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## The Law, Economics, and Medicine of Off-Label Prescribing

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## THE LAW OF INTIMATE WORK

Naomi Schoenbaum\*

*Abstract:* This Article introduces the concept of intimate work—intimate services provided by paid workers to a range of consumers—and seeks to unify its treatment in law. The concept explains multiple exceptions to work law that have previously been viewed as random and even contradictory. From the daycare worker to the divorce lawyer, the nurse to the hairstylist, intimate work introduces an intimate party—the consumer—into the arm’s-length employer-employee dyad on which work law is premised. This disruption leads to limited enforcement of non-compete agreements, the waiver or imposition of fiduciary duties, and exceptions to wage-and-hour and antidiscrimination law, among other consequences.

The current ad hoc approach to intimate work does harm. Law’s separate regulation of intimacy and work fails to recognize the special value and vulnerability generated when the two overlap. At times, law protects only a narrow subset of intimate work, as the existing approach to non-compete agreements reveals. At other times, law gets intimate work backward, taking away protection at precisely the moment more protection is needed, as is the case with antidiscrimination law. The resulting law permits employers to promote discrimination in the formation of intimate work bonds, to discipline intimate workers who act to benefit consumers, to expose intimate workers and consumers to the abuse of personal information, and to break valuable intimate work bonds with impunity. These harms are only magnified with the rise of intimate work.

This Article proposes a unified law of intimate work sensitive to the value and vulnerability it generates. This law has implications for a wide swath of doctrines, and for gender equality, as women are especially harmed by the failure to value intimate work. Much of this law can be achieved by analogical adaptation of time-proven doctrines. For example, law should no longer ignore lost intimate work bonds as an injury when evaluating non-compete agreements or crafting remedies for termination. In other situations, new approaches are needed, such as limits on employers’ ability to cultivate discriminatory consumer preferences. In the end, this new law of intimate work is designed to protect intimate workers and consumers while valuing relationships that are central to everyday life.

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INTRODUCTION .....	1169
I. INTIMATE WORK .....	1174
A. Definition and Typology .....	1175
B. Common Consequences .....	1179
II. THE LAW OF INTIMATE WORK (AND WHAT IS MISSING).....	1185
A. Legal Categories of Intimacy and Work .....	1185
B. Discrimination.....	1187
1. Title VII and the BFOQ.....	1190
2. Public Accommodations Law.....	1196
C. Sacrifice.....	1198
1. Wage-and-Hour Law .....	1200
2. Retaliation.....	1202
D. Exposure.....	1205
1. Fiduciary Duties .....	1206
2. Harassment .....	1208
3. Workers' Compensation .....	1209
E. Lost Investments .....	1209
1. Non-Compete Agreements .....	1211
2. Duty of Loyalty .....	1214
3. Trade Secrets .....	1215
4. Termination and Transfer.....	1216
III. THEORIZING A NEW LAW OF INTIMATE WORK.....	1218
A. Why Law .....	1219
1. The Benefits of Law .....	1219
2. Objections and Responses .....	1223
3. The Inadequacy of Private Ordering .....	1225
a. Exit and Voice.....	1225
b. Market Failures .....	1226
B. What Law .....	1228
1. Functional Recognition .....	1228
a. Expanding Recognition.....	1228
b. Initial Recognition .....	1231
c. Reversing Recognition.....	1233
d. Principles.....	1234
2. Additional Recognition .....	1236
a. Discrimination.....	1237
b. Sacrifice .....	1241
c. Exposure .....	1241
d. Lost Investments .....	1243
CONCLUSION .....	1243

## INTRODUCTION

Consider the following cases. A hospital seeking to hire a labor and delivery nurse may consider only women for the position, although such discrimination would be unlawful in hiring almost all other workers.<sup>1</sup> A home health aide hired to provide companionship to an elderly client need not be paid minimum wage or overtime, although an employer would violate wage-and-hour law by failing to pay almost any other worker.<sup>2</sup> A lawyer or therapist owes fiduciary obligations to her clients, although most other workers are held only to arm's-length contractual obligations to their clients.<sup>3</sup> A non-compete agreement restricting a doctor from ongoing relationships with patients is unenforceable, although a court would not hesitate to enforce the same agreement as applied to an accountant, a hairstylist, or most any other worker.<sup>4</sup>

This Article explains and unifies these exceptional cases by introducing the concept of *intimate work*. Intimate work involves the paid provision of services entailing intimacy to a range of consumers. The examples above reveal that law often singles out intimate work for special treatment, creating a de facto law of intimate work. To appreciate the breadth of this phenomenon, one need look no further than two of the most watched Supreme Court cases last term. *Burwell v. Hobby Lobby Stores, Inc.*'s<sup>5</sup> recognition of employers' religious freedom may lead to special treatment for intimate work under antidiscrimination law, permitting wedding vendors, for example, to refuse service to gay couples.<sup>6</sup> And *Harris v. Quinn*'s<sup>7</sup> holding that home healthcare providers are the lone public employees exempt from union dues sets intimate

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1. See *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982) (dismissing case on mootness grounds because the plaintiff found work with another employer, which mooted all of his requested relief).

2. See 29 U.S.C. § 213(a)(15) (2012) (exempting workers who provide companionship to the elderly from wage-and-hour protections). In 2013, the Department of Labor issued regulations that would narrow this exemption. The D.C. Circuit reversed the invalidation of both rules, but it is too soon to tell whether any further review will unsettle this outcome. See *infra* note 181 for further discussion of these rules.

3. See, e.g., *Horne v. Patton*, 287 So. 2d 824, 829–30 (Ala. 1973) (applying fiduciary duties to doctor vis-à-vis patient); *Clancy v. State Bar*, 454 P.2d 329, 333 (Cal. 1969) (en banc) (per curiam) (applying fiduciary duties to attorney vis-à-vis client).

4. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (invalidating non-compete agreement for interfering with the doctor-patient relationship); *Williams v. Hobbs*, 460 N.E.2d 287, 290 (Ohio Ct. App. 1983) (same).

5. 573 U.S. \_\_\_, 134 S. Ct. 2751 (2014).

6. See, e.g., Paul Horwitz, *Hobby Lobby Is Only the Beginning*, N.Y. TIMES, July 2, 2014, at A25.

7. 573 U.S. \_\_\_, 134 S. Ct. 2618 (2014).

work apart under labor law.<sup>8</sup> Despite the special place of intimate work throughout a range of laws, no scholar has yet synthesized the law of intimate work or assessed its effectiveness.<sup>9</sup>

By developing the category of intimate work as a descriptive matter, this Article brings the unique features of intimate work, and its current regulation, into full view. Normatively, the Article reveals the incoherence of the existing law of intimate work. Across a wide swath of doctrines—from antidiscrimination law, to wage-and-hour law, to retaliation protections, to fiduciary law, to non-compete agreements, to the misappropriation of trade secrets, to remedies for unlawful termination—law has not done enough to recognize the unique circumstances of intimate work. This Article argues for a new unified field of intimate work law to protect the circumstances under which intimate workers labor and the public as consumers receive critical services.

Bringing together intimacy and work joins two spheres that law tends to consider separate.<sup>10</sup> Yet, in everyday life, intimacy and work are anything but distinct. Workers—doctors, nurses, divorce lawyers, hairstylists, and bartenders—have long engaged in the intimate aspects of life. More recently, intimate work is on the rise, as workers have come to provide services that were once the hallmark of family life.<sup>11</sup> Dating counselors guide us in how to pick the right partners; wedding planners instruct us in how to create memories; lactation consultants teach us how to breastfeed; and funeral directors arrange our deaths.<sup>12</sup> It is now possible to rent a worker to serve as a mom, husband, grandma, grandpa, or friend.<sup>13</sup>

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8. *Id.* at 2644.

9. Scholars have addressed individual examples of intimate work, but have not explored the category as a unified field in experience or law. See Katharine Silbaugh, *Turning Labor into Love*, 91 NW. U. L. REV. 1, 72–79 (1996) (discussing work law exceptions for domestic care workers); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 156 (2004) (discussing the bona fide occupational qualification to antidiscrimination law as applied to some intimate work).

10. See *infra* Part II.A.

11. See Timothy Noah, *Labor of Love: The Enforced Happiness of Pret A Manger*, NEW REPUBLIC (Feb. 1, 2013), <http://www.newrepublic.com/article/112204/pret-manger-when-corporations-enforce-happiness>.

12. See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF: INTIMATE LIFE IN MARKET TIMES* 9–17 (2012).

13. See, e.g., RENT A MOM INC., <http://www.rentamominc.com> (last visited Aug. 17, 2015) (“The Company with a Heart for Families”); RENT A HUSBAND, <http://www.rentahusband.com> (last visited Aug. 17, 2015) (promising a “handyman . . . in a good mood . . . [e]ven if those nagging household chores have put you in a bad one”); RENT A GRANDMA, <http://rentagrandma.com> (last visited Aug.

While the varieties of intimate work differ, they are united by the presence of a consumer seeking and receiving intimacy. The intimacy consumer disrupts the arm's-length employer-employee dyad that law, in contrast to social science, assumes is at the heart of all employment relationships.<sup>14</sup> The close relationship between the worker and consumer generates value as a source of personal and professional support for both consumers and workers, but also generates substantial vulnerability.<sup>15</sup> Together, this value and vulnerability place participants in the intimate work relationship in a unique position that calls for tailored regulation. But law's separate regulation of intimacy and work creates a blind spot to a social reality—like intimate work—that combines the two. Law thus fails to protect the value and guard against the vulnerability of intimate work. This legal shortcoming has consequences for the promise of work as a site of equality, for the harms that can flow from work, and for the stability of critical relationships.

First, intimate work raises vulnerability to *discrimination*. The close relationships formed by intimate work are valuable as a site for combatting bias, but these relationships also introduce another party into the employment relationship—the consumer—who can discriminate against the worker and against whom the worker can discriminate.<sup>16</sup> Rather than using intimate work to promote equality, law exempts certain intimate workers from protection.<sup>17</sup> For other intimate workers and consumers, law fails to intervene when employers reinforce discriminatory preferences by, for example, accommodating consumers'

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8, 2015); RENT A GRANDPA, <http://rentagrandpa.com> (last visited Aug. 8, 2015); RENT A FRIEND, <https://rentafriend.com/beafriend> (last visited Aug. 17, 2015) (“Get paid to be a friend!”).

14. Compare Robin Leidner, *Emotional Labor in Service Work*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (1999) (highlighting the relationship between the worker and the consumer as critical to the work experience), and Brian Uzzi, *The Sources and Consequences of Embeddedness for the Economic Performance of Organizations: The Network Effect*, 61 AM. SOC. REV. 674, 677 (1996) (highlighting the relationship between the worker and the consumer as essential to developing trust between the consumer and the firm), and Amy S. Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147, 160 (2009) (same), with MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 3 (2d ed. 2010) (describing the premise of work law as the employer-employee relationship), and MARK ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 3 (7th ed. 2011) (defining the subject of work law as the regulation of the employer-employee relationship).

15. See *infra* Part I.B.2.

16. See *infra* Part II.B.

17. See 42 U.S.C. § 2000e-2(e)(1) (2012) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification . . .”).

preferences (e.g., a request for a female gynecologist),<sup>18</sup> and advertising workers' preferences (e.g., a photographer indicating her opposition to gay marriage).<sup>19</sup>

Second, there is the vulnerability to *sacrifice*. Intimate workers' willingness to act altruistically on behalf of consumers generates value, but also means that they risk work-related rewards—including their jobs—to benefit consumers.<sup>20</sup> Rather than protecting the value that altruism generates, law again takes away protection. Even though altruism means intimate workers may do more work for consumers, certain intimate workers are exempt from law that guarantees payment for these efforts.<sup>21</sup> And even though intimate workers are more likely to risk retaliation by advocating on behalf of consumers, law affords them no additional retaliation protection, and in practice provides less.<sup>22</sup>

Third, there is the vulnerability to *exposure*. Intimate relationships lead to value-generating closeness and sharing, but also leave workers and consumers vulnerable to having sensitive information revealed and misused, and to emotional harm.<sup>23</sup> Law recognizes this value and the attendant vulnerability too narrowly. Some intimate workers owe fiduciary duties to their consumers to protect them from this type of exposure.<sup>24</sup> But more often, these duties do not extend to intimate workers,<sup>25</sup> nor do they run from consumers to intimate workers, even though the latter reveal personal information and may be just as exposed. No other law protects against the emotional harm to which intimate workers and consumers are vulnerable.

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18. See *Veleanu v. Beth Isr. Med. Ctr.*, No. 98 Civ. 7455, 2000 WL 1400965, at \*1 (S.D.N.Y. Sept. 25, 2000) (holding that satisfying patient's request for female gynecologist does not constitute unlawful discrimination).

19. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (holding that wedding photographer who refuses service to gay couple violates antidiscrimination law but stating that employer could post a sign indicating its disapproval of same-sex marriage instead).

20. See *infra* Part ILC.

21. See 29 U.S.C. § 213(a)(15) (2012) (exempting babysitters and companions for the elderly from overtime and minimum wage); *id.* § 213(b)(21) (exempting live-in domestic workers from overtime).

22. See, e.g., *Five Star Transp., Inc.*, 349 N.L.R.B. 42 (2007) (refusal to hire school bus drivers who complained about safety concerns for children to predecessor employer); *Orchard Park Health Care Ctr., Inc.*, 341 N.L.R.B. 642, 644 (2004) (suspension and discharge of nursing home employees who complained about poor client conditions).

23. See *infra* Part IID.

24. See, e.g., *Clancy v. State Bar*, 454 P.2d 329, 333 (Cal. 1969) (attorney-client); *Petrillo v. Syntex Labs., Inc.*, 499 N.E.2d 952, 961 (Ill. App. Ct. 1986) (doctor-patient).

25. See, e.g., *Grow v. Ind. Retired Teachers Cmty.*, 271 N.E.2d 140, 143 (Ind. Ct. App. 1971) (retirement home worker-resident).

Finally, there is the vulnerability to *lost investments*. Despite the unique value the intimate relationship produces, workers and consumers are vulnerable to losing this value when their relationships rupture.<sup>26</sup> The law of non-compete agreements recognizes the lost value of these ruptured relationships for a narrow subset of workers—doctors and lawyers—but not for the whole category of intimate work.<sup>27</sup> Other law that regulates the rupture of intimate work ties—such as the duty of loyalty, trade secrets, and unemployment insurance—fails to take account of these ruptured relationships, leaving intimate workers and their consumers perpetually vulnerable to losing investments in these bonds.<sup>28</sup>

This Article calls for a comprehensive field of intimate work law that protects the value and remedies the vulnerability of intimate work. Extending critiques of the law's special treatment of intimacy outside of work,<sup>29</sup> this Article theorizes how a law that recognizes intimate work would better reflect and protect the value that intimacy and work bring to our lives. A law reconfigured to recognize intimate work would also bring significant benefits for gender equality, as women bear the disproportionate burden of the failure to value intimate work.<sup>30</sup> Beyond these benefits, law is needed because private ordering is inadequate in the intimate work context.

A new law of intimate work would recognize intimate work in two recognize the relevance of intimate work under current doctrine. In deciding the enforceability of a non-compete agreement, for example, courts must consider hardship to the worker and injury to the public,<sup>31</sup> yet courts do not take into account the loss of intimate work

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26. See *infra* Part I.E.

27. See, e.g., *Zona Corp. v. McKinnon*, No. PLCV201100247, 2011 WL 1663094 (Mass. Super. Ct. Mar. 14, 2011) (hairstylist); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531 (Wyo. 1993) (veterinarian).

28. See *infra* Part I.E.2–4.

29. 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) (critiquing special discrimination rules for the family); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005) (critiquing special economic exchange rules for the family); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (critiquing special support rules for the domestic family); Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (same); Silbaugh, *supra* note 9 (critiquing special work rules for the family). See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (exposing and critiquing legal separation of family and market).

30. See *infra* note 290 and accompanying text.

31. See, e.g., *Hopper*, 861 P.2d at 539–40.



relationships. Second, this Article proposes additional law to recognize intimate work fully. To enhance the free formation of intimate work bonds, for example, new law would limit employers' reliance on identity traits to match consumers with intimate workers.

This Article proceeds in three parts. Part I makes visible the social reality of intimate work by defining intimate work, setting forth a typology with illustrative examples, and delineating the contours of the category. Part II describes the existing law of intimate work and what is missing. Relying on a rich social science literature, this Part catalogues the mismatch between the law of intimate work and the conduct of intimate workers and consumers—and the harms that result. Part III theorizes a new law of intimate work that would extend existing legal protections to intimate work and develop new protections.

## I. INTIMATE WORK

Until the Industrial Revolution, intimacy and work were merged in the household: Work was done in the home by the family, which was also the primary site of intimacy.<sup>32</sup> The law likewise merged these relations within the status relations of the household: master-wife, master-servant, and master-slave.<sup>33</sup> With the Industrial Revolution came a spatial separation of family and work that placed the family (and intimacy) in the home, and paid work in the market.<sup>34</sup> An ideology and law of separate spheres followed. The market became the province of work, which was marked by rationality, self-interest, and autonomy.<sup>35</sup> The family became the province of intimacy, which was marked by affection, altruism, and dependence.<sup>36</sup> The law followed, with separate law governing the family and the market.<sup>37</sup>

This divide is, of course, a false one. Workers regularly engage in intimacy,<sup>38</sup> and, indeed, the primary purpose of some jobs is to provide intimate services to consumers.<sup>39</sup> But it is not the mere ubiquity of

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32. See Olsen, *supra* note 29, at 1499.

33. See Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 8 (2011).

34. See Olsen, *supra* note 29, at 1499.

35. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 10–43 (1992); Olsen, *supra* note 29, at 1563–70.

36. See Gavison, *supra* note 35, at 10–43; Olsen, *supra* note 29, at 1563–70.

37. See Olsen, *supra* note 29, at 1499.

38. See, e.g., Laura Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 130–34 (2011).

39. Consider the psychotherapist, massage therapist, nurse, or divorce lawyer, to name just a few

intimate work that matters for legal regulation. It is the common consequences of introducing an intimate consumer into work—the unique value and vulnerability that it generates—that render it a category worthy of special regulation. But law’s focus on the employer-employee relationship to the exclusion of the relationship with the consumer means that the law fails to protect the value, and guard against the vulnerability, that intimate work produces.

Before turning to the shortcomings of the law’s current approach to intimate work, this Part provides an integrated account of the phenomenon of intimate work and what coheres it as an important category of study for law. It begins by defining intimate work, follows with several illustrative examples, and then differentiates the category of intimate work from other types of work.

### A. *Definition and Typology*

The definition of intimate work set forth earlier—a worker providing intimate services to a consumer—requires unpacking. The “intimate” part of intimate work arises when interactions depend on “particularized knowledge received, and attention provided by, at least one person—knowledge and attention that are not widely available to third parties.”<sup>40</sup> The knowledge is not ordinary knowledge, but knowledge of special types of information such as “shared secrets, interpersonal rituals, bodily information, awareness of personal vulnerability, and shared memory of embarrassing situations.”<sup>41</sup> Nor is the attention ordinary attention, but attention that encompasses “such elements as terms of endearment, bodily services, private languages, emotional support, and correction of embarrassing defects.”<sup>42</sup>

The “work” part of intimate work means that these intimate services are provided as part of, or adjunct to, paid market work.<sup>43</sup> Note that this definition excludes intimate work in the family. Other scholars have recognized the presence of intimate work within the family, primarily in the form of housework and childcare.<sup>44</sup> While intimate work in the

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examples.

40. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 14 (2005).

41. *Id.*

42. *Id.* at 14–15.

43. Work can be paid or unpaid, part of the market or not. See Noah D. Zatz, *What Welfare Requires from Work*, 54 *UCLA L. REV.* 373, 380–83 (2006).

44. See Silbaugh, *supra* note 9, at 11–13; Nancy Staudt, *Taxing Housework*, 84 *GEO. L.J.* 1571, 1574 (1996); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.*

family shares some features of intimate work in the market, it remains unpaid.<sup>45</sup>

Intimate work arises in four common categories. First, work can be intimate because it involves *body work*, which I define as non-erotic services that involve contact with or access to private information related to the body. Body work is intimate because it requires physical exposure to and sometimes contact with the body, the revelation of private information about the body, or both. Examples include a doctor, nurse, personal trainer, manicurist, massage therapist, and bikini waxer.

Second, work can be intimate because it involves *care work*, which I define as support with the needs of daily living. Care work is intimate because it requires exposure of personal, often sensitive information, and sometimes access to or knowledge about the body. Examples include childcare workers and home healthcare workers.

Third, work can be intimate because it involves *confidences work*, which I define as work that entails access to private information. This category of intimate work includes both workers whose job descriptions include receiving confidences, such as a divorce lawyer or therapist, as well as workers who as a matter of fact often receive confidences, such as a wedding photographer or bartender. Confidences work also includes what we might call spiritual workers, such as clergy.

Finally, work can be intimate because it entails *erotic work*, which I define as work that involves the performance of erotic services. Erotic work is intimate because it involves exposure of the body, the revelation of private sexual information, or both. Erotic workers include sex workers, exotic dancers, and phone sex operators.

These categories have their differences, but they all share the presence of intimacy, whether it be in the form of body access, daily interactions about our personal lives, conversations about private affairs, or erotic acts. These categories also all share the feature of arising out of paid work, whether it is the check we write to the nanny, doctor, or divorce lawyer. In each of these situations, part of why the work has value is because the intimate worker knows of the contours of our body, our daily habits, the details of our marriage, or our erotic preferences.

These categories of intimate work are meant to be fluid. A single intimate worker may perform multiple types of intimate work. For instance, a home health aide engages in care work by organizing her client's apartment, in confidences work by learning about the client's

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2227, 2235–37 (1994).

45. See Silbaugh, *supra* note 9, at 22.

family, and in body work by lifting the client and learning her medications. Generally, adding forms of intimacy increases the intimacy of the work.

