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Naomi Schoenbaum

George Washington University Law School, nschoenbaum@law.gwu.edu

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TOWARDS A LAW OF COWORKERS

*Naomi Schoenbaum**

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A growing body of research reveals what most Americans already know from experience: that our coworkers play a central role in our lives. The significance of coworker relationships is only magnified in an era of expanding work hours in the twenty-four-seven economy. But the law does not reflect this reality, and instead relegates coworkers to the status of legal strangers. This Article argues that the law's failure to recognize coworker relationships undermines not only these relationships, but also the goals of work law, and makes the case for a law of coworker relationships that would promote the equal, fair, and safe workplace the law envisions.

This Article bypasses the longstanding divide between the collective focus of labor law and the individual focus of employment law by positing a relational theory of work law, with coworkers at the center. Relying on a rich social science literature, the Article shows how coworker bonds help to achieve the goals of work law by enhancing employee leverage, promoting collective action, facilitating worker voice, and even preventing legal violations from occurring in the first place. But across a wide swath of doctrines, from labor law to antidiscrimination law to wage-and-hour law and beyond, the law limits workers' ability to harness the power of these bonds by erecting barriers to coworker bonding, discouraging the exchange of coworker support, and allowing employers to rupture coworker bonds.

To remedy these shortcomings, this Article proposes a law of limited-purpose support that would recognize coworker bonds. This model would adapt time-tested doctrines to the reality of coworker relationships, and would provide new protections to coworkers. This law of limited-purpose support would align work law with work life, and allow coworker relationships to fulfill their promise of achieving a better workplace.

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INTRODUCTION

Coworkers—even more than family—are the people with whom we spend most of our waking hours. For at least eight hours per day—and for some, many more hours—we share a piece of our lives with our coworkers, we support each other, and we complain to each other. So even as we are increasingly “bowling alone” with declining connections in our civic community,¹ we rely on our coworkers for friendship and solidarity.² This critical role of coworkers in our lives is reflected in a host of cultural landmarks, which have come to be preoccupied with the relationships we create at work, rather than in the family or the community.³ But the law fails to recognize the role of coworkers in our lives, and instead relegates the status of coworkers to legal strangers.

This Article critiques the legal status of coworkers. It argues that work law’s blindness to these relationships not only undermines the relationships, but also work law’s goal of a more equal, fair, and safe workplace,⁴ and that work law must be reformed to recognize the reality of coworkers in our lives. In pursuing the first study of work law through the lens of coworker relationships, this Article makes three contributions to the law of work.⁵

¹ See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (describing the decline of communal activities in America since the middle of the twentieth century).

² See *infra* Part I.A.

³ This is perhaps most evident in the shift in the subject of popular television shows, which focus less on relationships in the family and more on relationships at work. See, e.g., JENNINGS BRYANT & J. ALLISON BRYANT, *TELEVISION AND THE AMERICAN FAMILY* 10-15 (2009); Andrea Press, *Gender and Family in Television’s Golden Age and Beyond*, 625 ANNS. OF AM. ACAD. POL. & SOC. SCI. 139, 140 (2009); *30 Rock* (NBC); *Empire* (FOX); *The Good Wife* (CBS); *Mad Men* (AMC); *The Office* (NBC); *Parks and Recreation* (NBC). We can also see this in the media attention afforded to our coworker relationships. See, e.g., Alena Hall, *7 Ways to Become a Better Work Friend*, HUFFINGTON POST (Feb. 26, 2015, 8:11 AM), http://www.huffingtonpost.com/2015/02/26/friends-at-work-tips_n_6746398.html; Ron Friedman, *You Need a Work Best Friend*, N.Y. MAG. (Dec. 2, 2014, 8:30 AM), <http://nymag.com/scienceofus/2014/11/you-need-a-work-best-friend.html>; Sarah E. Needleman, *Moving on After a Colleague Leaves*, WALL STREET J. (Mar. 23, 2014, 11:05 PM), <http://blogs.wsj.com/juggle/2011/03/23/moving-on-after-a-colleague-leaves/>.

⁴ See 29 U.S.C. § 151 (aiming to eliminate “the harmful consequences of [t]he inequality of bargaining power between employees . . . and employers”); 29 U.S.C. § 202 (aiming “to eliminate . . . labor conditions detrimental to the health, efficiency, and general well-being of workers”); 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”).

⁵ Other scholars have recognized isolated instances in which coworker relationships matter in work law and how the law fails to recognize this, but have missed the pervasive extent to which coworker bonds matter throughout work law, and the pervasive extent to

First, as a positive matter, focusing on the role of coworkers reframes the law of work in light of longstanding scholarly focus on the tensions and tradeoffs between labor law and employment law. The separate fields of law that govern the workplace have been viewed as fundamentally at odds, with employment law the realm of individual rights, and labor law the realm of collective action.⁶ According to the dominant view, the rise of employment law, with its focus on individuals, undermines the collective approach of labor law, and is responsible for labor law's demise.⁷ A few scholars have recognized that employment law can promote collective activity.⁸ But under this view, when it does so, it is acting "as labor law";⁹ collective action by coworkers is not part of employment law *qua* employment law, which retains its individual focus.

Relying on an extensive body of social science research, this Article reconfigures the relationship between labor law and employment law by making the case that coworker bonds are integral to the success of *both* fields of law. As for labor law, coworker bonds generate the support and solidarity that underlies the collective action so essential to labor law's success.¹⁰ Coworker bonds play an equally important part in employment

which work law nonetheless undermines these 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); 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 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).

⁶ 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).

⁷ See sources cited *supra* note 6.

⁸ See Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE 561, 585-91 (2014); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2686, 2686 (2008).

⁹ Sachs, *supra* note 8, at 2686.

¹⁰ See 29 U.S.C. § 151 (aiming to "encourage[e] the practice and procedure of collective bargaining"); *infra* Part I.B.1.

law, by easing a paradox of employment law enforcement. The success of employment law depends on workers voicing complaints, but a weak bargaining position and a fear of retaliation holds workers back from complaining.¹¹ Coworker bonds overcome these barriers by providing the emotional support to spur employees to come forward, the informational support to evaluate possible legal violations, and the instrumental support to substantiate complaints to employers and courts.¹² Still further, coworker bonds reduce the need for complaint by preventing legal violations from occurring in the first place.¹³

Second, as a normative matter, this Article reveals how current law denies coworker bonds the ability to fulfill their promise of furthering the goals of work law. In an important article on the law of the workplace, Professor Vicki Schultz argued that sexual harassment law, by “punish[ing] employees for sexualized interactions, . . . create[s] a climate that may stifle workplace friendships and solidarity more generally. . . .”¹⁴ This may be correct, but it stops short of a complete diagnosis. The problem is not only or even primarily with sexual harassment law, but with a legal regime that places no pressure on employers to eliminate sexual harassment in a way that encourages, or least does not stand in the way of, coworker solidarity. Under this view, sexual harassment law is just one doctrine among many that shapes whether and to what extent coworker bonds are formed, leveraged, and maintained.

And across a wide swath of doctrines, work law does not recognize the importance of coworker relationships. First, work law erects barriers to forming and leveraging coworker bonds.¹⁵ For example, the law provides no general protection against workplace bullying, even though hostile workplace climates are known to undermine the formation of positive coworker bonds.¹⁶ So while coworker relationships—like any

¹¹ 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.

¹² See *infra* Part I.B.2.

¹³ 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).

¹⁴ Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2069 (2003) (documenting how fear of liability led to antifraternalization policies and penalties for coworker social interactions).

¹⁵ See *infra* Part II.A.

¹⁶ See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (hostile work environment must be hostile on the basis of a protected trait).

relationships—are not always positive, the law deserves blame for its failure to intervene.¹⁷ Second, work law allows employers to fire coworkers who exchange key forms of support.¹⁸ So despite bans on retaliation for complaining of unlawful activity such as discrimination, workers who support complaining coworkers can be terminated for doing so.¹⁹ Third, work law ignores coworker bonds by allowing employers to rupture these relationships with near impunity.²⁰ For instance, an employee who complains that discrimination has harmed her coworker bonds has no cause of action because “harmonious working relationships” are not an interest protected by antidiscrimination law.²¹

These shortcomings of work law have broader implications for this area of law and equality under it. By cabining an appreciation of coworker bonds to a tepid understanding of solidarity under labor law, work law limits the possibility for synergy between labor law and employment law.²² And work law’s failure to recognize important work relationships relegates support to the family, reinforcing the family-market divide, with harmful consequences for women.²³

In its final contribution, this Article proposes a new path forward: a law of limited-purpose support relationships.²⁴ 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 would be included as an interest that the law protects. 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.

This Article proceeds in three parts. Part I sets forth a relational theory of work law, which demonstrates how coworker bonds are central to work law’s success. Part II catalogues how work law undermines coworker

¹⁷ See *infra* Parts I.B.3, II.A.1.

¹⁸ See *infra* Part II.B.

¹⁹ See, e.g., *IBM Corp.*, 341 N.L.R.B. 1288 (2004) (allowing termination for exchange of coworker support under labor law).

²⁰ See *infra* Part II.C.

²¹ E.g., *Jackson v. Deen*, 959 F. Supp. 2d 1346, 1350 (S.D. Ga. 2013).

²² See *infra* Part II.D.1.

²³ See *infra* Part II.D.2.

²⁴ See *infra* Part III.

bonds, and, in the process, undermines these relationships and the goals of work law. Part III proposes a novel model of relationship recognition 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 importance 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 transform our behavior from arms-length to altruistic. 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 produce the solidarity and support that form the basis for the collective action that is at heart of labor law. 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 in Work Life

Work has long been identified as a source of social bonds, which generate behaviors more consistent with the protocols of the family than the market.²⁵ Strongly bonded coworkers act altruistically, considering each other's interests as much as or more than simple dollars and cents.²⁶ A

²⁵ 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).

²⁶ See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON. 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

classic study of coworker altruism comes from a case of “cash posters,” utility company workers who record customers’ payments.²⁷ 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 rational actor model. Nobel Laureate George Akerlof explained this 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.”²⁸

Coworker altruism generates three forms of support: emotional, informational, and instrumental.²⁹ Outside of the family, the emotional support we receive from coworkers is arguably the most significant source of support for working Americans.³⁰ Emotional support from coworkers can apply to subjects ranging from trouble at work to divorce, illness, and death.³¹ 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.³² Instrumental support comes in the form of additional work that coworkers do for each other.³³ This additional work typically involves “extra-role

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).

²⁷ Akerlof, *supra* note 26, at 543.

²⁸ *Id.* at 543, 550.

²⁹ See PATRICIA SIAS, *ORGANIZING RELATIONSHIPS* 60 (2009).

³⁰ See ZELIZER, *supra* note 25, at 242-44 (collecting studies finding significant exchanges of emotional support by coworkers); Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-Workers*, 72 SOC. FORCES 843, 850 (1994) (using the General Society Survey to generalize that “[f]or millions of American workers—approximately half—close friendships are formed among co-workers, [and] ‘important matters’ are discussed with them”).

³¹ See McGuire, *supra* note 25, at 131-32 (reporting results of ethnographic study of coworker support).

³² See *id.*; Scott E. Seibert, et al., *A Social Capital Theory of Career Success*, 44 ACAD. MGMT. J. 219, 221-24 (2001).

³³ See John R. Deckop et al., *Getting More than You Pay for; Organizational Citizen*

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.³⁴

Because of the support that coworkers provide, these relationships increase productivity and enhance performance.³⁵ Indeed, “[w]ithout such close personal ties, we can infer, many workplaces, far from operating more efficiently, would actually collapse.”³⁶ And coworkers not only allow us to work better, but also to work happier.³⁷ The support that coworkers provide is key not only for work-related well-being, but for well-being more generally.³⁸

While family provides support that confers work benefits,³⁹ coworkers offer support in ways that family cannot.⁴⁰ Coworkers have unique access

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).

