

Working Relationships

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Work has long been a site of friendship, but the financial crisis of the late 2000s highlights the importance of work friendships, both to individual employees and the economy at large. As employees are laid off, they lose not just paychecks and job security but also the daily support of coworkers.¹ Employees left behind also lose that support while coping with anxiety over the possibility of additional layoffs and new workplace social dynamics. At the same time, government efforts to stimulate the economy have relied on the advice and expertise of economists, bankers, and financial advisers who have often previously worked together in the private sector.² In turn, the strategies they develop have benefited former co-workers and partners at investment banks like Goldman Sachs.³

Legislators and legal scholars have largely ignored such ties arising from workplace interactions. Instead, law has long located personal relationships in the home, recognizing and explicitly regulating them only to the extent that they occur within the domestic sphere. Historically, law did this by establishing special rules, collected under the umbrella of domestic relations law, governing a range of relationships thought to occur within the home, including the relationships of husband and wife, parent and child, guardian and ward, master and servant, and master and slave.⁴ This domestic

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1. See, e.g., Catherine Bergart, *Losing the Income, and the Camaraderie*, N.Y. TIMES, May 17, 2009, at BU10.

2. See Julie Creswell & Ben White, *The Guys from "Government Sachs"*, N.Y. TIMES, Oct. 19, 2008, at BU1.

3. *Id.*

4. See, e.g., TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD,

relations umbrella originally acknowledged that both intimacy and production occurred and mixed within the home, but over time the legal home was purged of its overtly productive aspects. Legal recognition of the master-slave relationship was abolished, the master-servant relationship was moved under the umbrella of employment law, and the guardian-ward relationship was subsumed within the rules pertaining to the parent-child relationship in general, leaving only spousal and parent-child relationships under the newly named umbrella of family law.⁵

This realignment solidified the legal home as a site of pure intimacy rather than production. The domestic relationship in which intimacy and commerce most explicitly mixed—the master-servant relationship—came to be governed by rules pertaining to the workplace.⁶ Thus, the master-servant relationship is now assumed to be productive rather than intimate, even when the workplace is also a home.

The legal assignment of intimacy to the home and production to the workplace masks various dynamics within the home, the workplace, and spaces in between. As numerous scholars have illustrated, a focus on the intimacy of the home can obscure the violence and alienation of the home, as well as the productive work that takes place within it.⁷ In addition, as I have previously argued,⁸ family law's focus on the home ignores intimacy outside of the home,

GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY (Lucius E. Chittenden ed., 2d ed. 1846).

5. See, e.g., Martha Minow, "Forming Underneath Everything that Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 825 (pointing out that inclusion of master-servant relationships in early domestic relations treatises "suggests how the conception of family or domestic life has changed historically").

6. For detailed discussions of the transformations in master-servant law, see AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 60–97, 175–217 (1998); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 223–92 (1993).

7. See, e.g., MARTHA ALBERTSON FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE* (1994) (illustrating various ways that the state has been complicit in domestic violence); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (examining how constitutional notions of privacy have permitted and at times encouraged violence against women in the home); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (discussing how law ignores the productive nature of home labor).

8. See Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

particularly the intimacy that occurs between friends providing a range of care, support, and companionship to one another. Family law's silence about friendship does not mean that friendship is unregulated, however. The conferral of explicit legal status on spousal and family relationships to the exclusion of other relationships instead shapes understandings of both family and friendship, challenging the notion that family law only affects the domestic sphere.⁹

In this Essay I extend my previous consideration of friendship to the specific context of the workplace, analyzing friendship through the lens of the ties that arise at work instead of those assumed to arise within the home. Many adults spend half or more of their waking hours at work, in the process forming relationships with supervisors, co-workers, subordinates, customers, and other third parties. Although such relationships are at times primarily transactional, at other times they take on intimate qualities similar to those of family relationships or friendships. Workplaces are thus often sites of both intimacy and production, much like the home is a site of both intimacy and production, even though the law assigns production to the workplace and intimacy to the home.

Moreover, friendships and other ties in the workplace are often a component of workplace success rather than a simple byproduct of that success or a negative distraction from it. Workplace friendships foster connections that may lead to promotions and higher status, and such connections may also provide care and support to workers in increasingly uncertain and competitive workplace environments. Some legal scholars have categorized these effects as "favoritism" and have considered ways to eliminate that favoritism in order to promote meritocracy and antidiscrimination goals in the workplace. This Essay takes a different tack, examining relationships in the workplace to challenge legal understandings of both work and family, particularly the assumption that purported merit-based success can be separated from intimacy or care. Part I examines the ways that current legal analysis largely ignores relationships at work or constructs them solely as threats to workplace equality. Part II draws

9. *See id.* at 202–03.

on social science literature to illustrate that personal relationships are neither irrelevant to the workplace nor always at odds with antidiscrimination goals, even as they may replicate patterns of inequality not currently addressed by antidiscrimination law. Part III then sets forth an agenda for future legal consideration of affective bonds at work that does not collapse work relationships into family, or define them against family, but instead examines the flow of intimacy in and out of the home, the workplace, and other spaces both public and private, and productive and intimate.

I. RELATIONSHIPS AND WORKPLACE LAW

Law currently addresses personal relationships in the workplace in two primary ways. First, the Supreme Court has repeatedly held that unwelcome sexual or romantic attention between supervisors and employees, or between co-workers, may constitute sexual harassment that violates Title VII if sufficiently severe or pervasive.¹⁰ In turn, many employers have promulgated policies banning or regulating all sexual or romantic relationships at work for fear that even consensual romantic or sexual relationships might subject employers to sexual harassment liability, particularly once those relationships end.¹¹ As such, by targeting sexual relationships as a particularly likely source of workplace discrimination, the law has separated sexual relationships from other relationships at work and provided employers with incentives to monitor and regulate them.

10. Title VII provides, in relevant part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2011). The Supreme Court has held that harassment because of sex is a form of discrimination because of sex. *See, e.g.*, *Pa. State Police v. Suders*, 542 U.S. 129, 146–47 (2004); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). A few lower courts have extended this analysis to unwelcome behavior occurring after the conclusion of a consensual sexual or romantic relationship between an accused harasser and alleged victim. *See, e.g.*, *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007).

11. *See generally* Ian J. Silverbrand, *Workplace Romance and the Economic Duress of Love Contract Policies*, 54 VILL. L. REV. 155 (2009) (examining employer responses to workplace romance).

At the same time, workplace law has largely placed other personal relationships at work outside of the domain of explicit legal regulation.¹² This second indirect consideration of workplace relationships affects workplace ties by not providing incentives for employers to regulate them. Federal courts have consistently held that employment preferences for friends and acquaintances,¹³ family members,¹⁴ or lovers¹⁵ generally do not constitute prohibited discrimination but instead are forms of favoritism legitimately within employers' prerogatives. Employers may still choose to implement antinepotism or antifraternalization policies aimed at purging employment decisions of favoritism based on personal ties,¹⁶ and courts have upheld such policies against constitutional challenges in the public employment context.¹⁷ However, courts have not required

12. This placement of personal relationships outside of the domain of legal regulation is particularly true of employment discrimination law. As discussed *infra* text accompanying notes 16–17, civil service laws do seek to regulate some personal relationships through antinepotism laws. In addition, labor law facilitates and regulates interactions between groups of employees. In future work, I will analyze the connections between personal relationships at work and employee solidarity.

