Enoch, ‘False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences’ (2020) 129 *The Philosophical Review* 159.

This author is dispositionally sceptical of claims that a particular ‘vice’ conflicts with the requirements of a job, or that a worker’s moral, social or political views are incompatible with his or her continued employment. The theory advanced in this article generally rejects the employer’s reputation or corporate image (on which more below) as a purported justification for moral tutelage.⁴⁷ A safer justification may be the safety of customers or colleagues (which also serves the value of diversity in potentially making vulnerable groups more welcome), with two caveats: just as was the case in an earlier section with respect to dismissal for criticism being an excuse to get rid of ‘troublemakers’, it approaches employer claims of harm to customers or colleagues with scepticism;⁴⁸ and it builds in some tolerance for the effects of moral error (which is implicit anywhere there is contestation about anything).

4.4 Integrity

‘Strategic adaptation’ damages a final virtue of democratic citizenship that we should discuss: integrity.⁴⁹ By forcing people to choose between their moral, philosophical, religious or political commitments and their job, employers are inviting workers to, in essence, ‘sell out’. It is very difficult for citizens to advance particular causes in the public realm if their fellow citizens can point to behaviour in their working lives that contradicts those beliefs. Political science literature demonstrates citizens’ disapproval of hypocrisy, particularly where financial gain is involved.⁵⁰ Employers often worry that the political or other public activities and statements of people who happen to work for them will damage the reputation of their business;⁵¹ they fear a sort of ‘guilt by association’ with the objectionable views of their workers. Avoiding this reputational harm is recognised time and again by courts as a legitimate aim of management in sanctioning workers for political activity and expression. However, no

⁴⁷ Paul Wragg, ‘Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle’ (2015) 44(1) *Industrial Law Journal* 1.

⁴⁸ Strossen (n 38) 47, 109ff, ch 6; Gerald Chipeur and Robert Clarke, ‘The Art of Living With Ourselves: What Does the Law Have to do with Conscience?’ in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart 2019) ch 9, 175; John Adenitire, ‘Conscientious Exemptions in a Liberal State’ in the same volume, ch 13, 280ff.

⁴⁹ Damien Cox, Marguerite La Caze and Michael Levine, ‘Integrity’ in *Stanford Encyclopaedia of Philosophy* (rev 2021) <<https://plato.stanford.edu/archives/fall2021/entries/integrity/>> accessed 4 October 2024; Lynne McFall, ‘Integrity’ (1987) 98 *Ethics* 5. For more on integrity in the context of employment and other cases of conscientious objection or exemption, see the various contributions to Adenitire (n 48).

⁵⁰ See for example, Monika L McDermott, Douglas Schwartz, and Sebastian Vallejo, ‘Talking the Talk but Not Walking the Walk: Public Reactions to Hypocrisy in Political Scandal’ (2015) *American Politics Research* 1.

⁵¹ For example, *Predota v Austria* (dec) Application no 28962/95; *Pay v United Kingdom* (dec) Application no 32792/05; *Redfearn v United Kingdom* Application no 47335/06; *Szima v Hungary* Application no 29723/11.

credence is given for the effect on the reputation of *workers* where they are seen to ‘sell out’, or compromise on their beliefs to get or keep a job: not only to their reputations, but their own psychological health.⁵²

In light of what was said earlier about inequality of bargaining power and material dependence of workers on their employers, we expect to see people compromise their beliefs and values in pursuit of employment. That is a trade-off many (perhaps even most) people will make, in ways big and small. To a certain extent, it is entirely healthy that in a pluralist, liberal democracy, people will temper their convictions and adjust how they manifest them, in the interest of ‘living together’⁵³ as a community, and obedience to commonly-agreed laws. The problem is that, in a capitalist labour market, these compromises and adjustments will systemically favour the interests and beliefs of employers and their preferred interest-groups.

