COWORKERS IN LAW

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Like "in laws" in the family, coworker relationships are "in law" in that they are created by a legal relationship—the one between employer and employee—but coworker relationships themselves are not recognized in law. This Article critiques the legal status of coworkers by arguing that coworkers are at the heart of work life and work law, that work law fails, and indeed undermines its own purposes, in its blindness to this important reality, and that coworkers must be "in law" to fulfill the goals of work law.

While scholars have focused on the tensions between labor law and employment law, this Article unites work law under a relational theory that highlights the central role of coworkers to the success of work law. Coworker social bonds provide support that enhances employee leverage, promotes collective action, facilitates worker voice to register complaints, and even prevents legal violations from occurring in the first place. In this way, coworkers are instrumental to achieving the equal, fair, and safe workplace that work law envisions. But the law's blindness to coworker relationships limits workers' ability to harness the power of these bonds. Across a wide swath of doctrines—from unit determinations, to discrimination, to retaliation, and beyond—work law erects barriers to coworker bonding, discourages the exchange of coworker support, and permits employers to rupture coworker bonds. This means, for example, that employees are without standing to complain that discrimination harmed coworker bonds, and that employers can fire workers who support their coworkers.

This Article proposes a new relationship model—a law of limited-purpose support—that would recognize coworker bonds. This model would take a two-pronged approach. First, time-tested doctrines would be adapted to the reality of coworker relationships. So, for example, in assessing standing under antidiscrimination law, coworker bonds would count among the interests the law protects. Second, coworker bonds would enjoy new protections, such as a blanket protection against retaliation when coworkers exchange work-related support. Under the law of limited-purpose support, coworker bonds could fulfill their promise of achieving a better workplace.

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[*] For helpful conversations and comments, I thank Michael Abramowicz, Naomi Cahn, Tom Colby, Marion Crain, Charlie Craver, David Fontana, Phyllis Goldfarb, Emily Hammond, Chip Lupu, Laura Rosenbury, Mike Selmi, Roger Trangsrud, and the George Washington University Mount Vernon Fellows Workshop. For excellent research assistance, I thank Trisha Pande.

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INTRODUCTION

Although the "in law" relationship has often been the butt of a joke,[1] the term "in law," as its name might suggest, has deeper significance for law. We refer to a family relationship as "in law" when it exists as a product of a primary relationship created and regulated by law—marriage—even though this secondary relationship—the one "in law"—is not recognized or regulated by law. We might expand this definition of "in law" to denote *any* relationship once removed from law in this way. Coworkers are one such relationship. The coworker relationship exists by virtue of a legal relationship between an employee and employer—a relationship, that, like marriage, is created and regulated by law—but is once removed from that relationship. When more than one employee enters into an employment relationship with the same employer, these employees become coworkers. But the coworker relationship itself is not recognized or regulated by law.

This Article critiques this legal status of coworkers. It argues that coworkers are central to work life and work law, that work law fails, and indeed undermines its own purposes, in its blindness to this important reality, and that work law must be reformed to recognize this reality. So while my initial reliance on coworkers "in law" was descriptive, I also rely on coworkers "in law" in a prescriptive sense: that coworker relationships must be recognized in law for work law to achieve its goals. In pursuing the first study of work law through the lens of coworker relationships, this Article makes two contributions, both positive and normative, to the law of work.[2]

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[1] In-law jokes have a long history. The earliest known reference is from the first century AD, when the Roman poet Juvenal wrote: "It is impossible to be happy while one's mother-in-law is still alive." JUVENAL, SATIRE VI 145 (Lindsay Watson & Patricia Watson eds., Cambridge Univ. Press 2014). Recently, a greater sensitivity about in-law humor is evident. One London Borough Council warned its employees that "mother-in-law jokes, as well as offensively sexist in their own right, can also be seen as offensive on the grounds that they disrespect elders or parents." *Council Outlaws Mother-in-Law Jokes*, THE TELEGRAPH (Sept. 26, 2010, 5:01 PM), http://www.telegraph.co.uk/news/newstopics/howaboutthat/8026003/Council-outlaws-mother-in-law-jokes.html.

[2] Other scholars have recognized limited ways in which coworker relationships matter in work law and limited ways in which work law fails to recognize the importance of coworker bonds. *See* Laura Rosenbury, *Working Relationships*, 35 WASH. U. J. L. & POL'Y 117, 138-41 (2011) (recognizing importance of coworker support and arguing that employment discrimination law should interrogate it); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2189 (2003) (recognizing importance of coworker bonds and arguing that sexual harassment law limits bonding), Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intragroup Solidarity*, 77 IND. L.J. 63, 69-78 (2002) (recognizing the role that coworkers can play in promoting or preventing

As a positive matter, this Article unifies the law of work under a relational theory, with coworker bonds at the center. The law of the workplace has been divided into separate fields of employment law and labor law, whose ends and means have been viewed as fundamentally at odds, with employment law the realm of individual rights, and labor law the realm of collective action.[3] Scholars have been preoccupied with the tensions and tradeoffs between these two areas of law. According to the dominant view, the rise of employment law, with its focus on individual rights, undermines the collective approach of labor law, and is responsible for labor law's demise.[4] Other scholars have recognized that employment law can promote collective action, what has been called "employment law as labor law."[5] But under this view, when employment law supports collective action, it stands in for labor law; collective action is not part of employment law *qua* employment law, which retains its individual focus.

This Article reconfigures the relationship between labor law and employment law. Relying on a rich social science literature on the role of coworker relationships in the workplace, the Article makes the case that coworker bonds are integral to the success of both fields of law. Coworker bonds generate solidarity and support critical to achieving the aims of work law: a more equal, fair, and safe workplace that levels the playing field between employee and employer.[6] Under this view, rather than being

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discrimination and harassment); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 837-38 (1989) (critiquing aspects of labor law for failing to understand coworker altruism). But scholars have missed as a positive matter the pervasive extent to which coworker bonds matter to work law, and as a normative matter the pervasive extent to which work law nonetheless undermines these bonds.

[3] *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 577 (1992) (arguing that there is a "tension between the new individual employment rights and the New Deal system of collective bargaining"); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 329 (2005) (blaming employment law for "foreshadow[ing] the eclipse . . . of the centrality of collective action altogether"); James Brudney *The Changing Workplace: Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (2004) (blaming employment law for "undermining the concept of group action" central to labor law); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 375–77 (2002) (indicating that unionism is a poor fit with rugged individualism of American folklore).

[4] *See* sources cited *supra* note 3.

[5] *See* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 48, 172 (2013); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2686, 2686 (2008); Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE 561, 585-91 (2014).

[6] *See* National Labor Relations Act, 29 U.S.C. § 151 (aiming to eliminate "the harmful

fundamentally at odds, labor law and employment law have the potential to be mutually reinforcing.

As for labor law, the solidarity and support generated by coworkers' social bonds are essential to generating both formal and informal collective action, which labor law takes as its goal.[7] Coworker bonds are equally important to employment law. The enforcement of employment law requires the effective exercise of employee voice.[8] But because employees are typically in a weak bargaining position and fear retaliation, they require support from coworkers to exercise voice.[9] In addition to emotional support that can spur employees to come forward, coworkers provide informational support essential to evaluating possible violations, and instrumental support essential to substantiating claims to employers and courts.[10] Moreover, coworker bonds not only facilitate employee voice, but reduce the incidence of violations in the first place.[11]

Yet, under current law, coworker bonds cannot fulfill their promise. Coworker bonds thus not only unite the field of work law but also serve as a tool of critique, this Article's second, normative contribution. The law's cabining of supportive relationships to the family means that work law does not adequately recognize or protect coworker relationships or the solidarity and support they generate, as confirmed by a number of recent Supreme Court decisions.[12] This not only does damage to the goals of work law, but

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consequences of [t]he inequality of bargaining power between employees . . . and employers"); Fair Labor Standards Act, 29 U.S.C. § 202 (aiming "to eliminate . . . labor conditions detrimental to the health, efficiency, and general well-being of workers"); Occupational Safety and Health Act, 29 U.S.C. § 651 (aiming "to assure . . . safe and healthful working conditions"); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (explaining that employment discrimination law aims to "achieve equality of employment opportunities").

[7] *See* 29 U.S.C. § 151 (aiming to "encourage[e] the practice and procedure of collective bargaining"); *infra* Part I.B.1.

[8] I rely on the exit/voice framework from the seminal work on group behavior, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). Under this framework, members of an organization have two responses to dissatisfaction with the organization—exit or voice—with loyalty to the organization mediating the choice between the two. While Hirschman used labor unions as an example of voice, this Article highlights voice as critical across all of work law. See *infra* note 34.

[9] *See infra* Part I.B.2.a.

[10] *See infra* Part I.B.2.b.

[11] *See* Amy Blackstone, et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 L. & SOC'Y REV. 631, 635 (2009) (collecting studies finding that the presence of coworker bonds is associated with lower incidence of discrimination).

[12] *See* Thompson v. N. Am. Stainless, 131 S. Ct. 863 (2011) (privileging family over coworker relationships); Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 555 U.S. 271, 280 (2009) (Alito, J., concurring) (ignoring significance of coworker support); *infra* Parts II.C.3 and II.D.3.

also reinforces the family-market divide, which does damage to the goal of gender equality.

Work law's blindness to coworker bonds operates across a wide swath of doctrines by virtue of three mechanisms. First, work law undermines coworker solidarity by erecting barriers to coworker bonding. For example, work law places undue restrictions on who can come together to bargain collectively,[13] while at the same time providing no general protection against workplace harassment, which undermines the formation of coworker bonds.[14] Second, work law fails to value coworker support by allowing employers to fire workers who seek support from or provide support to their coworkers. So despite retaliation bans for complaining of unlawful activity, workers who provide support to coworkers that is instrumental to these complaints can be terminated for doing so.[15] Finally, work law ignores coworker bonds by allowing employers to rupture these valuable relationships with near impunity. For instance, an employee who complains that discrimination has harmed her coworker relationships has no cause of action because "harmonious working relationships" is not an interest protected by antidiscrimination law.[16]

This Article proposes a new path forward: a law of limited-purpose support relationships. Such a law would recognize that critical support in particular domains arises outside the family and would protect the relationships that provide this support. Importantly, regulation here would be distinct from the regulation of the family, and tailored to protect the unique value of these relationships. A law of limited-purpose support relationships requires a two-pronged approach. First, courts would adapt time-tested work law doctrines to the reality of coworker relationships. So, for example, in assessing standing to bring an employment discrimination claim, coworker bonds should be included as an interest that the law seeks to protect. Second, new law would encourage employers to value coworker bonds. For example, a law of limited-purpose coworker support would include a blanket protection against retaliation when coworkers engage in work-related supportive behavior.

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[13] *See, e.g.*, The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 N.L.R.B. No. 11 (2014) (ignoring coworker bonds in generating a "commonality of interest" that would support a bargaining unit).

[14] *See, e.g.*, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (emphasizing that unlawful hostile work environment must be hostile on the basis of a protected trait).

[15] *See, e.g.*, Jordan v. Alt. Res. Corp., 458 F.3d 332 (4th Cir. 2006) (allowing termination under employment discrimination law after employee sought support from coworkers for racial slur); IBM Corp., 341 N.L.R.B. 1288 (2004) (allowing termination for exchange of coworker support under labor law).

[16] *E.g.*, Jackson v. Deen, 959 F. Supp. 2d 1346, 1350 (S.D. Ga. 2013).

This Article proceeds in three parts. Part I sets forth a relational theory of work law, which argues that coworker bonds are central to work law's success. Part II catalogues how work law undermines coworker bonds, and discusses the consequences for the relationship between labor law and employment law, and between the law of the family and the law of the market. Part III sets forth a new way to recognize supportive relationships outside of the family—a law of limited-purpose support—that would appreciate the importance of coworker bonds throughout work law.

I. A RELATIONAL THEORY OF WORK LAW

The essential role of coworker relationships to the success of work law provides a unifying thread to the regulation of the workplace. This Part presents a relational theory of work law explaining why this is so. It begins with a discussion of how coworkers are central to work life, and describes how working together builds bonds that change our behavior from arms-length conduct associated with the market, to altruistic conduct associated with the family. It then explains how these bonds and the behavior they generate are essential to the enforcement of work rights. Beginning with labor law, this Part sets forth how coworkers are necessary for the solidarity and support on which the regime of collective action is premised. This Part then makes the case that employment law is not as individual as it has long seemed, and that coworkers are critical for its enforcement. This Part concludes by recognizing that sometimes coworker relationships are not so rosy, and incorporates this into the theory.

A. Coworkers as Central to Work Life

Work has long been identified as a source of strong social bonds, which generate behaviors more consistent with the protocols of the family than the market.[17] Strongly bonded coworkers act altruistically, considering each other's interests as much as or more than simple dollars and cents.[18] A

[17] *See* Brian Uzzi, *The Sources and Consequences of Embeddedness for the Economic Performance of Organizations: The Network Effect*, 61 AM. SOC. REV. 674, 675-82 (1996) (documenting and explaining the protocols of close work relationships); VIVIANA ZELIZER, ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY 242-44 (2010) (highlighting the prevalence of close relationships between coworkers and the personal nature of their behavior); Gail M. McGuire, *Intimate Work: A Typology of the Social Support That Workers Provide to Their Network Members*, 34 WORK & OCCUPATIONS 125, 131-32 (2007) (same). Note that the literature generally distinguishes between strong ties and weak ties; I rely here on strong ties and the more robust support behaviors they generate. *See* Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973).

[18] *See* George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON.

classic study of coworker altruism comes from a case of "cash posters," utility company workers who record customers' payments.[19] Some of these workers significantly exceeded the minimum standards of the firm, while some fell far below it. Yet few of the high-performing workers desired or expected a raise or promotion—behavior that could not be squared with the model of a rational self-interested actor. Nobel Laureate George Akerlof explained the behavior as a product of altruism motivated by coworker bonds: "in their interaction workers acquire sentiment for each other . . . . If workers have an interest in the welfare of their coworkers, they gain utility if the firm relaxes pressure on the workers who are hard pressed; in return for reducing such pressure, better workers are often willing to work harder."[20]

Coworker altruism generates three forms of coworker support: emotional, informational, and instrumental.[21] Outside of the family, the emotional support we receive from coworkers is arguably the most significant source of support for working Americans.[22] Emotional support from coworkers can apply to subjects ranging from trouble at work to divorce, illness, and death.[23] Coworkers also convey sensitive information to each other, helping one another find out about promotions, performance complaints, and potential layoffs, as well as offering feedback on work problems.[24] Finally, instrumental support comes in the form of additional

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543, 550 (1982) (explaining how workers give up economic rewards out of sentiment for coworkers); Rebekah Peeples Massengill, *"The Money is Just Immaterial": Relationality on the Retail Shop Floor*, 18 RES. SOC. WORK 185, 197-98 (2009) (documenting how workers view coworker relationships as just as if not more important than money). Consider the remarks of one firefighter: "It's hard to describe the closeness that you felt with the guys in the fire house . . . When the bells hit, nobody would do any more good for you than a fireman. It's a group of men with a unique brotherhood feeling—they'll never let you down." Randy Hodson, *Individual Voice on the Shop Floor: The Role of Unions*, 75 SOC. FORCES 1183, 1206 (1997).

The question of whether any behavior can be genuinely altruistic because the altruistic actor derives utility from her altruism is one that need not trouble readers. My purpose is simply to highlight actions that, on their surface, appear contrary to the interests of the rational self-interested actor envisioned in work law. For more on altruism in law, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), and on the broader philosophical question about altruism, see THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

[19] Akerlof, *supra* note 18, at 543.

[20] *Id.* at 543, 550.

[21] *See* PATRICIA SIAS, ORGANIZING RELATIONSHIPS 60 (2009).

[22] *See* ZELIZER, *supra* note 17, at 242-44 (collecting studies); Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-Workers*, 72 SOC. FORCES 850 (1994) (collecting studies).

[23] *See* McGuire, *supra* note 17, at 131-32.

[24] *See id.*; Scott E. Seibert, et al., *A Social Capital Theory of Career Success*, 44 ACAD.

work that coworkers do for each other.[25] This additional work typically involves "extra-role behavior": discretionary behavior that is not directly or explicitly recognized by the formal reward system, but that nonetheless promotes the effective functioning of the organization.[26] Because of the support that coworkers provide, these relationships increase productivity and enhance performance.[27] Indeed, "[w]ithout such close personal ties, we can infer, many workplaces, far from operating more efficiently, would actually collapse."[28]

While family provides support that confers work benefits,[29] coworkers can offer support in ways that family cannot.[30] Coworkers have unique access to information that makes it easier to provide work-related support. For example, a worker who seeks advice about how to deal with a shared supervisor can get an insider perspective and tailored advice from a coworker. And some of the support comes in forms that only coworkers can provide, for example, the donation of unused leave days, or, as the cash posters displayed, picking up a coworker's slack.[31] The support that coworkers provide is also unique from family intimacy in another way. Strong coworker ties means that work can offer the riches of intimacy—stress release, playfulness, humor, affection, and even flirtation or sex—but without the unending demands of the family that can reduce the pleasure of intimacy derived there, especially for women.[32]

MGMT. J. 219, 221-24 (2001).

[25] *See* John R. Deckop et al., *Getting More than You Pay for; Organizational Citizen Behavior and Pay-for-Performance Plans*, 42 ACAD. MGMT. J. 420, 420 (1999). For an overview of the literature, see KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 94-96 (2005).

[26] *See* STONE, *supra* note 25, at 95.

[27] *See* Jason D. Shaw, et al., *Turnover, Social Capital Losses, and Performance*, 48 ACAD. MGMT. J. 594, 595 (2005) (collecting citations). For a discussion of the gendered distribution of support and its implications, see *infra* Part II.E.2.

[28] ZELIZER, *supra* note 17, at 250.

[29] *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 110-11 (2d ed. 1993) (documenting how wives provide child care, host business clients, and provide other work support for husbands).

