

## Arm's-Length Intimacy: Employment as Relationship

Marion Crain\*

Two important assumptions shape the law of work: that workers and employers possess interests that are diametrically opposed, and that each makes no investment in the other beyond the immediate exchange of dollars for labor. Neither assumption is justified. Without work to be done, jobs won't exist; accordingly, workers are keenly interested in supporting the firms for which they labor.<sup>1</sup> Workers pour sweat, blood, and even dollars into the firms that employ them when firms need it most.<sup>2</sup> Nor are most employers

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\* Wiley B. Rutledge Professor of Law and Director, Center for the Interdisciplinary Study of Work & Social Capital, Washington University in St. Louis. I am grateful to Dean Kent Syverud, Washington University School of Law, and the Israel Treiman fellowship for funding, and thank Deirdre Aaron, Nick Billman, and Andrew Donelan for excellent research assistance. Participants in the "For Love or Money?" workshop sponsored by Washington University's Center for the Interdisciplinary Study of Work & Social Capital in March 2010 offered valuable insights. I am particularly indebted to Scott Baker and Noah Zatz for discussions and comments on earlier drafts.

1. Even the most militant labor unions have internalized this message, agreeing to wage concessions during recessionary periods to help struggling firms. *See, e.g., United Automobile Workers*, N.Y. TIMES, Jan. 13, 2011, [http://topics.nytimes.com/top/reference/timestopics/organizations/u/united\\_automobile\\_workers/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/u/united_automobile_workers/index.html) (reporting that the United Auto Workers' Union made wage and benefit concessions worth \$7,000 to \$30,000 a year per member during the 2008–09 recession in an effort to save jobs and assist GM and Chrysler). Union organizers, too, have incorporated the understanding that workers and firms' fortunes and well-being are linked. Consider, for example, the Harvard Union of Clerical and Technical Workers' campaign slogan: "It's not anti-Harvard to be pro-union." *See* Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1874 (1992) (describing non-adversarial approach to organizing adopted by the Harvard union).

2. *See* Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179, 1186, 1233–37 (2010) (describing propensity of workers to invest their retirement savings in company stock and firms' marketing efforts to encourage identification with the corporate brand that might encourage such behavior). Despite increased public awareness about the risks of insufficient diversification of employee retirement portfolios in the wake of the Enron and WorldCom debacles, many workers continue to invest the bulk of their retirement portfolios in company stock. In January 2009, the *Wall Street Journal* reported that workers were responding to the recession by investing more, not less, in the companies that employed them. *See* Eleanor Laise, *Despite Risks, Workers Guzzle Company Stock*, WALL ST. J., Mar. 5, 2009, at D1.

interested only in wringing every last drop of sweat out of each worker for the minimum price possible. In the modern hyper-competitive market, firms utilize myriad recruiting and retention strategies to bind workers to the firm, hoping to convince workers to link their identities as well as their financial fortunes to the firm.<sup>3</sup> To foster employee morale, firms promulgate handbooks and policy manuals specifying benefits and promising to deal fairly with employees.<sup>4</sup>

Employment is rife with evidence of mutual investment. Workers make firm-specific human capital investments, learning how institutions that employ them function and forging relationships with coworkers, customers, and competitors that are not readily transportable to the next job. Workers construct their personal lives—their homes, families, social networks, and communities—around the assumption that their work in that place and often for that employer will continue absent business downturns or poor performance. Employers also make investments: training, relocation, and costly benefit packages are designed to attract talent, nurture firm loyalty, and encourage organizational citizenship behavior.<sup>5</sup>

Work law ignores the realities of interdependence and mutual investment, committing itself to a model of employment as an arm's-length, impersonal cash-for-labor transaction.<sup>6</sup> Employment at will is

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3. See Crain, *supra* note 2, at 1200–20, 1227–29.

4. See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1259 n.2, 1265 (N.J. 1985) (analyzing employee handbook that promised to “retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively,” and finding the promise enforceable; the court noted that the employer secured valuable advantages by articulating this company philosophy in its handbook, including enhanced morale and union avoidance); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087–89 (Wash. 1984) (finding employer contractually bound to promises of job security and fair treatment in an employee handbook where promises secured “an orderly, cooperative and loyal work force”).

5. In the new economy, service firms in particular depend heavily upon “organizational citizenship behavior” by employees—that is, extraordinary effort and firm loyalty that is not rewarded through traditional reward mechanisms (wages). See DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4–5 (1988); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 95 (2004). See generally Crain, *supra* note 2, at 1196 (describing firms’ increasing reliance on extra-role behavior of front-line employees).

6. On the prevalence of the law’s conceptualization of employment as “an abstract contractual exchange, rather than as an experientially grounded network of human

the default rule.<sup>7</sup> In its strictest legal incarnation, “[t]he at-will contract lasts only from moment to moment, at every moment completed and at every moment renewed.”<sup>8</sup> Thus, employees are free to quit, and the employer is free to discharge, without notice, severance pay, or proof of fault, unless the parties contract explicitly to the contrary.

A contractual framework characterized by the assumption of arm's-length dealing and a default rule of unrestricted unilateral exit with no notice or transitional period overlooks the substantial emotional attachment and investment that define work for many workers. Discharge, when it comes, is often sudden and devastating, dealing a powerful emotional blow that severs workers' psychological moorings.<sup>9</sup> Discharged workers suffer tremendous stress and accompanying health effects, including increased risk of disease, alcoholism, social impacts such as increased propensity for spousal and child abuse, divorce, and higher death rates.<sup>10</sup> Sudden job

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relationships,” see Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 864 (1989) (explaining how contractual imagery of self-interested individuals dealing with one another at arm's length has a “durable hold on modern liberal thought”).

7. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884) (“All [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.”). The rationale behind this doctrine is the policy favoring business flexibility—to maximize the ability of firms to shrink and enlarge their workforces in response to market fluctuations—and by the concomitant freedom of employees to quit to pursue more desirable market alternatives. Despite a series of common law incursions in many states, the basic doctrine remains the default rule in all jurisdictions save one. See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 100–22 (2d ed. 2010). For a recent invocation of the right to discharge at will, see Kim Janssen, *Packer Backer Fired for Wearing Green Bay Tie*, CHI. SUN-TIMES, Jan. 25, 2011, <http://www.suntimes.com/3473075-418/store-tie-customers-bears-john.html> (describing discharge of car salesman who came to work on the day after the Green Bay Packers defeated the Chicago Bears wearing a branded Packers necktie).

8. Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment* 1 (UCLA Sch. of Law, Law & Econ. Research Paper Series, Paper No. 09-03, 2009), available at <http://ssrn.com/abstract=1342667>.

9. See LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* 178–204 (2006).

10. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988); see also Andrew E. Clark et al., *Scarring: The Psychological Impact of Past Unemployment*, 68 *ECONOMICA* 221 (2001) (demonstrating long-term psychological scarring effect of experience of being discharged or laid off); Richard E. Lucas et al., *Unemployment Alters the Set Point for Life Satisfaction*, 15 *PSYCHOL. SCI.* 8 (2004) (explaining that discharged workers never fully return to previous levels of life

loss is correlated with lower post-displacement earnings, which in turn leads to downward economic mobility and spiraling economic effects that impact whole communities.<sup>11</sup>

Moreover, the vast majority of individual workers lack the bargaining leverage or knowledge of their rights necessary to protect their investment by negotiating for job security.<sup>12</sup> Absent a labor

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satisfaction); Michael Luo, *For Workers at Closing Plant, Ordeal Included Heart Attacks*, N.Y. TIMES, Feb. 25, 2010, at A22 (discussing health consequences of layoffs, including doubled risk of heart attack and stroke in older workers). Job loss significantly impacts life expectancy, as well: one study found that death rates jumped 50 to 100 percent in the year after a job loss, and were still 10 to 15 percent higher twenty years later. Luo, *supra* (discussing study by Till von Wachter and Daniel G. Sullivan). Loss of material resources such as income and health insurance, as well as the prolonged earning reduction that typically follows lengthy unemployment, can also affect health by serving as additional stressors. See *Unemployment Can Have Long-Term Effects on Physical and Mental Health, Speakers Say*, Daily Lab. Rep. (BNA) No. 214, Nov. 5, 2010, at A-7.

11. One study found that for higher-earning, longer-tenured workers the income losses amounted to nearly three times the workers' annual salaries. LOUIS S. JACOBSON, ROBERT J. LALONDE & DANIEL G. SULLIVAN, *THE COSTS OF WORKER DISLOCATION* 85–87 (1993). Job loss results in lifetime earnings losses because post-displacement earnings are typically reduced, particularly where discharge is sudden and transition time is inadequate to secure a new job. See Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 63–64 (1993) (summarizing studies demonstrating that advance notice of plant closing is associated with lower unemployment and poverty rates three years later); Gary Chartier, *Friendship, Identity, and Solidarity. An Approach to Rights in Plant Closing Cases*, 16 RATIO JURIS 324, 343–45 (2003) (explaining how large plants create and sustain social networks critical to the communities in which they are located, and likening plant closing to the psychic death of the community); STAUGHTON LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS* 77 (1982) (explaining that workplace networks functioned as a “second family” in long-time mill towns).

12. In his Comment to this Essay, Scott Baker challenges my assumption that most individual workers lack bargaining power. See Scott Baker, *Comment on Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 213 (2011). The assumption is not mine alone, however. Legislators and courts alike have taken testimony, made findings, and relied upon the disparity in bargaining power between individual workers and employers as the justification for regulating the employment relation. See, e.g., National Labor Relations Act, 29 U.S.C. § 151 (2006) (finding that “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . by depressing wage rates and the purchasing power of wage earners in industry” and conferring the right to organize and bargain collectively in order to “restor[e] equality of bargaining power between employers and employees”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding constitutional validity of Washington State minimum wage, and stating: “The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden

union, no real negotiation occurs over most terms and conditions of employment. Imagine the typical job applicant in the 2011 labor market negotiating for job security, for example. By contrast, firms are able to protect their investments through covenants not to compete and confidentiality agreements, to which workers routinely agree (often severely compromising their future employability). Yet work law continues to treat employment as if it were an impersonal cash-for-labor transaction between equals, hewing to assumptions of independence and arm's-length bargaining even where their application seems fanciful.

Other legal models exist that would be more responsive to the realities of the employment relationship, particularly at termination. Marriage law offers a status-based framework designed to recognize and protect investment in relationships characterized by intimacy, interdependence, and investment. Notice and waiting periods are standard fare at marital dissolution to ease the transition and encourage couples to salvage marital relationships, temporary support and alimony are available to dependent spouses, and fault is still relevant in many states. Might such a status-based framework be adapted for the employment relationship? The employment relationship, after all, possesses many attributes that we associate with marriage and long-term intimate relationships: psychological and economic investment, interdependence, and expectations that the relationship will endure absent bad behavior. Employment relationships are also surprisingly intimate; relationships at work shape one's life in ways that run to the core of identity.<sup>13</sup>

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for their support upon the community.”); *Holden v. Hardy*, 169 U.S. 366, 397 (1898) (upholding statute limiting employment in underground mines and smelters to eight hours per day, and stating: “The legislature has also recognized the fact . . . that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them.”).

13. See Viviana A. Zelizer, *Intimacy in Economic Organizations*, in *ECONOMIC SOCIOLOGY OF WORK* 23, 33–34 (Nina Bandelj ed., 2009) (describing forms that workplace intimacy assumes); see also Gail M. McGuire, *Intimate Work: A Typology of the Social Support That Workers Provide to Their Network Members*, 34 *WORK & OCCUPATIONS* 125, 134 (2007) (identifying and describing the array of support that coworkers offer one another, both inside

At first blush, the idea of applying legal principles developed for application to marriage and family may seem preposterous. Marriage is, after all, about love; work is about money. But think again: many people display contempt for their spouses and demonstrate passion for their work. For some, the “emotional magnets” between affective families and work have actually reversed: sociologist Arlie Hochschild concluded that these workers view their workplaces as home, choosing to invest emotionally in their work “families” rather than in their traditional affective families.<sup>14</sup> Moreover, the always blurry line between work and love or leisure—between activities undertaken for profit and those pursued out of passion—has become increasingly difficult to draw in the lives of modern Blackberry-carrying, cell phone-toting workers.<sup>15</sup> One recent study found that at least some categories of workers are so invested in work that they have precious little time left for family.<sup>16</sup>

Our resistance to the notion of a law of relationship termination that would apply equally to the worlds of love and work stems from law’s obsession with maintaining separate spheres of economic activity (the world of impersonal rationality) and intimacy (the world of sentiment). In a powerful book, sociologist Viviana Zelizer described and critiqued this divide, observing that in real life activities undertaken for love and for profit are often commingled, complementary, and even interdependent.<sup>17</sup> Drawing on Zelizer’s insights, this Essay returns to first principles, challenging the assumptions that justify the differential treatment of waged work and intimate relationships at law, particularly at termination. Why does law assume, during pendency of the relationship, that the interests of

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and outside the workplace); Chartier, *supra* note 11, at 343–44 (exploring how workplace networks shape the identities of workers and communities).

14. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 44, 198–201 (1997) (describing workers’ preference for investing time and energy in the arena of paid employment rather than with their families).

15. See generally CHRISTENA E. NIPPERT-ENG, *HOME AND WORK: NEGOTIATING BOUNDARIES THROUGH EVERYDAY LIFE* (1996) (discussing workers’ choices and strategies regarding segmentation or integration of work and home).

16. Sixty-two percent of high-earning workers surveyed worked more than fifty hours per week, 35 percent worked more than sixty hours per week, and 10 percent worked more than eighty hours per week. See Sylvia Ann Hewlett & Carolyn Buck Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV., Dec. 2006, at 49, 50–51.

17. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 1–2 (2005).

workers and employers are always opposed, while those of cohabiting lovers and spouses are always aligned? Why does law neglect transition costs at exit from employment, but attend to them at exit from marriage? Why does law disregard investment and reliance in the employment context, yet recognize and compensate for investment and reliance in marriage or marriage-like relationships? Why does law resist acknowledging intimate or affective connections at work, yet embrace them in marriage, family and marriage-like relationships? I suggest the difference it might make to cast aside traditional separate-spheres thinking about labor and love, and argue for a status-based framework in which employment is reconceptualized as a relationship characterized by dependence and investment that is more akin to marriage than to an impersonal, cash-for-labor transaction.<sup>18</sup> I look to divorce and marital property law as a blueprint for a law of relationship termination transferrable to the employment context.

### I. SEPARATE SPHERES: LOVE AND WAGED WORK

Love and work form the core of a meaningful existence. When they endure, they serve as sources of both emotional and financial support, minimize dependence upon the state for subsistence, constitute our identities, and structure our lives. When they collapse, the effects on individuals are often devastating, both financially and emotionally.

The law, however, draws a clear distinction between employment (waged labor) and intimate (for love) relationships. Waged labor

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18. In this effort, I am deeply indebted to Kate Silbaugh for her provocative and groundbreaking Article questioning the law's treatment of these categories in the context of housework and domestic labor. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

I recognize that my thesis runs contrary to that of many feminists who focus on the institution of marriage and the governing family law, who have made persuasive arguments in favor of a shift toward a contractarian approach in that context. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing against the status of marriage and in favor of contract); Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225 (2011). While persuasive in the context of individuals possessing equal bargaining status, a contractarian approach is poorly suited to employment because of the gross disparity in bargaining power between most workers and the firms that employ them.

arrangements are theorized in law as transactional, adversarial, economically rational (for profit), fundamentally self-interested, and predicated on an expectation of reciprocal benefit. Intimate relationships, on the other hand, are characterized as future-looking, sharing a common purpose, motivated by other-regarding feelings of love and affection, and featuring compromise, cooperation, and sometimes sacrifice.

Yet the lived experience of most people belies this artificial divide. For the luckiest among us, work is a calling, a labor of love.<sup>19</sup> In a fascinating study, Stuart Bunderson and Jeffery Thompson found that zookeepers understood their work as encompassing a moral obligation of vigilance for the proper treatment of the animals in their care.<sup>20</sup> The zookeepers willingly made economic sacrifices to perform work that was dirty, dangerous, slopped over into personal time and crowded out family life, and offered little opportunity for professional advancement or personal growth.<sup>21</sup> For them, work was about much more than money. As one of their interview subjects explained: “I’m making \$9 an hour and every day I drive past Subway and on their little leader board out front: ‘Hiring starting at \$9 an hour.’ I make as much as someone at McDonald’s does. I’m certainly not doing it for the money.”<sup>22</sup>

Others asserted that they would do the job for nothing, pointing to years of volunteer work prior to obtaining the job.<sup>23</sup> Some worried that their ideological and personal commitment to the work made them vulnerable to exploitation, noting that they tried to hide their commitment to minimize this vulnerability.<sup>24</sup> Ultimately, however,

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19. See J. Stuart Bunderson & Jeffery A. Thompson, *The Call of the Wild: Zookeepers, Callings, and the Double-Edged Sword of Deeply Meaningful Work*, 54 ADMIN. SCI. Q. 32, 32–34 (2009) (describing what it means to see work as a calling); see also MARGARET JANE RADIN, CONTESTED COMMODITIES 105 (1996) (distinguishing between rank and file and professional workers in this way: “Laborers play notes, . . . and [professionals] play the music.”). But see Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI-KENT L. REV. 543, 544–45 (2004) (arguing that de-skilling strategies have resulted in the commodification of professionals’ labor).

20. Bunderson & Thompson, *supra* note 19, at 41–42.

21. *Id.* at 42–43. One participant confessed that his love for zookeeping work had cost him his marriage. *Id.* at 42.

22. *Id.* at 42.

23. *Id.*

24. *Id.* at 43.

most accepted the risk of exploitation as part of the personal sacrifice made to pursue work as a calling.<sup>25</sup>

The emotional significance of work to one's life is not limited, however, to those who heed a calling. Sometimes its meaning lies in the nature of the tangible things we create through our work and the mark we leave upon the world. A stonemason in Studs Terkel's memorable book, *Working*, described how his work brought purpose and continuity to his life:

There's not a house in this country that I haven't built that I don't look at every time I go by. . . . I can set here now and actually in my mind see so many that you wouldn't believe. . . . I've got one house in mind right now. . . . That's the work of my hands. . . .

I can't imagine a job where you go home and maybe go by a year later and you don't know what you've done. My work, I can see what I did the first day I started. All my work is set right out there in the open and I can look at it as I go by. It's something I can see the rest of my life. . . .

[Work means i]mmortality as far as [I'm] concerned.<sup>26</sup>

Just as commonly, the significance of work is found in the social connections fostered there. Consider Tammy Calef's description of the bonds she shared with her coworkers, which she felt keenly upon discharge:

Imagine being in a family for almost ten years and then they tell you they don't want you anymore. I loved my job. I loved working for FedEx. I had made a determination that this is [where] I was going to retire. . . . I saw FedEx employees more than I saw my family and I did everything that they wanted me to do and [then] I'm injured. I'm still doing my job [but] they're telling me go home. Go home until you hear back from

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25. *Id.*

26. STUDS TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* 21–22 (1974) (quoting Carl Murray Bates, stonemason).

us and then they don't call. . . . And that's it. The door closed.<sup>27</sup>

There can be little doubt that the workplace is a central site for the personal relationships that sustain us. Researchers have marveled at the range of intimate relationships that arise in the workplace and the role that such relationships play in enhancing workplace productivity and worker well-being within and beyond the workplace.<sup>28</sup> Important workplace relationships are forged at both the individual level (23 percent of employees in one survey reported “a platonic office ‘husband’ or ‘wife,’ with whom they ‘hang out’ regularly”)<sup>29</sup> and at the collective level (both Viviana Zelizer and legal scholar Vicki Schultz have argued that workplace intimacy—within reasonable bounds—enhances worker solidarity).<sup>30</sup>

Work law has acknowledged the non-market components of relationships between coworkers in at least two contexts, though its embrace of the non-market aspects of the relationships has been tepid, at best. First, labor law recognizes the ethic of union solidarity through section 7 of the National Labor Relations Act, which protects concerted activity “for mutual aid or protection.”<sup>31</sup> To receive protection, however, workers must show that their activity was self-interested and addressed to a subject of legitimate concern to workers *qua* workers—typically wages, hours, or working conditions.<sup>32</sup> Second, employment discrimination doctrine protects workers against employer retaliation for assertions of rights under the anti-discrimination statutes, and the Supreme Court has recently

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27. *Calef v. FedEx Ground Packaging Sys., Inc.*, 343 F. App'x 891, 895–96 (4th Cir. 2009) (alteration in original).

28. *See Zelizer, supra* note 13, at 33–34; *see also McGuire, supra* note 13, at 134 (describing the forms that such bonds assume in the workplace).

29. *Zelizer, supra* note 13, at 35; *see also* Laura A. Rosenbury, *Work Wives* (Jan. 17, 2011) (unpublished manuscript) (on file with author).

30. *See Zelizer, supra* note 13, at 29–30; Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2069, 2191 (2003).

31. National Labor Relations Act, 29 U.S.C. § 157 (2006).

32. *See Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (holding that employee activity is protected only if self-interested); *NLRB v. Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F.2d 503, 505–06 (2d Cir. 1942) (reasoning that individuals who aid coworkers act for the purpose of mutual aid or protection because they perceive an implied promise of reciprocal benefit to themselves); *see also Fischl, supra* note 6 (critiquing narrow interpretation of mutualism in labor law).

confirmed that this protection includes retaliation targeting a worker's intimates at work—though not “mere acquaintances.”<sup>33</sup> Thus, although the workplace serves as an important source of connection and belonging on par with that offered by family,<sup>34</sup> law tends to reduce the employment relationship to a self-interested economic exchange and ignores the non-familial forms that intimacy assumes in that venue.

At the same time, however, intimate relationships—such as those within marriage—are not subject to the laws regulating the market. Yet marriage and marriage-like relationships are at least by some accounts still as fundamentally economic at their core as they were historically. Despite our modern commitment in the United States to a vision of marriage as a lifelong romance with one's soulmate, evidence from social scientists suggests that marriage is neither lifelong nor romantic for many people.<sup>35</sup> The modern ideal of romantic-companionate marriage, some suggest, is inherently unstable.<sup>36</sup> As the crude divorce rate approached 50 percent, the phenomenon of the “starter marriage” prompted books and even a television miniseries.<sup>37</sup> Through serial marriage and divorce, the story goes, individuals mature and learn which qualities are most important to them in a spouse and simultaneously advance their economic and social status with each marriage—just as they would with successive

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33. See *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011) (declining to identify a “fixed class of relationships for which third-party reprisals are unlawful,” but noting that discharge of a “close family member” would always be actionable, while milder reprisals against “a mere acquaintance” would rarely be actionable); see also Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63 (2002) (arguing that Title VII should protect workers who advance Title VII-protected norms of workplace equality in order to protect intergroup worker solidarity across gender or racial lines).

34. See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 5–7 (2003).

35. See Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 *THE FUTURE OF CHILDREN: MARRIAGE AND CHILD WELL-BEING* 33, 43–46 (2005).

36. Marion Crain, “Where Have All The Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 *OHIO ST. L.J.* 1877, 1886 (1999).

37. See PAMELA PAUL, *THE STARTER MARRIAGE AND THE FUTURE OF MATRIMONY* (2002) (analyzing historical trends in American marital patterns and finding that Americans are increasingly marrying multiple times over the course of longer life spans, and implying that divorce is part of an experimentation and maturation process); GIGI LEVANGIE GRAZER, *THE STARTER WIFE* (2005) (upon which a 2008–09 USA Network miniseries was based).

home purchases. Further, intimate partnerships short of marriage are increasingly sustained as much by the practical financial savings realized through cohabitation as by an emotional commitment to the relationship.<sup>38</sup> Yet law persists in treating intimate and familial relationships differently than it does market relationships.

## II. MUTUALLY EXCLUSIVE CATEGORIES: LOVER OR LABORER

To maintain the separate spheres of love and work, law must discipline relationships that challenge the boundaries between love and labor. For most courts, the quintessential employment relationship is conducted at arm's length, is devoid of affective or familial ties and is defined by easy exit. This section discusses two cases that illustrate the dichotomy between love and labor in law. Both cases involve claims by individuals asserting employee status for purposes of recovering wages for labor performed. In both cases, the plaintiffs' intimate, affective bonds to their asserted employers resulted in their categorization as not "employees," and their claims failed.

