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Nondomination and the Ambitions of Employment Law

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Most legal scholars writing about domination do it through a group lens. Critical legal theory and anti-subordination theory, in particular, have focused on the ways in which groups maintain their power over other groups through social structures. The experience of domination at the individual level is likely worse when it is an instance of a larger social phenomenon of subordination; certainly, members of subordinated groups are more likely to experience domination in multiple spheres. But there is an inherent problem with individual domination separate from group subordination.

Republican theory properly identifies domination as a negative value in human relationships. Republican theorists argue that subjection to the arbitrary power of another person wears down a person's character and ultimately undermines our collective capacity for self-determination. But even among these theorists, who associate domination with unfreedom, the emphasis is not on domination as a wrong by one individual against another. Their account of domination highlights the insidious ways in which domination undermines self-respect, free thought, and ultimately, the conditions for democratic self-governance. But republican theories of domination do not lend themselves to identifying individual acts that exacerbate or entrench domination if it survives state policies intended to promote freedom. And because republican theory does not distinguish between the potential to abuse power and its actual abuse, given the

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limits of state power, we can expect domination to be omnipresent even under a state committed to freedom.

Domination actualizes through a series of actions, each of which is an unjustified exercise of power by one person over another. Such domination is a wrong by one individual against another even when it does not echo group subordination and irrespective of what effect it might have over the long-run on the oppressed individuals, let alone the prospects for self-government.

Private law, at its best, can be understood as recognizing domination as a wrong. It attempts to vindicate some limits to private domination, even divorced from group subordination. The Kantian tradition of private law conceives of the state as critical to displacing private domination, and regards this function as one of the essential functions of the state in achieving just relations among citizens in a society. The nondomination principle that animates private law has not been given enough attention, perhaps because there is so much domination that private law neglects or even affirmatively enables. Moreover, domination is most recognizable over the course of a relationship while legal liability in private law more often attaches as the result of discrete actions with concrete, immediate harm. While it is beyond the scope of this essay to develop the point fully, I will argue that nondomination remains an appropriate ambition of private law. Private law theory does not offer a complete account of the wrong of domination and private law does not offer a complete response. But private law is one essential element of a nondomination agenda. A state program that aims to limit domination will rely on a variety of public policies to undermine the conditions for domination and to combat group domination; it will rely heavily on private law to remedy individual wrongs of domination.

Employment law takes center stage in both antisubordination theory and republican theory. It has an obvious role to play in any struggle against domination, given that it is a context in which

many individuals are uniquely vulnerable to the power of other private persons. In light of the conclusion that private law is properly understood to embody a nondomination principle, this essay offers two possible interpretations of employment law. Employment law is a field that is at least formally an instance of private law because disputes arise between private parties against one another (though often the employee's claim is brought against the employer by an administrative agency) and employment relationships are governed by contract. Still, most employment lawyers and scholars do not identify with private law and regard theirs as a subject of public law because it aims to regulate the economy (or at least a fundamental unit of economic relations) with the public welfare, and especially social justice, in mind.

The private and public law lenses on employment law correspond to two interpretations of its role in mitigating domination. We might understand employment law as continuous with private law, that is, attempting to vindicate a nondomination principle in the context of employment. Alternatively, we might understand employment relationships to define group membership, commonly recognized along class lines. In that case, employment law is not about individual nondomination but about mitigating class subordination. It might do this in service of the antisubordination principle, or in order to ensure that employees are capable and ready to exercise the responsibilities of democratic citizenship. Happily, these various purposes largely coincide; there is no need to choose among them because employment law can advance them all.

However, there are points of normative divergence. Doctrine would evolve differently were it to grant priority to group empowerment, on the one hand, or to individual empowerment, on the other. This essay endorses the mandate of the individuated nondomination principle with two caveats: liability standards should incorporate social meaning into assessments of workplace conduct, and remedies should be deterrent, and in some cases punitive, as well as compensatory.

The effect of embracing nondomination in employment should be to expand the range of behaviors we recognize as wrongful in a pluralist society.

The essay will proceed as follows. First, I will argue that there is something missing in existing discussions of domination. In the second Part, I will suggest private law (supported by private law theory) plays an important role in filling out our pictures of domination and the role of the state in limiting it. Private law allows us to recognize domination in wrongs by one person against another, and it has the potential to articulate the state-enforced boundaries on domination as well as a framework for thinking through inevitable compromises between the aspiration to nondomination and other basic interests of a liberal state. The third Part will turn to employment law and cast it as a hybrid that can be understood either to ameliorate class domination or to mitigate domination of individual employees by their particular employers. While these two functions are largely compatible, sometimes we must give priority to one ambition over the other.

I. Domination talk and what is missing

Domination is such a stark and dark facet of the human condition that it is central to many challenges to the institutional structures that manage the way we live together. In the legal literature, the concept features most prominently in critical legal theory and antisubordination theory. Republican theory identifies a different set of problems with domination as such, separate from group hierarchies. However, antisubordination theory does not develop the problem of individual domination that is not derivative from group domination, and republican theory is interested in domination over time, with its attendant effects on the character of citizens, rather than the injustice of individual acts of wrongdoing. Both group domination and relational domination are important targets of state action. But they neglect the micro building blocks that

sometimes scale up to relationships of domination or even structures of subordination, and sometimes do not: individual wrongs of domination.

A. The Antisubordination Principle

Anti-subordination theory arose in the context of adjudicating the legality of discrimination.[2] It is partly constitutional theory because the Equal Protection Clause of the 14th Amendment prohibits certain kinds of discrimination by the state. It is also relevant to understanding antidiscrimination statutes, including those controlling employment discrimination. The core principle is that law should not "perpetuate…the subordinate status of a specially disadvantaged group."[3]

Anti-subordination theory was an alternative to the anti-classification principle, a formalist approach that rejects government classifications that distinguish among social groups on irrelevant grounds. The anti-classification approach is highly intuitive and prevails to a considerable degree under existing law, which applies heightened scrutiny to classifications that are historically suspect. But the anti-classification approach came under considerable challenge because it rejects classifications that would undermine subordination while permitting practices that perpetuate subordination as long as they are facially neutral. Anti-subordination theory, by contrast, takes into account the social consequences of a government practice. It reinterprets even cases that are regarded as properly decided but for the wrong reasons. For example, anti-subordination theorists have famously argued that *Brown v. Board of Education*, which struck down school segregation, should be read as rejecting segregation not just because the state classified children as black and

[2] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI. L. REV. 9, 10 (2003) ("Both antisubordination and anticlassification might be understood as possible ways of fleshing out the meaning of the antidiscrimination principle.")

