

## Free speech at work (and beyond)

**Bruce Barry**



*Rights to free speech can still be tenuous in the workplace despite the apparent elevation of the importance of employee interaction. Indeed, contemporary management practice has become so reliant on predictability and control that even remote 'threats' to this may be regarded with suspicion and dealt with harshly. Yet the workplace is a vital breeding ground for the development of social ties that give life to the idea of civil society.*

Many people living in free societies take freedom of speech for granted. It is, after all, not just any individual right but arguably the most foundational of rights. As American jurist Benjamin Cardozo put it in a 1937 court ruling, freedom of speech is 'the matrix, the indispensable condition, of nearly every other form of freedom'.<sup>1</sup> But for many people freedom of expression loses much of its meaning inside

the corporate workplace, where civil liberties and job security often find themselves in tension. This should alarm those who appreciate the merits of both free enterprise and free speech.

Laws governing the individual rights that people enjoy in relation to their employers vary from country to country but, as a general rule, firms in industrialised nations have substantial latitude to treat expressive behaviour by employees — both on the job and outside of work — as threatening or otherwise unacceptable. A firm's discretion to punish worker speech is especially broad in the United States, where the law gives employers the power to hire and fire 'at will', for good reason, bad reason or no reason, and with few exceptions and limited rights to challenge a termination. Consider these actual examples: a factory owner sacks a worker for displaying a particular candidate's political bumper sticker on her automobile; an engineer is fired for writing a book of satire about an imaginary corporation and its imaginary employees; an insurance company manager loses his job for refusing to join the firm's effort to lobby local government for something that went against his personal beliefs; or a software developer is dismissed for anonymous musings about her workplace on a personal blog.<sup>2</sup>

In settings where workers do enjoy just-cause protections against arbitrary discipline or termination, rights to free speech can still be tenuous given the inevitable difficulty involved in proving that an adverse employment outcome is speech-related. Especially in situations

where performance evaluation is inherently subjective, it can be a significant challenge to demonstrate that one's expressive activity was the true basis for a job assignment not received, a promotion not awarded or even for a termination.

The system of employment law within a given country defines the reach of employee rights and the limits to employer power within that economy and society. But legal rules do not account fully for limits to free expression in and around the workplace. Much of what happens to employees who choose to express themselves on or off the job results from the actions of managers under

worker accepts a given employer's conditions of work or else moves on in the marketplace for labour to something preferable. The logic of market liberalism suggests several grounds for giving employers a free hand to limit worker speech: the firm's right to seek profits without putting those profits at risk by the behaviour of an employee; the employer's prerogative to manage the internal dynamics of a business as he or she sees fit; the employer's interest in cultivating the loyalty and trust of workers; the firm's desire to create and preserve an image or reputation; and a firm's right to its own expressive activity.<sup>3</sup>

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the sway of employer policies and the firm's culture. Of greater consequence than legal rules, therefore, are the discretionary choices that employers make about their tolerance for expressive activities by those who work for them. How employers regulate speech on and off the job is guided by two key forces: first, conventional market wisdom about the nature of jobs and work; and secondly, habits of management practice regarding employee dissent.

### Markets and morality

An orthodox labour market view of the employment relationship constructs the employer–employee relationship on a foundation of property rights and contracts. A

It bears mentioning that the logic behind these 'rights' isn't built solely on a narrow admiration of markets for their own sake. If the goals of a healthy society include economic prosperity and stability, then a relatively free hand for employers to manage productivity and efficiency may work to promote important public interests. But a market-focused theory of employment is convincing only if the integrity of a working free market for labour is assumed. As many ethicists and critics of market liberalism have observed, that assumption comes with a number of problems. There are often striking imbalances between employers and workers that make the act of hiring a true market

transaction in name only. Firms, for instance, will often have better knowledge about the background labour market conditions in play, and have advantages of power and mobility owing to less dependence on a given worker than the worker's dependence on a given job.<sup>4</sup>

From this perspective, an employer who elects to be intolerant of worker speech incurs mainly a market risk — the prospect that labour markets will punish the firm for management practices that workers and prospective workers find disagreeable. But putting aside legal and market consequences, does a firm that treats expressive activity harshly also escape moral reproach? Some business ethicists argue that when corporations assert rights to economic autonomy in how they conduct business, they incur commensurate obligations to act in moral ways towards employees and other stakeholders. A right to do business as one sees fit doesn't operate in a moral vacuum; it comes



footing. The 'rights' of corporations and employers are not rights of the kind that protect individual civil liberties. Although some libertarians regard private property ownership as a natural right, a corporation's 'property right' interest in particular ways of doing business is a contrived privilege, one that has meaning only in relation to the acts of government that create the privilege and enforce it. The laws of some countries may treat corporations as having rights of persons, with autonomy to hold