In *Velez v. Sanchez*,<sup>39</sup> an Ecuadoran teenager named Linda Velez argued that she was brought to the United States and forced to work as a caregiver in the home of a New York family.<sup>40</sup> Velez testified that her responsibilities included living with Betsy Sanchez and her family, and caring for Sanchez's young children.<sup>41</sup> In return, Sanchez promised that Velez could complete high school in the United States and that she would pay Velez \$80.00 per week for her services and provide lodging, food, and other necessities. Sanchez did not, in fact, send Velez to high school; instead, she paid for Velez to take an English class, a GED course, and a class at a community college.<sup>42</sup> Nor did Sanchez pay Velez the promised weekly wage.<sup>43</sup> The

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38. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 323 (2008) (describing evidence that cohabitants in the United States typically cohabit for practical reasons—shared finances, housing, and convenience—rather than out of a relational commitment).

39. No. 04-CV-4797, 2010 U.S. Dist. LEXIS 126586 (E.D.N.Y. Nov. 30, 2010).

40. *Id.* at \*1.

41. *Id.* at \*4.

42. *Id.* at \*7.

43. *Id.* at \*8.

relationship between the two soon soured, and interactions in the Sanchez household became increasingly hostile. Velez testified that Sanchez and her sister verbally abused her and subsequently sought to physically prevent her from leaving.<sup>44</sup>

Velez brought a wage and hour claim under the Fair Labor Standards Act (FLSA) and a forced labor claim under the Alien Tort Statute.<sup>45</sup> The district court rejected both claims and granted summary judgment in favor of the Sanchez family, concluding that Velez “was a member of the Sanchez household—albeit an unhappy one—not an employee.”<sup>46</sup> The court relied on several factors: the existence of familial ties (Betsy Sanchez’s father was Linda Velez’s stepfather, although the two had never lived in the same household previously and the court acknowledged that no legally cognizable family tie existed);<sup>47</sup> Velez’s testimony that she regarded Sanchez as a sister, and gave her cards and letters commemorating holidays;<sup>48</sup> the fact that Sanchez reciprocated by taking Velez on family vacations, giving her gifts, and paying for her classes and YMCA membership, which the court observed “are not the sorts of dispensation one receives from an employer;”<sup>49</sup> and Velez’s decision to remain in the household after Sanchez told her that she was unable to continue paying wages, partly out of “love” for the Sanchez children, and partly because she wished to remain in the United States.<sup>50</sup> Said the court: “When her relationship with [Sanchez] became strained, Velez did not react as an employee would—by quitting—but chose to remain . . . .” Thus, “no reasonable jury could conclude that the ‘economic reality’ of their relationship was that of employer and employee.”<sup>51</sup>

Even more revealing was the Fourth Circuit’s analysis in *Steelman v. Hirsch*.<sup>52</sup> Tammy Steelman and Michelle Hirsch were lovers who

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44. *Id.* at \*11.

45. *Id.* at \*1, \*14, \*25.

46. *Id.* at \*26.

47. *Id.*

48. *Id.* at \*8, \*27.

49. *Id.* at \*27.

50. *Id.*

51. *Id.*

52. 473 F.3d 124 (4th Cir. 2007).

exchanged vows in anticipation of spending their lives together, considered themselves married, and cohabited in North Carolina from 1999 to 2004.<sup>53</sup> At the outset of the romantic relationship, Steelman left her job at a residential cleaning company and came to work with Hirsch in “Hair of the Dog,” a dog grooming business that Hirsch had opened just six months earlier.<sup>54</sup> The two worked side-by-side in the business over the ensuing five years, supporting themselves from its proceeds.<sup>55</sup> Although they had no specific compensation agreement, Steelman testified that they had agreed that “[w]hat was mine was hers and what was hers was mine,”<sup>56</sup> and described their economic interests as aligned and forward-looking: “My working for her was us working for our future.”<sup>57</sup> Nevertheless, Hirsch listed Steelman as an employee on the books of the business so that Steelman could be covered by health insurance through her employment, and issued sporadic paychecks to Steelman in order to substantiate the employment relationship.<sup>58</sup> Hirsch testified that although she considered bringing Steelman in as a partner in the business, she ultimately decided to treat her as an employee and to maintain the business as a sole proprietorship.<sup>59</sup>

Alas, when the romantic relationship broke down, so ended Steelman’s employment.<sup>60</sup> When Hirsch asked Steelman to return her American Express card (used for personal expenses and paid for out of Hair of the Dog proceeds), Steelman quit and moved out of the house that the couple had shared.<sup>61</sup> When Hirsch became romantically involved with someone else, Steelman opened a competing dog grooming business and filed an action in federal district court seeking wages owed her under the FLSA and the North Carolina Wage and Hour Act.<sup>62</sup> In the alternative, she asserted an ownership stake in Hair of the Dog and sought compensation for the

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53. *Id.* at 125–27.

54. *Id.* at 125.

55. *Id.* at 126.

56. *Id.*

57. *Id.* at 125.

58. *Id.* at 126.

59. *Id.* at 126–27.

60. *Id.* at 127.

61. *Id.*

62. *Id.*

work she had performed in the business during the relationship under North Carolina state law, which allows claims for breach of implied contract, fraud, quantum meruit, and unjust enrichment between nonmarital cohabitants if they can establish that they performed valuable labor independent of meretricious sexual services.<sup>63</sup>

Accepting the legal dichotomy between activities undertaken for love and those undertaken for profit, Steelman argued that she was due compensation either as an employee or as an unmarried cohabitant in a marriage-like partnership relationship.<sup>64</sup> The district court granted Hirsch's motion for summary judgment and denied Steelman's claim, reasoning that because employee status is fundamentally incompatible with partnership status, Steelman could not be both an employee and an equity partner.<sup>65</sup> Steelman's employment law claims were rejected, and she was left to pursue her *Marvin v. Marvin* style claims in state court.<sup>66</sup>

The Fourth Circuit affirmed.<sup>67</sup> Although the court observed that Steelman's argument in the alternative (that she was either an employee or an intimate romantic partner) was an acceptable litigation strategy, the court seemed aghast at the prospect of the law acknowledging the coexistence of intimacy and a cash-for-labor exchange in the same household and the same business.<sup>68</sup> The court ruled that Hirsch and Steelman's intimate relationship negated any employment relationship *regardless of* Steelman's status as an owner/romantic partner under state law.<sup>69</sup> Citing cases dealing with volunteers, independent contractors, and prison inmates who sought recovery of wages due for work performed, the Fourth Circuit found that the FLSA permits compensation only for work performed within the "traditional employment paradigm" of an "'arms' length"

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63. See *Suggs v. Norris*, 364 S.E.2d 159, 161–62 (N.C. Ct. App. 1988) (adopting and following the reasoning of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976)).

64. *Stelman*, 473 F.3d at 128–29.

65. *Id.* at 127.

66. Having granted summary judgment to Hirsch on the FLSA claim, the district court then dismissed the state law *Marvin*-styled claims without prejudice, declining to exercise supplemental jurisdiction. *Id.* at 125, 127.

67. *Id.* at 132.

68. *Id.* at 129–30.

69. *Id.* at 128.

bargain” typical of a “true employer-employee relationship.”<sup>70</sup> Steelman and Hirsch’s arrangement, said the court, was not such a relationship; it was characterized by shared mutual interests and an intention to remain together permanently:

Taking the evidence in this case in the light most favorable to [Stelman], the plaintiff cannot be adjudged an “employee” for purposes of the FLSA . . . . The intended lifetime partnership she described was not “the bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship.” . . . According to the plaintiff, the couple saw their work together as a way to improve an economic future that they intended to share in perpetuity, rather than as a transfer of one individual’s assets to another in exchange for labor.<sup>71</sup>

Nor did Steelman behave like an employee. She enjoyed “extensive access to company funds,” a “privilege” not typical of an employee, said the court, but one more likely to be granted to an owner/partner.<sup>72</sup> Moreover, she lived “comfortably and exclusively off the proceeds of the business,” and the parties “shared the risks and rewards of their joint venture in a fashion more characteristic of a partnership than an employer-employee relationship.”<sup>73</sup> Although the court stopped short of concluding that one partner in a romantic couple could never be an employee of another,<sup>74</sup> it intoned that the FLSA was “not meant to . . . impos[e] a one-size-fits-all federal solution upon all sorts of human relationships,” nor was it designed to serve as “a weapon” for disappointed intimates “upon the dissolution of all domestic partnerships and other intimate arrangements involving shared funds and shared labor.”<sup>75</sup> The court worried that applying the FLSA to Hirsch and Steelman would “restructure all

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70. *Id.* at 129 (quoting *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993)).

71. *Id.* at 130 (citation omitted). The concurring judge underscored the fact that Steelman worked for the couple’s “shared advantage”—“for their future”—and thus was not operating at arm’s length in a bargained-for exchange of compensation for labor. *Id.* at 133.

72. *Id.* at 130.

73. *Id.*

74. *Id.* at 132 & n.2.

75. *Id.* at 132.

manner of personal and financial dealings,” and rejected “plaintiff’s invitation to push the Act to this new frontier.”<sup>76</sup>

The courts’ unwillingness in *Velez v. Sanchez* and *Steelman v. Hirsch* to recognize the market aspects of familial and intimate relationships reflects concerns about commodifying such relationships through application of wage and hour laws. Both courts sought to define the boundaries of employment relationships by limiting them to parties who stand at “arm’s length” from one another and can easily exit without suffering psychological or emotional consequences.<sup>77</sup> Thus, *Velez* was either a sister or a domestic, and *Steelman* was either a lover or laborer; they could not be both. But why should *Velez*’s right to wages for her caregiving work or *Steelman*’s entitlement to just compensation for her investment turn on whether either was emotionally attached to their asserted employers? Suppose instead that once a claimant established a relationship characterized by investment, dependence, and some longevity signaling attachment, a general law of relationship termination modeled upon family law applied? Suppose that employment law focused on easing the transition to independence and recognizing investment by providing notice, transitional support, and compensation for investment? In short, why should a different legal regime apply to marriage, marriage-like intimate relationships, and caregiving arrangements than to the employment context?<sup>78</sup> The remainder of this Essay explores these questions.

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76. *Id.*

77. Even the phrase “arm’s length” connotes images of connection and closeness as well as distance and separation: a handshake, the metaphor associated with contractual “arm’s-length” relationships, represents after all a physical connection, the touching of two bodies. Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 284, 296 (Robin Fretwell Wilson ed., 2006).

78. Or, for that matter, why do marriage and marriage-like relationships warrant a different analysis than other intimate relationships, such as friendships? See Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing that family law’s silence on the subject of friendship as a source of substantial resources and obligations maintains a divide between marriage and friendship that perpetuates gender inequality); see also Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007) (arguing for a law that facilitates and recognizes friendship).

### III. MARRIAGE AND EMPLOYMENT: COMMON ROOTS, DIVERGENT LEGAL FRAMES

Marriage and employment share a common status-based genealogy in master-servant law.<sup>79</sup> The household model in which the master provided for and controlled his family and servants was transported to the pre-industrial workplace, and along with it assumptions about the proper order of things that were based upon custom and ideology.<sup>80</sup> Like marriage, work was seen as “enabling and redemptive,”<sup>81</sup> “a source of spiritual or secular enhancement of the self.”<sup>82</sup> Both marriage and employment initially emphasized “bonds of loyalty, subservience, and one-directional joint endeavor.”<sup>83</sup> Both represented an amalgam of contract and status that defined the “total legal situation of the individual.”<sup>84</sup> Though the parties might contract as to some terms, the background rules for the relationship were prescribed by custom and ultimately embedded in standard form contracts supplied by law (the at-will rule for American workers; the marriage contract for intimate relationships for which the parties sought formal legal recognition); “it was never contemplated that the parties would design their own relationship.”<sup>85</sup>

#### *A. Employment Law: From Status to Contract*

Nevertheless, the legal rules and theoretical frames for the two institutions soon diverged. Beginning in the nineteenth century,

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79. See Mary Ann Glendon, *The New Family and the New Property*, 53 TULANE L. REV. 697, 698–99 (1979).

80. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 13–14 (1983).

81. *Id.* at 14.

82. *Id.* at 15.

83. *Id.* at 13.

84. *Id.* at 11 (quoting PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 54 (1969)) (describing employment arrangement as a “status contract” with very different characteristics from traditional arm’s-length contracts).

85. *Id.* at 13–14 (quoting ALAN FOX, BEYOND CONTRACT: WORK, POWER & TRUST RELATIONS 185 (1974)); see also SELZNICK, *supra* note 84, at 136 (“The law could not and did not treat the conditions of employment as the outcome of free bargaining and mutual assent. Rather, the concept of contract was adapted to what had to be done to maintain the organizational strength of the business enterprise.”).

employment law embraced a contractual framework in recognition of the centrality of employment arrangements to the exchange economy. The law of the market presumed that employment contracts entailed the voluntary exchange of freely-bargained promises by relative equals negotiating at arm's length.<sup>86</sup>

The English rule applicable to employment was originally a default presumption of employment for a period of one year with mutual requirements of reasonable notice.<sup>87</sup> In the United States, however, the one-year presumption and notice requirement soon gave way to a default rule of free terminability, which gained purchase in 1877 with the publication of Horace Wood's treatise on master-servant law.<sup>88</sup> American courts have since embraced the doctrine of employment at will for employment relationships of undefined duration, subject to certain exceptions developed at common law or imposed by statute.<sup>89</sup> Pursuant to the at-will doctrine, either the employer or the employee may terminate the employment relationship at any time and for any reason without notice.<sup>90</sup> The doctrine is justified by the contractual principle of mutuality: both worker and employer are equally free to quit at any time in order to

86. ATLESON, *supra* note 80, at 11–12.

87. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119 (1976) (discussing Blackstone's rule that employment was presumed to be for one year, and explaining that although the rule was rooted in concerns about equity in situations of seasonal labor where either employer or employee could leave the other in the lurch unexpectedly, it applied to all classes of workers, even non-agricultural workers).

88. See HORACE WOOD, *THE LAW OF MASTER AND SERVANT* § 133 (1877).

89. For interesting discussions of the evolution and spread of the employment at will doctrine, see Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453 (2008) (explaining that the at-will doctrine spread across the country as states competed with one another to attract capital investment); Feinman, *supra* note 87, at 131 (1976) (arguing that the employment at will rule spread from salaried managers to manual workers, functioning as "an adjunct to the development of advanced capitalism in America"); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85 (1982) (suggesting that weak U.S. labor unions failed to combat the application of at-will employment to manual laborers, and the rule then spread to salaried managers). See generally CRAIN, KIM & SELMI, *supra* note 7, at 100–07. For a thoughtful exploration of the relationship between employment and the master-servant doctrine in the nineteenth century, see CHRISTOPHER L. TOMLIN, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

90. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884) ("All [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.").

maximize their gains in the market.<sup>91</sup> The law envisions employers as nimble actors required to respond quickly to market shifts, and workers as free agents bargaining for the most advantageous terms of employment and moving on to greener pastures as more attractive opportunities beckon.

The potential for the exploitation of less powerful workers in slack labor markets loomed large, and law eventually stepped in to regulate employment through statutes establishing minimum terms, such as the Fair Labor Standards Act<sup>92</sup> (wage and hour law) and the Occupational Safety and Health Act<sup>93</sup> (workplace health and safety standards), and statutes prohibiting discrimination, such as Title VII,<sup>94</sup> the Age Discrimination in Employment Act,<sup>95</sup> and the Americans With Disabilities Act.<sup>96</sup> The National Labor Relations Act protected workers' rights to organize labor unions, which negotiated collective bargaining agreements protecting workers' job security, among other benefits.<sup>97</sup> In the 1970s and 1980s, state courts in many jurisdictions developed a common law of wrongful discharge carving out exceptions to the at-will doctrine, some predicated on tort principles, others grounded in contract.<sup>98</sup> Courts were particularly receptive to claims for breach of implied contract by employees who were able to point to oral or written representations of job security ("If you do a good job, you'll have a job for life"), plus longevity of employment and a pattern of employer actions that induced reliance upon those promises, such as raises, promotion, positive employment

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91. For scholarly defenses of the at-will rule, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Richard W. Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881 (1983). Other scholars would accept some limits on the doctrine, particularly prohibitions on discrimination. See, e.g., Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

92. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006) (establishing a federal minimum wage and requiring the payment of overtime wages for hours worked in excess of forty per week).

93. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

94. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2006).

95. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006).

96. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

97. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

98. See CRAIN, KIM & SELMI, *supra* note 7, at 122–78, 192–263.

evaluations, and lack of disciplinary action.<sup>99</sup> Some claims were based upon representations made in employee handbooks.<sup>100</sup> A minority of courts were also initially receptive to claims for breach of the implied covenant of good faith and fair dealing, though they soon made clear that such claims sounded in contract, not in tort—rendering them largely superfluous.<sup>101</sup>

Nevertheless, the at-will doctrine still holds powerful sway. As the *Velez* and *Steelman* cases illustrate, work law remains firmly committed to a contract model of regulation predicated on the image of an impersonal cash-for-labor transaction featuring easy exit and no affective ties. Despite their success in negotiating for job security in the form of just-cause-for-discharge provisions in collective bargaining agreements, labor unions have not challenged the larger cash-for-labor frame. Rather than pressing social justice and broader political agendas, unions concentrated their resources on advancing the “immediate and practical concerns” of their members at the bargaining table, negotiating for fair wages, increased job security, and improved working conditions—the “bread and butter” of employment.<sup>102</sup> Plaintiffs’ lawyers likewise had little practical incentive to argue for reconceptualizing work as something more than a cold-cash-for-labor bargain since prevailing on this argument would deprive individual worker-plaintiffs of the “employee status” required for protection under many regulatory regimes in employment, as *Velez* and *Steelman* demonstrate.<sup>103</sup> When unions and

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99. See, e.g., *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (enforcing implied contract for thirty-two-year employee who alleged a promise that his future was secure and a pattern of raises and promotions consistent with that promise). See generally CRAIN, KIM & SELMI, *supra* note 7, at 114–78 (collecting cases).

100. See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1259 n.2, 1265 (N.J. 1985) (enforcing handbook promise to “retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively”); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626–27 (Minn. 1983) (enforcing handbook provisions that described stability of employment in the banking industry and provided a four-step process for dismissal).

101. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 387, 401 (Cal. 1988) (recognizing claim but limiting damages to contractual damages); cf. *Murphy v. Am. Home Prod. Corp.*, 448 N.E.2d 86 (N.Y. 1983) (rejecting claim).

102. See Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767, 1779–80 (2001) (describing ideology of business unionism adopted by organized labor after World War II).

103. See Fischl, *supra* note 6, at 866 (discussing pressure on plaintiffs’ lawyers to fashion

plaintiffs' lawyers did make more transformative arguments—that workers should be treated as equal partners with the employer in the employment relationship, just as non-titled spouses were in community property regimes (and later, in equitable distribution systems)—the arguments were promptly dismissed as too radical.<sup>104</sup>

### *B. Marriage and Family Law: Mired in Status*

Marriage law evolved along a different path, embracing status rather than contract as its organizing principle.<sup>105</sup> This status-based

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legal arguments that accept the premises of the regime of self-interest in order to win protection for individual workers in particular cases); *see also* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 956 (2008) (discussing definition of “employee” for purposes of Fair Labor Standards Act protection).

Employee advocates have sometimes used a psychological contract frame identified by organizational behavior scholars to press for implied contractual terms limiting the bases for discharge, a strategy that helped to ground the implied contract exception to the employment at will doctrine. *See* Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994); *see also* Denise M. Rousseau, *Psychological Contracts in the Workplace: Understanding the Ties that Motivate*, 18 ACAD. MGMT. EXECUTIVE 120 (2004). The phrase “psychological contract” in this context refers to a worker’s beliefs regarding the terms and conditions of a reciprocal exchange agreement between worker and employer. Such perceptions, if based upon observable behaviors of the firm, whether formal or informal, explicit or implicit, may give rise to implied-in-fact contract claims based upon employee reliance. *See Pugh*, 171 Cal. Rptr. 917; *Woolley*, 491 A.2d at 1265 (N.J. 1985) (finding provisions of an employee handbook enforceable and noting the benefits of loyalty and union avoidance that the employer reaped from shaping employee expectations). While the psychological contract construct is not itself particularly reliant on proof of affect or emotion, violation of psychological contracts is associated with strong emotional reactions such as feelings of betrayal. *See, e.g.*, Judy Pate & Charles Malone, *Post-“Psychological Contract” Violation: The Durability and Transferability of Employee Perceptions: The Case of Tim-Tec*, 24 J. EUR. INDUS. TRAINING 158, 161 (2000) (describing intense emotional reaction by employees to employer’s decision to discharge striking employees and hire new ones, including statements such as “I would go out of my way to ruin TimTec. I hate them with a passion.”).

104. *See* Local 1330, *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) (dismissing claim by workers, Congressman from the Youngstown district, and the Attorney-General of Ohio that a community property right had arisen in the steel mills owned by U.S. Steel that prevented the mill’s owners from imploding the mill and leaving the community in a state of waste); *see also* First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666, 676–79 (1981) (denying union’s claim that employer must bargain with the union over a decision to terminate a contract with a customer where the decision resulted in job losses, and observing that “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed”).

105. Brian Bix, *Private Ordering and Family Law*, J. AMER. ACAD. MATRIMONIAL L.

set of rights and obligations furthered the state's interest in protecting vulnerable parties—children, and dependent spouses—who could fall into poverty if the relationship with the primary breadwinner dissolved.<sup>106</sup> American marriage law initially reflected the English tradition of a “divorceless society”: absolute divorce was difficult or impossible to obtain, and divorce from bed and board (effectively a legal separation) could be obtained only for cause.<sup>107</sup> In general, divorce was available only if one party proved that the other was guilty of fault, such as adultery, desertion, or cruelty.

Rules restricting exit from marriage eased beginning in the 1970s with the enactment of no-fault divorce law in California; other states soon followed.<sup>108</sup> No-fault divorce law permits a divorce by one party over the other's objection upon proof of irretrievable breakdown of the marriage, incompatibility, irreconcilable differences, or in many jurisdictions, simply by enduring a separation for a fixed period of time; waiting periods prior to finalizing the divorce may vary depending upon whether both spouses consent.<sup>109</sup> Family law also creates rights to alimony or spousal support at divorce for those who can establish need, inability to support themselves, and proof that the other spouse can afford to pay.<sup>110</sup> Though less common now than they were in the past, alimony awards have the potential to continue for decades, even for life, in appropriate cases, and are subject to revision upon proof of changed circumstances.<sup>111</sup> The state's interest

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(forthcoming 2011) (manuscript at 12).

106. *Id.* at 13.

107. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 204 (2d ed. 1985).

108. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 292 (1987). Some form of no-fault divorce has been available in all fifty states since 1985. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Looking at Interjurisdictional Recognition*, 42 FAM. L.Q. 923, 972–73 (2010). Although New York had perhaps the most restrictive version of no-fault divorce law, conditioning divorce on a separation agreement settling property division issues, it adopted a true no-fault divorce law in August 2010. *Paterson Signs No-Fault Divorce Bill*, N.Y. TIMES, Aug. 16, 2010, at A14.

109. DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 26 (1995).

110. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 506 (2005).

111. Alimony stemmed from the era when absolute divorce was unavailable, and a legal separation—divorce from bed and board—was the only legal dissolution possible. Since a divorce from bed and board was not really a divorce at all, the duty of support continued in the form of alimony. Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 5–6 (1989); see, e.g., J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*,

in ensuring that ex-spouses do not end up on the public dole is so powerful that courts can and do reopen divorce settlements decades later to avoid it.<sup>112</sup>

No-fault divorce law was accompanied by a significant shift in marital property law in the non-community property states. The title rules that had originally governed marital property division at divorce in the non-community property states (he who earns it, owns it) gave way to equitable distribution principles and a partnership theory that recognized the non-financial contributions of homemakers and caregivers to the acquisition of marital assets.<sup>113</sup> Modern marriage law is thus characterized by powerful images of partnership.<sup>114</sup> Equitable distribution law allows property division regardless of title based upon consideration of contribution/investment in the acquisition of marital property, marital duration, the need, reliance, and expectation interests that generally accompany marriages of significant duration, and in a few jurisdictions, marital fault.