[30] *See* SIAS, *supra* note 21, at 70 ("Peers offer a unique type of support—support that a family member cannot provide with the same knowledge and understanding and, in fact, when faced with a work-related problem, employees often turn to peers first for support."); Srinika Jayaratne & Wayne A. Chess, *The Effects of Emotional Support on Perceived Job Stress and Strain*, 20 J. APP. BEH. SCI. 141, 143 (1984) (collecting studies finding that coworker support is more important than outside support for mediating job stress and strain).

[31] *See* ZELIZER, *supra* note 17, at 246.

[32] *See* ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 40-44 (1997).

B. Coworkers as Central to Work Law

Because the employment contract is so essential to employee's well-being, and because employees tend to be in a weak bargaining position, the law subjects the employment contract to special regulation.[33] The law of the workplace contains two models for protecting the employment relationship: employment law and labor law. Employment law's statutory protections create a floor below which the employment contract cannot drop. These include minimum wage and overtime guarantees, bans on discrimination, safety and health standards, unemployment insurance, and so on. Labor law, on the other hand, embodies a model of collective action to bargain for protections beyond legal floors.

Despite the different strategies of labor and employment law, coworker bonds play a critical role in achieving the aims of both areas of law. Work law relies on workers exercising voice—both to employers and to legal actors such as agencies and courts—to gain and enforce its protections.[34] But the same weak bargaining position that leads employees to need protection in the first place also makes it difficult for employees to exercise voice, even with the protection of work law. Coworkers, and their supportive behaviors, buoy the exercise of worker voice that is essential for protections under both labor and employment law. This Section explains how this is so, discussing these fields of law in turn.

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[33] *See generally* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (explaining that work law attempts to address this inequality of bargaining power but does not do enough to do so).

[34] In Hirchman's exit-voice-loyalty framework, *see supra* note 8, workers typically prefer voice to exit because of loyalty to the firm, generated by coworker bonds, employer loyalty strategies, the steep costs of exit in light of firm-specific investments, and the lack of alternative employment opportunities. *See* Richard Freeman, *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, 94 Q. J. ECON. 643 (1980). Exercising voice within the firm, "[b]y speaking up to those who occupy positions that are hierarchically higher than their own," allows employees "to help stem illegal and immoral behavior, address mistreatment or injustice, and bring problems and opportunities for improvement to the attention of those who can authorize action." James R. Detert & Amy C. Edmonson, *Implicit Voice Theories: Taken-for-Granted Rules of Self-Censorship at Work*, 54 ACAD. MGMT. J. 461, 461 (2011). I use the notion of voice more expansively, to cover both complaints made to an employer while an employee is still employed, as well as complaints made to an agency or court about the employer, whether or not the employee remains employed (as complaints from former employees often result from discharge or constructive discharge, which we might think of as involuntary exit, and seek reinstatement).

1. Labor Law

Labor law aims to promote collective coworker action to level the playing field between the employee and the employer.[35] Even though labor law is premised on collective action, much labor law scholarship still presumes that collective action turns on a self-interested "logic."[36] But coworker bonds and the support they generate are essential to collective action at work.[37]

Solidarity—the "mix of love, empathy, and commitment to principle" that leads workers to "feel together" such that "an injury to one is seen as an injury to all"[38]—has been identified as a necessary predicate for collective labor activity.[39] Beginning as early as Marx, scholars of the workplace have recognized that bonds between coworkers generate the solidarity that serves as a foundation for collective labor activity.[40] Indeed, solidarity has been shown to be more a product of informal coworker social attachments than of labor unions or their organizing efforts.[41] Social interaction that

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[35] 29 U.S.C. § 151 (because of the harmful consequences of "[t]he inequality of bargaining power between employees, who do not possess full freedom of association or actual liberty of contract, and employers[,] . . . "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

[36] The classic text, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1960), focuses on private economic gains as the basis for collective action. For an application to labor law, see Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996). Notable exceptions include Fischl, *supra* note 2, and Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 273 (2012).

[37] Eric L. Hirsch, *The Creation of Political Solidarity in Social Movement Organizations*, 27 SOC. Q. 373, 374 (1986); David A. Snow, et al., *Social Networks and Social Movements: A Microstructural Approach to Differential Recruitment*, 45 AM. SOC. REV. 787, 790-92 (1980).

[38] Marion Crain, *Arm's Length Intimacy: Employment as Relationship*, 35 WASH. U. J. LAW & POL'Y 163, 202-03 (2011).

[39] *See, e.g.*, Randy Hodson, et al., *Is Worker Solidarity Undermined by Autonomy and Participation? Patterns from the Ethnographic Literature*, 58 AM. SOC. REV. 398, 398 (1993).

[40] *See* Douglas E. Booth, *Collective Action, Marx's Class Theory, and the Union Movement*, 12 J. ECON. ISSUES 163, 167-68 (1978) (explaining that Marx grounded collective worker consciousness in the fact of coworker relationships that allowed workers to come together out of isolation); Hodson, *supra*, note 39, at 399 (describing solidarity as including elements friendship, shared meanings, and shared norms).

[41] Rick Grannis, et al., *Working Connections: Shop Floor Networks and Union*

takes place both at work and at off-site locations like the local bar build the cohesion and mutuality that form the basis for solidarity.[42] It is not just the formation of coworker bonds, but the maintenance of these bonds that is important for solidarity.[43] Workplaces with personnel stability provide a foundation of stable coworker ties to support solidarity and collective action, whereas high turnover leaves little opportunity for workers to develop the bonds necessary for solidarity.[44]

Not only are coworker bonds a predicate to the solidarity necessary for collective employee activity, but coworker bonds have been specifically linked to all three forms of collective activity that labor law seeks to promote: informal collective activity, union representation, and formal collective activity, such as collective bargaining and striking.[45]

First, coworker bonds generate informal collective action. Bonds of association and fellowship lead coworkers to act in mutual defense: workers stand up for each other, putting themselves at risk.[46] For example, when workers are upset by management's disciplining of a coworker friend, they act in support of their friend, while also challenging managerial prerogatives.[47] In one classic study, department store workers supported their struggling co-worker friend by contributing to her clothing budget, her lunch, her insurance premiums, and a vacation fund, and also sought a raise for her, in defiance of management. After a manager forced the return of

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Leadership, 51 SOC. PERSPS. 649, 651 (2008) (explaining that "the structures of informal social networks in workgroups create a social fabric that simultaneously forms the basis for labor solidarity"); Marc Dixon, et al., *Unions, Solidarity, and Striking*, 83 SOCIAL FORCES 3, 7-9 (2004) (noting how developing bonds with coworkers in informal work groups generate solidarity); Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Reversal*, 25 ANN. REV. SOC. 95, 111 (1999) (same).

[42] *See* RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACT, AND CONTEMPORARY AMERICAN WORKERS 10 n.24, 137 (1988) (explaining how coming together in bonds of coworker friendship "creates other directedness and mutuality" and builds solidarity); Hodson, *supra* note 18, at 1198 (describing how "the willingness of workers to put themselves at risk to defend fellow workers" defines solidarity).

[43] *See* Hodson, *supra* note 39, at 400.

[44] *See id.*

[45] 29 U.S.C. § 151 (guaranteeing "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

[46] *See* Dixon, et al., *supra* note 41, at 12-13; Hodson, *supra* note 18, at 1196.

[47] *See* ZELIZER, *supra* note 17, at 246. Examples of friendship-generated informal collective activity abound in ethnographies of the workplace. For example, in an open pit mine, a truck driver was suspended for refusing to drive a truck whose tires the driver considered unsafe. The driver's friends went on strike for a week to demand the man's reinstatement. *See* Hodson, *supra* note 18, at 1196.

the contributions, the workers collected them again.[48] Informal collective action matters not only as an independent goal of labor law,[49] but also helps to achieve the other goals of labor law: union representation and formal collective action.[50]

Coworker friendship and the solidarity it generates are also important for union representation. Multiple studies of factors that affect the outcome of union organizing campaigns cite the existence of coworker bonds as a critical component of successful campaigns.[51] Friendship not only lays the groundwork for mutual defense that plants the seeds for unionization, but provides a network of bonded coworkers that facilitate communication of sensitive union information during a campaign.[52]

Once a union wins the right to represent workers, coworker friendship reinforces union strength by transmitting values of unionism and loyalty to the union. One study documents how union stewards at a particular plant were friends, met regularly, ate meals together, and drank together after meetings.[53] When inculcating newcomers into union values or at times of crisis, they joked and told stories about the plant and the early days when it was first unionized.[54]

Coworker bonds likewise are important for effective yet democratic

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[48] ZELIZER, *supra* note 17, at 246.

[49] *See* Fresh & Easy Neighborhood Market, 361 N.L.R.B. no. 12 (2014) (referencing the "solidarity principle" of NLRA: "[t]hat in enacting Section 7, Congress created a framework for employees to 'band together' in solidarity to address their terms and conditions of employment with their employer").

[50] *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989) (explaining the "nexus between unstructured concerted activity and more formalized union activity" as "central to the legislative intent embedded in Section 7"); Hodson, *supra* note 18, at 1186 (explaining how informal collective activity helps to bring about formal collective activity by cultivating an "us v. them" dynamic, and by teaching workers that they cannot realize their goals individually, by providing workers with the experience and confidence to engage in more organized forms of collective action).

[51] *See, e.g.*, H. DELGADO, NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES 49-55 (1993) (documenting how the successful organizing campaign of Latino manufacturing workers depended on the creation of community, especially through drinking and soccer games); Ruth Milkman & Kent Wong, *Organizing the Wicked City: The 1992 Southern California Drywall Strike*, *in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 169 (Ruth Milkman, ed. 2000) (documenting how the successful organizing campaign of drywallers turned on the solidarity generated by their social cohesion and friendship).

[52] *See* Granovetter, *supra* note 17, at 1363 (explaining how strong ties transmit sensitive information).

[53] *See* Hodson, *supra* note 18, at 1203-04 ("In handling the present, men call upon the past for guidance. The lessons of the past are learned and handed on as stories.").

[54] *Id.*

union leadership. On the one hand, "[i]n an industrial capitalist society, labor unions represent the best opportunity for workers to democratically exert a measure of control over their workplaces."[55] On the other hand, to be effective, unions must "mobilize disciplined collective action on the part of its members."[56] This requires leaders who can command loyalty from rank-and-file employees, which can run counter to their role as democratic representatives. Coworker friendship resolves this tension. Social networks form the basis for labor solidarity *and* engender the emergence of leaders from within the ranks. Workers' preferences are transmitted to leaders through friendships that develop in the workplace, and members' confidence in a fellow member's ability to represent them effectively is built through social networks.[57] Coworker bonds thus allow unions to simultaneously be a "town hall" democratically representing workers, as well as an "army" that can effectively mobilize them.[58]

Finally, coworker bonds are linked to the third key form of collective activity that labor law seeks to promote: formal collective action. Higher levels of solidarity within a union are linked with a higher likelihood of that union striking.[59] This is because friendship networks in the workplace provide a mechanism for the development and implementation of collective union strategies.[60]

2. Employment Law

Employment law provides minimum employment standards enforced through a mix of public and private mechanisms. To make the discussion here tractable, I focus on three substantial and representative sources of employment law:[61] antidiscrimination law,[62] wage-and-hour law,[63] and

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[55] Grannis et al., *supra* note 41, at 654.

[56] *Id.*

[57] *Id.* at 651.

[58] *Id.*

[59] *See* Vincent J. Roscigno & Randy Hodson, *The Organizational and Social Foundations of Worker Resistance*, 69 AM. SOC. REV. 14, 14 (2004).

[60] *See id.*

[61] These laws cover a range of concerns and also run the spectrum from more or less reliance on private enforcement. *See* Estlund, *supra* note 2, at 396 n.290 (placing OSHA on the public end of the spectrum, Title VII on the private end, and FLSA in the middle, but with movement towards private enforcement); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998) (highlighting shift towards private enforcement of Title VII).

[62] Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (2006); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006).

[63] Fair Labor Standards Act, 29 U.S.C. §§ 201-09 (2006).

safety-and-health law.[64] Respectively, these laws aim "to achieve equality of employment opportunities";[65] "to eliminate . . . labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers";[66] and "to assure . . . every working man and women safe and healthful working conditions."[67]

While employment law is typically contrasted with labor law for its focus on individual rights, collective action and the coworker bonds that support it are just as essential to employment law. Employment law is meant to correct employees' weak bargaining position with statutory protections, but the weakness the law is meant to correct also limits the exercise of voice necessary for employment law's enforcement. In the face of this weakness, coworker bonds facilitate employee voice and strengthen employees' bargaining position so as to reduce rights violations from occurring in the first place.

a. Why relationships matter for employment law

Employee voice to register complaints is essential to the enforcement of employment law, regardless of whether enforcement is accomplished by an agency or through a private right of action. The agencies that enforce employment law are notoriously weak and understaffed.[68] Where they are permitted, private suits have come increasingly to pick up this slack.[69] Combined with agencies' resource constraints, employees, as compared with regulators, typically have better access to the information necessary for enforcement.[70] So even when agencies do take action, it is often after employees have alerted them to a problem.[71]

The role of employee voice is even easier to see when it comes to private enforcement mechanisms, where it is necessary to raise a legal violation. Beyond the obvious need to complain either to an agency or

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[64] Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (2006).

[65] Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

[66] 29 U.S.C. § 202.

[67] *Id.* § 651.

[68] *See* Estlund, *supra* note 2, at 330, 360 n.186 (characterizing public enforcement of wage-and-hour law and health-and-safety law as weak and noting that the tiny number of OSHA inspectors means that an employer can expect a visit only once every 107 years); Selmi, *supra* note 61, at 1403 (characterizing public enforcement of antidiscrimination law as weak in ambition of theories and damages pursued).

[69] *See* Estlund, *supra* note 2, at 360; Selmi, *supra* note 61, at 1401. Private suits are permitted to enforce wage-and-hour law and antidiscrimination law, but not occupational-safety-and-health law.

[70] *See* Estlund, *supra* note 2, at 324 & nn.140-62.

[71] *See id.* at 361 n.194 (noting that the DOL relies on employee complaints for its enforcement of the FLSA).

court to raise a violation, employment law sometimes requires specific forms of employee voice to take advantage of its protections. Antidiscrimination law requires employees to ask employers for a reasonable accommodation for a disability,[72] as well as to report a sexually or racially hostile work environment through the employer's internal grievance procedure.[73]

But wronged employees do not always exercise voice. Complaining requires "legal consciousness"—framing one's experience as a legal wrong, and formulating a response.[74] Even when legal consciousness is stirred, employees fear retaliation for their complaints, and current protections against retaliation are insufficient to overcome this muzzle to worker voice.[75] First, existing retaliation protections are quite narrow, and kick in only once employees reasonably believe there has been a legal violation.[76]

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[72] *See* 29 C.F.R. § 1630.2(o)(3) (setting forth "interactive process").

[73] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (providing affirmative defense to escape liability so long as employer "exercise[s] reasonable care to prevent and correct promptly" the harassment, and the employee "unreasonably failed to advantage of any preventative or corrective opportunities provided by the employer"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (same). Employers generally establish the defense by implementing an internal investigation process requiring employee reporting. *See* Lissau v. S. Food Serv., 159 F.3d 177, 182 (4th Cir. 1998).

[74] Amy Blackstone, et al., *supra* note 11, at 634-35; *see also* Elizabeth Hirsh & Christopher J. Lyons, *Perceiving Discrimination the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 L. & SOC'Y REV. 269, 270 (2010) (seeking legal redress requires *naming* the act as a legal wrong, *blaming* the employer, and *claiming* the behavior by seeking redress within the regulatory framework).

[75] *See* Detert & Edmonson, *supra* note 34, at 461 (collecting studies finding that workers do not exercise voice even when they believe they have valid complaints and attributing this to concern about negative consequences); Estlund, *supra* note 2, at 358-59, 373; Deborah Brake, *Retaliation*, 90 MINN. L. REV. 18, 20, 37 n.58 (2005) (compiling studies showing that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination"); Louise F. Fitzgerald, et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (finding that between 33% and 62% of employees who filed harassment complaints experienced retaliation).

[76] Jordan v. Alt. Res. Corp., 458 F.3d 332, 340-43 (4th Cir. 2006) (holding that plaintiff must have a reasonable belief that conduct violates Title VII for retaliation protection to attach and denying protection to employee who complained of serious racial slur on this basis); Bythewood v. Unisource Worldwide, Inc., 413 F. Supp. 2d 1367, 1373 (N.D. Ga. 2006) (applying reasonable belief standard to retaliation claims under Fair Labor Standards Act). This is so despite the fact that, at least in the harassment context, employees must also fear that a delay in reporting, even occasioned by efforts "to collect evidence so company officials would believe [the plaintiff]," will foreclose liability under the *Faragher*/*Ellerth* affirmative defense. Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 269-70 (4th Cir. 2001). This puts harassment plaintiffs in a Catch-22: report too soon, and you risk losing retaliation protection; report too late, and you risk losing your claim.

Second, procedural constraints limit the efficacy of some retaliation protections. For example, there is no private right of action to enforce retaliation protection under safety-and-health law.[77] Third, as a practical matter, even if an employee has a remedy against retaliation, few workers can afford to risk losing a job in the period of time it would take to enforce the right. The fear of suit is not enough to deter employers from unlawful retaliation because of the dearth of successful litigation.[78] In the litigation game of haves and have-nots, employers, as repeat players with greater resources, tend to come out on top.[79] Finally, employees may be reluctant to complain because they do not want to signal that they are troublemakers, either to their current employer, or to prospective employers.[80]

These hurdles are perhaps unsurprising because the same reasons employees need protection against their weak bargaining position continue to hold sway when employees must exercise voice. Like in labor law, then, coworkers are essential to leveling the playing field between the employee and the employer, both by raising legal consciousness, and by overcoming the hurdles to complaining. How coworker bonds achieve these ends—and even reduce the incidence of violations—is the subject of the next Part.

b. How relationships matter for employment law

Coworker bonds are critical to the success of employment law in three ways. First, the support that coworkers provide raises legal consciousness and facilitates employee voice. Second, coworkers act collectively to enforce their employment rights in ways that overcome impediments to employees exercising voice. Third, strong coworker relationships prevent

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See Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 957 (2007).

[77] *See* Estlund, *supra* note 2, at 394.