Within these categories and across them, intimate work will differ in some respects depending on the relationship between the worker and the consumer. Intimate work typically entails intimacy—personal information—flowing from the consumer to the intimate worker. This unilateral intimacy suffices to render a relationship intimate.<sup>46</sup> Private information may also be shared by the intimate worker. Over time, the intimate nature of the interaction in one direction often leads the intimate worker to share personal facts about herself.<sup>47</sup>

Even when a worker provides services that are not intrinsically intimate, the relationship between the worker and the consumer can grow intimate over time.<sup>48</sup> A client's relationship with a corporate lawyer, for example, does not require personal disclosures, but intimacy may nonetheless arise if a personal relationship develops between the client and the lawyer from ongoing interactions disclosing intimate information over time.<sup>49</sup> In fact, developing intimate relationships with clients is one productivity strategy employed by workers in otherwise non-intimate, client-driven businesses, and employers often encourage the development of intimacy as a way to increase customer loyalty.<sup>50</sup>

Regardless of the category in which it falls, intimate work exists along a spectrum of intimacy, with some intimate work relationships more intimate than others. Intimate work may be more or less intimate

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46. See ZELIZER, *supra* note 40, at 14–15.

47. Even when the work itself only requires intimate facts to flow in the direction of the consumer to the worker, bilateralism tends to increase the intimacy of the work. See, e.g., CAMERON LYNNE MACDONALD, *SHADOW MOTHERS: NANNIES, AU PAIRS, AND THE MICROPOLITICS OF MOTHERING* 105–42 (2010) (mothers and nannies); RACHEL SHERMAN, *CLASS ACTS: SERVICE INEQUALITY AT LUXURY HOTELS* 184–97 (2007) (hotel workers and guests).

48. Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-Workers*, 72 *SOC. FORCES* 843, 847 (1994) (noting that “[n]urse/patient, doctor/patient, teacher/student, salesperson/customer and many other service relationships may become emotionally intense” (citations omitted)). Sociologists have long acknowledged the significant social relations that can develop between workers and customers. See Gregory P. Stone, *City Shoppers and Urban Identification: Observations on the Social Psychology of City Life*, 60 *AM. J. SOC.* 36 (1954).

49. See Brian Uzzi, *Embeddedness in the Making of Financial Capital: How Social Relations and Networks Benefit Firms Seeking Financing*, 64 *AM. SOC. REV.* 481, 488 (1999).

50. See *id.* (documenting how workers who service clients use intimacy to gain information and build trust and quoting a relationship manager at a bank: “On the golf course, at a ball game, or the theater, they’ll let their guard down more often. We exchange information—not like marriage—more like dating. I share information about me as a person. I let them see me and share with them our company’s struggles. As I share that information, I get information back. It’s kind of a quid pro quo.”).

depending on the features of the relationship, including the location of the relationship and the duration of the relationship. In terms of location, relationships centered in the home traditionally have been associated with the highest degree of intimacy, either because of the association with the family, the greater access to personal information, the higher likelihood of bilateral intimacy, or some combination of these features.<sup>51</sup> In terms of duration, work can be intimate in a single transaction, but intimacy tends to grow over time.<sup>52</sup> The spectrum of intimacy across intimate work means that there are paradigmatic examples of intimate work, and other examples of intimate work that are more tenuous. Any legal response to intimate work must take this spectrum into account, as discussed in Part III.

Before forging ahead, it is worth making explicit what the category of intimate work does not include. First, intimate work does not include co-workers, even though co-workers can have quite intimate relationships,<sup>53</sup> and these intimate relationships share much of the same value and vulnerability of intimate worker-consumer relationships. There is greater variation in the extent to which intimate co-worker relationships arise out of work. For example, two friends may work for the same large corporation but never work together. This requires determining in what circumstances co-worker intimacy can be viewed as intervening in the employer-employee relationship.<sup>54</sup> And because intimate relationships between co-workers are ubiquitous, intimate co-workers cannot be meaningfully set aside as a distinct category and instead requires assessing whether to reconsider the whole of employment law. This project, by contrast, considers the law of intimate work that does and should apply to a subset of workers and their consumers.<sup>55</sup>

Second, intimate work does not include circumstances where the

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51. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 634 (1980) (“[T]he privacy of the home is constitutionally protected not only because the home is seen as a sanctuary, privileged against prying eyes, but also because it is the place where most intimate associations are centered.”).

52. The literature distinguishes between encounters—one-time transactions—and relationships—an ongoing series of transactions. See Barbara Gutek et al., *Achieving Service Success Through Relationships and Enhanced Encounters*, 16 ACAD. MGMT. EXECUTIVE 132, 133 (2002). Relationships will tend to be more intimate, but an encounter can be, too.

53. See Rosenbury, *supra* note 38, at 140.

54. This doesn’t mean that the law shouldn’t intervene in the context of intimate co-workers, but that a more robust justification for doing so, and more considered line-drawing, may be required.

55. The regulation of co-worker intimacy and the implications for work law—including both employment law and labor law—are the subject of future work. See Naomi Schoenbaum, *Coworkers in Law* (Aug. 28, 2015) (unpublished manuscript) (on file with author).

consumer is the employer. This excludes from the analysis nannies and home health aides directly employed by their charges, but includes those who are employed and placed by agencies.<sup>56</sup> The employer-intimate worker-consumer triad coheres with the category of intimate work. The introduction of the intimate worker-consumer relationship into the employer-employee dyad poses challenges for the employer—for example, what obligations the employer has to ensure the relationship forms free of discrimination, and what rights the employer has to rupture the relationship between the intimate worker and the consumer. As fleshed out in the next Part, this complicates employment law, which primarily focuses on the employer-employee relationship. When the employer is the consumer of intimate work, however, the relationship remains a dyad, albeit of an altered sort. These differences prompt the need for a different legal response.<sup>57</sup>

### B. *Common Consequences*

This section theorizes the common consequences of intimate work that render it a meaningful regulatory classification. While the law typically regulates work as an arm's-length relationship between the employer and the employee, the hallmark of intimate work is the introduction of another party—the consumer—with whom the worker relates intimately. The introduction of this significant third party into the

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56. See *infra* Part ILC.1 for a discussion of exceptions that apply to these workers. Note that some workers who provide intimate services to consumers, for example, a divorce lawyer who owns his own firm and is self-employed, are not employees at all. These workers fall outside the scope of this Article, which addresses employment law's treatment of intimate work.

57. The question of what law should apply here is taken up in other work. See Naomi Schoenbaum, *Why Families Aren't Firms* (Aug. 28, 2015) (unpublished manuscript) (on file with author). These relationships more squarely raise the question of why such intimate workers cannot opt in to at least some of the protections of family law, and the impact of their exclusion from family law. While scholars have likened the hiring of nannies to outsourcing by firms, see Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254 (2012); Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 879–80 (2007), here the law *forces* outsourcing. One theory of the firm holds that we create firms because of asymmetric investments. See Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1762–63 (1989). If a person makes an investment in a factory that only one other person can use, the second person can hold up the first for the joint surplus, and so they go into business together before any investment. Intimate workers could be organized the same way—and when such services are provided inside a family we might say they are. But the law, through limits on adoption, polygamy, and so forth, makes bringing such work inside the family firm impossible. Because family law bars optimal forms of organization for this intimate work, there is a need for other legal intervention. Because the exemption recognized in *Harris v. Quinn*, 573 U.S. \_\_\_, 134 S. Ct. 2618 (2014), see *supra* notes 7–8 and accompanying text, applies to intimate workers who effectively work under the control of the consumer, I will address this exemption in later work.

employer-employee dyad distinguishes intimate work from other work in ways that require different regulation.<sup>58</sup> This section catalogues the distinct features of intimate work, and the next Part turns to what this means for law.

Because of the intimacy of the relationship, the protocols that govern the relationship between the intimate worker and the consumer are less those of market transactions and more those of personal relationships. This leads intimate workers and consumers to act altruistically, and to consider each others' interests as much as, if not more than, simple dollars and cents.<sup>59</sup> The personal rather than transactional protocols that govern intimate work relationships mean that these relationships provide critical emotional, material, and productive support.

As for emotional support, work ties are pervasively referred to as "like family."<sup>60</sup> As one home health aide said of her genre of work: "We get close, very close. You are just as much a member of their family as their children or grandchildren."<sup>61</sup> Indeed, outside of the family, work is one of the most significant sources of emotional support for working Americans.<sup>62</sup> This emotional support is present in the full range of intimate work, from care workers,<sup>63</sup> to concierges at luxury hotels,<sup>64</sup> to retail store workers,<sup>65</sup> to hairstylists,<sup>66</sup> to relationship managers at

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58. See *infra* Part II.B–E for implications of this third-party analysis for the category of intimate work.

59. See Rebekah Peeples Massengill, "The Money Is Just Immaterial": *Relationality on the Retail Shop Floor*, 18 RES. SOC. WORK 185, 187 (2009); Uzzi, *supra* note 14, at 675–82. Consider the remarks of one intimate worker: "The money is just immaterial . . . 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." Massengill, *supra*, at 197–98.

60. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 44 (1st ed. 1997); NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 68, 96 (1st ed. 2009); Massengill, *supra* note 59, at 196.

61. Deborah Stone, *Caring by the Book*, in *CARE WORK: GENDER, LABOR AND THE WELFARE STATE* 89, 104–05 (Madonna Harrington Meyer ed., 2000); see also HOCHSCHILD, *supra* note 60, at 152–87 (describing ethnography of relationships developing in caregiving setting); ZELIZER, *supra* note 40, at 163–93 (collecting studies of relationships developing in caregiving settings).

62. See VIVIANA A. ZELIZER, *ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY* 242–44 (2010) (collecting studies documenting the prevalence of intimacy between workers and consumers and the importance of these relationships).

63. See Stone, *supra* note 61, at 104–05.

64. See SHERMAN, *supra* note 47, at 106, 184–86.

65. See Massengill, *supra* note 59, at 197–99 (detailing how customer relationships are important to retail workers' meaning of work).

66. See GRANT MCCrackEN, *BIG HAIR: A JOURNEY INTO TRANSFORMATION OF SELF* 186 (1995)

garment factories<sup>67</sup> and commercial banks.<sup>68</sup> Intimate workers and their consumers also provide each other material support with direct cash assistance as well as in-kind support, such as computer equipment and legal advice.<sup>69</sup>

Beyond emotional and material support, intimate work relationships are critical for intimate workers' professional success. These relationships generate productivity by motivating intimate workers and consumers to act altruistically and perform additional work to support one another.<sup>70</sup> Intimate work relationships enhance extra-role work: discretionary behavior that is not directly or explicitly recognized by the formal reward system, but that nonetheless promotes the effective functioning of the organization.<sup>71</sup>

Intimacy also serves as a conduit for information that aids in work success. On the one side, consumers may provide information about intimate workers to others, sponsoring them and conferring legitimacy by backing up their reputations with superiors and prospective customers.<sup>72</sup> On the other side, intimate workers secure additional private information from consumers that help them provide better service.<sup>73</sup> These productivity benefits of intimate work mean that strong relationships with consumers justify price premiums, reduce employee training costs, and lower turnover, all of which lead to higher firm profits.<sup>74</sup> Intimate consumers also get lower interest rates on loans<sup>75</sup> and lower billing rates from corporate lawyers.<sup>76</sup>

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(describing how hairstylists serve as sources of support to customers with personal problems, counseling customers and allowing them to unburden their "souls," cutting hair while also cutting away guilt).

67. See Uzzi, *supra* note 14, at 677.

68. See Uzzi, *supra* note 49, at 488–89.

69. See ZELIZER, *supra* note 40, at 178–81.

70. See George A. Akerlof, *Labor Contracts As Partial Gift Exchange*, 97 Q.J. ECON. 543, 550 (1982) (explaining how altruism leads workers to work harder than necessary not for a raise or a promotion, but for better treatment of their coworkers); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 95 (2005).

71. See Stone, *supra* note 61, at 95 (healthcare workers and patients); Uzzi, *supra* note 14, at 680 (factory managers and customers); Uzzi, *supra* note 49, at 490 (bank managers and clients).

72. See Scott E. Seibert et al., *A Social Capital Theory of Career Success*, 44 ACAD. MGMT. J. 219, 223–24, 232–33 (2001) (finding that sponsorship through social ties enhances career success).

73. See Uzzi, *supra* note 49, at 488.

74. Chi Kin Yim et al., *Strengthening Customer Loyalty Through Intimacy and Passion: Roles of Customer–Firm Affection and Customer–Staff Relationships in Services*, 45 J. MARKETING RES. 741, 741 (2008).

75. See Uzzi, *supra* note 49, at 482, 496–98.

76. See Brian Uzzi & Ryon Lancaster, *Embeddedness and Price Formation in the Corporate Law*



The work context enables intimacy to generate different forms of support than that afforded by intimates outside of work. While family and friends provide support that undoubtedly confers work benefits,<sup>77</sup> intimate work relationships nonetheless offer work support in ways that family and friends cannot. When intimacy arises at work, it primes the altruism that intimacy generates to take on productive forms simply because work-related support is much easier for work intimates to provide.<sup>78</sup> Moreover, some productive support requires information that family and friends cannot provide.

Intimate work also provides unique support precisely because it is commonly separated from our family lives and takes place in a more structured form than family or other non-work intimacy. This means that work offers the riches of intimacy—pleasure, playfulness, humor, affection, and even flirtation or sex—but with the order and boundedness of work and without the unending demands of family that can reduce the pleasure of intimacy at home.<sup>79</sup> As Arlie Hochschild has documented, while family was traditionally seen as the haven from the heartless world of work, for some, work has become a haven from the unbounded and unregulated stress of the family, particularly for women, who feel family pressures more acutely than men.<sup>80</sup> As one worker noted about her relative caregiving abilities at home and at work: “I’m a good mom at home, but I’m a better mom at work.”<sup>81</sup>

While intimacy at work is more regulated than family or other non-work intimacy, the work environment also provides for the repeated contact intimacy needs to flourish.<sup>82</sup> In an era of “solo bowlers,” once we have completed our schooling, the regular proximity necessary to generate intimate support is rarely available except through work.<sup>83</sup>

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*Market*, 69 AM. SOC. REV. 319, 320, 335 (2004).

77. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 79–81 (2d ed. 1993) (documenting how, beyond providing childcare, wives host business clients, take notes, and engage in other supportive behaviors that help husbands succeed at work).

78. For example, in an intimate relationship between a consumer and her nurse, personal trainer, or hairstylist, the fact that the intimacy arises in the workplace means that the consumer will often have the opportunity to learn about the workplace dynamics, which puts her in a position to give the worker more informed advice about how to deal with a superior or a coworker, as the consumer may also have had the chance to get to know these persons.

79. See HOCHSCHILD, *supra* note 60, at 35–52.

80. See *id.* at 38–42.

81. *Id.* at 42.

82. See *id.* at 35–52.

83. See *id.* at 40–44 (describing how regular contact in the workplace affords the opportunity for intimacy to develop there); PATRICIA M. SIAS, *ORGANIZING RELATIONSHIPS* 65–70 (2009) (same).

Work thus provides the unique setting that allows meaningful intimacy to develop outside the family. This special combination of regulated and regular intimacy means that the support we receive from intimate work is a “uniquely intense” form of support.<sup>84</sup> The experience of ongoing mutual discovery in a realm where it is always partially secluded is more explosive than in the realm of the family where members are already fully disclosed through constant contact.<sup>85</sup>

Finally, the close worker-consumer relationship in the regulated context of work also holds value as a key site for promoting equality. Focusing on relationships between co-workers, Cynthia Estlund persuasively sets forth the case for work as a critical site of civil society where workers develop ties of empathy and solidarity with their fellow citizens.<sup>86</sup> She highlights how regulating discrimination promotes more diverse workplaces, and how relationships between workers of different races then play a role in combatting racial bias.<sup>87</sup> Precisely due to the intimacy of worker-consumer relationships, intimate work holds the promise to be such a civil society site on steroids. Closer relationships between parties of different races or other protected identity characteristics have a greater potential for overcoming biases than more distant relationships.<sup>88</sup>

Introducing a close intimate worker-consumer relationship into employment not only produces value, but also produces four key vulnerabilities for workers and consumers alike. First, intimate work

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*See generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2010) (describing the decline of communal activities in America since the middle of the twentieth century).

84. *See* Marks, *supra* note 48, at 846.

85. *See id.*

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

87. *Id.* at 4.

88. Professor Estlund discusses the mixed evidence behind the contact hypothesis—that bringing people of different backgrounds together reduces biases—and ultimately concludes that it is likely to have validity in the work context in light of the circumstances of work. *See id.* at 22–29. According to some research, one feature of some intimate work—hierarchy—would undermine the effect of contact. *See id.* Other research, however, suggests that the most important factor in promoting contact’s positive effect is a closer personal relationship. *See id.*; Yehuda Amir, *Contact Hypothesis in Ethnic Relations*, 71 *PSYCHOL. BULL.* 319 (1969) (finding that intimate contact is an important factor in contact reducing prejudice); Gregory M. Herek & John P. Capitanio, “*Some of My Best Friends*”: *Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 412 (1996) (finding that contact, and especially close contact, with gays and lesbians was correlated with more positive attitudes toward gays and lesbians). Intimate work of course is defined by closeness, and thus this factor supports the conclusion of a positive effect of contact in the context of intimate work.

generates value because of the freedom that intimate workers and consumers enjoy in forming meaningful relationships. But this also leaves workers and consumers vulnerable to *discrimination* in the formation of these relationships, and in particular, to the employer's promotion of discriminatory preferences that interfere with the formation of these relationships.<sup>89</sup>

Second, intimate work generates value because of the altruism that intimate workers and consumers manifest toward one another. But this leaves workers vulnerable to *sacrifice*, because their altruism may result in extra work on behalf of consumers that the employer does not compensate.<sup>90</sup> Moreover, employers may discipline intimate workers when their altruism entails advocating for the consumer against the employer's poor treatment.

Third, intimate work generates value because of shared information and emotional closeness. But this leaves workers and consumers vulnerable to *exposure* by having this personal information revealed or misused.<sup>91</sup> Moreover, both parties are vulnerable to having the information turned against them as a way to inflict emotional harm.

Finally, intimate work generates value because of the investments workers and consumers make in these relationships. But this leaves workers and consumers vulnerable to *lost investments* when these relationships rupture, as these investments are relationship-specific, and are not portable when the relationship ends.<sup>92</sup>

A fuller explication of the vulnerabilities must wait until the next Part, as it is only by revealing the law's ad hoc approach to intimate work that the vulnerabilities of intimate workers and consumers are brought into sharp relief. This is because the law's failure to recognize and protect the value of intimate work plays a large role in producing these vulnerabilities.

All told, the value and vulnerability that the intimate worker-consumer relationship produces means that for intimate workers, the consumer is just as (if not more) important than the employer for determining wages, conditions, and the overall work experience.<sup>93</sup> And

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89. See *infra* Part II.B.

90. See *infra* Part II.C.

91. See *infra* Part II.D.

92. See *infra* Part II.E.

93. See Dorothy Sue Cobble & Michael Merrill, *The Promise of Service Worker Unionism*, in SERVICE WORK: CRITICAL PERSPECTIVES 153, 160 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009) ("This attitude prevails regardless of whether the worker's income is derived wholly from the customer (the professional in private practice or the self-employed home cleaner),

for consumers, work—and its regulation—has a significant impact on key aspects of participation in civil society, including the receipt of medical, legal, and other important services.

## II. THE LAW OF INTIMATE WORK (AND WHAT IS MISSING)

Current law divides the regulation of intimacy and the regulation of work, with separate principles of family and market respectively governing each sphere. Law has no coherent approach to regulate a social reality, like intimate work, that combines the two. This ad hoc law of intimate work harms intimate workers and consumers by failing to protect the unique value and guard against the unique vulnerability of intimate work. The result is a law that permits employers to promote discrimination in the formation of intimate work bonds, to fail to compensate and even discipline intimate workers for their altruism, to expose intimate workers and consumers to emotional harm, and to break valuable intimate work bonds with impunity.

This Part begins by laying out the challenge intimate work poses for law in light of the categorical regulation of intimacy and work. It then sets forth the existing law of intimate work, how it fails to address the value and vulnerability of intimate work, and the resulting harms. It proceeds in a roughly chronological path through the intimate work relationship—from the formation of the relationship and the discrimination that may taint it, to the sacrifice and exposure risked once the relationship is developed, and finally to the loss of value that can result when the relationship ruptures.

### A. *Legal Categories of Intimacy and Work*

A brief discussion of the regulation of intimacy and work aids in understanding law's shortcomings with regard to intimate work. The categorical regulation of intimacy and work presents a challenge for a reality like intimate work where the two categories overlap.

In some situations—namely within the family—law protects intimacy.<sup>94</sup> Family law recognizes the value intimate relationships generate by promoting intimate bonds based on affection and support

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only partially so (the waiter, bartender, or cab driver), or not at all (the nurse or teacher).”).

94. Scholars have explored how family law circumscribes its protection for care and support to the domestic family. *See generally* Murray, *supra* note 29; Rosenbury, *supra* note 29.

within the domestic family.<sup>95</sup> Law also protects family intimates from at least some of the vulnerabilities that can arise in the context of close relationships, including the risk of sacrifice,<sup>96</sup> exposure to emotional harm,<sup>97</sup> and lost investments in the relationship.<sup>98</sup> But family law categorically excludes intimate work from its protections by covering only those in family or family-like relationships.<sup>99</sup> Workers and consumers are not covered, regardless of how intimate they are.<sup>100</sup> Note that family law is decidedly ambiguous on discrimination, and, in marriage at least, permits parties to engage in it.<sup>101</sup>

In other situations—namely within the market—law protects work.<sup>102</sup> Work is subject to standard marketplace regulation, including contract law and tort law, as well as to law that applies especially to the work

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

96. Family law imposes reciprocal duties of care and support on spouses to guard against unreciprocated altruism. See, e.g., CAL. FAM. CODE §§ 3900, 4300 (West, Westlaw through 2015 Reg. Sess.); VA. CODE ANN. § 20-61 (West, Westlaw through 2015 Reg. Sess.). Family law also guards against unreciprocated sacrifices by compensating them at the end of the relationship. See, e.g., ARK. CODE ANN. § 9-12-315(a)(1)(A)(viii) (West, Westlaw through 2015 Reg. Sess.) (providing that homemaking services are considered in property distribution at divorce).

97. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 869–73 (1993) (discussing ways in which law protects spouses from emotional abuse, while acknowledging limits); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1270–71 & n.67 (2009) (discussing criminalization of adultery and other acts that cause emotional harm in marriage).

98. Family law protects individuals from the loss of relationship-specific investments by distributing these investments at the end of the relationship through property distribution, alimony, and child support and custody determinations. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 476–79 (1996).

99. See SCHNEIDER & BRINIG, *supra* note 95, at 211–21, 1350–1405.

100. Cf. Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163, 174–79 (2011) (discussing how the law's categories mean that an individual must be categorized as *either* a family member *or* a worker).

101. The law has moved decidedly toward banning the *state* from discriminating in the context of the family, see *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (declaring bans on interracial marriage unconstitutional); *George v. George*, 409 A.2d 1, 2 (Pa. 1979) (requiring that divorce law be sex neutral); *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584, 2599 (2015) (declaring constitutional right to same-sex marriage), but still permits *individuals* to discriminate in making decisions about who to marry or adopt. See also Emens, *supra* note 29, at 1315–18.

102. See Zatz, *supra* note 43, at 380–83 (citing multiple exclusions of non-market work, including prison work and family work, from work law).

relationship, including employment law, antidiscrimination law, and labor law. The legal assignment of intimate relationships to the family results in a work law premised on the fact that the only significant work relationship is an arm's-length one between employer and employee. This leads to a law of work that is often blind to the intimate worker-consumer relationship and its value.

Nonetheless, because family law simply excludes non-family intimacy, any law of intimate work must be found in work law. But the legal categories of intimacy and work create a law of intimate work that is insensitive to its circumstances. Sometimes, as with non-compete agreements, work law treats intimate work too much like other work. In these instances, it either fails to recognize the special circumstances of intimate work at all and treats all work as simply arm's-length, or recognizes only a narrow slice of intimate work and fails to appreciate how this recognition should extend to a larger set of workers and consumers. Other times, as with exceptions to wage-and-hour and antidiscrimination law, when work law recognizes intimate work, it is too focused on intimacy. It applies regulatory terms from the family context that are out of place—indeed harmful—in the work context. These shortcomings of the ad hoc approach to intimate work—treating intimate work too much like work or too much like family—are documented in the remainder of this Part.

### *B. Discrimination*

The introduction of the consumer into the employment relationship introduces a party who can discriminate against the intimate worker—and a party against whom the worker can discriminate. While there are opportunities for a service recipient to discriminate against workers in many service encounters, intimacy enhances the salience of the particular worker and her identity to the consumer.<sup>103</sup>

Intimate workers' identities can be powerful signals. The intimate worker is in many ways inseparable from her product: the intimate services she provides.<sup>104</sup> Thus the worker's identity characteristics "serve as signifiers . . . shaping customers' expectations about the service they

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103. See, e.g., Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. ECON. 835 (1998) (finding that the racial composition of an establishment's customers has sizable effects on the race of who gets hired in jobs that involve direct contact with customers, and hypothesizing that this is due to customer preferences in relationships).

104. See Leidner, *supra* note 14, at 100; Wharton, *supra* note 14, at 152.

are to receive.”<sup>105</sup> The Filipina childcare worker, for instance, is perceived as caring, family-first, and docile;<sup>106</sup> the gay male hairstylist is perceived as not only stylish but as a gifted interlocutor.<sup>107</sup> While the signal may not be reliable, it is a cheap heuristic in a circumstance where information costs are high and biases run deep.<sup>108</sup>

Because of the personal nature of the services, consumers may perceive identity to be relevant to the provision of services. Identity may be seen to confer expertise: The Jewish couple may believe that a Jewish wedding photographer will better capture their wedding, or the black patient may believe that a black doctor can better relate to her health circumstances.<sup>109</sup> Identity preferences for intimate workers may derive from a belief that the consumer will face less discrimination from providers who share the consumer’s identity.<sup>110</sup> The sensitive circumstances of intimate work can also lead consumers to be more comfortable with workers of a particular identity for more inscrutable reasons.<sup>111</sup> For example, some women simply feel more comfortable

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105. Wharton, *supra* note 14, at 152 (internal quotation marks omitted).

106. See Cameron Lynne Macdonald & David Merrill, *Intersectionality in the Emotional Proletariat*, in *SERVICE WORK: CRITICAL PERSPECTIVES*, *supra* note 93, at 113, 120–22 (explaining that “racial/ethnic groups are preferred by parents [for caregivers] based on their presumed qualities that are rooted in their ethnicity,” and quoting a childcare placement agency owner: “people think that Filipinas are from a different planet where everybody cares about children” (citation omitted)).

107. See Aaron J. Blashill & Kimberly K. Powlishta, *Gay Stereotypes: The Use of Sexual Orientation as a Cue for Gender-Related Attributes*, 61 *SEX ROLES* 783, 783–84 (2009) (finding that gay men are stereotyped as having feminine traits, such as empathy, nurturance, and sensitivity); Steven Petrow, *The Problem with the Gays: What Happened to Our Style Gene*, *HUFFINGTON POST* (Mar. 25, 2011, 11:08 AM), [http://www.huffingtonpost.com/steven-petrow/gay-style-stereotypes\\_b\\_840469.html](http://www.huffingtonpost.com/steven-petrow/gay-style-stereotypes_b_840469.html) (discussing positive stereotypes of gay men, including stylishness).

108. For the seminal discussion on labor market signals, see Michael A. Spence, *Job Market Signaling*, 87 *Q.J. ECON.* 355, 356–61 (1973), and for more general discussion on signals, see Akerlof, *supra* note 70, at 489.

109. See Kimani Paul-Emile, *Patients’ Racial Preferences and the Medical Culture of Accommodation*, 60 *UCLA L. REV.* 462, 464 n.3 (2012) (collecting studies); Tamar Lewin, *Women’s Health Is No Longer a Man’s World*, *N.Y. TIMES*, Feb. 7, 2001, at A14 (discussing how women’s preference for female gynecologist is partially rooted in the belief that they will understand women’s health better because they are women); Damon Adams, *Patients Say Best Doctors Are Ones Who Look Like Them*, *AMEDNEWS.COM* (Jan. 12, 2004), <http://www.ama-assn.org/amed>.

110. Frederick M. Chen et al., *Patients’ Beliefs About Racism, Preferences for Physician Race, and Satisfaction with Care*, 3 *ANNALS FAM. MED.* 138 (2005) (analyzing surveys showing that minorities who perceive racism in the healthcare system are more likely to prefer physicians of the same race); Jennifer Malat & Mary Ann Hamilton, *Preference for Same-Race Health Care Providers and Perceptions of Interpersonal Discrimination in Health Care*, 47 *J. HEALTH & SOC. BEHAV.* 173 (2006) (same).

111. See, e.g., Lewin, *supra* note 109 (in context of gynecologists, noting that “many women find it easier to talk to another woman when the subject is sexuality or menopause or pregnancy”).

with a female gynecologist or therapist.<sup>112</sup>

Intimacy also strengthens the motivation to discriminate in the other direction—from employers (and intimate workers) against consumers—although these preferences often have more to do with intimate workers' religious and moral beliefs. This issue has recently received attention in the context of wedding vendors who have refused service to gay couples.<sup>113</sup>

Employers play a role in cultivating and reinforcing these discriminatory preferences in intimate work settings, which interferes with the formation of meaningful intimate work relationships between workers and consumers.<sup>114</sup> Indeed, employers' reliance on identity characteristics in intimate settings may be the last bastion of acceptable overt discrimination.<sup>115</sup>

Law fails to ensure that intimate workers and consumers form these meaningful relationships free from discriminatory influences. Even though intimate work increases motivation to rely on identity, work law provides less protection against discrimination instead of more, leaving intimate workers and consumers more vulnerable to discrimination. In this way, law regulates intimate work too much like the family, and fails to appreciate the unique value of intimate work—intimacy in a more regulated, equality-promoting setting than the family. Law here limits not only intimate workers' equal employment opportunities, but also the promise of intimate work to enhance equality.

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112. *See id.*; Raquel R. Cabral & Timothy B. Smith, *Racial/Ethnic Matching of Clients and Therapists in Mental Health Services: A Meta-Analytic Review of Preferences, Perceptions, and Outcomes*, 58 J. COUNSELING PSYCHOL. 537 (2011) (finding a moderately strong preference for therapist of the patient's own race and ethnicity); Bernadette M. Lauber & Jean Drevenstedt, *Older Adults' Preferences for Age and Sex of a Therapist*, CLINICAL GERONTOLOGIST, 1993, at 13 (finding sex preferences for therapists); Cynthia F. Pikus & Christopher L. Heavey, *Client Preferences for Therapist Gender*, J.C. STUDENT PSYCHOTHERAPY, 1996, at 35 (finding that women prefer women therapists and that men express little preference).

113. *See, e.g.*, *State v. Arlene's Flowers*, No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015), available at <http://www.adfmedia.org/files/ArlenesFlowersSJruling.pdf> (upholding discrimination challenge to wedding florist's refusal to serve gay couple against First Amendment defenses); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (upholding discrimination challenge to wedding photographer's refusal to serve gay couple against First Amendment defenses); Michael Paulson & Fernanda Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays*, N.Y. TIMES, Feb. 22, 2014, at A1.

114. *See infra* notes 137–46 and accompanying text.

115. *See* Sam Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006) (documenting how employment discrimination scholarship has become focused on structural and unconscious biases in the wake of a reduction in overt discrimination).



### 1. *Title VII and the BFOQ*

At first blush, employment discrimination law recognizes the harm of discrimination in service work by prohibiting employers from acting on discriminatory customer preferences.<sup>116</sup> But rather than providing greater protection for discrimination in the intimate services context, the law provides less. Borrowing a page from family law's acceptance of intimate discrimination,<sup>117</sup> when work law recognizes work as sufficiently intimate, it removes sex discrimination protection. Title VII's "bona fide occupational qualification" (BFOQ) exception<sup>118</sup> exempts from sex discrimination protection erotic workers whose work sufficiently turns on sexual titillation, such as erotic dancers;<sup>119</sup> body workers who see or touch clients' genitals, such as labor and delivery nurses or bathroom attendants;<sup>120</sup> and confidence workers for whom a particular sex is necessary to achieve the therapeutic goals of their work, such as counselors at a psychiatric hospital for abused children.<sup>121</sup> Even though race is not included in Title VII's BFOQ exception, intimacy has in rare circumstances even justified employer reliance on race.<sup>122</sup>

Recognizing the broader category of intimate work reveals the arbitrariness of BFOQ line-drawing. Work law here bows to some discriminatory customer preferences for intimate work services but not

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116. See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (holding that an employer cannot deny a woman an executive position in the international operations division based on foreign customer preference to work with men); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (holding that employer cannot deny a man a position as flight attendant based on customer preference to be served by women).

117. See *Emens*, *supra* note 29, at 1309–10.

118. 42 U.S.C. § 2000e-2(e)(1) (2012).

119. *Yuracko*, *supra* note 9, at 157 (discussing hypothetical cases as these cases have not been raised).

120. See *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (attendants responsible for cleaning bathrooms); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) (janitor responsible for cleaning bathrooms); *EEOC v. Mercy Health Ctr.*, No. Civ. 80–1374–W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982) (labor and delivery nurse); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982) (same).

121. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996).

122. In the case of a correctional facility that mimicked military basic training an employer was allowed to consider race in the selection of officers. In light of the "fierce intimacy" of the boot camp, race-matching was deemed essential for the black inmates "to play the correctional game of brutal drill sergeant and brutalized recruit." *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996). *But see Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("The privacy interest that is offended when one undresses in front of a doctor or nurse of the opposite sex does not apply to race.").

others.<sup>123</sup> It is difficult to justify why a discriminatory preference for a body worker who touches sensitive areas like one's buttocks (e.g., a massage therapist or personal trainer) is denied while a discriminatory preference for a body worker who can possibly view one's genitals (e.g., a janitor responsible for cleaning bathrooms) is accepted.<sup>124</sup> Likewise, it is difficult to justify why a discriminatory preference based in confidences intimacy (e.g., a divorce lawyer, psychotherapist, or weight loss counselor) is denied while a sex preference based in bodily intimacy (again, the janitor) is recognized.<sup>125</sup>

Each of these intimate work circumstances implicates quite intimate services, and the consumer's preferences for the massage therapist, divorce lawyer, psychotherapist, or weight-loss counselor are not clearly less important or valid than for the janitor. These intimate services simply implicate different forms of intimacy, and consumers may be more sensitive to some forms of intimacy than others. Here the law sets apart and prioritizes certain body work over other forms of intimate work. Of course, the goal of the law may be to validate some intimacy preferences and not others.<sup>126</sup> My point here is to highlight how the category of intimate work reveals that there is nothing natural about this line.<sup>127</sup>

One might wonder whether acknowledging the broader category of intimate work might support expanding the recognition of the BFOQ. After all, if intimate work generates close relationships between the intimate worker and the consumer, this could argue in favor of granting consumers, and in turn employers, more leeway in selecting intimate workers with preferred identities. But the arbitrariness of the BFOQ's line-drawing does not point in the direction of expanding the BFOQ to cover a broader range of intimate work. This is because the BFOQ

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123. See generally Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003) (arguing that customer privacy concerns on which some BFOQ cases rest are just another form of customer preference).

124. Compare *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052 (D. Ariz. 1999) (denying BFOQ for massage therapist), and *EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993) (denying BFOQ for health club instructors), with *Norwood*, 590 F. Supp. at 1418 (accepting BFOQ for janitor), and *Brooks*, 537 F. Supp. at 1125 (same).

125. Compare *EEOC v. HI 40 Corp.*, 953 F. Supp. 301 (W.D. Mo. 1996) (denying BFOQ for weight-loss center counselors), with *Norwood*, 590 F. Supp. at 1418 (accepting BFOQ for janitor), and *Brooks*, 537 F. Supp. at 1125 (same).

126. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 26 (2000) ("Title VII does not simply displace gender practices, but rather interacts with them in a selective manner," and by so doing, approves what it does not prohibit.).

127. I am not alone in this critique of intimate work. See Kapczynsky, *supra* note 123; Yuracko, *supra* note 9. The category of intimate work provides another critique.

imports into work law an outdated strand of intimacy regulation from family law. The privacy BFOQ cases are built on heteronormative assumptions of the need for sexual privacy: that concerns about sex and sexual arousal raised by intimate work can be quelled by providing these services in a same-sex space.<sup>128</sup> Civil and criminal law once did enforce a norm of no-sex between members of the same sex.<sup>129</sup> This constructed same-sex spaces as a sex-free zone, creating the legal backbone for the BFOQ to validate same-sex privacy preferences in the context of intimate work.

Recent changes in family law call this approach into question. With the unconstitutionality of sodomy laws,<sup>130</sup> and the right to same-sex marriage,<sup>131</sup> family law has moved far away from same-sex as a no-sex zone. BFOQ cases in the therapeutic context (e.g., the child sexual abuse counselor)<sup>132</sup> that rely on the role-modeling theory—that a woman is better at modeling behavior for a girl and a man is better at modeling behavior for a boy—are seriously undermined by cases relying on the opposite conclusion to recognize the rights of same-sex couples.<sup>133</sup> In view of the changes in family law, work law's recognition of sex-based intimacy preferences enshrines an outdated law of intimacy.<sup>134</sup>

Note also that despite the significance of intimate work relationships, failing to defer to consumer preferences does not impose an undue burden on consumers. Consumer preferences for intimate workers have

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128. Note that cases recognizing the sex-based privacy BFOQ have conditioned it on a preference for same-sex service provision. See *Olsen*, 75 F. Supp. 2d at 1060.

129. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

130. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

131. See *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584, 2599 (2015).

132. See, e.g., *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) (accepting BFOQ in part based on theory that “[r]ole modeling, including parental role modeling, is an important element of the staff’s job, and a male is better able to serve as a male role model than a female and vice versa”).

133. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931–36 (N.D. Cal. 2010) (holding that state law defining marriage to exclude same-sex marriage was unconstitutional because, *inter alia*, argument that children fare better with a father and a mother was unfounded), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.*, *Hollingsworth v. Perry*, 570 U.S. \_\_\_, 133 S. Ct. 2652 (2013); *Baker v. State*, 744 A.2d 864, 909 (Vt. 1999) (Johnson, J., concurring) (reasoning that “uniting men and women to celebrate the ‘complementarity’ of the sexes and providing male and female role models for children [is] based on broad and vague generalizations about the roles of men and women”).

134. Sexual titillation cases can also be seen as deeply heteronormative, but these preferences have yet to be undermined in the same way. Others have called for greater reform to the discrimination norms in the context of the family. See, e.g., R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Emens, *supra* note 29.

been shown to be quite malleable. While women currently prefer female gynecologists, this preference arose only relatively recently.<sup>135</sup> Until just a few decades ago, when gynecology was a male profession, women saw male gynecologists without complaint.<sup>136</sup> This shift in preference for female gynecologists, of course, was prompted in large part by Title VII requiring equal employment opportunities, which opened up the medical profession to women. Thus, there is reason to believe that consumer preferences can be responsive to the force of law.

Even more fundamentally, work law fails to appreciate how work intimacy differs from family intimacy because of the employer's role in determining preferences. Allowing individuals to exercise identity preferences in the context of family intimacy—i.e., to discriminate in who to date and marry—is meant to preserve individual liberty.<sup>137</sup> By contrast, one of the unique strengths of intimate work is the existence of intimacy in a more regulated space, where equality and other values can be promoted as they are not in the context of family intimacy. And in the intimate work context, it is not simply individual preferences at stake. The employer plays a role in cultivating preferences, which may in fact *constrain* autonomy in forming intimate work relationships. Work law's failure to appreciate the employer-intimate worker-consumer triad means that work law sometimes overlooks the employer-consumer relationship. Here, work law takes consumer preferences as given, failing to recognize the employer's role in promoting discriminatory consumer preferences, and how this intervenes in the development of intimate worker-consumer relationships.

As Vicki Schultz has made clear in the case of employees, individuals do not come to the workplace with fully formed preferences about work.<sup>138</sup> Rather, work experiences themselves, which are largely determined by the employer, shape workers' expectations and preferences.<sup>139</sup> This is no less true for consumers, whose expectations and preferences are not formed solely or primarily from non-work-

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135. See Lewin, *supra* note 109.

136. See *id.*

137. See Emens, *supra* note 29, at 1356–57.

138. 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 (1990) (“[W]omen’s work preferences are formed, created, and recreated in response to changing work conditions.”).

139. *Id.* at 1816 (describing the variety of mechanisms employers use to “structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs”).

related experiences. Rather, our experiences receiving intimate work services, which are largely determined by employers, help to shape our expectations and preferences for intimate work services.<sup>140</sup>

Multiple examples illustrate how employers make intimate worker identity more salient for consumers. A host of employer websites advertise intimate workers on the basis of protected identity traits. These are particularly popular for domestic care work: Rent-a-Grandma, Rent-a-Grandpa, Rent-a-Mom, and Rent-a-Dad.<sup>141</sup> The identity of the person tells you what she does: Rent-a-Grandma provides caregiving services; Rent-a-Grandpa does household repairs. Other businesses emphasize identity as a selling point for their intimate workers. Women Ob/Gyn, a “group of five female OB/GYN’s, and three nurse practitioners,” is “women, helping women.”<sup>142</sup> The Women’s Law Group is a law firm specializing in divorce composed of “female attorneys who . . . practice law from a woman’s perspective.”<sup>143</sup>

Yet other businesses make protected identity traits salient by allowing consumers to select intimate workers on the basis of these traits. When a customer is booking a massage, a spa’s first question is often, “Do you prefer a male or female massage therapist?”<sup>144</sup> For online appointment bookings, some hair salons allow customers to select their hairstylist from a drop-down menu either by name, or by simply selecting “male” or “female.”<sup>145</sup> Not only do such questions allow selection on the basis of sex, but they suggest that sex is the most important criteria for selecting an intimate worker.

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140. Other scholars have recognized the role of the law in shaping even our most intimate preferences. See Emens, *supra* note 29, at 1366–74, for a discussion of the law’s role in structuring, as she terms it, “the accidents of sex and love”—the likelihood of dating and marrying people from particular identity groups.

141. See sources cited *supra* note 13.

142. WOMEN OB/GYN, <http://www.womenobgyn.com> (last visited Aug. 12, 2015) (giving the tagline “Women, helping women” and describing “group of five female OB/GYN’s, and three nurse practitioners,” with a photograph of only women providers). In the past fifteen years, the rising demand for female gynecologists and obstetricians has led to a rise in all-female practices. See Kate Stone Lombardi, *A Clinic Where All the Doctors Are Women*, N.Y. TIMES, Dec. 3, 2000, at WE8.

143. THE WOMEN’S LAW GROUP, <http://thewomenslawgroup.com> (last visited Aug. 12, 2015) (“At The Women’s Law Group, we understand that going through a divorce, custody issue, or other family law matter can be one of the most difficult times of your life. Our Tampa divorce attorneys and staff are here to help you.”); WOMEN’S DIVORCE RIGHTS, <http://www.womensdivorcerights.com/about.php> (last visited Aug. 12, 2015) (“Founded . . . to support, inspire, and encourage women . . . during each stage of their lives.”).

144. Erika Allen, *The First Issue in Any Massage*, N.Y. TIMES, Sept. 16, 2012, at ST22.

145. See *Select Service(s) and Employee(s)*, *Bubbles Hair Salon*, BUBBLES, <https://bubbles.mylocalsalon.com/onlinebooking/v7410/Steps/SelectServices.aspx?siteid=d2a0742a-0aba-e011-9d91-0050563fff01&event=1> (last visited Aug. 12, 2015).

