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Dignity, Rankism, and Hierarchy in the Workplace: Creating a Dignitarian Agenda for American Employment Law

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Dignity, "Rankism," and Hierarchy in the Workplace: Creating a "Dignitarian" Agenda for American Employment Law

Reviewed by David C. Yamada†

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† J.D., New York University, 1985; Professor of Law, Suffolk University Law School, Boston; founding President of the New Workplace Institute, an independent, non-profit, research and education center devoted to the creation of healthy, productive, and socially responsible workplaces. Although I take issue with Robert Fuller on a number of points, his thoughtful writings resonate strongly with me, as much of my own work has addressed issues directly related to employee dignity, especially workplace bullying, freedom of speech in the workplace, and legal determinations of employee status. Thus, portions of this Review Essay, particularly Part IV, which proposes the rudiments of a dignitarian legal agenda for the workplace, are informed strongly by previous publications. I ask readers to indulge those passages that are supported by self-citation.
I.
INTRODUCTION

Robert Fuller, a physicist, human rights advocate, and former Oberlin College president, has experienced the world as both a "somebody" and a "nobody." Insights gained from both stations in life have led him to call for a social movement devoted to advancing individual dignity. Based on his outreach and advocacy, he believes that this movement "is already under way and quietly gaining momentum." According to Fuller, the primary obstacle to building a "dignitarian" society is the persistence of "rankism," his term for "abuses of power associated with rank." Rankism manifests itself both in discrimination based on constructs such as race, sex, or age, and in hierarchical relationships in "schools, businesses, health care organizations, religious institutions, the military, and government bureaucracies." Fuller's basic premise is that reducing rankism and unnecessary hierarchy promote a society that affirms individual dignity.

Fuller first set out his ideas in *Somebodies and Nobodies: Overcoming the Abuse of Rank*. He explained that, as a college president working with various constituency groups, he began to see that many of the common "isms" in society, such as racism and sexism, "were all manifestations of a more fundamental cause of discrimination," one that he could not quite name. However, after he stepped down from the presidency and became a person without an impressive title and high status, he "experienced what it's like to be taken for a 'nobody.'" He believed that his feelings of deep "indignity and humiliation" were similar to the feelings people of color or women experienced when marginalized and treated dismissively.

Based on the response to *Somebodies and Nobodies*, Fuller understood that he had tapped into a deep vein of indignation towards rankism:

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2. See id. at 167-68; see also Penelope Trunk, A Battle Cry for the Rank and File: "Dignitarian" Cause Gives Voice to Principle that Every Worker Deserves Respect, BOSTON SUNDAY GLOBE, Aug. 6, 2006, at G1 (stating that "Fuller's idea is that people have a right to be treated with dignity no matter their place in the pecking order"). Fuller's website, www.breakingranks.net, provides further information on efforts to create a dignitarian movement.
3. FULLER, supra note 1, at 167.
4. Id. at 7.
5. Id. at 6-7.
6. See id. at 1-5.
8. Id. at 2.
9. Id.
10. See id.
I heard from kids, parents, teachers, nurses, physicians, managers, professionals, and workers of every stripe. The impotent rage they must contain—whether at home, in school, or on the job—exacts a toll on their health and happiness and hence on their creativity and productivity. Occasionally their repressed indignation erupts in what others see as a senseless act of violence. But violence is rarely, if ever, senseless. If it seems so, we've simply failed to understand it. Like the original n-word, nobody is an epithet that packs a powerful punch. That is why we're so desperate to pass as somebodies and shield ourselves from rankism's punishing sting.¹¹

Many readers wanted something more concrete in terms of strategies and tools for fighting rankism and building a "dignitarian" society in which "rank-holders are held accountable, rankism is disallowed, and dignity is broadly protected."¹² All Rise: Somebodies, Nobodies, and the Politics of Dignity ("All Rise") is Fuller's response to those requests, and here he tackles rankism with a more prescriptive focus, quickly reiterating its many harms and then laying out an agenda for a dignitarian society.¹³

This essay examines All Rise through the lens of American employment law and policy. Fuller recognizes that rankism, hierarchy, and dignity have tremendous implications for the workplace and employment relations. He devotes a full chapter specifically to the workplace,¹⁴ and references to rankism on the job appear throughout the book.¹⁵ Income equity, job security, employee participation, discrimination, and workplace bullying are among the topics he addresses.¹⁶

Although Fuller does not limit his commentary to employment relations, his work is of special importance to this field precisely because he relates the workplace to core themes of individual dignity in society as a whole. Business and labor reporter Robert Levering has observed that, in the context of legal rights and responsibilities, the workplace is all too often severed from the rest of human activity:

We generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights you enjoy as a citizen. There's no process for challenging—or changing—bad decisions made by the authorities. There's no mechanism to vote for people to represent you in decision-making bodies . . . .