[3] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

white and separated them from each other but more fundamentally because segregation perpetuated subordination of Blacks as a group.[4]

It is characteristic of antisubordination theory that it rejects an individualistic approach to labeling practices as wrongful. A focus on wrongful classification, Owen Fiss argued, "seeks to further transactional fairness."[5] With antisubordination theory, Fiss and others brought to light the role of discrimination in perpetuating social hierarchy – that is, the domination of some social groups by others. They ushered in a hugely important shift in our thinking about discrimination because he helped to explain why discrimination is so insidious, and in particular, why some kinds of discrimination are problematic while others are not. They brought the concept of domination to the table.

Critical legal theory has made legal scholars think about social domination by powerful groups across multiple areas of law, not just in the context of discrimination. Roberto Unger identified two strands in the movement.[6] The deconstructionist line shows the malleability of legal doctrine; it is continuous with earlier work in legal realism. The other strand emphasizes how legal rules reinforce social hierarchies. That is, law perpetuates domination by powerful social groups, especially by whites, men, and in more recent writing, by heterosexuals.

As with anti-subordination theory, it was a major contribution of critical legal thought to show that individual behavior could be not merely obnoxious but oppressive *because* it was part of a practice of group domination. For example, Catherine MacKinnon revolutionized our thinking

[4] *See, e.g.*, Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of Brown*, 69 OHIO ST. L.J. 791, 829-30 (2008); Balkin & Siegel, *supra* note 2, at 11-13; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).
[5] Owen Fiss, *Another Equality*, 20 ISSUES IN LEGAL SCHOLARSHIP 1 (2004).
[6] Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563-64 n.1 (1983).

about sexual harassment by helping women (and policymakers) to see that sexual harassment perpetuated the subordination of women in the workplace. Sexual harassment, she argued, is not just inappropriate flirtation. Women are targeted qua women and their domination by men is the systematic and desired effect of the harassment.[7]

Both antisubordination theory and critical legal theory shifted the conversation to domination. In the first instance, both targeted state action – either in the form of discriminatory laws or legal doctrine. It was perhaps natural, then, to focus on structural domination among social groups rather than domination of individuals by other individuals. They were trying to get us to see the forest for the trees, to look beyond the individual instances of discrimination or adjudication to observe the patterned effects of state action.

But trees are interesting too. An unfortunate and unintended consequence of the impact of antisubordination and critical legal theory might be that many legal scholars come to think of domination almost entirely in group terms. Inter-group domination is in fact of critical significance to the justice of state institutions; it is the primary wrong in our own society. But there is also a problem with domination as such. This is true where domination takes place within a practice of social subordination. Some of the terror and helplessness of that kind of domination comes from recognizing that it is part of a pervasive, perpetual and loosely coordinated pattern of behavior that is at some level intended to keep you and others like you down for life. But some of the terror lies in the immediate domination, the powerlessness in that moment vis a vis a particular other person. That terror and helplessness is present even in domination that does not advance social hierarchy.

[7] Catharine A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE FOR SEX DISCRIMINATION 172 (1979) (rejecting tort approach to sexual harassment as failing to recognize the ways in which sexual harassment is not an individual act of domination).

B. Republican Theory

Republican theory has attempted to account for "the unfreedom that arises from relationships within which a person falls under the power of a master (in potestate domini)."[8] Its account of domination does not attempt to map domination onto caste structures, and in turn its account does not depend on any group dimension to domination. Phillip Pettit has defined domination as one individual's "exposure to another's power of uncontrolled interference".[9] This articulation expands the concept to include practices about which antisubordination theory and critical legal theory might offer little comment. At the same time, it sets aside the kind of structural domination that is the target of antisubordination theory because Pettit characterizes domination as a self-conscious relationship in which there is mutual knowledge of the domination on the part of both the dominating and dominated parties.[10] By emphasizing individual relationships, republican theory misses aspects of group domination that are better registered in antisubordination theory while adding private dimensions that antisubordination theory neglects. Similarly, the capacious sweep that allows republican theory to account for the insidious effects of a "situation" also disable it from registering individual acts of domination.

In Pettit's influential formulation, a person is dominated if vulnerable to the arbitrary interference of another, including having the profile of options available altered by another.[11] One is vulnerable to arbitrary interference if interference can result from a process that does not respect the interests of persons. With respect to what counts as someone's interests, Pettit explains that a

[8] Tom O'Shea, *Are Workers Dominated?*, 16 J. ETHICS & SOC. PHIL. 1, 2 (2019).
[9] Phillip Pettit, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 28 (2012).

[10] Sharon Krause, *Beyond Non-Domination: Agency, Inequality and the Meaning of Freedom*, 39 PHIL. & SOC. CRIT. 187, 188. *Cf.* Phillip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 583 (1996) (domination will usually be common knowledge as between dominating and dominated)
[11] Pettit, *supra* note 9, at 59 ("I can impose my will on you in a choice between X, Y and Z by taking steps, uncontrolled by you, that change the cognitive or objective profile of the options.").

''set of practices and policies will be in a person's net interest, plausibly, if it is one whose expected results are something that the agent wants for himself or herself, where that want satisfies conditions that guard it against charges of clear irrationality.''[12] While Pettit earlier suggested that something is in someone's interest if it satisfies her rational preferences, on a weak understanding of rationality, he later clarified that domination is manifest in interference "uncontrolled" by the interfere, thus deferring to dominated person's understanding of her own interests.[13]

It is ambiguous in Pettit's theory what kind of control over interference is adequate to negate domination. One view would hold that participation in a fair political process on footing equal to other community members is sufficient control over inference by others, i.e., sufficient to render any inference as nonarbitrary. Thus, Frank Lovett describes arbitrary power as "social power... that is not reliably constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned."[14] We could focus either on the dominated party, to ask whether she has any say in how power is wielded, or we can focus on the dominating person, and ask whether she is accountable to anyone else in her exercise of power.[15] On this process-oriented view, characterizing any relationship as one of domination requires reference to background political institutions and a normative conclusion about their adequacy.

Christopher McMahon points out that if democratic politics can inoculate relationships against the charge of domination, then republican theory—at least as developed by Pettit—lacks the resources to justify policy demands designed to limit domination. Any arbitrary interference

[12] Philip Pettit, *The Common Good*, in Keith Dowding, Robert Goodin and Carole Pateman, eds., JUSTICE AND DEMOCRACY: ESSAYS FOR BRIAN BARRY 153 (2004).
[13] Pettit, *supra* note 9, at 58. *See also* M. Victoria Costa, *Freedom as Non-Domination, Normativity, and Indeterminacy*, 41 J. OF VALUE INQUIRY 291, 294 (2007) (describing Pettit's view that "[i]n the case of private parties, interference is arbitrary when it is not forced to track the interests of the particular individual who suffers it").
[14] Frank Lovett, A GENERAL THEORY OF DOMINATION AND JUSTICE 96-7 (2010).
[15] Christopher McCammon, *Domination: A Rethinking*, 125 ETHICS 1028, 1044-1046 (2015).

can be said to have been effectively licensed on behalf of the common good. McMahon develops this argument with respect to employment law, in particular, pointing out that it is plausible that legislatures have fairly concluded that employment at-will, for example, operates to the general economic benefit of the polity.[16]

Pettit, however, does not seem to want to limit republican theory to complaints about the inadequacy of political process. He responds to McMahon that "[t]he problems of the imperfect, the ineffective, and the unauthorized state show that no matter what the political rulings in a society, and no matter what the political successes, there is always likely to be independent ground for republican complaints against the status quo."[17] Pettit's response is persuasive that there is likely to be domination present in any real-world democracy. But it remains the case that, *to the extent* that well-functioning democratic politics has endorsed a policy permitting interference on the grounds of a common interest, his theory lacks the resources to characterize that interference as arbitrary, and therefore, the relationship within which it takes place as one of domination.