That is not to say that employers will necessarily be acting nefariously: sometimes, they attempt to impose moral order on their workplace out of concern for customers or other workers. The problem is that is not their proper role in a democratic society. Democratic citizens are entitled to their own process of moral formation; they should adjust their beliefs and behaviour in the interests of ‘living together’ alongside their colleagues (who are, of course, fellow citizens), but only *in extremis* should employers be entitled to compel them. Allowing employers to hold workers to particular moral standards, where these have nothing to do with performance of the job but reflect either moral tutelage or a fear of ‘guilt by association’, creates significant disincentives to personal integrity. You do the ‘HR hokey-cokey’, *and you turn around*. If integrity is one of the values that we want to inculcate in citizens of a democracy, and selling out or hypocrisy something we want to discourage, then this seems like a bad system of incentives.⁵⁴ Having due regard to the limits of human fortitude, labour law should minimise the extent to which workers are forced to choose between values and jobs.

5. Conclusion

⁵² Chipeur and Clarke (n 48) 175; Cha *et al* (n 17) 650ff.

⁵³ To borrow a loaded phrase from the case law on religious dress: see, for example, *SAS v France* Application no 43835. For discussion, Howard (n 23) 80.

⁵⁴ Reed T Shafer-Ray, ‘The Tragedy of Selling Out’ (*The Harvard Crimson*, 9 November 2017); Lily Zheng and Inge Hansen, *The Ethical Sellout: Maintaining Your Integrity in the Age of Compromise* (Berrett-Koehler 2019); Lily Zheng, ‘We Sell Out in Little Ways All the Time: Why Don’t We Talk About It More?’ (*Zora*, 5 December 2019) <<https://zora.medium.com/we-sell-out-in-little-ways-all-the-time-why-dont-we-talk-more-about-it-a9f44be34720>> accessed 4 October 2024.

Workplaces all over the world are being ‘shaken all about’ by the worker expression problem. Partly this arises from confusion and conflict over what labour law is ‘all about’. Are we interested in protecting ‘freedom from work’, such that workers enjoy balance, and by necessary implication *separation*, between ‘work’ and ‘life’? If so, labour law should protect workers from restrictions on, and sanctions for, their expressive activity (particularly when this takes place outside a workplace setting). Or is the above dependent on a false dichotomy – should there be no ‘work self’ at all, but simply an authentic ‘whole self’ which the law obliges employers and colleagues to respect? That approach is conflicted on the priority it gives to freedom of expression.

What cannot be disputed is the value of expression, including the expression of people who (if their freedom of expression is not protected adequately by law) would come under economic pressure not to express themselves or to join the political agendas of more powerful actors, to a democratic political culture. Expression is a kind of political participation – and to be meaningful, such participation must benefit from *political independence*. That means respect for contestation, diversity, moral formation and integrity.

Foolish, bizarre, upsetting or offensive as a worker’s beliefs might sometimes be to managers, colleagues or customers, this article has argued that they should only be grounds for dismissal in exceptional circumstances. Ordinarily, employers should be obliged to accommodate their workers’ independent moral formation and political activities, and contestation of their own decisions, behaviour and preferences, across a diverse spectrum of the society in which they operate. The alternative, as suggested above, is a process of ‘strategic adaptation’, where citizens will compromise on their own beliefs and cultural backgrounds, deferring to the preferences of their present employer or future employers, in order to earn a living. This not only disempowers workers in the public sphere, but increases the already greater power of wealthy employers, and groups employers happen to patronise at any given time.

And yet: labour law cannot abandon its ‘in-out-in-out’ dance with *both* ‘work-self balance’ and ‘bring your whole self to work’. Some aspects of political independence (most clearly diversity and moral formation) depend on a certain amount of ‘self-sharing’ at work, since the workplace is often one of the strongest communities in many people’s lives. The ‘work-self’ must be broader than pure *work*, if democracy depends on workers not leaving their *citizenship* at the

door. How much broader is being fiercely contested within labour law doctrine and scholarship all over the world – including in this special issue.