Ethically speaking, basic moral rights, like freedom of choice, autonomy and privacy, are more significant than the boundaries of organisations and their rules or customs. Business ethicist Patricia Werhane calls these rights 'so fundamental and inviolable that every human being possesses them despite his or her particular social, political, historical, or even cultural situation'.<sup>7</sup> In this sort of incorruptible libertarianism, fundamental rights deserve respect in virtually all situations, winning out over competing interests such as the economic and property interests of corporate and other employers.

Even if the market for labour did work the way free markets are supposed to, without harmful imbalances of knowledge and power, it would still be wrong to treat employer–employee tension over free speech in the same way that we treat tussles over economic rights. There are some human dimensions of social life — freedom of expression among them — for which economic efficiency and equilibrium are not acceptable benchmarks. When someone's

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with an obligation to respect the rights of others as moral equals, including those whom one employs.<sup>5</sup>

That doesn't, however, necessarily put employee rights and employer interests on an equivalent moral

assets, conduct business without interference and go to court.<sup>6</sup> Even so, what corporations have acquired are legal privileges, not moral authority, which is the exclusive province of sentient beings.

speech is silenced by the actions of a powerful institution — an employer, or perhaps a court siding with an employer — the danger is that far more speech will be chilled than just the expressive act at hand.

### Habits of practice

Modern management thinking over the past half-century can be read broadly as movement toward collaboration and participation in the accomplishment of work. Certainly there is variation in how employers approach (and tolerate) expressive activity by workers. These variations are a product, at least in part, of management trends on such issues as worker autonomy, involvement, voice, justice and ethics. But are these meaningful developments in management thinking or just the latest tools of management control that build the illusion of a liberated workplace?

The answer is both, revealing that employers may genuinely want workers to be engaged, committed and satisfied but on their (employers') own terms — not too engaged (because we only seek ideas that conform to corporate values), not too committed (because we may compel you to believe and say things you don't like) and not too satisfied (because we may do away with your job on short notice).

Clearly, many workplace cultures are far less bureaucratically rigid and more accommodating to employee input, needs wants, and goals than a generation or two ago. But, at the same time, many employers aggressively protect their power over the conditions of work and invest copious legal and financial resources to defeat regulatory threats to their economic or moral autonomy.

Connecting the evolution of modern management with the topic at hand — free speech at work — invites a paradox. Movement away from old-school notions of bureaucracy and alienation, in favour of cultures of employee participation and involvement, makes workplaces more hospitable to free expression. If authority structures are flatter, work teams are more common and employee involvement is valued, then expressive activity within the workplace, on work-related issues at least, ought to expand, right?

Certainly, communication networks at work are wider and busier, especially given new forms of digital

technology for interaction among employees who may not be in the same location (or on the same continent). This is especially true for people in executive positions, who tend to have larger discussion networks and more close ties with others at work.<sup>8</sup> So can we assume that more interaction and wider patterns of communication translate into freer expression?

Not necessarily. It remains the case that, in many workplaces, speaking up is seen as pointless or even dangerous, contributing to what management researchers call a climate of 'organisational silence'. Silence happens when people fear



that speaking up will lead them to be evaluated negatively or will damage workplace relationships.<sup>9</sup> This is detrimental to workers, who forfeit a sense of control, commitment or value

to efficiency and productivity. Developments in management and communication might elevate the volume of employee interaction but that doesn't necessarily translate into

work and life that it's no accident that democracies are inevitably 'employment societies'. Paid work is democracy's foundation, Schultz writes, providing 'one of the few arenas — perhaps the only one — in which diverse groups of people can come together and develop respect for each other through shared experience'.<sup>12</sup>

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to the firm, but also to employers, whose decisions and strategies are undermined by limited information and whose ability to detect and correct errors is impaired. Executives who enthuse about collaboration can still find themselves leading laboratories of employee silence if employees believe that only 'positive' contributions are desired and that dissent is an invitation to reproach rather than reward.