Instead of turning on the unresponsiveness of interference to a dominated person's wants, other republican theorists focus on the substantive adequacy of the choice set that remains, or even whether interests are adequately served. Along these lines, Cecile Laborde argues that "domination refers" to power structures and interpersonal relationships that "significantly threaten or deny basic capabilities" and "basic interests."[18] Thus, domination is present when one's basic interests are vulnerable to another person.[19] If, in order to identify domination, Pettit's view must

[16] Christopher McMahon, *The Indeterminacy of Republican Policy*, 33 PHIL. & PUB. AFFAIRS 67, 83-86 (2005).
[17] Phillip Pettit, *The Determinacy of Republican Policy: A Reply to McMahon*, 34 PHIL. & PUB. AFFAIRS 275, 283 (2006).
[18] Cecile Laborde, *Republicanism and Global Justice: A Sketch*, in eds. Andreas Niederberger & Philipp Schink, REPUBLICAN DEMOCRACY 284 (2013). *See also* Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L. J. 293 (2012). 294 (stating his power-based resourcism view).
[19] A focus on the choices that people have rather than their ability to participate in the setting of those choices is similar to a focus on the constraints that people are subject to rather than the arbitrariness of those constraints. *See*

characterize politics as independently inadequate, Laborde's different focus on the substantive options available to the dominated requires us to characterize the resources or choice-set of the dominated as inadequate—independent of any conduct by the dominating party.

These problems of indeterminacy are not unique to republican theory. But republican thinking about domination has two additional (and related) features that limit its utility as a framework for organizing a legal regime to limit domination. First, domination is conceived as a negative relation. Some features of our legal system make such relations more or less likely and republican theory gives us grounds, for example, to promote the feasibility of exit from dominating relations.[20] But one cannot ban such relationships as such.[21] Second, domination as Pettit and other republic theorists understand it is everywhere. It is useful to recognize it wherever in our common lives it rears its head. But a liberal state could not undertake to eliminate domination as such without inserting itself into our lives in radically new ways.

The first limitation, the relational character of domination, is not a theoretical deficit. It reflects rather a mismatch between the theoretical project and the policy problem of defining domination in ways that are legally actionable. This is not to say that identifying problematic relationships bears no policy fruit. Again, one likely implication, for example, of republican insights is that the welfare state should be used to increase the social wage such that employees have face lower exits costs from employment.[22] Policies that increase the social wage may be in the fields of health care, education, or tax; they do not usually fall within the ambit of employment

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Christian List and Laura Valentini, *Freedom as Independence*, 126 ETHICS 1043, 1045 (2016) ("freedom as independence" is "the robust absence of constraints simpliciter, not only of arbitrary constraints").

[20] See Robert Taylor, EXIT LEFT (2017) (facilitating exit is a means of controlling domination).

[21] To be fair, there is no indication that Pettit or anyone else intended political theories of nondomination to serve this practical purpose. Unlike antisubordination theory, republic theories of domination were not developed as legal principles.

[22] *See* Shapiro, *supra* note 18, at 333 (advocating for a low exit cost regime (high social wage) combined with less regulation of employment relationship).

law as such. It is in fact difficult to imagine controlling domination primarily by controlling evidence of it, that is, individual acts made possible by it. Nevertheless, a higher social wage, like other policies that shape the background against which private relationships are situated, can be designed to diminish the capacity of employers to exercise arbitrary power over their employees.

While limiting the structural power that individuals, especially employers, exercise over others is an important implication of the republican account, it leaves something missing. Unless we expect domination to be eliminated as a result of background policies, the theory does not further guide how to treat, from a legal perspective, individual abuses of power by some employers or other private persons with unwarranted power over others.

The second problem is that republican theory does not enable us to distinguish employers and others who do abuse their excessive power from those who do not.[23] On the republican conception of domination, domination is omnipresent. This insight captures something true and terrifying but it also fails to deliver an important legal tool for combating domination in individual cases. Pettit writes that "although interference always involves the attempt to worsen an agent's situation, it need not always involve a wrongful act: coercion remains coercion, even if it is morally impeccable."[24] Similarly, even if arbitrariness of interference is defined by reference to the dominated person's inability to control interference, authorization by the dominated of the dominating relationship does not cleanse it.[25] The implication is that, even if domination is

[23] Philip Pettit, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 31 (1997).
[24] Pettit, *supra* note 10, at 579. *But see* Costa, *supra* note 13, at 298 ("One plausible way to make the distinction between actions that count as interference and actions that do not is to say that a necessary condition on an agent counting as interfering with another person's actions or choices is that the agent is breaking a moral rule towards that person.").
[25] *Id.* at 585 ("Whether a relationship sprang originally from a contract or not, whether or not it was consensual in origin, the fact that it gives one party the effective capacity to interfere more or less arbitrarily in some of the other's choices means that the one person dominates or subjugates the other.").

justified by either a moral rule or the preferences of the dominated, it is unjust and should be the target of the state.

Republicans like Pettit also affirmatively decline to distinguish between those who merely possess the power to interfere artbirarily and those who actually do it. While insisting on the presence of domination in the latter cases again captures something important that can easily be missed, it also impairs our ability to target abuse usefully. Ian Shapiro pointed out that Pettit's theory seems to suggest that a school bully that only beats up Black children but could beat up anyone dominates all the children equally.[26] Indeed, it is not clear that republicans can distinguish the bully from the gentle giant who could get away with beating up his peers but does not actually hurt anyone. The upshot is that domination is all around us. While we might prefer a regime where no one could get away with bullying anyone, we also need a framework for thinking about how to deal with actual bullies.

It makes sense that the critique of domination should be so far-reaching in the republican account because its primary aim is not to identify wrongdoing at all but to preserve the conditions for collective self-governance. The problem with domination is not that it is a wrong to the dominated but that it renders her unfit for self-governance. As Pettit explains

> [J]ust as the dominated person cannot be taken to enjoy the freedom of thought that is necessary if someone is to be worth hearing, they also cannot be taken to enjoy freedom of choice, either. Operating within the gravitational field that relationships of domination establish…[w]hen [the dominated] purport to speak their minds or to display their minds in action…there is a robust possibility, marked in everyday expectation, that they are not fully their own masters."[27]

Republican thought emphasizes the way in which domination corrodes the independence of free persons. Individuals subject to domination are not self-respecting, they do not think freely and

[26] Shapiro, *supra* note 18, at 324.
[27] Philip Pettit, *The Domination Complaint*, 46 NOMOS 87,105 (2005).

independently about political issues, or even their own self-interests vis a vis the state. In short, dominated people are not good citizens, and a democracy that allows people to experience domination consistently over extended periods of time is self-defeating.