Feminist scholars were instrumental in directly challenging the love/money dichotomy in family law, arguing persuasively that

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42 FAM. L.Q. 419, 431–33 (2008) (noting that spousal support is typically awarded only in long marriages—at least ten years' duration—and is more likely to be for a fixed term than for an indefinite period).

112. See Jennifer Levitz, *The New Art of Alimony*, WALL ST. J., Oct. 31, 2009, at W (describing cases).

The law's commitment to marriage as status and to the state's role as protector of the vulnerable is perhaps best illustrated by the law's historical hostility toward prenuptial contracts. Nearly all states refused to enforce them until relatively recently. See Brian Bix, *Bargaining in the Shadow of Love: Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998). Although this hostility has receded and nearly all states now enforce them, courts typically limit the types of clauses that are enforceable and subject them to a relatively rigorous review for fairness, voluntariness, and unconscionability. See Bix, *supra* note 105, at 17–19. Agreements made during marriage are viewed with even more skepticism, as courts worry that one party may take advantage of the other's vulnerability and extort agreement with a threat to leave the relationship. *Id.* at 20–22.

113. Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 62 (2001). Kelly argues that the theory is in fact a pretense, and shows its lack of credibility by pointing to the triumph of individualism when it comes to division of career assets such as professional degrees, which are not considered jointly owned despite the mutual investment in obtaining them during marriage. *Id.*

114. See Susan Etta Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property*, 21 VT. L. REV. 409, 422 (1997) (discussing analogy of marriage to a business partnership in family law divorce cases).

characterizing marriage as only and always about intimacy was simply another way of devaluing women's unpaid homemaking and caretaking work.<sup>115</sup> These scholars advanced proposals for valuing and compensating unpaid homemaking and caretaking work that had significant practical application at divorce.<sup>116</sup> Some commentators, most notably Susan Prager, argued that marital property law should privilege sharing principles in order to foster accommodation and compromise, conduct essential to a strong marriage.<sup>117</sup> The partnership theory of marriage thus furthered norms of cooperation and solidarity rather than individualism, and recognized that decision making in a relationship that included expectations of continuity and stability would be different than decision making guided by individual self-interest.<sup>118</sup>

Since *Marvin v. Marvin*, the law has also recognized the property rights of nonmarital cohabitants in jointly acquired/created property through implied contract claims and equitable theories such as quantum meruit, restitution, constructive trust, and unjust enrichment (so-called "palimony" claims).<sup>119</sup> However, the courts remain obsessed with severing any aspect of the arrangement that might imply that sexual services are being exchanged for compensation, lest nonmarital cohabitation be confused with prostitution.<sup>120</sup> More

115. See, e.g., Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994) (arguing that the family wage should be viewed as jointly owned, regardless of who holds title to the wages vis-à-vis the employer who pays them, and arguing for income equalization between the two post-divorce households); Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 586–91 (1974) (proposing partnership model of the family in order to enhance the value of women's unwaged caretaking work). Some argued that this devaluation slopped over onto the paid caregiver, as well. See Silbaugh, *supra* note 18, at 72–79.

116. See sources cited *supra* note 115.

117. Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); see also Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199 (1987).

118. Prager, *supra* note 117, at 6, 12.

119. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); see also Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565 (2009) (arguing that the law should offer a distinct and separate regime for cohabiting couples in which couples might choose among a menu of different formats depending upon the duration and circumstances of their cohabitation, all of which blend a right of free exit with a partnership model of marital property).

120. See Hasday, *supra* note 110, at 507–09.

recently, advocates for gay and lesbian couples seeking access to marriage have also challenged the love/money dichotomy in the marriage context, sometimes focusing on the economic benefits of marriage to persuade courts that it is unjust to exclude same-sex couples from access to the institution.<sup>121</sup>

### *C. Evolving Toward the Middle: The Influence of Shifting Norms*

In the late 1970s and early 1980s, a few scholars noted the opposite paths along which employment and marriage were evolving: employment was becoming less readily terminable (through the enactment of statutes constraining the employer's ability to discharge and through the common law's embrace of exceptions to the employment at will rule) and marriage was becoming more readily terminable (through the enactment of no-fault divorce law).<sup>122</sup> Mary Ann Glendon concluded that "in law and in fact it is easier to get rid of your spouse than your employee," and argued that employment was usurping the role that family had once played in furthering wealth acquisition and class status.<sup>123</sup>

Subsequently, however, cultural norms and market realities shifted, causing both institutions to evolve toward the middle. Labor markets once characterized by stable employment, longer job tenure and strong internal firm career ladders reversed course, and the common law development of exceptions to the doctrine of employment at will stalled. Employers offered a "new deal" in which re-employability and skills training replaced job security; union density declined precipitously, and with it the number of workers covered by job security provisions in collective bargaining agreements; and work was reconstituted so that increasing numbers

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121. See, e.g., *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (ruling that denial to same-sex partners of the privileges associated with marriage violated the common benefits clause of the state constitution).

122. See, e.g., Glendon, *supra* note 79, at 699; Power, *supra* note 91, at 889-91 (noting the same parallel evolutionary paths, and arguing for a return to a strong version of the employment at will default rule on the basis of the unidirectional nature of the risk assumed by the employer).

123. Glendon, *supra* note 79, at 705. *But cf.* Rosenbury, *supra* note 29, at 9 (arguing that wives received more protection against unpredictable dismissal and financial hardship, including rights to the equivalent of "severance pay" (alimony) than "work wives").

of workers led nomadic lifestyles as contingent employees or independent contractors.<sup>124</sup> Market values invaded the home sphere.<sup>125</sup> Marriage destabilized as women entered the workforce in increasing numbers, divorce became even easier to obtain, and marital property law emphasized a “clean break” philosophy that favored property division over continued dependence and alimony obligations. As Martha Fineman summed it up, by the early 1990s marriage was transformed into a “voluntary (and therefore, perhaps, temporary) union of equals which either may terminate ‘at-will’ if it does not satisfy their desires and needs.”<sup>126</sup>

As norms concerning the meaning and duration of marriage and employment converged, scholars observing both institutions noticed striking parallels in the perceptions of entrants.<sup>127</sup> In particular, a mismatch existed between their beliefs about the likely stability of the relationship they were beginning and their expectations about the law’s response should the relationship founder. Both groups display a strong tendency toward over-optimism at the outset of a relationship, and accordingly take few steps to protect themselves, even when they are intellectually aware that such steps would be desirable.<sup>128</sup> Both

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124. See STONE, *supra* note 5; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001). By the end of 2010, union density had declined to less than 12 percent, with private sector union membership falling below 7 percent. News Release, Bureau of Labor Statistics, Union Members—2010 (Jan. 21, 2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

125. See Crain, *supra* note 36, at 1917–28.

126. Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 265, 266 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

127. See, e.g., Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 737 (2009); Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1801 (1996). See generally Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980).

128. See Laura Petrecca, *Unromantic? Maybe, But Prenups Make Sense*, USA TODAY, Mar. 8, 2010, at 1B (describing results of a Harris poll finding that although one-third of adults say they would ask a significant other to sign a prenuptial agreement, only 3 percent of spouses or engaged persons actually have such an agreement). The tendency toward over-optimism apparently stems from our common belief that we are “above average,” and thus are less likely than the average person to experience negative events such as divorce or discharge. The tendency toward over-confidence derives from our habit of interpreting ambiguous information in self-serving ways. Williams, *supra* note 127, at 737; Issacharoff, *supra* note 127, at 1801.

are concerned with signaling lack of commitment at the outset of the relationship.<sup>129</sup> Finally, both also seem confident that the law will protect them if the relationship fails.

Entrants to marriage certainly understand intellectually that the odds of divorce are high and that their marital vows are aspirational rather than legally binding, yet they nevertheless cling to statistically unfounded beliefs that their marriages will not founder: although most entrants to marriage correctly believe that 50 percent of marriages end in divorce, on average individuals predict that their own chance for divorce is 10 percent.<sup>130</sup> Most also believe that their ex-spouses will deal fairly with them and that the law will protect them if their marriages do founder.<sup>131</sup> Although new spouses accurately predict that courts award alimony in 40 to 50 percent of cases, over 80 percent believe that a court would award alimony in their case.<sup>132</sup> Further, though new spouses predict that 20 percent of women who are awarded alimony are unable to collect it, 100 percent believe that their spouse would pay it.<sup>133</sup>

Nor would most take advantage of the ability to bind their spouses more tightly by contract if it were available. Experiments with covenant marriage in Louisiana, Arkansas, and Arizona suggest that most new entrants into marriage see no need to inject additional legal force into the vows they utter; only 2 percent of new marriage entrants in Louisiana elect covenant marriage, a rate similar to those seen in Arizona and Arkansas.<sup>134</sup>

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129. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 118–19 (1997) [hereinafter Kim, *Bargaining with Imperfect Information*] (noting that the issue of job security is unlikely to be raised at the outset of the employment relationship: employees fear signaling shirking, while employers fear attracting shirkers).

130. Williams, *supra* note 127, at 757–58.

131. *Id.* at 735, 758.

132. *Id.* at 758. In fact, however, alimony is typically awarded in only 10 to 15 percent of cases. See Kathrine C. Daniels et al., *Alternative Formulas for Distributing Parental Incomes at Divorce*, 27 J. FAM. & ECON. ISSUES 4, 6 (2006).

133. Williams, *supra* note 127, at 758.

134. Covenant marriage restricts both entry into and exit from marriage in order to strengthen couples' commitment to the institution. In Louisiana, the first state to adopt this variation on the standard form marriage contract, covenant marriage has three attributes that distinguish it from traditional/standard-form marriage: premarital counseling is mandatory; the couple is obligated to pursue all options to preserve the marriage prior to dissolution; and divorce is not available except upon proof of fault or two years living separate and apart. LA.

Workers, on the other hand, do not generally believe that employment is for life. Nevertheless, they consistently underestimate the likelihood that they will be discharged, and persist in the legally erroneous belief that they cannot be discharged except for cause, regardless of employer disclaimers to the contrary.<sup>135</sup> They rely instead upon their own notions of justice and fairness, reinforced by the firm's actual behavior toward them; for example, most well-advised firms follow progressive disciplinary policies.<sup>136</sup>

These erroneous expectations regarding the likely endurance of marital and employment relationships have proved highly resistant to influence by law.<sup>137</sup> Although the misperceptions result from a mismatch between cultural norms and the law and thus should be theoretically repairable through law reform, insulating strategies

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REV. STAT. ANN. §§ 9:272 to 9:276 (West 2008 & Supp. 2010); see Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 612–15 (2005). In Arizona, divorce is available on fault grounds or no-fault grounds (separation for at least one year after a separation decree or two years without a decree, or upon mutual agreement). ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2007 & Supp. 2009). Arkansas allows divorce only on fault grounds and where the parties have been separated for two years after entry of a decree of separation; if a minor child exists, the separation must continue for two and one-half years after the date of the separation decree. ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (2009). Opponents of covenant marriage argue that its existence undermines commitment in traditional marriage and erodes the institution. See, e.g., Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869 (2010); Jonathan Mummolo, *Va. Foundation Seeks to Reduce Divorces*, WASH. POST, July 26, 2007, at B1.

135. Weinstein, *supra* note 127, at 810 tbl.1; see also Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 465, 479–80 [hereinafter Kim, *Norms, Learning, and Law*] (arguing that workers overestimate their rights because they confuse law with norms and believe “that the law prohibits what fairness forbids”); Kim, *Bargaining with Imperfect Information*, *supra* note 129, at 155 (reporting results of empirical study that suggests that workers believe they have protection against arbitrary discharge even where employers inform them otherwise). *But see* Williams, *supra* note 127, at 770 (suggesting that employees have a “roughly accurate sense of their chances of being fired”).

136. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 9–10 (2002) (explaining that employees' belief in rights to job security absent just cause for discharge are a rational response to employer policies that implicitly communicate that norm); see also Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 121 (2002) (arguing that switching to a default rule of just cause for discharge would more effectively protect employees in subsequent negotiations with employers).

