

# GOOD FAITH IN EMPLOYMENT

Sabine Tsuruda\*

*This Article argues that the duty of good faith in contractual performance offers powerful but neglected resources to empower workers to pursue their legitimate interests and resist mistreatment by employers. The duty of good faith creates a joint authority structure within contractual relationships, vesting co-contractors with equal and joint authority over the meaning, purposes, and, hence, the requirements of their contract. Implementing such an authority structure requires ensuring that the parties to a contract have the communicative space and epistemic resources they need to uncover and develop a common understanding of their contract. In the context of employment, such an authority structure would be transformative. It would require legal recognition of a variety of employee speech rights and protection from termination for reasonable and good faith refusals to perform work, and would offer a legal basis to challenge the scope and enforceability of at-will employment clauses. The duty of good faith could thus supply a common law foundation for rights and obligations commonly associated with labor law.*

## INTRODUCTION

In the United States, the parties to a contract are generally subject to a nonwaivable and implied duty of good faith in performance.<sup>1</sup> The duty requires that parties perform their contracts and exercise contractual rights and powers in ways that exhibit “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”<sup>2</sup> By requiring parties to act in ways consistent with their shared purposes and expectations, the duty of good faith precludes parties from using vulnerability within the contractual relationship to secure advantages that were not agreed to or bargained for under the parties’ initial agreement.

The duty of good faith is thus commonly thought to police opportunism and facilitate voluntary collaboration in contractual relationships.<sup>3</sup> But when viewed in

---

\* Assistant Professor, Queen’s University Faculty of Law. I am grateful to Aditi Bagchi, Richard Brooks, Hugh Collins, Nicolas Cornell, Courtney Cox, Hanoch Dagan, Avihay Dorfman, Erik Encarnacion, Richard Epstein, Cynthia Estlund, Jeffrey Helmreich, Roy Kreitner, Sophia Lee, Crescente Molina, Guy Mundlak, Liam Murphy, Steven Schaus, Hila Shamir, Zoë Sinel, Adam Slavny, Rebecca Stone, Julia Tomassetti, and the participants and organizers of the Private Law Theory Meets the Law of Work Conference and the Private Law Theory Reading Group.

1 See Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981); Uniform Commercial Code (U.C.C.) § 1-304 (Am. L. Inst. & Unif. L. Comm’n 2001).

2 Restatement (Second) of Contracts, § 205 cmt. a.

3 See, e.g., PETER BENSON, JUSTICE IN TRANSACTIONS 155-64 (2019); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980); Steven J. Burton, *Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272, 275-76 (Gregory Klass et al. eds., 2014).

the context of employment law, these functions appear to be mostly aspirational. In the United States, an employer's duty of good faith in employment contracts is primarily targeted at protecting an employee's financial expectations in employment.<sup>4</sup> Meanwhile, other common law doctrines, such as the duty of obedience and the presumption of at-will employment, give employers largely unilateral authority to shape the requirements and direction of an employee's job.<sup>5</sup>

This Article argues that employment is an urgent contractual setting in which to fully implement the duty of good faith. The employment relationship is rife with forms of dependency—such as employees' dependency for their livelihood, for their membership in a community, for their self-esteem, and the like, on the actions of their employer<sup>6</sup>—that leave employees vulnerable to objectionable control by their employers.<sup>7</sup> Work is also life-shaping, enlisting our minds and bodies in the ongoing, often immersive, pursuit of particular ends. That our employment relationships not only start off as, but also remain, voluntary and cooperative undertakings over time is thus essential for ensuring that how we labor for and with one another is compatible with the basic moral authority we have as persons over our bodies, minds, and choice of life projects.

Fully implementing the duty of good faith in employment would be transformative. First, it would require securing communicative and epistemic conditions for the parties to an employment contract to ascertain, develop, and implement their joint perspective on the purposes and terms of their relationship. Such communicative and epistemic conditions include being able to ask and receive answers to questions about the purposes and terms of that relationship, as well as to voice disagreement and skepticism about a co-contractor's interpretation. Consequently, it should not be a breach of contract—let alone a permissible ground for termination—for an employee to simply object that a given task or assignment is beyond the scope of their contract. Nor should it always be a breach of contract or a basis for dismissal for an employee to refuse to perform work that the employee reasonably doubts is

---

4 See, e.g., *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985); *Hall v. Farmers Insurance Exchange*, 713 P.2d 1027, 1030-31 (Okla. 1985); Restatement of Employment Law § 2.07(b), cmt.c (noting that the duty of good faith principally protects an employee's financial expectations and protects an employee from being fired for performing their job duties, but does not alter the "essential nature" of at-will employment).

5 See *infra* Parts II and III.

6 See Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530-38 (1997); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000).

7 See, e.g., ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* 52-54 (2017) ("[A]t will employment . . . grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment at will baseline, workers, in effect, cede all of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers' authority over workers, outside of collective bargaining and a few other contexts, . . . is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal."); ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* 11 (2015) (describing how the employment relationship permits employers to dominate their employees); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 245-47 (2013).

within the scope of their job. Recognizing such rights to speak and refuse to work is part of recognizing the employee's joint authority over the meaning of the contractual relationship and hence treating the employee's labor as a voluntary undertaking.

Second, the duty of good faith in employment can also supply a common law basis for collective worker authority and action commonly associated with statutory labor law. An employment contract does not only create a relationship between an employer and an employee, but also sets the terms for how an employee is to interact within a broader workplace. In order to act in good faith, an employee will often need to take collective interests and dimensions of their work into account. This can be difficult for a single employee to do on their own, both as a moral and practical matter. Statutory labor law protections for collective discussion and worker action may accordingly be required for enabling employees to develop and coordinate a shared perspective across the workplace, and to discharge their duty of good faith accordingly.

Examining the limits and potential of the duty of good faith in employment can thus fruitfully complicate the widely held view that it is the contractual character of employment that oppresses or otherwise leaves employees vulnerable to employer mistreatment.<sup>8</sup> No doubt employment contracts can reflect and exacerbate many troubling social inequalities,<sup>9</sup> leaving individual employees "helpless in dealing with an employer."<sup>10</sup> Courts, legislatures, and commentators have accordingly tended to reach beyond the common law of contract to secure fair and decent working conditions for people, using statutory law,<sup>11</sup> constitutional law,<sup>12</sup> and organizing outside of the law to empower working people to further their legitimate interests and to "resist arbitrary and unfair treatment by employers."<sup>13</sup> But the case of good faith illustrates that employment contracts can also fail to appropriately protect working people's basic interests by diverging from contracts generally, in at least one important respect—namely, by failing to be governed by the duty of good faith in performance, one of contract's "core value[s]."<sup>14</sup>

Examining the duty of good faith in the context of employment also has implications for general contract law and theory. The duty of good faith is commonly thought to

8 See *supra* note 7.

9 See, e.g., Noah D. Zatz, *The Minimum Wage as Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 6, 33-39 (2009) ("[O]nly an ostrich could fail to notice how often the lowest paid workers hail from groups central to antidiscrimination projects").