Again, republicans capture important dimensions of the problem of dimension that are too easily overlooked from the liberal perspective. But it is in the first instance an account of why domination is bad—not why it is wrong. Historically, it has been concerned with what it takes for a democratic republic to preserve itself, not the duties of such a republic to its citizens. While we might gather that justice requires minimizing domination in a society[28], if domination persists under social arrangements as we find them the mandate speaks only to further institutional reform, not bilateral justice between individuals under the existing regime.

Caste hierarchies, character erosion and the demands of justice on social institutions go a long way toward expounding the problem of domination but they do not exhaust it. To fill out the picture, we need to think about domination at the micro level as a private wrong.

II. Private law and nondomination

Private law recognizes domination as a wrong. In fact, Immanuel Kant conceived of the state as essential to displacing private domination and replacing it with the rule of right through private law. Just relations among citizens is not possible, in his account, absent a state that determines and protects private rights, enforces corresponding obligations, and adjudicates private disputes. The state of nature is unjust in considerable part because it is an unmodified field of private domination.

[28] Frank Lovett, A GENERAL THEORY OF DOMINATION AND JUSTICE (2010).

Kant offers an intuitive way of thinking about the wrong of domination: It is the assertion of power backed by force, the antithesis of the rule of reason. When one person arbitrarily interferes in the life of another unconstrained by rights and obligations, when the terms of their interaction are not set with reference to the weaker party's interests, the dominator denies that the person she oppresses is a moral agent of equal standing.[29] She effectively denies even her own capacity to act on reason, to control the heterononous impulses that her power unleashes. A situation in which her power is unchecked is unjust because it is not governed by the right.[30] The injustice lies in the wrongful relation *between individuals*, and when power is *in fact* abused, the wrongful relation escalates into a realized wrong. Kant thus put his finger on an aspect of domination that is under-emphasized by most legal scholars and other theorists of domination today: wrongful *acts* by one *individual* against another.

The arbitrary exercise of power is problematic because it rejects the rule of right. A person that dominates another transgresses some boundary between herself and the other. We do not need to know (or agree on) exactly what the boundary is to name the conduct as domination. Domination often consists in denying any boundary, in asserting that rights are irrelevant because the imbalance of power between persons controls. Private law checks the assertion of power by imposing boundaries that are rooted in some account of what each person owes others. Even when its account is deficient, the imposition of rules by the state drains domination of some of its dehumanizing force. We might say that the nondomination principle in private law holds that individuals must be bound by basic social rules. People are not entitled to do whatever they want;

[29] *See generally* Edward Demenchonok, *Learning from Kant: On Freedom*, 75 REVISTA PORTUGUESA DE FILOSOFIA 191, 217 (2019).

[30] Immanuel Kant, THE METAPHYSICS OF MORALS, 6:237 ("Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity." *See also* 6:231 ("reason says only that freedom is limited to those conditions in conformity with the idea of it").

they are accountable to other people for the ways in which their conduct adversely affects other people's interests.

For some readers, most of private law does not on its face concern domination as such. When someone drives too fast and hits another car, is she really attempting to dominate the other driver? It is not the most central case of domination but it is indeed properly understood as an abuse of a certain kind of power. Because the power is not necessarily asymmetrical between the drivers, the threat of domination is limited. And there are facts on which the accident is not properly conceived as domination at all. But if we zoom out for a moment, it might be easier to recognize this individual transgression of one of domination, and perhaps more clearly, to recognize liability as vindicating a nondomination principle.

Why does someone end up hitting someone else with their car? The potential explanations are too numerous to exhaust but let us consider a few possibilities. At one extreme, we have the driver that willfully accelerates to 100 miles per hour and weaves through heavy traffic as part of a game or challenge. Such a driver is perhaps easiest to recognize as dominating the other drivers on the road by using his risk tolerance to force accommodation by all other drivers; he is literally pushing others around. Another driver might be merely negligent, distractedly driving less cautiously than she should. While she does not transgress in order to dominate, she nevertheless prioritizes her own comfortable level of attention over the interests of others in avoiding an accident. She could choose to focus on her driving; she chooses not to; and she imposes this choice on others without giving their interests fair weight. At the other extreme of the reckless driver is the well-meaning but incompetent driver. He is doing his best but is simply incapable of driving safely. In many contexts, we might be more sympathetic with than critical of the incompetent. But driving when one lacks capacity to drive safely—even if one has managed to pass minimum legal

requirements—puts one's own interests in convenient transportation over other people's interests in safety. If the incompetent driver actually injures someone, he has indeed dominated his victim, for he has chosen to force a stranger to physically bear the costs of his own limitations.

Of course, liability for individual wrongs like these does not displace power in social relations. The rules of private law do not constrain many kinds of interactions and, even where they do constrain, they take raw power to harm others as a starting point, that is, the *trigger* for the need for legal liability. By aiming to delineate power rather than eliminate it, private law might take for granted that power is an unavoidable facet of the human condition. More problematically, private law creates entitlements that are themselves a source of power.[31] Modern domination is not usually the assertion of power by the physically powerful; it is the assertion of power by the economically powerful, and the latter's economic power is the product of private law rules of contracts and property.[32]

Private law today does not even self-conceive as an actualization of Kant's vision. That is, most private law scholars do not think about private law as advancing any nondomination principle. Legal economists, corrective justice theorists and civil recourse theorists do not talk about domination as such. Nevertheless, each of these approaches can be interpreted through the lenses of nondomination. Legal economists would structure the rules of market interactions in a way that maximizes the welfare of the public in its entirety; they recommend limiting market power or at least abuse just when it undermines the public interest. Corrective justice theorists

[31] Hanoch Dagan and Avihay Dorfman are critical of what they describe as traditional and formal private law theory on related grounds, i.e., that private law so understood merely prevents domination or sub-ordination, it does not enable self-determination. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1413-14 (2016).

[32] *See* Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920) (arguing that the government is the source and distributor of coercive power). *See also* Barbara Fried, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001).

would have private law compensate individuals for wrongs done to them by others given rights as they are defined elsewhere.[33] The imperative to ensure that wrongdoers are held to account by their victims is even more express in civil recourse theory, which takes the central purpose of private law to be that victims are empowered to exact justice from their wrongdoers.[34] No one should get away with acting as if they are unconstrained by rules in their dealings with others. These ambitions are closely aligned with a nondomination principle.