137. See Williams, *supra* note 127, at 736; Kim, *Norms, Learning, and Law*, *supra* note 135, at 465.

(aligning the law more closely with prevailing expectations) and debiasing strategies (seeking to correct the information asymmetry) seem inadequate to the task of countering deeply held religious and romantic ideals in the marriage context and gross inequalities in bargaining power in the employment context. Not only is it difficult to persuade the parties to think about the demise of the relationship while they are under the spell of the rosy haze of romantic coupling or hiring, but the situation is complicated by the dilemma of bargaining against a backdrop of significant inequality in bargaining power, the challenge of information asymmetries between more powerful and less powerful parties, concerns about signaling a lack of commitment at the outset of the relationship, and the inherent inability to predict or anticipate the degree of one's investment in the relationship over time, and thus to foresee the effects of dissolution of the relationship in the future.<sup>138</sup> Some scholars conclude that even switching default rules may not protect the interests of the parties in a long term relationship, because their interests change over time as they invest in ways that cannot be anticipated at the outset.<sup>139</sup>

Moreover, as some have observed, optimism in these contexts may be functional, and correcting it could have collateral costs.<sup>140</sup> Optimism in romantic relationships may be an important precondition for a successful and enduring marriage; there is some evidence that optimistic romantic partners perceive their mates as more nurturing and supportive, which increases the likelihood that the marriage will be happy and will endure.<sup>141</sup> Employee optimism improves worker morale because workers view their employers as more supportive, which in turn affects job satisfaction and performance and enhances the duration of the relationship.<sup>142</sup>

How heavily, then, should the law's assumptions about the parties' presumed intent based upon their acceptance of the standard form nature of the marriage contract ("for life") or the employment

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138. Issacharoff, *supra* note 127, at 1794–95, 1801.

139. *Id.* at 1795–96, 1800 (arguing for a return to the default rule of hiring for a presumed term, with the burden placed on the party with information and bargaining power to clearly specify employment terms that deviate therefrom).

140. Williams, *supra* note 127, at 736.

141. *Id.*

142. *Id.* at 775–76.

contract (“at-will”) weigh in characterizing these relationships for purposes of regulating termination? Under current law, these fictional default rules—that love and marriage last for life, and that employment is temporary and tenuous—powerfully influence the law’s categorization process. Consider, for example, the *Steelman* court’s reliance on the couple’s asserted intention to form a partnership “in perpetuity.”<sup>143</sup> Such a forward-looking expectation was something the court saw as characteristic of love, not labor; indeed, it was fundamentally inconsistent with employment at will. Moreover, even if *Steelman* had succeeded in her bid to be categorized as an employee for purposes of her FLSA compensation claim, her recovery would have been limited to the minimum wage for the hours that she could prove that she had worked.<sup>144</sup> Employees who can be discharged at any time for any reason have no future or long-term interest in the business enterprise; thus, their recovery can be only the value of their actual labor—not the value of their forward-looking expectation interest or their reliance interest. Yet, a spouse or nonmarital cohabitant could claim a property interest based upon the very same contribution because the belief that marriage or an intimate relationship will last forever would be seen as rational, no matter how objectively unrealistic that belief may be.

#### IV. RELATIONAL CONTRACT THEORY AND PROPERTY CLAIMS TO THE RESCUE?

Marriage and employment contracts are classic examples of relational contracts.<sup>145</sup> In contrast to transactional contracts—one-

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143. *Steelman v. Hirsch*, 473 F.3d 124, 130 (4th Cir. 2007).

144. *Id.* at 128.

145. See Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 823 (2000) (marriage); Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 153–54 (2005) (employment). Collective bargaining in a unionized context also epitomizes the relational contract: the parties deliberately negotiate a contract with open terms, intentional gaps, reserved discretion for one party or the other and built-in dispute resolution mechanisms, precisely because the duration of the arrangement makes it difficult to forecast future needs. Business arrangements can also be relational in nature, where they are of longstanding duration, entail investment unique to that business transaction, and interdependence between the companies develops. See, e.g., *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515 (Ohio 1990) (requiring parties to a twenty-three-year-long business relationship in which Oglebay transported Armco’s iron ore over the Great Lakes from

time commoditized exchanges of labor or goods for cash that are made out of self-interest and require minimal personal interaction—relational contracts are characterized by longer duration, forward-looking cooperation, mutual investment, and personal relationships.<sup>146</sup> Where duration and forward-looking relational interactions characterize the arrangement, many scholars have argued that the law should embrace implied contracts created out of duration and daily living that reflect the actual development of the relationship rather than adhering to a more formal model of contract.<sup>147</sup>

Could relational contract theory substitute for the rigid cash-for-labor transaction model that currently dominates work law? Robert Bird has argued, for example, that the law should harness relational contract theory to hold liable employers who engage in “relational opportunism” (inducing employees to forge a psychological contract with the firm and reaping the benefits of increased loyalty, but then violating the implicit contract by terminating employees at will).<sup>148</sup> Despite some initial movement in this direction, the possibilities have not been realized. Most jurisdictions today recognize claims for breach of implied contract, varying the at-will rule.<sup>149</sup> The strength of the law’s commitment to at the at-will principle in the employment arena has significantly limited the success of such claims, however. Courts intent upon resisting erosion of the at-will doctrine have refused to enforce implied contract claims on the basis that oral representations violate the Statute of Frauds, that oral representations or handbook provisions are insufficiently definite to ground a contract,<sup>150</sup> or by enforcing disclaimers indicating that nothing said

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its mines to its plants to negotiate and mediate each shipping season for the duration of a contract when they were unable to agree upon a mutually satisfactory rate following a downturn in the iron and steel industry).

146. See IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001); Symposium, *Relational Contract Theory: Unanswered Questions*, 94 NW. U. L. REV. 737 (2000).

147. See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 895–98 (1978). But see Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 871–75 (2000) (defending the role of formalism in relational contracts).

148. Bird, *supra* note 145, at 198–200.

149. See *supra* notes 98–101 and accompanying text.

150. See, e.g., *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591 (Mich. 1993); *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986).

was intended to modify the at-will arrangement.<sup>151</sup> Equitable arguments founded upon principles of promissory estoppel have enjoyed very limited success.<sup>152</sup>

Nor have courts been willing to import marital-property type principles directly into the employment arena, even when the facts cry out for relief. In *Local 1330, United Steel Workers of America v. United States Steel Corp.*, the Sixth Circuit denied what it characterized as “a cry for help from steelworkers and townspeople in the City of Youngstown, Ohio,” who sought to resist the closing of two steel mills that employed 3,500 workers and had been the lifeblood of the community since the early 1900s.<sup>153</sup> Acknowledging the dependence of both the workers and the community of Youngstown on the steel mills, the court nonetheless refused to reify the powerful symbiotic relationship by ordering U.S. Steel to continue to operate the mills or by restraining the piecemeal sale or demolition of the mills so that they could be sold to the plaintiffs for operation as a going concern through a community corporation.<sup>154</sup> The ruling dashed the plaintiffs’ early hopes, which had been stoked by the district court’s suggestion in its initial decision on the plaintiffs’ application for a preliminary injunction that plaintiffs amend their complaint to assert a property-based interest mirroring that of a long-time spouse in a marital property context. The district court explained its initial receptivity to the theory in this way:

Everything that has happened in the Mahoning Valley has been happening for many years because of steel. Schools have been built, roads have been built. Expansion that has taken place is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel.

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151. See, e.g., *Conner v. City of Forest Acres*, 611 S.E.2d 905 (S.C. 2005); *Wilkinson v. Shoney’s, Inc.*, 4 P.3d 1149 (Kan. 2000).

152. See Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 21–26 (1999) (observing that low success rate of promissory estoppel claims in the employment setting is attributable to “judicial veneration for the at-will employment rule”).

153. 631 F.2d 1264, 1265 (6th Cir. 1980). The plaintiffs included two labor unions, the Congressman from the Youngstown district, and the Attorney-General of Ohio. *Id.* at 1265.

154. *Id.* at 1266.

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We are talking about an institution, a large corporate institution that is virtually the reason for the existence of that segment of this nation (Youngstown). Without it, that segment of this nation perhaps suffers, instantly and severely. Whether it becomes a ghost town or not, I don't know. . . .

....

But what has happened over the years between U.S. Steel, Youngstown and the inhabitants? Hasn't something come out of that relationship . . . [?]

....

. . . I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.<sup>155</sup>

The plaintiffs amended their complaint in response, adding a claim for vindication of their "community property" rights.<sup>156</sup> Despite the district court's apparent sympathy for the plaintiffs, however, it ultimately denied their claims for breach of contract and promissory estoppel, as well as the novel claim for division of "community property" that the court had previously invited. The Sixth Circuit court affirmed, reasoning that there was no basis in law for a legally recognized property right in a job.<sup>157</sup>

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155. *Id.* at 1279–80 (emphasis omitted).

156. *Id.* at 1280.

157. *Id.* at 1282.

## V. RETHINKING EMPLOYMENT AS RELATIONSHIP

Although many scholars have criticized family law for not going far enough to promote sharing principles and failing to adequately protect the reliance interests of the dependent (typically non-wage-earning or secondary-earner) spouse, employment law has lagged far behind family law in its ability to recognize the interplay between love and money at termination of the relationship.<sup>158</sup> Critically, family law takes account of the dependent party's need for time to deal with the pain of termination of the relationship and financial support to weather the transition to independence. Although exiting marriage was made easier by the enactment of no-fault divorce regimes allowing unilateral divorce, divorce law in most jurisdictions still requires notice and waiting periods, and many states require mediation or divorce counseling at termination of the relationship. Spousal support and rehabilitative alimony are available to ease the financial transition, functioning as a form of "severance pay" or "unemployment benefit" to compensate the non-titled spouse for her lost investment and ease the transition into either a new marriage or the waged labor market.<sup>159</sup> A significant number of jurisdictions

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158. See, e.g., Kelly, *supra* note 113; Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1627, 1631 (2008) (arguing that the "revolution" in marital property law from title theory to equitable distribution was incomplete, and proposing that spouses be required to share preexisting separate property, inherited property, and gifted property to the extent that such assets shape the parties' identities during the marriage); Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203 (2006) (arguing for partnership analogy to support the value of mothering activities in marriage); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 145 (2004) (arguing that the theory of partnership marriage be strengthened by conceptualizing earning power acquired during marriage as marital property and that all claims to wealth division at divorce be understood as property rights); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004) (arguing for division of human capital acquired during marriage).

159. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 153 (6th ed. 2003). Posner observes that alimony is most critical where age depreciates the wife's ability to form a new marriage that will be as profitable as the dissolving marriage was. Mark Ellman explains further:

[T]he traditional wife makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband's eventual market success. The traditional husband realizes his gains from the marriage in its early years, in the form of increased earning capacity and the production of children; his contribution is

consider fault relevant to the financial aspects of property division or support at divorce, a rough equivalent to a just-cause-for-discharge rule that shifts power to the innocent party at termination. While there may be “Fifty Ways to Leave Your Lover,” dissolving a marriage—particularly one of significant duration—is neither costless nor easy.

Exiting employment, on the other hand, remains a quick process largely devoid of notice and waiting periods.<sup>160</sup> Severance pay or

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deferred until the marriage’s later years when he shares the fruits of his enhanced earning capacity with his wife. In any relationship in which the flow of payments and benefits to the parties is not symmetrical over time, there is a great temptation to cheat. The party who has already received a benefit has an incentive to terminate the relationship before the balance of payments shifts. The traditional marriage, like the machinery necessary for production of a customized part, is a risky investment in the absence of an enforceable long-term contract.

Noneconomic factors exacerbate the wife’s difficulty. The spouses’ respective marriageability, if they divorce and seek new partners, follows a different pattern as they age. Prevailing social mores, relatively universal and apparently intractable, cause the woman’s appeal as a sexual partner to decline more rapidly with age than does the man’s. Moreover, even though the man’s appeal as a sexual partner also declines with age, the financial assets he brings to a marriage typically increase, somewhat softening the decline in his marriageability. The more precipitous decline in the woman’s sexual appeal, on the other hand, is worsened by another social convention: In general women marry men who are of the same age or older, but do not marry men significantly younger than themselves. The woman seeking a second husband thus operates in a constricted marriage market that largely excludes younger men. . . . The older woman may also be unable to offer child-bearing services. If she has children already by a previous marriage, they may well have a negative value for prospective mates. In other words, the divorced older woman finds the “price” she can get for her domestic services relatively depressed in the marriage market segment in which she operates.