³⁴ See STONE, *supra* note 33, at 95.

³⁵ See, e.g., Dan S. Chiaburu, et al., *Do Peers Make the Place? Conceptual Synthesis and Meta-Analysis of Coworker Effects on Perceptions, Attitudes, OCBs, and Performance*, 93 J. APP. PSYCH. 1082 (2008) (collecting studies showing that coworker support enhances work performance); Jason D. Shaw, et al., *Turnover, Social Capital Losses, and Performance*, 48 ACAD. MGMT. J. 594, 595 (2005) (same); Karen A. Jehn & Priti Pradhan Shah, *Interpersonal Relationships and Task Performance: An Examination of Mediation Processes in Friendship and Acquaintance Groups*, 72 J. PERS. & SOC. PSYCH. 775 (1997) (finding that groups of friends outperform groups of acquaintances in both decisionmaking and effort tasks). For a discussion of the gendered distribution of coworker support and its implications, see *infra* Part II.E.2.

³⁶ ZELIZER, *supra* note 26, at 250.

³⁷ See, e.g., Marks, *supra* note 30, at 850 (using the General Society Survey to conclude that coworker support is associated with greater job satisfaction); Christine M. Riordan & Roger W. Griffith, *The Opportunity for Friendship in the Workplace: An Underexplored Construct*, 10 J. BUS. & PSYCH. 141 (1995) (finding that coworker bonds enhance work satisfaction); PAUL E. SPECTOR, JOB SATISFACTION: APPLICATION, ASSESSMENT, CAUSES, AND CONSEQUENCES 44 (1997) (collecting studies to same effect).

³⁸ See Marks, *supra* note 30, at 850; McGuire, *supra* note 25, at 131-32; see generally Sheldon Cohen & Thomas A. Wills, *Stress, Social Support, and the Buffering Hypothesis*, 98 PSYCH. BULL. 310 (1985) (discussing the relationship between social support and enhanced well-being).

³⁹ 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).

⁴⁰ See SIAS, *supra* note 29, 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).

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.⁴¹ Coworkers also can offer the riches of intimacy—stress release, playfulness, humor, affection, and even flirtation or sex—without the unending demands of the family that can reduce the pleasure of intimacy derived there, especially for women.⁴²

B. Coworkers in Work Law

Because the employment contract is so essential to employees' welfare, and because of unequal bargaining power between employees and employers, the law subjects the employment contract to special regulation.⁴³ The law of the workplace contains two regimes of regulation: 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 allow employees to bargain for protections beyond legal floors.

Coworker bonds play a critical role in achieving the aims of both areas of law. Both labor law and employment law rely on workers exercising voice to employers, agencies, and courts to gain and enforce work law's protections.⁴⁴ But the same weak bargaining position that leads employees

⁴¹ See ZELIZER, *supra* note 25, at 246.

⁴² See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 40-44 (1997).

⁴³ 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).

⁴⁴ In Hirschman's exit-voice-loyalty framework, see *supra* note 11, 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

to need protection in the first place also makes it difficult 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 law and employment law. This Section explains how this is so, discussing these fields of law in turn.

1. Labor Law

Labor law aims to promote collective coworker action to level the playing field between the employee and the employer.⁴⁵ Scholarship on collective action often still focuses on the individual and assumes a model of self-interest.⁴⁶ But coworker bonds and the support and solidarity they generate are essential for understanding collective action at work.⁴⁷

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”⁴⁸—forms the foundation of collective labor activity.⁴⁹ Beginning as early as Marx, scholars of the workplace have recognized that

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).

⁴⁵ 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.”).

⁴⁶ 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 5, and Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 273 (2012).

⁴⁷ 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).

⁴⁸ Marion Crain, *Arm’s Length Intimacy: Employment as Relationship*, 35 WASH. U. J. LAW & POL’Y 163, 202-03 (2011).

⁴⁹ 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).

bonds between coworkers generate solidarity.⁵⁰ Indeed, solidarity has been shown to be more a product of informal coworker social attachments than of labor unions or their organizing efforts.⁵¹ Social interactions between coworkers that take place at work and at off-site locations like the local bar build the cohesion and mutuality that serve as the basis for solidarity.⁵² Coworker bonds also reduce turnover, which in turn promotes solidarity and collective action.⁵³ Not only do coworker bonds form the basis for solidarity necessary for collective action, 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.⁵⁴

First, coworker bonds generate informal collective action. Bonds of fellowship lead coworkers to act in mutual defense: workers stand up for each other, putting themselves at risk.⁵⁵ For example, when workers are upset by an employer's treatment of their coworker, they act in support of their coworker, while also challenging managerial prerogatives.⁵⁶ In one classic study, department store workers supported their struggling coworker by contributing to her clothing and lunch budgets, insurance premiums, and

⁵⁰ 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 49, at 399 (describing solidarity as including elements friendship, shared meanings, and shared norms).

⁵¹ Rick Grannis, et al., *Working Connections: Shop Floor Networks and Union 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 SOC. FORCES 3, 7-9 (2004) (explaining 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).

⁵² 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 26, at 1198 (describing how "the willingness of workers to put themselves at risk to defend fellow workers" defines solidarity).

⁵³ See Hodson, *supra* note 49, at 400.

⁵⁴ 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").

⁵⁵ See Dixon, et al., *supra* note 51, at 12-13; Hodson, *supra* note 26, at 1196.

⁵⁶ See ZELIZER, *supra* note 25, 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 26, at 1196.

vacation fund, and also sought a raise for her, in defiance of management. After a manager forced the return of the contributions, the workers collected them again.⁵⁷ These forms of informal collective action matter not only as an independent goal of labor law,⁵⁸ but they also help to achieve the other goals of labor law: union representation and formal collective action.⁵⁹

Coworker bonds are also important for achieving union representation and promoting union strength. Coworker bonds are a critical component of successful union organizing campaigns.⁶⁰ These bonds not only lay the groundwork for mutual defense that plants the seeds for unionization, but they provide a network of ties that facilitates communication of sensitive information during a campaign.⁶¹ Once a union wins the right to represent workers, coworker bonds within the union are linked to higher rates of formal collective action, such as striking.⁶² Social networks of coworkers reinforce union strength by providing a mechanism for the development and implementation of collective union strategies and for transmitting values of union loyalty.⁶³ One study documents how union stewards at a particular plant were friends, met regularly, ate meals together, and drank together after meetings.⁶⁴ When inculcating newcomers into the values of unionism

⁵⁷ ZELIZER, *supra* note 25, at 246.

⁵⁸ 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”).

⁵⁹ 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 26, 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).

⁶⁰ 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).

⁶¹ See Granovetter, *supra* note 25, at 1363 (explaining how strong ties transmit sensitive information).

⁶² See Vincent J. Roscigno & Randy Hodson, *The Organizational and Social Foundations of Worker Resistance*, 69 AM. SOC. REV. 14, 14 (2004).

⁶³ See *id.*

⁶⁴ See Hodson, *supra* note 26, 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.”).

or at times of crisis, they joked and told stories about the plant and the early days when it was first unionized.⁶⁵

Coworker bonds likewise are important for effective yet democratic 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.”⁶⁶ On the other hand, to be effective, unions must “mobilize disciplined collective action on the part of its members.”⁶⁷ This requires leaders who can command loyalty from rank-and-file employees, which can run counter to their role as democratic representatives. Coworker bonds resolve 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.⁶⁸ Coworker bonds thus allow unions to simultaneously be a “town hall” democratically representing workers, as well as an “army” that can effectively mobilize them.⁶⁹

2. Employment Law

Employment law encompasses a wide range of minimum employment standards. To make the discussion here tractable, I focus on three representative sources of employment law:⁷⁰ antidiscrimination law (Title VII of the Civil Rights Act of 1964),⁷¹ wage-and-hour law,⁷² and safety-and-health law.⁷³ Respectively, these laws aim “to achieve equality of

⁶⁵ *Id.*

⁶⁶ Grannis et al., *supra* note 51, at 654.

⁶⁷ *Id.*

⁶⁸ *Id.* at 651.

⁶⁹ *Id.*

⁷⁰ These laws cover a range of concerns and also run the spectrum from more or less reliance on private enforcement. See Estlund, *supra* note 6, at 396 n.290 (placing safety-and-health law on the public end of the spectrum, antidiscrimination law on the private end, and wage-and-hour law 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 antidiscrimination law).

⁷¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, & 42 U.S.C.). While I refer to Title VII as a shorthand for federal employment discrimination law, much of these arguments apply with equal force to the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634.

⁷² Fair Labor Standards Act, 29 U.S.C. §§ 201-09.

⁷³ Occupational Safety and Health Act, 29 U.S.C. §§ 651-78.

employment opportunities”;⁷⁴ “to eliminate . . . labor conditions detrimental to . . . the minimum standard of living necessary for health, efficiency, and general well-being of workers”;⁷⁵ and “to assure . . . every working man and women safe and healthful working conditions.”⁷⁶

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 even prevent violations from occurring in the first place.

a. Why relationships matter for employment law

Employee voice to register complaints is essential to both the public and private enforcement of employment law. When it comes to public enforcement, employees, as compared with regulators, typically have better access to the information necessary for enforcement.⁷⁷ So even when agencies do take action, it is often after employees have alerted them to a problem.⁷⁸ And agencies that enforce employment law are notoriously weak and understaffed.⁷⁹ Private suits (where they are permitted) have increasingly come to pick up this slack.⁸⁰

When it comes to private enforcement, the role of employee voice is clear. Beyond the obvious need to complain to an agency or court to initiate legal action, 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,⁸¹ as well as to report a sexually or racially hostile work

⁷⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

⁷⁵ 29 U.S.C. § 202.

⁷⁶ *Id.* § 651.

⁷⁷ See Estlund, *supra* note 6, at 324 & nn.140-62.

⁷⁸ See *id.* at 361 n.194 (noting that the DOL relies on employee complaints for its enforcement of the FLSA).

⁷⁹ See *id.* 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 70, at 1403 (characterizing public enforcement of antidiscrimination law as weak in ambition of theories and damages pursued).

⁸⁰ See Estlund, *supra* note 6, at 360; Selmi, *supra* note 70, at 1401. Private suits are permitted to enforce wage-and-hour law and antidiscrimination law, but not occupational-safety-and-health law.

⁸¹ See 29 C.F.R. § 1630.2(o)(3) (setting forth “interactive process”).

environment through the employer's internal grievance procedure.⁸²

But wronged employees do not always exercise voice. Complaining requires "legal consciousness"—framing one's experience as a legal wrong, and formulating a response.⁸³ Even when legal consciousness is stirred, employees fear retaliation for their complaints, and retaliation protections are inadequate to overcome this muzzle to worker voice.⁸⁴ First, existing retaliation protections are narrow, kicking in only once employees reasonably believe there has been a legal violation.⁸⁵ Second, procedural constraints limit the efficacy of some retaliation protections. For example, there is no private right of action to enforce retaliation protection under

⁸² 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 [the harassment] promptly," 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).

⁸³ Amy Blackstone, et al., *supra* note 13, 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).

⁸⁴ See Detert & Edmonson, *supra* note 44, 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 6, 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).