Some private law scholars do think about the moral function of private law in expressly Kantian terms. Arthur Ripstein develops a Kantian interpretation of law, and particularly private law. He understands it to check private domination by holding people in their own lanes. He argues that private law, especially tort law, entitles people to use their resources—including their bodies and their property—as they see fit, as long as their use is consistent with like use by others.[35] The other side of the coin is that others may not use us for their purposes but must respect the rights we have to control our own resources. Ripstein locates freedom in our ability to count on what is ours because we are not subject to arbitrary interference by others in the pursuit of their own, separate interests.[36]

Notwithstanding its limitations, not only private law theory but private law itself is broadly consistent with the Kantian account in its core features. Both tort and contract law can be understood to protect our rights from infringement by others, or to protect us from our abuse by others by virtue of sheer power or opportunity.[37] When an individual injures our body or property

33 See generally, Ernie Weinrib, The Idea of Private Law (1995).
[34] John Goldberg & Ben Zipursky, RECOGNIZING WRONGS (2020).
[35] Arthur Ripstein, PRIVATE WRONGS (2016).
[36] Arthur Ripstein, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY 33-34, 42-43 (2009).
[37] *Cf.* George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 359 (1996) (associating contract with a theory of failed collaboration and identifying nondomination with criminal law, and with strict liability in tort).

through antisocial conduct, they flout the rules we have set up for collective living. Tort law offers a remedy against the wrongdoer and, in doing so, it not only deters similar conduct going forward but releases the victim from the power of the wrongdoer, who asserted his power over the victim by freely trespassing the social boundaries erected around her.

In contract, abuse of the nonbreaching party is more subtle. Failure to perform a contract is not abusive in itself. But failure to compensate the nonbreaching party for breach similarly flouts the obligation to abide by one's agreement; it allows that the breaching party may use the nonbreaching party for her ends without regard for the other party's own interests, and without abiding by prevailing conventional and legal constraints. A suit for breach occurs only after a breacher fails to compensate voluntarily. At that point, private law—through contractual remedy—steps into force the breaching party to play by the rules. A damage award affirms the applicability of the rules to the contractual relationship. It ensures that the relationship is governed by common rules rather than the whim of the stronger party. In these ways, private law doctrine in both tort and contract vindicates *some* limits to private domination, without depending on its relation to group subordination.

I cannot fully defend here a reading of private law that puts it in service of the nondomination principle. But it is worth wondering why we do not typically conceive of private law in these terms. One likely explanation is that, instead of serving a nondomination principle, many people take private law to be an instrument of domination. Many of its rules seem to enable domination by privileged groups. Most obviously, the rules of private property entitle the wealthy to the resources that enable them to exercise bargaining power over others. Contract law does not concern itself at all with the balance of power that leads up to an agreement, and which is reflected in its terms. Contract law only concerns itself with protecting the bargain once made. Tort

similarly protects existing entitlements without worrying about whether those are distributed justly.

The indifference in private law to the justice of the entitlements it protects is indeed a significant political-moral defect. If we are persuaded that the rules themselves represent a morally arbitrary exercise of power by the privileged, then their enforcement hardly vindicates any nondomination principle. However, we might concede the entitlements are unjustly distributed and further argue, as I have elsewhere[38], that the background distribution should be taken into account in the application of private law doctrine, and *still* acknowledge the foundational role of accountability in mitigating domination. That is, private law doctrine might be unjust because the social rules it enforces are suboptimal. But few would endorse the withdrawal of law altogether from bilateral, private relationships on the grounds that the legal rules we have are unjust. One can argue that the rules should be different while recognizing that rules that govern private behavior are morally critical—precisely because they check individual discretion about how to treat other people.

Another feature of private law that might impede its realization of the nondomination principle is the context in which liability attaches. Domination is most recognizable over the course of a relationship; it is not surprising that republican theory focuses on relationships rather than acts of domination. Legal liability in private law, however, more often attaches as the result of discrete actions with concrete, immediate harm. When a person drives negligently and accidentally hits a pedestrian, we do not ordinarily see that as an act of domination. Likewise, we do not think failure to deliver widgets on time constitutes domination of the factory to which the

[38] Aditi Bagchi, *Distributive Justice and Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193 (Gregory Klass et al. eds., 2014).

widgets were promised. But the ways in which ordinary negligence and contract law advance nondomination is perhaps best evident in the breach. In countries where drivers do not face significant consequences for injuring pedestrians, they tend to drive more recklessly. In their indifference to the injuries they may inflict on other human beings, they express a dominating attitude. A pattern of conduct might amount to domination without an individual act amounting to domination. But the rule that prohibits the conduct is nevertheless properly conceived as capping domination in each instance. Similarly, failure to deliver widgets is not necessarily domination. But a rule that holds us to the commitments we have made to others and prevents us from walking away when it suits us disallows domination.

Why should we think about wrongs—at least some wrongs—as wrongs of domination? We might worry that private law theory does not help explain an area of law for which antisubordination and republican theory fail to adequately account for; we might worry that these theories pass like ships in the night addresses different kinds of problems in a world that has plenty. It is worth understanding these theories as offering distinct, albeit largely complementary, accounts, however, because they offer distinct but largely complementary insights into how we can use law to combat domination.

One of the obstacles to regarding these theories as complementary from an institutional point of view is that both antisubordination theory and republic theory self-consciously take aim at certain versions of liberal theory that are arguably epitomized in private law theory. That is, private law theory could be read to assert the primacy or even the exhaustiveness of the individual perspective. It traditionally did not incorporate reference social hierarchy or group membership. It traditionally took even each individual transaction between persons in isolation, declining even to cognize the relationships within which individual acts were situated. But those backward

features of private law theory are not essential to it. And it's framework for thinking about individuals wronging one another can help fill out the pictures of domination painted by antisubordination and republican theory, respectively.

For example, antisubordination theory would not, standing alone, aim to explain why any one individual of a subordinated group—and not other members—should have a claim against a particular privileged individual. We take for granted that, while recognizing a category of liability, or even certain criteria of liability, might be motivated by the antisubordination principle, the identity of winners and losers in particular cases turns on individual experiences. Private law theory helps explain why they are picked out for compensation and redress.

Republican theory too depends on private law theory, albeit in ways that writers like Pettit would surely resist. As we saw in Part I, the republican ideal of freedom does not within itself satisfactorily answer all the questions it raises about the exercise of power by one person over another. What does it mean to say that an employer has arbitrarily dismissed an employee? Is dismissal arbitrary if it is costly for the empower, as through reputational or training costs? Is it nonarbitrary if the law reserves such prerogative for the employer? Does the employer have the power to dismiss on arbitrary grounds only if no one will object or complain? Is it sufficient ot show domination that the dismissed employee could not stop the dismissal? Or that employees together cannot alter the at-will policy? Neither the solution of examining political processes or employees' substantive capabilities generates answers to practical questions surrounding bilateral accountability.