These gender differences in the impact of age on marriageability further increase the risk of traditional marriage for women. Ending the marriage becomes even less expensive for men, while a wife’s probable loss increases as the parties age. Thus, the traditional wife not only makes substantial investments early in expectation of a deferred return, but she depletes her capital assets while making those investments. She gives him “the best years of her life”—the years in which her sexual appeal is highest, her fertility greatest, and her domestic services are most in demand—and she can never get those years back. At the same time, the man realizes gains from the marriage during its early years, in the form of increased earning capacity as well as the production of children, and his earning capacity has general value both in the marriage market and in the commercial world. He can take much of the gain realized from his first marriage into a second, and he can more easily find a replacement mate.

Ellman, *supra* note 111, at 42–44 (footnotes omitted).

160. The sole exception arises in the situation of mass layoffs, where the Worker Adjustment Retraining Notification Act requires sixty days’ notice. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101–2109 (2006).

transitional support is not available from the employer as a matter of right, and state support through unemployment insurance is limited to workers with sufficient labor market force attachment and earnings history to qualify. This is true regardless of duration of the employment relationship, even though employment—like marriage—features a temporal life cycle in which the dependent individual's bargaining power is highest at the outset of the relationship and in the early years, and then wanes as investments specific to the relationship are made, yielding a powerful lock-in effect for the more vulnerable party and a temptation for the stronger party to under-compensate or exit when the costs outweigh the benefits of continuing.<sup>161</sup>

The continuing divergence in how law treats employment as opposed to marriage is justified by the myths of non-investment and non-intimacy, and the goal of free mobility in the labor market. The next part catalogues some of the ways in which workers invest and form intimate connections at work, and the remainder of this section considers legal reforms consistent with a goal of free mobility in the labor market that would nevertheless protect workers' investments.

#### *A. The Myth of Non-investment in Employment*

Workers invest in the firms that employ them, particularly over time. They wear out their bodies on the job. They invest emotionally and psychologically in the firm as well. For most, work is more than a matter of economic necessity. Indeed, for most, work is constitutive of identity.<sup>162</sup> Working confers self-sufficiency, dignity, standing in society, and membership in the social structure. Not to work means dependence, failure, declining social status, insecurity, and shame.<sup>163</sup>

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161. Workers are most vulnerable to discharge at the outset of the relationship, when they commit substantial resources to relocating, forgoing other opportunities, learning firm-specific skills, and yet are relatively fungible from the employer's perspective. Late-career workers are also vulnerable to opportunistic discharge because internal job ladders and seniority practices render them costly (paid disproportionately well relative to their productivity). Thus, courts are most likely to protect workers in these two groups using mechanisms such as implied contract theory. See Schwab, *supra* note 91, at 11, 41. Others have observed, however, that the mid-career worker is equally vulnerable, since she has already made her investment but has most likely not yet reaped its full benefits. See Stone, *supra* note 124, at 537.

162. See PAUL DU GAY, CONSUMPTION AND IDENTITY AT WORK 9 (1996) (explaining that work is a stable source of identity and meaning in people's lives).

163. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82

Workers also make firm-specific investments of human capital and advance along the internal job ladders inside their firms, simultaneously aging and pricing themselves out of the market as they allow other opportunities to pass.<sup>164</sup> They build families, forge social networks, and invest in homes and in their communities, binding themselves to the geographic area where the employer's firm is located. They raise and socialize children who, in some parts of the country, go into the same plants, mills, and mines that their ancestors have labored in for decades before them. Workers also invest financially in the firms that employ them, particularly through purchases of company stock in their retirement plans, as the Enron and WorldCom debacles revealed in stark and painful terms.<sup>165</sup>

Nor do firms remain neutral in this process. Employer human resource policies designed to reduce turnover costs and enhance productivity actively incentivize worker investment. Historically, firms used compensation in a variety of forms to align workers' financial interests with those of the firm, hoping to encourage attachment and loyalty. Profit-sharing plans, discounted employer stock purchase plans, and employee stock ownership plans all played a role in binding employees to the firm and eliciting extraordinary effort from them.<sup>166</sup> In response to wage and price controls imposed during World War II that blocked firms from paying higher wages, employers substituted health insurance and pension benefits to attract scarce workers in the World War II labor market. Favorable tax treatment and aggressive bargaining by labor unions completed the picture, and health and pension benefits became part of the standard package of fringe benefits.<sup>167</sup> In addition to allowing firms to recruit and retain a stable workforce, pension benefits also assisted in regulating workforce tenure: by facilitating retirement and linking

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CORNELL L. REV. 523, 530–34 (1997); see also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1890–91 (2000).

164. See Schwab, *supra* note 91, at 41.

165. Crain, *supra* note 2, at 1234–36.

166. *Id.* at 1192; see also Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(k) Plans*, 14 ELDER L.J. 1, 5 (2006).

167. David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 25–26 (2001).

benefits to years of service, firms could control the rate of workforce turnover.<sup>168</sup>

In recent years, service sector employers have also developed increasingly sophisticated internal marketing programs designed to bind workers to the firm while simultaneously enhancing productivity. Internal marketing programs “sell” the corporate brand to employees inside the firm. The goals of internal branding programs are to align employee identity with the firm’s brand values and to nurture an emotional attachment to the firm that will pay off in enhanced employee loyalty and extra-role behavior, which in turn correlates with higher customer satisfaction and loyalty.<sup>169</sup> Internal branding programs deploy a coordinated hiring, training, disciplinary, and reward structure to indoctrinate workers into brand values and create an emotional connection to the firm that will blur the boundaries between workers’ self-interest and that of the firm.<sup>170</sup> The most effective branding programs generate a sense of community and belonging that induces organizational citizenship behavior—extraordinary effort in the service of the firm’s goals—and reduces the need for close supervision. Workers essentially manage themselves, making decisions as if they were owners rather than workers.<sup>171</sup>

Such human resource strategies are designed to deconstruct the antagonistic relationship between the firm and its workers. The most effective programs deliberately solicit a deeper psychological investment in the firm, yielding not only psychological investment, but financial investment. A surprisingly high percentage of workers hold disproportionate shares of company stock in undiversified 401(k) retirement accounts, despite media coverage attendant to the

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168. Crain, *supra* note 2, at 1192–93; CRAIN, KIM & SELMI, *supra* note 7, at 918–19.

169. See Colin Mitchell, *Selling the Brand Inside*, HARV. BUS. REV., Jan. 2002, at 99.

170. The typical internal branding program includes the following elements: communicating and explaining the brand to employees, convincing them of its value, linking every brand in the organization to delivery of the brand promise, establishing and enforcing performance standards designed to measure fulfillment of the brand promise, and selecting, training, rewarding and punishing employees according to their level of on-brand behavior. Pierre Berthon, Michael Ewing & Li Lian Hah, *Captivating Company: Dimensions of Attractiveness in Employer Branding*, 24 INT’L J. ADVERTISING 151, 153–54 (2005).

171. See Libby Sartain, *Branding From the Inside Out at Yahoo!: HR’s Role as Brand Builder*, 44 HUM. RESOURCE MGMT. 89 (2005); Crain, *supra* note 2, at 1208–09.

implosion of firms like WorldCom and Enron that demonstrate the risks of an undiversified retirement portfolio when workers lose their jobs and life savings simultaneously.<sup>172</sup> In earlier work, I have argued that internal branding programs distort employees' perception of their own self-interest, persuading workers to internalize and adopt the firm's values and brand as their own.<sup>173</sup> For those who internalize the employer's brand, the rewards are unparalleled feelings of connection and belonging. As economist George Akerlof explained, workers "anthropomorphize" the firms for which they work, developing affection not only toward their coworkers, but toward the firm itself.<sup>174</sup>

### *B. The Myth of Non-Intimacy in Employment*

Of course, emotional investment in employment does not necessarily equate to intimacy as the concept is understood in family law—e.g., relationships that involve love. But the traditional concept of intimacy does not capture all nonmarket ties; intimate ties can and do exist outside the realm of romantic or familial love.<sup>175</sup> A broader understanding of intimacy might consider attachment, affection, loyalty and feelings of duty or obligation. Consider, for example, worker solidarity. While solidarity does not mean that workers love or even like their coworkers, it does represent a form of social capital that signifies connection: "some measure or mix of love, empathy . . . or commitment to principle" that gives rise to supportive networks between workers.<sup>176</sup> An injury to one is seen as an injury to all; workers "feel together," experiencing events in the workplace

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172. See James J. Choi, David Laibson & Brigitte C. Madrian, *Are Empowerment and Education Enough? Underdiversification in 401(k) Plans*, 2005 BROOKINGS PAPERS ON ECON. ACTIVITY 151 (arguing that media coverage of the losses suffered by workers at Enron, WorldCom and Global Crossing as a result of under-diversification of retirement portfolios had only a minimal impact on investment patterns by employees in other companies; the authors found a 2 percent decline in employee investment in company stock following the media blitz).

173. Crain, *supra* note 2.

174. See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON. 543, 550 (1982).

175. See, e.g., Rosenbury, *supra* note 78.

176. Fischl, *supra* note 6, at 860.

together even when the target of the adverse employment action is an individual.<sup>177</sup>

It is equally apparent that nonmarket motives exist on the employer's side of the equation as well. Employers (or their individual managerial representatives) do not always behave as classic market actors. Business owners sometimes manifest affection and sympathy for workers.<sup>178</sup> Individual supervisors sometimes make common cause with workers.<sup>179</sup> And employment discrimination law is rife with examples of individual supervisors who displayed feelings of bigotry, hatred, and intolerance—nonmarket motives, to be sure.<sup>180</sup>

### *C. Transition and the Importance of Notice*

If we acknowledge the presence of investment and intimacy in employment that parallel investment and intimacy in marriage, what form might a legal regime applicable to both and designed to mitigate the effects of sudden termination take? In the past, employment law scholars have focused on constraining exit by modifying the at-will rule. Most ignore the goal of free labor mobility, arguing that the costs of the at-will doctrine fall too heavily on wrongly or arbitrarily discharged employees, and propose a just cause standard either as a default rule around which the parties may contract or as an absolute constraint.<sup>181</sup> Like the argument for re-invigoration of fault principles

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177. See Crain, *supra* note 1, at 1868.

178. See, e.g., Rebecca Leung, *The Mensch of Malden Mills*, 60 MINUTES (July 6, 2003), <http://www.cbsnews.com/stories/2003/07/03/60minutes/main561656.shtml> (describing efforts of mill owner to support employees of his family's textile mill in the aftermath of a fire that destroyed the business).

179. See, e.g., *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1983) (supervisor fired for refusing to spy on employees).

180. See, e.g., *Holloman v. Keadle*, 931 S.W. 2d 413 (1996) (tort claim for outrage against physician-employer who frequently cursed employer, referred to her as a "white nigger," "slut," and "whore," and threatened to kill her if she quit or "caused trouble").

181. See, e.g., Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 346 (1988); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 424 (2002); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Estlund, *supra* note 136; Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1746–50 (2004); St. Antoine, *supra* note 10, at 71–81; Clyde

at divorce, this position ignores the dramatic shift in cultural norms toward the embrace of free mobility and the concomitant opportunity to make a better match, whether it be a job or a spouse. For that reason, such proposals are doomed.

A few recent analyses, however, have accepted values of free mobility as the new normal and instead proposed reforms designed to ease the transition from one job to another and simultaneously protect workers.<sup>182</sup> Rachel Arnow-Richman has made a particularly strong case for accepting the norm of free mobility in labor markets and focusing legal reform on easing the transition to the next job rather than erecting barriers to termination.<sup>183</sup> She proposes a default rule mandating advance notice of termination (or, at the employer's election, severance pay for the duration of the notice period). Her proposal would apply to every employment relationship, thus extending to all workers the protections afforded by the federal Worker Adjustment and Retraining Notification Act (WARN)<sup>184</sup> to workers terminated as part of a mass layoff (albeit with employers retaining the option to provide severance pay in lieu of notice).<sup>185</sup> An exception would exist where the employer could establish just cause for discharge ("serious misconduct" in Arnow-Richman's terminology).<sup>186</sup> Arnow-Richman's approach would leave intact the

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W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521 (1976); Sunstein, *supra* note 136.