[78] *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282-83 (2012) (collecting studies finding that discrimination plaintiffs face long odds and that less than 5% will ever achieve any form of litigated relief).

[79] See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974), for the theory, and Eyer, *supra* note 78, at 1282-83, for data confirming the theory in the employment litigation context, and Scott A. Moss, *Bad Brief, Bad Law, Bad Markets*, 63 EMORY L. J. 59 (2013), for a discussion of the bad lawyering of the "have-nots."

[80] *See* Detert & Edmonson, *supra* note 34, at 461 ("The belief that voice is risky has been described as a general expectation that speaking up will have undesired outcomes, such as harm to one's reputation or image, reduced self-esteem or emotional well-being, or negative work evaluations and reduced opportunities for promotion."); Michael A. Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 356-61 (1973) (providing a general theory of employee signaling).

employment law violations in the first place. This Section discusses these three mechanisms in turn.

Coworkers stir legal consciousness and promote the exercise of employee voice to complain of legal violations. "[T]he presence of close work friends . . . is a strong and consistent predictor of [legal] mobilization."[81] For example, the closer one feels to friends at work, the more likely she is to report sexual harassment to a supervisor or government agency.[82] Coworkers amplify voice by providing three types of support: emotional, informational, and instrumental.

As for emotional support, coworkers provide validation of workplace wrongs, and even shape perceptions of the wrong in the first place. Because coworkers have often undergone, or at least witnessed, similar experiences, coworkers are comfortable sources of support and credible sources of empathy.[83] Coworkers are thus well placed to validate concerns about work conditions, which confirms the worker's sense of a violation, a necessary precondition to exercising voice.[84] Speaking with friends at work can also help to shape perceptions of having been wronged. Sharing the experience of possible sexual harassment with a coworker and getting validation about the negative feelings it generates can help a worker see such events as legal violations, rather than just comments by "'a sleazy guy.'"[85] Talking to coworkers about complaints of harassment that they registered with the employer can lead a worker to see that she too "'can speak up if something like this happens.'"[86]

Informational support from coworkers also plays a crucial role in rights' enforcement. Workers rely on their close coworkers as sounding boards for workplace problems.[87] Coworkers' experiential knowledge allows them to provide informed guidance about potential rights' violations and helps to confirm or disconfirm their coworkers' concerns. So, for example, an employee who receives a lower-than-expected paycheck and is assessing

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[81] Blackstone, *supra* note 11, at 646 (collecting studies); *see also* Abhijeet K. Verdara, et al., *Making Sense of Whistle-Blowing's Antecedents: Learning from Research on Identity and Ethics Programs*, 19 BUS. ETHICS. Q. 553 (2009) (workplace culture with higher incidence of coworker friendship is linked with a greater incidence of whistleblowing).

[82] *See* Blackstone, *supra* note 11, at 652-54.

[83] *See* sources cited *supra* notes 30-31; M.S. Salzer & S.L. Shear, *Identifying Consumer-Provider Benefits in Evaluations of Consumer-Delivered Services*, 25 PSYCH. REHAB. J. 281 (2002).

[84] Blackstone, *supra* note 2, at 655-57 (explaining how relationships shape perceptions of having been wronged); Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCC. HEALTH PSYCH. 247, 249 (2003).

[85] Blackstone, *supra* note 11, at 655 (quoting research subject).

[86] *Id.* (quoting research subject).

[87] *See* SIAS, *supra* note 21, at 65-66.

whether her employer engaged in wage theft, a permissible deduction, or a mistake might ask a coworker how many hours she was paid for, or whether they are entitled to pay for certain activities or break times. Obtaining information from coworkers is essential before complaining of employment law violations because retaliation protection attaches only once the employee reasonably believes there has been a violation.[88] The primary way for an employee to arrive at such a reasonable belief is through information from coworkers.[89]

Informational support from coworkers is especially important when a violation turns specifically on the employer's treatment of one's coworkers, as is the case under antidiscrimination law. The mechanism for proving employment discrimination is by comparison—whether the employer would have made the same decision for someone from a different group, e.g., for a man instead of a woman—which courts operationalize by considering how an employer *in fact* treated employees from the different group.[90] Only by acquiring the relevant comparative information can the employee know whether she has experienced discrimination, and this sensitive information will be most readily available from close coworkers. For example, a pregnant woman denied a light-duty accommodation could only know whether she had been discriminated against by finding out whether her employer offered accommodations to non-pregnant workers.[91]

Coworker support is particularly important for certain types of discrimination, such as pay discrimination, where the information necessary to identify a violation is typically private and thus available only from close coworkers. This precise problem was behind the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company*, in which the plaintiff was paid substantially less than her male coworkers for decades, but did not learn of the pay gap until a coworker informed her of it.[92] Although Title VII was amended to allow these types of late-discovered discrimination

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[88] *See supra* note 76.

[89] *See* Blackstone, *supra* note 11, at 655-57.

[90] *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (cataloguing and critiquing this method of proof in antidiscrimination law).

[91] *See* Young v. United Postal Serv., 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (2014); *see also* Long, *supra* note 76, at 958 (noting that coworkers may have information about incidents of discrimination).

[92] Lilly Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (reversing judgment for plaintiff because claim was filed outside limitations period). Some employers ban workers from divulging their salaries, although this may violate the NLRA's protection for concerted activity. *See infra* Part II.C.1; Serv. Merch. Co., 299 N.L.R.B. 1125 (1990). A recent executive order bans federal contractors from penalizing employees who discuss salary. *See* Exec. Order No. 11246 § 202 (Apr. 8, 2014).

claims, the hurdle of discovering salary information remains.[93]

The third type of support coworkers provide—instrumental support—is also critical to the realization of workers' rights. Instrumental support extends to participating in the reporting and complaint process, both internally to the employer, and to enforcement agencies and courts. Sometimes a worker will accompany a coworker to a meeting with the employer to discuss possible violations, either to provide moral support, or to serve as an advocate.[94] Other times, coworkers testify on each other's behalf during employers' internal investigations of alleged violations, as well as before agencies and courts on such matters.[95] Given their experiential knowledge, coworkers are often in the best position to confirm or disconfirm alleged violations.

Coworkers also provide instrumental support against rights violations in less formal ways. Coworkers engage in solidarity by refusing to join ranks with harassers and instead coming to the defense of their coworkers who are being harassed, to the point of jeopardizing their own employment.[96] In one case, a white male commanding officer had invited his fellow white male police officers to join him in the harassment of their black and female coworkers.[97] The white male officers refused, and instead joined their female coworkers and coworkers of color in demanding that their supervisor be disciplined for his discriminatory behavior.[98]

Beyond the supportive role that coworkers play in individual employment law violations, coworkers are also essential in taking collective action to enforce employment law. Coworkers often labor under the same conditions and thus endure the same employment law violations. Professor Benjamin Sachs described, in a consequential 2008 article, how employment law can serve as a focal point and catalyst for collective action by employees, a phenomenon he calls "employment law as labor law."[99] While Sachs focused on how employment law can serve as a path to organizing under labor law, an equally important conclusion to draw from his findings of collective action around employment law is the significant role coworker relationships play in enforcing employment law *qua* employment law.

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[93] Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 125 Stat. 5 (2009), codified at 42 U.S.C. § 2000e-5(e)(3)(A).

[94] *See* Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 47-48 (1st Cir. 2010).

[95] *See* Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 555 U.S. 271 (2009).

[96] *See* Zatz, *supra* note 2, at 69-78 (citing examples). For more examples, see cases cited *infra* Part II.C.

[97] *See* Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998) (en banc).

[98] *Id.*

[99] Sachs, *supra* note 5, at 2686.

As with labor law, the mutually supportive behavior that arises from coworker bonds sets the stage for collective action to enforce employment rights.[100] Moreover, coworkers are actually better off if they act collectively to enforce individual employment rights. Acting collectively with one's coworkers reduces the risks of exercising voice. When a group of employees complain, it is harder for the employer to pin the blame on any individual worker, and the employer may be unwilling to terminate a large swath of workers. And in cases where individual suits would bring damages too paltry to motivate a lawyer to take the case, such as for wage-and-hour violations, collective worker action is essential for enforcement. For this reason, the class action has been especially important to the enforcement of employment law, resulting in "extensive reforms in employers' policies and millions of dollars in monetary relief."[101]

Finally, in addition to providing support if and when workplace wrongs do occur, strong coworker bonds can prevent these employment law violations from occurring in the first place. This is true both at the individual employee level and at the workplace level. At the individual level, a worker who has strong coworker relationships is less likely to experience discrimination or harassment.[102] Coworker bonds make a worker appear stronger to potential harassers, making her a less appealing target.[103] And coworkers protect one another from harassment by warning each other to avoid potential harassers.[104] At the workplace level, supportive work cultures, such as those with high coworker solidarity, have been linked with lower incidences of harassment.[105] Coworker bonds thus not only provide leverage to address violations, but create the predicate conditions conducive to the goals of employment law.

3. Contingencies

Despite these ways in which coworker bonds are central to achieving the purposes of work law, coworker bonds may also operate to impair workers' rights. There are two primary concerns: that workplace

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[100] *See supra* Part I.B.1. Note that Sachs does not address the role of coworker relationships in helping employment law serve as labor law.

[101] Suzette Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive*, 26 BERK. J. EMP. & LAB. L. 405, 406 (2005).

[102] *See* Blackstone, *supra* note 11, at 635 (collecting studies); Lindsey Chamberlain, et al., *Sexual Harassment in Organizational Context*, 35 WORK & OCCUPATIONS 262 (2008); Stacey DeCoster, et al., *Routine Activities and Sexual Harassment in the Workplace*, 26 WORK & OCCUPATIONS 21 (1999).

[103] Brake, *supra* note 75, at 39-41.

[104] Blackstone, *supra* note 11, at 656.

[105] *See id.* at 635.

relationships, especially with supervisors, reduce employee voice, and that coworkers provide support in ways that undermine workplace equality, a core work right. These concerns do not alter the conclusion that coworker relationships are essential to the success of work law, but highlight the need for legal regulation that is sensitive to when coworker relationships can play a more harmful role.

The first concern is that close relationships between supervisors and employees could muzzle employee voice. While there is some reason to worry that an employee's friendship with a supervisor may mute voice if the employee believes that her complaints could lead to discipline or other negative consequences for her supervisor, a close relationship with a supervisor may also make an employee more likely to exercise voice.[106] An employee may feel more comfortable discussing sensitive matters with a friend, may be more confident that a friend will address her complaints, and may be less fearful of retaliation from a friend.[107]

As for the second concern about equality, the classic case is a male supervisor who favors a female direct report with whom he has a romantic relationship. This of course may have positive outcomes for the direct report, but negative ones for equality, particularly if the favoritism extends beyond a single paramour to a more widespread identity preference.[108] As Professor Laura Rosenbury has discussed, limiting this concern to romantic relationships with supervisors is too narrow.[109] If the provision of workplace support is critical to work success, then we should be troubled by the identity-based provision of support through friendship in the workplace, regardless of whether a supervisor is involved.[110] On this perspective, coworker bonds affected by race or sex preferences have the potential to undermine the goals of antidiscrimination law. Coworkers may even band together to exclude other coworkers on the basis of identity, for example, a

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[106] *See* SIAS, *supra* note 21, at 70-72.

[107] *See id.*

[108] Isolated examples of favoritism towards a paramour do not violate Title VII, *see, e.g.*, Preston v. Wis. Health Fund, 397 F.3d 539 (7th Cir. 2005) (Posner, J.), but more "widespread favoritism" on the basis of a protected trait "may constitute hostile environment harassment." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM, EEOC Notice No. 915.048 (Jan. 12, 1990), http://eeoc.gov/policy/docs/sexualfavor.html; *see also* Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 1, 5 (2009).

[109] Rosenbury, *supra* note 2, at 138-41; *see also* Schultz, *supra* note 2, at 2189 (arguing for "organizations to take more seriously the potential for discriminatory dynamics to develop in connection with *nonsexual* forms of affiliation between supervisors and their employees, or between coworkers who can affect each other's employment prospects").

[110] Rosenbury, *supra* note 2, at 138-41.

group of men who exclude women from their golf outing or poker game.[111]

Simply because coworker bonds lead to support does not determine the ends—promoting or undermining equality—to which these behaviors are put. Law is an important mediating factor in determining these ends, and the right law can lead coworker bonds to promote rather than undermine equality.[112] I turn to the role of law in constructing beneficial coworker bonds—and the law's shortcomings here—in the next Part.[113]

II. HOW LAW UNDERMINES COWORKER BONDS

Despite the centrality of coworker bonds to the success of work law, the law paradoxically ignores much of the solidarity and support that coworkers provide. In this way, both labor law and employment law rely on coworker bonds for their effectiveness and yet limit harnessing the power of these bonds to effectuate workers' rights, mutually weakening both labor law and employment law.

Given that labor law provides mechanisms for coworkers to come together collectively to address the conditions of their workplace, as well as protection for at least some of this collective conduct, labor law does go some way towards recognizing the importance of coworker relationships.[114] But even labor law remains blind to many of the ways coworker relationships generate the solidarity and support necessary for the success of work law. Given the traditional conception of employment law as premised on individual rights, it may come as no surprise that employment law pays little attention to the importance of coworker bonds. What is perhaps surprising, then, is just how broadly employment law doctrines impinge on the development and maintenance of coworker bonds.

Before delving into the ways in which work law undermines critical coworker bonds, this Part explains why the law does so by situating the problem in the context of the law's family-market divide.[115] It then divides work law's failure to recognize and protect coworker relationships into

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[111] Zatz, *supra* note 2, at 69-70.

[112] *Id.* at 70-73 (highlighting that coworker bonds can take the form of *intra*group solidarity or *inter*group solidarity and urging law to encourage the latter).

[113] *See infra* Part II.B.2.

[114] *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . ").

[115] For scholarly treatment of the family-market divide, see the seminal Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

three mechanisms: how work law undermines the development of meaningful coworker bonds; how work law discourages supportive coworker behavior; and how work law pays little heed to rupturing coworker bonds. These concepts do overlap to some degree: the ease with which bonds may be broken affects workers' ex ante incentives to develop bonds in the first place, and discouraging supportive behavior also undermines the development of solidarity between workers. Nonetheless, I separate these mechanisms for disquisitional ease. This Part concludes by laying out the implications of work law's treatment of coworker bonds for the relationship between labor law and employment law and for the law's family-market divide.

A. Bonds from Family to Market

Work law's approach to supportive relationships can best be understood by placing it within the context of a body of feminist legal scholarship exposing and critiquing the family-market divide: the law's distinct approach to the family as compared with the market.[116] The law prizes the domestic family as the exclusive repository of meaningful support and provides special recognition to the relationships therein in three ways: promoting solidarity, encouraging support, and maintaining bonds. First, family law recognizes the value of strong family bonds by promoting the development of supportive relationships within the family.[117] Second, family law encourages support by mandating duties of care and support within the family, both between spouses, and from parent to child,[118] and affords privileges of care and support to family members that are not available to others.[119] Third, in recognition of the value of relationship-specific investments, family law promotes the maintenance of developed

[116] *See generally id.*

[117] Family law creates barriers to entry that encourage selectiveness in entering intimate relationships and makes relationships sticky with waiting periods and formal legal process requirements for dissolution of these relationships. *See* CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INTRODUCTION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 211-21, 1386-96 (3d ed. 2006).

[118] *See, e.g.*, CAL. FAM. CODE § 720 (requiring that spouses "contract toward each other obligations of mutual respect, fidelity, and support"); LA. CIV. CODE art. 98 ("Married persons owe each other fidelity, support, and assistance"); Forsyth Mem'l Hosp., Inc. v. Chisolm, 467 S.E.2d 88 (N.C. 1996) (requiring wife to pay for husband's medical expenses); IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 503 (5th ed. 2010) ("All American jurisdictions recognize a parental duty to support minor children.").

[119] *See* Laura Rosenbury. *Friends With Benefits*, 106 MICH. L. REV. 189, 191 (2007) (citing, among other examples, Family and Medical Leave Act benefits); Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1186 (citing unemployment insurance benefits for relocating with a spouse).

bonds by making them sticky, and protects family members in the event that the family dissolves.[120]

Scholars have primarily focused on the consequences of the family-market divide for the family.[121] They have highlighted how law's view of the family as the exclusive site of intimacy means that the law is typically blind to behavior characteristic of the market—namely, production—that takes place in the family. So despite the family being a key site of production, the law nonetheless sees the family only in terms of love, and refuses to apply the law of production there.[122] One seminal case refusing to enforce a contract for a wife to receive compensation for providing care for her ailing husband sums up the approach well: "[E]ven if few things are left that cannot command a price, marital support remains one of them."[123]

The following three Sections in this Part aim to expose the flip side of the law's categorical placement of support within the family and production within the market: the law's relative blindness to supportive relationships at work. Work law's failure to recognize and protect coworker bonds and the support they generate can be seen in how work law allows employers to undermine coworker solidarity, discipline coworker support, and break coworker bonds, as detailed in the following three sections below.

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[120] The primary concern is that such support will go unreciprocated, i.e., a spouse will forego career opportunities to provide care to the couple's children, and then the spouses will divorce. Family law provides some protection here by considering these forms of support in distributing property and making alimony awards. *See, e.g.*, ARK. CODE ANN. § 9-12-315(a)(viii) (providing that homemaking services are considered in property distribution at divorce). For a feminist critique that these protections are not robust enough, see JOAN WILLIAMS, UNBENDING GENDER 114-28 (2000).

[121] *See* WILLIAMS, *supra* note 120, at 114-28; Katharine Silbaugh, *Turning Labor into Love*, 91 NW. U.L. REV. 1 (1996). One notable exception is Professor Laura Rosenbury, who has explored the impact of the family-market divide on how identity affects the provision of support at work, Rosenbury, *supra* note 2, and whether marital norms of gendered support continue at work, Laura Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345 (2013). Rosenbury powerfully argues that law's exclusive recognition of intimacy in the family means that employment discrimination law ignores affective interactions at work. In some respects, my project is complementary to Rosenbury's, as I explore how work law is blind to how coworker bonds operate throughout work law. In other respects, however, I part company with Rosenbury, in her argument that employment law "largely ignor[es] affective interactions unless they constitute prohibited sexual harassment." Rosenbury, *supra* note 2, at 134. I explore how the legal treatment of coworker bonds infiltrates a wide array of doctrines across employment law and labor law. From my perspective, coworker bonds are more pervasively and expressly regulated throughout work law, in some ways that do recognize coworker bonds (e.g., the basic protections of labor law, *see supra* note 114), and other ways in which the law undermines such bonds, *see infra* Parts II.B-D.