Rainer Forst suggests how neo-Kantian theories of justification offer the best solution to the problem of defining arbitrary interference and wherein its wrongfulness lies. He argues that "[a]rbitrary rule or domination appears where persons are subjected to actions, norms or

institutions without adequate justification."[39] The concept of justice, that figures so lightly in republican theory, "possesses a core meaning to which the essential contrasting concept is that of arbitrariness, understood in a social sense, whether it assumes the form of arbitrary rule by individuals or by part of the community (for example, a class) over others, or of the acceptance of social contingencies that lead to asymmetrical positions or relations of domination."[40] The idea of right that animates private law theory similarly contrasts with the unjustified exercise of power that is the basis for recognition of a legal wrong.

The rules of social interactions are set by the rules of private law. Those rules might be insufficiently justified themselves, as is true of all other categories of law. But prima facie they represent rules that are the product of political and legal discourse; they are, in a large political community, as close as we can get to mutual justification. When an individual trespasses on another by acting outside of her right, she flouts the constraints imposed by the process of mutual justification in favor of the boundaries of her own de facto power. Enabling redress for individuals who are wrongs by ad hoc usurpations of power is by no means sufficient to ensure that a polity is regulated by principles that can be mutually justified. But it is one part of that pursuit of justice.

Just as private law alone is inadequate to the task of controlling domination, the nondomination principle cannot explain private law. My point is that, in private law, we at least find a space in which domination is recognized as a potential bilateral wrong that one person does another. This captures an important dimension of domination, though it does not minimize the

[35] Rainer Forst, *A Kantian Conception of Justice as Nondomination*, in eds. Niederberger, Andreas, and Schink, REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 155 (2013).
[40] *Id.* at 157. *See also* Rainer Forst, *Noumenal Power*, 23 J. OF POL. PHIL. 111 (2015); Charles Larmore, *A Critique of Philip Pettit's Republicanism*, eds. Ernest Sosa and Enrique Villanueva, SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY. PHILOSOPHICAL ISSUE ELEVEN 22 (2001) (republicanism is not so different from liberal theory of legitimacy that demands justification for power).

significance of other aspects of domination developed by theorists in other fields. Private law in a society that recognizes domination as a wrong will go further than ours to control it. It will require us to work out the boundaries of permissible and impermissible domination, which will likely mean not just deciding what forms of domination are wrongful but also which wrongs of domination we can live with—because controlling it more perfectly will compromise other basic interests of a liberal state.

A liberal state shows restraint in the use of force, including the imposition of legal liability. Moreover, a liberal state declines to coerce citizens to advance specific conceptions of the good. These limitations apply to private law and they are among the compelling reasons that private law does not police all commitments we make to each other; only those we make in the context of exchange. They are the reason contract law does not compensate us for all the harm we experience from broken agreements; it usually compensates only economic losses. More generally, private law consistently relies on money damages because money is a common currency useful to each of us in our various life projects; but calculating damages based on economic loss compensates those with more monetarily valuable assets at a higher rate than those who have less to begin with. Critical theorists were right that private law exacerbates social hierarchies in some basic ways. In some cases, its limitations may be defensible due to other important interests, including the basic interest of the state in facilitating wealth generation. But I do not aim here to defend private law's rules in substance. The basic form—that cabins the choices we make when those choices affect others—is enough to put private law in imperfect service of the nondomination principle.

III. Two interpretations of employment law

Employment law would be a natural extension of the nondomination principle to the specific context of employment. If contractual and property entitlements empower employers to

exercise arbitrary discretion over employees, employment law could concentrate on controlling that power. After all, employment, if not particular employment relationships, is a long-run situation for employees. In her important book, Elizabeth Anderson argues that subjection to the arbitrary will of an employer is a prototypical instance of private domination.[41] Perhaps it is not a surprise, then, that two of the few private law scholars to write about employment both focus on the problem of domination. John Gardner writes that "[i]t is simply unbelievable that anyone, paying wages or otherwise, could enjoy legitimate authority over such an extensive swathe of another's life irrespective of how the use of that commandeered time contributes constitutively to the life of the person who is subject to the authority."[42] Even if the material needs of an employee lead her to accept autocratic conditions at work, deferring to her choice privileges her contractual freedom over other freedoms that citizens in a liberal democracy should enjoy.[43] Similarly, Hugh Collins concludes that "the contract of employment embraces an authoritarian structure that appears to be at odds with the commitment of liberal societies to values such as liberty, equal respect, and respect for privacy."[44] These are familiar themes from private law.

I have elsewhere sought to link specific employment law doctrines with either of the two main subjects of private law, contract and tort.[45] Some doctrines can be understood to vindicate nondomination by upholding contract principles.[46] They are intended to ensure that employment

[41] Elizabeth Anderson, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 54 (2017) (describing employer power as "sweeping, arbitrary and unaccountable").

[42] John Gardner, *The Contractualisation of Labour Law*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 23 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2019).

[43] *Id.* at 12 (2019) (describing "how easily freedom of contract can become an enemy of all other freedom").

[44] Hugh Collins, *Is the Contract of Employment Illiberal?*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 48 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2019).

[45] *See* Aditi Bagchi, *The Employment Relationship as an Object of Private Law*, in eds. Gold et al, THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (2020).

[46] *Id.*

contracts reflect the actual understanding of their parties and are not subject to problems of opportunism or simple breach. Because employers usually unilaterally draft written employment agreements and are usually better positioned to walk away from their commitments without nonlegal recourse, holding employment relationships to contract would promote employee interests. Enforcing mutual agreements and compensating breach—familiar objectives from general contract law—help employees realize the promise of free choice, the great promise of the acclaimed move from status to contract. Other doctrines in employment law help to preserve freedom of contract for employees over time, or to preserve freedom of choice given the dynamics of employment that tend otherwise to undermine freedom over time.[47] Most important among these are labor law doctrines that make it possible for employees to organize and negotiate with their employer collectively.

Other employment law doctrines are better understood as extensions of tort principles.[48] They impose mandatory duties; they do not defer to private ordering. Many typical employment regulations imposing minimum wages or safety standards, or entitling employees to leave, suggest some modicum of social consensus that it is disrespectful to treat employees otherwise. They effectively flesh out duties of care that employers owe employees, not unlike the duties of care that are sometimes imposed by tort law on commercial entities or professionals vis a vis their customers or clients.

Given the ways in which employment law seems continuous with private law, why do most employment lawyers and employment law scholars nonetheless locate their field in public law? One simple answer might be because they do not associate private law with the nondomination

[47] *Id.*
[48] *Id.*

principle. However, I speculate that it is also because we associate employment law with other, albeit closely related, purposes. Employment law is a tool with which to regulate the economy. Minimum wages and hour regulations, training and job placement programs, and even leave and safety policies influence the supply and demand for labor. Workers that are not directly governed by the Fair Labor Standards Act, for example, have a stake in it because its regulations are of economic consequence for all of us. Moreover, almost all employment laws appear calculated to advance the justice of our basic structure. Social equality is threatened "when employer practices needlessly lead to hierarchies within or outside the workplace."[49] From this perspective, employment law is oriented toward public justice and that is largely the assigned task of public law.