182. See, e.g., Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 135–37 (2006) (arguing that creation of property right in employment is "overkill" and proposing a requirement of notice, analogizing sale of labor to a lease of human capital); Katherine V.W. Stone, *Knowledge at Work Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002) (describing contemporary employment contract as a promise of training and skill development that will enhance marketability in exchange for zealous commitment to work in the immediate term and extra-role performance, and arguing that courts should refuse to enforce covenants not to compete where the employer does not honor its end of the bargain).

183. See Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 36 (2010) ("If employers no longer implicitly offer workers long-term job security, and employees no longer expect to remain in the same job for their lifetime, the guiding theory of worker protection should focus on enabling continued labor market participation rather than on preserving particular jobs.").

184. See Worker Adjustment Retraining and Notification Act of 1988, 29 U.S.C. §§ 2101–2109 (2006).

185. Arnow-Richman, *supra* note 183, at 8. Arnow-Richman dubs this a "pay-or-play" system. *Id.*

186. See *id.*

statutory and common law exceptions to employment at will, permitting workers who could show illegal motivation to continue to challenge the termination itself. For most workers, however, notice would become the “new cause,” offering protection to workers terminated for any reason other than just cause.<sup>187</sup> Arnow-Richman’s approach thus re-focuses the law on how termination occurs rather than on why it occurs.<sup>188</sup>

The parallel between Arnow-Richman’s proposal and the course that family law has followed is striking. Once we relinquish the idea that law should impose barriers to the termination of intimate relationships that are core to individuals’ well-being, the benefits of easing the deleterious effects of termination through transition strategies are revealed. At family law, notice, waiting periods, temporary support, and rehabilitative alimony are standard tools for facilitating the transition from dependence (both emotional and financial) to independence (or to a new intimate relationship; alimony/spousal support, for example, terminates upon cohabitation in many states and remarriage in nearly all). Retaining a fault-based exception allowing for speedier termination and reducing the costs of termination for the innocent party is another striking parallel between Arnow-Richman’s proposal and the family law.

#### *D. Recognizing Investment at Work*

In a landmark 1988 law review article, Joseph Singer argued that our social vision of how individuals interact with one another and with the community shapes our perceptions, language, morality, and normative commitments.<sup>189</sup> In the family law arena, the law creates property rights arising out of intimate relationships of mutual dependence and enforces them through divorce and property distribution proceedings in family court or civil court, taking into account the status of the more vulnerable spouse or partner, the non-economic contributions of the non-title-holding spouse or partner,

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187. *See id.* at 38.

188. *Id.* at 39–41.

189. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 627 (1988).

and the reliance interests of the parties.<sup>190</sup> Thus, Singer points out, our legal system already recognizes expectation and reliance interests by creating affirmative obligations that grow out of relationships over time, even where the parties have made no formal agreement to share property.<sup>191</sup> Why shouldn't we extend this recognition to the interests that grow out of the employment relationship over time? Why shouldn't property law protect the more vulnerable party (the worker) who has invested in a relationship when the more powerful party ends it?<sup>192</sup>

Pragmatic objections to this approach are relatively easily overcome. Family law typically links both property entitlement at dissolution of the marriage and alimony to marital longevity, recognizing the likelihood that contribution, need and reliance increase as marriage endures and the parties age. Would doing the same at termination of employment using a figure based upon wages and longevity of employment be so unthinkable? In tacit recognition of the investment and dependence that workers forge to firms, voluntary severance pay in the employment context has traditionally also been tied to job longevity. A 2009 survey found that 46.2 percent of employers offered severance pay to all employees and 30.1 percent offer it to a subset of departing employees.<sup>193</sup> Sixty-three percent of firms link the amount of severance pay to length of service, though some also link it to employee status and others use a unitary severance figure or link it to the reason for the separation (severance is more likely to be available if the position was eliminated, and less likely to be available if the worker was discharged for poor performance).<sup>194</sup> A typical formulation of severance pay by longevity is one to two weeks' pay per year of service, up to a maximum of twelve weeks' pay.<sup>195</sup> Though U.S. law does not mandate severance

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190. *Id.* at 692–94.

191. *Id.* at 701.

192. *Id.* at 724.

193. *How Employers Are Handling Severance*, HR FOCUS (Inst. of Mgmt. & Admin., Newark, N.J.), Nov. 2009, at 10–11. Large firms are particularly likely to furnish severance pay, usually as a mechanism for inducing “voluntary” departures so that firms do not have to choose which workers to cut, or in exchange for a waiver of legal claims by involuntarily departing workers. *Id.* at 11.

194. *Id.* at 13.

195. *Id.*; see also Arnow-Richman, *supra* note 183, at 58 (observing that private studies

pay, human resources policy in many firms supports it, either for its litigation-avoidance benefits, the positive morale boost it affords to those workers who remain, or because it serves as a vehicle for preserving a relationship between the departing worker and the firm.<sup>196</sup> Such a relationship affords the firm the opportunity to re-hire departing workers for subsequent projects, re-deploy them in new organizational roles, and protect valuable intellectual capital.<sup>197</sup>

Pressing the family law analogy a bit further, title to property no longer reigns supreme in dividing property at marital dissolution. Assets acquired during marriage through the labor of either or both are divisible property, regardless of how title is held. Why should title continue to control the disposition of property created through the joint labor of workers and the firm during an employment relationship? In some industries, for example, trade secrets might be viewed as an asset created by the workers as a collective rather than as property belonging solely to the firm. Professor Nathan Newman has argued that because trade secrets are the product of collaboration of many interdependent workers, they should be subject to division by collective bargaining.<sup>198</sup>

Alternatively, in situations where workers' accumulated human capital is so intertwined with firm-specific relationships that exit is hindered by contracts limiting re-employability (a covenant not to compete) or by trade secrets doctrine (particularly the inevitable disclosure rule), law might impose financial costs upon the party seeking to enforce the limits on mobility. Katherine Stone has argued that courts should limit the enforceability of noncompetes where the employer has not made a significant contribution to the worker's

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suggest that voluntary severance plans calculate non-executive employee severance benefits at one week per year of service).

196. Ninety-six percent of workers receiving severance are required to sign a waiver of rights to sue as a condition of receipt. *See How Employers Are Handling Severance*, *supra* note 193, at 11, 13.

197. RIGHT MGMT., SEVERANCE PRACTICES AROUND THE WORLD: EXECUTIVE OVERVIEW 4 (2009).

198. Nathan A. Newman, *Trade Secrets and Collective Bargaining: A Solution to Resolving Tensions in the Economics of Innovation*, 6 EMP. RTS. & EMP. POL'Y J. 1, 28–29 (2002) (proposing that trade secrets should be regulated and valued through collective bargaining so that workers receive fair compensation for their part in producing them).

overall future employability.<sup>199</sup> Still another option would be to apply the pay-or-play principle: employers who bind their workers to non-compete agreements could be required either to pay a predetermined lump sum to the worker in recognition of the temporary barrier to re-employability that is posed by the non-compete (calibrated by duration of the non-compete), or to waive the noncompete and forego payment.

Of course, there is a flip side to the coin of employment as relationship: workers might owe reciprocal obligations to employers, too.<sup>200</sup> More robust duties of loyalty, deference to managerial authority, and obligations to give notice before quitting come to mind. Although this risk is not insubstantial, many of these duties are already remarkably entrenched in labor and employment law doctrine, a fact that is sometimes hard to square with the lip service paid to the arm's-length character of the relationship. For example, courts routinely dismiss claims by employees who have displayed disloyal or insubordinate behavior toward their employers, finding such conduct unprotected.<sup>201</sup>

#### *E. Seeing the Damage of Job Loss*

The law's frame of employment as an impersonal spot transaction of work for wages rather than as an ongoing relationship also directs the limited damages available under most employment statutes. Relief in employment law contexts is generally limited to economic losses; equitable remedies are the staple of most employment statutes, and compensatory and punitive damages are either unavailable (e.g., NLRA, FLSA) or extremely limited (e.g., Title VII damages caps linked to size of employer).<sup>202</sup> Scott Moss and Peter Huang have

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199. Stone, *supra* note 182.

200. Scott Baker alludes to this possibility in his Comment. See Baker, *supra* note 12, at 214 (speculating that perhaps employees who quit should be required to reimburse the employer for sunk costs).

201. See Matheny & Crain, *supra* note 181, at 1726–36 (discussing illustrations of disloyal or insubordinate conduct found unprotected by the NLRA and disloyal or insubordinate speech by public sector employees held unprotected by the First Amendment); ATLESON, *supra* note 80, at 91, 180 (exploring assumptions about employee status that influence judicial decisionmaking in labor disputes).

202. Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment*

made a powerful case that employment law fails to take into account the emotional investment that employees make at work, and thus undercompensates their losses at termination.<sup>203</sup> Moss and Huang argue that the vision of the rational actor that shapes old-school law and economics theory offers an impoverished view of the real-world dynamics of the labor market. Relying on evidence from behavioral economics and cognitive science, Moss and Huang propose that courts consider awarding compensatory damages for emotional distress when workers are wrongfully terminated, at least where the individual is unemployed for a significant period of time or is permanently deprived of his or her chosen field of work as a result of the discharge.<sup>204</sup>

Moss and Huang's argument is entirely consistent with a holistic conception of workers' motivations as driven by a complex interplay of love and money, and offers further evidence of how different work law might look if it rejected the intimacy/for-profit dichotomy. Of course, it is also possible that a frame of employment as relationship might render courts reluctant to require that such relationships be initiated or maintained (for example, through imposition of reinstatement or reinstatement remedies). After all, if workers are fungible tools of production akin to machines, reinstatement and instatement remedies are tolerable as long as productivity is maintained. But if the affective or intimate aspects of employment are emphasized, might courts become as reluctant to order the maintenance of employment relationships as they are in the context of marital or familial relationships?

These are risks worth taking, in my view. In the end, how law conceptualizes employment and addresses the consequences of financial instability or termination reflects the values that society chooses to privilege. As Clyde Summers once observed:

Instability of employment, often in the form of mass dislocation, is a painful fact of our modern market economy . . . . The costs [of dislocation] must be borne either by the

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*Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 195–206 (2009).

203. *Id.* at 220–21.

204. *Id.* at 258–59.

workers, the employer or by society in general. How we distribute those costs implicitly expresses our social values . . . .<sup>205</sup>

This Essay is an unapologetic argument for recognizing the investments that workers make and the attachments that they form at work, and redistributing risk from workers to employers.<sup>206</sup>

## VI. CONCLUSION

Law is obsessed with categories. Indeed, some might say that law is all about drawing distinctions between one type of thing, relationship, or transaction and another in order to justify the differential legal treatment accorded to items in one category versus those in another. In life, however, things, relationships, and transactions do not divide so neatly. Often, how they divide—and thus, how we treat them—turns almost entirely upon how we conceptualize them to begin with.<sup>207</sup> Life's complexities and connections, rather than law's rigid categories, offer the promise of a more just legal regime.

What difference might it make to think about employment as an intimate relationship characterized by investment rather than limiting our conceptual frame to an arm's-length exchange of labor for dollars? The differences might be as simple as requiring notice and transitional assistance (severance pay) linked to longevity and/or investment, as radical as recognizing new common law claims based in property rights for workers (such as collective rights to trade secrets), or as straightforward as heeding evidence of emotional harm linked to termination and providing compensation for it. This Essay has argued that reconceptualizing employment as a relationship—as

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205. Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1034 (1995).

206. For additional argument along these lines, see Marion Crain, *Work Matters*, 19 KAN. J.L. & POL'Y 365 (2010).

207. See, e.g., Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129, 1129 (2005) (describing sale of rabbits for "pets or meat, you decide. If a customer wants rabbits as meat, [the female entrepreneur] will provide them slaughtered and dressed, or her customer can take them home and butcher them; on the other hand, a customer who wants rabbits as pets, can buy them, think of them as bunnies, and take them home as pets.").

about both money and love—is an important first step toward any of these reforms.