⁸⁵ See *Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam) (holding that plaintiff's retaliation claim failed because "[n]o reasonable person could have believed that the single incident [about which the plaintiff complained] violated Title VII's standard"); *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); *supra* note 81. 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. 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).

safety-and-health law.⁸⁶ 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.⁸⁷ In the litigation game of haves and have-nots, employers, as repeat players with greater resources, tend to come out on top.⁸⁸ 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.⁸⁹

In short, the weak bargaining position of employees that renders work law necessary also limits employees' ability to make use of work law protections effectively. As with labor law, coworkers are essential to leveling the playing field between the employee and the employer. How coworker bonds accomplish this 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 directly facilitates employee voice. Second, coworkers act collectively in ways that overcome impediments to employees exercising voice. Third, strong coworker relationships obviate the need for complaint by preventing violations from occurring 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]

⁸⁶ See Estlund, *supra* note 6, at 394.

⁸⁷ 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).

⁸⁸ 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; Eyer, *supra* note 86, 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 how bad lawyering affects the success of the “have-nots.”

⁸⁹ See Detert & Edmonson, *supra* note 44, 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).

mobilization.”⁹⁰ 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.⁹¹ Coworkers amplify voice with the emotional, informational, and instrumental support their bonds generate.⁹²

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.⁹³ Coworkers are thus well placed to confirm a worker’s sense of a violation, a necessary precondition to exercising voice.⁹⁴ And even before a worker herself recognizes a violation, speaking with friends at work can raise awareness that a wrong has occurred. Sharing the experience of 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.””⁹⁵ And talking to coworkers who have already complained to the employer can lead a worker to see that she too ““can speak up if something like this happens.””⁹⁶

Informational support from coworkers also plays a crucial role in rights’ enforcement. When workers rely on their coworkers as sounding boards for workplace problems, coworkers’ experience allows them to provide guidance that can confirm or disconfirm their coworkers’ concerns.⁹⁷ For example, an employee who receives a lower-than-expected paycheck and is assessing whether her employer engaged in wage theft or a permissible deduction might ask a coworker how many hours she was paid for, or whether they are entitled to pay for break times. Obtaining information from coworkers is essential before complaining of violations because retaliation protection attaches only once the employee reasonably believes there has been a violation.⁹⁸ The primary way for an employee to arrive at

⁹⁰ Blackstone, *supra* note 13, 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) (finding that workplace cultures with a higher incidence of coworker friendship are linked with a greater incidence of whistleblowing).

⁹¹ *See* Blackstone, *supra* note 13, at 652-54.

⁹² *See supra* Part I.A.

⁹³ *See* sources cited *supra* notes 32-33; SIAS, *supra* note 29, at 65-68.

⁹⁴ Blackstone, *supra* note 13, 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).

⁹⁵ Blackstone, *supra* note 13, at 655 (quoting research subject).

⁹⁶ *Id.* (quoting research subject).

⁹⁷ *See* SIAS, *supra* note 29, at 65-66.

⁹⁸ *See supra* note 85.

such a reasonable belief is through information from coworkers.⁹⁹

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.¹⁰⁰ 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, as the Supreme Court made clear in last term's *Young v. United Postal Service* decision, a pregnant woman denied a light-duty accommodation can only know whether she has been discriminated against by finding out whether her employer offered accommodations to non-pregnant workers.¹⁰¹

This type of coworker support is particularly important for 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.¹⁰² Although Title VII was amended to allow these types of late-discovered discrimination claims, the hurdle of discovering salary information remains.¹⁰³

⁹⁹ See Blackstone, *supra* note 13, at 655-57.

¹⁰⁰ See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (cataloguing and critiquing this method of proof in antidiscrimination law).

¹⁰¹ See 575 U.S. ---, 135 S. Ct. 1338, 1354 (2015) (holding that a finding of pregnancy discrimination based on a denial of an accommodation turns on precisely how the employer treated pregnant as compared with non-pregnant employees, i.e., "evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers"); Naomi Schoenbaum, *When Liberals and Conservatives Agree on Women's Rights*, POLITICO MAG. (Mar. 31, 2015), <http://www.politico.com/magazine/story/2015/03/supreme-court-pregnancy-discrimination-coalition-116559.html#.VdnOJGRViko> (discussing *Young* case); see generally Long, *supra* note 85, at 958 (noting that coworkers may have information about incidents of discrimination).

¹⁰² 550 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.B.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).

¹⁰³ 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). A recent proposed rule would require employers with 100 or

Coworkers also provide critical instrumental support by participating in the reporting and complaint process, both internally to the employer, and to 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.¹⁰⁴ Other times, coworkers testify on each other's behalf regarding alleged violations at internal employer investigations, as well as before agencies and courts.¹⁰⁵ Strong coworker bonds give workers access to information and the incentive to pay close attention to their fellow workers' circumstances, which puts coworkers in a better position to confirm violations. Finally, coworkers provide instrumental support by standing up to supervisors who discriminate against and harass their fellow workers.¹⁰⁶

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 has described how employment law can serve as a catalyst for collective action by employees, a phenomenon he calls "employment law as labor law."¹⁰⁷ While Sachs focused on how employment law forges a path to organizing under labor law, an equally important conclusion to draw from his findings is the significant role coworker relationships play in enforcing employment law *qua* employment law.

As with labor law, the mutually supportive behavior that arises from coworker bonds sets the stage for collective action to enforce employment rights.¹⁰⁸ Moreover, workers are actually better off if they act together with their fellow coworkers to enforce individual employment rights. 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 unable to terminate or

more employees to report certain salary information to federal employment agencies that enforce pay discrimination law, *see* 81 F.R. 5113 (2016), *available at* <https://federalregister.gov/a/2016-01544>, but these agencies are required to keep this data confidential, *see* 42 U.S.C. 2000e-8(e) (forbidding "any [EEOC] officer or employee" from making "public in any manner whatever any information obtained by the Commission . . . prior to the institution of any [Title VII] proceeding . . . involving such information").

¹⁰⁴ *See* Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 47-48 (1st Cir. 2010).

¹⁰⁵ *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 (2009).

¹⁰⁶ *See, e.g.,* Zatz, *supra* note 5, at 69-78 (citing examples); Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998) (en banc) (white police officers came to the support of female officers and officers of color who were being harassed by their supervisor). For more examples, see *infra* Part II.B.2.

¹⁰⁷ Sachs, *supra* note 8, at 2686. Note that Sachs does not address the role of coworker relationships in helping employment law serve as labor law.

¹⁰⁸ *See supra* Part I.B.1.

otherwise retaliate against a large swath of workers while keeping its business running. 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. In wage-and-hour cases, plaintiffs must opt in to a class action,¹⁰⁹ and thus social networks that tie employees together aid in finding representation and enlarging the class.

Finally, strong coworker bonds can obviate the need for complaint by preventing violations from occurring in the first place. At the individual employee level, a worker who has strong coworker relationships is less likely to experience discrimination or harassment.¹¹⁰ Coworker bonds make a worker appear stronger to potential harassers, making her a less appealing target.¹¹¹ And coworkers protect one another from harassment by warning each other to avoid potential harassers.¹¹² At the workplace level, supportive work cultures with high coworker solidarity have been linked with lower incidences of harassment.¹¹³ Coworker bonds thus not only help to provide employees with the voice necessary to address violations, but also create the predicate conditions conducive to achieving 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: (1) that workplace relationships, especially with supervisors, reduce employee voice, and (2) 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

¹⁰⁹ See 29 U.S.C. §216(b).

¹¹⁰ See Blackstone, *supra* note 13, 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).

¹¹¹ Brake, *supra* note 84, at 39-41.

¹¹² Blackstone, *supra* note 13, at 656.

¹¹³ See *id.* at 635.

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.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ As Professor Laura Rosenbury has discussed, limiting this concern to romantic relationships with supervisors is too narrow.¹¹⁷ 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 the relationship is romantic, and regardless of whether a supervisor is involved.¹¹⁸ On this perspective, coworker bonds affected by race or sex preferences have the potential to undermine the goals of antidiscrimination law. Workers may even band together to exclude other coworkers on the basis of identity, for example, a group of men who exclude women from a golf outing or poker game.¹¹⁹

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

¹¹⁴ See SIAS, *supra* note 29, at 70-72.

¹¹⁵ See *id.*

¹¹⁶ 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).

¹¹⁷ Rosenbury, *supra* note 5, at 138-41; *see also* Schultz, *supra* note 14, 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”).

¹¹⁸ Rosenbury, *supra* note 5, at 138-41.

¹¹⁹ Zatz, *supra* note 5, at 69-70; *see also* Debra Cassens Weiss, *Men-Only Golf Retreats and Unequal Work Assignments Alleged in Bias Suit Against McElroy Deutsch*, ABA J. (Apr. 6, 2015, 8:48 AM), http://www.abajournal.com/news/article/men_only_golf_retreats_and_unequal_work_assignments_alleged_in_bias_suit_ag.

the right law can lead coworker bonds to promote rather than undermine equality.¹²⁰ I turn to the role of law in constructing beneficial coworker bonds—and the law’s shortcomings here—in the next Part.¹²¹

II. HOW LAW UNDERMINES COWORKER BONDS

Despite the centrality of coworker bonds to the success of work law, labor law and employment law limit the power of these bonds to effectuate workers’ rights. Labor law goes some way towards recognizing coworker relationships by providing mechanisms for coworkers to come together to address workplace conditions, as well as protection for some of this conduct.¹²² 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 focused on individual workers, it may come as no surprise that employment law pays little attention to coworker bonds. What is perhaps surprising is how broadly employment law doctrines impinge on the development and maintenance of these bonds.

Before delving into the ways in which work law undermines coworker bonds, it is helpful to situate this problem in the context of the law’s distinct approach to the family as compared with the market.¹²³ 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.¹²⁴ Second,

¹²⁰ See Zatz, *supra* note 5, at 70-73 (highlighting that coworker bonds can take the form of *intragroup* solidarity or *intergroup* solidarity and urging law to encourage the latter).

¹²¹ See *infra* Part II.A.1 for a discussion of the law’s failure to place responsibility on employers for workplace climates that are hostile to the nondiscriminatory development of meaningful coworker bonds.

¹²² 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”).

¹²³ 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).

¹²⁴ 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).

family law encourages support by mandating duties of care and support within the family,¹²⁵ and affording privileges of care and support to family members that are not available to others.¹²⁶ Third, in recognition of the value of relationship-specific investments, family law promotes the maintenance of developed bonds by making them sticky, and protects family members in the event that the family dissolves.¹²⁷

Scholars have primarily focused on the consequences of the family-market divide for the family.¹²⁸ They have highlighted how the law's view of the family as the exclusive site of intimacy means that the law is blind to behavior characteristic of the market—namely, production—that takes place in the family.¹²⁹ One seminal case refusing to enforce a contract that would

¹²⁵ 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.”).

¹²⁶ 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).

¹²⁷ 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).

¹²⁸ See *id.* 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 5, 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 5, 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, e.g., *supra* note 122), and other ways in which the law undermines such bonds, see *infra* Parts II.A-C.

¹²⁹ See generally WILLIAMS, *supra* note 127, at 114-28 (cataloguing how the law of the market is not applied to production within the family); Silbaugh, *supra* note 128, at 27-79 (same).

have compensated a wife for caring 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.”¹³⁰ This Part aims to expose the flip side of the law’s categorical placement of support within the family and production within the market: the law’s blindness to supportive relationships at work.

This Part divides work law’s failure to recognize coworker relationships into three mechanisms: how work law stands in the way of coworker bonds being formed and leveraged; how work law discourages coworkers from exchanging support; and how work law ignores the rupture of coworker bonds. These concepts 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 coworker bonds. Nonetheless, I separate these mechanisms to provide a framework for thinking about the different ways in which the law fails to recognize the importance of coworkers. This Part concludes by laying out how the law’s treatment of coworkers maintains both the tension between labor law and employment law, with resulting negative consequences for the law of work, and the separation of the family and the market, with resulting negative consequences for gender equality.