13. These cases make up a small portion of total Title VII cases, but the outcomes across circuits are remarkably consistent. *See* *Greene v. Potter*, 557 F.3d 765, 771 (7th Cir. 2009); *Harris v. Hays*, 452 F.3d 714, 721–22 (8th Cir. 2006) (Gibson, J., concurring); *Neal v. Roche*, 349 F.3d 1246, 1252 (10th Cir. 2003); *Dugan v. Albemarle Cnty. Sch. Bd.*, 293 F.3d 716, 723 (4th Cir. 2002); *Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 108 F.3d 935, 938–39 (8th Cir. 1997); *Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995); *Odom v. Frank*, 3 F.3d 839, 845 (5th Cir. 1993); *Autry v. N.C. Dep't of Human Res.*, 820 F.2d 1384, 1387 (4th Cir. 1987); *Rapp v. Gen. Motors Corp.*, 148 F. Supp. 2d 924, 932 (N.D. Ohio 2001); *Housley v. Boeing Co.*, 177 F. Supp. 2d 1209, 1217 (D. Kan. 2001).

14. There are even fewer cases alleging favoritism toward family members, but the outcomes of these cases are consistent with the outcomes in cases alleging favoritism toward friends and acquaintances. *See, e.g.*, *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 (11th Cir. 1990); *Holder v. City of Raleigh*, 867 F.2d 823, 826–27 (4th Cir. 1989).

15. The outcomes of these cases are also remarkably consistent with those alleging favoritism toward friends or family. *See* *Tenge v. Phillips Modern AG Co.*, 446 F.3d 903, 908 (8th Cir. 2006); *Preston v. Wis. Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003); *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990); *DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986); *Ayers v. Am. Tel. & Tel. Co.*, 826 F. Supp. 443, 445 (S.D. Fla. 1993).

16. *See, e.g.*, *Ellis v. United Parcel Serv., Inc.*, 523 F.3d 823, 828 (7th Cir. 2008) (finding that violation of employer's anti-fraternalization policy was a legitimate, non-discriminatory reason for plaintiff's discharge).

17. *See, e.g.*, *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 711–12 (6th Cir. 2001). Civil service laws may even require public employers to adopt such antinepotism policies.

public or private employers to implement such policies; employers may therefore take personal relationships into account when making employment-related decisions.¹⁸

For example, the First Circuit upheld a district court's finding that an employer's decision to hire an employee's white male "fishing buddy" rather than an African-American woman "was a near-classic case of an old boy network in operation, but not a situation in which the employment decision was motivated by racial animus."¹⁹ Similarly, the Seventh Circuit held that a district court properly granted judgment as a matter of law to the employer in a sex discrimination case because the evidence established that a supervisor "manipulated the overtime procedures in order to benefit a few of his friends, not out of a desire to discriminate against female employees."²⁰ In yet another case, the Eighth Circuit simply stated that "it is not intentional sex discrimination . . . to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unemployed nor an old friend and happens to be female."²¹ Courts have reached the same result when supervisors favor their lovers, admitting that such decisions are "unfair,"²² but concluding, for example, that "when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both

However, employers may not use such policies to interfere with employees' rights to engage in union and other concerted activity, including the right to discuss terms and conditions of employment for the employees' mutual benefit, or to discriminate against union members. *See, e.g.,* *Spencer Foods, Inc.*, 268 N.L.R.B. 1483, 1485–86 (1984) (partially overruled on other grounds). In addition, some commentators have argued that antinepotism policies violate Title VII because they have a disparate impact on women, given that wives tend to earn less than their husbands and have less seniority. *See, e.g.,* Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75, 79 (1982). A few courts have agreed. *See, e.g.,* *EEOC v. Rath Packing Co.*, 787 F.2d 318, 322, 331–32 (8th Cir. 1986). However, most courts have disagreed, either finding no disparate impact or concluding that the policy was job-related and consistent with business necessity. *See, e.g.,* *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 614–18 (11th Cir. 1995); *Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1509–11 (10th Cir. 1987); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412–14 (8th Cir. 1975).

18. *See* cases cited *supra* notes 13–15.

19. *Foster v. Dalton*, 71 F.3d 52, 55 (1st Cir. 1995).

20. *Greene v. Potter*, 557 F.3d 765, 771 (7th Cir. 2009).

21. *Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 108 F.3d 935, 938 (8th Cir. 1997).

22. *DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986).

sexes alike for reasons other than gender.”²³ Indeed, one court stressed that employment preferences based upon personal relationships of any type are generally outside of law’s reach: “Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification.”²⁴ Pursuant to all of these cases, so long as the favoritism is directed toward individuals instead of groups, or is isolated instead of widespread, employers may take personal ties into account when making various employment decisions.²⁵

Some legal scholars, most notably Mary Anne Case, have criticized law’s deference to employers’ reliance on personal ties when making employment decisions. Case argues that preferences for friends and lovers at work can thwart antidiscrimination goals because workplace decision-makers tend to “like,” whether sexually or not, members of a particular gender or other protected category.²⁶ In particular, in Case’s view, relationships between people who are hierarchically arranged at work are problematic because such relationships are often available to some but not others on the basis of gender, race, or religion. The cost of such potentially discriminatory effects is too high to justify whatever benefits such relationships

23. *Ackel v. Nat’l Commc’ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (quoting *Green v. Adm’rs of the Tulane Educ. Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002)) (internal quotation marks omitted).

24. *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002).

25. When favoritism spreads from isolated instances to widespread practice, courts have found impermissible discrimination. *See, e.g.*, *Miller v. Dep’t of Corrections*, 115 P.3d 77, 80 (Cal. 2005) (concluding that widespread sexual favoritism may create a hostile work environment because “the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management”); EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice 915.048, 2 EEOC Compliance Manual § 615 (Jan. 12, 1990) (setting forth guidelines that were subsequently endorsed by the *Miller* court, 115 P.3d at 88–90).

26. Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 153, 156–58 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009). For an earlier analysis and proposal similar to Case’s, see Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 *INDUS. REL. L.J.* 153 (1991).

between hierarchically arranged employees might confer, Case maintains, therefore justifying a ban on supervisors' preferences for friends and lovers and, in some situations, justifying a ban on relationships between hierarchically arranged employees altogether.²⁷ Case therefore prioritizes a broad interpretation of antidiscrimination law over employer prerogatives or the potential benefits of workplace relationships for employees and employers alike.

Other scholars agree that preferences for friends and lovers may mask subtle discrimination, but they focus less on using existing antidiscrimination law to eliminate such preferences. Instead, these scholars emphasize that such preferences may be influenced by implicit bias, and they focus on developing strategies to reduce that bias outside of antidiscrimination law.²⁸ Vicki Schultz is unique within this group, as she advocates structural reforms designed to eliminate workplace bias, primarily through eliminating forms of job segregation, while also acknowledging the benefits that may flow from relationships at work.²⁹ Schultz agrees with Case that both sexual and nonsexual relationships at work can lead to discriminatory favoritism, but she argues against bans on sexual conduct and fraternization in the workplace.