In the context of erotic workers, employers cultivate the demand for sexy workers and the sex preferences that accompany them. Businesses convert food servers and bartenders into intimate workers who sell sexual titillation in restaurants, bars, and clubs like Hooters, and with it cultivate sex-specific preferences—typically for women—in these otherwise sex-neutral roles.<sup>146</sup>

But without a concrete adverse employment action (e.g., failure to hire), the employer's promotion of discriminatory consumer preferences does not result in a Title VII claim.<sup>147</sup> While Title VII bars employers from “classify[ing]” employees or applicants in a way that “deprive[s]” them of employment opportunities,<sup>148</sup> an employee would have a difficult time proving causation: that a sex-segregated drop-down box, for example, was a classification that limited employment opportunities. Moreover, much of this discrimination is at the hiring stage, and these types of claims are notoriously rare and difficult to prosecute.<sup>149</sup>

To the extent that law permits employers to cultivate and reinforce consumers' discriminatory preferences, this helps to shape preferences by legitimating rather than disrupting such preferences, particularly by creating the environment in which intimate services are delivered. If consumers have their preferences accommodated, this reinforces their preexisting view that this is the only acceptable way these services may be delivered. Employers' role in constructing discriminatory preferences then interferes with the free formation of meaningful intimate work relationships.

This can have a significant impact on the employment opportunities of intimate workers. Discriminatory preferences can lead to fewer customers or worse reviews, which can reduce earnings and limit work opportunities more generally.<sup>150</sup> Systematic discriminatory preferences

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146. Diane Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 78–100 (2007) (detailing how casino bartenders are sexualized); Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1271–74 (same). The well-known case of Darlene Jespersen involved a bartender who was eroticized into a “bar babe” by her employer's imposition of a sex-specific grooming code. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

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

148. 42 U.S.C. § 2000e-2(a)(2) (2012).

149. *See Naomi Schoenbaum, It's Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting Model,”* 30 HARV. J.L. & GENDER 99, 140 (2007).

150. *See Laurence M. Kahn, Customer Discrimination and Affirmative Action*, 29 ECON. INQUIRY

for intimate workers of a particular identity can also have more systematic consequences, including occupational segregation, as workers decide what jobs to fill based on consumer demand. Gynecological medicine, for example, has become increasingly female-dominated as more women express a preference for female gynecologists.<sup>151</sup>

A few courts have begun to recognize the role that employers play in shaping discriminatory preferences for intimate workers. In a case denying a residential care facility's claim that residents' racial preference for certified nursing assistants constituted a BFOQ, the court proposed that the employer could "attempt to reform the resident's behavior after admission."<sup>152</sup> A case denying sex as a BFOQ for massage therapists went further, discussing how the employer perpetuated customers' biases by asking for their sex preference.<sup>153</sup> The court suggested that the spa could instead provide customers with a "description of the therapists' qualifications," and could quell privacy concerns by informing customers of draping policies and telling them that they "can instruct therapists about where they may and may not touch."<sup>154</sup> The court was confident about the impact on customer preferences: "More information about the process, along with a reduced focus on gender and an increased focus on qualifications, may alter the extent to which clients of both sexes are willing to engage the services of a male."<sup>155</sup>

## 2. *Public Accommodations Law*

The law regulating discrimination against consumers also does too little to protect them from employer-promoted bias. Public accommodation laws ban businesses from discriminating against consumers, but they nonetheless allow employers to act in ways that continue to promote biases against both consumers and intimate workers.<sup>156</sup> Unlike consumer preferences for intimate workers of a

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555 (1991) (finding that customer discrimination can result in long-run wage differentials).

151. See Lewin, *supra* note 109 (documenting that women now comprise over seventy percent of ob/gyn residents and attributing this to patient demand and quoting chairman of the Council on Resident Education in Obstetrics and Gynecology that this is "a huge issue for male medical students").

152. Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 915 (7th Cir. 2010).

153. Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052, 1070 (D. Ariz. 1999).

154. *Id.* at 1072–73.

155. *Id.* at 1074. Both men and women overwhelmingly express a preference for a female massage therapist when asked. See Allen, *supra* note 144.

156. See, e.g., 42 U.S.C. § 2000a(a) (2012) (banning discrimination in public accommodations on

particular identity arising out of privacy interests, the basis for intimate worker preferences for consumers of a particular identity is more often grounded in religion or the right to expression, for example, wedding vendors who prefer not to serve gay and lesbian couples out of a religious objection to same-sex marriage. Intimate workers and their employers have typically lost in cases brought by consumers challenging discrimination against them under public accommodations laws.<sup>157</sup>

Despite consumers prevailing in these cases, the public accommodation cases give short shrift to the role of the employer in cultivating discrimination affecting both consumers and intimate workers. Take the well-known case out of New Mexico that upheld a finding of discrimination against a wedding photographer who refused to provide services to gay couples in violation of the state public accommodations law.<sup>158</sup> The employer argued that the law compelled the expression of support for gay marriage, which the employer objected to as violating the right to freedom of expression and free exercise of religion.<sup>159</sup> In rejecting these defenses, the court noted that the employer could continue to express its views by “post[ing] a disclaimer on their website or in their studio advertising that they oppose same-sex marriage.”<sup>160</sup>

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the basis of race, national origin, and religion); N.M. STAT. ANN. § 28-1-7(F) (West, Westlaw through 2015 1st Spec. Sess.) (banning discrimination in public accommodations on the basis of, *inter alia*, race, religion, national origin, sex, sexual orientation, gender identity, spousal affiliation).

157. *See* N. Coast Women’s Care Med. Grp. v. Superior Court, 189 P.3d 959 (Cal. 2008) (holding that doctors who refused fertility treatment to lesbian patient violated state public accommodation law); Nathanson v. MCAD, No. 199901657, 2003 WL 22480688 (Mass. Super. Ct. Sept. 16, 2003) (holding that divorce lawyer who catered to women clients violated state public accommodation law by refusing to represent male client); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that wedding photographer who refused to service gay couples violated state public accommodation law). I exclude from consideration laws that exempt certain body workers (doctors) from performing certain services (abortions) on the basis of religious objection because these laws exempt services rather than persons from the protection of public accommodations laws.

It is not yet clear whether this will change in the wake of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_, 134 S. Ct. 2751 (2014), which allowed employers an exception from the mandate to provide contraception coverage in their health care plans on religious grounds. Two noted scholars have concluded that concern that the decision will broaden religious exceptions for employers in other contexts is overblown. *See* Ira Lupu & Robert Tuttle, *Hobby Lobby in the Long Run*, CORNERSTONE (July 1, 2014), <http://berkeleycenter.georgetown.edu/rfp/blog/hobby-lobby-in-the-long-run>. Note that an employer’s religious freedom defense in a case like *Elane* would arise under a state analogue to the Religious Freedom Restoration Act that controlled in *Hobby Lobby*, as that statute applies only against the federal government. *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

158. *Elane Photography*, 309 P.3d at 53.

159. *Id.* at 63.

160. *Id.* at 59, 68 (noting that the public accommodation law also does not require the employer



This type of employer action not only undermines the law's aim at preventing dignitary (and even material) harms to protected groups; it cultivates the exact discriminatory preferences against consumers that the law was meant to combat. Such public expressions reinforce the discriminatory preferences of the intimate workers who provide services at the firm. A firm that provides wedding photography services to the public while openly expressing opposition to gay marriage signals discriminatory preferences to gay customers, while remaining in technical compliance with the law. Such a firm is unlikely to get any gay couples as customers, and thus intimate workers will not need to confront or put to the side their biases in the provision of intimate services.

Moreover, such employer actions reinforce discriminatory preferences not only for consumers, but for intimate workers. The same New Mexico law that bans sexual orientation discrimination in public accommodations also bans such discrimination in employment.<sup>161</sup> A sign posted by the employer disapproving of gay marriage cultivates and reinforces biases against gay *workers* as well, and likewise signals to gay applicants that they are not welcome as employees. Again, without an adverse employment action, there is no relief for this cultivation of discriminatory bias by employers.<sup>162</sup>

### C. *Sacrifice*

The value-generating altruism that is a hallmark of intimate work means that both the intimate worker and the consumer may act against their own self-interest to benefit the other.<sup>163</sup> For example, employers

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“to either include photographs of same-sex couples in its advertisements or display them in its studio”).

161. See N.M. STAT. ANN. § 28-1-7(A) (West, Westlaw through 2015 1st Spec. Sess.) (“It is an unlawful discriminatory practice for . . . an employer [with fifteen or more employees] . . . to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of . . . the employee’s sexual orientation . . .”); *id.* § 28-1-7(F) (“It is an unlawful discriminatory practice for . . . any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of . . . sexual orientation . . .”).

162. See *supra* notes 147–49 and accompanying text.

163. For discussions of how certain forms of work can be invisible—and the adverse consequences—see, for example, ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (2d ed. 2003) (providing the seminal study on invisible emotional labor—work we do to create a particular feeling or state of mind in others—and documenting a variety of resulting harms); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000) (explaining how invisible work is not rewarded formally or

who engage in cost-cutting strategies may be saved from their adverse effects on customers by intimate workers' willingness to increase their work efforts without additional compensation.<sup>164</sup> So, for example, in response to layoffs, intimate workers may intensify effort or work more hours.<sup>165</sup> "[B]ecause they care," intimate workers "are not as prepared to jeopardize their relationship with those for whom they care in pursuit of their own self-interest as other workers may be."<sup>166</sup>

Sometimes intimate workers sacrifice by violating employer policies to benefit consumers. A particularly telling example comes from a recent study of Motherhood, Inc.<sup>167</sup> The now defunct company provided instruction and guidance to new mothers and relied on its employees to develop intimate relationships with customers.<sup>168</sup> But the company also relied on employees to recommend its products consistently, even though doing so would undermine their function as trusted confidantes to their clients, which presumably makes the company valuable to its customers.<sup>169</sup> To develop intimacy and perform the work required, employees had to engage in a "difficult decoupling" of their intimate relationships with customers and the employer's profit motive, captured well by one employee's comment: "It's hard to support moms by upselling."<sup>170</sup> Many employees opted out of such difficult decoupling by refusing to recommend the company's products.<sup>171</sup>

Such risky sacrifices by intimate workers come in many forms. Home health aides violate the policy against giving out their home telephone numbers to their clients or visiting them off hours.<sup>172</sup> A nurse engages in

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informally).

164. See Susan Himmelweit, *Caring Labor*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 33 (1999).

165. *Id.*; Paula England, *Emerging Theories of Care Work*, 31 ANN. REV. SOC. 381, 390 (2005) (explaining that "emotional bonds put care workers in a vulnerable position, discouraging them from demanding higher wages or changes in working conditions that might have adverse effects on care recipients").

166. Himmelweit, *supra* note 164, at 33 (discussing this phenomenon in the context of caregivers); see also England, *supra* note 165, at 390 (describing this as "[a] kind of emotional hostage effect").

167. See Catherine Turco, *Difficult Decoupling: Employee Resistance to the Commercialization of Personal Settings*, 118 AM. J. SOC. 380 (2012). The company name nicely evokes the core tension of intimate work: the fundamentally intimate nature of motherhood and the fundamentally instrumental nature of the market.

168. *Id.* at 389–91, 396.

169. *Id.* at 398–400.

170. *Id.* at 380, 399.

171. *Id.* at 398.

172. See Stone, *supra* note 61, at 105. Stone also explains how hospice volunteers choose not to

a “small act of rebellion” by unclipping the hospital phone, pulling out its batteries, and closing a particularly vulnerable patient’s room door to “sit[] down beside her patient, just to be near.”<sup>173</sup>

The employer determines the consequences of these intimate worker efforts by either rewarding these efforts, or, by contrast, failing to reward or even *penalizing* workers for them. Engaging in intimate behaviors that go unrewarded, or, worse yet, result in discipline, puts intimate workers at risk of foregoing the material rewards of work—compensation and continued employment.<sup>174</sup> Note that although consumers also engage in altruism, intimate workers’ sacrifices render them more vulnerable because employers have far greater ability and motivation to impose harmful consequences on workers than on consumers.

Work law regulates the rewards and penalties that result from employment to ensure adequate compensation for workers’ efforts and to protect against workplace injury and retaliation. A number of protections, such as minimum wage guarantees<sup>175</sup> and retaliation protection,<sup>176</sup> are afforded when the employee is engaged in work. But when it comes to intimate work, the law fails to compensate all of the work that intimacy generates, and fails to protect intimate workers who act on behalf of their consumers from retaliation. To the extent the law recognizes intimate work as different here, it again borrows a page from family law’s regulation of intimacy, subtracting protection for the compensation of intimate work, rather than adding more. This leaves intimate workers vulnerable to employers’ failure to compensate, and even to penalize, their altruism. Law’s failure to compensate and protect altruism undermines the relational and emotional aspects of market behavior that are fundamental to intimate work.

### 1. *Wage-and-Hour Law*

Despite the additional productive efforts that intimate work generates, intimate workers may not end up materially better off for these efforts.

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get Medicare certification, which would allow them to be paid, because they do not want to comply with the intimacy boundaries imposed by the program, such as the policy against giving out home phone numbers. *Id.*

173. Sara Corbett, *The Last Shift*, N.Y. TIMES MAG., Mar. 16, 2003, at 61.

174. For example, the nurse who fails to answer her hospital phone to spend quality time with a patient might be disciplined for doing so, *see id.*, or a Motherhood, Inc. employee who refuses to recommend the company’s products to her consumers might be terminated for failing to meet her sales quota, *see supra* notes 167–71 and accompanying text.

175. *See, e.g.*, 29 U.S.C. § 206 (2012) (minimum wage); *id.* § 207 (overtime).

176. *See, e.g., id.* § 158 (retaliation protection).

Combining intimacy with work increases the odds that intimate work is made invisible to the employer. When work is viewed as undergirded by love and affection, its productive value is not appreciated.<sup>177</sup> Friendship between the intimate worker and the consumer, for example, may be seen as an adjunct to the work, or perhaps even a distraction, rather than a critical feature of intimate work that tends to enhance efficiency.<sup>178</sup>

Work law does little to address the invisibility of intimate work or ensure that intimate workers are compensated for all of it, and instead treats intimate work too much like family intimacy. The Fair Labor Standards Act (FLSA) guarantees a minimum hourly wage plus overtime.<sup>179</sup> To the extent this law recognizes intimate work, it *removes* rights to compensation, just as the law restricts compensation for work done in the family.<sup>180</sup> Wage-and-hour protection is limited for some of the most intimate domestic workers.<sup>181</sup>

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177. For a discussion of this phenomenon in the context of the family, see generally Silbaugh, *supra* note 9 (arguing that the law fails to recognize housework as work because of the affectionate familial context in which the work is performed).

178. See, e.g., ZELIZER, *supra* note 62, at 241–44 (discussing how, in the context of coworkers, intimacy in the workplace is seen as antithetical to production based on a commonly held view that intimacy and production should exist in separate spheres).

179. See 29 U.S.C. § 206 (minimum wage); *id.* § 207 (overtime).

180. This principle of non-compensation for work done within the domestic family is colorfully expressed in one seminal case refusing to enforce a contract for a wife to receive compensation for providing care for her ailing husband: “[E]ven if few things are left that cannot command a price, marital support remains one of them.” *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 655 (1993).

181. See 29 U.S.C. § 213(a)(15) (exempting babysitters and companions for the elderly from overtime and minimum wage); *id.* § 213(b)(21) (exempting live-in domestic workers from overtime). In 2013, the Department of Labor issued a rule that would extend wage-and-hour protection to companions for the elderly (typically referred to as home healthcare workers) employed by third-party agencies, see 29 C.F.R. § 552.109 (2014), after the Supreme Court had held that these intimate workers were exempt under existing regulations, see *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162 (2007). Before the rule was to take effect on January 1, 2015, the regulation was vacated, see *Home Care Ass’n of Am. v. Weil*, 76 F. Supp. 3d 138, 140 (D.D.C. Dec. 22, 2014), but that decision was reversed, see *Home Care Ass’n of Am. v. Weil*, No. 15-5018, 2015 WL 4978980, at \*1 (D.C. Cir. Aug. 21, 2015). In 2013, the Department also narrowed the definition of “companionship” work that qualifies for the exemption. See 29 C.F.R. § 552.6(b) (excluding from the exemption companions who spend more than twenty percent of their time on care work). This regulation was also vacated, see *Home Care Ass’n of Am. v. Weil*, 78 F. Supp. 3d 123, 124 (D.D.C. Jan. 14, 2015), a decision that was likewise reversed, see *Home Care Ass’n of Am.*, 2015 WL 4978980, at \*1. It is too soon to tell whether the appellate rulings will be upset by en banc or Supreme Court review.

Another notable set of intimate workers exempt from wage-and-hour protections is teachers. See 29 U.S.C. § 213(a) (including within an exemption to the FLSA “any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools”); 29 C.F.R. § 541.303(a) (applying exemption to “any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge”); *id.* § 541.204(b) (expanding the “educational establishments” covered to include “an elementary or secondary school

Indeed, for purposes of coverage under wage-and-hour law, courts distinguish between efforts motivated by intimacy and efforts motivated by service to the employer, assuming that there is little or no overlap, and leaving intimate work uncompensated. In the case of a K-9 officer seeking compensation for the time he spent caring for his police dog at home, for example, the Second Circuit responded “[a]t some point, an officer’s attention to his assigned dog may not be provided primarily for the employer’s benefit but rather out of the caretaker’s own sense of love and devotion to the animal in his charge.”<sup>182</sup>

So, when intimate workers engage in certain forms of intimacy, the law does not treat or protect these activities as work. The law’s division between intimacy and work does not reflect reality, as legal scholars have made clear in the context of the family.<sup>183</sup> Intimate work can contribute as much value to the consumer and the employer as any other efforts of the intimate worker, and, in fact, adding intimacy to work often *enhances* its productive value.<sup>184</sup> Recognizing the productive value of intimate work need not negate or undermine intimacy. Sociologists and economists have found that economic exchange coexists with motives of care and altruism in a range of relationships, and that workers can successfully combine motives of love and money.<sup>185</sup> The law’s continuing divide between intimacy and work leaves intimate workers undercompensated for the value they generate.

## 2. *Retaliation*

Work law’s failure to recognize the overlap of intimacy and work also means that it does little to address the double bind that intimate workers face when employers penalize intimate workers for acting altruistically toward consumers. Work law that typically limits the harms that

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system, an institution of higher education or other educational institution”). For a discussion of this problem in the context of adjunct professors, see Trisha Pande, *Professors at the Poverty Line: Protecting Adjunct Professors Under the Fair Labor Standards Act* (Apr. 20, 2015) (unpublished manuscript) (on file with the author).

182. *Holzappel v. Newburgh*, 145 F.3d 516, 523 (2d Cir. 1998); *see also Velez v. Sanchez*, 693 F.3d 308, 315, 330 (2d Cir. 2012) (explaining that whether a worker who lived with her stepsister’s family acted out of love in providing care for the children is one consideration in determining if she was an employee entitled to wage-and-hour protections).

183. *See Silbaugh*, *supra* note 9, at 17–18 (documenting the valuable production done in the household); *cf. Hasday*, *supra* note 29, at 497–99 (arguing that economic exchange—a hallmark of productive market behavior—is ubiquitous in the family).

184. *See supra* Part I.B.

185. *See ZELIZER*, *supra* note 62, at 250–55; Nancy Folbre & Julie A. Nelson, *For Love or Money—Or Both?*, 14 J. ECON. PERSP. 123 (2000).

employers can inflict on workers for doing their jobs and standing up for their rights does little to protect intimate workers who act on behalf of their consumers because work law, insensitive to the overlap of work and intimacy, sees these as acts of intimacy unrelated to work. Work law's failure to extend protection against discipline to these acts of intimate work converts altruism into sacrifice.

Work law that protects employees who advocate for their own work-related interests fails to protect intimate workers who advocate for their work interests—their consumers. The National Labor Relations Act (NLRA) grants employees, whether unionized or not, the right “to engage in other concerted activities for the purpose of . . . mutual aid or protection” without retaliation.<sup>186</sup> But the NLRA has ignored intimate worker-consumer bonds in evaluating when such activities are “mutual”—i.e., in furtherance of the interest of both the complaining employee and those on whose behalf she complains.<sup>187</sup> For example, when a counselor in a facility for disturbed children protests the quality of treatment, this is viewed as only in the interest of the children and not *also* in the employee's interest, and thus does not qualify as protected “mutual aid.”<sup>188</sup> Courts will sometimes allow such cases to proceed, but only by contorting such actions to fit within work law's narrow view of what counts as a work-related concern—self-interested economic gain.<sup>189</sup>

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186. 29 U.S.C. §§ 157–158.

187. As Richard Michael Fischl and Cynthia Estlund have argued, the application of the “mutual aid or protection” provision has been limited by work law's conception of activity being in the employee's work interest only when it is in the employee's narrow economic self-interest. See Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989).

188. See *Lutheran Soc. Serv. of Minn., Inc.*, 250 N.L.R.B. 35, 42 (1980) (counselors for troubled children who complained that proposed program changes would negatively affect the children); see also *Five Star Transp., Inc.*, 349 N.L.R.B. 42, 46 (2007) (school bus drivers who wrote letters to school about transportation safety concerns only “implicate[d] the safety of children, not the common concerns of employees”); *Orchard Park Health Care Ctr., Inc.*, 341 N.L.R.B. 642, 644 (2004) (nursing home employees who called the state health department patient care hotline to report poor customer conditions “were concerned about the quality of the care and welfare of the residents, not their own working conditions”); Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel in the N.L.R.B. Office of Gen. Counsel, to Richard L. Ahearn, Regional Director of Region 19, *The Wedge Corp.*, No. 19-CA-32981, 2011 WL 4526829 (N.L.R.B.G.C.), at \*3 (Sept. 19, 2011) (bartender's Facebook posts regarding concerns about customer service are not protected because “employee concerns about the quality of care and the welfare of patients or clients are not interests encompassed by the ‘mutual aid or protection’ clause” (internal quotation marks omitted)).

189. See, e.g., *Misericordia Hosp. Med. Ctr.*, 246 N.L.R.B. 351, 357 (1979), *enforced*, 623 F.2d 808 (2d Cir. 1980) (holding that a nurse who was terminated for protesting unsanitary conditions

Altruism itself—an endemic feature of intimate work—is not considered worthy of protection. An intimate worker acting to benefit the consumer necessarily implicates the interest of the worker not solely because it matters for her personal economic gain, although it does, and not solely because the intimate work relationship is a formative part of an intimate worker's working conditions, although it is.<sup>190</sup> For intimate workers, caring about the consumer means that the welfare of the consumer *on its own* affects the intimate worker's welfare.