10 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

11 See, e.g., National Labor Relations Act (NLRA), 25 U.S.C. §§ 151-169 (2012).

12 See, e.g., *Mounted Pol. Ass'n of Ont. v. Canada*, 1 S.C.R. 3 (2015) (holding that the constitutional freedom of association protects the right to bargain collectively).

13 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)). For discussions of the efficacy of worker organizing outside of the law, see, for example, Alex Gourevitch, *The Right to Strike: A Radical View*, 112 AM. POL. SCI. REV. 905 (2018); Diana S. Reddy, *There is No Such Thing as an Illegal Strike*, 130 YALE L.J. FORUM 421, 429-33, 454-58 (2021). For an argument that contract law can redound to the mutual benefit of employers and employees, see generally Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

14 Markovits, *supra* note 3, at 272.

be a “thin” duty that neither adds to nor takes away from the content of contractual obligation, and instead simply gives effect to whatever actual shared understanding the parties have.<sup>15</sup> But as the case of employment illustrates, the duty of good faith cannot be a thin duty because the duty demands legal recognition of a bundle of rights and obligations to protect good faith communication and refusals to work, regardless of whether the parties share a more hierarchical understanding of their relationship.

Finally, although this Article takes US law as its starting point, the moral arguments are broader in their application. The interpretation of the duty of good faith advanced here is in large part motivated by the moral reasons democratic societies have to protect people’s basic interests in how they labor. The critique of US employment law, as well as the suggested alternative approach to implementing good faith in employment, can accordingly be used to evaluate employment in other jurisdictions.

Part I outlines the general contours of the duty of good faith performance and its purposes in employment contracts. Parts II and III argue that applying the duty of good faith to employment contracts would require legal recognition of a variety of employee speech rights and protection from termination for reasonable refusals to perform work, and could offer a common law foundation for statutory labor rights. Part IV then discusses broader implications for contract law and theory.

## I. THE DUTY OF GOOD FAITH IN CONTRACTUAL PERFORMANCE

In the United States, the duty of good faith in contractual performance generally requires that the parties to a contract exhibit fidelity to “an agreed common purpose”<sup>16</sup> and consistency with the parties’ “legitimate contractual expectations.”<sup>17</sup> The parties’ legitimate contractual expectations include the expectation that each party will interpret and perform their contractual commitments in line with the parties’ shared and objectively manifest purposes, and that the parties will similarly exercise contractual rights and powers in ways that evince a “good faith effort to redeem” those purposes.<sup>18</sup> Examples of bad faith hence include, but are not limited to, “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”<sup>19</sup>

### *A. Joint Authority*

The duty of good faith in performance accordingly creates a kind of egalitarian and joint authority structure for contractual relationships. The duty applies reciprocally

---

15 See *infra* Section IV.A.

16 Restatement (Second) of Contracts § 205 cmt. a.

17 Oregon RSA No. 6 v. Castle Rock Cellular, 840 F. Supp. 770, 776, *aff’d*, 76 F.3d 1003 (9th Cir. 1996).

18 Seana Valentine Shiffrin, *Common and Constitutional Law: A Democratic Perspective*, in 37 TANNER LECTURES ON HUMAN VALUES 51 (2018).

19 Restatement (Second) of Contracts § 205 cmt. d.

and in light of the shared purposes and legitimate expectations of both parties.<sup>20</sup> And by requiring fidelity to such purposes and expectations, the duty directs the parties to equally consider and be governed by their shared perspective. As Daniel Markovits explains, “[g]ood faith is the attitude that parties must adopt towards their plans in order for the plans to be joint plans at all. It is, quite literally, the matrix in which a shared perspective is possible.”<sup>21</sup> The duty of good faith thus makes the parties to a contract joint authorities over the character, content, and scope of their contractual relationship.<sup>22</sup> This authority is both epistemic and practical, covering what the terms of the parties’ relationship mean, what their purposes are, and, hence, what the contract requires.

By acting in accordance with such an authority structure, the parties can make it the case that their relationship unfolds and develops on the basis of the voluntarily undertaken and jointly authored foundations of their relationship. Negatively, such an authority structure precludes a party from exploiting a co-contractor’s dependency for performance to extract benefits that were not originally bargained for.<sup>23</sup> The parties’ joint interpretive authority also precludes unilateral action when and because it proceeds on the basis of only one party’s understanding of the relationship. This is true even when the contract delegates some discretion to create new terms (or to terminate the relationship) to only one of the parties—the scope and purposes of that discretion are still under the joint authority of the parties.

More positively, the duty of good faith encourages the parties to work together to shape the evolution of their contractual relationship over time. When conflicts occur or ambiguities come to light in the course of a contractual relationship, the parties’ joint interpretive authority provides a strong reason for each party to instead consider and even consult the other party’s expectations and understanding of the relationship. After all, how the conflicts or ambiguities are to be resolved depends on the parties’ shared understanding of the relationship and their respective expectations.

The joint authority structure created by the duty of good faith would thus seem to play an essential (though no doubt insufficient) role in safeguarding some of the basic human interests—in, for instance, exercising meaningful agency over how we work, who we partner with, and the like—that explain why so much of social life in a democratic society ought to be organized through contract to begin with.

In turn, as a nonwaivable duty, the duty of good faith supplies a public standard for interpretation and hence for determining what counts as compliance or breach.

20 In contrast to the general common law of contract, courts have often applied the duty of good faith in a lopsided or incomplete way in employment. See 5 AM. JUR. 2D § 55 (citing *Development Co. of Am. v. King*, 161 F. 91 (2d Cir. 1908)) (explaining that an employee is obligated to follow the reasonable orders of their employer even if given in bad faith); *supra* note 4 and accompanying text.

21 Markovits, *supra* note 3, at 293.

22 *Id.* at 284 (“To display good faith in contract performance is simply to recognize the authority of the contract, and hence the authority of one’s counterparty to insist on performance according to the contract’s terms . . . Honoring the duty involves internalizing the authority structures of that relation and implementing them in one’s own practical life.”).

23 See Markovits, *supra* note 3, at 276 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373, 387 (1980)).

The duty of good faith in contractual performance therefore plays a core role in constituting contract law as law, notwithstanding the voluntary character and often privately determined content of contractual obligation.<sup>24</sup>

### *B. Employment Contracts in a Democratic Society*

The core role of the duty of good faith in enabling voluntary collaboration warrants securing a central place for the duty in the law of employment contracts. This is crucial, not because voluntary choice just matters as such, but because of the nature of employment and its role in our lives and broader society.<sup>25</sup>

For better or for worse, when we work, we give our lives a particular shape and content, using our minds and bodies in the service of substantive ends, such as assembling furniture or cars, administering medical care, adjudicating legal claims, caring for children, developing strategies for racial justice, or cleaning homes. And when we work for or with others, we put ourselves in relationships that may require or involve close and regular contact, navigating disagreement, collaborating for shared purposes,<sup>26</sup> and engaging in other forms of social interaction. The kind of work we perform thus in part determines the kinds of lives we live—what values we pursue, the character of our relationships with other people, and, in the case of employment, our material wellbeing.