¹¹. FULLER, supra note 1, at 4.
¹². Id. at 5.
¹³. Id.
¹⁴. See id. at 51-74.
¹⁵. See, e.g., id. at 17-18 (discussing nuclear power risks and whistleblowing), 30-31 (discussing worker malcontent), 48-49 (discussing rankism in higher education), 94-95 (discussing rankism in health care fields), 119 (outlining legislative priorities for dignitarian society), 174 (calling for support of equitable compensation).
¹⁶. See id. at 52-70.
We take for granted that such rights and protections don’t apply to the workplace partly because most of us have never seen examples to the contrary.\footnote{17}

In contrast, *All Rise* makes the vital case that concerns about dignity and rankism must carry into all our endeavors. One of Fuller’s genuine triumphs is to argue successfully that individuals should not be required to sacrifice their personal dignity for the sake of earning a living. In doing so he bridges a noticeable gap, connecting the broader theme of dignity with a growing body of literature related specifically to issues of dignity in the workplace.\footnote{18} However, he is less adept, at least in *All Rise*, at translating these concerns into a practical blueprint for change. In particular, Fuller does not give sufficient weight to the potentially useful role of legal protections and responsibilities in helping shape dignitarian workplaces. Thus, I devote a good portion of this essay to suggesting how American employment law can respond to rankism in the workplace in a manner supportive of Fuller’s basic agenda.

II. CREATING DIGNITARIAN WORKPLACES

Fuller’s dignitarian agenda for the workplace emphasizes the role of enlightened managers, executives, and corporate boards. He begins his chapter on the workplace by observing that a “vital part of leadership is the detection and elimination of rankism and malrecognition,” adding that “[g]ood leaders know this instinctively and seek to instill nonrankist behavior in others by exemplifying it in their own relationships with subordinates.”\footnote{19} Successful business leaders “create an atmosphere of unimpeachable dignity from top to bottom in their organizations,” resulting in both personal gain and strong company performance.\footnote{20} By focusing on voluntary action by employers, Fuller undervalues the potential role of the law in creating dignitarian workplaces.

A. Combating Rankism in the Workplace

Leadership that respects the contributions and opinions of all employees is a critical element in Fuller’s recommendations for affirming
dignity in the workplace. For example, Fuller urges managers to "Recognize and Listen." He then supplies two anecdotes describing managers’ personal experiences in learning to value employees and listen to their concerns. In one, a museum director shares how he learned to appreciate "that the most important people, in terms of their daily contributions to the mission of the museum, were not those with the highest rank." The director made a regular habit of walking through the museum to speak to employees and solicit their input. In the other anecdote, a public school principal explains how she prompted the resignation of a respected teacher by inadvertently snubbing her at a school open house. After staff and parents rose to the teacher's defense, the principal not only apologized to the teacher, "but also initiated an inquiry into rankism in her school." According to Fuller, "this happened only because the leader chose listening over defensiveness and turned an instance of malrecognition into a policy of respect."

Along similar lines, Fuller recommends that employers facilitate questioning and protect dissent:

A fundamental characteristic of a healthy work culture is that everyone, regardless of rank, exhibits a questioning attitude. The freedom to challenge any action, any condition, and any assertion cannot be maintained in an environment laced with rankism. Only by continually demonstrating respect for all opinions and those who hold them will an environment be maintained in which a spirit of respect can thrive.

Fuller reports that high technology companies such as Intel, Hewlett-Packard, and Google, as well as the U.S. Navy's nuclear power program, have created mechanisms for feedback and questioning by all workers. These good management practices also foster an open environment that makes risky whistleblowing activities unnecessary.

Fuller also addresses compensation, asserting that "[n]o organization can claim to be dignitarian if the ratio of the highest to the lowest employees exceeds a certain number." While he does not specify an ideal ratio, he notes that the "average ratio of highest to lowest paid employees in the United States is in the hundreds," while in "Europe and Japan it is

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21. Id. at 52.
22. Id.
23. Id. at 52-53.
24. Id. at 53.
25. Id.
26. Id. at 54.
27. Id.
28. Id.
29. Id.
30. Id. at 56.
variously put at ten to fifteen." It is the responsibility of the board of directors to remedy inequitable compensation ratios after considering "the views of all stakeholders in the organization."

Other recommendations Fuller offers are transparent decision making, accountability and responsibility, and elimination of unnecessary hierarchy. Diversity issues fall into the last category, consistent with Fuller's thesis that mistreatment on the basis of identity group membership is a form of rankism. Ultimately, a dignitarian workplace celebrates cultural differences rather than ignores them.

Fuller is quite vague on the role of law and public policy in implementing this dignitarian agenda for the workplace, and he warns against legal change running ahead of cultural change. For the most part, his recommendations fall within the normal realm of management prerogatives. In Fuller's ideal world of employment relations, smart, well-meaning, and self-interested employers will treat employees with dignity because it is both the right thing to do and good for business, the classic "win-win" situation. Employees, in turn, will share suggestions, feedback, and concerns in an atmosphere of trust. Even as a labor supporter and former union shop steward whose own background has been fueled by activism, I must concede that good management is a critically important starting place for creating healthy work environments and equitable pay scales. This is especially true in a time of low union membership levels.