[122] *See generally* WILLIAMS, *supra* note 120, at 114-28; Silbaugh, *supra* note 121 (cataloguing law of the market is not applied to family labor).

[123] Borelli v. Brusseau, 12 Cal. App. 4th 647 (1993).

B. Undermining Solidarity

This Section sets forth how work law inhibits the development of coworker solidarity—the building of coworker bonds that generate support—in two ways. Work law's treatment of coworker solidarity is overinclusive, in erecting barriers to solidarity where they need not be placed, and underinclusive, in failing to remove barriers to solidarity where it is vulnerable. So despite the presence of significant coworker solidarity, there are nonetheless fewer and weaker bonds than there might be as compared with a law of work that appreciated the importance of these bonds. While work law does not go so far as to *ban* coworker relationships, it nonetheless makes meaningful coworker bonds less likely to be present.

1. Barriers to Solidarity

Work law erects barriers to solidarity. Sometimes, as with limits on which employees can bargain together, these barriers bar workers from leveraging coworker bonds to achieve the purposes of work law. Other times, as with the broad ban on employee participation programs, these barriers stand in the way of opportunities for coworkers to bond and develop solidarity in the first place. While coworkers can still form meaningful bonds, these barriers make it more difficult for coworkers to do so, and make it more difficult to harness the power of coworker bonds to achieve the purposes of work law.

a. Bargaining Unit Determinations

Labor law erects barriers to leveraging coworker bonds in the law governing the scope of the bargaining unit. A bargaining unit is limited to workers who share a "community of interest."[124] In assessing common interests, the law looks at a limited set of economic factors—common skills, working conditions, bargaining history, supervision, hours, wages, and benefits—and fails to appreciate how bonds between coworkers can create shared interest, even when economic interests are not perfectly aligned.[125]

In *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass*

[124] NLRB v. Action Auto., 469 U.S. 490, 494 (1985).

[125] *See, e.g.*, Blue Man Vegas v. NLRB, 529 F.3d 417, 421 (D.C. Cir. 2008) ("integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange").

Co., for example, a group of retirees was not permitted to form a unit with current employees to bargain over the benefits of the retired workers.[126] The Supreme Court paid little heed to the fact that years of working together meant the retirees "had deep legal, economic, and emotional attachments to a bargaining unit" that could bridge the gap in their precise interests,[127] and focused on the divergence of material interests instead.[128]

While the Board has recently taken a more lenient approach to approving a union's proposed bargaining unit, the standard nonetheless continues to pay too little attention to coworker bonds.[129] The Board does consider contact between employees in determining whether they constitute an appropriate bargaining unit, but it nonetheless downplays the bonds, solidarity, and common interests that flow therefrom. For example, the Board notes that "contact among the petitioned-for employees is limited to attendance at storewide meetings and daily incidental contact related to sharing the same locker room, cafeteria, etc."[130] For the Board, this type of informal contact is not sufficiently related to work to lead to common interests. But it is precisely in these informal settings that coworker bonds and mutual concern flourish, as they allow coworkers to bond and exchange support, even when employees' work-related concerns are not perfectly aligned.[131]

Because unit determinations are often "the decisive factor in determining whether there would be any collective bargaining at all in a

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[126] 404 U.S. 157, 182 (1971).

[127] 177 N.L.R.B. 911, 914 (1969); *see also* Fischl, *supra* note 2, at 837-38.

[128] 404 U.S. at 173.

[129] This comes in the face of unions seeking to organize "micro-units" based on the segments of a workforce where they find support, and employers seeking broader units. *See* Macy's Inc., 361 N.L.R.B. No. 4 (2014) (approving micro-unit); The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 N.L.R.B. No. 11 (2014) (denying micro-unit). When the union petitions for certification of a unit that constitutes a segment of the workforce, and the employer contends that the unit must include additional employees, the Board will approve the proposed unit so long as the unit of employees "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and they "share a community of interest." *See* Specialty Healthcare & Rehabilitation Ctr. of Mobile, 357 N.L.R.B. No. 83 (2011), *enfd. sub nom.* Kindred Nursing Ctrs. East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013). The burden is then on the employer to demonstrate that additional employees share an "overwhelming" community of interest with the petitioned-for unit such that there "is no legitimate basis upon which to exclude" them. *Id.* Judicial treatment of this standard has been limited, and thus it remains to be seen how robust the standard will remain after review.

[130] The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 N.L.R.B. No. 11 (July 28, 2014).

[131] *See supra* notes 41-42 and accompanying text.

plant or enterprise,"[132] labor law's failure to appreciate how coworker friendship can forge shared interests seriously limits workers' ability to harness the power of their bonds to support unionization—one of the goals of labor law. And while incipient bonds might be converted into stronger forms of solidarity through unionization, rejecting these bargaining units robs these coworkers of the opportunity to come together regularly and in a way that would further highlight their common interests and deepen their bonds.

b. Management Exclusions

Labor law excludes supervisors and managers from bargaining units.[133] It does so on the basis of a separate spheres view of management and labor that fails to account for coworker bonds, and in so doing, bars leveraging these bonds to serve the purposes of work law.[134] At the time the supervisor exclusion was added to the NLRA, the dominant management principles divided "brain work"—deciding what work to do and how to do it—and "brawn work"—doing the work—with the former done by management and the latter done by labor.[135] This promoted a division of labor between the rank-and-file and management, only to be reinforced by their separation in law.[136]

But employers' use of cooperative relations across management and labor—and the bonds that develop as a result—seriously undercuts this basis for the exclusion. Employers encourage solidarity between management and labor to prod employees to pursue the organization's goal, go beyond assigned tasks, and commit to the organization.[137] Employers rely on team organizational structures that depend on friendship between labor and management,[138] and even refer to these teams as "family."[139] The

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[132] NLRB v. Action Automotive, Inc., 469 U.S. 490, 502 n. 9 (1985) (Stevens, J., dissenting) (internal quotation marks omitted).

[133] 29 U.S.C. § 152(3) (supervisors); NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974) (managers).

[134] *See* NLRB v. Health Care & Retirement Corp., 511 U. S. 571, 573 (1994) (explaining that the exclusion as necessary to retain division between management and labor); Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 985-88 (1990).

[135] Crain, *supra* note 134, at 985-88; Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 139-44 (1988).

[136] *See* Health Care & Retirement Corp., 511 U. S. at 573.

[137] *See* Peter Capelli, *Rethinking Employment*, 33 BRIT. J. INDUSTRIAL REL. 563 (1995).

[138] *See* ZELIZER, *supra* note 17, at 247-50.

[139] *See* NELSON LICHTENSTEIN, THE RETAIL REVOLUTION: HOW WAL-MART CREATED

bonds that develop between labor and management build common interests, and can be seen in acts of support and mutual defense.[140] These bonds are all the more natural given the rise of mid-level managerial and supervisory employees and the resulting murky division between management and labor.[141]

Yet labor law's management exclusion bars leveraging these coworker bonds in service of the law's broader aims of counterbalancing the employer's unequal bargaining power.[142] While labor-management bonds survive in the face of the exclusion, the law undermines the promise of workplace bonds to fulfill the goals of work law by separating the most powerful employees from the rest of the laboring class, and pitting them against each other. Rather than promote solidarity, then, labor law "stirs hostility between the classes of workers and reinforces the stratification of labor."[143]

Allowing management to organize could prompt the concern that these workers would align too much with labor, and too little with the employer.[144] But this ignores the more complex interests that workers display. First of all, managers *already* experience divided loyalty, both to themselves, and to the employer, and this has not yet undercut their ability to manage.[145] Second, because of existing bonds between management and labor, management *already* has an interest in labor's welfare, and this still has not undercut their ability to manage. A more complete accounting of coworker bonds and the ability of workers to act on behalf of multiple interests, as they already do, reveals the wrongheadedness of the exclusion.

A BRAVE NEW WORLD OF BUSINESS 70, 90-96 (2009) (describing how Wal-Mart uses the family metaphor to cultivate solidarity between management and labor); Marion Crain, *Managing Identity: Buying in to the Brand at Work*, 95 IOWA L. REV. 1179, 1211 (2010) (reporting how Southwest encourages workers to relate to the firm as family).

[140] *See, e.g.*, United Food & Commercial Workers Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1993) (describing supervisor who stood up for rank-and-file employees under his purview who he believed were unfairly and unlawfully fired). See *infra* Part II.D.3 for a critique of the lack of protection for this type of coworker support.

[141] Crain, *supra* note 134, at 960. Many supervisors in the current service economy are middle-level managers who have more in common with the rank-and-file than with capital. *See* Regan Rowan, *Solving the Bluish Collar Problem*, 7 U. PA. J. LAB. EMP. L. 119, 120 (2004).

[142] Crain, *supra* note 134, at 1017-19 (explaining how the exclusion encourages management to view themselves as separate from the rank-and-file).

[143] *Id.* at 1006 (explaining that the exclusion discourages these groups of workers from "rely[ing] on one another for support").

[144] *See* NLRB v. Health Care & Retirement Corp., 511 U. S. 571, 573 (1994) (explaining the exclusion as necessary to address the "imbalance between labor and management" that resulted when "supervisory employees could organize as part of bargaining units and negotiate with the employer").

[145] *See* Crain, *supra* note 134, at 960.

c. Employer Domination

In some instances, labor law not only limits leveraging coworker bonds, but erects barriers to bonding in the first place. Labor law's broad ban on employer domination of labor organizations is one such example.[146] This ban was meant to combat old-style company unions that *co-opt* employees: because company unions are dominated by the employer, they build a sense of solidarity between workers and capital that undermines coworker solidarity capable of generating the type of collective action and genuine employee participation that labor law seeks to promote.[147] But the ban has been applied much more broadly to a range of programs that bring employees together to involve them in production and other managerial decisions,[148] and thus limits opportunities for coworkers to develop solidarity over the terms and conditions of employment and exercise collective voice on these matters.[149]

But under the right conditions—notably adequate participation—employee participation programs have been shown to build positive bonds between coworkers that promote the goals of labor law.[150] Research even

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[146] 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it").

[147] *See* Mark Barenberg, *Democracy and Domination in Labor Law: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 760-63 (1994). Some commentators have raised a similar concern in the context of modern employer-led employee participation programs: that they undermine solidarity by displacing coworker bonds formed in informal work groups, and by emphasizing the commonality of interest between workers and capital. *Id.* at 914-16. But, as discussed below, whether these concerns are realized, or whether positive solidarity is promoted, turns on the nature of the participation program.

[148] *See* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 126 (1994) (noting that "[t]he statutory ban is easily triggered"). For cases so finding, see, for example, Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994); E.I. dupont de Nemours, 311 N.L.R.B. 893 (1993). These cooperative programs, so called because they involve cooperation between labor and management, include employee participation programs, which bring groups of employees together to involve them in firm decisionmaking, and employee production teams with significant responsibility for producing a product or service. *See* Rafael Gely, *Whose Team Are You On?* 49 RUTGERS L. REV. 323, 335-37 (1997).

[149] *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 164 (2003) (arguing that one way labor law could promote solidarity would be to "get[] out of the way" by eliminating this restriction); Estreicher, *supra* note 148, at 126-27; Barenberg, *supra* note 147, at 838.

[150] *See* Barenberg, *supra* note 147, at 921-22 (citing studies demonstrating that when "comprehensive participation is implemented at both the shopfloor and strategic levels,"

links certain forms of employee participation to an *increased* incidence of formal union activity, precisely because these forms of participation provide employees with the opportunity to come together and develop solidarity and supportive bonds.[151] Thus the application of the ban on domination to *all* employee participation programs that deal with the terms and conditions of employment is overbroad. Indeed, by barring mechanisms for cultivating and deploying meaningful coworker bonds, the ban undermines labor law's goal of promoting coworker solidarity and enhancing employee voice.

2. Harassment and Discrimination

This Section thus far has addressed how work law tamps down too much on coworker solidarity by erecting barriers to building and leveraging coworker bonds. In other ways, however, work law does too little to address workplace cultures that undermine positive coworker bonds. Work law pays insufficient attention to rooting out solidarity-inhibiting cultures, and places no pressure on employers to encourage solidarity-promoting cultures.

A hostile work environment does not trouble the law unless the hostility is on the basis of a protected trait.[152] But general workplace harassment, or workplace bullying, hinders the development of robust coworker bonds. Workplace bullying causes its target to withdraw, thus making the target unavailable as a source of solidarity and support for her coworkers.[153] Even more important from the perspective of coworker relations, bullying affects not only its target, but also the target's coworkers, who suffer stress and workplace negativity, and even reduced productivity and health problems.[154] The target and coworker effects interact: as bullying increases

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positive solidarity results, and thus recommending that the ban be modified to allow this type of participation); Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences*, 76 CHI.-KENT. L. REV. 1237, 1250-51 (2000) (collecting studies showing that employee participation programs do not promote company objectives if they are truly empowering)

[151] Brooke, *supra* note 150, at 1265 (citing studies linking non-majority union to formal union organizing).

[152] Or if it rises to the level of a common law tort. On the law's current limits to addressing workplace bullying, see David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).

[153] *See* H K. Van Heugten, *Bullying of Social Workers: Outcomes of a Grounded Study Into Impacts and Interventions*, 40 BRIT. J. SOC. WORK 638, 645 (2000).

[154] *See* Megan Paull, et al., *When Is a Bystander Not a Bystander?*, 50 ASIA PAC. J. HUM. RES. 351, 354-55 (2012) (collecting studies); Gary Namie & Pamela E. Lutgen-Sandvik, 4 INT'L J. COMM'N 343, 347 (2010) (collecting studies); HELGE HOEL & CARY COOPER, DESTRUCTIVE CONFLICT AND BULLYING AT WORK 20-21 (2000), *available at*

a target's stress, this negatively affects the work unit, which in turn increases the target's stress, and so on.[155] This coworker feedback effect of bullying, if uninterrupted, leads to a negative workplace culture inhospitable to the development of coworker bonds and support.[156]

Law's failure to encourage employer intervention in these dynamics plays a powerful role in determining whether coworkers offer support to the target, thereby interrupting the negative relational culture, or idly stand by (or even join in the bullying), thereby furthering the negative relational culture. This is because coworkers "wait and see how organizational authorities respond to others' reports of bullying. Managerial responses—whether effective, absent, or ineffective—encourage witnesses to speak out or stay silent, engender support for or withhold support from targeted workers . . . ."[157] Therefore, the law's blind spot to workplace bullying, which many foreign jurisdictions have addressed, undermines supportive coworker relations, particularly in light of the prevalence of bullying.[158]

Even when harassment is based on a protected trait, work law still fails to discourage management from disciplining supportive coworkers. As with general workplace bullying, coworkers play an important role in determining whether workplace harassment on the basis of race or sex is perpetuated or interrupted.[159] Again, the reaction of coworkers—whether

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http://www.adapttech.it/old/files/document/19764Destructiveconfl.pdf.

[155] *See* Elfi Baillien, et al., *Organization, Team Related and Job Related Risk Factors for Bullying, Violence and Sexual Harassment in the Workplace*,13 INT'L J. ORG. BEH. 132, 140 (2009) (discussing positive feedback loop); Paull, et al., *supra* note 154, at 355 (discussing "spiraling" effect).

[156] HOEL & COOPER, *supra* note 154, at 20 ("Bullying was found to be associated with a negative work-climate . . and unsatisfactory relationships at work."); Paull, et al., *supra* note 154, at 354 (discussing "culture of bullying" with negative effect on coworker relations); Namie & Lutget-Sandvik, *supra* note 154, at 349 (citing "contagion" effect of bullying). There is the possibility of reverse causation: that bad workplace cultures may in fact cause bullying. But the mechanism by which bullying impacts coworkers supports causation in the posited direction: that bullying negatively affects coworkers because it leads coworkers to view employers as unjust, particularly when they fail to intervene. *See* Marjo-Riitta Parzefall & Denise M. Salin, *Perceptions of and Reactions to Workplace Bullying*, 63 HUM. RELS. 761, 771-73 (2010).

[157] Namie & Lutget-Sandvik, *supra* note 154, at 347; *see also* Parzefall & Salin, *supra* note 156, at 773 (linking managerial failure to respond to bullying with a climate of injustice); Paull, *supra* note 154, at 4 ("Colleagues . . . avert their eyes to avoid being drawn into conflict," withdraw from the victim, and "at best gave covert and passive support.").

[158] Namie & Lutget-Sandvik, *supra* note 154, at 358 (37% of American workers—or 54 million people—have been bullied at work).

[159] *See* Zatz, *supra* note 2, at 70 (ongoing discrimination and harassment "depends on whether the discriminatory tendencies of a few supervisors or coworkers are amplified or counteracted by other members of the workplace").

they combat the harassment, stand idly by, or even join in the harassment—turns on how management responds to the harassment. The more likely management is to sanction coworkers who support the target, the less likely coworkers are to engage in supportive behavior.[160] As explained in the next Section, though, work law does not sufficiently protect coworkers who support targets of discrimination and harassment from employer sanctions, let alone encourage employers to promote supportive coworker conduct.[161]

As discussed above, beyond harassment, coworkers may discriminate against each other in their provision of support, which undermines a broader sense of solidarity across the workplace.[162] If these forms of coworker support are sufficiently related to the terms of employment and sufficiently related to an employer policy, employment law will prohibit this discrimination. For example, a bank policy that allows employees to form their own teams on a systematically discriminatory basis can be challenged on disparate impact grounds.[163] But a cause of action based on more subtle forms of support denied by coworkers faces stumbling blocks. Under Title VII, discrimination is actionable only when it constitutes an adverse employment action that affects the terms and conditions of work.[164] When the employer does not take a tangible action against the employee (e.g.,

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[160] Namie & Lutget-Sandvik, *supra* note 154, at 347; *see also* Zatz, *supra* note 2, at 70, 77.