For the lucky few of us, the life-shaping character of work may be an occasion for celebration. For many others, jobs and other forms of work are mere means to securing a basic level of wellbeing, and often contexts that reflect and contribute to structural and systemic inequalities.<sup>27</sup> But for most, if not all, working people, the life-shaping character of work makes it morally urgent that how we work—including the people the people we work for and with, where we work, and the ends our work furthers—is a matter that is, in some meaningful sense, up to us, in ways that reflect and respect the basic moral authority each of us has over our bodies, minds, and the kinds of lives we pursue.<sup>28</sup>

It is, of course, no easy task to fully specify what would count as exercising such meaningful agency over how we work, and I will not attempt to do so here. But for the present purposes, it may suffice to note that, at a minimum, what job we perform (and whether we have a job) must be largely and typically a matter of a voluntary undertaking, rather than of our social status, state conscription, or some form of

---

24 See Shffrin, *supra* note 18, at 55.

25 I thus do not deploy a “moralistic” view of contract according to which “the point of contract law” is “the enforcement of moral obligation, or the promotion of virtue, for their own sake.” Liam Murphy, *The Practice and Promise of Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 154 (Gregory Klass et al. eds., 2014).

26 See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 4-5, 138-39 (2003).

27 For an elaboration on this point, see Sabine Tsuruda, *Disentangling Religion and Public Reason: An Alternative to the Ministerial Exception*, 106 *CORNELL L. REV.* 1255, 1282-92 (2021).

28 This is not at all to suggest that such authority is unlimited. On the contrary, such authority, to be compatible with the fundamental and hence equal value of each person's life, is limited by each person's equal and like authority.

brute coercion.<sup>29</sup> Appropriately tailored formation and enforceability doctrines can help to ensure that the decision to perform one job or another is the product of an autonomous choice by a free and equal person,<sup>30</sup> rather than simply an act of surrender or a rational response to conditions of social inequality, such as poverty and caste.<sup>31</sup> But the moment of formation is not the only moment in an employment relationship that matters. Having formed an employment relationship, a person's need to stably earn a livelihood and their interests in contributing to and being a part of the project for which they were hired make them vulnerable to their employer. Giving full legal effect to the duty of good faith in employment contracts would thus seem to be an essential part of ensuring that the vulnerability that inheres in the employment contract does not become an occasion for subverting the values that recommend contractualizing employment to begin with.

For example, in the context of employment, as elsewhere, the duty of good faith in performance can supply legal resources to resist and later contest ill-begotten contractual modifications. Governed by the duty of good faith, an employer cannot exercise their discretion to, say, demote the employee to avoid giving the employee a benefit they are owed under the contract, such as ongoing employment in a particular role or a financial bonus.<sup>32</sup> The duty of good faith can thus help to ensure that employment relationships are compatible with meaningful occupational freedom, binding the employer to the substantive understanding and commitments upon which the employee's choice to undertake the job was premised.<sup>33</sup>

In turn, the duty of good faith in the context of employment contracts can encourage the parties to collaborate in the face of ambiguity or disagreement. After all, a central purpose of forming an employment relationship (as opposed to an independent contracting relationship) is to engage someone's ongoing assistance.<sup>34</sup> The duty of good faith can give effect to that purpose by supplying an alternative to unilateral action and exit in the face of contractual ambiguity and indeterminacy.<sup>35</sup> Rather than seek to resolve ambiguities and fill gaps between contractual purposes and express terms only on the basis of one party's understanding—or to simply end the relationship in the face of contractual indeterminacy—the parties must look to

29 See Karl N. Llewellyn, *What Price Contract?*, 40 *YALE L.J.* 704 (1931).

30 Following John Rawls, I deploy an institutional and political conception of free and equal persons. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 23-24 (Erin Kelly ed., 2001); Sabine Tsuruda, *Working as Equal Moral Agents*, 26 *LEGAL THEORY* 305, 309-10 (2020).

31 This is not to suggest that the common law of contract is the only relevant source of law. Surely social insurance policies, statutory and constitutional antidiscrimination law, labor law, and the like are also among the social conditions for meaningful freedom of occupation.

32 See Restatement of Employment Law § 2.07 (2015).

33 The duty of good faith can similarly help to secure conditions for productive freedom for employers. Entrusted with the employer's ends, an employee acting in good faith will generally refrain from exercising their discretion in ways that subvert those ends.

34 For an argument about why a society should have an institution for ongoing cooperation such as employment, as opposed to simply having only independent contracting, see Sabine Tsuruda, *A Cooperative Paradigm of Employment*, in *WORKING AS EQUALS* (Julian Jonker & Grant Rozeboom eds, forthcoming 2023), at Section 2.C.

35 See *id.*

see whether their shared purposes and understanding of their primary commitments can settle the matter.

The duty of good faith in contractual performance can accordingly not only guard against exploitation of the dependencies that inhere in the employment relationship, but also, more positively, facilitate cooperation. The duty of good faith would thus seem to have an essential role to play in making it the case that contract is, as Hanoch Dagan and Michael Heller argue, the institution through which we “legitimately enlist others to our own goals, purposes, and projects.”<sup>36</sup>

### *C. Doctrinal Challenges*

In reality, the duty of good faith, as it is interpreted in the law of employment contracts, falls far short of facilitating cooperation and safeguarding our basic interests in how we work. As I will argue for the remainder of this Article, the duty of good faith tends to occupy a circumscribed and subordinate status relative to other core doctrines in employment law, such as the duty of obedience and the presumption of at-will employment. These latter doctrines, I will argue, give employers overwhelming and largely unilateral authority over how the employment relationship develops over time in ways that impair cooperation and conflict with our basic moral authority over our bodies, minds, and choice of life projects.

Rather than look exclusively outside of the common law for solutions, the remainder of this Article illustrates how a more thoroughgoing implementation of the duty of good faith in employment contracts could offer powerful legal resources to protect employee speech and reasonable refusals to work, support collective worker action, and secure for workers an ongoing voice in how their employment relationships develop over time. The duty of faith can thus offer a common law foundation for rights normally associated with labor law, providing immediate protection for workers’ basic interests when labor law fails to do so, as it often does in the current era of increasingly circumscribed labor rights.

In advancing these arguments, my goal is not to offer a set of readymade proposals for legal reform, or to be comprehensive in outlining all the ways that implementing the duty of good faith in employment would change the status quo. Instead, I hope to illustrate a few significant ways that the law of employment contracts might realize the cooperative ideal that animates the duty of good faith, and to thereby motivate further inquiry into how such reforms might be undertaken.

## II. COMMUNICATING IN GOOD FAITH

First, an important but overlooked dimension of the duty of good faith in performance concerns communication between the parties to a contract. In Part I, I explained how the duty of good faith in performance requires that the parties exhibit fidelity

---

36 Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 49, 61 (2023).



to their shared contractual purposes and legitimate contractual expectations. Such fidelity importantly involves implementing an egalitarian authority structure that treats both parties as joint authorities over the purposes and requirements of their contract.