Schultz writes, for example:

[T]he problem of favoritism cannot be solved by an antifraternization rule alone. Approaching the problem that way singles out sexual relationships in a way that obscures the exclusionary dynamics that often underlie other personal

27. Case, *supra* note 26, at 154–58.

28. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1929–30, 1956–71 (2009) (arguing that legal coercion is unlikely to reduce implicit bias and instead proposing reforms designed to increase employers' motivations to act in nondiscriminatory ways); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 43 (2006) (“In the end, because implicit biases draw on widely shared cultural understandings, any effort to eliminate those biases requires a massive, society-wide effort to change the significance of race and gender in our culture.”); Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 315–16 (2002) (arguing that structural workplace reforms are necessary because “the good intentions of workplace decisionmakers are not sufficient to prevent the discriminatory results of cognitive biases”).

29. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

affiliations. Under my approach, the law would treat sexual and nonsexual forms of intimacy (and exclusion) alike. This does not imply that organizations should ban all forms of contact and intimacy—both sexual and nonsexual—between their employees. But it does mean that organizations should take more seriously the potential for discriminatory dynamics to develop in connection with *nonsexual* forms of affiliation between supervisors and their employees, or between coworkers who can affect each other's employment prospects.³⁰

In other words, playing golf with a boss may lead to as much favoritism as having sex with a boss.³¹ If an employer bans sexual relationships between hierarchically arranged employees but permits golf and other activities between such employees, then female subordinates are likely to be disproportionately harmed in a workplace with overwhelmingly male supervisors.³² Male subordinates may use their generally superior golf skills to make connections with male supervisors, whereas female subordinates will be denied the opportunity to make use of their sexuality to make connections with those supervisors (an opportunity that might otherwise be available if the female subordinates were willing to adopt a heterosexual performance).

Therefore, although Schultz and Case agree that sexual relationships at work are not meaningfully different from other personal relationships at work, they draw opposite conclusions. Case employs law's regulation of sexual relationships at work to challenge law's deference to other forms of relationships between hierarchically arranged employees. Schultz, in contrast, employs law's deference toward nonsexual favoritism to challenge what she considers to be law's over-regulation of sexual relationships at work and the corresponding under-regulation of gender segregation.

Schultz justifies her conclusion by relying on the fact that work is an increasingly important site for personal interaction and support.³³

30. *Id.* at 2189.

31. *Id.*

32. *Id.*

33. *Id.* at 2186–90; *see also* Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (“We tend

As such, some workplace relationships have come to resemble relationships found within the home, voluntary associations, and the like. Law permits dating, friendship, favoritism, and even bias in those contexts.³⁴ Schultz argues that law also should permit dating, friendship, favoritism, and bias in the workplace so long as they are motivated by affective ties rather than discriminatory animus.³⁵ In other words, law's treatment of the affective relationships should not change simply because the location of the relationships has changed.

This focus on the nature of the relationship rather than its location in some ways reflects arguments made in opposition to the bill that became the Civil Rights Act of 1964. Specifically, some opponents of the proposed text of Title VII of the Act argued that employers should enjoy the same rights of intimate association that home and apartment dwellers enjoy.³⁶ Congress eventually reached a compromise, exempting employers with fewer than fifteen employees from Title VII's reach on the theory that smaller employers were more like families or other intimate associations.³⁷ In no way does

these days, far more than in earlier times, to find our friends, lovers, and even mates in the workplace.”). Moreover, Schultz elsewhere argues that workplace isolation, including but not necessarily limited to the deprivation of training and feedback, may in fact constitute a hostile work environment. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687, 1771–72 (1998).

34. See, e.g., Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009) (analyzing discrimination in personal relationships and advocating for increased legal attention to such intimate discrimination without legally prohibiting it).

35. Schultz, *supra* note 29, at 2188–90.

36. See H.R. Rep. 88–914 (1963), reprinted in U.S. Equal Emp't. Opportunity Comm'n., *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2064–65 (Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152) (1968). Congress and courts have consistently rejected such arguments since the passage of Title VII. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (“[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.”). But some scholars continue to argue that Title VII violates employers' associational rights. See, e.g., Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75, 81 (2004) (“[T]he effort to impose a general antidiscrimination law such as Title VII fails to meet constitutional standards because it violates the general norm of free association, albeit with less severe consequences, every bit as much as a law that might mandate forced marriage.”).

37. 42 U.S.C. § 2000e(b) (2006). Similar reasoning has long exempted domestic workers from various workplace protections. See Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1841 (2007)

Schultz argue that this exemption should be expanded, but her arguments do call for an acknowledgment of the potentially intimate nature of work, even for larger employers.³⁸ Although Title VII's fifteen-employee threshold could be interpreted as separating the solely productive workplaces from the ones that are simultaneously productive and intimate, Schultz's argument relies on a rejection of that interpretation. Unlike Title VII's early opponents, Schultz supports the goals of workplace antidiscrimination law while also emphasizing that such goals should not, and cannot, purge the workplace of the intimacy that many individual employees experience and value as they go about accomplishing their workplace tasks.³⁹

Other legal scholars have also recognized the value of relationships that exist at work, but have done so because such relationships possess value beyond that experienced by the individual employees involved.⁴⁰ Cynthia Estlund, in particular, celebrates the ties and friendships that develop between workers of different races as necessary for achieving a world free of racism and white privilege, given that other areas of life are increasingly segregated.⁴¹ In contrast to Schultz, then, Estlund values affective ties at work primarily for instrumental reasons, prioritizing structural change over connections experienced by individual workers.

Although Estlund's approach to workplace ties may seem to constitute a middle ground between Schultz and Case, in the end Estlund's approach is much closer to Case's than Schultz's. Estlund recognizes the value of only those workplace relationships that by their very nature are consistent with antidiscrimination goals. Relationships that may conflict with those goals are not the

("The lack of adequate protection partially reflects an employment law framework that presupposes a world in which workers leave the confines of their private homes and travel to public workplaces.")

38. See generally Schultz, *supra* note 29.

39. *Id.* at 2136–39.

40. The two primary examples are Cynthia Estlund and Noah Zatz. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63 (2002).

41. ESTLUND, *supra* note 40, at 9–15, 60–83.

workplace bonds that Estlund celebrates.⁴² Like Case, who would support all workplace intimacy once we are all “perfectly bisexual,”⁴³ Estlund would appear to support all workplace intimacy in a world where racial hierarchy no longer exists.⁴⁴ Until that time, only those workplace relationships that challenge, instead of replicate, traditional patterns of association will be valuable in Estlund’s view.

In sum, with the primary exception of Schultz, legislators and legal scholars have explicitly considered relationships at work only to the extent that those relationships either threaten or further equality in the workplace and the larger society. Legislators and legal scholars almost universally view severe or pervasive unwelcome sexual advances as constituting impermissible sex discrimination, and therefore call for the regulation of such interactions.⁴⁵ Case calls for this regulation to go a step farther, to encompass workplace decision-making based on personal relationships rather than qualifications.⁴⁶ Legislators have not extended workplace regulation in this manner, however, remaining silent about workplace friendships and connections that do not operate in explicitly discriminatory ways. This legislative silence about most relationships at work likely does not reflect a legislative judgment about the value of such relationships, but instead likely reflects the general policy of deferring to employer prerogatives in areas not tainted by impermissible discrimination.⁴⁷ Schultz is therefore largely alone in

42. Noah Zatz, too, primarily embraces only those forms of solidarity that further Title VII’s antidiscrimination goals. Zatz, *supra* note 40, at 65–70.