[161] *See infra* Part II.C.

[162] *See supra* Part I.B.3; Laura Rosenbury, *supra* note 2, at 120-25 (explaining how the provision of workplace friendship and support on discriminatory terms can have a significant impact on workers' performance); Zatz, *supra* note 2, at 70-73 (explaining how "[i]ntragroup relations frequently form the basis if intergroup discrimination" through informal social relations that "mark[] [some workers] as outsiders, closes them off from important information and decisionmaking, and deprives them of informal acts of workplace solidarity crucial to job success"). Rosenbury and Zatz appear to disagree on precisely how important support is for performance: Zatz only worries about an impact on performance "when coworkers systematically fail to provide such support," *supra* note 2, at 72, whereas Rosenbury views the impact as more insidious and pervasive, *supra* note 2, at 120-25.

[163] *See* McReynolds v. Merrill Lynch, 672 F.3d 482 (7th Cir. 2012) (Posner, J.) (determining that a "teaming" policy, in which brokers, rather than managers, could determine the membership of work teams to share clients, could amount to disparate impact discriminate for disproportionate excluding African-American employees, because "there is no doubt that for many brokers team membership is a plus"); Rosenbury, *supra* note 121, at 385. However, a supervisor's isolated preference for a friend will not be considered discrimination. *See id.* at 385 n.190 (collecting cases); *supra* note 108 (explaining that Title VII distinguishes between isolated instances of favoritism and more systematic preferences).

[164] *See, e.g.*, Beyer v. County of Nassau, 524 F.3d 160 (2d Cir. 2008) (requiring adverse employment action for Title VII claim to proceed); Jones v. Reliant Energy, 336 F.3d 689 (8th Cir. 2003) (same).

termination), an employee can show an adverse employment action only when it amounts to a hostile work environment.[165] Because work law fails to appreciate the importance of coworker support, courts will be unlikely to recognize the denial of coworker support to constitute a hostile work environment.[166]

In addition to placing too few incentives on employers to generate a solidarity-promoting culture, Professor Vicki Schultz argues that employment law—in particular, sexual harassment law—places incentives on employers to *discourage* bonding and support between coworkers.[167] She explains that "when managers punish employees for sexualized interactions with each other, they create a climate that may stifle workplace friendships and solidarity more generally. . . . We cannot expect diverse groups of people to form close bonds and alliances—whether sexual or nonsexual—if they must be concerned that reaching out to one another puts them at risk of losing their jobs or their reputations."[168] Precisely because workplace relationships are not viewed as an important interest to be protected by work law, there is no pressure under current law on employers both to ensure a work environment free of sexual harassment and gender-based exclusion, *and* to promote a work environment that continues to encourage, or least not stand in the way of, coworker solidarity.

C. Disciplining Support

When solidarity does form, work law nonetheless undercuts these coworker bonds and the support they provide by allowing employers too much leeway in disciplining exchanges of coworker support. Without any protection for supportive behavior, employment at will permits employers to terminate workers who engage in supportive conduct. Termination in retaliation for relying on or offering coworker support places a steep cost on supporting coworkers.[169] While labor law and employment law contain

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[165] *See* Harris v. Forklift Sys., 510 U.S. 17 (1993).

[166] Employment law's failure to recognize coworker relationships and the support they provide as an important "term or condition" of work is also discussed below. *See infra* Part II.D. Another challenge is attributing coworker conduct to the employer. Courts have struggled with this in hostile environment cases. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[167] *See generally* Schultz, *supra* note 2.

[168] *Id.* at 2069.

[169] *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 838 (7th ed. 2011) ("Discharge has been called the 'capital punishment' of the workplace, and anyone who has ever been fired knows how apt that description is: loss of employment means not only loss of income, but in our culture is often equated with loss of character and identity as well.").

protections that cabin employers' discretion to discipline supportive behaviors, they are not nearly robust enough to protect all of the forms of coworker support that are critical to advancing the goals of work law. By failing to protect workers from discipline or termination for the full range of important support activity, work law discourages this supportive behavior between coworkers and undermines the deepening of coworker bonds.

1. Concerted Activity

Labor law grants employees, whether unionized or not, the right "to engage in concerted activities for the purpose of . . . mutual aid or protection" without risking one's job.[170] This provision has the potential to provide broad protection to the exchange of coworker support.[171] But labor law ignores the nature and value of coworker bonds and the support they generate in determining which concerted activities are protected, fundamentally undermining coworker bonds and the support they provide.

Sometimes labor law fails to protect the exchange of coworker support because it does not recognize the critical role of support in collective coworker activity. Support by one coworker whose "only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position" is "mere talk," and "if [this talk] looks forward to no action at all, it is more than likely to be mere 'griping.'"[172]

In one case, the Board held that a worker who was notified that she was put on probation could be fired for asking a coworker whether he had ever been placed on probation.[173] The Board's determination that this was "purely personal" rather than protected "concerted" activity demonstrates labor law's narrow recognition of coworker support.[174] Seeking information from a coworker about an employer's past disciplinary practices is an integral part of the process of raising legal consciousness and gaining the requisite knowledge to assess whether there is a legal violation that recommends further action. A worker discussing this matter with a coworker might also be seeking emotional support to validate her response and spur her on to further action.

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[170] 29 U.S.C. § 157.

[171] *See* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERK. J. EMP. & LAB. L. 23 (2006) (discussing labor law's potential to provide broad protection to non-union employees).

[172] Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 693 (3d Cir. 1964).

[173] *See* Adelphi Inst., 287 N.L.R.B. 1073, 1975 (1988).

[174] *Id.*

Labor law also denies protection to supportive coworkers because it fails to recognize the role of coworker support to labor law's goal of enhanced employee leverage. The Board has held that a non-union member can be fired for seeking coworker support when facing employer discipline.[175] The Board recognized labor law's goal of leveling bargaining power disparities between employer and employee, but determined that coworker support does not accomplish this goal because the coworker does not act from any legal authority vis-à-vis the employer, and instead provides only "moral and emotional support."[176]

The Board's position demonstrates an impoverished view of the role of coworker support in the workplace, and in achieving the goals of labor law. First, coworkers provide more than moral and emotional support; they also serve as an important source of information for workers facing discipline, and as a source of instrumental support as well. Second, even coworkers' "moral and emotional" support is critical to employee leverage.[177] These forms of coworker support can level the playing field between employee and employer in meetings. For example, the presence of one's coworker may provide just the strength the worker needs to stand up for herself in the meeting, and the coworker may be able to corroborate the worker's version of events.

Other times when a worker is fired for seeking support from or providing support to a coworker, labor law takes a limited view of whether such support is "mutual." Courts consider the provision of support "mutual" when the worker "assures himself, in case his turn ever comes, of the support of the one whom [he is] then helping."[178] While this approach is at times sufficient to grant protection, it may also fail to protect coworker support. This can be seen in the fight over protections for workers who seek the support of coworkers in enforcing their employment rights, a particularly important category of coworker support from the perspective of employment law. The Board has permitted a worker to be terminated for seeking the support of a coworker in pursuing a sexual harassment claim because such support-seeking was not "mutual."[179] The Board considered

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[175] *Compare* IBM Corp., 341 N.L.R.B. 1288 (2004) (determining that nonunion members have no right to be accompanied by a coworker at an investigatory interview that might result in discipline), *with* NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (recognizing that union members have a right to a union representative present in such circumstances).

[176] IBM Corp., 341 N.L.R.B. at 1292.

[177] *See supra* Part I.B.2.b.

[178] NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942) (Hand, J.); *see also* NLRB v. Browning-Ferris Indus., Chem. Servs., Inc., 700 F.2d 385 (7th Cir. 1983) (Posner, J.) (adopting same approach).

[179] *See* Holling Press, Inc., 343 N.L.R.B. 301 (2004).

sexual harassment uncommon enough such that the expectation that supportive coworkers would one day have the favor returned in their own cases of sexual harassment was too "speculative."[180]

This summer, the Board reversed course on the question of whether a worker seeking support for a sexual harassment claim engages in protected activity.[181] However, even in this decision, the limited recognition of the importance of coworker bonds in labor law is apparent, as the Board clings to a notion of mutuality based in "the implicit promise of future reciprocation."[182] Moreover, the specter of reversal looms large given the Board's past flip-flopping on this issue, and the frequency with which the Board's positions change along with changes in political control.[183]

This limited approach to the mutuality of coworker support fails to understand not only how support is exchanged in coworker relationships, but the central role of coworker relationships at work.[184] The case law wrongly assumes that coworker support takes the form of a specific qui pro quo: I'll help you with your sexual harassment claim, so that you'll help me with mine. But support between coworkers is not so tit-for-tat, and in fact is far more fluid: support in one form leads to reciprocal support in a variety of other forms.[185] Therefore, even under labor law's narrow view of mutuality, the standard should be satisfied, because supportive coworkers

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[180] *Id.* at 304.

[181] Fresh & Easy Neighborhood Market, 361 N.L.R.B. no. 12 (2014).

[182] The Board's decision here perhaps made some progress on two points. First, the Board recognized that sexual harassment aimed at one worker could nonetheless adversely affect other coworkers. *Id.* Second, while the Board continued to based its decision on an expectation of reciprocal support, it did begin to recognize in a footnote the importance of coworker support for work law: "[W]e believe that fostering a supportive work culture with high coworker solidarity where employees feel free to address sexual harassment with their coworkers, results in an increased likelihood of reporting and has been linked to lower incidences of harassment in the workplace overall." *Id.*, slip op. at 7 n.21.

[183] *See* Corbett, *supra* note 171, at 27 (noting that "the law of the Board changes frequently, depending in significant part on its political composition").

[184] Professor Fischl, *supra* note 2, likewise criticizes labor's law presumption of selfish employee motives in this context, but his critique is somewhat different than mine. Fischl argues that the "mutual aid or protection" clause should be understood in light of "an ethic of solidarity rooted in working-class bondings and struggles" that rejects "individualism []as appropriate only for the prosperous and wellborn." *Id.* at 851. Fischl's critique is then based in a class-based understanding of solidarity versus individualism, whereas I criticize work law for failing to recognize that the same forms of altruism and support that arise in the family also arise at work, regardless of class and struggle.

[185] *See supra* Part I.A.1; Jonathon R. B. Halbesleben & Anthony R. Wheeler, *To Invest or Not? The Role of Coworker Support and Trust in Daily Reciprocal Gain Spirals of Helping Behavior*, 30 J. MGMT. 112 (2012) (discussing how reciprocity between coworkers operates on a positive feedback loop and takes alternative forms).

could expect reciprocal support to be returned in other forms.[186]

Moreover, understanding these cases requires not only understanding how support is exchanged in coworker relationships, but also understanding the significance of these relationships and how exchanges of support build them. Two principles are central here. First, coworker relationships matter because they address the imbalance of bargaining power between employer and employee, both at the individual employee level, and at the collective level: the stronger the relationships that develop among a group of coworkers, the more leverage those workers typically will enjoy vis-à-vis management. Second, the exchange of support between coworkers is an integral part of the development and maintenance of coworker bonds. With these principles in place, we can see that both seeking support from and providing support to coworkers are mutually beneficially acts in a profound sense simply because they help to secure one of the key determinants of workplace leverage and success: coworker bonds.

2. Sympathy Strikes

Labor law also restricts the ability of coworkers who are members of different bargaining units (or different unions) to support one through its treatment of "sympathy" strikes. A sympathy strike refers to a strike conducted by workers belonging to one bargaining unit in support of a primary strike that is conducted by their coworkers belonging to another bargaining unit at the same employer.[187]

While labor law protects this activity, the right to engage in a sympathy strike may be waived by collective bargaining agreement.[188] The Board and most courts have held that the right to engage in a sympathy strike is waived simply by the inclusion of a general no-strike clause in the agreement, even without any suggestion that the general clause was meant to apply to sympathetic activity.[189] The upshot is that most coworkers will

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[186] Even accepting this view of the self-interested worker, acting in support of a coworker benefits the supportive worker not only because his coworker will return the favor in the future, but because stronger coworker relationships improve performance. *See supra* notes 27-28 and accompanying text.

[187] Children's Hosp. Med. Ctr. of N. Cal. v. Cal. Nurses Ass'n., 283 F.3d 1188, 1191 (9th Cir. 2002).

[188] *Id.* (explaining that sympathy strikes are protected by 29 U.S.C. § 157).

[189] *See* NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953) (holding that general no-strike clause bars sympathy strike); Int'l B'hood of Elec. Workers, Local 803 v. NLRB, 826 F.2d 1283 (3d Cir. 1987) (holding that absent extrinsic evidence to the contrary, a general no-strike clause includes sympathy strikes); Local Union 1395, Elec. Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986) (upholding Board policy that general no-strike clause presumptively includes sympathy strikes); *but see* Children's Hosp. Med.

not be protected against termination when engaging in a sympathy strike.[190]

The ease with which the Board and courts have determined that workers have waived their right to engage in sympathy strikes is inconsistent with the critical role of coworker solidarity to labor power. Determining that the right to provide coworker support is waived without express say-so presumes that coworker support is a trivial matter that does not require specific consideration. But this form of coworker support is essential: "An integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective." And sympathy strikes are important not only for the impact of strike, but also for coworker bonds: "Sympathy strikes are a means by which workers can demonstrate their solidarity with their [coworker] brothers and sisters . . . ."[191]

3. Retaliation

Employment law prohibits retaliation for taking action against legal violations, but it does so too narrowly to insulate coworker support from employer discipline, leaving employers free to retaliate against coworkers who exchange support in many circumstances.[192] Retaliation protection comes in two forms: participation in a formal discrimination proceeding, and opposition to unlawful discrimination.[193] The protection for participation conduct has been construed broadly, but this broad protection attaches only *after* a formal charge has been filed with the EEOC.[194] This

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Ctr. of N. Cal., 283 F.3d at 1191 (declining to apply presumption that general no-strike clause includes sympathy strikes).

[190] *See* CHARLES B. CRAVER, THE RIGHT TO STRIKE AND ITS POSSIBLE CONFLICT WITH OTHER FUNDAMENTAL RIGHTS OF THE PEOPLE IN THE UNITED STATES AT XX WORLD CONGRESS OF LABOUR & SOCIAL SECURITY LAW 6 (Sept. 2012), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1532&context=faculty_publications ("[S]ympathy strikes by employees of the struck firm who work in different bargaining units are likely to contravene no-strike clauses contained in their own bargaining agreements and thus constitute unprotected activity.").

[191] Children's Hosp. Med. Ctr. of N. Cal., 283 F.3d at 1191-92.

[192] I focus on Title VII here because retaliation doctrine is far more developed here than other areas of employment law. Note that other areas of employment law often borrow from the well-developed Title VII jurisprudence. *See, e.g.*, Bythewood v. Unisource Worldwide, Inc., 413 F. Supp. 2d 1367, 1373 (N.D. Ga. 2006) (applying Title VII retaliation standard to FLSA).

[193] *See* 42 U.S.C. § 2000e-3 (making it unlawful for an employer to take retaliatory action against any employee "because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter" (emphasis added)); Slagle v. County of Clarion, 435 F.3d 262, 266 (3d Cir. 2006) (distinguishing opposition and participation and noting that the latter is broader).

[194] *See* Townsend v. Benjamin Enters. 679 F.3d 41, 49-51 (2d Cir. 2012) (collecting

limitation means that participation protection is not available in many cases, as employees will rarely file a charge with the EEOC as their first response to concerns of workplace illegality, precisely *because* they are likely to seek feedback from their coworkers first.[195]

This leaves protection for opposition conduct, which contains two hurdles. First, it attaches only once there is a reasonable belief of unlawful conduct, even though seeking and providing coworker support is often necessary for establishing this reasonable belief. Therefore, an employee who seeks informational support from her coworkers to assess whether she has been discriminated against can be fired for seeking this support because she has not yet developed the reasonable belief required for protection.[196] This is so even though coworker support is one of the primary avenues to attaining a reasonable belief, particularly in the discrimination context, where comparative information is essential to determining a violation.[197] Note that not only the worker seeking the information, but also the coworker from whom the information was sought, is vulnerable to discipline.[198]

Second, protection under the opposition clause attaches only when the conduct is viewed as somehow "t[aking] a stand against" unlawful conduct.[199] In *Crawford v. Metropolitan Government of Nashville*, the Supreme Court recently held that an employee's reporting her own experiences of sexual harassment in response to an internal employer investigation were protected opposition activity, even though the employee did not instigate the action.[200] Some forms of instrumental coworker support may likewise be viewed as "taking a stand." So, for example, a

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cases).

[195] *See* Long, *supra* note 76, at 958 (noting that "[a]n employee actually has an incentive to ask around the workplace to better understand her situation before invoking the employer's internal mechanism to address workplace discrimination"). This is especially troubling in the context of sexual harassment, where employees are required to complain internally before filing a formal charge, and thus this broader participation would never be available. *See supra* notes 73 and 76 and accompanying text. In some circuits, the reasonable belief requirement applies even to the participation clause, and thus merely filing a formal charge at the earliest possible moment is not a solution. *See* Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (stating in dicta that reasonable-belief standard applies to participation clause).

[196] *See* Jordan v. Alt. Res. Corp., 458 F.3d 332, 340-43 (4th Cir. 2006) (allowing termination of employee who was the target of a slur, discussed it with coworkers, and then complained about it to the employer); Long, *supra* note 76, at 958.

[197] *See supra* notes 90-93 and accompanying text.

[198] *See* Long, *supra* note 76, at 958-59.

[199] Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 555 U.S. 271, 277.