A. Blocking Bonds

This Section sets forth how work law acts as an impediment to workers developing and leveraging meaningful bonds with their fellow workers. As an initial matter, work law pays little attention to workplace climates that are inhospitable to positive coworker bonding. The law allows employers to stand by in the face of worker conduct, such as workplace bullying, that undermines coworker bonds, and even permits employers to discipline workers who attempt to change the workplace climate for the better. Once bonds are formed, work law stands in the way of coworkers harnessing the power of their bonds when it comes to forming bargaining units and participating in sympathy strikes.

1. Workplace Climate: Harassment and Discrimination

Work law pays almost no attention to the role that employers play in creating firm cultures that undermine positive coworker bonds. A hostile work environment does not trouble the law unless the hostility is on the

¹³⁰ *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (1993).

basis of a protected trait.¹³¹ But general workplace harassment, or workplace bullying, produces negative coworker interactions and 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.¹³² 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.¹³³ The target and coworker effects interact: as bullying increases a target's stress, this negatively affects the work unit, which in turn increases the target's stress, and so on.¹³⁴ This coworker feedback effect of bullying, if uninterrupted, leads to a negative workplace culture inhospitable to the development of coworker bonds and support.¹³⁵

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 culture, or stand by (or even join in the bullying), thereby furthering the negative culture. 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

¹³¹ 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).

¹³² 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).

¹³³ 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) (same); HELGE HOEL & CARY COOPER, DESTRUCTIVE CONFLICT AND BULLYING AT WORK 20-21 (2000), available at <http://www.adapttech.it/old/files/document/19764Destructiveconfl.pdf> (same).

¹³⁴ 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 133, at 355 (discussing "spiraling" effect).

¹³⁵ HOEL & COOPER, *supra* note 133, at 20 ("Bullying was found to be associated with a negative work-climate . . . and unsatisfactory relationships at work."); Paull, et al., *supra* note 133, at 354 (discussing "culture of bullying" with negative effect on coworker relations); Namie & Lutget-Sandvik, *supra* note 133, 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).

withhold support from targeted workers.”¹³⁶ In this way, the law’s blind spot to workplace bullying, which many foreign jurisdictions prohibit, undermines positive coworker relations.¹³⁷

Even when harassment is based on a protected trait like race or sex, work law still fails to encourage coworker support that would disrupt the harassment. As with general workplace bullying, coworkers play an important role in determining whether racial or sexual harassment is perpetuated or interrupted.¹³⁸ Again, the reaction of coworkers—whether they combat the harassment, stand idly by, or even join in the harassment—turns on how management responds. If an employee believes that her employer will discipline her for opposing the harassment of her coworkers, the employee will of course be less likely to oppose this behavior.¹³⁹ And work law permits employers to discipline employees who try to disrupt discrimination and harassment against their coworkers.¹⁴⁰ In one case, a white male commanding officer had invited his fellow white male police officers to join him in his harassment of their female coworkers and coworkers of color.¹⁴¹ The white male officers refused, and instead joined their targeted coworkers in demanding that their supervisor be disciplined for his behavior.¹⁴² The supervisor responded by harassing the supportive white officers and threatening to discharge them, and the law did nothing to stand in the way of the employer exacting this discipline.¹⁴³

Beyond harassment, workers may exercise discriminatory preferences in their formation of coworker bonds.¹⁴⁴ Recall the examples above of an all-

¹³⁶ Namie & Lutget-Sandvik, *supra* note 133, at 347; *see also* Parzefall & Salin, *supra* note 135, at 773 (linking managerial failure to respond to bullying with a climate of injustice); Paull, *supra* note 133, at 4 (“Colleagues . . . avert their eyes to avoid being drawn into conflict,” withdraw from the victim, and “at best gave covert and passive support.”).

¹³⁷ Namie & Lutget-Sandvik, *supra* note 133, at 358 (37% of American workers—or 54 million people—have been bullied at work).

¹³⁸ *See* Zatz, *supra* note 5, 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”).

¹³⁹ Namie & Lutget-Sandvik, *supra* note 133, at 347; *see also* Zatz, *supra* note 5, at 70, 77.

¹⁴⁰ *See, e.g.,* Zatz, *supra* note 5, at 69-78 (citing examples).

¹⁴¹ *See* Childress v. City of Richmond, 134 F.3d 1205, 1210 (4th Cir. 1998) (en banc).

¹⁴² *Id.*

¹⁴³ *Id.* at 1216 (denying white officers’ Title VII hostile work environment claim because the workplace was “biased in their favor”). The next Section provides additional examples of the law permitting employers to discipline supportive coworker conduct. *See infra* Part II.B.

¹⁴⁴ *See supra* Part I.A.3; Laura Rosenbury, *supra* note 5, at 120-25 (explaining how the provision of workplace friendship on discriminatory terms can have a significant impact on workers’ performance); Zatz, *supra* note 5, at 70-73 (explaining how “[i]ntragroup

male poker game or golf outing.¹⁴⁵ Again, work law does too little to intervene in these circumstances. Law steps in only if the denial of the bond is recognized as related to work performance. For example, a bank policy that allows employees to form their own teams on a systematically race discriminatory basis can be challenged under Title VII.¹⁴⁶ But a cause of action based on a discriminatory exclusion from coworker bonds or support that is less clearly tied to work performance faces stumbling blocks. Under Title VII, discrimination is actionable only when it affects the terms and conditions of work.¹⁴⁷ Because coworker relationships themselves are not an interest that Title VII protects,¹⁴⁸ a court is unlikely to recognize the discriminatory denial of coworker bonds or support as actionable. The only way in which the law has recognized a workplace climate to affect the terms and conditions of work is when the conduct amounts to a racially or sexually hostile work environment,¹⁴⁹ and the denial of coworker bonds has

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 5, at 72, whereas Rosenbury views the impact as more insidious and pervasive, *supra* note 5, at 120-25.

¹⁴⁵ See *supra* note 119 and accompanying text.

¹⁴⁶ See *McReynolds v. Merrill Lynch*, 672 F.3d 482, 487 (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 discrimination by disproportionate excluding African-American employees, because “there is no doubt that for many brokers team membership is a plus”); Rosenbury, *supra* note 128, at 385. However, a supervisor’s isolated preference for a friend will not be considered discrimination. See Rosenbury, *supra* note 128, at 385 n.190 (collecting cases); *supra* note 116 (explaining that Title VII distinguishes between isolated instances of favoritism and more systematic preferences).

¹⁴⁷ See, e.g., *Beyer v. Cnty. 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).

¹⁴⁸ See *Jackson v. Deen*, 959 F. Supp. 2d 1346, 1350 (S.D. Ga. 2013) (“workplace harmony is not an interest sought to be protected by Title VII”). Employment law’s failure to recognize coworker relationships and the support they provide as a “term or condition” of work is discussed further below. See *infra* Part II.C.1.

Another challenge here is attributing coworker conduct to the employer, a concern that was not present in the bank case, because there a specific employer policy was the subject of the challenge. See *McReynolds*, 672 F.3d at 487. More informal conduct by workers must be somehow attributed to the employer in order to hold the employer liable. Courts have developed an approach to address this problem in sexually or racially hostile environment cases. See *supra* note 82.

¹⁴⁹ See *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

never been recognized as such.

2. Bargaining Units

Once coworker bonds do form, labor law governing the formation of a bargaining unit—a necessary predicate to unionization—erects a barrier to leveraging coworker bonds. A bargaining unit is limited to workers who share a “community of interest.”¹⁵⁰ 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 interests, even when economic interests are not perfectly aligned.¹⁵¹

In *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass 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.¹⁵² 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,¹⁵³ and focused on the divergence of material interests instead.¹⁵⁴ This not only makes it harder to identify a legitimate bargaining unit, which is necessary for workers to unionize, but weakens the unit by limiting its membership.

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.¹⁵⁵ The Board does

¹⁵⁰ NLRB v. Action Auto., 469 U.S. 490, 494 (1985).

¹⁵¹ 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”).

¹⁵² 404 U.S. 157, 182 (1971).

¹⁵³ 177 N.L.R.B. 911, 914 (1969); see also Fischl, *supra* note 5, at 837-38.

¹⁵⁴ 404 U.S. at 173.

¹⁵⁵ 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 WL 3613065 (July 22, 2014) (approving micro-unit); *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, 361 N.L.R.B. No. 11, 2014 WL 4216304 (July 28, 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 & Rehab. Ctr. of Mobile*,

consider contact between employees in assessing a bargaining unit, but it nonetheless downplays the bonds, solidarity, and common interests that flow therefrom. For example, in one recent case, the Board noted 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.”¹⁵⁶ For the Board, this type of informal contact was not sufficiently related to work to lead to common interests. But it is precisely in these informal settings that coworker bonds and solidarity flourish, as they allow coworkers to exchange support, even when employees’ work-related concerns are not perfectly aligned.¹⁵⁷

Because unit determinations are often “the decisive factor in determining whether there would be any collective bargaining at all in a plant or enterprise,”¹⁵⁸ 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.¹⁵⁹ And while incipient bonds might be converted into stronger forms of solidarity through unionization, rejecting these bargaining units robs these workers of the opportunity to come together regularly and in a way that would further highlight their common interests and deepen their bonds.

3. Sympathy Strikes

Labor law also restricts the ability of coworkers who are members of different bargaining units (or unions) to leverage their bonds through its treatment of “sympathy” strikes. When a group of workers in one unit goes on strike, workers belonging to a different unit (or union) at the same employer can engage in a “sympathy” strike by striking in solidarity with their coworkers engaged in the primary strike.¹⁶⁰

While labor law protects those who participate in a sympathy strike as a

357 N.L.R.B. No. 83 (2011), *enfd. sub nom.* Kindred Nursing Ctrs. East 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.

¹⁵⁶ The Neiman Marcus Group, 2014 WL 4216304, at *5.

¹⁵⁷ See *supra* Part I.A.

¹⁵⁸ NLRB v. Action Automotive, Inc., 469 U.S. 490, 502 n. 9 (1985) (Stevens, J., dissenting) (internal quotation marks omitted).

¹⁵⁹ See *supra* note 45 and accompanying text.

¹⁶⁰ Children’s Hosp. Med. Ctr. of N. Cal. v. Cal. Nurses Ass’n., 283 F.3d 1188, 1191 (9th Cir. 2002).

default rule, the right to engage in a sympathy strike may be waived by collective bargaining agreement.¹⁶¹ 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 sympathy strikes.¹⁶² The upshot is that many coworkers will not be protected against termination when engaging in a sympathy strike.¹⁶³

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, as sympathy strikes are a key “means by which workers can demonstrate their solidarity with their [coworker] brothers and sisters . . .”¹⁶⁴

B. Disciplining Support

Work law also undercuts coworker bonds by allowing employers too much leeway to discipline 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

¹⁶¹ *Id.* (explaining that sympathy strikes are protected by 29 U.S.C. § 157).

¹⁶² *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., 283 F.3d at 1191 (declining to apply presumption that general no-strike clause includes sympathy strikes).

¹⁶³ *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.”).

¹⁶⁴ Children’s Hosp., 283 F.3d at 1191-92.

supporting coworkers.¹⁶⁵ While labor law and employment law contain 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 behavior between coworkers and undermines the deepening of coworker bonds.