43. Case, *supra* note 26, at 158.

44. ESTLUND, *supra* note 40, at 63–80.

45. Of course, there is debate over the scope of this regulation. As previously discussed, Schultz expresses concern that employers’ fear of sexual harassment liability often leads to regulation of a much broader range of consensual sexual interactions at work. Schultz, *supra* note 29, at 2087. Janet Halley also takes issue with approaches that assume all unwelcome sexual advances in the workplace are problematic. See JANET E. HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 283–85, 290–303 (2006). At the very least, Halley, like Schultz, criticizes the ways that the current construction of sexual harassment law regulates behavior that is not necessarily severe, pervasive, and/or unwelcome. *Id.*

46. Case, *supra* note 26, at 158.

47. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (stating that Title VII “eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice” and explaining the Court’s task as drawing a “balance between employee rights and employer prerogatives”); see also *supra* notes 13–15 and accompanying text.

supporting the freedom to engage in workplace relationships based on the value of such relationships to individual employees.⁴⁸

Under these various legal approaches, workplace relationships are evaluated based on their value to individual employers and employees or their effect on workplace equality. In turn, legislators and legal scholars believe such relationships should be left to individual choice, of either the employer or employees, or treated as discrimination. Given this state of law, legislators and legal scholars have not considered how personal relationships may affect workplace dynamics beyond discrimination or whether law should affirmatively support at least some forms of workplace intimacy. The next Part begins a consideration of these neglected issues by turning to social science literature examining workplace intimacy more broadly.

II. SOCIAL SCIENCE CONSIDERATIONS OF RELATIONSHIPS AT WORK

Social science literature analyzing workplace intimacy generally explores a broader range of connections between personal relationships and work than those considered by legislators and legal scholars. Like workplace law, some of this analysis considers the potential harms of personal relationships at work, albeit mostly from the perspective of employers concerned about workplace productivity.⁴⁹ The vast majority of the social science literature, however, chronicles the ways that relationships at work may lead to improved outcomes for employees and employers alike. As Ethan Leib summarizes this aspect of the literature: “Employees with friends at the workplace are more efficient than their peers, suffer less stress at the office, tend to stay at their jobs longer, and experience less job dissatisfaction.”⁵⁰

48. Schultz, *supra* note 29, at 2191–92.

49. See, e.g., Evan M. Berman, Jonathan P. West & Maurice N. Richter, Jr., *Workplace Relations: Friendship Patterns and Consequences (According to Managers)*, 62 PUB. ADMIN. REV. 217, 222 (2002); Sharon Foley & Gary N. Powell, *Not All is Fair in Love and Work: Coworkers' Preferences for and Responses to Managerial Interventions Regarding Workplace Romances*, 20 J. ORGANIZATIONAL BEHAV. 1043, 1044 (1999); Sharon A. Lobel, Robert E. Quinn, Lynda St. Clair & Andrea Warfield, *Love Without Sex: The Impact of Psychological Intimacy Between Men and Women at Work*, ORGANIZATIONAL DYNAMICS, Summer 1994, at 4, 11.

50. ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND

Even more interestingly, the social science literature has increasingly emphasized the ways that personal relationships are a fact of the workplace,⁵¹ with highly contextual effects.⁵² Viviana Zelizer recently wrote: “When it comes to the positive or negative impact of intimacy, the crucial fact is not the sheer presence of intimate relations, but the type of relation and its location within the larger web of connections within the organization.”⁵³ Some scholars attribute such intimacy to the entrance of married white women into the workforce beginning in the 1970s, but in fact “Americans made the workplace a site of social as well as economic life” from the start of the twentieth century.⁵⁴ This social aspect of work has not been

WHAT THE LAW HAS TO DO WITH IT 40 (2011) (citing various sources in the fields of sociology and labor economics); *see also* Viviana A. Zelizer, *Intimacy in Economic Organizations*, in *ECONOMIC SOCIOLOGY OF WORK* 23, 29–31 (Nina Bandelj ed., 2009) (also citing various studies by economic sociologists, organizational analysts, scholars of sociology and the law, and specialists in work and occupations). For some earlier studies concluding that work relationships have a net positive effect, see Christine M. Riordan & Rodger W. Griffith, *The Opportunity for Friendship in the Workplace: An Underexplored Construct*, 10 *J. BUS. & PSYCHOL.* 141, 151 (1995) (“[F]riendship within the work environment may be severely underrated and underutilized as a condition for individual and organizational effectiveness.”); Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-workers*, 72 *SOC. FORCES* 843, 850 (1994) (using the 1986 General Society Survey to generalize that “[f]or millions of American workers—approximately half—close friendships are formed among co-workers, ‘important matters’ are discussed with them, and such discussions are associated with greater job satisfaction”).

51. For a critique of earlier social science studies that instead confined intimacy to the home and other private retreats from economic production, including “free-floating friendships,” see Marks, *supra* note 50, at 844–45.

52. *See, e.g.*, Christine L. Williams, Patti A. Giuffre & Kirsten Dellinger, *Sexuality in the Workplace: Organizational Control, Sexual Harassment, and the Pursuit of Pleasure*, 25 *ANN. REV. SOC.* 73 (1999) (arguing that sexual activity in the workplace is neither good nor bad but instead must be evaluated by considering the consent to such activity and context-specific boundaries).

53. Zelizer, *supra* note 50, at 24; *see also id.* at 25 (defining intimacy as “privileged access to another person’s attention, information, and trust, all of which would damage the person if widely available to other people”); *id.* at 33 (stating that “[s]exual, kinship, and friendship relations are all impressively prevalent in workplaces” and quoting Deirdre McCloskey’s statement that “[m]odern capitalist life is love-saturated”); Gary Alan Fine, *Friendships in the Work Place*, in *FRIENDSHIP AND SOCIAL INTERACTION* 185 (Valerian J. Derlega & Barbara A. Winstead eds., 1986) (discussing how different types of work allow for and foster different types of friendships based on the structure of the job, the composition of the workforce, the degree to which workers are permitted to be autonomous, and the degree to which the job can be left at work instead of pervading off-work hours).