It is especially heartening to hear Fuller's call for listening, questioning, and healthy dissent in the workplace. In the modern climate of career advancement, conformity, "getting along," and self-censorship have become standard paths for moving ahead or at least remaining

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31. Id. at 57.
32. Id.
33. Id. at 59.
34. Id.
35. Id.
36. Id. at 61.
37. Id.
38. See id. at 119 (outlining potential legislative priorities for a dignitarian society).
39. See id. at 170-71.
40. See id. at 51-54. Quite relevant to Fuller's position is a small but growing body of literature about organizational advocacy and change, mainly in the context of professional, non-union employment settings. See, e.g., JOHN P. KOTTER & DAN S. COHEN, THE HEART OF CHANGE: REAL-LIFE STORIES OF HOW PEOPLE CHANGE THEIR ORGANIZATIONS (2002) (providing accounts of how people engage in in-house organizational change); DEBRA E. MEYERSON, TEMPERED RADICALS: HOW PEOPLE USE DIFFERENCE TO INSPIRE CHANGE AT WORK (2001) (examining how those who consider themselves outsiders can change their workplaces); JANE GALLOWAY SEILING, THE MEANING AND ROLE OF ORGANIZATIONAL ADVOCACY: RESPONSIBILITY AND ACCOUNTABILITY IN THE WORKPLACE (2001) (exploring the concept of organizational advocacy).
Nevertheless, enlightened management theory clearly endorses the value of employee input and participation in building productivity and raising morale.

Thus, Fuller's agenda for inclusive company practices is welcome. But ultimately it is not enough. The history of labor and employment relations in the United States shows that not all employers will voluntarily adopt a dignitarian agenda for their workers, even if doing so is in their best interests. Fuller relies too much on the initiative of employers who hold unilateral power to grant rights and privileges, while somewhat blithely encouraging workers to speak up on behalf of their own and others' interests. Under this arrangement, the employer continues to enjoy the authority to withdraw privileges that become too discomforting to continue. The typical worker, who is not in a union and is hired on an at-will basis, is not in a strong position to respond with hard bargaining over her compensation and working conditions.

Fuller recognizes that organized labor has served an important social and political purpose "in response to discrimination and exploitation by a dominant group," but he does not identify a contemporary role for unions in achieving dignity in the workplace. Concededly, bad or ineffective unions may protect the jobs of incompetent workers and those who engage in bullying, thuggish, and even violent behaviors. However, the ways in which the labor movement as a whole advances dignitarian goals such as fair compensation, protections against unfair discharge, and safe working conditions far outweigh these negatives. A union can help workers through collective bargaining as well as various types of informal and formal advocacy and dispute resolution. Good management and an effective union can make for an optimal situation, but even in the absence

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41. See David C. Yamada, Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace, 19 BERKELEY J. EMP. & LAB. L. 1, 11 (1998) [hereinafter, Voices From the Cubicle] (positing that "the culture surrounding today's workplace, rather than encouraging individual and collective action towards a common good, actually promotes this docility, self-censorship, and acceptance of hierarchy").

42. See id. at 51-53 (discussing recommendations of leading management consultants and analysts).

43. The history of the labor movement and the emerging literature on workplace bullying and abusive work environments make this abundantly clear. See, e.g., BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (detailing the author's experiences in various low-wage jobs); HARVEY A. HORNSTEIN, BRUTAL BOSSES AND THEIR PREY (1996) (examining the nature and prevalence of cruel and abusive supervision); PRISCILLA MUROLO & A.B. CHITTY, FROM THE FOLKS WHO BROUGHT YOU THE WEEKEND: A SHORT, ILLUSTRATED HISTORY OF LABOR IN THE UNITED STATES (2001) (detailing labor struggles for better pay and working conditions); GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK (rev ed., 2003) (examining the dynamics of workplace bullying and offering advice for targets).

44. FULLER, supra note 1, at 110.

of good management, a union can be an important first line of defense for workers.

Ironically, then, Fuller's dignitarian agenda for the workplace has an oddly hierarchical quality to it. There is no call for actual sharing of power or for formal mechanisms that protect employee expression rather than simply encourage it. Instead, the approval and implementation of dignitarian work practices remains largely in the hands of employers. This may be a more accurate picture of the typical American workplace than a labor relations model that assumes union participation in bargaining over work conditions. However, one might hope that Fuller would look deeper into the realpolitik of institutional power and offer suggestions for changing existing dynamics. If he did, he might find American workers eager to participate. An extensive survey on employees' attitudes about participation in the workplace conducted by Professors Richard Freeman and Joel Rogers showed strong support for greater employee voice and representation in an atmosphere of cooperative worker-management relationships. However, most workers believed "that management [was] unwilling to share power and authority with them." These findings suggest that if employees are given greater rights to participate and express themselves in the workplace, they will contribute in constructive and responsible ways.