1. Concerted Activity

Labor law grants all 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.¹⁶⁶ This provision is meant to protect collective employee activities aimed at addressing the terms and conditions and work, and has the potential to provide broad protection to the exchange of coworker support.¹⁶⁷ But in determining what counts as “concerted” and what counts as “mutual,” labor law ignores the nature and value of coworker bonds, fundamentally undermining these bonds and the support they provide.

Sometimes labor law fails to protect the exchange of coworker support because it is blind to how the provision of coworker support amounts to “concerted activit[y]” that levels the playing field between employer and employee. Courts have held that support by one coworker in the form of “advis[ing] an individual [worker] as to what he could or should do” is considered “mere talk”; “if [this talk] looks forward to no [concerted] action at all, it is more than likely to be mere ‘griping.’”¹⁶⁸ This understanding

¹⁶⁵ 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.”).

¹⁶⁶ 29 U.S.C. § 157.

¹⁶⁷ 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). Note that the NLRA does not contain any numerosity requirement; even two employees acting together under the right circumstances should meet the requirement for “concerted” activity.

¹⁶⁸ *E.g.*, *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 693 (3d Cir. 1964); *see also* *MCPC, Inc. v. NLRB*, 813 F.3d 475, 483 (3d Cir. 2016) (reaffirming standard set forth in *Mushroom Transportation Co.*, *supra*); *NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662, 666 (1st Cir. 1998) (declining to protect as “concerted activity” one employee’s discussing a workplace safety hazard with another because the conversation was not “engaged in with the object of initiating or inducing or preparing for group action, nor did

does not appreciate how the bilateral exchange of support from one coworker to another is itself meaningful “concerted activit[y]” because it can serve as a necessary predicate to a worker taking action regarding her workplace conditions.¹⁶⁹

This wrongheaded conception of coworker support can be seen in a case in which 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.¹⁷⁰ The Board determined that this activity was “purely personal” rather than “concerted.”¹⁷¹ But seeking information from a coworker about an employer’s past disciplinary practices can be an integral part of the process of raising legal consciousness by allowing the inquiring worker to gain the requisite knowledge to assess whether there has been a legal violation that recommends further action.¹⁷² 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.¹⁷³

Labor law has also denied protection to coworker support by failing to recognize the way that this support enhances employee leverage. The Board has held that a non-union member has no right to have a coworker accompany her at an employer interview that might result in discipline because this form of coworker support is not protected “concerted activit[y]” as a “matter of policy.”¹⁷⁴ The Board recognized labor law’s goal of leveling bargaining power disparities, but pointedly stated that “[c]oworkers cannot redress the imbalance of power between employers

“it ha[ve] some relation to group action in the interest of the employees”); *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 551 (6th Cir. 1993) (refusing to protect employee who complained to management about working conditions after he had spoken with coworkers about their complaints because there was no “evidence that [the complaining employee] was acting in anyone’s interest but his own”).

¹⁶⁹ See *supra* notes 92-106 and accompanying text.

¹⁷⁰ See *Adelphi Inst.*, 287 N.L.R.B. 1073, 1975 (1988)

¹⁷¹ *Id.*

¹⁷² See *supra* notes 97-99 and accompanying text.

¹⁷³ See *supra* notes 93-96 and accompanying text. Coworker communication providing informational support and raising legal consciousness also has been denied protection. *Daly Park Nursing Home*, 287 NLRB 710, 710-11 (1987) (employee discussed a discharged coworker’s legal rights and options with her fellow coworkers—noting that the discharge was “unfair,” and that it was “a shame” that the discharged coworker could not hire a lawyer to challenge the dismissal, and, in response to another employee’s remark that she would lose the legal fight to the wealthy employer, noting that she hoped the coworker would at least be able to receive unemployment compensation).

¹⁷⁴ 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).

and employees.”¹⁷⁵ Instead, a coworker merely provides “moral and emotional support.”¹⁷⁶

This position represents an impoverished view of the role of coworker support in achieving the goals of labor law. First, coworkers provide more than moral and emotional support for workers facing discipline; they also serve as an important source of information and instrumental support.¹⁷⁷ A coworker may be able to corroborate the worker’s version of events and provide historical information about how the employer has treated similar circumstances in the past. Second, even coworkers’ “moral and emotional” support can be critical to employee leverage in a meeting anticipating possible disciplinary action.¹⁷⁸ The presence of one’s coworker may provide just the strength the worker needs to stand up for herself.

Other times labor law takes a limited view of whether coworker support meets the mutuality requirement.¹⁷⁹ 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.”¹⁸⁰ While this approach is at times sufficient to grant protection, other times it fails 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.”¹⁸¹ The Board considered 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.”¹⁸²

Last summer, the Board reversed course on this question, and determined that a worker seeking coworker support for a sexual harassment claim engages in protected activity.¹⁸³ However, even in this decision, the

¹⁷⁵ IBM Corp., 341 N.L.R.B. at 1292 (reaching this conclusion because the coworker does not act from any legal authority vis-à-vis the employer, does not have special “knowledge of the workplace and its politics,” and does not have special “skills” to “elicit[] favorable facts”).

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* notes 97-99, 104-06 and accompanying text.

¹⁷⁸ See *supra* notes 93-96 and accompanying text.

¹⁷⁹ See 29 U.S.C. § 157 (protecting “concerted activities for the purpose of . . . *mutual aid or protection*” (emphasis added)).

¹⁸⁰ 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).

¹⁸¹ See *Holling Press, Inc.*, 343 N.L.R.B. 301 (2004).

¹⁸² *Id.* at 304.

¹⁸³ *Fresh & Easy Neighborhood Market*, 361 N.L.R.B. no. 12, 2014 WL 3919910

limited recognition of the importance of coworker bonds is apparent, as the Board clings to a notion of mutuality based in “the implicit promise of future reciprocation.”¹⁸⁴ 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.¹⁸⁵

This approach to the mutuality requirement fails to understand not only how support is exchanged in coworker relationships, but the central role of coworker relationships at work.¹⁸⁶ The case law wrongly assumes that coworker support takes the form of a specific quid pro quo: I’ll help you with your sexual harassment claim so that you’ll help me with my sexual harassment claim. But support between coworkers is not so tit-for-tat: support in one form may lead to reciprocal support in a variety of other forms.¹⁸⁷ For example, if workers A and B have a strong relationship such that worker A aids worker B with her sexual harassment claim, worker B may return the favor by aiding worker A in meeting a deadline. Therefore, even under labor law’s narrow view of mutuality, a far broader range of conduct should satisfy the standard, as supportive coworkers could expect their support to be returned in other forms.¹⁸⁸

(Aug. 11, 2014).

¹⁸⁴ 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 base 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.* at *10 n.21.

¹⁸⁵ See Corbett, *supra* note 167, at 27 (noting that “the law of the Board changes frequently, depending in significant part on its political composition”).

¹⁸⁶ Professor Richard Fischl likewise criticizes labor’s law presumption of selfish employee motives in this context, but his critique is different than mine. See Fischl, *supra* note 5, at 851. 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.* Fischl’s critique is 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 across all workers, regardless of class.

¹⁸⁷ See *supra* Part I.A; 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).

¹⁸⁸ 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

Moreover, understanding the role of coworker relationships in the workplace and how exchanges of support help to build these relationships reframes the notion of mutuality. Two principles are central here. First, coworker relationships matter because the stronger the relationships that develop among a group of coworkers, the more leverage those workers typically will enjoy vis-à-vis management.¹⁸⁹ Second, the exchange of support between coworkers is an integral part of the development and maintenance of coworker bonds.¹⁹⁰ With these principles in place, we can see that the exchange of support between coworkers is mutually beneficially in a profound sense simply because it helps to secure one of the key determinants of employee leverage: coworker bonds.

2. 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.¹⁹¹ Retaliation protection comes in two forms: participation in a formal discrimination proceeding, and opposition to unlawful discrimination.¹⁹² The protection for participation conduct attaches only *after* a formal charge has been filed with the EEOC.¹⁹³ But employees will rarely file a charge with the EEOC before seeking support from coworkers, precisely because they rely on coworker

supra notes 33-36 and accompanying text.

¹⁸⁹ See generally *supra* Part I.B for a discussion of how coworker support strengthens employees' position in the workplace.

¹⁹⁰ See Granovetter, *supra* note 25, at 1363 (explaining how strong ties are developed through exchanges of support).

¹⁹¹ I focus on Title VII because retaliation doctrine is far more developed there than other areas of employment law, which 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). Other areas of employment law may grant protection against retaliation for specific conduct protected under the law. For example, OSHA provides employees who face a dangerous workplace with the right to refuse to work. See 29 CFR § 1977.12(b)(2); *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). Note that this walk-out right could be exercised jointly by employees so as to build and reinforce coworker solidarity and support.

¹⁹² 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. Cnty. of Clarion*, 435 F.3d 262, 266 (3d Cir. 2006) (distinguishing opposition and participation and noting that the latter is broader).

¹⁹³ See *Townsend v. Benjamin Enters.* 679 F.3d 41, 49-51 (2d Cir. 2012) (collecting cases).

emotional and informational support in order to file the charge.¹⁹⁴

This leaves protection for opposition conduct, which presents 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.¹⁹⁵ 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.¹⁹⁶ Note that not only the worker seeking the information, but also the coworker from whom the information was sought, is vulnerable to discipline.

Second, protection under the opposition clause attaches only when the conduct is viewed as somehow “[taking] a stand against” unlawful conduct.¹⁹⁷ In *Crawford v. Metropolitan Government of Nashville*, the Supreme Court recently held that an employee’s reporting of her own experiences of sexual harassment in response to an internal employer investigation into a coworker’s allegations of sexual harassment was protected opposition activity.¹⁹⁸ Some forms of instrumental coworker support may likewise be viewed as “taking a stand.” So, for example, a coworker who provides support to a worker complaining of sexual

¹⁹⁴ See Long, *supra* note 85, 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 82, 85 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).

¹⁹⁵ 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), *overruled on other grounds*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282-84 (4th Cir. 2015) (holding that a single sufficiently severe incident can support a reasonable belief of actionable harassment); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001) (commanding that employees who believe they have been harassed should “not investigate, gather evidence, and then approach company officials”); Long, *supra* note 84, at 958.

¹⁹⁶ See *supra* notes 97-103 and accompanying text.

¹⁹⁷ *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty, Tenn.*, 555 U.S. 271, 277 (2009).

¹⁹⁸ *Id.*

harassment by accompanying the worker to the human resources department to raise additional harassment allegations has engaged in protected opposition activity.¹⁹⁹

However, most emotional and informational support provided by coworkers will fall outside of opposition protection.²⁰⁰ In fact, a concurring opinion in *Crawford* made clear that these forms of support, such as 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 coworkers” about concerns of harassment, should not be protected.²⁰¹ Accordingly, some courts have interpreted *Crawford* to apply only to instances when a coworker complains directly to employer.²⁰² Such a narrow construction of opposition conduct would exclude much supportive coworker behavior from protection.²⁰³

C. Breaking Bonds

Work law belittles coworker bonds 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 incentives to cultivate these bonds in the first place. And work law fails to appreciate not only the significance of coworker bonds generally, but also the valuable relationship-specific investments made in particular coworker relationships.²⁰⁴ Coworker bonds are not fungible, and require significant investments of time to make meaningful.²⁰⁵ The closer the coworker bonds, the more effectively they function as avenues of support.²⁰⁶ 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

¹⁹⁹ 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); *Crawford*, 555 U.S. at 277 (giving example of coworker’s refusal to fire junior worker for discriminatory reasons).

²⁰⁰ *Crawford*, 555 U.S. at 277.

²⁰¹ See *id.* at 282 (Alito, J., concurring, joined by Thomas, J.).