That collaboration and silence are simultaneously possible points to an important observation, made some years ago by organisation theorist William G. Scott in an insightful essay on liberty and justice in management: that a more cooperative workplace is not the same thing as a freer workplace.<sup>10</sup> Liberty has meaning as a significant organising principle in employment, Scott contends, only if firms see it as part of their core purpose to enhance individual character and self-determination. Although some firms may mention these goals in corporate value statements or human resources policy documents, many won't take them very seriously except as a means to achieving 'real' organisational purposes related

workplaces that are more hospitable to freedom of expression and the freedom to dissent.

### Free speech matters

The freedom to express oneself without fear of employer reprisal is important for three reasons. First, freedoms to think, speak, and act are paramount values for a free society. Secondly, guarantees of due process are indispensable to the existence of a just society. Thirdly, work is not merely something people do between intervals of 'real life'; it is where people, to a meaningful extent, live out their lives.

For many adults, conversations with co-workers represent important opportunities to form social and political connections and to exchange views on issues of the day. Work, in other words, is where civic discourse happens for many people.<sup>11</sup> The quantity and quality of that discourse gives meaning to the idea of citizenship in a free society and helps to define the success of democratic institutions.

Vicki Schultz, a legal scholar at Yale University, observed in an engaging essay on the connections between

The workplace, in other words, is a vital breeding ground for the development of social ties that give life to the idea of civil society. Free speech rights are precarious when firms instinctively treat employee expression as an avoidable nuisance, a legal liability, a challenge to reputation or a threat to commercial prosperity. Excessive curbs on employee speech are more than just inconveniences for the individuals involved; they contribute to the debilitation of civil society and consensual democracy.

This is not a manifesto for 'anything goes' — employers need not concede to workers a right to speak about anything at any time. Certainly a functional free-enterprise system need not require employers to tolerate employee expression that is abusive, harassing or otherwise poses genuine risks to legitimate firm interests.

But it is alarming when workers are punished not because their speech concretely jeopardises employer interests but because it triggers abstract employer fears about the effects that might possibly occur. Contemporary management practice has become so reliant on predictability and control that even remote 'threats' to the established order may be regarded with suspicion

and dealt with harshly. Better that employers arrive at judgments — cultivate mindsets — that the success of the enterprise is not so easily threatened by employee acts of artistic, literary, political or just idle expression. ■

## ENDNOTES

- <sup>1</sup> *Palko v. State of Connecticut*, 302 U.S. 319 (1937), 327.
- <sup>2</sup> These examples are among the dozens of cases cited and discussed in my book released in 2007, *Speechless: The Erosion of Free Expression in the American Workplace*, Berrett-Koehler, San Francisco.
- <sup>3</sup> Lucy Vickers 2002, *Freedom of Speech and Employment*, Oxford University Press, Oxford, pp. 28–36.
- <sup>4</sup> John J. McCall 2003, 'A Defense of Just Cause Dismissal Rules', *Business Ethics Quarterly*, vol. 13: pp. 158–159.
- <sup>5</sup> See Robert Phillips, R. Edward Freeman, and Andrew C. Wicks 2003, 'What Stakeholder Theory is Not', *Business Ethics Quarterly*, vol. 13, pp. 479–482.
- <sup>6</sup> For a brief account of the 400-year history of the corporation as a business form, see Joel Bakan 2004, *The Corporation: The Pathological Pursuit of Profit and Power*, Free Press, New York, pp. 5–27.
- <sup>7</sup> Patricia H. Werhane 1985, *Persons, Rights, & Corporations*, Prentice-Hall, Englewood Cliffs, NJ, p. 7.
- <sup>8</sup> Glenn R. Carroll and Albert C. Teo 1996, 'On the Social Networks of Managers', *Academy of Management Journal*, vol. 39, pp. 421–440.
- <sup>9</sup> Frances J. Milliken, Elizabeth W. Morrison, and Patricia F. Hewlin 2003, 'An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why', *Journal of Management Studies*, vol. 40, pp. 1462–65. See also Elizabeth Wolfe Morrison and Frances J. Milliken 2000, 'Organizational Silence: A Barrier to Change and Development in a Pluralistic World', *Academy of Management Review*, vol. 25, pp. 706–725.
- <sup>10</sup> William G. Scott 1988, 'The Management Governance Theories of Justice and Liberty', *Journal of Management*, vol. 14, pp. 286–290.
- <sup>11</sup> Cynthia Estlund 2003, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy*, Oxford University Press, Oxford.
- <sup>12</sup> Vicki Schultz 2000, 'Life's Work', *Columbia Law Review*, vol. 100, pp. 1928–29.

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