Parties committed to their common purposes accordingly have reason to uncover that shared understanding and ascertain one another's legitimate contractual expectations, and to do so in ways that support the ongoing health and stability of the relationship. And one direct, often necessary, way to discover that information is to consult with and work with the other party, rather than take legally risky unilateral action that can erode the trust upon which contractual relationships often depend. Indeed, consulting and collaborating is precisely what a party acting in good faith would do in the face of their own uncertainty or the disagreement of a co-contractor. As a result, the duty of good faith and the authority structure it creates require that the parties to a contract have sufficient communicative space and epistemic resources to ascertain, develop, and implement their joint perspective on the purposes and terms of their relationship.

The need for such communicative space and epistemic resources is particularly acute in the context of employment. As Hugh Collins explains, an employment contract is a relational contract that is "unlikely to function successfully unless both parties cooperate to achieve the . . . purpose of the contract" because "the expected performance obligations and the hoped-for outcomes" are often indeterminate.<sup>37</sup>

At the same time, workplaces have traditionally not been spaces for free and open communication, particularly between employers and employees. Not only do pressures for efficient production create incentives for employers to limit and control employee expression, and to minimize workplace debate, but legal doctrines, such as the duty of obedience, and the employer's control over firing and promotions can further stifle workplace communication.<sup>38</sup>

Implementing the duty of good faith in employment contracts thus requires creating legal space for employees and employers to communicate with each other about the scope and purposes of contractual commitments, powers, and rights. How much space and through what means?

### *A. Employee Speech Protections*

First, it should not count as a breach of contract for a party to speak to the other party in a good faith attempt to resolve a perceived ambiguity or a disagreement about the scope or purposes of their joint enterprise. For example, an employee should be able to ask for clarification about how to do their job. More controversially, when an employee is told to do something that the employee believes is beyond the scope of their job, the employee should be able to ask why and how the new task or requirement is within the scope of their job. Even if what the employee is being told

---

37 See Hugh Collins, *Relational Justice in Work*, 24 THEORETICAL INQUIRIES L. 26, 38-39 (2023).

38 See generally Tsuruda, *supra* note 30.

to do is ultimately within the scope of the employer's lawful authority, whether the employer is acting within the scope of their authority is a matter over which both the employer and the employee should have joint authority under the duty of good faith. So when the law treats an employee's demand for an explanation about why their job is changing as a breach of contract, the law treats the employee in a way that is incompatible with the joint authority that parties are supposed to respect.

For the same reasons, good faith communication of reasonable disagreement with an order should not constitute a breach of contract, let alone provide a sufficient basis for termination. An employee might similarly seek to exercise their joint authority over the contractual relationship by asking about or objecting to a material change in the direction of the enterprise, and the employee should accordingly receive some meaningful protection for such speech. Such legal recognition of an employee's joint epistemic and practical authority over what the contract requires is needed to ensure that both the employment relationship and the law respect the employee's basic moral authority over how they labor and for whom. Protecting good faith queries about and reasonable objections to working conditions are thus important ways that implementing the duty of good faith in employment could ensure that the employment relationship unfolds under terms that maintain and value the employee's labor as a voluntary undertaking over time.

Labor and employment law in the United States traditionally either utterly fails to protect such good faith employee efforts to clarify the terms and purposes of their job or is ambivalent in its protection of such speech. When employment is at will, an employee can be fired for any lawful reason. So whether such good faith queries and objections about the job are protected depends on whether the employee has a protected right to engage in such expression. And it is unlikely that the employee has such a right. Even when employment can only be terminated for cause, objecting to employer orders or expressing skepticism about those orders can constitute insubordination in breach of the common law duty of obedience, and can thus ultimately supply cause for termination.<sup>39</sup> And although labor law offers powerful protections for employee speech about the terms of their work,<sup>40</sup> that protection is fairly circumscribed, not extending to high-level managerial decisions or changes in the direction of the enterprise,<sup>41</sup> and requiring some material connection to employees' collective interests.<sup>42</sup>

---

39 The legal concept of "cause" can still be relevant even when employment is at will. For example, termination for cause often precludes an employee from securing unemployment benefits. *See, e.g., In re Stergas*, 673 N.Y.S.2d 223, 223 (1998).

40 *See* 29 U.S.C. § 157 (protecting covered employees engaging in "concerted activities for the purpose of . . . mutual aid or protection"). Such protection for employee speech is not limited to unionized workplaces. *See* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 *IND. L.J.* 101, 119 (1995) (discussing how labor law "protects a great deal of employee communication that promotes participation and self-governance within the workplace").

41 *See, e.g.,* Good Samaritan Hosp., 265 N.L.R.B. 618, 626 (1982); Five Star Transportation, Inc., 349 N.L.R.B. 42, 44-45 (2007).

42 *See* 29 U.S.C. § 157 (protecting covered employees engaging in "concerted activities for the purpose of . . . mutual aid or protection") (emphasis added).

Protecting good faith queries about and objections to working conditions that seek to clarify or otherwise redeem the parties' shared understanding of their relationship would thus give the common law of contracts a meaningful role in protecting employee speech about the workplace, including when such speech is not protected by statutory (or constitutional) law.<sup>43</sup>

In addition to not automatically treating an employee's good faith efforts at communication as breaches of contract (and not as grounds for termination), the common law should avoid chilling such attempts at communication. For example, suppose an employee complains about a change in their job simply because they are irritated with their boss (and suppose that the basis for such irritation is wholly personal—their boss is just an annoying person). The law risks chilling good faith analogues of such expression if the employee's grumbling—even if unreasonable—can easily provide a sufficient ground for termination.<sup>44</sup> Under such a legal regime, an employee may reasonably worry that the risk of their boss misinterpreting the grounds for the complaint has costs that far outweigh the benefits of trying to resolve an ambiguity or express disagreement about how their employer is interpreting job requirements.

Further, other employees in the workplace may not have the information they need to see for themselves whether the speech that gave rise to discipline or termination was a good faith attempt at communication. Automatic dismissal of an employee who complains about an order or a change in their working conditions can therefore give other employees reason to believe that any such complaints, regardless of their foundations, will be met with harsh treatment.

It does not, of course, follow that unreasonable or bad faith complaints or questions should never count as breaches of the employment contract. But the risks of chilling good faith communication count in favor of adopting legal rules that require a material breach—such as repeated or particularly severe breaches—before summary (or retaliatory) dismissal is warranted.<sup>45</sup> For example, in Canadian and English jurisdictions, summary dismissal requires repeated breaches of the employment contract or a breach that is so severe as to bring about a breakdown in the employment relationship.<sup>46</sup> In a similar spirit, “just cause” clauses in collective

---

43 Cf. *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that a district attorney could lawfully be fired for exposing misrepresentation in a crucial affidavit for a criminal case); Emily Gold Waldman, *Fulfilling Lucy's Legacy: Recognizing Implicit Good-Faith Obligations Within Explicit Job Duties*, 28 *PAGE L. REV.* 429 (2008) (arguing that regardless of whether the First Amendment protected the plaintiff in *Garcetti* from termination, the plaintiff's termination was contrary to the implied covenant of good faith and fair dealing in contract law).

44 I argue elsewhere that the common law should accommodate indignant employee expression at work. See Tsuruda, *supra* note 30, at 318–23.