²⁰² See, e.g., *Brush v. Sears Holdings Corp.*, 466 F. App’x 781, 787 (11th Cir. 2012).

²⁰³ 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.B.1.

²⁰⁴ See Schoenbaum, *supra* note 126, at 1204-07.

²⁰⁵ See *id.*

²⁰⁶ See Blackstone, *supra* note 13, at 640-42 (finding stronger effects of coworker support with stronger bonds).

when such bonds are ruptured. But work law shows no such tendency.

1. Relational Harm

Damage to coworker bonds is not an actionable harm under work law. The Supreme Court recently restricted standing in employment discrimination claims only to those within the statutory zone of interests.²⁰⁷ Because coworker bonds are not recognized as an interest 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.”²⁰⁸ Specifically, the plaintiff complained that she was no longer able to provide emotional support for her coworkers who were suffering from discrimination.²⁰⁹ The court denied the claim because “workplace harmony is not an interest sought to be protected by Title VII.”²¹⁰

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.”²¹¹ But courts do not account for lost coworker relationships in fashioning a remedy for termination, especially in considering whether reinstatement is necessary to make the terminated employee whole.²¹² 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.²¹³

²⁰⁷ *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).

²⁰⁸ *Jackson v. Deen*, 959 F. Supp. 2d 1346, 1350 (S.D. Ga. 2013).

²⁰⁹ *Id.* (“Employees came to her to complain and for help, which she felt obligated to give but was unable to fully provide.”).

²¹⁰ *See id.*

²¹¹ *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, mental anguish, loss of enjoyment of life, and other nonpecuniary losses”).

²¹² *See* Larry M. Parsons, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1462 (1989).

²¹³ *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

Still further, 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.²¹⁴ 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.²¹⁵ Other employer actions that break bonds, such as transfer or reassignment, are even less regulated.²¹⁶

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.²¹⁷ 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 time so far away that established relationships would wither.²¹⁸

2. 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 organizing²¹⁹ or complaining of discrimination.²²⁰ These laws ban retaliation because it can discourage an employee from engaging in the protected activity.²²¹ The

the desirability of one position over another are not relevant"); *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (same).

²¹⁴ See Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 *UCLA L. REV.* 335, 340 (2001).

²¹⁵ See *id.*

²¹⁶ The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, requires covered employers to give notice of mass layoffs and relocations, *id.* § 2102; see also Schoenbaum, *supra* note 126, at 1181.

²¹⁷ 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).

²¹⁸ See Schoenbaum, *supra* note 126, at 1196-97, on how bonds fade over time without ongoing contact.

²¹⁹ 29 U.S.C. § 157.

²²⁰ 42 U.S.C. § 2000e-3.

²²¹ See Brake, *supra* note 84, at 20.

question arises whether an employer who retaliates by visiting harm on the employee's intimate—e.g., firing a family member or friend who works for the same employer—has engaged in 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. Supervisors are excluded from the general bargaining protections of labor law.²²² However, labor law does extend protection to a supervisor who is terminated in retaliation for the supervisor's family member engaging in union activity.²²³ 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.”²²⁴ 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.”²²⁵ But not so with coworkers, who are not extended this protection.²²⁶ 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 options facing a rank-and-file employee with a mother who works as a supervisor when deciding whether to undertake union activity. She may undertake the activity fearing that harm may befall her mother, or she may desist from the activity. Labor law presumes that severing the relationship with her mother 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.²²⁷ 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 coworker bonds play in the successful operation of work law.

²²² See 29 U.S.C. § 152(3).

²²³ *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987).

²²⁴ See *id.* at 1089.

²²⁵ *Id.*

²²⁶ See *United Food & Comm. 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).

²²⁷ *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—but that this was insufficient to warrant protection).

The law's disparate treatment of family and coworker relationships may be based in a different positive or normative view of these relationships. On a positive view, family bonds are hard to sever. Even if the employee distanced herself from her mother, the employer might still exact a reprisal against her.²²⁸ 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.”²²⁹ The Court so decided in a case in which an employer terminated the fiancé of an employee who had complained of harassment.²³⁰ 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.”²³¹

Despite a relatively plaintiff-friendly approach,²³² courts have applied this standard wrongheadedly, making family the touchstone for determining which bonds matter at work. In the case of a coworker who claimed she was fired in retaliation for her friend's complaint of sexual harassment, the court determined 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.”²³³ While courts will need to assess whether a coworker bond is substantial enough to merit protection, the court did so in a way that failed to appreciate why work bonds matter. The court

²²⁸ 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 generally* Jill Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012) (exploring how siblings are denied protections that are granted to other family relationships).

²²⁹ *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 868 (2011) (internal quotation marks omitted).

²³⁰ *Id.*

²³¹ *Id.*

²³² 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).

²³³ *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).

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.²³⁴ But even coworkers who do not have a family-like relationship can exchange meaningful workplace support.²³⁵ 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.²³⁶ Notably, the court ignored these facts 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,”²³⁷ the court remained fixated on family-like bonds.

The privileging of family over coworker bonds is seen again in Title VII’s approach to associational discrimination. Associational discrimination is the term that has been applied to discrimination against an employee because of the employee’s interracial association.²³⁸ Courts will find a violation if an employer fires an employee because of the employee’s interracial marriage.²³⁹ But few jurisdictions will recognize the claim where the association is a strong coworker relationship rather than a family relationship.²⁴⁰ As with third-party reprisals, the law presumes that there is an easy way to avoid the harm: break the coworker bond.

²³⁴ See Kimberly D. Elsbach, *Interpreting Workplace Identities: The Role of Office Décor*, 25 J. ORG. BEH. 99, 110 (2004).

²³⁵ 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.

²³⁶ *Id.* at *3.

²³⁷ 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).

²³⁸ See, e.g., Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012). Work law also bans discrimination on the basis of an association with someone with a disability. 42 U.S.C. § 12112(b)(4) (making it unlawful to “exclud[e] or otherwise deny[] equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association”).

²³⁹ Courts consistently recognize that a family relationship between the plaintiff and the person 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).

²⁴⁰ *Id.*

D. Further Implications

Beyond the immediate impact on coworker relationships and the goals of work law described above, work law's regulation of coworker relationships also has implications for the relationship between labor and employment law, and for the family-market divide, discussed in turn below. Work law's failure to recognize coworker bonds robs labor law and employment law from the opportunity to operate synergistically in promoting workplace rights and workplace bonds. And work law's relegation of important bonds to the family not only fails to reflect workers' reality, but also undermines gender equality.

1. The Labor-Employment Divide

The centrality of coworker bonds to the success of both labor law 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 judges' and policymakers' beliefs about work and workers, which can migrate across all of work law.²⁴¹ This construction of coworker relationships can seep across doctrines, and

²⁴¹ I am not the first to propose that the law of work shapes our ideas of work, workers, and the workplace. See Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 144 (1988) (recognizing that work law "shap[es] ideas about work"). This shaping of the idea of work is self-reinforcing. As legal decisionmakers—administrative law judges, the National Labor Relations 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.

because the same subjects—employees—are the relevant actors, between labor law and employment law.²⁴² Moreover, this ideology of work can also take hold in the public, particularly when prominent cases are decided or legislative battles are waged, which then further reinforces this ideology for relevant decisionmakers.²⁴³

This calls into question scholars' approach of relying on one area of work law to stand in for another. So, for example, Professor Benjamin 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.²⁴⁴ 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 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 in unionized workplaces, this does not negate the potential for mutual reinforcement of labor law and employment law.²⁴⁵ An employment law that recognizes coworker bonds could still positively influence how federal appellate judges who decide both employment law and labor law cases view relationships at work. 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 heightened sense of the significance of coworker bonds to her union workplace.²⁴⁶

²⁴² See *id.* (noting the importance of the ideology of work underlying labor law); Fischl, *supra* note 5, at 837-38 (discussing how conception of worker in one doctrine of labor law could spill over to other labor law doctrines).

²⁴³ See Crain & Matheny, *supra* note 8, at 578 (describing how legal decisions relying on the ideology of unions as conspiracies took hold in the public mind).

²⁴⁴ Sachs, *supra* note 8, at 2686-90; see also Crain & Matheny, *supra* note 8, at 579-91 (discussing alternative forms of collective action).

²⁴⁵ See Stone, *supra* note 6, 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).

²⁴⁶ See Schoenbaum, *supra* note 126, at 1170-71 (discussing employee mobility).

2. The Family-Market Divide

Work law's treatment of coworker bonds not only undermines its stated goals, but also reinforces the family-market divide. Feminist legal scholars have focused on how this divide harms women, by failing to value productive work that women disproportionately engage in within the family.²⁴⁷ The next Part highlights how the family-market divide can have the same harmful consequences for women at work.

A law of work that fails to acknowledge the importance of coworker support plays a role in creating an ideology of work that likewise fails to acknowledge the importance of coworker support.²⁴⁸ So 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.²⁴⁹ Like the failure to value work in the family, the failure to value support at work disproportionately harms women workers.

Women engage in more supportive behavior at work,²⁵⁰ and thus a law of work that fails to protect supportive coworker conduct disproportionately harms women workers. Moreover, women are judged less favorably than men when they do provide support at work, and more harshly than men when they decline to provide it.²⁵¹ Indeed, a woman has to provide support just to be viewed as favorably as a man who does not.²⁵² These gender dynamics that drive women to engage in more support work further harm women when this support goes unrecognized by law and by employers, even as the employer reaps the productivity benefits of the support work

²⁴⁷ See sources cited *supra* notes 127-28.

²⁴⁸ See Stone, *supra* note 241, at 144 (recognizing that work law “shap[es] ideas about work”).

²⁴⁹ See Adam Grant & Sheryl Sandberg, *Madam C.E.O., Get Me a Coffee*, N.Y. TIMES, Feb. 8, 2015, at SR2, available at <http://www.nytimes.com/2015/02/08/opinion/sunday/sheryl-sandberg-and-adam-grant-on-women-doing-office-housework.html>.

²⁵⁰ See Alice H. Eagly & Maureen Crowley, *Gender and Helping Behavior: A Meta-Analytic Review of the Social Psychological Literature*, 100 PSYCH. BULL. 283, 284 (1986); Deborah L. Kidder, *The Influence of Gender on the Performance of Organizational Citizenship Behaviors*, 28 J. MGMT. 629, 630 (2002).

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) (finding that when participants evaluated the performance of a male or female employee who did or did not stay late to assist a coworker in preparing for a meeting, a man was rated 14% more favorably than a woman for assisting, and a woman was rated 12% lower than a man when both declined to assist).

²⁵² See *id.*

that women disproportionately do.²⁵³ To make matters worse, women are more likely to engage in support that is behind-the-scenes or otherwise not visible, further compounding the gendered consequences of the failure to value acts of coworker support.²⁵⁴ The unacknowledged support that women do hinders their careers by exacting an opportunity cost in terms of time taken away from more valued endeavors, and by undercutting women's authority in a world of work where support is not valued.²⁵⁵ Still further, the unacknowledged support that women workers disproportionately provide, particularly in the form of emotional labor—work done to create a particular feeling or state of mind in others—also exacts an emotional toll.²⁵⁶

And because the law fails to give due heed to support at work, despite all of it that occurs there, this leaves the family as the only proper legal source of the values of altruism and care, and places all the more pressure on the family to protect them. This reinforces the law's anxiety about compensating production in the family, which likewise harms women, as they are disproportionately the producers in this realm.²⁵⁷ The family-market divide is rigidly upheld, impervious to the reality of work in the family, and support in the workplace.