54. CLAUDE S. FISCHER, *MADE IN AMERICA: A SOCIAL HISTORY OF AMERICAN CULTURE AND CHARACTER* 150 (2010); *see also id.* at 133–34 (describing the formation of workplace ties from the beginning of the twentieth century); RANDY HODSON, *DIGNITY AT WORK* 200–25

limited to one type of workplace, such as white-collar workplaces, but instead can pervade multiple forms of work, including factory lines.⁵⁵

Some relationships at work may substitute for intimacy traditionally thought to occur within the home. As Stephen Marks concluded, “millions of people probably find in co-workers some support, nurturance, companionship, and approbation not available to them at home, either because they have no spouse or spouse-like partner, or because they get little or no such rewards if they have one.”⁵⁶ These rewards may also include sex, as recent surveys of employees and human resource professionals report that between 40 and 47 percent of workers have been involved in at least one “workplace romance” at some point in their working lives.⁵⁷

However, relationships at work do not merely possess the assumed rewards of relationships at home; in fact, intimacy at work may be much different than intimacy at home. Workplace bonds constitute “an expressive subworld that runs parallel to the instrumentalities of the job for which one is paid, often using and playing off of those instrumentalities to elaborate itself, but not restricted to job concerns for its further development.”⁵⁸ As such, work relationships may be much more defined by workplace dynamics than the dynamics of the home. Moreover, workplace intimacy necessarily mixes with the work of the workplace, often in complex ways. That mixing means that most intimacy at work is

(2001) (compiling and analyzing more than one hundred workplace ethnographies from the 1930s onward). Of course, the entrance of more married women into the workforce altered the social significance of work, which in turn affects the social significance of workplace ties even if such ties long pre-dated Title VII. The nature of workplace ties also likely has been affected by other social phenomena that have similarly made the workplace of greater importance, including the role the workplace has come to play in providing employees with health insurance.

55. See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 188 (1997) (chronicling social bonds that developed on a factory line, providing “friends to joke with and confide in”).

56. Marks, *supra* note 50, at 853; see also HOCHSCHILD, *supra* note 55, at 42 (“Research shows that work friends can be as important as family members in helping both men and women cope with the blows of life.”).

57. Zelizer, *supra* note 50, at 35.

58. Marks, *supra* note 50, at 854.

neither simply an instrument of workplace success nor irrelevant to that success.⁵⁹

Both the prevalence and varied nature of workplace relationships have led social scientists to conclude that “no practical policy of banning or radically containing intimacy is likely to work within economic organizations.”⁶⁰ Unlike similar arguments made by Schultz, however, such conclusions acknowledge the positive aspects of workplace relationships beyond the individual expression trumpeted by Schultz, as well as the potential harms of such relationships beyond the favoritism criticized by Case. As such, the social science literature permits a more nuanced consideration of the benefits and risks of workplace relationships than is present in the legal literature.

Moreover, these benefits and risks are often intertwined. Interviews and surveys conducted by Arlie Hochschild revealed that working parents often agreed that “work feels like home should feel” because emotional support is more readily available in the workplace than at home.⁶¹ Women in particular may take a job in order to “take out an emotional insurance policy on the uncertainties of home life.”⁶² This research leads to more complex understandings of the benefits of workplace relationships, but it also points to the potential for more complex harms, including more complex forms of inequality. If female employees experience emotional support and intimacy at work, for example, they may be more likely than their male colleagues to stay in a given job even if opportunities for

59. See Rachel L. Morrison, *Are Women Tending and Befriending in the Workplace? Gender Differences in the Relationship Between Workplace Friendships and Organizational Outcomes*, 60 *SEX ROLES* 1, 1 (2009) (“It is assumed that people do not initiate and maintain relationships at work simply as a means to assist them in their organizational objectives or work activities. Indeed most people, in and out of the work environment, seek to make friends and social connections for the intrinsic rewards that these relations provide.”); Nick Rumens, *Working at Intimacy: Gay Men’s Workplace Friendships*, 15 *GENDER, WORK & ORG.* 9 (2008) (discussing ways that workplace friendships may create a sense of belonging both at work and outside of it, thereby improving workplace productivity as well as happiness at work and beyond).

60. Zelizer, *supra* note 50, at 35.

61. HOCHSCHILD, *supra* note 55, at 200.

62. *Id.* at 201; see also ARLIE RUSSELL HOCHSCHILD, *THE COMMERCIALIZATION OF INTIMATE LIFE: NOTES FROM HOME AND WORK* 204 (2003) (“A loss of supportive structure around the family may result in a gain for the workplace, and vice versa.”).

workplace advancement are low or nonexistent.⁶³ Far from being a free choice, this trend may be heavily influenced by gender role socialization. Women may value intimacy at work because it is unmoored from expectations that women should perform unpaid labor in the home and men should be breadwinners. Or women may be so used to providing unpaid labor in the home that it is unremarkable (to them and others) also to perform unpaid or underpaid labor at work.⁶⁴

Workplace relationships may therefore perpetuate historical forms of inequality even in the absence of employer animus or favoritism. For example, one general survey found that friendship at work “trumped such seemingly obvious employee motivators as pay and benefits” for both male and female employees.⁶⁵ More in-depth studies have revealed, however, that this is likely more true for women than men. In a study of female retail establishment employees, one female employee stated:

The money is just immaterial. If you can't establish relationships and if you can't establish people actually coming here, then all of that hard work and selling, getting that merchandise in and ordering it, really isn't worth it. I guess seeing that customers are happy and they're leaving and people are laughing and having a good time, that is reaping all of the benefits of just being friendly and outgoing and knowing that they are our number one priority.⁶⁶

Another study found that “[w]hen women report increased social support, more opportunities for friendships and/or increased prevalence of friendships [in the workplace] they were less likely to be planning to leave their job; while the friendship variables were not

63. See, e.g., Rebekah Peeples Massengill, “*The Money is Just Immaterial*”: *Relationality on the Retail Shop Floor*, in *ECONOMIC SOCIOLOGY OF WORK*, *supra* note 50, at 185, 197–200; Morrison, *supra* note 59, at 9–11.

64. Cf. Karen Ramsay & Gayle Letherby, *The Experience of Academic Non-Mothers in the Gendered University*, 13 *GENDER, WORK & ORG.* 25, 35–41 (2006) (finding that mothers and non-mothers alike are affected by the ideology of motherhood at work, including being perceived as “natural” caregivers).

65. Susan Ellingwood, *The Collective Advantage*, *GALLUP MGMT. J.*, Sept. 15, 2001, <http://gmj.gallup.com/content/787/collective-advantage.aspx>.

66. Massengill, *supra* note 63, at 197–98.

related to intent to leave for men.”⁶⁷ The study’s author thus speculated that “women may perceive friendship as a necessary aspect of work, whereas men may see their organizational friendships as an added bonus.”⁶⁸

Therefore, although the social science literature emphasizes that workplace relationships often affect workplace success, such effects consist of more than discrimination or favoritism. Instead, workplace friendships may lead to outcomes that are simultaneously positive and negative as they promote stability, workplace success, and individual employee happiness while also limiting opportunities to seek out more lucrative experiences with other employers.

III. AN AGENDA FOR ALTERNATIVE LEGAL APPROACHES

Insights from the social science literature discussed above may influence legal responses to work relationships in multiple ways. Below I analyze three broad directions in which law could move, in the process setting forth an agenda for more detailed analyses of work relationships in the future.

A. Personal Relationships Throughout Life and Law

Both the case law and social science literature reveal that affective bonds can and often do occur in various aspects of the workplace and throughout individuals’ working lives.⁶⁹ Despite this acknowledgement, the larger legal system does not contemplate how such bonds relate to the bonds celebrated in legally recognized families or other forms of personal relationships not explicitly recognized by family law. Instead, laws relating to the family and laws relating to the workplace remain distinct and different, with family law channeling certain affective interactions into marriage and particular understandings of the parent-child relationship, and employment law largely ignoring affective interactions unless they constitute prohibited sexual harassment.