45 Cf. Restatement (Second) of Contracts §§ 235, 237, 241.

46 For Canadian law, see, for example, *McKinley v. BC Tel*, 2001 SCC 38; *Henry v. Foxco Ltd*, 2004 NBCA 22; *Donovan v. New Brunswick Publishing Co.*, 1996 CanLII 4832 (NB CA); *Bennett v. Cunningham*, 2006 CanLII 37516 (ON SC). For English law, see, for example, *Wilson v. Racher* [1974] ICR 428 (CA); HUGH COLLINS, *EMPLOYMENT LAW* 105–07, 164–65 (2d ed. 2010).

bargaining agreements often require progressive discipline before termination is warranted.<sup>47</sup>

This is admittedly far from a complete account of how to protect good faith employee attempts at communication with their employer. A number of complexities would still need to be addressed and worked out over time. For example, employee speech, depending on the time, place, and manner in which it is communicated, can seriously compromise the shared and legitimate purposes of the parties' employment relationship. A nurse who objects in the middle of an operation to a surgeon's urgent request to get her a glass of water can put the patient's health and life at risk. What counts as a good faith effort to make such queries or communicate such objections in the service of the contractual relationship can accordingly depend on context and the particular nature of the employment relationship.

Further, queries and objections about the job can also cause delays in production or in the provision of a service. Although the relationship between such speech and the duty of good faith means that the productive purposes of the relationship cannot have complete priority over such speech,<sup>48</sup> it does mean that speaking in good faith will have to involve some amount of balancing and consideration of productive purposes. And how much balancing and sensitivity is perhaps impossible to specify *ex ante*.

As a result, courts may often be confronted with the interpretive challenge of determining how to account for the productive purposes of a given employment relationship in a way that does not undermine or partially waive the duty of good faith. But I think this is a challenge that courts should accept and are competent to accept. Here, courts would be called on to interpret a contract, not to "micromanage" a business or to tell an employer what is in their best economic interests.<sup>49</sup> Given

---

47 For an overview of different ways that "just cause" has been defined and a discussion of what kinds of policy and institutional considerations are implicated in those definitions, see KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, *ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM*, ROOSEVELT INSTITUTE (2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform/>.

48 For arguments that democratic values require protection for employee speech from employer retaliation more broadly, see, for example, Bagenstos, *supra* note 7, at 256; Tsuruda, *supra* note 30.

49 *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997). The morally suspect view that employers are owed special "solicitude" in the adjudication of employment claims has also had a deleterious effect on First Amendment and antidiscrimination rights over time. *Janus v. AFSCME*, 138 S. Ct. 2448, 2493 (2018) (Kagan, J., dissenting) ("So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose [a First Amendment challenge to termination]."). Compare *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding that a teacher was not deprived of First Amendment protection from employer retaliation for statements criticizing her school district's failure to comply with a desegregation order merely because she voiced those concerns in a private meeting with the school principal), with *Connick v. Myers*, 461 U.S. 138 (1983) (holding that if an employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for her discharge"), *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that a district attorney could lawfully be fired for exposing misrepresentation in a crucial affidavit for a criminal case), *Barone v. City of Springfield, Oregon*, 902 F.3d 1091 (9th Cir. 2018).

that asking questions about the scope and purposes of one's work can itself be a way of discharging the duty of good faith—one of contract's core, arguably constitutive,<sup>50</sup> legal duties—it would be an abdication of the judicial role for judges to simply throw their hands up on grounds of incompetence and leave it to the parties to sort out such matters for themselves.

Finally, these remarks on good faith communication have so far been focused on employee speech. But I do not mean to suggest that employers should not similarly have protected opportunities to communicate with their employees on such terms. To the extent that current law penalizes or otherwise discourages such collaborative communication,<sup>51</sup> the duty of good faith would likely recommend similar reforms.<sup>52</sup>

### B. Employer Duties to Listen and Disclose

The common law of contracts should therefore afford an employee fairly robust protection for asking their employer questions about their job duties and objecting to changes or other aspects of the job, when doing so is a good faith effort to resolve ambiguity or disagreement on common contractual ground. Such attempts at communication are important ways that an employee acts on the duty of good faith and exercises joint authority over the contract. Respect for such attempts is thus a part of what it is for an employer and contract law to appropriately recognize that an employee, like any other party to a contract subject to the duty of good faith in performance, has joint authority over the meaning—and hence the purposes and requirements—of the contract.

---

(holding that a community service officer who was allegedly fired for admitting at a public event that she had heard of racial profiling complaints could not establish a First Amendment retaliation complaint because the officer was speaking in her official capacity), and *Hagen v. City of Eugene*, 736 F.3d 1251, 1258 (9th Cir. 2013) (holding that *Pickering* balancing did not apply to a police officer who was fired for repeatedly raising workplace safety issues because the officer's complaints had "all the hallmarks of traditionally internal work-place complaints one would typically expect an officer to communicate to his superiors").

50 See *supra* Part I.

51 Cf. National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(2) (2012) (banning company unions); CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010) ("In seeking to banish the scourge of company unions, Congress effectively banned not only organizations that purported to bargain collectively, or that masqueraded as unions, or that were used by employers to evade the duty to bargain with the employees' own chosen representative; it also banned some employee representation plans that were favored by employees and that worked well, by all accounts, within the particular organization.").

52 Conflicts between statutory law and common law should thus not always be resolved in favor of statutory law. Cf. Shiffrin, *supra* note 18, at 55 (arguing that *Northwest v. Ginsberg*, by holding that the Airline Deregulation Act precludes application of the covenant of good faith and fair dealing to frequent flyer agreements, risks "exiting the realm of law" and instead "leaving standards of interpretation . . . to the free market . . . where the powerful dictate terms, their meaning, and abide by them only at their pleasure").

Consequently, an employer can also fail to appropriately recognize that authority when the employer does not take such attempts at communication seriously. Examples of such failures might include, but are not limited to, failing to make an appropriate representative available to listen, refusing to offer any justification for changes in working conditions, and dishonest responses or deceptive representations that such communications are being taken seriously (consider email addresses that are never checked, “suggestion boxes” whose contents never make their way to anyone with any power or information).<sup>53</sup>

Of course, merely listening to employee queries and objections is insufficient for ensuring that such communication will yield a common understanding of shared purposes. In many cases, employers will also have to respond—for instance, to give the employee the information they need to determine whether a change in performance metrics, or in the direction of the business, really is consistent with legitimate contractual expectations and shared purposes. Respecting the joint authority structure created by the duty of good faith, and enabling the parties to discharge good faith performance duties, will therefore sometimes obligate employers to respond to employee queries and disclose pertinent information, and to not retaliate against employees who make good faith efforts to engage in a dialogue when disagreement persists.

This is not to say that all failures to listen or disclose pertinent information are equally serious, or that all such failures should be a basis for an employee’s claim for breach of contract or otherwise receive the same degree of legal censure. The occasional eyeroll in response to an employee’s grumbling is hardly on a par with requiring an employee to interface exclusively with an app that offers the employee little prospect of having questions or objections addressed.<sup>54</sup> A legal regime that imposed liability on an employer for any instance in which they did not take an employee’s good faith communication seriously would be needlessly stifling of ordinary, authentic human communication.