Work law has yet to recognize how intimate workers' tendency to sacrifice for their consumers could leave them unprotected against retaliation under other laws as well. Antidiscrimination law protects employees who complain of discrimination from retaliation.<sup>191</sup> The forms of retaliation that are prohibited are quite broad—essentially anything that the employer can do that might dissuade a reasonable worker from complaining.<sup>192</sup> In *Thompson v. North American Stainless, LP*,<sup>193</sup> the Supreme Court recognized that an employer firing an employee's fiancé after that employee complained of discrimination would dissuade a reasonable employee from complaining.<sup>194</sup> But no court has yet applied such a theory to intimate workers. So an intimate worker—say a camp counselor—who complained of discrimination could be retaliated against by an employer withdrawing resources from her campers without relief.<sup>195</sup>

Occasionally, an intimate worker who sacrifices on behalf of a consumer and is then fired will be protected by a claim for termination in violation of public policy.<sup>196</sup> But such claims turn on the fortuity of state

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and inadequate staffing engaged in protected activity because her protest contained passing reference to employee work circumstances); Estlund, *supra* note 187, at 936.

190. See *supra* Part I.B for a discussion of how the quality of intimate work bonds affects productivity and other conditions of work.

191. 42 U.S.C. § 2000e-3(a) (2012) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”).

192. See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173–74 (2011).

193. 562 U.S. 170 (2011).

194. *Id.* at 174.

195. The Court expressly refrained from drawing any bright line that would limit its holding. *Id.* at 174–75. This holds promise for protection of intimate worker sacrifices. However, family-like intimacy—a fiancé—is a far easier case than a work intimate. I return to *Thompson*'s potential for the protection of intimate work in Part III.B.1.b, *infra*.

196. Compare *Kirk v. Mercy Hosp. Tri-Cnty.*, 851 S.W.2d 617, 618 (Mo. Ct. App. 1993) (upholding claim for termination in violation of public policy brought by nurse who was fired after

law: the existence of a relevant state statute and a court willing to interpret it broadly to support the public policy at issue.

#### D. *Exposure*

The established intimate work relationship also renders consumers and intimate workers vulnerable to exposure. When one party gives another party access to private information, this creates a risk that the receiving party will not keep it confidential, or will use it against the other party.<sup>197</sup> Because intimate work is premised on a consumer sharing private information with a worker,<sup>198</sup> intimate work exposes the consumer to the vulnerability that the worker will misuse this information. And this risk of exposure can go in both directions. Because intimate workers often share personal information about themselves with consumers, and indeed rely on this type of intimacy to enhance the productive value of the relationship,<sup>199</sup> intimate workers too can be vulnerable to this type of exposure.

Intimacy also provides additional access and opportunity to impose other types of harm. It is well-known that work poses the opportunity for bullying, harassment, and abuse, and not only on the basis of protected identity traits.<sup>200</sup> Intimate work only heightens the opportunity for such harm to occur, as intimacy provides additional avenues to push buttons and to emotionally manipulate one's target.<sup>201</sup>

The regular exposure that work often provides means that there is not a simple means for the intimate worker to avoid abusive or demeaning treatment by the consumer. In such circumstances, workers, if they remain in their jobs, have little choice but to accept the intimacy and its

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complaining about poor patient care out of concern for patient based on state nursing law), with *Wright v. Shriners Hosp. for Crippled Children*, 589 N.E.2d 1241, 1242 (Mass. 1992) (rejecting claim for termination in violation of public policy brought by nurse who was fired after complaining about poor patient care based on nursing code of ethics).

197. See Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 675–76 (2009) (discussing duty of confidentiality that arises in appropriate circumstances to protect against an abuse when principal shares private information with agent).

198. See *supra* notes 40–41 and accompanying text.

199. See *supra* note 47 and accompanying text.

200. See David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 484–85 (2000) (documenting the prevalence of general workplace bullying).

201. See Mara Brendgen et al., *Verbal Abuse by the Teacher During Childhood and Academic, Behavioral, and Emotional Adjustment in Young Adulthood*, 99 J. EDUC. PSYCHOL. 26 (2007); Premilla D’Cruz & Ernesto Noronha, *The Limits to Workplace Friendship: Managerialist HRM and Bystander Behaviour in the Context of Workplace Bullying*, 33 EMP. REL. 269 (2011).



attendant emotional vulnerability. While intimate work poses similar risks to the consumer, they are typically less constrained from seeking services elsewhere in the market.

While fiduciary duties guard against a small subset of intimate work exposure, the law fails to capture the full range of this vulnerability, treating much of intimate work too much like any other work. Duties to protect against the harms of exposure in intimate work relationships are owed only by some intimate workers toward their consumers—and not the other way around. Areas of work law, like workers' compensation, that prevent or remedy workplace injuries are premised on a model of physical rather than interpersonal injury, and thus fail to address the type of exposure that intimate work generates. In this way, the law fails to take seriously the intimacy that is a predicate for productivity across the full range of intimate work and the risk of harm this imposes.

### 1. *Fiduciary Duties*

To the extent that work law recognizes the potential for harmful exposure from the intimate work relationship, it does so primarily in the form of fiduciary duties running from intimate workers to their consumers. Professional licensing standards and codes of professional ethics place legal and moral duties on intimate workers to avoid imposing a variety of harms on vulnerable consumers.<sup>202</sup> Certain intimate workers, such as doctors and lawyers, owe formal fiduciary duties to their consumers because of the high levels of trust and dependence inherent in such relationships.<sup>203</sup> Such relationships impose obligations on these intimate workers to, among other things, act in their consumers' best interests and keep their confidences.<sup>204</sup>

Beyond formal fiduciary duties imposed by virtue of relationship status, courts may impose duties of loyalty and care on the basis of trust and dependence arising out of the circumstances of a particular relationship. These are typically referred to as informal fiduciary relationships or confidential relationships.<sup>205</sup> Courts that take a more

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202. See ZELIZER, *supra* note 40, at 18–21 (recounting such a code for psychotherapists); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 815–16 (1983) (discussing these standards for doctors and lawyers).

203. See, e.g., *Clancy v. State Bar*, 454 P.2d 329, 333 (Cal. 1969) (en banc) (per curiam) (attorney-client); *Petrillo v. Syntex Labs., Inc.*, 499 N.E.2d 952, 961 (Ill. App. Ct. 1986) (doctor-patient).

204. See Hasday, *supra* note 29, at 522–24.

205. See Leib, *supra* note 197, at 700–02 (collecting cases denying claims for fiduciary duty based on friendship).

generous approach to the application of fiduciary duties have found such relationships to arise running from a number of intimate workers—nurses,<sup>206</sup> social workers,<sup>207</sup> therapists,<sup>208</sup> pastors,<sup>209</sup> hairstylists<sup>210</sup>—to their consumers. These fiduciary duties go a good way toward protecting consumers from exposure that may arise in the intimate work relationship.

However, courts that take a narrower approach will deny fiduciary protection when a relationship is deemed to be among equals rather than between one dominant and one subordinate party.<sup>211</sup> In these jurisdictions, intimate work relationships that are not seen to involve dominance by the intimate worker over the consumer will not merit fiduciary protection for the consumer.<sup>212</sup> And this limitation will restrict the application of duties running from consumers to intimate workers, even when the parties develop a friendship, because the intimate worker will be unlikely to establish dominance by the consumer. Despite the fact that many intimate workers develop bilaterally intimate relationships as a way to produce closer and more productive bonds with consumers,<sup>213</sup> and are encouraged to do so by their employers,<sup>214</sup> they may be without recourse should the consumer turn against them. The consumer,

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206. See *Estate of Bliss v. Williams*, 18 Cal. Rptr. 821, 827 (Dist. Ct. App. 1962) (confidential relationship existed between decedent and nurse who took care of “his physical needs and quite frequently acted for him in his business and property matters”); see also *Iacometti v. Frassinelli*, 494 S.W.2d 496, 499 (Tenn. Ct. App. 1973) (“It is that relationship where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of that confidence, to influence and exercise dominion over the weaker or dominated party, such as nurse and invalid, trusted business adviser and friend etc.” (citing *Bayliss v. Williams*, 46 Tenn. (6 Cold.) 440 (1869))).

207. *Abeyta v. Soos ex rel. Cnty. of Pinal*, 319 P.3d 996, 996 (Ariz. Ct. App. 2014); *Heinrich v. Silvermail*, 500 N.E.2d 835, 836 (Mass. App. Ct. 1986).

208. *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *In re Kimberly C.*, No. 3-11-0412, 2011 WL 10481304 (Ill. App. Ct. Nov. 9, 2011).

209. *In re Succession of Stamm*, 43 So. 3d 326 (La. Ct. App. 2010).

210. *In re Brodbeck v. James*, 915 P.2d 145, 152 (Kan. Ct. App. 1996) (“We find the close friendship and trust attested to by James and Hart [hairstylist] was sufficient evidence of the existence of a confidential relationship.”).

211. See *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 330 (Minn. Ct. App. 2007) (requiring one party “who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence”); Leib, *supra* note 197, at 693, 702 (describing two-part test requiring showing of “trust and vulnerability, dominance, or influence”).

212. See, e.g., *Grow v. Ind. Retired Teachers Cmty.*, 271 N.E.2d 140, 143–44 (Ind. Ct. App. 1971) (rejecting informal fiduciary relationship running from retirement home and its workers to resident because requisite dominance was not present).

213. See *supra* notes 46–48 and accompanying text.

214. See *supra* note 48 and accompanying text.

precisely because of her situation at the intersection of intimacy and work, has an inside view of the intimate worker's business and may become a trusted advisor and critical source of word-of-mouth advertising.<sup>215</sup> Nonetheless, intimate workers' exposure will often go unprotected. The obligations of consumers to intimate workers are then the same as any arm's-length deal, sounding only in basic tort or contract.

## 2. *Harassment*

Moreover, while consumers can typically exit a relationship with an intimate worker that has become hostile or otherwise destructive, the intimate worker may only be able to do so by giving up her job. Intimate workers have little say about who receives their services.<sup>216</sup>

Work law may require workers and consumers to *come together* by banning segregation, but aside from sexual harassment law, it does little to keep them apart.<sup>217</sup> And sexual harassment law only addresses a narrow source of emotional harm that arises at work: when harassing conduct based on sex rises to the level of a hostile work environment.<sup>218</sup> Beyond the tort of intentional infliction of emotional distress, some jurisdictions outside the United States hold employers liable for failing to maintain an environment free of bullying or harassment.<sup>219</sup> But even if such a standard were adopted here, the closeness of intimate work relationships means that they expose workers to the threat of emotional harm before conduct rises to the level of bullying.<sup>220</sup>

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215. See *supra* Part I.B.

216. This may not be true across the board, but it is a correlate of the definition of employment, which turns on an employer's control over the employee's work. See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 675 (2013) ("The 'control' test is the dominant standard for employment, both nationally and internationally.").

217. See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1230 (2011) (discussing the limits of U.S. law in intervening in harassment aside from sexual harassment).

218. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986) (racially or sexually hostile work environment arises only when the conduct is "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment'" (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))). See *infra* Part II.4 for further discussion of discrimination and sexual harassment law.

219. See Clarke, *supra* note 217, at 1231 (collecting foreign legislation).

220. For example, Quebec's labor code bans "psychological harassment," defined as "vexatious behaviour in the form of repeated and hostile or unwanted conduct . . . that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee." Act Respecting Labour Standards, R.S.Q. 2014, c. N-1.1, ch. IV, div. V.2, § 81.18 ¶ 1 (Que., Can.).

### 3. *Workers' Compensation*

Nor does workers' compensation—the law meant to remedy workplace injuries—adequately remedy the vulnerability to the emotional harms that can result from exposure. Workers' compensation does recognize a small set of “extraordinary” instances of particularly trying intimate work and allows such intimate workers to recover for injuries that result from it.<sup>221</sup> But, again, this law is too narrow to protect all intimate workers. For the vast majority of intimate work, courts tend to deny recovery on the theory that emotional exposure is just part of the job.<sup>222</sup> Otherwise, the only protection against emotional harm afforded to intimate workers is the one provided to everyone in the form of tort law, which is reserved for egregious behavior.<sup>223</sup> Despite the unique circumstances of intimate work, then, intimate workers are afforded little remedy for the harms their work can inflict.

#### E. *Lost Investments*

The development of intimacy typically requires investments in the relationship.<sup>224</sup> The information exchange that develops between the intimate worker and consumer reduces the search for alternative partners because getting to know someone is costly.<sup>225</sup> Norms of altruism and reciprocity too become more valuable over time.<sup>226</sup> The “longer the

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221. See, e.g., *Smith-Price v. Charter Pines Behavioral Ctr.*, 584 S.E.2d 881 (N.C. Ct. App. 2003) (allowing recovery for psychiatric nurse who suffered from post-traumatic stress disorder where job required treating suicidal patients and treatment errors could result in death).

222. See, e.g., *Anthony v. Fairfax Cnty. Dep't of Family Servs.*, 548 S.E.2d 273 (Va. Ct. App. 2001) (denying recovery to social worker because confrontations with angry parents, including being pulled from her chair and thrown out of a house and being pushed off a porch, were not unusual occurrences for a social worker); *Chi. Bd. of Educ. v. Indus. Comm'n of Ill.*, 523 N.E.2d 912, 917 (Ill. App. Ct. 1988) (categorically denying recovery for mental distress arising from repeated stressful interactions with consumers because this would “open a floodgate for workers who succumb to the everyday pressures of life”).

223. See, e.g., *Hollomon v. Keadle*, 931 S.W.2d 413, 415 (Ark. 1996) (requiring a showing of “extreme and outrageous” conduct that it is “utterly intolerable in a civilized community” to establish the tort of intentional infliction of emotional distress).

224. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. SOC. REV. 95, 98, 100–03 (1988); Seibert, *supra* note 72, at 222.

225. Uzzi, *supra* note 14, at 681 (explaining that the sharing of private information “in turn causes [individuals] to reduce their search for alternative information sources or exchange partners” because, *inter alia*, “the acquisition of information is costly,” and “thus, the more time devoted to information transfer with one party, the less time available for other ties”).

226. See *id.* at 680–81 (discussing process by which trust develops between workers and consumers such that over time “economic exchange becomes embedded in a multiplex relationship composed of economic investments, friendship, and altruistic attachments”); cf. Naomi

[intimate work] relationship lasts the richer it becomes in debits and credits, creating an opportunity-rich social structure.”<sup>227</sup> Because the value of intimate work derives from relationship-specific investments, it is largely lost when the intimate work relationship ends, either through termination or reassignment of the worker, or the worker or consumer’s departure.<sup>228</sup>

Intimate work relationships can persist and still retain some of their value even when intimate workers and consumers are no longer working together.<sup>229</sup> But rupturing the work relationship vastly reduces the value, and in particular, robs it of the unique features that make intimate work ties so valuable. The separation of the tie from work will tend to reduce the benefits derived from intimacy specifically found at work. Because the relationship is separated from an ongoing work relationship, the relationship will be less capable of supporting the intimate worker in her productive capacity. The consumer cannot communicate the same types of valuable information or provide on-the-spot support. And the separation of the tie from work will tend to reduce its intimacy. It is the regular interaction that work almost uniquely affords that helps to generate and maintain intimacy.<sup>230</sup> If the separation of the relationship from work also involves a geographical move, this only further reduces valuable intimacy.<sup>231</sup>

Despite the value of these intimate work relationships, work law leaves intimate workers and consumers perpetually vulnerable to these relationships being ruptured. Here, there is a law of intimate work that recognizes the bonds between intimate workers and consumers, but it is far too narrow. For most intimate workers, work law treats intimate work too much like all other work by affording far too little significance to the

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Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1199 (explaining how developing strong bonds requires making investments over time).

227. Uzzi, *supra* note 14, at 678 (explaining that “the identity of the individuals and the quality of their social ties are as important as the information itself,” and thus that without trusted information sources, the information itself is far less valuable).

228. See RONALD S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION 9 (1992) (noting that “the connection, with whatever social [intimate] capital it contained, dissolves” and that “[i]f a firm treats a cluster of customers poorly and they leave, the social [intimate] capital represented by the firm-cluster relationship is lost”); Donald P. Moynihan & Sanjay K. Pandey, *The Ties That Bind: Social Networks, Person-Organization Value Fit, and Turnover Intention*, 18 J. PUB. ADMIN. RES. & THEORY 205, 210–11 (2007) (“Employees exiting an organization will lose the potential to use the carefully cultivated social [intimate] capital they have built.”); Schoenbaum, *supra* note 226, at 1207–15.

229. See Schoenbaum, *supra* note 226, at 1206–07 (focusing on coworkers).

230. See *supra* notes 82–85 and accompanying text.

231. See *supra* notes 82–85 and accompanying text.

relationship between the worker and the consumer and treating it as fungible. In this way, work law undermines the relational and emotional components of production that are integral to intimate work.

### 1. *Non-Compete Agreements*

Non-compete agreements limit workers' ability to leave a firm and start a competing business or work for a competitor. Unlike most contracts, courts scrutinize these agreements because they limit the freedom to work and can restrain trade.<sup>232</sup> Most jurisdictions uphold non-compete agreements so long as they are reasonably limited in scope (geographic and durational) and purpose.<sup>233</sup> In a few cases, the law of employee mobility *does* recognize intimate work. Traditionally, courts have scrutinized covenants not to compete for doctors and lawyers more carefully on the basis of the special nature of the relationship between these professionals and their customers.<sup>234</sup> For other intimate workers, though, courts pay little heed to intimate work relationships and their value to both the worker and the consumer.

In determining the validity of a covenant not to compete, courts look to whether the hardship to the worker or injury to the public outweighs the employer's need to protect its legitimate interests.<sup>235</sup> In determining injury to the public, courts assess whether the intimate worker's services were "unique [or] uncommon."<sup>236</sup> When the services provided by the intimate worker are available elsewhere in the area, courts see no harm in barring access to a particular worker.<sup>237</sup> The law here regards the service provided to be the only thing of value. The unique supportive value of these relationships, the investments made in them, and how these investments can enhance the value of the service provided are not considered.

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232. See *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 539 (Wyo. 1993).

233. Michael Selmi, *The Restatement's Supersized Duty of Loyalty*, 16 EMP. RTS. & EMP. POL'Y J. 101, 101-02 (2012).

234. See *Valley Med. Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1999) (invalidating doctor's restrictive covenant because it interferes with the doctor-patient relationship); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989) (holding that restrictive covenants among attorneys are prohibited on the basis of the lawyer-client relationship). Some courts have become more permissive in upholding these covenants against doctors so long as the community is not deprived of important medical services, but courts still scrutinize these agreements more closely than those for other intimate workers. See *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85 (Ill. 2006).

235. See *Hopper*, 861 P.2d at 539-40; *A.E.P. Indus., Inc. v. McClure*, 302 S.E.2d 754, 760 (N.C. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

236. *Hopper*, 861 P.2d at 544.

237. *Id.*

In determining hardship to the worker, courts assess whether she can practice her chosen profession. So long as the worker can continue plying her trade, courts deny that restricted access to particular consumers causes any hardship to the worker.<sup>238</sup> This analysis regards intimate work as simply the provision of services, with the recipients of those services being interchangeable. This ignores the personal and professional value embedded in intimate work relationships. And intimate work provides yet another reason for courts to scrutinize non-compete agreements. Because intimate workers tend to be myopic both about the extent of intimacy they develop with consumers and the duration of the employment relationship, they do not reach optimal contractual arrangements at the outset of employment relationships.<sup>239</sup>

Courts do consider the employer's loss of customers as a reason for *upholding* a restrictive covenant.<sup>240</sup> In fact, some courts even rely on customers' "close" and "personal relationships" with, and "love" for, an intimate worker as a reason to *enforce* a non-compete agreement; otherwise, this intimacy could result in the employer's loss of customers.<sup>241</sup> While an employer's investment in creating the necessary conditions for intimate work relationships is a relevant consideration in assessing the validity of a non-compete agreement, it should not be to the exclusion of the intimate worker-consumer relationship.

Defenders of current law might argue that the employer rightly owns the value of customer relationships generated by intimate work, because these relationships would not exist but for the employer selling the intimate worker's services. But research on intimate work shows the importance of worker-consumer bonds for firm loyalty. Management literature on customer-firm loyalty has disaggregated customer relations with workers and with firms and has found that customer relations with workers, particularly intimate workers, drive customers' loyalty to

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238. See, e.g., *id.* at 543 (enforcing covenant that barred veterinarian from practicing small animal medicine because she could still practice large animal medicine); *Mayne v. O'Bannon Pub. Co.*, No. 31A05-1301-CT-5, 990 N.E.2d 525 (table), 2013 WL 3787601, at \*3 (Ind. Ct. App. July 17, 2013) (enforcing five-year non-compete agreement against manager with close relationships with customers); *Zona Corp. v. McKinnon*, No. PLCV201100247, 2011 WL 1663094 (Mass. Super. Ct. Mar. 14, 2011) (enforcing non-compete against hairstylist).

239. See *infra* Part III.A.2 for further explication of contracting and information deficits in the context of intimate work.

240. See *Philip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (Neb. 1982) (enumerating employer's loss of customers as a factor weighing in favor of enforcing non-compete agreement).

241. *Mayne*, 2013 WL 3787601, at \*3 (enforcing non-compete because manager "was the face of" the employer, "she knew the customers and their printing needs well," and they "loved" her).

firms.<sup>242</sup> In the intimate work context, “customers develop loyalty to a [firm] because of their loyalty to [workers],” who “function as prominent firm agents and whose performance represents a key characteristic of the service.”<sup>243</sup>

This research highlights the fiction of the agency relationship in the context of intimate work. That is, consumers develop relationships with the agent (the intimate worker) that is quite distinct from their relationships with the principal (the employer). Recognizing intimate work requires recognizing that the delegation from the principal (the employer) to the agent (the intimate worker) means that when the intimate worker acts on behalf of the employer, she is not fungible. Rather, the agent comes to stand in for the principal in ways that overtake the role of the principal. Given the significance of intimate work relationships to both consumers and workers, the law’s failure to appreciate this imposes significant harms.