67. Morrison, *supra* note 59, at 9.

68. *Id.* at 11.

69. See *supra* notes 13–15, 33–35, 40–44, 49–58 and accompanying text.

This legal assignment of intimacy to the family to the exclusion of other sites of intimacy may be the best way for law to regulate and shape the emotions and dependencies that arise from personal relationships. But legal scholars have not examined the underpinnings of this intuition or its implications. Family law scholars have engaged in intense debates about the boundaries of the legal family, largely by asking whether function should supplement or even replace formal definitions of the legal family.⁷⁰ That emphasis on function, however, generally has not been extended to affective interactions that do not look like either marriage or the parent-child relationship. In addition, functional approaches have ignored affective interactions that take place in locations other than the home, even if such interactions embody the care, support, and intimacy at the heart of functional definitions of the family.

In earlier work, I called on family law scholars to extend the functional approach to examine the various locations of family functions.⁷¹ I also urged family law scholars to interrogate the boundaries of family law, in contrast to the boundaries of the family, in order to reveal how family law implicitly regulates relationships, such as friendship, that are not included within the boundaries of the legal family.⁷² The above examination of relationships at work has convinced me that I did not go far enough. My previous recommendations are still unduly tied to existing legal definitions of family and to common assumptions that personal relationships can and should be confined to the domain of family law, however defined. Even if family law is expanded to encompass locations outside of the home and forms of relationship that traditionally have been excluded from family law analysis, a focus on family law continues to assign intimacy to the family to the exclusion of other aspects of life and law. My earlier work thereby implicitly reinforced

70. See Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owning*, 95 W. VA. L. REV. 275, 287–88 (1992–93); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270–72 (1991); Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 576–84.

71. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 877–80 (2007).

72. Rosenbury, *supra* note 8, at 226–29.

the state's focus on relationships in only one domain, the legal family, instead of examining the effects of relationships across all social and legal domains.

Relationships at work challenge that limited focus, thus providing an opportunity for legal scholars to examine intimacy in all its forms and its interaction with other aspects of life, including work and production.⁷³ Indeed, relationships at work reveal that affective bonds occur both throughout all aspects of daily life and throughout many, if not all, areas of law. In future work, I plan to expand upon my previous considerations of marriage and friendship⁷⁴ and upon the analysis of work relationships in this Essay, in order to lay a foundation for a broader analysis of the role of intimacy throughout the life course. I see this analysis as flowing from my earlier work, but the analysis does not depend on acceptance of all of the arguments in that work.

I will begin by focusing on particular forms of work relationships that both mimic and challenge traditional notions of family intimacy, most prominently the relationships of “work wives” or “day spouses.”⁷⁵ I hope other scholars will similarly take advantage of the example of relationships at work to begin a larger interrogation of the effects of confining legal considerations of intimacy to family. Limiting explicit legal consideration to those bonds that resemble family relationships shapes our understandings of the bonds outside

73. Family law scholars have already done this in one sense by incorporating the Family and Medical Leave Act (FMLA) into their analysis. *See, e.g.*, Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17 (2004). However, most analysis of the FMLA focuses on the work/family balance I critique. *See, e.g.*, Katharine Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193 (2004); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443; Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010). As such, the existing scholarship does not examine how the FMLA may affect relationships between coworkers by providing legal support for one type of intimate relationship occurring outside of work while remaining silent about intimate relationships occurring within the workplace.

74. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010); Rosenbury, *supra* note 8; Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227.

75. *See* Laura A. Rosenbury, *Work Wives* (Apr. 1, 2011) (unpublished manuscript) (on file with author).

of that resemblance, potentially overvaluing some forms of intimacy and undervaluing others. By examining affective bonds outside the comfort of the core zones of family law, I hope family law as a field will move beyond analysis of types of intimacy that can be colonized into family forms, and thus beyond the attempts to define, and regulate, the legal family that have been so prominent in family law.⁷⁶

In so doing, family law scholars may destabilize their own identity, as a move away from family toward intimacy more diversely-defined challenges what is meant by family law at all. I urge family law scholars to take this risk, and even to welcome it. The separation of family law from employment law or other areas of law necessarily contributes to simplistic categorizations of everyday life as family or work, intimacy or production, love or money. Legal scholars in and out of family law have recently begun to challenge such categorizations by engaging in compelling analyses of the ways that legal definitions of family play a role in various other areas of law, from criminal prosecution,⁷⁷ defenses,⁷⁸ and sentencing,⁷⁹ to immigration,⁸⁰ and government conflict-of-interest rules.⁸¹ As such, traditional family law considerations have been supplemented by “family and the law” approaches.

This move toward “family and the law” is a promising development, but such approaches still construct family as separate from most aspects of law, as the word “and” implies. Now is the time for scholars of family and employment law, as well as scholars in other areas of law, to build upon these approaches in order to challenge the legal assignment of relationships, affection, and intimacy to the legally defined family as opposed to other legal

76. See *supra* text accompanying notes 70–72.

77. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009) (examining the relationship between statutory rape laws and marriage laws).

78. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 6–9, 43–45 (2009).

79. *Id.* at 12–16, 48–53.

80. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (examining various regulations of marriage in immigration law).

81. Susan Frelich Appleton & Robyn M. Rimmer, *Power Couples: Lawmakers, Lobbyists, and the State of Their Unions*, 24 WASH. U. J.L. & POL’Y 207 (2007) (using the example of power couples to examine the relationship between family law and government conflict-of-interest laws).

domains. Indeed, various forms of intimacy could be a subject of every law school class. Conceptions of family law may blur into other forms of legal analysis as a result, but that is likely a cause for celebration rather than fear. The boundaries between family and other aspects of life are more blurred and fluid than is reflected in current legal doctrine, and such boundaries might become even more fluid if scholars interrogate and challenge the regulatory force of current legal definitions of family in all aspects of life and law.

B. Personal Relationships and the Quest for Workplace Equality

Employment discrimination doctrine and scholarship also reflect simplistic categorizations of everyday life as family or work, intimacy or production, love or money. Existing doctrine that largely defers to employer prerogatives with respect to workplace relationships⁸² serves as another reminder that the state explicitly supports and regulates personal relationships only when they occur in non-work domains. The one personal interaction governed by Title VII rather than employer prerogatives—sexual harassment—is not considered a relationship at all but instead is defined as a discriminatory power dynamic. Similarly, scholarship calling for more regulation of workplace relationships in order to combat favoritism assumes that merit can always be separated from relationship and thus, that production can and should be separated from intimacy.⁸³

In many ways, these approaches to workplace relationships reflect underlying themes and tensions within all of workplace antidiscrimination law. The general deference to employer prerogatives in all hiring, firing, and promotion decisions unless those decisions are discriminatory assumes that discriminatory intent is a phenomenon distinct from all other workplace dynamics. Pursuant to that assumption, the workplace will promote equality so long as assessments of individual merit are not tainted by animus. Some scholars have recognized the limitations of this assumption, calling for a structural turn toward workplace equality that moves

82. See *supra* notes 13–15 and accompanying text.

83. See, e.g., Case, *supra* note 26.

beyond litigation interrogating the intent of employers' decision-makers.⁸⁴ Other scholars believe that intent can be better understood and combated within the context of larger workplace dynamics, in large part by uncovering the ways that implicit bias, as opposed to animus, can affect employment decisions.⁸⁵ The call to eliminate favoritism at work can be seen as a subset of this attempt to eliminate implicit bias, as workplace relationships are thought to favor some groups over others given patterns of intimacy outside of work.