At the same time, given the importance of creating legal space for and recognition of employees’ attempts at good faith communication, the common law risks undermining such recognition and the grounds for creating such legal space if it treats employers as if they are under no obligation to listen and respond appropriately.

Rather than deploy a blanket rule treating all such failures to listen and respond to employees as breaches, a court might consider treating such failures as potential contributing factors for a wrongful termination claim. An employer’s failures to listen and respond to good faith communication should also, as I will now argue, supply a basis for evaluating the contractual permissibility of subsequent actions the employee might take, such as refusing to perform work that the employee believes is beyond the scope of their job.

---

53 Cf. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 *YALE L.J.* 715, 719-20, 735-38 (1997).

54 See EMILY GUENDELSBERGER, *ON THE CLOCK: WHAT LOW-WAGE WORK DID TO ME AND HOW IT DRIVES AMERICA INSANE* 21-23 (2019) (interviewing former Amazon warehouse workers).

### III. REFUSALS TO WORK, COLLECTIVE INTERESTS, AND LABOR RIGHTS

In addition to grounding contractual rights and obligations to engage in good faith communication, the duty of good faith and its associated authority structure could also give employees a contractual right to refuse to work in the face of certain communicative failures, as well as supply a common law basis for collective worker authority and action commonly associated with statutory labor law.

#### *A. Reasonable Refusals to Work*

First, an employee ordinarily does not commit a breach of contract by refusing to perform work that is beyond the scope of their employment.<sup>55</sup> But in order for an employee to defend their contractual rights by refusing to work, the employee needs access to the information required to determine whether the work is in fact within the scope of their employment. An employee's right to refuse to perform work beyond the scope of employment is thus undermined when an employer is under no obligation to give the employee such information. In turn, requiring an employee to perform work when the employee lacks a sufficient objective basis to determine whether such work is within the scope of their employment can fail to treat the employee's labor as a voluntary undertaking.

Apart from (or in addition to) sometimes imposing liability on employers for (some) bad faith refusals to respond to employees, the duty of good faith accordingly recommends holding employers responsible for such refusals by treating such refusals as a basis for an employee to refuse to perform work—even if it turns out that the work was, all things considered, within the scope of the employee's job. To make the point in a slightly different inflection, the reasonable availability of such information should operate as a condition precedent to an employee's duty to work. Making such information reasonably available to an employee is part of cooperating in an employee's performance, and an employee should not be automatically held to have breached their contract when they refuse to work in the absence of such cooperation. The duty of good faith thus supplies a common law basis for a limited right to strike.<sup>56</sup>

A similar set of considerations bear on protecting employee refusals to work in the face of genuine indeterminacy about whether a given task falls within the scope of the employment contract. In the event that there is no objective fact of the matter

---

55 See, e.g., *Rudman v. Cowles Communications, Inc.*, 280 N.E.2d 867, 872 (N.Y. 1972) (“[A]cts done by the employee in defense of his contract rights, or an assertion of an agreed status or function in the enterprise, are not insubordination.”); 19 WILLISTON ON CONTRACTS § 54:24 (explaining that “both parties [to an employment contract] are entitled to substantial compliance with the contract”).

56 This is not to suggest that there might not be other grounds for protecting a right to strike at common law, such as the constitutional freedom of association. See Kevin Banks, *Ending Canadian Common Law's Impairment of Employee Freedom of Association: Charter Values, Incremental Change, and the Future of Canadian Labour Relations Policy* (Feb. 23, 2022) (unpublished manuscript) (on file with author).

about whether a given task or change in working conditions is within the scope of employment, courts should not automatically defer to employers.

To illustrate, it will help to first consider two different conceptualizations of an employee's common law duty of obedience. At common law, an employee is obligated to obey all of the reasonable orders of their employer.<sup>57</sup> Under more modern contractual interpretations of this duty, what makes an order reasonable is that it falls within the scope of the employment contract.<sup>58</sup> Under traditional agency-based interpretations of this duty, what makes an order reasonable is that it bears some reasonable connection to the employer's interests, which include efficient production, maintaining order, protecting a public image,<sup>59</sup> maintaining a safe and non-discriminatory environment, and the like.

Such employer interests and the employer's pursuit of them may well be among the objective purposes of the employment contract, and so what counts as reasonable under each conceptualization of the duty of obedience can overlap. But the agency-based conceptualization offers an importantly different ground for an employee's performance obligations than the more modern contractual conceptualization of the duty of obedience—namely, the employer's interests, rather than the parties' agreement.<sup>60</sup> The agency-based conceptualization of the duty of obedience is thus at odds with the duty of good faith and its requirement that the parties interpret and give content to their agreement by looking to common ground.

Returning now to reasonable refusals to work, when there is no fact of the matter about whether the employee's putative job duties are actually within the scope of the employment contract, courts should accordingly not deploy the agency-based conceptualization of the duty of obedience because courts should not look only to the employer's perspective to interpret the employment contract. Ordinarily, outside of the context of employment, if a contract is truly ambiguous with respect to an alleged performance obligation, there just is no such obligation,<sup>61</sup> and the parties may go ahead and modify the contract if they so choose.<sup>62</sup> It would not just conflict with the duty of good faith for one party to impose their own meaning on the contract; it would also be incompatible with the objective theory of contract for a court to simply ask one of the parties what interpretation they would prefer

---

57 Traditionally, an employee is obligated to obey all lawful orders, regardless of their reasonableness. *See, e.g.*, Restatement (Third) of Agency §§ 1.01, 8.09.

58 *See, e.g.*, 19 WILLISTON on Contracts §§ 54:23-24.

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

60 I have argued elsewhere that the muddled character of the ground for employees' duties of obedience, as well as the duty's deployment of the anachronistic concept of obedience, recommends abandoning the duty and simply speaking in terms of employees' performance obligations. *See Tsuruda, supra* note 30, at 314-24; *cf. Aditi Bagchi, Exit, Choice and Employee Loyalty*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 271-92 (Paul B. Miller & Andrew S. Gold eds., 2016); Dagan & Heller, *supra* note 36.

61 *See* Restatement (Second) of Contracts § 33.

62 *See* Restatement (Second) of Contracts § 89; U.C.C. § 2-209 cmt. 2 (explaining that modifications are subject to the duty of good faith).



and defer to them. And such an interpretive practice would be particularly illiberal in the context of labor.<sup>63</sup>

So when an employment contract is truly ambiguous with respect to some matter, an employee should not be automatically treated as having breached the employment contract if the employee refuses to comply with the employer's unilateral resolution of that ambiguity.

To be clear, this is not to suggest that the duty of good faith always permits an employee to stop working in the face of such uncertainty under all circumstances. It may, for instance, be that such a work stoppage will seriously compromise another employee's (or other person's) equally (or more) weighty interest in the workplace, in ways that either breach the duty of good faith or some other significant obligation. For example, whether in the warehouse, operating room, or elsewhere, stopping work without giving adequate notice to others can physically injure fellow employees and third parties, such as patients.