[200] *Id.*

coworker who provides support to a worker complaining of sexual harassment by speaking with the alleged harasser and accompanying the worker to the human resources department to raise additional harassment allegations engaged in protected opposition activity.[201]

However, other forms of coworker support that do not appear to "t[ake] a stand against an employer's discriminatory practices" will not be protected, which would exclude protection for much emotional and informational support.[202] A concurring opinion by Justices Alito and Thomas in *Crawford* expressed concern about "open[ing] the door to retaliation claims" for a worker who was "informally chatting with a co-worker at the proverbial water cooler or . . . after work at a restaurant or tavern frequented by co-workers."[203] Some courts have interpreted *Crawford* even more narrowly, suggesting that it would apply only to instances when the employer solicits the information, and only when the employee is either the aggrieved or the accused party.[204] Such a narrow construction of opposition conduct would exclude supportive coworker behavior. Contrary to one court's suggestion, coworkers are not merely "disinterested" parties.[205] Unlawful harassment is of interest to one's coworkers, not only out of altruistic concern for the victim, but for concern about a workplace climate that stands in the way of coworker solidarity.[206]

D. Breaking Bonds

Work law belittles coworker bonds and the support they provide by offering almost no protection against the rupturing of these bonds. Such disregard for coworker relationships not only fails to respect the importance of these bonds, but also reduces a worker's ex ante incentives to cultivate these bonds in the first place. And work law fails to appreciate not only the

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[201] *See* Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 47-48 (1st Cir. 2010). Other instrumental coworker support that can be closely linked to a worker's discrimination charge has been protected. *See* McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996) (holding that failing to prevent one's coworkers from filing discrimination charges was protected opposition); *see also* Crawford, 555 U.S. at 277 (giving example in *dicta* of coworker's refusal to fire junior worker for discriminatory reasons).

[202] Crawford, 555 U.S. at 277.

[203] *See id.* at 282 (Alito, J., concurring, joined by Thomas, J.).

[204] *See, e.g.*, Brush v. Sears Holdings Corp., 466 F. App'x 781, 787 (11th Cir. 2012) (denying retaliation protection to an employee who opposed the employer's handling of a sexual harassment allegation).

[205] *Id.*

[206] *See supra* Part II.B.2. Whether labor law's protection for concerted activity between coworkers will step in to provide protection in these cases depends on precise conduct the coworkers engage in and the ways the political winds blow at the Board. *See supra* Part II.C.1.

significance of coworker bonds generally, but also the valuable relationship-specific investments we make in *particular* coworker relationships.[207] Coworker bonds are not fungible, and require significant investments of time to make meaningful.[208] The closer the coworker bonds, the more effectively they function as avenues of support.[209] Given that coworker bonds tend to deepen in meaning and value over time, work law should be especially concerned with damage to existing coworker bonds and the value that is destroyed when such bonds are ruptured. But work law shows no such pattern.

1. Relational Harm

Damage to coworker bonds is not an actionable harm under work law. The Supreme Court recently restricted Title VII standing to allow claims only within the statutory zone of interests.[210] Because coworker bonds are not recognized as a condition of employment that Title VII protects, damage to coworker solidarity will not support standing to bring suit. In a case against food mogul Paula Deen, for example, a white plaintiff claimed that discrimination against her coworkers caused her a loss of "harmonious working relationships with African-American subordinates."[211] Specifically, the plaintiff complained that she was no longer able to provide emotional support for her coworkers who were suffering from discrimination.[212] The court denied the claim because "workplace harmony is not an interest sought to be protected by Title VII."[213]

Remedies for termination likewise do not consider the loss of coworker relationships. Title VII allows for compensatory damages for both pecuniary and nonpecuniary harm, as well as injunctive relief including reinstatement to "make [victims] whole."[214] But courts do not account for

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[207] *See* Schoenbaum, *supra* note 119, at 1204-07.

[208] *See id.*

[209] *See* Blackstone, *supra* note 11, at 640-42 (finding stronger effects of coworker support with stronger bonds).

[210] Thompson v. N. Am. Stainless, 131 S. Ct. 863, 869 (2011) (holding that Title VII standing does not extend to the full scope of Article III and rejecting earlier broader interpretations).

[211] Jackson v. Deen, 959 F. Supp. 2d 1346, 1350 (S.D. Ga. 2013).

[212] *Id.* ("Employees came to her to complain and for help, which she felt obligated to give but was unable to fully provide.").

[213] *See id.*

[214] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); *see also* 42 U.S.C. § 2000e—5(g) (providing that remedies for unlawful discrimination include "reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate"); 42 U.S.C. § 1981a(a)(1), (b)(3) (allowing compensatory damages, including "future pecuniary losses, emotional pain, suffering, inconvenience,

lost coworker relationships in fashioning a remedy for termination, especially in considering whether reinstatement is necessary to make the terminated employee whole.[215] Similarly, Title VII does not allow recovery for a discriminatory transfer, even if it ruptures longstanding coworker bonds, because the loss of relationships is not protected by Title VII.[216]

2. Termination and Transfer

Employment law permits employers wide discretion to break coworker bonds. Unless a specific employment protection stands in the way, the prevailing regime of employment at will allows employers to rupture coworker bonds, for any reason, and without notice. Unemployment insurance, work law's remedy for the harms that result from termination, does not address lost coworker relationships.[217] The unemployment insurance regime, by experience-rating employers, provides only a mild disincentive to rupturing coworker bonds. The cash it provides is a poor substitute for developed relational support, which cannot easily be purchased on the market.[218] Other employer actions that break bonds, such as transfer or reassignment, are even less regulated.[219]

Likewise, the law of worker mobility pays little heed to disruptions to coworker bonds. Non-compete agreements limit workers' ability to leave a firm and start a competing business. While courts do scrutinize non-compete agreements, they focus on whether the agreement includes reasonable geographic and time limits.[220] Courts do not consider whether these limits would unduly hinder the maintenance of meaningful coworker bonds, for example, by allowing the employee to start a competing business only at a place so far away that coworkers would not be able to join, or at a

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mental anguish, loss of enjoyment of life, and other nonpecuniary losses").

[215] *See* Larry M. Parsons, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1462 (1989).

[216] *See, e.g.*, Policastro v. Nw. Airlines, 297 F.3d 535, 539 (6th Cir. 2002) ("Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions," and "an employee's subjective impressions as to the desirability of one position over another are not relevant"); Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (same).

[217] *See* Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340 (2001).

[218] *See id.*

[219] The Worker Adjustment and Retraining Notification Act requires covered employers to give notice of mass layoffs and relocations. 29 U.S.C. § 2102; Schoenbaum, *supra* note 119, at 1181.

[220] Today most jurisdictions uphold non-compete agreements so long as they are limited in time and purpose. *See* Michael Selmi, *The* Restatement*'s Supersized Duty of Loyalty*, 16 EMP. RTS. & EMP. POL'Y J. 101, 101-02 (2012).

time so far away that established relationships would wither.[221]

3. Privileging Family

Work law's lack of concern for rupturing coworker bonds is perhaps brought into fullest relief by comparing its treatment of family bonds. Work law generally prohibits employers from retaliating against employees who engage in protected activity, such as union organizing[222] or complaining of discrimination.[223] These laws ban retaliation because it can discourage an employee from engaging in the protected activity.[224] The question arises whether an employer causing harm to befall that employee's intimate is a form of prohibited retaliation. Labor law and employment law have somewhat different answers, but both privilege family bonds over coworker bonds. In so doing, work law's treatment of third-party reprisals suggests the proper response for those who wish to avoid them: sever the coworker relationship.

Take labor law's treatment first. As noted above, supervisors are excluded from the general bargaining protections of labor law.[225] However, labor law does extend protection to a supervisor who is terminated or disciplined in retaliation for the supervisor's family member engaging in union activity.[226] In one case, the employer terminated a supervisor who was the mother of an employee engaged in union activities. The Seventh Circuit held that the termination was unlawful because "[i]f he loves his mother, this had to hurt him as well as her."[227] So an injury to one's family member is an injury to oneself, and thus "[t]o retaliate against a man by hurting a member of his family is an ancient method of revenge."[228] But not so with coworkers, who are not extended this protection.[229] While a family relationship requires no proof of closeness for protection, a coworker relationship never qualifies for protection, regardless of proof.

Bound up in labor law's differential treatment of family and friend is an assumption about the facility of rupturing coworker bonds. Consider the

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[221] See Schoenbaum, *supra* note 119, at 1196-97, on how bonds fade over time without ongoing contact.

[222] 29 U.S.C. § 157.

[223] 42 U.S.C. § 2000e-3.

[224] *See* Brake, *supra* note 75, at 20.

[225] *See supra* Part II.B.1.b.

[226] NLRB v. Advertisers Mfg. Co., 823 F.2d 1086 (7th Cir. 1987).

[227] *See id.* at 1089.

[228] *Id.*

[229] *See* United Food & Commercial Workers Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1993) (denying protection to discharged supervisor who had close relationship with rank-and-file employees who engaged in protected activity).

options facing a rank-and-file employee with a sister who works as a supervisor when deciding whether to undertake union activity. She may undertake the activity fearing that harm may befall her sister, or she may desist from the activity. Labor law presumes that severing the relationship with her sister is not an option. For an employee with a close friend who is a supervisor, labor law acknowledges that concern of harm befalling the supervisor could discourage the employee from undertaking the activity.[230] There is one option remaining to avoid the bind of foregoing the activity or causing harm to one's friend: sever the friendship. In this way, labor law undercuts the role that mature coworker bonds play in the successful operation of work law.

The law's disparate treatment of family and coworker relationships may be based in either a different positive or normative view of these relationships. On a positive view, family bonds are hard to sever. Once a sister, always a sister. So even if the employee distanced herself from her sister, the employer might still exact a reprisal against the sister.[231] On a normative view, it is not that family bonds are just hard to sever, but that, given the importance of family bonds, the law should not *expect* us to sever them. The law does not afford the same deference to coworker bonds. Either way, the law creates an incentive to sever coworker bonds but not family bonds, and in so doing, undermines these bonds.

Although employment law leaves open the possibility of protection for coworker reprisals, it still demonstrates a lack of appreciation for coworker bonds. The Supreme Court recently recognized that third-party reprisals could constitute prohibited retaliation under Title VII because they could "dissuade[] a reasonable worker from engaging in protected activity," and so held in *Thompson v. North American Stainless*, where an employer terminated the fiancé of an employee who had complained of harassment.[232] The Court "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful," but continued to privilege family intimacy over work intimacy, indicating that "a close family member will almost always" qualify, while equivocating about a "close friend" or "trusted co-worker."[233]

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[230] *Id.* at 387 (upholding the Board's determination that "the discharge of a supervisor . . . almost invariably has a secondary or incidental effect on employees"— to discourage them from engaging in such activities—and that this was insufficient to warrant protection).

[231] The law provides a few mechanisms for severing family bonds—divorce, adoption, emancipation—but they are severe measures and do not apply to some family relationships (siblings, adult parents and children). *See* Jill Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012).

[232] 131 S. Ct. 863, 868 (2011) (internal quotation marks omitted).

[233] *Id*.

Despite a relatively plaintiff-friendly approach,[234] this standard has made family the touchstone for determining which bonds matter at work. In the case of a coworker who was fired after a worker complained of sexual harassment, the court held that their relationship "exists somewhere in the fact-specific gray area between a "close friend," who would be protected, and a "casual acquaintance," who would not.[235] The court considered that the fired coworker displayed cards from the complaining worker on her desk, as well as photographs of the two together, and that they spent time together outside of work. This type of evidence is most indicative of a *family*-like relationship.[236]

Even coworkers who do not share a sufficiently family-like relationship can share meaningful solidarity and support that is critical at work.[237] Here, the complaining worker told her fired coworker about the harassment, and her coworker was well placed to provide support, as she had experienced harassment at the hands of the same supervisor.[238] But the court did not consider this evidence in assessing whether the relationship qualified for protection under *Thompson*. Although fear of harm befalling a coworker with whom a worker had developed this type of supportive work relationship could certainly "dissuade a reasonable worker from engaging in protected activity,"[239] the court remained fixated on family-like bonds.

The privileging of family to coworker associations is seen again in Title VII's approach to associational discrimination, that is, when an employer discriminates against an employee because of the employee's interracial association.[240] Courts will find a violation if an employer fires a white employee after the employer learns that she is married to a black man.[241]

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[234] Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 282 (2011) (recognizing *Thompson* as part of plaintiff-favorable trend in Title VII retaliation cases).

[235] EEOC v. Fred Fuller Oil Co., No. 13-CV-295-PB, 2014 WL 347635 (D.N.H. Jan. 31, 2014) (denying employer's motion for judgment on the pleadings; *see also*

[236] *See* Kimberly D. Elsbach, *Interpreting Workplace Identities: The Role of Office Décor*, 25 J. ORG. BEH. 99, 110 (2004).

[237] The Supreme Court's reference to a "trusted coworker" even points in this direction, Thompson, 131 S. Ct. at 868, but the district court chose to focus on the Court's reference to "close friend," Fred Fuller, 2014 WL 347635, at *6.

[238] *Id.* at *3.

[239] *See* Ali v. D.C. Gov't, 810 F. Supp. 2d 78, 88-90 (D.D.C. 2011) (recounting how employer threatened to fire plaintiff's coworker who had provided important support if the plaintiff proceeded with his discrimination allegations, after which the plaintiff withdrew the allegations to avoid his friend's termination).

[240] *See, e.g.*, Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012). The Americans with Disabilities Act also bans discrimination on the basis of an association with someone with a disability. 42 U.S.C. § 12112(b)(4).

[241] All courts recognize that a family relationship between the plaintiff and the person

But few jurisdictions will recognize the claim where the association is a strong coworker relationship rather than a family relationship.[242] As with the third-party reprisals, the presumption of the law is that there is an easy way to avoid the harm: break the coworker bond.

E. Further Implications

Beyond the immediate impact on coworker relationships described above, and the implications for the goals of work law, work law's regulation of coworker relationships also has additional implications, both for the relationship between labor and employment law, and for family-market divide, discussed in turn below.

1. The Labor Law-Employment Law Divide

The centrality of coworker bonds to the success of both labor and employment law links their fates, and raises the stakes for the law's treatment of these bonds. While scholars have typically focused on the tensions between labor law and employment law, the foregoing Parts have revealed what they share: both areas of law rely on coworker bonds to achieve their stated goals, but also fail to recognize and protect coworker relationships sufficiently for them to achieve these goals. This mutual reliance on coworker bonds and mutual failure to support such bonds means that the fates of both areas of law are tied: the more coworker bonds are undermined by employment law, the more difficult it is for labor law to succeed, and the more coworker bonds are undermined by labor law, the more difficult it is for employment law to succeed. So while scholars have been quick to point out employment law's negative impact on labor law, the foregoing Part also supports the converse: that labor law has a negative impact on employment law.

Note also that these areas of law do more than impact the development and maintenance of meaningful coworker bonds. They also generate and deploy an ideology of work as an individual effort without important relationships, which affects not only the immediate doctrine to which it is applied, but more broadly pervades judges' and policymakers' beliefs about work and workers, which can migrate across all of work law.[243] This

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of a protected class that gave rise to the associational discrimination claim will support such a claim. *See* Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740, 743-45 (S.D. Miss. 2007) (collecting cases).

[242] *Id.*

[243] I am not the first to propose that the law of work shapes our ideas of work, workers, and the workplace. *See* Stone, *supra* note 135, at 144 (recognizing that work law "shap[es]

construction of coworker relationships can seep across doctrines, and because the same subjects—employees—are the relevant actors, between labor law and employment law.[244] Moreover, this ideology of work can also take hold in the public, particularly when prominent cases are decided or legislative battles are waged, which may then further reinforce this ideology for relevant decisionmakers.[245]

This calls into question scholars' approach of relying on one area of work law to stand in for another. So, for example, Professor Ben Sachs has argued that in the face of labor law's decline, employment law can galvanize collective action to substitute for the lack of labor activity.[246] But until employment law more robustly protects coworker solidarity and support, employment law will not adequately promote collective coworker activity.

While current law might leave us pessimistic about the negative impact of employment law on labor law, and vice versa, it also should give us cause for hope. If law were to shift its approach to coworker relationships, changes in labor law could help employment law achieve its goals, and changes in employment law could help labor law achieve its goals. While labor law's preemption of certain employment law rights for unionized workers hinders employment law from playing this role as robustly as it otherwise might for these workers, this does not negate the potential for mutual reinforcement of labor law and employment law.[247] An employment law that recognizes coworker bonds would still influence the ideology of work and the role of coworkers in it that can have a positive influence on labor law. And this can have an impact on the workers themselves. As workers are increasingly mobile between workplaces, including between union and non-union workplaces, a worker whose coworker bonds are protected in a non-union workplace can bring a

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ideas about work"). This shaping of the idea of work is self-reinforcing. As legal decisionmakers—ALJs, the Board, and judges—make decisions under a law that embodies a particular conception of work, they then redeploy this vision of work in their future decisions.

[244] Fischl, *supra* note 2, at 837-38 (discussing how conception of worker in one doctrine of labor law could spill over to other labor law doctrines; Barenbaum, *supra* note 147, at 763 (explaining how labor law constructs worker subjectivity and its implications); Stone, *supra* note 135, at 144 (noting the importance of the ideology of work underlying labor law).

[245] *See* Crain & Matheny, *supra* note 5, at 578 (describing how legal decisions relying on the ideology of unions as conspiracies took hold in the public mind).

[246] Sachs, *supra* note 5, at 2686-90; *see also* Crain & Matheny, *supra* note 5, at 579-91 (discussing alternative forms of collective action).

[247] *See* Stone, *supra* note 3, at 577; Rick Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687 (1997).

heightened sense of the significance of coworker bonds to a union workplace.[248]

2. The Family-Market Divide

Not only does work law's treatment of coworker bonds undermine its stated goals, but it also reinforces the family-market divide, with additional ramifications for work and family. Feminist legal scholars have focused on how this harms women in family, by failing to value productive work that women disproportionately engage in at home.[249] But the foregoing Part highlights how the family-market divide can have the same harmful consequences for women at work.