B. Workplace Bullying

Drs. Gary and Ruth Namie, co-founders of the Workplace Bullying & Trauma Institute, have defined workplace bullying as the "repeated, malicious, health-endangering mistreatment of one employee . . . by one or more employees." This destructive phenomenon is only beginning to attract attention in the United States. Fuller is well ahead of the curve in identifying workplace bullying, particularly in the form of abusive supervision, as an obstacle to individual dignity. He places bullying at work squarely within his dignitarian framework, calling it "archetypal rankism," and suggesting that we may be "approaching a tipping point" in

47. See id. at 183.
49. See id. at 101-115 (describing America's slow recognition of workplace bullying). It is telling that much of the first generation of psychological and organizational behavior research on workplace bullying has come from other nations. See, e.g., Stale Einarson, et al., Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice (2003) (containing over a dozen chapters on various aspects of workplace bullying and abuse); Charlotte Rayner, et al., Workplace Bullying: What We Know, Who is to Blame, and What Can We Do? (2002) (examination of workplace bullying by U.K. management professors).
50. See Fuller, supra note 1, at 65-70.
terms of public understanding of the harm it can inflict.\textsuperscript{51} He summarizes several studies and examples of workplace bullying, ultimately concluding that there is "little doubt that abusive bosses are bad for both the health of workers and the bottom line of companies that employ them."\textsuperscript{52}

Fuller's proposed responses to workplace bullying do not contemplate a role for law and public policy. Instead, he recommends self-help measures such as achieving economic independence from oppressive institutions and directly addressing issues of workplace bullying when they occur.\textsuperscript{53} Because "rankism cannot be ended with more rankism," it is important "to protect the dignity of [the] tormenters while at the same time suggesting to them a way to treat others with respect."\textsuperscript{54}

These may be plausible responses in some cases, but here, too, Fuller overlooks some of the economic, legal, and institutional realities that confront workers subjected to bullying behaviors. First, the structure of the labor force in America is such that most of today's workers are "highly dependent upon others to provide, for payment, the necessities of life."\textsuperscript{55} Many workers simply are not in a position to become economically independent from employing entities. Second, the average American worker, hired on an at-will basis and not granted a legal right to freedom of speech within the workplace,\textsuperscript{56} is extremely vulnerable to retaliation or discharge for raising allegations of bullying, especially against supervisors.\textsuperscript{57} Finally, in the less common but often frightening situation where a workplace bully demonstrates sociopathic personality traits, normal methods of informal dispute resolution may only exacerbate the torment for the targeted employee.\textsuperscript{58} As discussed in part IV below, the law can play a valuable role in providing relief for victims of workplace bullying.

\textsuperscript{51} Id. at 65.
\textsuperscript{52} Id. at 70.
\textsuperscript{53} Id. at 67-68.
\textsuperscript{54} Id. at 68-69.
\textsuperscript{55} LEE BALLIET, SURVEY OF LABOR RELATIONS 1-2 (2d ed., 1987). \textit{But see} DANIEL PINK, \textit{FREE AGENT NATION: THE FUTURE OF WORKING FOR YOURSELF} (2001) (describing the growing number of people who are opting to work as "free agents" pursuing solo, temporary, and microbusiness careers).
\textsuperscript{56} \textit{See generally} Yamada, \textit{Voices From the Cubicle}, supra note 41, at 21-46 (analyzing potential sources of speech protection for private sector employees).
\textsuperscript{57} The inadequacy of legal protections for targets of workplace bullying is discussed in greater detail in Part IV below.
\textsuperscript{58} \textit{See} NAMIE & NAMIE, supra note 43, at 14-15 (stating that chronic bullies "are the most malevolent, mean-spirited, and nasty people at work" who "end careers and shatter the emotional lives of their targets"); \textit{see generally} MARTHA STOUT, \textit{THE SOCIOPATH NEXT DOOR} (2005) (examining, through case studies and discussion, the social implications of roughly four percent of the general population having no ability to feel guilt, shame, or remorse).
III.
EVALUATING ACADEMIC TENURE

Curiously, Fuller takes aim at academic tenure as being a manifestation of rankism in the workplace. Fuller claims that tenure protects professors from having to compete periodically for continued employment, and this lack of accountability "is a recipe for rankism." Furthermore, expensive and unproductive tenured professors block younger people from entering the academy by taking up precious faculty slots.

Fuller's attack on tenure goes awry for at least two reasons. First, the realities of the academic job market are more nuanced than the scenario posed by Fuller. In recent years many tenured positions have opened up due to faculty retirements, but academic administrators and boards of trustees, not tenured faculty, have responded by replacing many of the vacancies with low-paid adjunct faculty positions. Secondly, Fuller offers no evidence to support the implication that vast numbers of tenured professors are somehow failing to do their jobs. Instead, he applies reasoning similar to that used to discard mid-career workers in corporate America, arguing that older or more senior employees have become too expensive.