The duty of good faith, as well as other similarly weighty legal duties, thus likely ground obligations on the part of the uncertain employee to give notice or otherwise exercise some degree of care in how and when they refuse to work. What these obligations are, how they are triggered, and when they are to be given priority are important details and complications that would need to be worked out in implementing the duty of good faith performance in employment. The duty of good faith in contractual performance can therefore ground a right—but a qualified right—to refuse to work.

### *B. Common Law Foundations for Labor Rights*

The duty of good faith can also supply a common law basis for legal protection of workers' collective interests and action. As some of the moral and legal complications around individual refusals to work may indicate, although an employment contract has a bipolar structure, the shared purposes of an employment contract and legitimate expectations of the parties do not implicate only the employee and the employer. A central purpose of forming an employment contract is to further the interests of a broader enterprise, whether that enterprise be a public one such as a police station, or a private enterprise such as a company or non-profit. And an employer's legitimate contractual expectations must surely include that the employee will not compromise the employer's ability to run a cooperative workplace and treat other employees fairly.

In order to act in good faith, an employee will therefore often need to take collective interests and dimensions of their work into account. This can be difficult for a single employee to do on their own. Sometimes individual interests can conflict with collective interests (such as when an employee seeks out a change in their pay that would be detrimental or unfair to other employees), and when one's livelihood is at stake, it can be challenging to give due consideration to the

---

63 See *supra* Part I.

interests of the collective and of others. Understanding the relationship between a change in an employment contract and collective interests can also be difficult and time-consuming, and can require information that is not readily available to the employee (such as how much other employees are getting paid). A major change in an employment relationship—such as changing a pay scale or the direction of the enterprise—may also not be the sort of thing that a single employee and an employer can legitimately decide on their own.<sup>64</sup>

In light of the purposes of employment contracts, the duty of good faith thus seems to require that employees (and employers) pursue not just their own interests and each other's shared interests, but pursue those interests in ways that harmonize with the broader collective interests of the workplace and its members, as well as the interests that individual employees have in exercising ongoing authority over how their labor. This is not something that the common law of contract, with its bipolar structure, is well suited to facilitate.

But the common law of contract does not need to do all of the work. For example, labor law can and already does go a long way in responding to these challenges to acting in good faith in the context of an employment relationship. Collective bargaining can help to ensure that individual employees' interests are harmonized with broader employee and workplace interests and purposes.<sup>65</sup> Representation by a union can also enable employees to overcome epistemic barriers to acting on the duty of good faith.

Further, responding to and implementing changes in the workplace with the assistance of statutory labor law can help to ensure that, in respecting employees' joint authority over employment contracts, the common law does not render employment so inefficient as to undermine workplace cooperation and a society's broader scheme of production. Such a division of labor between the common law and statutory law can accordingly help to ensure that the requisite expertise is brought to bear on employment relationships.<sup>66</sup>

Labor law can also provide an associational and legal structure within which employees can better develop and uncover a shared understanding about common or otherwise related job obligations and act accordingly. Legally protected worker associations such as unions can provide a safe space for employees to uncover their common interests, especially when coupled with a legal right to engage in such discussions for "the purpose of . . . mutual aid or protection."<sup>67</sup> The right to strike, and fair procedures for exercising that right, can in turn help employees to better

---

64 For an elaboration of these points, see Tsuruda, *supra* note 34, at Part III.

65 For example, under the NLRA, a union has a duty to represent all of its members fairly in the negotiation and enforcement of collective bargaining agreements. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) ("[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.").

66 If there is anything that common law judges are not competent to do, it includes making complex empirical predictions about how a given legal rule will affect production or the economy more broadly.

67 25 U.S.C. § 157.

indentify and reconcile any competing obligations with their individual interests in refusing to work.

These remarks about the relationship between labor rights and the duty of good faith are, to be sure, schematic and incomplete. Their purpose is not to offer a roadmap from contract to statutory labor law. Rather, it is that fully implementing the duty of good faith in employment, and thus enabling employees to discharge their duty of good faith, requires moving beyond the bipolar structure of contract law and creating the kinds of legal rights and protected spaces for collective worker authority and action commonly associated with statutory labor law.

#### IV. TOWARD A PURPOSIVE INTERPRETATION OF THE DUTY OF GOOD FAITH IN PERFORMANCE

The duty of good faith in contractual performance thus offers overlooked but powerful resources for developing the common law to better protect our basic interests in exercising meaningful agency over how we work and for what ends. Examining how the duty of good faith would operate in the context of employment also has implications for our understanding of the duty more generally.

##### *A. Is the Duty of Good Faith Performance a “Thin” Duty?*

First, the duty of good faith in contractual performance is commonly thought to be a “thin” duty. As Peter Benson and Daniel Markovits explain, what makes the duty a “thin” duty is that it contributes no independent content to the parties’ shared, objective understanding of their agreement.<sup>68</sup> Instead, as Markovits elaborates, the content of the duty of good faith is “fixed according to the actual intentions” of the parties.<sup>69</sup>

Of course, it does not follow that the duty of good faith, thinly conceived, requires giving effect to just any shared understanding the parties have of their contract. The parties may well understand one another to intend to perform the contract strictly and formalistically, only according to the contract’s express terms. Such a shared intention with respect to interpretation would accordingly conflict with the duty of good faith. So even under thin conceptions of the duty of good faith, the duty must preclude giving effect to at least some of the parties’ intentions.

Even so, proponents of thin conceptions of good faith would likely clarify that the duty does not exclude this kind of interpretive intention by *adding* any particular content to the parties’ actual understanding of their contract. What good faith performance ultimately requires would thus still be a matter of what the parties

---

68 See, e.g., BENSON, *supra* note 3, at 155-64; Markovits, *supra* note 3, at 278-80.

69 Markovits, *supra* note 3, at 290.

actually intended—of what purposes they agreed to, of what expectations they communicated to one another, and so forth.<sup>70</sup>

The case of employment, however, reveals that the duty of good faith cannot be a purely formal duty and instead must add to the content of contractual obligation. Proponents of thin conceptions of the duty of good faith overlook how the relevant form of respect for “the authority of the contract”<sup>71</sup> has communicative and epistemic conditions that can impose substantive, often demanding duties on the parties that may run contrary to their actual intentions. Employment, I have been arguing, illustrates this vividly.

The substantive conception of the duty of good faith advanced here should nevertheless be distinguished from the primary target of proponents of thin conceptions of the duty—certain “thick” conceptions of the duty of good faith, according to which the duty imposes independent standards of fairness, reasonableness, or economic rationality on the parties.<sup>72</sup> The duty of good faith performance, I have been arguing, still looks to the shared and objective purposes of the parties to fill gaps in the express terms of their contract, as opposed to, for instance, asking what the parties would have agreed to had they been economically rational actors.

### B. Purposive Interpretation

Rather than conceive of the duty of good faith as either a “thick” or “thin” duty, it might help to conceptualize the duty of good faith advanced here as a purposive interpretation of the duty of good faith, according to which duty’s scope and content ought to be interpreted in ways that give effect to the duty’s core purposes (and certainly not in ways that would subvert those purposes).<sup>73</sup> Those purposes, I have argued, are to help ensure that contractual relationships remain voluntary collaborations over time, and to thereby safeguard our basic human interests in exercising authority over the activities and ends to which we put our bodies and minds.