The law’s cramped recognition of intimate work relationships—only in the context of doctors and lawyers—is far too narrow to protect the value of intimate work relationships. The worker can start a competing business only in another location without her intimate ties or after time has passed and the ties have weakened. This is especially concerning in light of the rise in employers’ reliance on non-compete agreements,<sup>244</sup> including as applied to a range of intimate workers.<sup>245</sup>

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242. See Yim et al., *supra* note 74, at 746, 750, 752–53 (finding that loyalty relationships between workers and customers transfer to the firm for relational/intimate services (hair salon) but not transactional services (fast food)); see also Neeli Bendapudi & Robert P. Leone, *Managing Business-to-Business Customer Relationships Following Key Contact Employee Turnover in a Vendor Firm*, 66 J. MARKETING 83, 83–84 (2002) (collecting studies finding that in many cases, a customer’s relationship with an employee who is closest to them is stronger than the customer’s relationship with the firm; that these relationships result in positive emotional ties and customer loyalty to the firm; and that intimacy between customer and worker strengthens these relationships); Robert W. Palmatier et al., *Customer Loyalty to Whom? Managing the Benefits and Risks of Salesperson-Owned Loyalty*, 44 J. MARKETING RES. 185, 185 (2007) (developing the concept of salesperson-owned loyalty—“fealty directed specifically toward an individual salesperson independent of his or her affiliation with the selling firm”—and finding that while customer loyalty to the worker and the firm both contribute to a customer’s willingness to pay a price premium, only customer loyalty to the worker contributes to sales growth and selling effectiveness);

243. Yim et al., *supra* note 74, at 752–53 (finding such in context of hair salon).

244. Viva R. Moffatt, *The Wrong Tool for the Job: The IP Problem Within Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 876 (2010); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1149 (2009).

245. See Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in an Array of Jobs*, N.Y. TIMES, June 9, 2014, at B1 (documenting how restrictive covenants, once largely limited to the technology and sales sectors, are entering a range of fields, including those involving intimate work, such as camp counselors and hairstylists).



Of course, non-compete agreements might be seen as recognizing the value of intimate work ties from the perspective of the employer, who is seeking to maintain ties between the intimate worker and her consumers by keeping the worker in place. But the employer could protect these intimate work relationships with a fixed-term contract or through non-legal mechanisms that enhance loyalty.<sup>246</sup> A covenant not to compete does not guarantee that the intimate worker remains with her current employer, but does limit the worker (and her consumers) from retaining intimate work relationships when starting a competing business.

## 2. *Duty of Loyalty*

Likewise, the duty of loyalty bars employees who contemplate starting competing businesses from soliciting customers while still employed.<sup>247</sup> The law generally distinguishes between announcing the competing business and soliciting customers, permitting the former but not the latter.<sup>248</sup> In so doing, work law fails to afford intimate workers the opportunity of meaningfully planning their professional trajectories. Given the significance of particular intimate work relationships to intimate workers, the success of the new business, and even the intimate worker's desire to start it, may turn on whether her established relationships will follow her. Realistically assessing the prospect that customers will follow the intimate worker to her new business will likely involve the intimate worker crossing the line from announcing to soliciting. Despite the significance of intimate work relationships, courts have presumed that any contact initiated by the intimate worker to the consumer is solicitation.<sup>249</sup> So an intimate worker who attempts to maintain just the intimate side of the relationship risks running afoul of the duty to her employer.

This orientation of work law misconstrues the loyalty of both the intimate worker and the consumer as directed to the employer rather than to each other. As for the worker, prioritizing loyalty to her employer ahead of loyalty to her consumers not only wrongly casts the employer-

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246. See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1200–18 (2010), for a discussion of the variety of legal and non-legal mechanisms employers use to cultivate employee loyalty.

247. See Selmi, *supra* note 233, at 103.

248. See *id.*

249. See *Zona Corp. v. McKinnon*, No. PLCV201100247, 2011 WL 1663094 (Mass. Super. Ct. Mar. 14, 2011).

employee relationship in the old mold of master-servant law,<sup>250</sup> but fails to recognize how the intimate worker-consumer relationship can be just as, if not more, significant than the one between the worker and the employer.<sup>251</sup> Likewise, prioritizing the consumer's relationship with the employer over the relationship with the intimate worker fails to recognize that customer loyalty is driven more by bonds with the intimate worker than with the employer.<sup>252</sup>

### 3. *Trade Secrets*

The law of unfair competition and trade secrets similarly fails to appreciate the significance of intimate work. Trade secret law may protect customer lists if the identity of customers is kept sufficiently confidential.<sup>253</sup> Once customer identity is a trade secret, former employees are not allowed to use these customer lists for their own advantage.<sup>254</sup> In assessing whether customer lists, and thus the development of customer relationships, are subject to trade secret protection, courts often look to the employer's efforts in developing these customer relationships.<sup>255</sup> Courts view these efforts as leading to

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250. See generally JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (arguing that the whole of work law, including the duty of loyalty, continues to rely on a view of employment premised in master-servant relations).

251. See *supra* note 59 and accompanying text (discussing how relationships with consumers can be more important than wages for intimate workers).

252. See *supra* note 59 and accompanying text.

253. See, e.g., *Dicks v. Jensen*, 768 A.2d 1279, 1282 (Vt. 2001) (requiring that a trade secret: “(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy” and noting that forty-one states use the same standard).

254. A minority of courts allow employees to rely on information retained by memory or interaction with customers. See K.H. Larsen, *Former Employee's Duty, in Absence of Express Contract, Not to Solicit Former Employer's Customers or Otherwise Use His Knowledge of Customer Lists Acquired in Earlier Employment*, 28 A.L.R.3d 7 (2015) (“While a number of cases have approved a former employee's use of his knowledge of customers with whom he dealt in a previous employment, only a few cases appear to treat the former employee's right to use memorized information in competition with his former employer as an absolute or unqualified right.”). Compare *Movie Gallery U.S. v. Greenshields*, 648 F. Supp. 2d 1252, 1265 (M.D. Ala. 2009) (“While . . . detailed customer lists are properly viewed as trade secrets, a salesperson's built-up goodwill and relationships are not,” and thus “individual, customer-by-customer information is not properly considered a trade secret.”), with *Calisi v. Unified Fin. Servs.*, 302 P.3d 628 (Ariz. Ct. App. 2013) (holding that confidentiality determines trade secret protection, regardless whether employee memorized information), and *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921 (Mass. 1972) (same).

255. In addition to being sufficiently secret, a trade secret must derive value from not being “readily ascertainable” to competitors. How much effort the employer put in to developing the

the employer's rightful ownership of these relationships.<sup>256</sup>

The law fails to consider the significance of the intimate worker-consumer relationship in developing and maintaining the consumer's relationship with the firm, even when the employer was initially responsible for identifying the consumer. Research shows that it is more likely the intimate worker's efforts—and not the employer's—that secures an intimate consumer's loyalty.<sup>257</sup> So while the employer may have initially gotten the customer on board with the company, it is the intimate worker who kept her there. For example, contrary to the results of one case, the relationship between an intimate worker who cleaned a customer's home may be just as, if not more, responsible for the consumer's ongoing use of the firm than the phone call that initiated the consumer's contact with the firm.<sup>258</sup> The law denies the significance of the intimate worker role, and downplays evidence that consumers want to maintain relationships with intimate workers, not employers.<sup>259</sup> This leaves the intimate worker and the consumer with the ability to continue the intimate work relationship only on pain of litigation.

#### 4. *Termination and Transfer*

Beyond employee mobility, work law also provides remedies for termination and unemployment. But these remedies fail to include the value lost when intimate work relationships are ruptured. As for remedies upon termination, unemployment insurance (UI) provides partial wage replacement,<sup>260</sup> but nothing for the loss of intimate work ties. Cash is a poor remedy, as relationships cannot simply be bought on the market.<sup>261</sup> Other than the experience rating of UI programs, which serves as a mild disincentive to termination,<sup>262</sup> work law plays little role

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relationship speaks to whether the customers' identity was "readily ascertainable." *Dicks*, 768 A.2d at 1282.

256. See, e.g., *Town & Country House & Home Serv., Inc. v. Newberry*, 147 N.E.2d 724, 727 (N.Y. 1958) (focusing on the employer house cleaning business's efforts in identifying customers through cold calling prospective customers from neighborhoods they thought might have demand).

257. See sources cited *supra* note 242.

258. *Town & Country*, 147 N.E.2d at 727.

259. *Cupid Diaper Serv. v. Adelman*, 211 N.Y.S.2d 813, 814–15 (Sup. Ct. 1961) (rejecting evidence that customers wanted to continue service with intimate worker with whom they had an established relationship).

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

261. See Schoenbaum, *supra* note 226, at 1215.

262. See Lester, *supra* note 260, at 341.

in preventing or remedying the harms of lost intimate ties. Job training programs address human capital factors that can make unemployment difficult, but do little for the lost capital of ruptured intimate work ties.<sup>263</sup>

Even when the law provides relief for unlawful termination, the remedies fail to recognize lost intimate work bonds. For example, Title VII's relief for discriminatory firings allows for compensatory damages for both pecuniary and nonpecuniary harm, as well as injunctive relief including reinstatement to "make [victims] whole."<sup>264</sup> But courts do not account for lost intimate ties in fashioning a remedy for termination, or in considering whether reinstatement is necessary to make the terminated employee whole.<sup>265</sup>

The employer's relocation or reassignment of intimate workers also ruptures relationships between intimate workers and consumers. As compared with termination, the law imposes even fewer protections here.<sup>266</sup> Aside from the Worker Adjustment and Retraining Act (WARN Act),<sup>267</sup> just about the only limit against such dislocations is a claim of discrimination. But even then, work law does not recognize a cause of action unless the transfer is accompanied by changes in the overtly economic "terms and conditions of . . . employment," such as salary or benefits.<sup>268</sup> Work law leaves those who lose intimate work relationships

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263. See SEC'Y OF LABOR, ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY 19 (1986).

264. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); see also 42 U.S.C. § 2000e-5(g) (2012) (providing that remedies for unlawful discrimination include "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"); *id.* § 1981a(a)(1), (b)(3) (allowing compensatory damages, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses").

265. Many courts assessing whether reinstatement is a necessary remedy consider whether the terminated employee has found comparable employment. See *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973); *Greenbaum v. Svenska Handelsbanken, N.Y.*, 979 F. Supp. 973 (S.D.N.Y. 1997). This fails to recognize that the new workplace is not comparable in that it will almost certainly require the loss of significant consumer relationships. Courts have even recognized intimate relationships with consumers as a reason to *reject* reinstatement, when there is a concern that the employee's experience litigating with the employer will lead the employee to poison the employer's relationships with its customers. See *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp 919, 927 (S.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir. 1977).

266. See Schoenbaum, *supra* note 226, at 1169–70 (explaining how the WARN Act encourages worker relocations without recognizing their significant costs).

267. 29 U.S.C. § 2102 (2012). The WARN Act, which applies to a small minority of employees, requires covered employers to give notice of mass layoffs and relocations. See Schoenbaum, *supra* note 226, at 1169–70.

268. *Brennan v. Tractor Supply Co.*, 237 F. App'x 9, 23–24 (6th Cir. 2007) (quoting *Kocsis v. Multi-care Mgmt., Inc.*, 97 F.3d 876, 855 (6th Cir. 1996)); see also *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (quoting *Boone v. Goldin*, 178 F.3d 253, 256–57 (4th Cir. 1999))

as a result of discrimination without a remedy.

Critics might argue that considering lost relationships is inconsistent with employment law, which is premised in economic rewards, and not emotional ones.<sup>269</sup> But intimate work fundamentally challenges the view that work is simply about dollars and cents, rather than also about personal relationships, both for their intrinsic rewards and their role in productivity.<sup>270</sup> Even if we accept this broader notion of the rewards of work, we might still be concerned about adding relational considerations to these employment law doctrines because of the judicial administration problems associated with tricky line-drawing questions (e.g., when intimate work relationships are close enough to warrant protection). While an approach that requires distinguishing between different types of worker-customer relationships is undoubtedly more burdensome than simply distinguishing between family and non-family relationships, the additional cost is warranted given the benefits that it brings.<sup>271</sup> I return to *how* to address these difficult line-drawing questions in the next Part.<sup>272</sup>

### III. THEORIZING A NEW LAW OF INTIMATE WORK

The shortcomings of the current ad hoc approach of intimate work law naturally lead to the question of what, if anything, lawmakers should do in response. This Article argues for a unified field of intimate work law that would recognize the significance of the intimate worker-consumer relationship and the need to protect the value and guard against the vulnerability that the relationship generates. A law that recognizes the intersection of intimacy and work would not only enhance the value and minimize the vulnerability that intimate work produces, but would bring jurisprudential benefits to the fields of family law and work law by remedying their categorical regulation of intimacy and

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(holding that reassignment to selling houses in blighted neighborhood was not an adverse employment action because “absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion,” the adverse economic consequences were too speculative).

269. Cf. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 227–28 (2013) (noting that scholars typically conceive of the goal of employment law to be economic efficiency or rectifying imbalances of bargaining power between employer and employee).

270. See *supra* Part I.B.

271. See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (acknowledging “difficult line-drawing problems concerning the types of relationships entitled to protection” in evaluating retaliation against third-parties under Title VII, but explaining that such a concern fails to “justif[y] a categorical rule that third-party reprisals do not violate Title VII”).

272. See *infra* Part III.B.1.d.

work, which has been repeatedly critiqued, particularly as harmful to women. Once the conceptual intimacy-work divide is bridged, such a law could be implemented rather easily. In fact, the law can largely proceed incrementally, with analogical adaptation of time-proven doctrines to the circumstances of intimate work. This Part begins with a consideration of why law—and, in particular, why a unified law of intimate work—is needed, and then turns to a discussion of how to implement this new field of intimate work law.

### A. *Why Law*

Before delving into the details of the new law this Article proposes, a discussion of why this law is needed is in order. First, legal recognition of intimate work would not only ameliorate the harms of current regulation, but would begin to break down the categorical regulation of intimacy and work, generating a law that better reflects the reality of our lives, with benefits for gender equality. Second, market failures and a reduction in employee bargaining power in the context of intimate work render private ordering inadequate to maximize welfare, requiring the injection of law.

#### 1. *The Benefits of Law*

Part II set forth the harms of the current law of intimate work: that meaningful intimate work relationships will be tainted by discrimination; that intimate workers will be undercompensated and even disciplined for the altruism their work entails; that intimate workers will be exposed to excessive emotional harm; and that intimate workers and consumers will lose the value of substantial investments in these relationships. A new law of intimate work would enhance the welfare of intimate workers and the public as their consumers by remedying these harms. The next Part addresses why private ordering fails to maximize welfare, and law is needed to achieve this goal.

Before addressing these market failures, the broader benefits of a law of intimate work that would consistently recognize the intersection of intimacy and work and the value and vulnerability it produces deserve an airing. The benefits of a unified field of intimate work law can be glimpsed more easily when this Article is situated within an emerging body of scholarship—what I call “the new intimacy” scholarship—challenging the law’s special treatment of intimacy. Two strands of scholarship are most prominent here. First, scholars have highlighted the

ways in which the family is treated separately from the market.<sup>273</sup> These scholars have documented the harms that flow from failing to apply the rules of the market to the family, including the law's failure to compensate work done in the context of family, such as housework<sup>274</sup> and surrogacy,<sup>275</sup> and the law's acceptance of discrimination in the family.<sup>276</sup> Second, scholars have highlighted the ways in which the law treats the family as the exclusive repository for the rights and privileges associated with intimacy, and fails to recognize or beneficially regulate intimacy outside the family.<sup>277</sup>

These new intimacy scholars have explored how the categorical recognition of intimacy and work fails to reflect reality and undermines intimate relationships<sup>278</sup> and work,<sup>279</sup> which can both go unrecognized under this regime.<sup>280</sup> These scholars have also argued that the law's current regulation of intimate settings harms women, who do more of the intimate family work that is not compensated, and who historically have been disadvantaged in the marital relationship, and thus stand to gain from the recognition of relationships based in other forms of intimacy.<sup>281</sup>

This Article extends and deepens the critiques of the new intimacy scholarship by exposing the harms that flow from the law's failure to recognize the intersection of intimacy and work in the form of intimate work. In addition to ameliorating the harms delineated in Part II, recognizing intimacy in the context of work allows for an alternative model of intimacy with special benefits, including the promotion of

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273. See generally Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 753 (2011) (introducing and exploring "family law exceptionalism"); Olsen, *supra* note 29 (highlighting legal separation of family and market).

274. See Silbaugh, *supra* note 9, at 28–67.

275. See Hasday, *supra* note 29, at 513–15.

276. See generally Emens, *supra* note 29, at 1315–18 (highlighting acceptance of discrimination in dating and marriage).

277. See generally Murray, *supra* note 29, at 387 (highlighting how family law ignores extended family members and other non-family caregivers); Rosenbury, *supra* note 29, at 191 (highlighting how family law ignores non-domestic support, especially friendship).

278. See, e.g., Rosenbury, *supra* note 29, at 212–20 (privileging marriage undermines friendship).

279. See, e.g., Silbaugh, *supra* note 9, at 28–67 (documenting how law regulating the family fails to recognize work done in the context of intimacy).

280. See, e.g., *id.* at 84–85 (failing to compensate housework undermines this work).

281. See generally Hasday, *supra* note 29, at 517–22 (failing to recognize economic exchange in intimate relations reinforces women's dependence); Rosenbury, *supra* note 29, at 212–20 (arguing that privileging marriage and ignoring other forms of support reinforces hierarchical gender dynamics of marriage); Silbaugh, *supra* note 9, at 14–15 (failing to require payment for work in family harms women, who do most of this work).

gender equality.

Intimate work is uniquely valuable because it differs from family or family-like intimacy.<sup>282</sup> The all-consuming model of family intimacy tends to disproportionately burden women.<sup>283</sup> Legal recognition of an alternative model of less demanding intimacy can then bring more equality to the law of intimate relationships. Intimate work's position in the regulated context of work makes it easier, as compared with the more private context of the family,<sup>284</sup> to guard against the vulnerability to sacrifice and exposure that tend to arise when intimacy is present. The legal recognition of intimate work also allows meaningful intimacy to flourish in a context in which equality in the formation of intimacy can be promoted.<sup>285</sup>

A comprehensive field of intimate work law also holds the promise of dissolving the legal categories of intimacy and work to create a more fluid notion of both, within and without the family. A law that recognizes the overlap of intimacy and work would further the new intimacy law's project of protecting and valuing intimacy even when it arises outside the family, and protecting and valuing work even when it arises outside the market. Dissolving the categories of intimacy and work is important not only for protecting and compensating those who engage in this type of extra-categorical intimacy and work, but also for gender equality. As noted above, it is women who are disproportionately harmed by the failure to recognize intimacy outside of the family and the failure to recognize work outside the market.<sup>286</sup>

Valuing intimacy in the context of work would be a step toward valuing the relational and the feminine within the market, and another step toward gender equality. Relationships have long been aligned with the feminine in the masculine-feminine binary.<sup>287</sup> To the extent law continues to undervalue the relational aspects of work, law continues to undermine feminine traits as integral to market success.<sup>288</sup> While

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282. See *supra* Part I.A.

283. See *supra* Part I.A.; Rosenbury, *supra* note 38, at 139–41 (arguing that support provided disproportionately by workers of certain identities is an important axis for employment antidiscrimination law to interrogate).

284. See Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1998).

285. See *supra* Part I.A.

286. See sources cited *supra* note 281.

287. See Olsen, *supra* note 29, at 1499–1501.

288. Scholars have recognized the importance of relationships for contracting, business, and corporate settings, but curiously this has not been extended to *intimate* relationships. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (setting forth a relational theory of the corporation); Stewart Macauley, *Non-Contractual*



relational traits can be found in both men and women, the devaluing of a trait typically associated with women will tend to disproportionately burden women.<sup>289</sup> Moreover, while it is difficult to quantify, the best evidence available suggests that women do more intimate work than men and thus are disproportionately burdened by the harms that flow from the law's current shortcomings.<sup>290</sup>

Valuing work in the context of intimacy might also have a beneficial impact on weakening the divide between work and intimacy in the family. As referenced above, feminist legal scholars have long critiqued the law's failure to recognize housework and childcare for its disproportionately harmful impact on women.<sup>291</sup> Recognizing that intimacy and work can overlap in the market and thus that meaningful intimacy arises at work could further the project of recognizing that intimacy and work can overlap in the family and that meaningful work can be done there.

The regulation of intimate work within the preexisting regulatory structure of work aids in ensuring that the recognition of intimacy is in a form that preserves its unique benefits. One of the challenges of expanding the legal recognition of non-family intimates is how to do so without simply grafting the family model on to them.<sup>292</sup> Applying regulation from the family realm to intimate work relationships risks burdening these relationships in a way that undermines their special benefits. Intimate work's situation within the already regulated world of work provides an alternative institutional structure through which to recognize (and regulate) these relationships without simply relying on family or family-like structures.

So far I have focused on the benefits of legal recognition of intimate work. Of course, these benefits would only be achieved with regulation

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*Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1 (1963) (setting forth importance of trust in business dealings); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) (setting forth theory of relational contracts).

289. This is the type of disparate impact gender discrimination—disfavoring a trait associated with one sex more than another—that Mary Anne Case argued to be troubling, and potentially in violation of employment antidiscrimination law, in her seminal article on gendered traits and employment discrimination. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 34 (1995) (describing how the devaluing of the feminine, in men or women, will accrue to the disadvantage of women).

290. See, e.g., Rachel E. Dwyer, *The Care Economy? Gender, Economic Restructuring, and Job Polarization in the U.S. Labor Market*, 78 AM. SOC. REV. 390, 392 (2013); England, *supra* note 165, at 383.

291. See, e.g., Silbaugh, *supra* note 9, at 72.

292. See ETHAN J. LEIB, *FRIEND V. FRIEND* 78–108 (2011); Rosenbury, *supra* note 29, at 226–33.

that was sensitive to these goals, a challenge taken up in the next Part. Before doing so, it is important to clear the way of the most significant challenges to the reliance on law.