The law's categorical recognition of support in the family and not at work can be both cause and consequence of the low value placed on coworker support at work. Not only does the law view work as primarily an individual effort, with coworker support as insignificant, but so too do employers, who regularly assess individual accomplishment, but rarely track acts of support.[250] Like the failure to value work in the family, the failure to value support at work disproportionately harms women workers. Women not only engage in more supportive work behavior, but are judged less favorably than men when they provide support, and more harshly than men when they decline to provide it.[251] The unacknowledged support that women provide not only hinders their careers, but takes an emotional toll.[252]

Because the law fails to give due heed to love, affection, altruism, and support at work, despite all of it that occurs there, this leaves the family as the only proper legal source of these values, and places all the more pressure on the family to protect them. This reinforces the law's anxiety about loosening the reins on the exceptional treatment of the family.[253] If we cannot get legal protection for support at work, we must be able to get it from the family. The family-market divide is rigidly upheld, impervious to

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[248] *See* Schoenbaum, *supra* note 119, at 1170-71 (discussing employee mobility).

[249] *See* sources cited *supra* notes 120 and 121.

[250] *See* Adam Grant & Sheryl Sandberg, *Madam C.E.O., Get Me a Coffee*, N.Y. TIMES, Feb. 8, 2015, at SR2.

[251] *See* Madeline E. Heilman & Julie J. Chen, *Same Behavior, Different Consequences: Reactions to Men's and Women's Altruistic Citizenship Behavior*, 90 J. APP. PSYCH. 431, 434-40 (2005). To be precise, women are more likely to engage in support that is behind-the-scenes or otherwise not visible, and thus to not get credit for their support behavior. *Id.*

[252] The seminal work is ARLIE HOCHSCHILD, THE MANAGED HEART COMMERCIALIZATION OF HUMAN FEELING (1983, 2012 ed.), which discusses the costs of "emotional labor."

[253] *See* Borelli v. Brusseau, 12 Cal. App. 4th 647 (1993) (denying enforcement of support contract in marriage).

the reality of work in the supportive realm of the family, and support in the productive realm of work.

III. A THEORY OF COWORKERS IN LAW

Having set forth the central role of coworkers in life and law, and catalogued work law's failure to appreciate this, this Article argues for a law of work that values and protects coworker bonds. This Part begins with a more general discussion of how the law should recognize coworker relationships, and then turns to more specific proposals to update current law and to add new incentives on employers to promote coworker solidarity and support.

Before sketching out what this law would look like, I address a preliminary matter. Much of the role that coworkers play in work law is as an enforcement mechanism. If enforcement of work law is the problem, then a question arises whether the law should address this by shoring up coworker relationships, or by some other mechanism, such as more robust retaliation protection,[254] an enhanced role for public regulators,[255] or a regime of monitored self-regulation that relies on employers, employees efforts, and outside monitors.[256] I do not mean to suggest that my solution—protecting coworker relationships—should be exclusive. However, targeting coworker bonds as the remedy has the benefit of being cheap from a taxpayer perspective (as compared with enhanced public enforcement). Stronger coworker bonds also offer additional benefits in the form of enhancing workers' satisfaction and productivity, as these relationships are central to both.[257] Moreover, my solution has the potential to be self-reinforcing: as coworker bonds are protected, they are likely to serve a stronger role in enforcement, which only further strengthens the bonds, which in turn leads to more support for enforcement.

A. Towards a Law of Limited-Purpose Support

As identified above, the law takes a categorical approach to support, and provides its most robust protection to supportive relationships in their all-purpose form within the family. But support can be integral in particular domains, including work. In particular domains, persons outside the

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[254] *See* Brake, *supra* note 75, at 50-55.

[255] *See* Sarah Block, *Invisible Survivors: Female Farmworkers in the United States and the Systematic Failure to Report Workplace Harassment and Abuse*, TEX. J. WOMEN & L. (forthcoming 2015) (on file with author).

[256] *See* Estlund, *supra* note 2, at 324.

[257] *See* sources cited *supra* notes 27-28.

family—one's coworkers—are even better placed than family members to provide the type of support integral to both worker leverage and to the goals of work law. A legal regime of limited-purpose support relationships would allow the law to recognize that certain relationships, such as the coworker relationship, can provide critical forms of support in addition to, or even instead of, the forms of support provided by the family, in their respective domains. The law of limited-purpose support would borrow the aims of protecting relationships from family law—promoting solidarity, encouraging support, and maintaining bonds—but would modify these aims to fit the needs of the domain in which they arise. While this theory may have application to other relationships (e.g., customers) or other domains (e.g., schools), I focus here on coworker relationships.

The defining distinction between the comprehensive support relationship of the family and the limited-purpose support relationship proposed here for coworkers is that its domain of significance is limited. Rather than being a relationship whose significance crosses domains, the coworker relationship draws its primary value from the fact that it takes place at work, and in the context of an employment relationship. So while at a high level of generality, the approach that family law takes to recognize and protect relationships—to promote valuable bonds, to protect support, and to avoid rupturing these bonds—is also the approach that a law of limited-purpose support would aim to replicate, it would do so in a way that takes account of the unique value and the unique challenges of these relationships taking place at work, with the significant influence of an employer.

This means that in recognizing coworker relationships, the law must be sensitive to how coworker relationships generate value in ways distinct from the family model. Other scholars have critiqued family law's failure to extend its reach to other important supportive relationships, and have suggested adopting a more family-like approach to these relationships.[258] My point, by contrast, is that because the law only recognizes support in its comprehensive form within the family, it fails to recognize *alternative* forms of support that arise outside of the domestic sphere. My aim then is not for law to expand its recognition of the relationships that should qualify for the protections of family law. Rather, the goal here is for law to

[258] *See* Crain, *supra* note 38, at 166 (arguing for divorce-like mechanism to end of employment relationship, albeit focused on the employer-employee relationship, and not the relationship between coworkers); Rosenbury, *supra* note 119, at 195 (arguing for family law privileges, such as FMLA rights, to apply between friends); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390 (2008) (arguing for domestic family law to apply to a broader network of caregivers).

recognize that critical forms of support come from different types of relationships with different regulatory needs, and thus for the law to develop alternative models of support to recognize and more robustly protect these extra-family sources of support.

Notably, coworkers are not simply redundant of family support or a lesser form of support. While family members can provide some of the support that coworkers provide (e.g., giving workers advice about how to deal with discrimination at work), coworkers provide support that family members are not well positioned to provide.[259] This also means that family law protections may not even be adequate to protect and promote the types of support that coworkers provide. Because meaningful forms of coworker support are exchanged not only on a bilateral basis, but also in groups of employees, the legal recognition of coworker relationships would be more fluid and functional than those in the family.[260] Unlike marriage, this relationship need not be limited to any particular number or require any formal entrance mechanism. The more fluid nature of workplace support, along with the ability to enjoy multiple and overlapping coworker relationships also renders a divorce-like mechanism to sever these relationships unnecessary.

And even though coworkers provide forms of support more traditionally associated with the family,[261] this does not mean that coworker relationships need to receive the same legal treatment as family relationships, for example, an extension of FMLA rights for a worker to take leave to care for a coworker. Applying family responsibilities in the work context would rob coworker relationships of some of the benefits they provide that the family does not. In particular, applying the duties and even privileges of care associated with the family to coworker relationships would unduly burden these relationships such that they no longer offer the riches of intimacy without the unending demands of the family that can reduce the pleasure of intimacy derived there, particularly for women workers.[262] This special intimacy blossoms in part precisely *because* these relationships are regulated differently than the family. Any new law should not only provide needed protections, but also avoid regulation that might detract from the unique value of these relationships.

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[259] *See* Corbett, *supra* note 171, at 27.

[260] But see generally Rosenbury, *supra* note 121, for a discussion of bilateral coworker relationships in the context of "work wives."

[261] *See supra* McGuire, *supra* note 17, at 131-32 (recounting how coworkers provide important support on all sorts of matters outside of work, including, for example, advice about family problems, and even hands-on care, such as babysitting or transportation to medical appointments).

[262] *See supra* note 32 and accompanying text.

Another unique benefit of coworker relationships is the development of meaningful bonds in a diverse setting.[263] Note then that the limited-purpose support relationships I envision here would thus be outside the purview of the constitutional right to intimate association.[264] Indeed, this is critical to the project, as otherwise the antidiscrimination goals of employment law would be rendered suspect.[265] Legal recognition of alternative forms of support thus allows law to promote the significance of critical bonds while also promoting the critical value of nondiscrimination.

As explained at the outset of the Article, coworker relationships are similar to other more familiar "in-law" relationships because they arise secondarily out of a primary relationship—the one between employer and employee—that the law *does* recognize. By definition, employers have significant control over the terms and conditions of employment, and because coworker relationships form and play out at work, by extension, employers have significant control over the terms and conditions of coworker relationships.[266] Employers create the conditions under which coworker bonds are more or less likely to form, under which coworkers are more or less likely to support each other, and under which coworker bonds are more or less likely to rupture. They do so, for example, by allowing or denying workers the ability to work together, by disciplining or celebrating coworker support, and by maintaining work units or by transferring or terminating workers with developed bonds. For this reason, recognizing coworkers in law is primarily the exercise of regulating employers. Regulating in this way has the benefit of leaving the workers themselves free of any particular duties to each other, again allowing coworker bonds to retain their particular value as compared with family members.

While this imposes costs on employers, these costs are justified by the need to achieve the goals of work law. Employers control the terms and conditions of coworker relationships, and thus bear substantial causal responsibility, either through action or inaction, for the state of coworker bonds in the workplace.[267] And because employers are responsible for bringing workers together and benefit from the work-generating enterprise, they also bear a commensurate responsibility for cultivating safe, healthy, and fair working conditions.[268] These include certain minimum

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[263] *See generally* ESTLUND, *supra* note 149.

[264] See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980), on the contours of this right.

[265] *See* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (explaining that the right protects relationships from state intrusion through antidiscrimination mandates).

[266] *See* Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985) (holding that employment relationship turns largely on employer control).

[267] *See id.*

[268] *See* Ira S. Bushey & Sons v. United States, 398 F.2d 167 (2d Cir. 1968) (Friendly,

considerations for coworker bonds, which are necessary for work law to achieve its goals effectively.

A final point about limited-purpose support relationships: because they are relevant to one domain, they can typically be regulated through the existing law and institutions of that domain, rather than requiring a body of freestanding law. In the case of coworkers, that existing law is the body of work law, and the institutions that have developed to enforce it, namely, in addition to courts, agencies, such as the NLRB and EEOC, unions, internal employer compliance mechanisms, and even informal employee groups like workers' centers.

B. Updating Current Law

Work law could recognize coworker relationships perhaps most simply by updating current law to appreciate coworker solidarity and support as important interests of work law. Some of these changes would flow from applying a proper understanding of coworker bonds to current doctrine, and others would require statutory amendments.

1. Doctrinal Modifications

Modifying current doctrine to appreciate coworker relationships would require recognizing the significance of coworker solidarity and recognizing the significance of coworker support. As for coworker solidarity, current law limits the terms and conditions of employment to the narrow economic rewards of work, and fails to recognize that the relational conditions of work are just as, if not more important, which impacts a number of doctrines.[269] Recognizing coworker solidarity as an interest in work law would quite literally translate to the understanding of an employment law statute's zone of interests that would support standing to bring a claim under the statute. So, for example, while Title VII currently bars claims for relational losses due to discrimination for lack of standing, a work law that properly recognizes coworker solidarity would find standing to allow such a claim to proceed.

Likewise, a law of the workplace that appreciated the significance of coworker solidarity would recognize that a discriminatory transfer could constitute an adverse employment action an actionable under Title VII even if the transfer did not reduce the worker's pay or title, if it ruptured significantly meaningful coworker bonds. When evaluating make-whole

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J.) (justifying employer's legal responsibility for what goes on in the workplace based on control and foreseeability).

[269] *See supra* Parts II.C.2, II.D.2.

remedies for an unlawful termination, a work law of limited-purpose support relationships would also consider whether developed coworker bonds require reinstatement rather than simply money damages. And such a law would scrutinize a non-compete agreement for its consequences on coworker bonds, and would consider such bonds in determining whether an employee has violated of the duty of loyalty.

Doctrines that presume the relative ease with which employees can break bonds with coworkers would pay more heed to the significance of coworker bonds and the consequences of their rupture.[270] So law of third-party reprisals and associational discrimination would recognize that fear of harm to a close coworker can dissuade a worker from engaging in protected activity, and that ending a coworker relationship as a way to avoid harm befalling the coworker or to the worker herself is costly. Achieving proper recognition of coworker relationships would require decisionmakers not only to appreciate coworker relationships, but also their unique features. Courts would need to avoid relying too much on a family model of relational significance, and would instead consider the primary indicia of an important coworker bond: the exchange of support.[271]

As for coworker support, a work law that recognized coworker relationships would provide more robust protection to the supportive conduct that defines these relationships. Labor would appreciate a broader range of supportive activity as falling within the protection for "concerted activities" for "mutual aid or protection" would be modified. This would require work law to appreciate coworkers' altruistic behavior, and would not simply apply a simple rational actor model to these relationships. When considering whether coworker support is "mutual," the Board would not take a narrow quid pro quo view of coworker motivation, but would instead recognize the more fluid way in which support is exchanged and accrues to the benefit of coworkers.[272]

There still remains the question of how broadly "concerted activity" should be construed. If labor law protects "concerted" coworker activity for "mutual aid or protection," and if seeking and providing support are integral to building solidarity between coworkers, and this solidarity is in turn integral to coworker "mutual aid or protection," then, in theory at least, any time a worker seeks the support of a coworker or provides support to a coworker, she is acting for "mutual aid or protection." This interpretation probably presses the interpretation of current law too far, as the relationship between the coworker support and the ultimate "mutual aid or protection" is

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[270] *See supra* Part II.D.
[271] *See supra* Part II.D.3.
[272] *See supra* Part II.C.1.

too attenuated.[273] Whether it would be advisable to extend legal protection for coworker support to this extent is taken up later.[274]

A law of work that gave coworker support its due would give broader protection against retaliation to coworkers who support those who complain of employment law violations. When considering whether these coworkers are engaged in activity that "opposes" unlawful conduct, the law would recognize that coworker support is often an essential ingredient to a worker opposing unlawful conduct, and thus can be viewed as a meaningful part of the opposition conduct that should be protected. In this way, the law would have to expand its frame in assessing whether conduct amounts to "standing up" against a possible legal violation by looking at all of the actors and actions that are part of what allow a worker to "oppose" an alleged legal violation.[275] With this expanded frame, emotional, informational, and instrumental support from coworkers are often an essential part of the opposition. Such a law would likewise be more circumspect about employees waiving their rights to engage in supportive coworker conduct, as in the context of waiving the right to engage in a sympathy strike.[276]

Finally, a law that recognized that coworker support is essential to workplace leverage and success would also recognize that the provision of coworker support on a discriminatory basis could constitute an adverse employment action under Title VII, so long as the forms of support withheld are significant.[277] Such a cause of action would be an analogue to a hostile environment on the basis of race or sex, but the hostility would be based on the exclusion from coworker support.[278] Failure to receive support on a discriminatory basis can just as much change the conditions of work as sexually harassing behavior. In such cases, as with sexual harassment, the question of employer liability for something less than an official act of the employer (hiring, firing, promotion, and the like), would also arise, and doctrines that address this challenge in the sexual harassment context could

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[273] *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 693 (3d Cir. 1964) (requiring an *intent* on the part of one of the workers to initiate group action).

[274] *See infra* Part III.C.1.

[275] *See* Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 555 U.S. 271, 280 (2009).

[276] *See supra* Part II.C.2.

[277] *See supra* notes 162-66 and accompanying text.

[278] *See* Harris v. Forklift Sys., 510 U.S. 17 (1993) (setting forth the standard for hostile environment harassment). Notably, hostile environments are one area where employment discrimination law has not required a showing of discriminatory intent. Extending this approach to the exclusion of support would help plaintiffs in what would otherwise be a significant hurdle to recovery. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901 (1992).

be adapted here.[279]

2. Implementation

Updating doctrine to take account of coworker relationships raises a number of questions about how the changes suggested above would be implemented. Given the spectrum of significance of coworker relationships, an initial matter is which coworker relationships would be significant enough to qualify for recognition in the first place. Decisionmakers would engage in a functional inquiry of relevant work-related support, avoiding presumptions of support based on family relationships. The Supreme Court's decision in *Thompson*, where the Court held that the firing of an employee's fiancé was actionable retaliation, raises the promise of this type of fact-specific inquiry into the nature of the coworker relationship in a particular case.[280] While the Court continued to favor family relationships, it "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful," noting that the firing of a "trusted co-worker" could constitute actionable harassment.[281] Despite an application that has been too focused on family intimacy, this decision demonstrates the Court's confidence in decisionmakers' ability to draw sensible lines around the types of coworker relationships that warrant heightened recognition and protection in law.

Whether a coworker qualifies for protection should depend on the nature of the protection and the relevance of the relationship for that protection. The promise of *Thompson* is evident in this regard as well, as the standard the Court sets forth is both functional *and* work-related: whether the allegedly retaliatory action was the type that would have "dissuaded a reasonable worker from engaging in protected activity."[282] While courts have stumbled in their application of the standard by relying too much on family models of support, this can be corrected by recognizing that work-based support bonds as well as family-based support bonds can satisfy this standard. Note that this approach can also calibrate its protection to the strength of the coworker relationship along the spectrum indicated above.

Readers troubled by the administrative burden of a functional standard should recognize that even under current law, work law draws lines around which *family* relationship merit special consideration, and it has been able

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[279] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[280] Thompson v. North American Stainless, 131 S. Ct. 863, 868 (2011).

[281] *Id.* ("We expect that firing a close family member will almost always meet the Burlington standard. . . .")

[282] *Id.*

to do so without much trouble. Take, for example, the exclusion of family members of owners and managers from a bargaining unit because they lack a "community of interest" with their fellow employees.[283] Family members are not automatically excluded from the bargaining unit, but may be excluded if there is reason to believe that they are aligned with management.[284] Courts have been able to draw such lines.