III. TOWARDS A LAW OF COWORKERS

This Article argues for a law of work that values and protects coworker bonds. This Part begins with a general discussion of how the law should

²⁵³ See *supra* notes 33-36 (collecting citations showing how coworker support increases productivity).

²⁵⁴ See Eagly & Crowley, *supra* 250, at 284; Joyce K. Fletcher, *Relational Practice: A Feminist Reconstruction of Work*, 7 J. MGMT. INQUIRY 163 (1998) (exploring how women's support work is often not viewed as important work contributing to the organization); KANTER, *supra* note 39, at 111-29 (documenting based on ethnographic research how women workers engage in a host of supportive behaviors at work for which they are not rewarded); Kidder, *supra* note 250, at 630 (finding that women are more likely to engage in less visible support work that goes unrecognized); JOAN C. WILLIAMS & RACHEL DEMPSEY, *WHAT WORKS FOR WOMEN AT WORK* 68-69 (2014) (discussing how women are more likely to engage in "office housework" such as planning parties, ordering food, and taking notes); cf. Rosenbury, *supra* note 128, at 367-72 (theorizing a variety of roles that "work wives" can play and taking a more nuanced view of how the supportive roles that women can play can both help and hinder them at work).

²⁵⁵ WILLIAMS, *supra* note 253, at 68-69.

²⁵⁶ The seminal work is ARLIE HOCHSCHILD, *THE MANAGED HEART COMMERCIALIZATION OF HUMAN FEELING* (1983, 2012 ed.), which defines "emotional labor," *id.* at 7, and discusses its costs.

²⁵⁷ See *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (1993) (denying enforcement of support contract in marriage, leaving wife uncompensated for care work bargained for and provided to husband).

recognize coworker relationships, and then turns to specific law reform proposals. Before sketching out what this law would look like, I address a preliminary matter. Much of the role that coworkers play is in enhanced enforcement of work law. 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,²⁵⁸ an enhanced role for public regulators,²⁵⁹ or a regime of monitored self-regulation that relies on employers, employees, and outside monitors.²⁶⁰ 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. This approach also 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. More fundamentally, however, this Article calls for legal recognition of coworker bonds not only because of the positive role these bonds play in the enforcement of work law, but because of the positive role these bonds play in workers' lives.²⁶¹

A. 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. Persons outside the family—one's coworkers—are even better placed than family members at providing workplace support. 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. A law of limited-purpose support would borrow the aims of protecting relationships from family law—promoting solidarity, encouraging support, and maintaining bonds²⁶²—but would modify these aims to fit the needs of the domain in which they arise. While this theory

²⁵⁸ See Brake, *supra* note 84, at 50-55.

²⁵⁹ 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).

²⁶⁰ See Estlund, *supra* note 6, at 324.

²⁶¹ See *supra* Part I.A.

²⁶² See *supra* notes 124-27 and accompanying text.

may have application to other relationships (e.g., customers) or other domains (e.g., schools), I focus here on coworker relationships.

Some might view my call for greater recognition of coworker relationships in work law as a radical shift from current law, or as wildly impractical. But the reform I call for is not so great a divergence as it may appear, at least as a matter of principle. As I suggest earlier, the law recognizes the role of coworker relationships in some circumstances, but fails to take this recognition to its logical conclusion by failing to recognize all of the ways in which coworker bonds are important to work law. Moreover, the reforms I propose in the following sections represent a shift towards greater legal recognition of the importance of coworker bonds, but a relatively modest one compared with the more radical changes that would be required to recognize these relationships fully.²⁶³

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. 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 coworker relationships, which are significantly influenced by the employer.

This means that in recognizing coworker relationships, the law must be sensitive to how these 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.²⁶⁴ 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

²⁶³ See *infra* Parts III.C.2. (discussing how recognition of coworker bonds would require protection of the exchange of all coworker support, but stopping short of this broad proposal) and III.C.4, *infra* (discussing how just cause or reasonable notice regimes would better recognize coworker bonds, but stopping short of proposing such a shift).

²⁶⁴ See Crain, *supra* note 48, 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 126, 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).

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 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 protect these extra-family sources of support more robustly.

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.²⁶⁵ 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.²⁶⁶ 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,²⁶⁷ 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.²⁶⁸ This special intimacy blossoms in part precisely *because* these relationships are regulated differently than the family. Any new law should not only provide

²⁶⁵ See Corbett, *supra* note 167, at 27.

²⁶⁶ But see generally Rosenbury, *supra* note 128, for a discussion of bilateral coworker relationships in the context of “work wives.”

²⁶⁷ See *supra* McGuire, *supra* note 25, 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).

²⁶⁸ See *supra* note 42 and accompanying text.

needed protections, but also avoid regulation that might detract from the unique value of these relationships.

Another unique benefit of coworker relationships is the development of meaningful bonds in a diverse setting.²⁶⁹ Note then that the limited-purpose support relationships I envision here would thus be outside the purview of the constitutional right to intimate association.²⁷⁰ Indeed, this is critical to the project, as otherwise the antidiscrimination goals of employment law would be rendered suspect.²⁷¹ 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, which it does not do in the family.²⁷²

Coworker relationships arise secondarily out of a primary relationship—the one between employer and employee—that the law *does* recognize.²⁷³ 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.²⁷⁴ 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 promoting 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

²⁶⁹ See generally Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000).

²⁷⁰ See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980), on the contours of this right.

²⁷¹ See *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976) (explaining that the right protects relationships from state intrusion through antidiscrimination mandates).

²⁷² See generally Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009) (exploring ways in which law permits discrimination in romantic relationships).

²⁷³ See, e.g., *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985) (recognizing the employment law rights turn on an employer-employee relationship).

²⁷⁴ See *id.* (holding that employment relationship turns largely on employer control).

responsibility, either through action or inaction, for the state of coworker bonds in the workplace.²⁷⁵ 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.²⁷⁶ These include certain minimum 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 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 most simply by updating current law to appreciate coworker solidarity and support. This Section catalogues specific doctrinal reforms to achieve this goal, which can be broadly categorized as proposals that would recognize coworker bonds as an interest of work law, and proposals that would provide more protection for workers to harness the power of coworker bonds. This Section then addresses how to implement these changes.

1. Doctrinal Modifications

Recognizing Coworker Bonds as an Interest of Work Law. Current law limits the terms and conditions of employment to the narrow economic rewards of work. It fails to recognize that the relational conditions of work are just as, if not more, important, which impacts a number of doctrines. Recognizing coworker solidarity as an interest of work law would mean that there would be standing to bring a claim under an employment law statute based on sufficient harm to one's coworker relationships.²⁷⁷ 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

²⁷⁵ *See id.*

²⁷⁶ *See* Ira S. Bushey & Sons v. United States, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.) (justifying employer's legal responsibility for what goes on in the workplace based on control and foreseeability).

²⁷⁷ *See supra* notes 208-10 and accompanying text.

coworker solidarity would find standing to allow such a claim to proceed.²⁷⁸ Likewise, a law of the workplace that appreciated the significance of coworker solidarity would recognize that a discriminatory transfer would constitute an adverse employment action under Title VII when it ruptures significantly meaningful coworker bonds, even if it does not reduce the worker's pay or alter her title.²⁷⁹ When evaluating make-whole 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.²⁸⁰ And such a law would scrutinize a non-compete agreement for its consequences on coworker bonds.²⁸¹

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.²⁸² So the law of third-party reprisals and the doctrine of 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 the worker herself is costly.²⁸³

Finally, recognizing the importance of coworker relationships in determining the terms and conditions of work would also mean that the provision of coworker support on a discriminatory basis could constitute an adverse employment action under employment discrimination law, so long as the forms of support withheld are significant enough that they do in fact change the terms and conditions of work.²⁸⁴ So, for example, women who are excluded from poker games or golf outings and other forms of bonding by their coworkers on the basis of sex could raise a viable claim if they could show that these exclusions materially alter their experience of the workplace in terms of access to such things as mentoring, support, and information about work opportunities. 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.²⁸⁵ Given

²⁷⁸ *See id.*

²⁷⁹ *See supra* note 213 and accompanying text.

²⁸⁰ *See supra* notes at 211-12 and accompanying text.

²⁸¹ *See supra* note 217-18 and accompanying text.

²⁸² *See supra* Part II.C.2.

²⁸³ *See id.*

²⁸⁴ *See supra* notes 144-49 and accompanying text.

²⁸⁵ *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*

the importance of coworker bonds to success at work, 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 be adapted to this context.²⁸⁶

Protecting the Power of Coworker Bonds. A law of limited-purpose support would provide more protection for workers to leverage the power of their bonds. Such a law would recognize the ability of coworker bonds to form a “community of interest” that can support a bargaining unit, even when the employees’ economic interests are not perfectly aligned.²⁸⁷ This law would also be more circumspect about employees waiving their rights to leverage their coworker bonds, as in the context of waiving the right to engage in a sympathy strike.²⁸⁸

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 law would acknowledge that a broader range of supportive activity should fall within the protection for “concerted activities” for “mutual aid or protection.”²⁸⁹ This would require work law to appreciate the nature of coworker altruism, rather than simply apply a rational actor model to these relationships. When considering whether coworker support is “mutual,” the Board would avoid a narrow quid pro quo view of coworker motivation, and would instead recognize the more fluid way in which support is exchanged and accrues to the benefit of coworkers.²⁹⁰

There still remains the question of how broadly “concerted activity” for “mutual aid or protection” should be construed. If “concerted[ly]”

Discrimination, 141 U. PA. L. REV. 899, 901 (1992).

²⁸⁶ If the harasser is a supervisor, the employer has an affirmative defense that allows it to escape liability so long as employer “exercise[s] reasonable care to prevent and correct [the harassment] promptly,” and the employee “unreasonably failed to advantage of any preventative or corrective opportunities provided by the employer.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). If the harasser is a coworker, the employer will be liable “in negligence for a racially or sexually hostile work environment created by a victim’s co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action.” *E.g.*, *Richardson v. N.Y. State Dept. of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999).

²⁸⁷ *See supra* Part II.A.2.

²⁸⁸ *See supra* Part II.A.3.

²⁸⁹ 29 U.S.C. § 157.

²⁹⁰ *See supra* Part II.B.1.

exchanging support is integral to building coworker solidarity, which in turn is integral to coworkers providing “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 exchange of coworker support and the ultimate “mutual aid or protection” may be too attenuated.²⁹¹ Whether it would be advisable to extend legal protection for coworker support to this extent is then taken up later, in considering new protections that would be warranted under a law of limited-purpose coworker support.²⁹²

A law of work that gave coworker support its due would give broader protection against retaliation to coworkers who support fellow workers 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.²⁹³ 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.²⁹⁴ With this expanded frame, emotional, informational, and instrumental support from coworkers is often an essential part of the opposition.

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 substantial 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

²⁹¹ 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).

²⁹² See *infra* Part III.C.2.

²⁹³ See *supra* notes 195-203 and accompanying text.

²⁹⁴ *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty, Tenn.*, 555 U.S. 271, 280 (2009).

coworker relationship in a particular case.²⁹⁵ 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.²⁹⁶ 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 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.”²⁹⁷ Achieving proper recognition of coworker relationships would require courts to be sensitive to the unique features of coworker relationships. Courts would avoid relying on a family model of relational significance, and would instead consider the primary indicia of an important coworker bond: the exchange of work-related support.²⁹⁸

Readers troubled by the administrative burden of a functional standard should recognize that current law already requires courts to decide which family relationships merit special consideration, and it has been able 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.²⁹⁹ 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.³⁰⁰ Courts have been able to draw such lines, and this should

²⁹⁵ *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 868 (2011).

²⁹⁶ *Id.* (“We expect that firing a close family member will almost always meet the *Burlington* standard. . .”).