More in-depth examinations of relationships at work like the ones I propose are likely to provide new insights into these themes and tensions, particularly if such examinations move beyond the characterization of such relationships as either benign or discriminatory. Employment decisions that take personal relationships into account are not the product of animus, but that does not mean that such relationships are, or should be, irrelevant to the quest for workplace equality. Indeed, by acknowledging the various ways that relationships at work may influence workplace opportunities, I hope to begin new conversations about the ways antidiscrimination law might move beyond an animus-based framework.

First and foremost, workplace ties challenge the notion, embraced by lawmakers and scholars alike, that employees are autonomous wage-earners who simply need an opportunity to display their "individual merit" to workplace decision-makers. Instead, many employees rely on the support of others to make a living and succeed in the workplace. Employees therefore are not autonomous and their "merit" is not solely the product of individual ability. Feminist legal theorists have long acknowledged the support that many male workers receive from sources outside of the workplace, from stay-at-home wives or even working wives and other family members, and the ways that workers who do not have such support are often

84. See sources cited *supra* note 28.

85. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 978–88 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1535 (2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1027–52 (2006).

hampered.⁸⁶ But these theorists have not examined the support that workers do, or do not, receive from personal relationships within the workplace itself.⁸⁷ Focusing on relationships within the workplace, rather than outside of it, may better challenge the embrace of individual merit that continues to pervade most of the theorizing about workplace antidiscrimination law.

Second, such a focus on workplace relationships permits analysis of the ways that supportive ties within the workplace may constitute a crucial component of workplace success. Of course, a focus on favoritism also recognizes that relationships within the workplace may be a condition of success in the workplace, as critiques of the “old-boys network” emphasize. The social science literature reveals, however, that another layer of support often underlies workplace success, a form of support that goes beyond making the right connections or “sucking up” to the right people.⁸⁸ Workplace friends instead may serve as trusted sounding boards or otherwise may help workers get through daily experiences of job stress and anxiety. As such, workers often need supportive relationships both at home and at work in order to succeed in the workplace.

Third, this analysis of the importance of workplace ties may have consequential implications for legal rules designed to guarantee equal opportunity in the workplace. Theories of workplace equality that rest on permitting individual merit to rise above irrational discrimination are likely to be inadequate unless they consider which employees are most likely to receive support from workplace relationships and how that support contributes, and should contribute, to employers’

86. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 17–49 (2004); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 4–6 (2000).

87. For example, Joan Williams, discussed *infra* text accompanying note 96, recognizes that the carework women have traditionally performed within the home has effects outside of the home, in particular by serving as the (feminine) work against which (masculine) wage work is defined, but Williams overlooks the ways that carework also is performed outside of the home. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, *CHI-KENT L. REV.* 1441, 1442, 1474–76 (2001). Some of Martha Fineman’s work contains this blind spot as well, see, e.g., FINEMAN, *supra* note 86, at 188–95, although her more recent work seeks to analyze vulnerability arising in more varied contexts, see Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008).

88. See *supra* Part II.

assessments of employees' merit. In future considerations of specific workplace relationships, I plan to consider which employees are most likely to engage in reciprocal supportive relationships at work, which employees are most likely to receive such support but not give it, which employees are most likely to give such support but not receive it, and which employees are excluded from workplace relationships altogether. In addition, I will consider whether certain groups of employees, particularly employees of color and gay and lesbian employees, need to do more "identity work" to participate in such relationships than do employees who are white and straight.⁸⁹ If, despite Estlund's hopes,⁹⁰ workplace relationships track even loosely the dominance of gendered heterosexual and intraracial relationships outside of the workplace, then antidiscrimination law must take such workplace relationships into account.

This accounting likely will need to go well beyond a focus on the favoritism of individual decision-makers. Intimacy and affection in the workplace generally cannot be traced to a set of people in power and then eliminated. Rather, as Zelizer and others emphasize,⁹¹ intimacy often pervades the workplace, occurring not just in the vertical supervisor-supervisee relationships, upon which critics of favoritism focus, but also in co-worker relationships, relationships with customers and vendors, and the like. Moreover, much of this intimacy can produce better outcomes for both employers and employees.⁹² Beyond the arguments of Case and Schultz, the task of workplace antidiscrimination law is to analyze the ways that such intimacy supports or harms the success of individual employees and to determine whether that support and harm tracks traditional patterns of inclusion and exclusion. If it does, then antidiscrimination law must move well beyond a focus on individual merit, favoritism, or animus in order to develop a theory that incorporates the importance of personal relationships in the workplace and beyond.

89. This is an extension of the identity work first discussed by Devon Carbado and Mitu Gulati. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). I am indebted to Carbado and Gulati for the title of this Essay.

90. See *supra* text accompanying note 41.

91. See *supra* notes 50–58.

92. See *supra* text accompanying note 50.

C. Personal Relationships Across Public/Private Divides

Many theorists, including Estlund and feminists of various persuasions, have posited the workplace as a site of liberation from private and societal discrimination.⁹³ As Hochschild revealed, work is a place where women in particular are often freed from the gendered caregiving expectations that pervade the family home.⁹⁴ The analysis above, however, challenges the suggestion that care is therefore irrelevant to the workplace. Instead, care and support can be just as crucial in the workplace as they are in the home, even if that care and support is of a different nature in the two realms.⁹⁵ It seems unlikely, then, that gendered and racialized patterns of care completely disappear in the workplace. Dynamics of care cross the divides between public and private realms, problematizing any strategy for equality that relies on the distinctiveness of those realms rather than their similarities.

Joan Williams and others have already challenged the idea that work can be a site of women's liberation by analyzing the ways that the ideal worker is assumed to have no caregiving responsibilities outside of work that may interfere with work duties, an assumption that rarely matches the realities of women's lives.⁹⁶ These advocates of "work/family balance" have made important contributions to theories of workplace equality by analyzing the ways in which family care responsibilities affect work opportunities, but their rhetoric of balance assumes a separation between work and family, and between production and care. In this view, care is a factor external to the workplace, but employers must take such care into account in order to achieve gender equality within the workplace. Employers are therefore left with the message that dynamics of care within the

93. See, e.g., ESTLUND, *supra* note 40; Meredith Render, *The Man, The State and You: The Role of the State in Regulating Gender Hierarchies*, 14 AM. U. J. GENDER SOC. POL'Y & L. 73, 110–15 (2006); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1905–09 (2000).

94. See HOCHSCHILD, *supra* note 55, at 200; HOCHSCHILD, *supra* note 62, at 204.

95. See *supra* Part II.

96. See, e.g., WILLIAMS, *supra* note 86, at 64–72; Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1801–11 (2007); Williams, *supra* note 87, at 1474–76.

workplace either do not exist or are irrelevant to women's success unless they constitute animus-based discrimination.