The private and public law lenses on employment law correspond to two interpretations of its role in mitigating domination. To the extent we think of employment law as continuous with private law, it attempts to vindicate a nondomination principle in the context of employment. That is, it aims to ensure the justice of *individual* employment by prohibiting a discrete set of wrongs. In principle, it might attempt more ambitiously to secure just *relationships* in part by limiting the power that employers wield over employees; but the republican vision of nondominating employment must mostly rely on public law measures outside of employment law itself. Economic tools that influence the supply and demand for labor at each skill level, as well as measures that make workers more or less reliant on their employers for basic social goods like education and health care, are more important than anything within employment law to the question of how much power employers wield over employees. Employment law's interventions are more pointed: Employers are required to meet minimum standards of safety or compensation; they are prohibited

[49] Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 227 (2013).

from imposing particular kinds of burdens. Employment law does not deprive employers of the economic power to treat workers badly. But it recognizes a set of discrete wrongs that commonly realize domination by employers.

Alternatively, we might understand employment law to control class domination. Employment relationships assign most people to one of two historically significant social groups, capital and labor. In the United States, the categories of capital and management, on the one hand, and low-wage labor, on the other, correlate disturbing with racial groupings. Instead of conceiving of employment law as private law's extension into the realm of employment, we could understand employment law as the antidote to private law in that space. While private law empowers capital and by extension other privileged social groups at labor's expense, employment law restrains capital and its domination of labor and low-wage social groups *as groups*. On the former view, employment law controls private domination. On the latter view, employment law controls group subordination, especially but not limited to class subordination.

It would not be possible to sustain this ambiguity in purpose were the two identified purposes not largely in harmony. Legal doctrines that empower workers vis a vis their employers, by guaranteeing them compensation, benefits, or procedural rights like collective organization, advance both purposes. Even if it makes no difference to the choice of rules, it would still be interesting to grapple with the primary purpose of employment law in the way that private law scholars attempt to grapple with the purpose of contract and tort. But we have further reason to work through the relative priority of the individual and group nondomination agendas in employment law. Sometimes they point in different directions. I offer only a couple examples of such issues here for illustrative purposes: bullying, offsite speech, and nondisclosure agreements.

A. Bullying

Bullying (or "mobbing") is a salient topic in European employment law but, until recently, was hardly a legal topic at all in the United States.[50] In the United States, antidiscrimination statutes that protect vulnerable social groups represent a significant portion of employment law and a larger portion of employment litigation.[51] That is, if colleagues create harass and create a hostile environment for an employee just because they do not like her, an employer is unlikely to be held liable in the United States. In Europe, an employer is more likely to be regarded as responsible for sustaining the bullying even when the bullying appears to have been triggered by personal antipathy rather than socially significant subordination.

Should employer responsibility for harassment at work depend on whether that harassment tracks social subordination? Notably, at issue here is not direct employer action against the bullied employee but rather its failure to protect her from harassment by co-equal colleagues. Nevertheless, we might understand bullying to represent a kind of domination by the employer because the employer has the power to subject the employee to the bullying, or alternatively, to protect her from it by disciplining the bullies. However, it is difficult to understand bullying as class subordination because the first agents of wrong are other employees, who are not acting as bullies on behalf of the employer but on their own initiative. It seems likely that, in many cases of bullying, the employer would prefer that the bullying not take place.

[50] There has been some movement to expand protections for workplace bullying. *See* David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 253 (2010). However, there has also been (successful) pushback against the importation of a European status-blind model into the American workplace. *See, e.g.*, Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1220 (2011)

[51] *See* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 206–07 (2007) ("If the big story in American work law in the waning years of the last century was the displacement of collective bargaining by employment discrimination litigation as the principal vehicle for dispute resolution in the American workplace, the big story in the current decade is the increasing role of labor unions in a struggle for workplace equality that was at one time the nigh exclusive province of discrimination law.").

One reason to expand harassment and discrimination claims to allow recourse for bullying would be that it would alleviate the burden on employees to show that their harassment was related to their protected status as a racial, ethnic or religious minority, for example. There are probably numerous cases in which a person is bullied because of her group membership status but the bullies do not use racial epithets or sexualized language. It is hard for a plaintiff to show that she is subject to abuse by her colleagues because she is a Black or a woman if she cannot point to a pattern or indicative language. Allowing a plaintiff to recover for the fact of the bullying irrespective of the particular motivation lessens the burden in ways that are likely to advance the goals of the antisubordination principle.

However, there is also a compelling case to be made for acknowledging that individuals can be bullied for reasons that are genuinely unrelated to their social status. Such bullying can be traumatic too. Most of the time, there is no recourse for such bullying—just as, most of the time, there is no recourse for status-based discrimination and harassment. People treat each other badly in all kinds of ways and in all kinds of places, and in most contexts there is no protective law against it. There are many reasons why mistreatment in the workplace is of special significance but foremost among them is the economic significance of work to employees. Employees often need their jobs and cannot walk away because of the harassment they experience there. If they do walk away or "lean out", they face long-lasting economic repercussions. While it might be ambitious to aspire to a society where most people enjoy their work, and thus do not experience their daily obligations at work as burdens they bear in exchange for a livelihood, the more painful work is, the more oppressive the situation of an employee that is dependent on their employer. If work is miserable, the dictates of one's employers are at greater odds with one's own inclinations and desires at every moment of the day. While the actual power of the employer might not expand

because the employee is unhappy at work, the fact that the employer could make the employee's work environment more bearable but chooses not to sharpens the experience of domination arising from the economic relationship. This is particularly true when the aspect of work that is miserable is itself a kind of humiliation and experience of powerlessness at the hands of colleagues. The problems with bullying are compounded when the victim is targeted because of her membership in a vulnerable social group. In that case, the victim knows that the misery is not accidental and potentially fleeting; it is directed with the aim of making her life worse, and the lives of those like her. But even those who are not targeted by virtue of group membership may be socially vulnerable. Failing to offer recourse for bullying in those cases exacerbates the experience of domination that much of employment law aims to mitigate.

B. Off-Site Speech

A second area in which a nondomination principle calls for expanded protections outside the group paradigm is employer regulation of offsite speech. Here too the degree of protection afforded employees may turn on whether we target only class subordination or domination as such. Presently there is inconsistent protection across states for employees even for speech wholly unrelated to work; in most states, there is no statutory protection for at-will employees in the private sector that are terminated for off-site speech.[52] The most clearly protected category of speech is speech related to labor organization or some form of collective action.[53] Some kinds of

[52] *See* Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-at-Will Arena*, 41 FLA. ST. U. L. REV. 945 (2014). *See also* Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, 15 INSIGHTS ON L. & SOC'Y 12 (2015). There is greater protection for public employees under the First Amendment. *See* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 114 (1995).