²⁹⁷ *Id.*

²⁹⁸ *See supra* Part II.B.2.

²⁹⁹ *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).

³⁰⁰ *Id.* 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”). Only certain family members of substantial owners are automatically 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).

give us confidence in their ability to draw similar lines around coworker relationships that are worthy of recognition.

Importantly, recognizing coworker bonds would not be determinative in any particular case. It would be a factor to consider in the mix of other relevant factors. 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 exchanging support, but doing so in a way so disruptive to the employer's business that it does not warrant protection.³⁰¹

Nor would recognizing coworker relationships always accrue to the benefit of employees. For example, as just mentioned, labor law may exclude an employee who is a family member of an owner or manager from a bargaining unit if the employee's alignment with ownership or managements means that she lacks a "community of interest" with her fellow employees.³⁰² The functional approach advocated here would mean that a sufficiently close coworker relationship with an owner or a manger might likewise create too much alignment such that the employee friend should be excluded from the bargaining unit, too. Similarly, 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.³⁰³ 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

Underscoring the law's family-market divide, *see supra* notes 123-30 and accompanying text, 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.*

³⁰¹ *See NLRB v. IBEW Local 1129*, 346 U.S. 464 (1953) (denying protection when coworkers engage in support in a way that is "reasonably calculated to harm the Company's reputation and reduce its income").

³⁰² *See supra* notes 298-99 and accompanying text.

³⁰³ *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).

suffered, particularly when the loss is relational.³⁰⁴ 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.³⁰⁵ Money damages do confer one key benefit: they 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.

C. *New Incentives*

While updating current doctrine would go some way towards giving coworker relationships their due, gaps remain. 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. Some legal incentives for employers to promote and maintain coworker bonds are in order.

Before turning to any specific proposal for doing so, however, 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. For example, the ban on sexual harassment has encouraged coworker bonding, particularly between men and women, by changing norms of treatment for women in the workplace.³⁰⁶ At the same time, this ban has also caused employers to adopt policies out of fear of liability that discourage the formation of coworker solidarity.³⁰⁷ Current law fails to draw the right line between harmful and helpful bonds due to the absence of legal incentives for employers to value positive coworker bonding. Second, as compared with a specific instance of employer discipline for coworker support, the conditions that inhibit or promote solidarity are pervasive. 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 prerogatives. This Part considers several options that

³⁰⁴ 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).

³⁰⁵ 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.”).

³⁰⁶ See Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND LAW 241, 243 (Eyal Zamir & Doron Teichman eds., 2014) (discussing how sexual harassment law brought widespread changes in attitudes about appropriate workplace conduct).

³⁰⁷ See *supra* note 14 and accompanying text.

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 the burdens it imposes.

1. Positive Workplace Climate

Statutory protection against general workplace harassment could go some way towards promoting workplace cultures that are conducive to cultivating positive coworker bonds. A number of foreign jurisdictions already have such legislation in place.³⁰⁸ Workplace bullying laws have been proposed in over twenty states, though none has yet been enacted.³⁰⁹ The model legislation on which the state bills are based makes it unlawful to “subject an employee to an abusive work environment,” which “exists when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm, or both.”³¹⁰

One of the primary objections to the legislation is that somehow “tension created by competition” drives workplace productivity: “[I]t is those who push us to excel to whom we often owe our greatest debt of gratitude. By labeling pushing as ‘bullying,’ there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement.”³¹¹ But this gets things exactly backwards: it is not abusive competition among coworkers, but supportive workplace bonds, that have been shown to enhance productivity.³¹²

2. Support Protections

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

³⁰⁸ See David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. R. & EMP. POL'Y J. 475, 509-15 (2004).

³⁰⁹ 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).

³¹⁰ See *id.* at 334, 350-54 (internal quotation marks omitted) (including complete model legislation as appendix).

³¹¹ See Timothy P. Van Dyck & Patricia M. Mullen, *Picking the Wrong Fight: Legislation That Needs Bullying*, 3 MEALEY'S LITIG. REP.: EMP. L. 1, 3 (2007)

³¹² See *supra* notes 33-36 and accompanying text.

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, 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.³¹³

While this expanded protection for coworker support does not require any action by employers to promote solidarity, it does place a duty on employers to refrain from doing the thing that probably deters coworker support the most: retaliating.³¹⁴ This protection could materially impact workers' willingness to seek support from and provide support to their coworkers. A general no-retaliation duty 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 limit could be incorporated here.³¹⁵

Restricting the protection of coworker support to work-related matters is really too narrow, because even seeking and providing support related to non-work matters builds solidarity and the propensity for support for work-related matters.³¹⁶ I draw the line at work-related matters, however, out of fairness to employers. Work matters are where employers have control. Therefore, employers that wish to minimize incursion on their prerogative

³¹³ The generally more favorable procedures and remedies available under employment law as compared with the NLRA might lead us to favor an employment law approach. See Sachs, *supra* note 8, at 2694-96.

³¹⁴ See *supra* note 84 and accompanying text.

³¹⁵ See *NLRB v. IBEW Local 1129*, 346 U.S. 464 (1953).

³¹⁶ See Uzzi, *supra* note 25, at 675-82; ZELIZER, *supra* note 25, 250-55; McGuire, *supra* note 25, at 131-32.

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 of the employer’s prerogatives, and might cause tension with the employer’s obligation to prevent sexual harassment.³¹⁷

3. 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. A right to ask equips workers with a right to request 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.³¹⁸ Rather than requiring that the employer provide any accommodation, the law requires that the employer consider requests for accommodation and provides a process for considering such requests.³¹⁹

Adapting the right to ask to coworker bonds would mean that 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

³¹⁷ 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 Reins. Am. Corp.*, 237 F.3d 166, 166 (2d Cir. 2001) (allowing termination of employee for romantic relationship because dating falls outside state statute protecting employees for their “recreational activities”).

³¹⁸ 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 Oct. 5, 2015).

³¹⁹ See *id.*; 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 EMP. RTS. & EMP. POL’Y J. 233, 266-68 (2006). The U.K. law sets 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.” Employment Rights Act 1996 c. 18, § 80G.

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.

The right to ask is no panacea. The same features that help to avoid some of the 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, even without a guaranteed outcome, providing a formal legal mechanism lowers the cost of making requests and legitimates the requests.³²⁰ Right-to-ask laws can also create a focal point for both employers and employees to bargain around.³²¹ Indeed, despite the lack of a substantive guarantee, requests under the U.K. law are frequently satisfied.³²² As for the second point, fear of retaliation may inhibit employees from exercising the right to ask. Protection against retaliation for those who exercise the right could be provided to help alleviate this concern, but it would not eliminate it, as fear of retaliation persists in the face of protection against it.³²³ However, if the right-to-ask were adopted along with the other proposals suggested here to strengthen workplace bonds, employee leverage would increase and the fear of retaliation would be diminished.

4. At-Will Employment

Limiting an employer's ability to rupture coworker bonds by terminating or dislocating workers 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 or reasonable notice regimes, which restrict the discretion employers have to terminate employees.³²⁴ 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

³²⁰ 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).

³²¹ 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).

³²² See Stone, et al., *supra* note 319, at 266-68

³²³ See *supra* note 84 on how fear of retaliation persists despite protection against it.

³²⁴ 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, 2-3 (2010).

invest in these bonds.

Given a range of important considerations,³²⁵ ruptured coworker bonds on their own might not justify a move away from at-will employment, but the impact on solidarity is an important consideration that should weigh in the mix of assessing the best regime. While a just cause default regime would not 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 offer a transition period during which 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, unemployment insurance 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 clear 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.³²⁶

5. Solidarity Statements

Finally, akin to the filings of publicly traded companies with the Securities and Exchange Commission, the law could require employers to produce a solidarity statement at regular intervals.³²⁷ These assessments

³²⁵ Scholars have advocated for reforms on various grounds. *See, e.g.*, Arnow-Richman, *supra* note 324, at 1 (arguing for a reasonable notice regime because “[a] just cause rule provides only a weak cause of action to a narrow subset of workers” who are “able to prove they were fired for purely arbitrary reasons,” and thus “fails to account for the justifiable, but still devastating, termination of workers for economic reasons,” whereas requiring employers “to provide advance notice of termination or offer wages and benefits for the duration of the notice period . . . recognizes the necessity and inevitability of employment termination,” and “facilitates transition”); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 108 (2002) (arguing based on behavioral economics research that the default rule should be switched from at will to just cause because the resulting endowment effect would make the resulting employment rights for employees sticky); Estlund, *supra* note 324, at 1660 (arguing that “the at-will presumption continues to operate within the realm of wrongful discharge protections against employer discrimination and retaliation” and “continues to surround and undermine each of those protections” by “pos[ing] challenges in the form of difficulties of proof, delay, and cost” such that “wrongful discharge law provides an undependable escape from the oblivion of the at-will presumption”).

³²⁶ See Lester, *supra* note 214, at 340, for a discussion of the experience-rating system.

³²⁷ 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

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 statements 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.

As a general matter, mandatory disclosure has been lauded as a way "to improve the efficiency and rationality of market decisions . . . and advance public regulatory goals, all without intruding significantly upon the autonomy of market actors."³²⁸ Mandating solidarity statements would serve several functions in moving towards recognition of coworker relationships. First, solidarity statements would raise an employer's own awareness of how its policies and practices affect coworker solidarity. Such awareness in and of itself can lead to better decisionmaking. Second, making the information public would help to create a market for solidarity-promoting workplaces. This would allow prospective employees to sort among potential employers on this feature, and would encourage firms to compete on the feature of coworker solidarity.³²⁹ A firm's level of coworker solidarity is often difficult to assess *ex ante*, when employees are deciding among firms. Such statements would make this typically private information easier to acquire, and would raise the salience of solidarity as a feature by which to sort employers.³³⁰ 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 solidarity.

Law is needed here because the information that firms voluntarily reveal is typically inadequate, as it is generally "bias[ed] toward positive information," "there are few specifics about most matters," and

operations). Or, akin to environmental impact statements, the law could require employers to produce a solidarity impact statement when making changes to workplace policies that impinge on coworker bonds. 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).

³²⁸ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 351 (2011).

³²⁹ *See id.* (explaining how, "within the large domain [of work law] that is left to private ordering, mandatory disclosure can improve the operation of labor markets by better informing employees' choices among and bargains with employers").

³³⁰ 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.

“information is [not] standardized so as to enable comparisons across companies.”³³¹ And reliable third-party sources of information will be hard to come by for many if not most firms.³³² Mandating disclosure rather than simply relying on firms to make this information available thus reduces the information costs associated with evaluating this information and “strengthen[s] and broaden[s] the factual foundation for the reputational rewards and sanctions that are an increasingly significant driver in organizational behavior.”³³³

CONCLUSION

This Article has argued that despite the essential role of coworker bonds in achieving the stated goals of work law, work law pays far too little attention to and provides far too little protection for coworker bonds. It proposes a way forward with a law that would recognize coworker relationships. Taking such a view of coworker bonds would align the fields of labor law and employment law when before they were only in tension. This reconfigured view of work law can help this area of 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.³³⁴ This division can affect how lawyers practice law, and how these lawyers, when they become judges and legislators, reach decisions and make policy about the regulation of work. 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 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.

³³¹ See Estlund, *supra* note 327, at 382.

³³² *Id.* at 383.

³³³ *Id.* at 351.

³³⁴ Most employment law casebooks do not even include labor law’s protection for concerted activity, which applies to non-union workers. One exception is MARION G. CRAIN, PAULINE T. KIM, & MICHAEL SELMI, *WORK LAW* (2d ed. 2010).