Ultimately, Fuller's criticisms of tenure reflect his somewhat paradoxical stance about hierarchy and distribution of power in the workplace, for removing tenure would return considerable authority to academic administrators and boards of directors. It is fair to speculate whether his points are grounded more in the frustrations of a former college president who had to deal with stubborn faculty than in a sound argument that tenure advances rankism in the academic workplace. A more dignitarian approach to changing higher education would be to address specific abuses of tenure and the power granted by that institutional status and to tackle aspects of academic culture and governance that are rife with

59. FULLER, supra note 1, at 70-73.
60. Id. at 71.
61. Id. at 70-71.
63. For a thoughtful defense of academic tenure, see THE CASE FOR TENURE (Matthew W. Finkin ed., 1996) (containing series of essays discussing the substantive and procedural protections afforded by tenure and attendant policy issues).
64. After all, in any vocation where pay rates and benefits generally increase with seniority, productive workers who have been on the job the longest normally will be earning the highest salaries or wages.
rankism and unnecessary hierarchy. In addition, we should seek ways to provide more workers in all vocations with tenure-like protections, including job security, freedom of expression, and healthy working conditions, in return for a job well done.

IV. A DIGNITARIAN AGENDA FOR AMERICAN EMPLOYMENT LAW

One of the critical distinctions between the employment context and many other settings relevant to Robert Fuller's dignitarian framework is that American law expressly embraces rank and hierarchy in the workplace. The predominant employment relationship in the United States is at-will employment, whereby an employee can be discharged for any reason or none at all. Various statutory, administrative, and common law provisions create incursions into the rule of at-will employment, but with the exception of laws governing collective bargaining, none address fundamental imbalances of power between employer and employee.

It is something of an old saw that fairness, decency, and civility cannot be legislated. In terms of the standard array of unremarkable interactions in the workplace, this is true. Most people would heartily agree that turning courts and enforcement agencies into arbiters of everyday behavior and decisions in the office or factory is a terrible idea. However, the law can play a very useful role in structuring workplace relations when the marketplace (of money or behavior) fails to provide just results. This is why law plays some type of regulatory role in so many aspects of the employment relationship.

Employee dignity, rankism, and hierarchy settle right along the fault line that separates what should be regulated from what should be left to the daily give and take of the workplace. Obviously the idea of an abstract law that requires employers to be "fair" to employees and workers to be "nice" to each other is absurd. However, when conduct becomes abusive and abusive.

65. Professor Julius Getman begins his thoughtful and provocative examination of status and meaning in academic life by explaining how his original hope that academe would provide "an opportunity for caring relations" and "a sense of community" was dashed by the reality of "hierarchical and competitive" institutional cultures. See JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION ix (1992). In addition, Professor Kenneth Westhues has done pioneering work on "mobbing" behaviors in academe that have resulted in the destruction of careers and lives of targeted professors. See generally KENNETH WESTHUES, ADMINISTRATIVE MOBBING AT THE UNIVERSITY OF TORONTO: THE TRIAL, DEGRADATION, AND DISMISSAL OF A PROFESSOR DURING THE PRESIDENCY OF J. ROBERT S. PRITCHARD (2004); WORKPLACE MOBBING IN ACADEME: REPORTS FROM TWENTY UNIVERSITIES (Kenneth Westhues ed., 2005).

hurtful, or if the scales of economic and institutional power are seriously out of balance, then the law should enter the picture. Regrettably, the current state of American employment law does not hold up to this standard. Accordingly, the forthcoming discussion attempts to set out the basic parameters of a dignitarian legal agenda for the workplace.

A. Contingent Workers

The contingent workforce, comprised of people in non-traditional work arrangements such as independent contractors, part-time hires, and temporary help staff, is a major manifestation of hierarchy and rankism in the workplace. The Commission on the Future of Worker-Management Relations (more commonly known as the Dunlop Commission) found in 1994 that contingent workers "are drawn disproportionately from the most vulnerable sectors of the workforce." These workers "often receive less pay and benefits than traditional full-time or 'permanent' workers" and are "less likely to benefit from the protections of labor and employment laws." In particular, "[t]he single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employers and independent contractors." A 2006 Government Accountability Office report echoes these concerns, finding that a "smaller proportion of contingent workers than of standard full-time workers has health insurance or pension benefits, or is protected by key workforce protection laws, including laws designed to ensure proper pay and safe, healthful, and nondiscriminatory workplaces."

Student interns, another part of the contingent workforce, are also frequently treated as non-employees. Although student interns commonly provide valuable assistance to employers, many are not paid for their labor, often in apparent violation of minimum wage laws. The fact that unpaid internships are popular in so-called glamour fields such as politics and entertainment creates an economic class divide between those who can

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67. There is a voluminous body of literature about the contingent workforce. For one of the first scholarly legal discussions, see Symposium, The Regulatory Future of Contingent Employment, 52 WASH. & LEE L. REV. 723 (1995). For a more general industrial relations perspective, see CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker & Kathleen Christensen eds., 1998).

68. COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT’ OF LABOR, REPORT AND RECOMMENDATIONS 61 (1994) [hereinafter DUNLOP COMMISSION REPORT].

69. Id.

70. Id. at 64.


73. See id. at 217-18 (describing the modern "intern economy" and the proliferation of unpaid internships), 224-38 (analyzing the legality of unpaid internships under federal minimum wage law).
afford to work for free and those who cannot. The absence of a paycheck can have disturbing collateral effects as well. For example, in O'Connor v. Davis, the Second Circuit Court of Appeals held that a student intern could not sue her internship employer for sexual harassment under Title VII of the Civil Rights Act of 1964 because her unpaid status did not meet the legal definition of employee under the statute.