## 2. *Objections and Responses*

Some might object that injecting law here would interfere with liberty or otherwise undermine the freedom that beneficially distinguishes intimate work relationships from those of the family. As an initial matter, objecting to the injection of law here is a bit of a red herring. As Part II revealed, some intimate work relationships are already highly regulated.

More fundamentally, contrary to the concerns of libertarians, the law proposed here should make intimate workers and consumers *more* free in their relationships, not less. The primary concern with regulation interfering with liberty is the state flexing its coercive muscle vis-à-vis private parties in a way that interferes with individual choice.<sup>293</sup> But in the work context, there is another party—the employer—who holds significant coercive power over the worker.<sup>294</sup> The bulk of the argument in Part II was meant to reveal how the current law of intimate work leaves employers with too much liberty to reign in the freedom of workers and consumers to form and maintain meaningful intimate work relationships. The aim of a comprehensive field of intimate work law would be to constrain employers from undermining the value or heightening the vulnerability of intimate workers and consumers. The law would impose little in the way of affirmative obligations for workers or consumers that run the risk of burden or coercion, but instead would leave the parties freer to navigate the intimate work relationship without employer interference in the formation and rupture of these bonds.

Employers properly bear this burden because they promote and benefit from intimate work. For work that requires intimacy, such as nursing, childcare work, or therapy, the employer relies on and benefits from intimacy between the worker and the consumer. Even when intimacy is not inherent to the job, employers promote intimate work. Management literature advises employers to use intimacy as a tool of production that increases employee loyalty without requiring a reciprocal

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293. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2700–01 (2008).

294. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

commitment of job security from the firm.<sup>295</sup>

These intimacy strategies are particularly important in the service economy. For many service jobs, the quality of interaction between the worker and the consumer is part of the service delivered, and intimacy often enhances this interaction.<sup>296</sup> In response, employers sort for the intimate type—workers who will bring family values to work and develop ties with customers.<sup>297</sup> Employers also require workers to forge bonds with customers and learn intimate details about them so as to better meet their needs.<sup>298</sup> For the service worker, “inhabiting the job means, at the very least, pretending to like it, and, at most, actually bringing his whole self into the job, liking it, and genuinely caring about the people with whom he interacts.”<sup>299</sup> In the service economy, “emotional availability can no longer be dismissed as women’s work; it must be seen as a dominant commodity form under late capitalism.”<sup>300</sup>

Placing some of the burden of intimate work on employers does raise a key concern. It makes intimate work more costly for employers, providing an incentive for employers to avoid or reduce the intimacy of work, contrary to current practices. Given the need for and benefits of intimacy, as evidenced by its prevalence throughout the market, the lack of available substitutes, and the relatively modest burdens imposed by the interventions proposed here, an anti-intimacy reaction would be unlikely.<sup>301</sup>

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295. See Peter Cappelli, *Rethinking Employment*, 33 BRIT. J. INDUS. REL. 563 (1995).

296. See Leidner, *supra* note 14, at 83.

297. This can be a crucial signal of the “good type” of intimate worker that the employer desires. See Spence, *supra* note 108, at 356–61.

298. See, e.g., HOCHSCHILD, *supra* note 60, at 7, 105 (documenting how flight attendants were instructed to imagine that customers were guests in their living room); Wharton, *supra* note 14, at 156 (“[E]mployers enforce display rules because they assume that workers’ compliance with them is beneficial for the organization.”). In industries as varied as hospitality and healthcare, workers use technology “to instantly call-up a range and depth of information on customers to allow them to ‘make encounters feel more personal.’” Marek Korczynski, *Understanding Contradictions Within the Lived Experience of Service Workers: The Customer-Oriented Bureaucracy*, in SERVICE WORK: CRITICAL PERSPECTIVES, *supra* note 93, at 73, 82; see also Crain, *supra* note 246, at 1183 n.5.

299. Cameron Lynne Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, in WORKING IN THE SERVICE SOCIETY 1, 4 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996).

300. Paul Myerscough, *Short Cuts*, LONDON REV. BOOKS, Jan. 3, 2013, at 25; see also Noah, *supra* note 11.

301. See ZELIZER, *supra* note 62, at 250–55 (documenting the extensive findings of natural intimacy across many different types of work over time).

### 3. *The Inadequacy of Private Ordering*

Beyond the benefits of law, intimate workers and consumers need law because intimacy undermines the ability to maximize welfare through private ordering. Law is a backstop for protecting workers when exit and voice and other market mechanisms fall short.<sup>302</sup> Lopsided bargaining power that tends to favor employers often limits workers' ability to utilize exit and voice. But because of what transpires when intimacy meets work, intimate workers' ability to rely on exit and voice to protect the value and remedy the vulnerability of intimate work is reduced. Moreover, market failures in the context of intimate work render private bargaining inefficient. This means that intimate workers cannot reliably lean on self-help and need a law of intimate work.

#### a. *Exit and Voice*

Exit is the ability of the worker to end the employment relationship (which employees generally can under employment-at-will). Exit and its threat confer leverage on the worker.<sup>303</sup> Voice is the ability of workers to request desired terms and conditions of work from their employers.<sup>304</sup> Workers rely on voice through informal requests and other mechanisms of feedback, as well as a few legal protections that rely on voice.<sup>305</sup> Many workers are already limited in the effective use of exit and voice as protective mechanisms because dependence on their jobs renders them unwilling or unable to (credibly) threaten exit or to exercise voice.<sup>306</sup>

However effective exit and voice are in the context of work, there is reason to believe that they are even less effective in the context of intimate work. When it comes to exit, research consistently finds that close bonds at work reduce turnover.<sup>307</sup> If employers need not worry so

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302. I rely on the exit/voice framework from the seminal work on group behavior, ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 1–5 (1970). Under this framework, members of an organization have two responses to dissatisfaction with the organization—exit or voice—with loyalty to the organization mediating the choice between the two. *Id.*

303. See Richard Freeman, *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, 94 Q.J. ECON. 643, 643 (1980).

304. See James R. Detert & Amy C. Edmonson, *Implicit Voice Theories: Taken-for-Granted Rules of Self-Censorship at Work*, 54 ACAD. MGMT. J. 461, 461 (2011).

305. See, e.g., 29 C.F.R. § 1630.2 (2014) (providing for an “interactive process” by which disabled employees seek accommodations from employers).

306. See Hale, *supra* note 294, at 472–73.

307. See Terence R. Mitchell, *Why People Stay: Using Job Embeddedness to Predict Voluntary*

much about intimate workers exiting for better conditions or pay, this places less pressure on employers to better conditions or pay. This may help to explain why care workers—a large subset of intimate workers—systematically suffer a wage penalty.<sup>308</sup>

Intimate-worker voice is also muted by the combination of intimacy and work. Intimate workers can become what one economist terms “prisoners of love” due to their tendency to sacrifice for the benefit of their consumers.<sup>309</sup> Intimate workers may find themselves in circumstances where their attachments to consumers make them less likely to withhold services, demand higher wages, or otherwise seek better terms of work if this would risk adverse effects on their consumers.<sup>310</sup> So while intimate work may sometimes lead intimate workers to stand up to employers on behalf of their consumers,<sup>311</sup> it may also lead intimate workers to reduce voice about their *own* working conditions. Just as a parent’s intimate relationship with her children can hamper her ability to make credible threats about reducing care for or abandoning her children, so too does an intimate worker’s intimate relationship with her consumer hamper her ability to make credible threats about reducing care for or abandoning her consumer.<sup>312</sup> The felt obligations of intimacy may lead workers to simply take their lumps rather than complain.<sup>313</sup>

#### *b. Market Failures*

Multiple barriers to efficient bargaining justify legal intervention in the context of intimate work.<sup>314</sup> Contractual arrangements are unlikely to provide meaningful protection against lost intimate work relationships. Any personal services contracts (i.e., a contract that an intimate worker would stay with an employer) could not be specifically enforced,<sup>315</sup> and money damages are not an adequate substitute for lost ties.

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*Turnover*, 44 ACAD. MGMT. J. 1102, 1105 (2001); Moynihan & Pandey, *supra* note 228, at 211–14.

308. See England, *supra* note 165, at 383 (collecting studies finding the pay penalty even after controlling for education, skill, working conditions, and even sex composition).

309. *Id.* at 390.

310. *Id.*

311. See *supra* Part II.C.2.

312. England, *supra* note 165, at 390.

313. See Marks, *supra* note 48, at 855; Massengill, *supra* note 59, at 203.

314. See Christine Jolls, *Employment Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1349, 1352–57 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

315. See Clayton P. Gillette, *Tacit Agreement and Relationship-Specific Investment*, 88 N.Y.U. L. REV. 128, 147 (2013).

More problematic than any barriers to enforcement is that these contracts are unlikely to form in the first place. Workers are myopic and overly optimistic about the terms of the employment relationship and their legal protections against termination, making them unlikely to foresee the need to bargain with either work intimates or their employer for terms that are more protective of intimate ties.<sup>316</sup> Moreover, many workers are in too weak a bargaining position to negotiate successfully for these terms from their employer.<sup>317</sup>

Information deficits may also lead to inadequate bargaining at the formation of the employment relationship. Because it is the act of engaging in intimate work over time that can shift workers' preferences, intimate workers may be unlikely to foresee the impact of intimacy at the start of the employment relationship. The behaviors of intimate work are at least partially endogenous to doing intimate work. Rather than workers with preferences for intimate behaviors seeking out intimate work, workers develop intimate behaviors by doing intimate work and developing bonds with their consumers. "[C]hild care workers become attached to the toddlers they see every day, nurses empathize with their patients, and teachers worry about their students."<sup>318</sup> So just as workers in jobs involving intellectual skills get smarter, workers in jobs involving intimate skills get more intimate—they behave more intimately toward those who receive their services.<sup>319</sup>

Even if some bargains could be struck, say, between an employer and an employee, the consequences for consumers will not be adequately accounted for in such bargains.<sup>320</sup> Intimate work calls into question standard economic assumptions about externalities—i.e., that rational actors will only contract in their own interest. The problem here, though, is that these contracts are typically bargained for at the outset of the

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316. See Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (empirically finding that "workers appear to systematically overestimate the protections afforded by law, believing that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract").

317. The prevalence of non-compete agreements, which we might think of as non-portability-of-intimate-capital contracts, could be seen as evidence of this. See sources cited *supra* notes 244–45.

318. See England, *supra* note 165, at 390.

319. *Id.*

320. Cf. Andrew Clark et al., *Boon or Bane? Others' Unemployment Well-Being and Job Insecurity*, 17 LABOUR ECON. 52, 53–54 (2010) (finding that aggregate unemployment based on the strength of the regional labor market is a better predictor of a worker's well-being than the current employment status of that worker); Priti Pradhan Shah, *Network Destruction: The Structural Implications of Downsizing*, 43 ACAD. MGMT. J. 101, 102 (2000) (finding that dismissal of a friend is negatively related to a survivor's centrality in a firm's friendship and advice networks).

relationship, and at this point intimate workers are suffering from the information deficits and myopia just described.

## B. *What Law*

Once lawmakers move past the conceptual intimacy-work divide, putting in place a unified field of intimate work law would not be such a heavy lift. In most areas, courts could simply incorporate a functional understanding of the impact of intimate work under current doctrines. In a few areas, recognizing intimate work would require a more substantial response—a change in doctrine or a statutory amendment. These two mechanisms for implementing a new law of intimate work—functional recognition and additional recognition—are discussed in turn below.

### 1. *Functional Recognition*

A functional approach to intimate work requires courts to recognize that meaningful intimacy arises not only in the family, but also at work, and that intimacy in the provision of work services requires protection.<sup>321</sup> Three types of functional adjustments would be required. First, the law should *expand* recognition of intimate work in areas where it currently recognizes intimate work but does so too narrowly. Second, the law should *initiate* recognition of intimate work in areas where the law fails to recognize the implications of intimate work and treats it just like other work. Third, the law should *reverse* recognition of intimate work where the law recognizes intimate work but treats it too much like the family by subtracting rather than adding protection. These three types of changes are discussed in turn below, followed by a discussion of the principles that would guide their application.

#### a. *Expanding Recognition*

In some instances, the law properly recognizes the value and vulnerability of intimate work, but does so too narrowly, failing to recognize its full range.<sup>322</sup> In these cases, the law should expand its

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321. For examples of and justification for a functional approach to recognizing relationships, see, for example, Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270–72 (1991); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 483–91 (1990); Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 279–80 (1990).

322. See *supra* Parts II.C.2 (retaliation); II.D.1 (fiduciary duties); II.E (non-compete agreements).

recognition of intimate work.

Take the law of non-compete agreements, which strictly scrutinizes such agreements involving doctors and lawyers to avoid lost intimate work investments, but takes a far more lax approach toward other intimate workers, despite the same value and vulnerability at stake.<sup>323</sup> Here, the law could recognize intimate work by applying heightened scrutiny to non-compete agreements across the whole category of intimate work. This does not mean that non-compete agreements entered into by intimate workers would never be enforceable. Rather, the enforcement of these agreements is already subject to a balancing test that takes into account the hardship to the worker, the injury to the public, and the employer's need to protect its legitimate interest.<sup>324</sup> Recognizing intimate work would require courts to include the lost value of intimate work relationships as a hardship to the worker and an injury to the public for intimate workers beyond lawyers and doctors. This would still be balanced against the employer's legitimate interest, and the latter might still trump. The balancing would of course depend on the evidence presented in any particular case. While balancing such incommensurate interests is undoubtedly a difficult undertaking, current law already requires decision-makers to weigh incommensurate interests—the interests of the worker, the public, and the employer.<sup>325</sup> This revision would simply expand the universe of interests that must be weighed in the mix. The law might also consider allowing consumers who are affected by the enforcement of the agreement to intervene in the suit.

Likewise, a functional approach to fiduciary duties could better recognize intimate work. Currently, fiduciary recognition may be denied if a relationship is viewed too much along the lines of a friendship without sufficient dominance by one party over the other.<sup>326</sup> Courts

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323. See *supra* Part II.E.1.

324. See *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 539–40 (Wyo. 1993); *A.E.P. Indus., Inc. v. McClure*, 302 S.E.2d 754, 760 (N.C. 1983); *RESTATEMENT (SECOND) OF CONTRACTS* § 188 (1981).

325. See, e.g., *Hopper*, 861 P.2d at 540, 543–44 (in ruling on the enforceability of a non-compete agreement, considering the interests of the employer (e.g., “the risk of the covenantee losing customers” (quoting *Philip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (Neb. 1982))), the interests of the employee (e.g., “the necessity of the covenantor changing his calling or residence” (quoting *id.*)), and the interests of the public (e.g., whether the “public will . . . suffer injury from enforcement of the covenant”). On legal decisionmaking in the context of incommensurable values more generally, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

326. See *supra* Part II.D.1.



should more broadly recognize, as some already have, that friendship and the intimacy that accompanies it can co-exist with a work relationship.<sup>327</sup> The combination of intimacy and work render intimate work relationships prime candidates for the application of fiduciary duties. Relating in the realm of work means that intimate workers and consumers often deal with pecuniary matters that can result in legally cognizable injuries, and the intimacy of the relationship can heighten the need for protection based on increased dependence and trust. This is easy to see for duties running from the intimate worker to the consumer, but the same can be true in reverse.<sup>328</sup> Courts should also recognize that these relationships can generate fiduciary duties running from consumers to intimate workers.

While the application of fiduciary duties in the intimate work context in factually appropriate circumstances may seem like a significant shift, it is simply an application of a principle that is already applied in multiple jurisdictions: when there is sufficient trust and dependence between the parties, even without a dominant and subordinate party, fiduciary duties should attach to protect the vulnerability that can arise out of the misuse of information.<sup>329</sup> Jurisdictions that have already adopted such a principle, both in the context of intimate work and outside of it, have not been overburdened by this broader understanding of fiduciary duty.<sup>330</sup>

For other laws, recognizing the whole category of intimate work requires grounding in a theory that better reflects the way that intimate work changes the behavior of intimate workers. For example, recall that collective action rights under the NLRA protect intimate workers who complain of bad treatment of their consumers only when courts are willing to read such complaints as motivated by intimate workers' self-interested economic gain.<sup>331</sup> Work law instead should recognize that because intimate workers come to care about their consumers, actions taken to improve consumers' welfare also improve intimate workers' welfare. Therefore, intimate workers who exercise voice to improve conditions for their consumers typically satisfy the mutuality requirement for protection.

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327. See Leib, *supra* note 205, at 707–09 (collecting cases).

328. See *supra* Part II.D.1.

329. See Frankel, *supra* note 197, at 809–10.

330. See *supra* notes 205–10; Lieb, *supra* note 197, at 702–07.

331. See *supra* Part II.C.2.

b. *Initial Recognition*

In other instances, work law fails to recognize intimate work at all and treats it just like all other work. In such cases, current doctrine could be modified to appreciate the role of intimate work in intimate worker and consumer behavior. For example, Title VII's protection against retaliation "prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a [discrimination] charge."<sup>332</sup> Recognizing intimate work in this context would mean recognizing that among employer actions that would dissuade a reasonable *intimate* worker from making or supporting a discrimination charge would be retaliation against the intimate worker's consumers. Recall the earlier example of an employer who retaliates against a camp counselor by worsening conditions for her campers.

This type of recognition would require courts to adopt a more fluid understanding of intimacy and work instead of relying on existing legal categories of workers and intimates.<sup>333</sup> Recall the Supreme Court's decision in *Thompson* holding that an employer's action against a worker's fiancé could fall within the scope of prohibited employer action.<sup>334</sup> Recognizing intimate work would mean extending protection to acts against work intimates and not just family or family-like intimates.

*Thompson* does hold promise as a model for the functional recognition of intimate work not artificially limited by the legal categories of work and family that could be extended to other areas of work law. The Court suggested that retaliation protection would turn on a fact-specific inquiry into the intimacy at stake in a particular case.<sup>335</sup> While it continued to privilege family relationships,<sup>336</sup> it "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful," leaving open the possibility that adverse action taken against a "close friend" could constitute actionable harassment.<sup>337</sup> Indeed, the

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332. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (internal quotation marks omitted).

333. *See supra* Part II.C.2 (discussing role of legal categories and in presumptions about behavior in retaliation cases).

334. *See Thompson*, 562 U.S. at 174.

335. *See id.* at 174–75.

336. *Id.* at 175 ("We expect that firing a close family member will almost always meet the *Burlington* standard . . .").

337. *Id.* at 174–75 (in response to a concern about extending protection to a "close friend," stating that "inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize" because "[g]iven the broad statutory text and the variety of workplace

touchstone for relief was one based on a functional understanding of how intimacy can affect work behavior: whether the allegedly retaliatory action was the type that would have “dissuaded a reasonable worker from engaging in protected activity.”<sup>338</sup>

Recognizing intimate work in the context of unlawful terminations and transfers requires work law to appreciate how relationships with consumers fundamentally determine the terms and conditions of work for intimate workers.<sup>339</sup> In the case of remedying unlawful terminations, for example, appreciating the significance of intimate work relationships for personal and professional support for intimate workers should lead courts to consider whether reinstatement is necessary to make the worker whole. The significance of intimate work bonds would not mandate reinstatement, but would be weighed in the balance in considering the appropriate remedy. For example, evidence that a terminated employee was so embittered by the litigation process that she could not return as an effective employee would weigh against reinstatement. If reinstatement is not ordered, lost investments in intimate work relationships should be valued and awarded to the intimate worker as damages.<sup>340</sup>

Other times, initiating recognition of intimate work requires revision of the assumptions underlying a doctrine. This is so, for example, with the duty of loyalty and trade secret protection.<sup>341</sup> Both doctrines fail to protect intimate workers and consumers on the assumption that consumers are more bonded to businesses that offer services than to the intimate workers who serve them.<sup>342</sup> In cases of intimate work, courts should consider evidence that the consumer’s relationship with the firm may be driven more by bonds with the intimate worker than by the employer’s efforts. Again, intimate workers would not always prevail, but this evidence should be considered and weighed in the worker’s favor.

In cases involving a duty of loyalty violation, work law should grant intimate workers more leeway to plan their career trajectories without fear of litigation. Courts should move away from assuming that any contact between the intimate worker and consumer amounts to

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contexts in which retaliation may occur, Title VII’s antiretaliation provision is simply not reducible to a comprehensive set of clear rules”).

338. *Id.* at 174.

339. *See supra* Part I.B.

340. How such losses should be valued is addressed shortly. *See infra* notes 389–90 and accompanying text.

341. *See supra* Parts II.E.2 and II.E.3.

342. *See supra* notes 250–52 and accompanying text.

solicitation.<sup>343</sup> Rather, courts should engage in a more fact-sensitive inquiry as to whether such contact was soliciting business or was simply an attempt to continue the intimate side of the relationship.

In trade secret litigation, courts should take into account the relative role of intimate worker efforts as compared with employer efforts in assessing whether customer identity is subject to trade secret protection. Current law assumes that sufficient employer efforts mean that customer identity is not readily ascertainable to competitors, and this leads to employer ownership of the customer identity as a trade secret.<sup>344</sup> Instead, courts should also consider evidence that relationships between customers and particular intimate workers were integral to developing or maintaining a customer base. This evidence, although not determinative, should factor against the finding of a trade secret violation, as it cuts against employer ownership of the customer relationship, and gives the intimate worker a greater ownership stake. Any unfairness to the employer is reduced by the employer's ability to maintain customer identity as a trade secret by taking steps to strengthen customers' bonds with the firm as opposed to their bonds with particular intimate workers, by, for example, rotating which workers serve the same customer.

*c. Reversing Recognition*

In still other areas of work law, recognizing intimate work requires reversing current law's treatment of intimate work as too much like family intimacy. In such cases, current law's subtraction of protection for intimate work requires instead an addition of protection to ensure that workers and consumers can enjoy the value of intimate work without excessive vulnerability.