[53] *See* 29 U.S.C. § 157 (2012) and "Social Media" at https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/social-media-0.

religious speech might be protected as well.[54] Moreover, some courts have recognized a general public policy exception where the speech for which the employee was terminated implicates public policy.[55] But the public policy exception does not normally extend to all or even most speech that would be protected by the First Amendment against governmental regulation. Employers can terminate or discipline employees not only for disparaging the employer on social media but also for posting comments that the employer simply does not like. There is almost no zone of privacy in which the employee can act and speak freely without being subject to employment repercussions.

The current focus on protecting speech related to work is consistent with the anti-class subordination agenda. It is certainly important for workers to be able to communicate with each other about their employer, share grievances and attempt to coordinate efforts to change employment policies, for example. But it is also important for employees to be able to say random, stupid things that serve no important social purpose, at least where that speech does not undermine any public or employer policy (such as contributing to a hostile workplace, as in the case of off-site hate speech).[56] The burden should rather be on employers to justify their power to control employee off-site speech; the burden should be on the employer to identify the economic interest

[54] James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 621 (2019) ("[C]ompanies are not permitted to extend their authority over workers indefinitely. Companies are forbidden from leveraging their considerable economic power to achieve employees' religious compliance, whether those employees are at work or outside the office. And while a salary may pay for many things, it does not entitle companies to dominate employees' deepest projects and commitments.").

[55] *See, e.g., Flesner v. Technical Commc'ns Corp*., 575 N.E.2d 1107, 1111 (Mass. 1991); *Palmateer v. International Harvester Co*., 421 N.E.2d 876 (Ill. 1978); *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) .

[56] Courts have rightly held that termination of an employee for her hate speech, especially fighting words, does not contravene public policy. *See, e.g., Wiegand v. Motiva Enterprises*, LLC, 295 F. Supp. 2d 465, 476 (D.N.J. 2003). *See also* Tatiana Hyman, *The Harms of Racist Online Hate Speech in the Post-Covid Working World: Expanding Employee Protections*, 89 FORDHAM L. REV. 1553, 1585 (2021) (arguing that racist speech on personal social media can contribute to hostile work environment). But there are many kinds of speech that an employer may dislike that do not remotely qualify as hate speech.

they have in the category of speech at issue. While employers currently argue that they have reputational interests in employee offsite speech and conduct, their sanctions are not limited to conduct or speech that produces widespread notoriety. In fact, it is usually entirely up to the employers to decide whether they are interested in an employee's speech and conduct, and that total discretion is the hallmark of domination.

C. Non-disclosure Agreements

My final example is the permissibility of nondisclosure agreements. There is presently no employment law doctrine that governs these agreements; they are effectively regulated by contract law. Nondisclosure agreements are largely enforceable even though the lack of transparency makes it difficult for future workers to establish liability for employer conduct by showing patterns of conduct over time. Perhaps because the current permissive rule falls out of general contract law, it does not appear well-suited to resisting class subordination, or other group subordination, such as subordination of women through sexual harassment.[57] The permissive stance is, however, appropriately deferential to the individual victims of domination. Individual employees who have been harassed in the workplace sometimes want to band together with others to hold the employer responsible. In some cases, they sign the agreements only because they fear the long-term employment consequences of refusing, not only at their present employer but throughout their industry. But some victims plausibly do not want to fight the good fight.[58] They want to move

[57] *See* Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L 53, 69 (2018) ("NDAs that prohibit employees from disclosing information related to a sexual harassment claim, particularly if the EEOC is investigating the matter, may be unlawful as a matter of public policy."). Indeed, many states have or are considering banning NDAs that prohibit disclosure of workplace sexual harassment. *See* Savannah W. Pelfrey, *Employment Law-How the #metoo Movement Has Rocked the Workplace*, 43 AM. J. TRIAL ADVOC. 259, 262-4 (2019).

[58] *See* Rachel S. Spooner, *The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331, 334, 369 (2020) ("Many sexual harassment accusers prefer that their stories remain confidential."). *See also* See Areva Martin, *How NDAs Help*

on. While a focus on group subordination might deny them that right, a focus on individual domination should make us reluctant to impose further burdens on them. We have to come up with other ways to hold employers accountable, as through record-keeping and transparency requirements. We should not require individuals to bear unique burdens in the service of justice when they do not desire it. A victim of sexual harassment has already borne more than her fair share of the costs associated with a social practice of sexual subordination. The costs of overturning the existing structure should not be assigned to the same people.

While the victim's identity is constituted by group membership, she is nonetheless identifiable separate from the group. Similarly, understanding that the victim of harassment or discrimination is in the first instance a victim of a wrong done to *her* requires recognizing her experience of domination as derivative, but nevertheless experientially distinct, from group subordination. There is significant value in allowing her more rather than fewer options as she navigates her way out of her experience of domination.

These three examples are not intended to suggest that the individuated nondomination principle should preempt an antisubordination agenda categorically. For the most part, we need to make sure both purposes of employment law are well-served. The first step toward both purposes is to constrain employer discretion where it is entirely unchecked. At the second stage, when we ascertain whether employer conduct was reasonable—whether it be comments, nonpromotion, denial of leave or termination—we should take into account both whether the employer acted arbitrarily and in a manner that gave no weight to employee's legitimate interests, *and* whether their conduct served to perpetuate group subordination. Similarly, when we award

*Some Victims Come Forward Against Abus*e, TIME (Nov. 28, 2017); Molly Redden, *'You'll never work again': women tell how sexual harassment broke their careers*, THE GUARDIAN (Nov. 21, 2017).

damages for employer misconduct, statutes should provide *both* compensatory damages to employees for the individual harm they suffered *and* potential punitive damages that are intended to deter conduct that is especially socially pernicious.

While clarity about the animating purpose of employment law will help to guide reform, it was not my primary purpose here to clear a path for doctrinal change. Most of the time, resisting group subordination empowers employees against less systematic instances of domination as well. Whether recognizing domination in particular workplace conduct makes sense will turn on empirical and necessarily speculative questions such as the fraction of the population that presently experiences domination in that form; on how recognizing a legal claim that does not sound in group subordination will alter the prospects for claims that do sound in group subordination; the cost of recognizing new claims and, significantly, who will ultimately bear those costs. These kinds of questions apply in principle to almost every legal claim that we might recognize. It is always a first step to think through whether a moral entitlement justifies legal recourse in principle, even if a variety of institutional considerations weigh against legal recognition in the end.

At the moment, few legal scholars talk about domination between individuals as a species of wrongful conduct. My aim here has been to help revive and expand our attention to domination as a legal target. Domination is pernicious on multiple fronts. Implicit in private law is a nondomination principle that uniquely targets private tyranny. It has lessons for combating the primary site of private tyranny in modern society, the employment relationship.