In Fuller's language, the contingent workforce is a classic example of a "cycle of rankism begetting rankism." Already marginalized workers are further denied legal protections that are routinely extended to "regular" employees. Fortunately, there is no shortage of sound legal and policy reforms. Viable proposals include the adoption of an "economic realities test" that confers employee status upon workers who are economically dependent upon the hiring entities and legislative amendments that expressly cover independent contractors and student interns.

B. Income Fairness

As summarized above, Fuller frames issues of income fairness primarily by examining the income ratio between the highest and lowest paid workers at a company. This is a useful indicator for gauging whether an employer is socially responsible, but for a myriad of practical, political, and legal reasons, setting a maximum ratio by legislative fiat is not feasible. Instead, it is more helpful to look to Fuller's general call for compensation that allows a worker and his dependents "to live with dignity."

Raising and indexing the statutory minimum wage is one viable policy response towards this end. However, the minimum wage is so low that even raising it by a considerable percentage would still leave us at a rate that is utterly inadequate to sustain decent living conditions, especially in more expensive urban areas. Instead, the growing number of living wage

74. Id. at 218-19.
75. O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997). For a discussion of the court's decision, see Student Interns, supra note 72, at 240-44.
76. FULLER, supra note 1, at 175.
79. Student Interns, supra note 72, at 246-47.
80. FULLER, supra note 1, at 119.
82. Since 1997, the federal minimum wage has been $5.15. See History of Changes to the Minimum Wage Law, www.dol.gov/esa/minwage/coverage.htm.
ordinances and statutes serve as better examples of how public law can help to define a dignitarian version of a minimum wage. The very term living wage suggests the priority that should inform how we set a baseline level of compensation.

C. Job Security

Fuller calls for “dignity security” rather than job security, explaining that he favors “a fair chance to compete for any job for which I have the specified qualifications, and transitional support if I should need to find a new one.” In this context Fuller neglects to consider that dignity and peace of mind often go hand in hand, and that a modicum of job security can go a long way towards providing that peace of mind. For most people, transitional support is no substitute for the economic and psychological benefits of steady, ongoing employment. By contrast, job loss and subsequent periods of unemployment are a tremendous source of stress and anxiety, not only due to loss of income, but also because of the devastating impact on self-confidence and self-esteem.

Professor Clyde Summers has observed that America, “unlike almost every other industrialized country and many developing countries,” has adopted neither general protections against unfair dismissal nor minimum periods of notice. Currently Montana is the only state that provides just-cause protections against wrongful discharge through its statutory law. The leading proposal for reform is the Model Employment Termination Act, which attempts to balance the interests of employees and employers by providing good-cause protections and attorneys’ fees while imposing caps on recoverable damages.

Of course, legal protections against unfair discharge are not a panacea. After all, most employers do not engage in arbitrary firings of productive employees. Rather, for many workers, job security is most critical when a company’s financial condition raises the possibility of cutbacks and layoffs.

84. FULLER, supra note 1, at 119.
85. See LOUIS UCHITELLE, THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES 178-204 (2006) (assessing the emotional costs of layoffs). Uchitelle observed that during the early stages of researching his book, he did not expect to devote much attention to the “psychiatric aspect of layoffs,” but he found that the “emotional damage was too palpable to ignore.” Id. at 180. See also NICK KATES, ET. AL, THE PSYCHOSOCIAL IMPACT OF JOB LOSS 4 (1990) (observing that job loss or exclusion from the work force “can erode self-confidence and create practical difficulties that can be overwhelming”).
86. Summers, supra note 66, at 65.
In these situations, management practices and policies that emphasize job retention are one of the highest forms of applied dignitarian values. A truly dignitarian society should be appalled when companies, claiming financial exigency, downsize their workforces while providing generous salaries and bonuses to high-level executives. When layoffs are necessary, however, private and public transitional help should be generous and easy to access. Public policy should support adequate unemployment benefits, health insurance, and job training assistance for those who face unavoidable periods without work.

D. Freedom of Speech

Freedom of expression is one of the cornerstones of individual dignity, but few employees enjoy anything close to comprehensive, legally protected rights of free speech in their workplaces. Limited constitutional free speech protections extend to public employees. Private employees are generally excluded from claiming protection of constitutional speech guarantees. An uneven assortment of whistleblower provisions offers some protection against retaliation for reporting potential illegalities, statutory violations, and ethical breaches. Federal labor law protects individual speech only if it constitutes a form of concerted activity “for the purpose of... mutual aid or protection.” One state, Connecticut, has enacted a statute that provides speech protections to private employees that match those extended to public employees.