For example, in response to intimate workers' tendency to sacrifice for consumers by doing additional work for them, the FLSA currently *removes* wage and hour protection when workers act out of love and devotion.<sup>345</sup> To recognize intimate work and provide adequate protection here does not require a new test for the meaning of work. Rather, it requires an understanding that simply because work is done out of love and devotion for a consumer does not mean that it is not work that is also

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343. See *supra* Part II.E.2.

344. See *supra* notes 255–56 and accompanying text.

345. See *supra* note 181 and accompanying text (discussing how even intimate workers covered under the FLSA may be denied payment for portions of their work that are seen to be done out of love).

done “primarily for the benefit of the employer.”<sup>346</sup> Workers can work out of multiple motivations. Just as such mixed motives do not take non-intimate work outside the realm of work when one motive is to benefit the employer, so too should such mixed motives not render intimate work outside the FLSA’s protection. Work that provides *some* benefit to the worker based on her devotion to her consumer does not mean that the primary benefit of the work does not go to the employer.<sup>347</sup> Juries should be so instructed in such cases when deciding where to draw the line between work and non-work, with an emphasis on weighing the relative benefit to employer or employee of the contested intimate work tasks. This would allow for case-by-case line-drawing between paid work and non-paid intimacy rather than a categorical rejection of work that is motivated out of love.

*d. Principles*

One of the first considerations with separating out a subset of workers—intimate workers—who are treated differently under work law is how to identify the subset of workers who merit this treatment. As discussed at the outset of the Article, the distinction between intimate work and other work is not so much binary as a question of degree.<sup>348</sup> The law’s project would be identifying when work was sufficiently intimate to warrant distinct treatment. Line-drawing along a continuous rather than discrete input is endemic to law. Simply because line-drawing is difficult does not mean it is not a project worth undertaking.<sup>349</sup>

Courts should engage in a context-dependent inquiry to assess whether a worker qualifies for recognition as an intimate worker. Indeed, this is precisely what the Supreme Court suggested, at least in theory, when it recognized that an employer’s action against a “close friend” could constitute an act of retaliation worthy of protection under Title VII if the facts so warranted (i.e., that the act in retaliation against the “close friend” would have dissuaded the employee from complaining in light of

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346. *Holzapfel v. Newburgh*, 145 F.3d 516, 528 (2d Cir. 1998).

347. For example, simply because a nurse gains satisfaction from forgoing her lunch break to provide additional care and support to one of her patients does not negate the fact that the primary benefit of her work accrues to the employer.

348. *See supra* Part I.A.

349. For attempts to get purchase on various aspects of the line-drawing problem, see, for example, Bradley T. Borden, *Quantitative Model for Measuring Line-Drawing Inequity*, 98 IOWA L. REV. 971 (2013); David A. Weisbach, *Line-Drawing, Doctrine, and Efficiency in Tax Law*, 84 CORNELL L. REV. 1627 (1999).

the relationship).<sup>350</sup> And courts have likewise been able to draw such lines when assessing fiduciary obligations that are based on the facts of particular relationships.<sup>351</sup> The burden would be on the employee to assert and prove her interest as an intimate worker, although some intimate workers might categorically be recognized as intimate, at least for certain purposes, as doctors and lawyers are for non-compete agreements.

This proof structure is important because of the heterogeneity in how intimate workers and consumers treat their relationships across different types of intimate work and even within a particular type of intimate work. In light of professional training, licensing, and ethics, we might be willing to make certain presumptions about the doctor-patient relationship that we are not willing to make about the hairstylist-customer relationship. But the latter should still support a case for recognition if it can be proven to warrant it. This variation means that not all intimate workers need to be treated the same, either across the category of intimate work, or within a particular type of intimate work. That is, the law of intimate work might not treat all hairstylists the same for all purposes, as some develop quite intimate relationships with consumers, and others do not. Functional recognition of intimate work thus requires that categorical rules about intimacy and work do not bar intimate work relationships from protection when the facts merit it. Beyond this, decisionmakers must engage in a fact-sensitive inquiry to assess whether protection is warranted.

As for assigning value to ruptured intimate work bonds, money is a poor substitute for the loss suffered, particularly when the loss is relational.<sup>352</sup> But it is usually the best we can do, as we can see in many areas where the law awards damages for non-pecuniary losses. This area of intimate work could then borrow from other areas of law, such as the cause of action for loss of consortium, that engage in the difficult problem of how to monetize the loss of relational value, both in quantity and quality.<sup>353</sup> The continuous rather than discrete nature of money damages is consistent with, and indeed helps to recognize, the fact that intimate work exists along a spectrum of intimacy. Money damages can

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350. See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011).

351. See *supra* Part II.C.1.

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

353. See Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1710 (2007) (“[J]uries do assign values to even the most inchoate injuries, such as emotional distress and loss of consortium.”).

be calibrated to reflect the level of intimacy of the work relationship, which will typically bear a substantial relationship to the significance of the loss.

Critics may object that monetizing the value of intimate work commodifies it and lessens its value by crowding out the intrinsic motivations of intimacy—altruism and love—that make intimate work so valuable.<sup>354</sup> When subjects are asked to do a task that offers some intrinsic interests for many people, they are often *less willing* to perform the task when they are offered an extrinsic reward.<sup>355</sup> Extrinsic rewards may, under certain circumstances, thus crowd out intrinsic motivations.<sup>356</sup> This might suggest that compensating more of intimate work (and monetizing the value of lost intimate work relationships) would lessen intrinsic motivations for intimate work.<sup>357</sup>

A deeper dive into the research indicates that the concern about crowding out is unwarranted because it is unlikely to arise, or at least is avoidable, in the circumstances of intimate work. First, crowding out is more likely to occur when work is entirely unpaid, and the extrinsic reward leads the efforts to cross over the unpaid-paid divide.<sup>358</sup> Intimate workers, by definition, are already paid for some of their work. Second, crowding out occurs when the extrinsic rewards are viewed as “controlling”—those coupled with close supervision or judgments by supervisors that may call the worker’s competence into question.<sup>359</sup> But extrinsic rewards that are viewed as “acknowledging”—those that convey that pay is combined with trust, respect, and appreciation—do not have such an effect.<sup>360</sup> So long as compensation for intimate work is provided in an acknowledging rather than a controlling fashion, there is little reason to be concerned about crowding out.

## 2. *Additional Recognition*

Much of the protection required to remedy the vulnerability of intimate work can be achieved simply by taking a more functional

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354. England, *supra* note 165, at 394 (defining intrinsic motivation as “willingness to expend effort on a task without extrinsic reward”).

355. See Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589 (2001).

356. *See id.*

357. England, *supra* note 165, at 394.

358. *Id.*

359. *Id.* at 395.

360. *Id.*

approach to intimate work under current work law. But the full measure of protection required for intimate workers and their consumers can only be achieved by the more robust approach of adding law that would protect against the promotion of discriminatory intimate work preferences, the sacrifices taken by intimate workers, the exposure of intimate workers, and the lost value of intimate work relationships. These are discussed in turn below.

*a. Discrimination*

Recognizing the role that the employer plays in the relationship between intimate worker and consumer and recent changes in intimacy law that undermine this field of intimate work law, I join other scholars in advocating for the elimination of the BFOQ, at least in the context of same-sex preferences on the basis of privacy.<sup>361</sup> But I do not focus on this doctrinal change here, as the exception encompasses only a small subset of body workers.<sup>362</sup> Rather, my emphasis is on placing more responsibility on employers to avoid promoting discriminatory preferences in the intimate work relationship.

A first proposal would prohibit employers from fulfilling express requests by consumers for intimate workers of a particular protected trait. Current law already bans employers from “classify[ing]” employees on the basis of a protected trait, so long as the employee can show that it “deprive[s] or tend[s] to deprive [him] of employment opportunities or otherwise adversely affect[s] his status as an employee”<sup>363</sup> Fulfilling express protected-identity-based requests undoubtedly requires employers to “classify” employees. The challenge is that such “classif[ication]” may lead to negative employment consequences down the line that are traceable to the classification but are

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361. See Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 *FORDHAM L. REV.* 327 (1985) (arguing for the demise of the BFOQ based in customer privacy concerns because it contradicts the goal of Title VII to promote equal employment opportunity and change the status quo with regard to identity-based exclusions from employment); Kapczynski, *supra* note 123, at 1261–62 (arguing for the demise of the BFOQ based in customer privacy concerns because such concerns cannot be meaningfully distinguished from other customer preferences that the law does not tolerate).

362. See Yuracko, *supra* note 9, at 155–57 (discussing the range of cases in which the privacy-based BFOQ has been applied).

363. See 42 U.S.C. § 2000e-2(a)(2) (2012) (“It shall be an unlawful employment practice for an employer . . . to limit, *segregate*, or *classify* his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” (emphases added)).



nonetheless difficult to prove as such. Even though the fulfillment of such requests may not be neatly linked to a particular adverse employment action against an employee, this practice perpetuates and reinforces customer preferences. The change proposed here would make fulfilling such requests unlawful, even when the employee has difficulty drawing a connection to a specific adverse consequence.<sup>364</sup>

One could imagine extending this proposal to a duty on the part of the employer not to act on more subtle discriminatory preferences (e.g., to ensure that a request to avoid a particular nurse is not race-based). Such an affirmative duty that essentially amounts to a negligence-like standard would be out of place in an employment discrimination law largely focused on discriminatory intent.<sup>365</sup> In the context of sexual harassment, scholars have acknowledged how employers' obligations to address third-party harassment looks far more like a negligence standard than one based on discriminatory intent.<sup>366</sup> However, this obligation applies only when "the employer had actual or constructive notice of both the harassment and its basis in race or sex."<sup>367</sup> By analogy, liability in the context of employers acting on discriminatory consumer preferences would require the same type of notice on the part of the employer, which would typically be unavailable. Employers are far less likely to be on notice of subtle discriminatory preferences, which are based in the consumer's state of mind, as compared with the overt acts that make up harassing conduct.<sup>368</sup> Further combatting discriminatory consumer preferences thus requires resort to other mechanisms.

Employers should be held responsible for the affirmative acts they take that cultivate and reinforce discriminatory preferences. Such acts include employers advertising their intimate workers on the basis of membership in a protected class (e.g., a gynecology practice advertising

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364. This type of per se rule may be more properly enforced by the EEOC rather than through a private suit by an employee, as there would be a question about identifying the injured employee with standing to sue. Of course, a broad notion of injury could recognize that mere classification by a protected identity trait, even without a concrete material harm, reinforces stereotyping and stigma in a way that harms any employees subject to the classification.

365. See Noah A. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1359, 1364 (2009) (setting forth the few negligence-like elements in the largely intent-based employment antidiscrimination law).

366. *Id.* at 1359–61 (explaining how employers have an obligation to prevent intentional discrimination by third parties, including customers, in the context of sexual harassment, even when the employers themselves harbor no discriminatory intent).

367. *Id.* at 1403 (collecting cases).

368. Cf. Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1361–62 (2008) (describing the "identifiable" and tort-like conduct of sexual harassment as compared with other employment discrimination claims).

all women doctors and nurses);<sup>369</sup> otherwise making salient to consumers an intimate worker's membership in a protected class (e.g., a spa asking customers for sex preference for a massage therapist); or suggesting membership in a protected class as a basis for disfavored consumer and intimate worker treatment (e.g., a statement on a wedding photographer's website that the firm opposes same-sex marriage).<sup>370</sup>

Several mechanisms could lead employers to take responsibility for such acts. Antidiscrimination law could ban these acts, or could apply a rebuttable presumption of discrimination to employers who engage in these acts, even if intimate workers who want to challenge them cannot draw a direct link between these acts and an adverse employment action. These proposals might raise First Amendment concerns, although similar concerns have been put aside in the name of equality.<sup>371</sup> Another avenue to pursue is simply to rely on current law, under which such acts already serve as evidence of discrimination when an intimate worker experiences an adverse employment action, such as a failure to hire.<sup>372</sup> But enforcement problems in raising and proving hiring discrimination claims keep the existing law banning hiring discrimination from being an effective mechanism.<sup>373</sup>

One response then is to rely on the EEOC rather than private plaintiffs to bring these lawsuits. The EEOC already has such authority and would

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369. If the firm only employs workers from this protected class (e.g., a gynecology practice with only female doctors and nurses), such advertising would not even require the employer to engage in unlawful classification. 42 U.S.C. § 2000e-2(a)(2) (2012); *see also supra* note 362 and accompanying text.

370. *See supra* Part II.B.1.

371. For example, an employer may not post a sign that reads "White Only," despite the fact that this is a restriction on speech. CATHARINE A. MACKINNON, *ONLY WORDS* 13 (1993). The interaction of antidiscrimination law, particularly sexual harassment, and the First Amendment, has spawned a large literature. For an introduction, see, for example, *id.*; Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 *GEO. L.J.* 399 (1996); Cynthia Estlund, *Freedom of Speech in the Workplace and the Problem of Discriminatory Harassment*, 75 *TEX. L. REV.* 687 (1997); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 *SUP. CT. REV.* 1; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 *UCLA L. REV.* 1791 (1992).

372. *See* EQUAL EMP. OPPORTUNITY COMM'N, *PRE-EMPLOYMENT INQUIRIES CONCERNING A JOB APPLICANT'S RACE, COLOR, RELIGION, OR NATIONAL ORIGIN* (1982), *available at* <http://uwf.edu/svodanov/legal/EEOC-AB-inquires.pdf> ("[I]nquiries which tend directly or indirectly to disclose [information about an applicant's race, color, religion, sex, or national origin] . . . may, unless otherwise explained, constitute evidence of discrimination prohibited by Title VII."). Under some state laws, the inquiries themselves are prohibited. *See, e.g.,* WASH. REV. CODE § 49.60.180(4) (2014); WASH. ADMIN. CODE § 162-12-140 (2015).

373. *See* Schoenbaum, *supra* note 149, at 140.

simply need to make combatting intimate work discrimination an enforcement priority.<sup>374</sup> Of course, the EEOC's resources are limited, and expending more resources on hiring discrimination would mean expending fewer resources on other priorities. Scholars have critiqued the shift in focus of Title VII litigation from removing identity-based barriers to employment to protecting those already employed.<sup>375</sup> This scholarship would likewise support prioritizing hiring discrimination at the EEOC, and, in particular, employer practices that tend to exclude workers from a field of work on the basis of a protected identity trait, as we have seen in the context of intimate work.

While these proposals limit consumers from exercising discriminatory preferences, this should not be considered a flaw. When consumers' preferences would clearly result in an adverse employment action, the law does not consider the failure to satisfy these preferences a cognizable harm to either the consumer or the employer.<sup>376</sup> It should be no different when the connection to an adverse employment action is less clear. Moreover, in the longer run, challenging intimate biases can benefit not only workers and society, but those with biases themselves, who are no longer artificially restricted in their ability to connect with the full range of intimate workers.

To the extent critics would be concerned that a consumer might forego important medical or other services rather than interact with an intimate worker of an undesired identity, these proposals maintain space for a consumer with fixed preferences to exercise them. It will simply take more work for her to do so: She will need to do some additional investigation into the identity of a particular intimate worker before engaging her services, or she will have to couch a request for a particular intimate worker in nondiscriminatory terms. The changes proposed above thus allow antidiscrimination law to aim toward reducing customer biases while nonetheless recognizing the reality of intransigent preferences in the short and even long term.

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374. It has already done so on occasion. *See, e.g.*, *EEOC v. HI 40 Corp.*, 953 F. Supp. 301 (W.D. Mo. 1996) (successfully challenging female-only hiring policy for weight-loss counselors); *EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993) (successfully challenging female-only hiring policy for employees at women's health club).

375. *See* John Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991); Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1458 (1998).

376. *See* *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (holding that a company that restricted the job of international marketing director to men based on customer preference had engaged in unlawful discrimination).

*b. Sacrifice*

To protect intimate workers fully, the FLSA should be amended to extend to intimate work that is currently exempt from its reach on the basis of intimacy. The recent reforms that would expand wage and hour protections for home healthcare workers still exempt certain intimate work—“fellowship” and “protection.”<sup>377</sup> The law could require payment for all of this intimate work, as even fellowship and protection can be considered work, even if it is also intimate. While some have expressed concerns about the burden of costs to the consumers (or whoever pays) in this line of work,<sup>378</sup> it is difficult to see why any group of workers should not be guaranteed the same basic protections as other workers based on cost concerns, which can be addressed through other means.<sup>379</sup>

*c. Exposure*

A more generous application of fiduciary duties in intimate work relationships where confidences are shared can serve to protect intimate workers and consumers against certain forms of exposure. But it still leaves intimate workers open to hostile or demeaning treatment by consumers.<sup>380</sup> To protect against this type of exposure, intimate workers could be provided a right to ask, meaning “a right to ask for [particular] working conditions” as a way to avoid harmful exposure that can be a part of intimate work.<sup>381</sup> For example, a right to ask would allow intimate workers to seek reprieve from working with an abusive consumer.

In the United Kingdom, workers have such a right to request accommodations in the form of modified work hours or work location to care for a child.<sup>382</sup> The law does not require that the employer provide an

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377. 29 C.F.R. § 552.6 (2014).

378. See Press Release, Rep. John Kline & Rep. Tim Wahlen, Kline, Wahlen Statement on DOL Companion Care Regulation (Sept. 17, 2013), available at <http://walberg.house.gov/news/documentsingle.aspx?DocumentID=349958> (“Today’s regulatory action by the Department of Labor will raise costs and limit access to in-home care for vulnerable Americans.”); Steven Greenhouse, *U.S. to Include Home Health Aides in Wage and Overtime Law*, N.Y. TIMES, Sept. 18, 2013, at B1 (quoting industry officials raising concerns about costs).

379. For example, the government could subsidize consumers upon proof of need or give a tax credit.

380. This is far less true for consumers, who typically have more market power to exit than intimate workers who need their jobs.

381. See Schoenbaum, *supra* note 149, at 141–44, for a discussion of employing the right to ask in a different context.

382. See Employment Rights Act, 1996, c. 18, § 80F (U.K.) (as amended by the Employment Act

accommodation, but instead requires that the employer consider requests for accommodation and provide a process for considering such requests.<sup>383</sup> Scholars have commented on how a procedural guarantee like the one offered under U.K. law frequently results in an employer accommodating the request.<sup>384</sup> “By establishing an institutionalized forum for employers and workers to discuss potential workplace changes,” right-to-ask laws can “provide[] a means for employers to discover that there often are no significant financial, administrative, or practical downsides to modifying workplace practices as workers desire.”<sup>385</sup>

A right to ask (along with protection from retaliation for exercising the right) could buttress intimate worker voice. Providing a formal legal mechanism rather than requiring the worker to strike out on her own not only lowers the cost of making requests, but legitimates the requests.<sup>386</sup> Right-to-ask laws can also create a focal point for both employers and employees to bargain around subjects that are otherwise quite difficult to bargain around.<sup>387</sup> Moreover, an intimate worker’s request for changed conditions sends a credible signal of the worker’s unhappiness and her possibility of exit.<sup>388</sup> And a right to ask would largely be self-regulating. As most workers do not want to be perceived as “problems,” they will tend to ask for an accommodation of this sort only when it is really needed.

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2002).

383. See *id.*; Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75 (2012); Katherine Van Wezel Stone et al., *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMP. RTS. & EMP. POL’Y J. 233, 266–68 (2006). Regulations that implement the U.K. law require that some form of discourse take place: “the holding of a meeting between the employer and the employee to discuss an application . . . within twenty-eight days after the date the application is made.” Employment Rights Act, 1996, c. 18, § 80G(2)(a).

384. See Van Wezel Stone et al., *supra* note 383, at 268.

385. *Id.*

386. See Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOC. 1718, 1722–23 (2006) (discussing the legitimating effects of a behavior when it is legalized).

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

388. See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 589 (2008) (“A standard insight of the signaling theory literature in economics is that as a general matter, a statement is credible when it is accompanied by a costly action—in particular, an action that is more costly for a dishonest speaker to engage in.”); Caryl E. Rusbult et al., *Impact of Exchange Variables on Exit, Voice, Loyalty and Neglect: An Integrative Model of Responses to Declining Job Satisfaction*, 31 ACAD. MGMT. J. 599, 605 (1988).

Of course, the right to ask is no panacea. Beyond not guaranteeing any substantive outcome, it places the onus of seeking protection on intimate workers themselves, albeit while lowering the burden of doing so. To lighten the load, the law could switch the default so that the employer asks the intimate worker periodically whether she would like an accommodation against working with harmful consumers.

*d. Lost Investments*

Unemployment insurance does little to address the lost value of ruptured intimate work relationships.<sup>389</sup> Programs that directly facilitate the maintenance or development of intimate ties would be valuable to intimate workers. For example, UI offices could provide opportunities for the unemployed to network and socialize with prospective consumers. In fact, simply providing a space where the unemployed can gather and support each other in their job searches will almost inevitably result in connecting prospective intimate workers and consumers. And socializing with others who are looking for work could help to fill the void of lost intimate work ties.<sup>390</sup>

## CONCLUSION

The law is premised on categories. Courses and casebooks are built on the assumption that the objects of legal regulation can be neatly divided by subject matter. This Article highlights how legal categories can overlook a social reality that transcends these categories, and documents the harms that can flow as a result. It reveals how the law's categorical approach to intimacy and work overlooks the value and vulnerability produced by a fundamental part of civil society critical not only to a large set of workers, but also to the public who consumes their services.

This Article calls for a unified law of intimate work that transcends standard legal categories. Ultimately, if the law can begin to recognize both intimacy and work wherever it arises, legal categories, and the harmful barriers they erect, could start to erode. As work law begins to encompass intimacy, the legal categories of intimacy and work will

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389. See *supra* Part II.E.4.

390. One example of such a program is Platform to Employment, which some states have administered using federal funds. See Alana Semuels, *A Better Way to Help the Long-Term Unemployed*, THE ATLANTIC (Feb. 10, 2015), <http://www.theatlantic.com/business/archive/2015/02/a-better-way-to-help-the-long-term-unemployed/385298/>. This program provides a selected group of unemployed with a job-readiness class, among other benefits. *Id.* One participant was quoted as saying that the class “bonded like a family.” *Id.*

become less distinct: work law would also come to be intimacy law, and intimacy law would also come to be work law. A less categorical law would better reflect and protect the ways that intimacy and work operate in our lives.