Both the formal and substantive account of joint contractual authority advanced thus far fit well with a purposive interpretation of the duty of good faith. Formally, the duty of good faith helps ensure that contractual relationships, whether in the context of employment or elsewhere, facilitate cooperation between free and equal persons over time through the joint interpretive authority structure the duty creates.<sup>74</sup> And, substantively, in the context of employment, implementing that structure by creating legal space and protections for good faith workplace dialogue and reasonable refusals to work is needed to help make it the case that employment proceeds under

70 See *id.* at 280 (“Good faith requires contracting parties to vindicate reasonable contractual expectations but cannot be called on to fix the content of the expectations in whose terms it is defined.”).

71 *Id.* at 284.

72 See, e.g., Markovits, *supra* note 3, at 285-91.

73 Although purposive interpretation of *contracts*, according to which contracts are interpreted in light of their individual purposes, is commonplace—indeed, that is what the duty of good faith directs parties and judges to do—purposive interpretation of *legal rules* is more commonly at home in statutory and constitutional interpretation, especially outside of the United States in jurisdictions such as Canada.

74 See *supra* Sections I.A.-B.

terms that respect employees' basic moral authority over their bodies, minds, and choice of life projects.<sup>75</sup>

### *1. Employment at Will*

A purposive interpretation of the duty of good faith thus requires limiting the scope of at-will employment and reconceptualizing the duty of obedience to protect a wide range of good faith employee speech and refusals to work. These applications to employment contracts are not meant to be exhaustive. It may well be that, as with the duty of obedience, a purposive interpretation of the duty of good faith will require a more radical rejection of employment at will. At-will employment clauses seem to aim to avoid exactly the kind of substantive commitment to a shared cooperative enterprise that the duty of good faith requires, leaving the employer (and the employee) free to end the employment relationship for any lawful reason.

This is not to say that parties to at-will employment contracts do not have a shared understanding. On the contrary, they may have a very clear shared understanding that their relationship is one that may be terminated at any time for any lawful reason. But this seems to be the wrong kind of shared understanding. To exercise meaningful agency over what job to perform, a person needs to have a substantive understanding about the available job(s), such as what ends the job furthers, who they will be working for, and other information material to assessing how the job will fit into that person's life.<sup>76</sup> And that understanding normally needs to be shared, at least in significant part, by the employer and the employee, in order for the employee's work to contribute appropriately to the employer's enterprise. Indeed, that such understandings often are shared helps to explain what has happened when someone has been hired—that a person has been hired as a picker, rather than as a manager, in an Amazon warehouse, or as a custodial worker, rather than as a lawyer, at a law firm.

By binding the parties to this kind of shared substantive understanding, the duty of good faith, interpreted purposively, could play a crucial role in ensuring that the employment relationships we find ourselves in are relevantly like the ones we chose. But it is a commitment to precisely this kind of shared understanding about the substantive nature of the job that at-will employment clauses seek to avoid. As the Ninth Circuit has explained, when employment is at will, and thus terminable for any lawful reason or no reason, the employer "necessarily enjoys the lesser privilege of imposing prospective changes in the conditions of employment."<sup>77</sup> A purposive interpretation of the duty of good faith might thus supply a legal basis to

---

75 See *supra* Parts II-III.

76 Such epistemic requirements for meaningful choice are not unique to employment contracts. For example, exercising meaningful agency over who you form a requirements contract with will likely require having some information about the supplier and the quality of what it is they are supplying. The legal requirement that contracts be sufficiently certain and definite is thus not merely important for assisting courts in enforcement but also for ensuring that before the law lends its support to facilitating a relationship or transaction, the parties are adequately informed about the nature of that relationship or transaction.

77 *Cotter v. Dessert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989).

not simply limit the scope of permissible termination under at-will employment, but to challenge the very idea of at-will employment as an unlawful waiver of the duty of good faith.

### *2. Domain-Specific Interpretation*

It may also be that the duty of good faith grounds different contractual duties and rights in different contractual settings. The purposive interpretation advanced here conceptualizes the purposes of the duty of good faith not just abstractly in terms of the value of joint and voluntary undertakings, but also contextually in light of why certain domains of social life must be characterized by joint and voluntary undertakings. The case of employment highlights the importance of this contextual analysis by showing how the content of the duty of good faith can be contingent on the communicative and other related needs of the contractual setting, and on how the contractual setting can pose distinctive threats to the basic interests that the parties have in organizing their interaction through a joint and voluntary undertaking.

A purposive interpretation of the duty of good faith thus does not require doing away with the abstract common law ideal of facilitating a joint and voluntary undertaking, but instead requires interpreting that ideal concretely in light of the reasons we have to contractualize particular domains of social life.

## CONCLUSION

In this Article, I have argued that the duty of good faith in performance offers powerful but neglected resources to empower workers to pursue their legitimate interests and “resist arbitrary and unfair treatment by employers.”<sup>78</sup> The duty of good faith creates a joint authority structure within contractual relationships, vesting co-contractors with equal and irreducibly joint authority over the meaning, purposes, and hence, the requirements of their contract. Implementing such an authority structure requires ensuring that the parties to a contract have the communicative space and epistemic resources needed to uncover and develop a common understanding of their contract. Such an authority structure facilitates ongoing cooperation, directing the parties to work together to resolve disagreements and ambiguities and precluding exploitation of the contractual relationship to obtain benefits not originally or voluntarily agreed to.

In the context of employment, implementing such an authority structure would be transformative. Treating employees and employers as joint interpretative authorities would require protecting a wide range of currently unprotected employee queries and objections about their jobs, placing employers under obligations to listen and respond appropriately (and to thus disclose pertinent information), and generally protecting employees from legal (and other forms of) compulsion to continue working

---

78 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)).

when such communicative and epistemic conditions for good faith performance are absent. The duty of good faith could thus supply a common law foundation for rights and obligations commonly associated with labor law.

In turn, examining the duty of good faith in the context of employment can enrich our understanding of the duty more broadly. As the case of employment illustrates, the duty of good faith cannot be an entirely formal duty. Instead, to make good on its purposes, the duty of good faith must set substantive limits on contractual purposes and expectations, contrary to the predominant understanding of the duty of good faith.

It is, of course, not surprising that the case of employment might be overlooked in theorizing the general contractual duty of good faith in performance. As I have been arguing, the duty of good faith occupies a circumscribed and subordinate position in the law of employment contracts. And employment contracts are not governed only by the general common law of contract, but also in large part by employment-specific common law doctrines, such as the duty of obedience. In developing an interpretation of the general duty of good faith in contractual performance, the case of employment is therefore liable to being overlooked because it tends to reside outside of the general common law of contract.

But employment, because of its significance in our lives, is an urgent context for applying the general common law duty of good faith in contractual performance. So even though it is understandable that employment might be overlooked as a context for theorizing the general duty of good faith, it is nonetheless a context worth attending to in theorizing the duty and contract law more broadly.