It is ironic that although employers and “best practices” gurus wax eloquent about the need for rank-and-file input and feedback, they voice little support for legally enforceable, comprehensive speech protections for workers. However, if free speech is treated as a privilege, subject to arbitrary withdrawal when its exercise becomes too uncomfortable, then it exists only at the pleasure of the hierarchical structures that choose to grant it. A better approach, and one that balances dignity and responsibility,

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89. See Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (holding that although public employees enjoy First Amendment protections when speaking as citizens on matters of public concern, such protections do not extend to situations where they are making statements pursuant to their official duties).

90. See Yamada, Voices From the Cubicle, supra note 41, at 22-35 (analyzing applicability of federal and state constitutional free speech clauses to private employees).

91. See id. at 39-41 (analyzing whistleblower provisions as a form of employee speech protection).


93. CONN. GEN. STAT. § 31-51Q; see Yamada, Voices From the Cubicle, supra note 41, at 41-44 (analyzing Connecticut statute).
would be to provide a general right of free speech for all employees, subject to reasonable time, place, and manner restrictions.94

E. Unions and Collective Bargaining

Unions provide collective power that can offset the rankism practiced by employers. Many years ago, economist John Kenneth Galbraith recognized that unions exercised “countervailing power” in the battle over division of profits with companies.95 Sadly, he more recently acknowledged that although “worker organization remains a major civilizing factor in modern economic life,” it is “not now a practical solution” for many workers, especially those in the service sector.96

While there are many reasons behind the numerical decline of organized labor, one of the major causes is the sophisticated and generously funded anti-union activity of many employers.97 Lack of government enforcement of labor protections is another significant cause. In 2000, Human Rights Watch, an international non-governmental organization, issued a report on labor rights in America concluding that “workers’ freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers’ rights.”98

Labor law reform and stronger enforcement of existing labor laws would be a positive step toward helping to grow a resurgent labor movement. One meaningful legislative response is the Employee Free Choice Act (“EFCA”),99 a proposed bill that provides for streamlined union selection by employees through the use of signed authorization cards instead of a lengthy election campaign,100 mandatory arbitration when a new union fails to negotiate an initial collective bargaining agreement,101 and enhanced penalties for unfair labor practices.102 Passage of EFCA would help offset the considerable resources devoted to defeating union organizing efforts and resisting collective bargaining.

94. See Yamada, Voices From the Cubicle, supra note 41, at 46-59 (outlining parameters of proposed free speech statute).
95. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM 137-38 (1952).
100. See id. § 2.
101. See id. § 3.
102. See id. § 4.
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F. Workplace Bullying

As discussed above, Fuller recognizes the terrible harms inflicted by workplace bullying, but his analysis does not consider the potential role of legal protections in responding to this destructive behavior. Too many targets of severe workplace bullying lack adequate recourse under the law.\(^\text{103}\) For example, the typical target of severe bullying has little chance of prevailing in an intentional infliction of emotional distress claim brought against co-employees or an employer.\(^\text{104}\) The absence of a clear path to liability also encourages employers to sidestep complaints about bullying, often relegating them to the category of "personality conflicts." This is in sharp contrast to the current state of sexual harassment law. In 1998, the U.S. Supreme Court held that employers could be held strictly liable for sexual harassment committed by a supervisor,\(^\text{105}\) resulting in a groundswell of employer activity to design and implement sexual harassment policies.\(^\text{106}\)

There are public policy measures that can respond to workplace bullying. One option is for states to enact the Healthy Workplace Bill, model anti-bullying legislation designed to provide redress to targets of severe workplace bullying who can demonstrate tangible harm and to encourage employers to act preventively and responsively with regard to these behaviors.\(^\text{107}\) Variations of the bill have been introduced (though not yet enacted) in some half dozen states since 2003, and interest in this type of legislation is growing.\(^\text{108}\) Another sound response is to address the bewildering array of private and public employee benefit programs,
including health insurance, workers' compensation, unemployment insurance, and disability benefits, that individually and collectively fail to provide an adequate safety net for people suffering from psychiatric illness induced or exacerbated by mistreatment at work.109

G. Employment Discrimination Law

Fuller’s belief that racism, sexism, and other expressions and attitudes of bias towards members of identity groups are types or manifestations of rankism110 carries great significance for our system of employment law. Employment discrimination laws provide a potential claim for harassment or other mistreatment on the basis of protected class status (typically race, color, national origin, sex, religion, age, or disability).111 However, harmful conduct that cannot be linked to protected class status, including many instances of workplace bullying, often falls through the cracks of available legal protections.

Even when issues of generic abuse of workers arise, protected class status remains the dominant framework used by American legal scholars to examine issues of harassment and mistreatment in the employment context.112 The diversity of identity groups in America and the nation’s often painful experiences with issues of difference are chief among the social and political factors behind an extensive body of civil rights law and accompanying legal commentary. Fuller’s suggestion that we regard status-based discrimination as “just” one of many forms of rankism may prove a hard sell to those who have invested themselves heavily in the important, ongoing struggle for civil rights.