By instead exploring the ways that care permeates divides between work and family, legal scholars may glean new insights about appropriate legal responses to personal relationships, dependency, and individual choice throughout various aspects of life. For instance, the social science literature chronicled above challenges the common assumptions that family relationships and friendships outside of the workplace are ends in and of themselves, whereas work relationships are instrumental, existing solely to further individual financial or career success. To the contrary, employees may pursue workplace relationships for the "intrinsic rewards" of such ties,⁹⁷ whereas some family and dating relationships and some friendships may be quite transactional.⁹⁸ Despite this fluidity of purpose, law affirmatively supports only those relationships upon which it bestows the legal status of family. Just as I have explored how law could support friendship in ways that do not depend on collapsing friendship into family,⁹⁹ I hope to explore in future work ways that law might support and monitor workplace relationships without collapsing them into family.

The state may have an interest in supporting and monitoring workplace relationships in some fashion, instead of deferring to employer prerogatives, because of the dependencies that may arise within such relationships. The state has long justified its recognition of certain family relationships to the exclusion of others as necessary to privatize the dependency of certain family members, traditionally the dependencies of women and children on their husbands and

97. Morrison, *supra* note 59, at 1.

98. See VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 47–56, 94–147 (2005) (discussing ways that intimate relationships often involve market exchanges, thus leading to commodification in family law and coupling not explicitly affected by family law); Rosenbury & Rothman, *supra* note 74, at 845–46.

99. See Rosenbury, *supra* note 8, at 226–33. In this respect, I agree with Ethan Leib that friendship should not be subsumed within family. See LEIB, *supra* note 50, at 15–19. However, that does not mean, as Leib suggests, that the law should purge all sexual relationships from the friendship category. Instead, sex can be aligned with friendship just as easily as it can be aligned with marriage or family, and there is no need to prohibit that fluidity unless one wants to reinforce compulsory heteronormativity.

fathers.¹⁰⁰ Workplace dependencies are not as obvious as these family dependencies, but they likely exist on some level. Indeed, the state's deference to employer prerogatives may in fact be another form of the privatization of dependency, whereby employers are largely left alone so long as they pay wages that keep their employees from needing state assistance.¹⁰¹ In other words, employers provide the wages that permit families to exist without direct financial support from the state. If, in turn, workplace success depends on relationships in the workplace, scholars could make strong arguments about why the state should care about such relationships within the existing framework of the state's desire to privatize dependency.

Determining the contours of potential state support and monitoring of relationships at work will likely require more radical interventions. My future projects will lay out various possibilities for legal treatment of workplace intimacies, with a focus on treatments that recognize the importance of such intimacies without reinforcing gendered and racialized patterns of care and intimacy that occur outside of the workplace. Part of that task involves asking who benefits from workplace relationships and who does not, as set forth in the previous section, thus situating such relationships within larger societal structures. In particular, I want to mitigate the risk that those

100. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 7 (2000) (recounting how the state recognized marriage as an incentive for individual men to assume private responsibility for women and children in an era when women had few political and economic rights); Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 *IND. L.J.* 517, 533 (1998) (discussing the state's general use of marriage to privatize the dependency of both children and wives); Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 *J. GENDER SOC. POL'Y & L.* 415, 417 (2005) ("More specifically, society has called upon family law to address the economic needs of women and children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce.").

101. The Supreme Court has long relied on this rationale to uphold minimum wage laws. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) ("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 for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay."). For critiques of this rationale for the minimum wage, see Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 31, 57–58 (Annette Bernhardt et al. eds., 2008); Noah Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 *U. CHI. LEGAL F.* 1, 9–23.

work relationships that most resemble traditional family relationships, rooted in heteronormativity, gender hierarchy, and racial homophily, will be privileged by employers and employees alike.¹⁰²

But even more so, the task will require an examination of the interplay between individual workers' choices and employer practices. Some workers may want to stay in a particular job to maintain workplace relationships, among other factors, but may not be able to do so because of layoffs or other employer practices. In this situation, most observers see employer practices trumping individual choice. Other workers may choose relationships at work that track societal inequality instead of freeing them from it. Observers generally view this situation as solely the product of individual choice, as opposed to employer practices, but the dynamics may, in fact, be more complicated.

For example, as discussed in Part II, some women, unlike most men, may stay in a particular workplace instead of pursuing more lucrative alternatives in order to maintain workplace relationships. Current legal doctrine simply chalks this dynamic up to individual preferences without interrogating how the structure of the workplace may shape those preferences. Once analyzed in more depth, however, it is possible to see individual choice as shaped by the nature of the workplace and the market more generally. Women may subordinate their economic interests at work in order to maintain workplace ties, thereby replicating patterns of female sacrifice present in the home.¹⁰³ Or they may choose to value intimacy in response to stressful, unstable, or otherwise problematic working conditions.¹⁰⁴ Relationships at work may make work more bearable, and more human, challenging the idea that those relationships are solely the product of individual choice.

102. Despite Estlund's hopes, racial homophily is a likely possibility in the workplace. *See generally* Kelly A. Mollica, Barbara Gray & Linda K. Treviño, *Racial Homophily and Its Persistence in Newcomers' Social Networks*, 14 *ORG. SCI.* 123 (2003); Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 *ANN. REV. SOC.* 415 (2001).

103. *See* Rosenbury, *supra* note 74, at 1278–82.

104. *See* Massengill, *supra* note 63, at 195–200; Morrison, *supra* note 59, at 9–11.

Moreover, such relationship choices may also be influenced by the dynamics of the home. Although women may not be wholly liberated from care expectations in the workplace, such expectations at work may be preferable to those in the home. Women may actually enjoy the opportunity to experience emotional ties in the workplace that are less subsumed by domesticity and dependent care.¹⁰⁵ That enjoyment does not necessarily mean, however, that women who forego work opportunities to maintain workplace ties either are freely choosing lower wages or are falsely conscious. Instead, their work trajectories may be the product of a complex combination of individual choice, the structural constraints of home and work, and the relationships that both mediate and contribute to those constraints.¹⁰⁶

In these ways, considering the dynamics of care that flow between the public and private divides of work and home may unearth new sources of inequality and new strategies for combating that inequality. Such strategies will likely be most successful if they do not focus on individual animus or choice to the exclusion of societal structures, or vice versa. Rather, blurring the public/private divide in this manner also requires a blurring of the divide between societal inequalities and individual preferences. To do so most effectively, employment discrimination scholars, family law scholars, and other legal scholars must work together to examine the myriad roles of personal relationships across traditional legal divisions.

CONCLUSION

This Essay sets forth the mere beginnings of an agenda for potential legal responses to personal relationships in the workplace. This preliminary consideration reveals, however, that relationships at work are rarely motivated exclusively by love or money, to use the terms of this symposium volume. Instead, all personal relationships, regardless of location, are the product of a complex mix of need and

105. See HOCHSCHILD, *supra* note 55, at 200; HOCHSCHILD, *supra* note 62, at 204.

106. For discussion of similar dynamics that may influence women's choices to seek out certain jobs, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815–38 (1990).

affection, and of individual choice, structural constraints, and societal privilege and inequality. If scholars and lawmakers believe the state has an interest in intimate life, they must think across the divides of home and work, intimacy and production, and connection and individuality. I look forward to future explorations of the ways that working relationships may thus provide paths toward new legal conceptualizations of equality, freedom, and community for individuals in all aspects of life.