Recognizing coworker bonds would not necessarily be determinative. It would be a factor to consider in the mix of other relevant factors, but one that is crucial to understanding the harms and motivations at play in relevant cases. If a coworker bond were not sufficiently significant, it would not warrant protection. For example, a claim of associational discrimination on the basis of a coworker relationship with minimal interaction would fail. Or there might be countervailing considerations that would trump. For example, in a concerted activity case, coworkers could be engaging in support behavior, but doing so in a way so disruptive to the employer's business that it does not warrant protection.[285]

Nor would recognizing coworker relationships always accrue to the benefit of employees. For example, as mentioned above, labor law may exclude family members from bargaining units even when they receive no special benefits.[286] In this way, labor law sets up the family as the site of all-purpose loyalty and support, and fails to recognize how, within its sphere, coworker solidarity may trump family solidarity. The functional approach advocated here would recognize that there is no necessary reason

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[283] NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-95 (1985) (upholding Board's decision to exclude both a wife and a mother of those with less significant ownership interests under its authority to determine an appropriate bargaining unit even though these employees did not fall within the statutory exemption for family members).

[284] Action Automotive, 469 U.S. at 495-96 (noting that "[t]he greater the family involvement in the ownership and management of the company, the more likely the employee will be viewed as aligned with management and hence excluded"). Note that certain family members of substantial owners are excluded from the definition of employee. *See* 29 U.S.C. § 152(3) (excluding from definition of "employee" "any individual employed by his parent or spouse"); Action Automotive, 469 U.S. at 497 n.7 (1985) (exclusion applies only to child or spouse of an individual with at least 50% ownership interest).

[285] *See* NLRB v. IBEW Local 1129, 346 U.S. 464 (1953) (denying protection when coworkers engage in support in a way that sis "reasonably calculated to harm the Company's reputation and reduce its income").

[286] Note how, in contrast to coworkers, labor law presumes altruism in the family. First, no showing of any particular benefits accruing to the employee family member is required before she may be excluded. Action Automotive, 469 U.S. at 495. Second, labor law excludes family members who have no legal entitlement to the property of their owner or manager relation. That is, labor law excludes not only the owner's or manager's wife, who may be entitled to share in the rewards of the business under community property rules, but also his mother. *Id*.

why family solidarity would or should outweigh coworker solidarity at work.[287] On the one hand, then, a functional approach would be *more* skeptical that family solidarity trumps coworker solidarity, and would be less willing to exclude family members from bargaining units.

On the other hand, it would also mean that a sufficiently close coworker relationship with an owner or a manger might create too *much* alignment such that exclusion from the bargaining unit is warranted. Likewise, recognizing coworker bonds might support an employer's objection to the union proposed bargaining unit. An employer can show that a proposed bargaining unit must include additional employees if they share an "overwhelming" community of interest with the workers in the proposed unit.[288] An employer could support such a showing by submitting evidence of strong coworker bonds between the additional employees and those in the proposed unit.

Finally, there is a question of the appropriate remedy when it comes to the loss of coworker bonds. As in many areas where the law awards damages for non-pecuniary losses, money is a poor substitute for the loss suffered, particularly when the loss is relational.[289] But it is usually the best we can do. This area of law could then borrow from other areas of law, such as the cause of action for loss of consortium, that engage in the difficult problem of how to monetize the loss of relational value, both in quantity and quality.[290] Money damages do confer one key benefit here: the continuous rather than discrete nature of money damages maps on well to a spectrum of coworker closeness. Money damages can be calibrated to reflect the level of closeness of lost work relationships, which will typically bear a substantial relationship to the significance of the loss.

3. Statutory Amendments

In some instances, new legislation would be necessary to overcome the legal hurdles to work law recognizing coworker relationships. Some of this

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[287] *Cf. id.* at 502 n.10 (Stevens, J., dissenting) ("We are convinced that the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interest which an individual shares with fellow employees, absent evidence that because of such relationship he enjoys a special status which allies his interest with those of management.").

[288] Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. No. 83 (2011), *enfd. sub nom.* Kindred Nursing Ctrs. East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013).

[289] *See* J. Harvie Wilkinson III, *The Dual Lives of Rights; The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 317 (2010).

[290] *See* Eugene Kontorovic, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1711 (2007) ("[J]uries do assign values to even the most inchoate injuries, such as emotional distress and loss of consortium.").

new legislation would take the form of amendments to the National Labor Relations Act: removing the exclusion for supervisors,[291] and narrowing the ban on employer domination so that it applies only to true "company unions" and not to forms of employee participation that promote solidarity.[292] Given the political hurdles to any statutory amendment at the federal level, it is wise to consider alternatives to the NLRA amendments. One alternative is to try to do through judicial interpretation what you can't do through statutory amendment. Some headway could be made towards promoting more solidarity in the workplace by construing the supervisor exception narrowly such that it does not exclude as wide a swath of workers. As the Supreme Court recently explained, who counts as a supervisor has interpreted more broadly under the NLRA than other work laws, and there is some wiggle in the joints for a narrower construction.[293] Such an approach has already essentially been taken in the context of the ban on employer domination. While some decisions have held that joint management-labor participation mechanisms violate the ban, it has largely been a "paper tiger" for lack of enforcement.[294]

Statutory protection against workplace bullying, which would require employers to intervene in circumstances that undermine positive coworker solidarity, is also needed.[295] Such legislation faces better prospects. It can be fruitfully pursued at the state level, and indeed such legislation has already been proposed.[296]

C. New Incentives

While updating current doctrine would go some way towards giving coworker relationships their due, gaps remain. Given the employer's role in controlling the conditions of employment, the employer has the potential to serve as an actor helpful to the recognition of coworker relationships. But

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[291] I am not the first to propose this change to labor law, *see* Crain, *supra* note 134, at 957, but the vantage point of coworker support adds another argument in favor of this change. The exclusion of managers is based on judicial interpretation, but this interpretation relies heavily on the statutory exclusion of supervisors. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974). Removing the supervisor exclusion would thus also remove the manager exclusion, which could also be made express in any amendment.

[292] *See supra* Part II.B.1.c. Such a change has been proposed. *See* Teamwork for Employees and Management Act, S.295, 105th Cong. (1997) and H.R. 634, 105th Cong. (1997).

[293] *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2245 n.7 (2013).

[294] *See* ESTLUND, *supra* note 149, at 164.

[295] *See supra* Part II.B.2.

[296] *See* David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 329, 338-39 (2013) (cataloguing states that have introduced the Healthy Workplace Bill).

one of the greatest challenges for coworker relationships is that work law currently does little to encourage employers to promote meaningful coworker bonds or to avoid breaking coworker bonds.[297] Some legal incentives for employers to promote and maintain coworker bonds are in order.

Before turning to any specific proposal for doing so, I raise a few concerns that must be kept in mind in assessing the proposals below. First, existing law touching on coworker relationships has shown itself to be a blunt instrument not particularly adept at discerning between the types of coworker interactions that promote or undermine solidarity. So, for example, the ban on employer domination, which is meant to prevent harmful solidarity, actually bans a wider swath of coworker interaction that undermines solidarity.[298] Or the ban on sexual harassment, which is meant to eliminate coworker interactions that are harmful to gender equality, sweeps in a broader array of coworker interaction that promotes positive solidarity and support.[299]

Second, the conditions of work that can promote or inhibit solidarity are pervasive. As compared with a specific instance of employer discipline for coworker support, the conditions that inhibit or promote solidarity are more amorphous and far-reaching. In crafting incentives for employers to consider solidarity-inhibiting or solidarity-promoting conditions, one must take care that such incentives are not too intrusive on employer prerogative. This Part considers several options that would place some pressure on employers to be more concerned with the conditions of solidarity, while at the same time being mindful of the law's limitations, as well as its burdens.

1. Insulating Coworker Support

A question left open above is whether protection for supportive coworker activities, currently embodied in labor law's protection for "concerted activity . . . for mutual aid or protection," should be expanded beyond its current limits to include any seeking of coworker support and any provision of coworker support. I argue now that it should. Current law's piecemeal approach to protection for support is too focused on whether particular acts of support were engaged in with particular purposes (i.e., to come together with coworkers for mutual aid, or to stand up against discrimination) to provide the protection necessary for coworker support to fulfill the aims of work law. Under this expanded protection for coworker support, work law would protect workers who were seeking emotional,

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[297] *See supra* Parts II.B.2 and II.D.2.
[298] *See supra* Part II.B.1.c.
[299] *See* Schultz, *supra* note 2, at 2189.

informational, or instrumental support from their coworkers or who were providing such support to their coworkers on any matter related to work. This could be accomplished either by expanding the NLRA's protection for concerted activities, or by new employment legislation at the state or federal level.

While this expanded protection for coworker support does not require any affirmative action by employers to promote solidarity, it does place an affirmative duty on employers to refrain from doing the thing that probably deters coworker support the most: concern about employer retaliation.[300] This protection could materially impact workers' willingness to seek support from and provide support to their coworkers. A general no-retaliation obligation on employers for coworker support does then place the employer in the position of creating the necessary precondition for meaningful solidarity: being able to turn to one's coworkers without fear of the employer's response. And this form of protection benefits from being employee driven, because it is the employee who determines what forms of support to seek or provide, and from or to whom. This reduces the risk of the law drawing the wrong line around what forms of support and solidarity matter.

In terms of burdens on employers, this new law remains a balanced approach. While this law would appreciably broaden protection of supportive coworker conduct, it would not cover any and all supportive behaviors, regardless of the form they take. Labor law limits protection of concerted activities to those that are not unduly disruptive, and a similar limitation could be incorporated here.[301]

Limiting the protection of coworker support to work-related matters is really too narrow, because even the seeking and provision of support related to non-work matters builds solidarity and the propensity for support for work-related matters.[302] I draw the line at work-related matters, however, out of fairness to employers. Work matters are where employers have the most control. Therefore, employers that wish to minimize incursion on their prerogative to terminate or discipline employees can try to reduce the need for the exchange of work-related support by improving the conditions of work—e.g., making the workplace more fair, equal, and safe—such that coworkers do not need to rely on each other as much to achieve the goals of work law. Moreover, requiring an employer to defer to support on all matters—both inside and outside the workplace—would simply be too intrusive into the employer's prerogatives, and would more likely cause

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[300] *See* sources cited *supra* note 75.

[301] *See* NLRB v. IBEW Local 1129, 346 U.S. 464 (1953).

[302] *See* Uzzi, *supra* note 17, at 675-82; ZELIZER, *supra* note 17, 250-55; McGuire, *supra* note 17, at 131-32.

tension with the employer's obligation to prevent sexual harassment.[303]

2. Right to Ask

A right to ask could make some headway towards promoting and protecting solidarity while also being sensitive to the concerns of the role of law here. A right to ask equips workers with a right to ask for particular working conditions while being protected from retaliation. In the U.K., workers have a right to ask for modified work hours or work location to care for a child. The law does not require that the employer provide any accommodation, but requires that the employer consider requests for accommodation and provide a process for considering such requests.[304] The principle behind the right to ask is not the guarantee of an outcome but the guarantee of a dialogue, with protection against retaliation.

Here, workers would be granted a right to ask about matters related to developing and maintaining coworker relationships and giving and receiving coworker support. For example, workers might seek to be transferred with a close coworker, or might request that an employer intervene in a situation where an employee perceives she is receiving less coworker support on the basis of a protected identity trait. A right to ask addresses the concern of law's bluntness by placing a burden on the employee to harness her informational advantage. The employee is, after all, in a much better position to know which bonds are valuable and even which workplace conditions may be helpful or harmful to coworker bonds in a particular workplace. A right to ask also addresses the concern of overburdening employers by requiring relatively little of them in terms of substantive guarantees.

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[303] Note that while some states bar employers from taking actions against employees for certain off-duty non-work-related conduct, these protections have not extended so far as to cover social relationships. *See* McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166 (2001) (allowing termination of employee for romantic relationship because dating falls outside state statute protecting employees for their "recreational activities").

[304] *See* Employment Rights Act 1996, c. 18, § 80F (as amended by the Employment Act 2002), *available at* http:// www.emplaw.co.uk/load/4frame/era96/list.htm (last visited Feb. 15, 2014); *see also* Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75 (2012); Katherine Van Wezel Stone, et al., *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMPL. RTS. & EMPLOY. POL'Y J. 233, 266-68 (2006). Regulations that implement the U.K. law set forth that some form of discourse take place: "the holding of a meeting between the employer and the employee to discuss an application . . . within twenty-eight days after the date the application is made." *See* Employment Rights Act 1996, c. 18, § 80G, (as amended by the Employment Act 2002), *available at* http:// www.emplaw.co.uk/load/4frame/era96/list.htm.

The right to ask is no panacea. The same features that help to avoid some concerns about interventions here—the lack of right to any substantive outcome and the burden on the employee—can be viewed as weaknesses of this regime. As for the first point, despite the lack of a substantive guarantee, requests under the U.K. law are frequently satisfied.[305] As for the second point, the same reasons why employees need protection in the first place may inhibit them from exercising the right to ask as well. However, the right to ask does remove some of the impediments to the exercise of employee voice. Providing a formal legal mechanism lowers the cost of making requests and legitimates the requests.[306] Right-to-ask laws can also create a focal point for both employers and employees to bargain around subjects that are otherwise difficult to bargain around.[307]

3. Modifying At-Will Employment

One mechanism for promoting solidarity is to limit an employer's ability to rupture coworker bonds by terminating or dislocating workers. Adjusting the stickiness of the employment relationship could have incidental—but substantial—effects on coworker relationships. The U.S. is unique in its at-will employment regime. Other countries rely on just-cause regimes or regimes requiring reasonable notice (or, in lieu of reasonable notice, payment of wages for the period of reasonable notice).[308] Legal limits on an employer's ability to break coworker bonds would not only tend to keep meaningful coworker relationships intact, but would also improve workers' ex ante incentives to form and invest in these bonds.

Given a range of important considerations, ruptured coworker bonds on their own might not justify a switch to one of these regimes, but the impact on solidarity is an important consideration that should weigh in the mix of assessing the best regime.[309] While a just cause default regime would not

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[305] *See* Stone, et al., *supra* note 302, at 266-68

[306] *See* Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1720 (2006) (discussing the legitimating effects of a behavior when it is legalized).

[307] For a discussion of the role of focal points in addressing coordination problems, see Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

[308] For a discussion of just cause, see Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996). For a discussion of reasonable notice, see Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1 (2010).

[309] Scholars have advocated for reforms on various grounds. *See, e.g.*, *id.* at 1; Estlund, *supra* note 305, at 1660; Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 108 (2002).

eliminate the problem of ruptured bonds, it would reduce the problem by limiting the employer's freedom to fire employees for no reason at all. And while a reasonable notice regime would not eliminate lost coworker bonds, it would nonetheless offer a transition period where workers could search for new employment while remaining employed, thus decreasing a period marked by the absence of coworker bonds.

Even within our current at-will regime, the law that discourages termination and addresses the losses sustained from unemployment does too little to prevent and address the rupture of coworker bonds. With the full cost of unemployment, including lost investments in developed coworker bonds, in full view, work law might do more to discourage employers from breaking coworker bonds. For example, employers might be required to pay more for each termination under unemployment insurance's experience-rating system to discourage termination.

4. Solidarity Impact Statements

Finally, akin to the filings of publicly traded companies with the SEC, the law could require employers to produce a solidarity assessment at regular intervals,[310] or a solidarity impact statement when making significant changes to policies in the workplace.[311] These assessments would be filed with the Department of Labor and made public through a government website, and could also be publicized through private mechanisms (e.g., on an employer's website). The assessments might include information such as whether an employer has an anti-fraternization policy; a description of the firm's internal mechanisms for complaining of employer or other impediments to coworker solidarity and support; what affirmative efforts, if any, the firm undertakes to support solidarity, such as social events, community service activities, or even a communal cafeteria that brings coworkers together; and a survey of workers' subjective assessment of the quality of solidarity.

Producing such an assessment and making it publicly available would serve several functions in moving towards recognition of coworker relationships. First, such assessments would raise the employer's own awareness of how their policies and practices affect coworker solidarity. Such awareness in and of itself can lead to better decisionmaking. Second,

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[310] *See* Carl W. Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. PA. L. REV. 254, 254 (1972) (discussing purposes of SEC filings and arguing for SEC filings to allow and perhaps even require more "soft" information about the reality of business operations).

[311] For an analogy, see the environmental impact statement, Shaun A. Goho, *NEPA and the "Beneficial Impact" EIS*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 367 (2012).

making the information public would help to create a market for solidarity-promoting workplaces, allowing prospective employees to sort among potential employers on this feature. A firm's level of coworker solidarity is often difficult to assess ex ante, when employees are deciding among firms. Such assessments would make this typically private information easier to acquire, and raises its salience as a feature by which to sort employers.[312] Mandatory disclosure of the conditions of solidarity could not only provide better information, but also enhance performance beyond the scope of mandates.[313] If firms are competing for the best workers, and if workers value these programs, mandatory disclosure could lead to a race to the top for these programs.

CONCLUSION

This Article has argued that despite the essential role of coworker bonds in achieving the stated goals of work law, work law nonetheless pays far too little attention to and provides far too little protection to coworker bonds. It proposes a way forward with a law that would recognize limited-purpose support relationships like those that coworkers share. This view of coworker bonds aligns the fields of labor and employment law when before they were only seen in tension. And this reconfigured view of work law, with coworker bonds at the center, has the potential to help work law better fulfill its promise, with labor law and employment law serving mutually reinforcing roles.

Moving forward with this unified view of work law requires not only changes to law, but changes in how we *think* about the law. The current silos of labor law and employment law can perhaps be seen nowhere more clearly than in the way our law schools and law teachers treat these subjects, with separate courses and separate casebooks.[314] This division can affect how lawyers practice law, and how these lawyers, when they become judges and legislators, reach decisions and make policy about how work is regulated. This Article's proposals for law reform are then one important part of the change necessary to effectuate a unified field of work law. But they are not complete. Other changes, to curriculum, to teaching, and to

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[312] See Andrew T. Hayashi, *The Legal Salience of Taxation*, 81 U. CHI. L. REV. 1443 (2014), on the concept of salience and its importance for law.

[313] *See* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 377 (2011).

[314] Notably, most employment law casebooks do not even include coverage of labor law's protection for concerted activity, which applies to non-union workers. Notable exception is MARION G. CRAIN, PAULINE T. KIM, & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS (2d ed. 2010).

specialization within the field of work law, are needed. By highlighting the key role of coworker bonds throughout work law, this Article takes the first step towards a more unified law of work, and invites others to help pave the way forward.