This raises the question whether we are ready to have a respectful yet frank exchange about the relationship between generic mistreatment and status-based discrimination, including the difficult issue of what types of


110. FULLER, supra note 1, at 5-9 (discussing relationship of trait-based characteristics to societal hierarchies and distribution of power).


employee abuse may be “worse” than others or more deserving of attention from the legal system. Speaking as a proponent of both strong enforcement of employment discrimination statutes and the enactment of workplace bullying legislation, I do not think it necessary for any side to “win” a debate on these matters in order for everyone to move forward. In fact, there may be considerable opportunity to find common ground, as Fuller’s own account suggests. As recounted above, Fuller began to understand better the challenges facing people of color and women after he experienced life as a “nobody.” True social progress can occur when individuals and groups who have experienced mistreatment empathize with others’ struggles rather than dismiss them.

From a legal standpoint, even those groups covered by discrimination laws stand to benefit from more generic protections against workplace mistreatment. For example, professors Suzy Fox and Lamont Stallworth recently surveyed a racially diverse cohort of professionals, comprised of over 70% people of color, about workplace bullying. The respondents indicated widespread support for anti-bullying legislation. It is reasonable to assume that most, if not all, of the respondents were aware of the availability of discrimination law as a form of legal relief, yet they apparently understood that these protections do not cover all forms of mistreatment at work.

In any event, those of us who think, write, and teach about worker dignity and civil rights would benefit from considering how Fuller’s conception of rankism and discrimination relates to modern employment protections, and how all people subjected to abusive treatment at work can find meaningful protections in the law. Professor Catherine Fisk, writing about humiliation at work, diplomatically points us in this direction:

That is not to suggest that women and people of color do not suffer uniquely and encounter more humiliation at work. Rather, what I suggest is that the law has attended too little to all the ways in which people humiliate and are humiliated at work and to the question of which humiliations should be actionable for everyone.

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115. Id. at 396 tbl.5.

H. Other Important Issues

Many other employment matters not as closely related to topics addressed in *All Rise* are pertinent to articulating a comprehensive dignitarian legal agenda for the workplace. Employee privacy has become a major issue, especially with advancements in computer technology.\textsuperscript{117} Some employers continue to require compliance with demeaning or stereotypical appearance codes.\textsuperscript{118} Finally, a sad indicator of how far we have to go is that some workers are not allowed to use the restroom when the need arises.\textsuperscript{119}

Even in the absence of stronger legal protections and obligations, employers can incorporate dignitarian protections into their employee handbooks and policies in ways that may provide workers with contractual rights. During the 1980s, state courts began a trend of recognizing that substantive provisions of written employment policies and employee handbooks can be contractually enforceable.\textsuperscript{120} Employers may choose to include provisions covering subjects such as compensation, job security, and workplace bullying, thereby conferring contractual rights upon their workers. Although employers presumably could withdraw these rights, workers would be able to rely on them as contractual agreements while they remained in force.

IV. Conclusion

Robert Fuller has made an important, thoughtful contribution to the greater good by advancing a social framework built around dignity and by giving a name to the behaviors that constitute rankism. His characterization of rankism as an umbrella concept covering many of society’s “isms” is

\textsuperscript{117} See Matthew W. Finkin, *Information Technology and Workers’ Privacy: The United States Law*, 23 COMP. LAB. L. & POL’Y J. 471, 503 (2003) (concluding that “[f]or the most part, the federal and state legislatures have not considered the computerized monitoring of work or the computerization of databases . . . to raise any question meriting legislative attention”); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 676 (1996) (opining that “any meaningful protection of employee privacy requires limitation of an employer’s power to fire at will”).

\textsuperscript{118} See Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1146 (2006) (stating that requiring someone “to dress in a way that feels fundamentally contrary to his or her preferences is to ask him or her to project an inauthentic self”).

\textsuperscript{119} See Marc Linder & Ingrid Nygaard, *Void Where Prohibited*, 1 WORKINGUSA No. 4, 21 (Nov.–Dec. 1997) (reporting that “the denial of bathroom breaks to workers is not a problem out of a distant past,” but rather a current condition whereby “in many cases, workers have lost rest break protections in recent years as the drive for greater efficiency and productivity by employers has coincided with weakening government regulation and declining union power”).

intriguing and deserves our attention. In the employment context, Fuller makes the vital connection between individual dignity in general and conditions at work, and many of his recommendations for creating dignitarian workplaces are worthy of implementation. We can only hope that the critical issues he has raised begin to imprint themselves more firmly on our individual and collective psyches. The time is surely ripe for a dignitarian movement, and the workplace should be one of its starting points.

As this process unfolds, let us also urge Fuller to continue the hard thinking necessary to develop practical responses to the hurtful behaviors he so insightfully identifies. In terms of the workplace, he should look much more closely at the realities of institutional power distribution and consider the role of the law in governing the employment relationship. Those realities instruct us that rankism, employee abuse, and unnecessary hierarchy in the workplace cannot be addressed solely by voluntary management practices and a small number of workers who risk retaliation by speaking out. This Essay has offered the rudiments of a dignitarian legal agenda for the workplace that would further Fuller’s important cause. If American employment law does not affirm the dignity of workers, then the quest for a dignitarian society will prove an elusive one.