LAW AND THE QUESTIONS AND ANSWERS OF WORKPLACE MOBILIZATION

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Organizing is risky. Some workers join in and get fired, others face intimidation and drop out, while most—sensing the tension between legal rights and remedial realities—simply opt out. And more and more, the campaigns—and the campaigners—are getting sued. In *From the Picket Line to the Courtroom,* Professor Nicole Hallett does a good job covering this ground, and an even better job arguing for the logic of a labor organizing privilege to protect workers' confidential campaign discussions in later litigation.[1] This would, she argues, function as a key communicative "shield" that, although not sufficient to secure the free exercise of collective rights, is a "necessary condition" toward that goal.[2] I think she understates that case.[3] In practice, her proposal would be more than simply an evidentiary rule that also helps with workplace advocacy. By enhancing the sensitive person-to-person chemistry at play in initial campaign encounters, it represents a concrete and meaningful advance in modern organizing.[4]

To see why, consider some basic mobilization dynamics. Whether it is a colleague or a paid campaigner starting the conversation, organizing interactions

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1. Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 479–480 (2016).

2. *Id.* at 524.

3. Hallett deserves particular praise for defining the privilege to cover workers excluded from federal law as well as interactions that do not involve campaign or union staffers. *Id.* at 518–519. Both categories are at the cutting edge of modern organizing. *See* Josh Eidelson, *Alt-Labor*, AM. PROSPECT, Jan. 29, 2013 ("There's another reason for the rise of alt-labor: For an increasing number of U.S. workers, unions are not even an option."); Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577420 (describing recent innovations like "union organizing without the union organizers [and] collective action for the sake of collective action").

4. And of course, however common abusive litigation tactics become, it is likely to still be the case that the vast majority of workers involved in organizing will never find themselves ensnared in corporate litigation. Although Hallett does not cite the number of workers impacted by abusive lawsuits (and coming up with an estimate would be both difficult and beyond the scope of her project), it would surely be less than, for example, even a portion of the 104,291 workers involved in National Labor Relations Board representation elections in 2015. NAT'L LABOR REL. BD., ELECTION REPORT FOR CASES CLOSED, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4416/Total%20Elections%202015.pdf (see "NLRB Elections—Summary" and "Total Employees Eligible to Vote"). Adding in the unknown thousands of workers active in the 214 nonunion entities organizing in the United States today only buttresses that conclusion. Eidelson, *supra* note 3 (describing and quantifying "nonunion groups . . . organizing and mobilizing workers" in the United States).

are, at root, relational.[5] Initial discussions often take place in a worker's own home,[6] a setting so sensitive that unlawful coercion is presumed if management tries to stop by.[7] There, organizers classically make preliminary "assessments" of workers' interest and leadership potential,[8] but the evaluations go both ways.[9] Workers are wondering if getting involved is worth their time, if this guest can be trusted, and, even so, what dangers lurk ahead. If these or any number of other potential anxieties rise to the surface in the form of a probing question, the query might, as Hallett suggests, revolve around litigation and particularly whether the communications at hand would be kept confidential.[10] But really, it is probably going to be less specific and a lot more visceral: *If something bad happens, would I be protected?*

Since there is legitimate cause for concern,[11] a lot rides on the answer to that question. The traditional reply goes something like this: *Technically yes, but real protection comes from how your co-workers would fight back.*[12] It is a telling—and truthful—misdirection. Activists exist in a kind of liminal space—protected on

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5. Community organizers, in particular, have an almost spiritual belief in the power of relationships to spark collective action and change. *See, e.g.*, MICHAEL GECAN, GOING PUBLIC 21 (2002) ("I began to develop one of the most important habits any leader or organizer can have—the habit of building new public relationships."); EDWARD T. CHAMBERS, ROOTS FOR RADICALS 44 (2006) (calling relation-building "one organized spirit going after another person's spirit for connection, confrontation, and an exchange of talent and energy."). Union activists also put relation-based recruitment at the center of successful workplace organizing. Seth Newton Patel, *Have We Built the Committee? Advancing Leadership Development in the U.S. Labor Movement*, 16 WORKINGUSA: J. LAB. & SOC'Y 113, 115 (2013) (stating that "the key to victory is the recruitment, training, and mentoring of a new generation of organizers").

6. This is true for both traditional and non-traditional campaigns. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664–665 (2010) ("During the organizing phase . . . [a]lthough some discussions between employees take place at work, the effort consists primarily of visits with employees when they are not at work through so-called 'house calls.'"); Josh Eidelson, *Fast food walkout planned in Chicago*, SALON.COM (Apr. 24, 2013), http://www.salon.com/2013/04/24/fast_food_walkout_planned_in_chicago/ ("Action Now took a leadership role in organizing fast food workers after discovering on door-to-door canvasses about fare hikes that 'people were more concerned with their jobs.'").

7. Peoria Plastic Co., 117 N.L.R.B. 545, 547–548 (1957) ("[W]e have . . . consistently condemned the technique of . . . calling upon [employees] at their home to urge them to reject a union . . . regardless of whether or not the employer's actual remarks were coercive in character.").

8. Patel, *supra* note 5, at 116–117.

9. *See* Sachs, *supra* note 6, at 664.

10. Hallett, *supra* note 1, at 504–505.

11. *Id.* at 477.

12. Modern campaigns frequently use, and tell workers that they will use, collective action as a substitute for the inadequacies of law. The Fight for $15, for example, uses "squads of supporters" to "escort[]" strikers back to work "to discourage managers from retaliating" even though backlash against returning activists is already illegal. Josh Eidelson, *Fast-Food striker fired—but not for long*, SALON.COM (Dec. 1, 2012), http://www.salon.com/2012/12/01/fast_food_striker_fired_but_not_for_long/. *See also* JENNIFER GORDON, SUBURBAN SWEATSHOPS 215–217 (2005) (depicting campaigns where legal problems are handled first through letter-writing, sidewalk fliers, demonstrations, and pickets, and only later—if that doesn't work—through litigation).

paper, prepared for a delayed and unsatisfying justice in practice,[13] and otherwise hoping that the campaign takes off so the boss does not dare retaliate. Front-line activism is thus the terrain of the truly brave, a fact with varying consequences for campaigns. While the ambitious OURWalmart and Fight for $15 campaigns have parlayed small, scattered strikes into impressive wage gains,[14] other efforts, like a more traditional operation at Target, are summarily crushed once the company cracks open the anti-union playbook and the principal supporters are chased into hiding (or just fired).[15] The rise of alternative or "alt-labor"[16] brings the daring requirement into sharpest relief, with mobilizations centered around uniquely vulnerable populations like immigrants or those lacking employment protections entirely.[17]

But no matter the campaign, the reality is this: the chance to respond to the foundational question of protection with positive law unmediated by a "yes-but," a "sort-of," or an "it depends" is relationally additive in crucial ways. The difference between "Yes, it's like talking to your doctor," and "It's complicated, because employers frequently don't follow the law," may be the difference between a supporter and someone who decides to sit it out.[18]

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13. Basic labor doctrine protects workers from discipline when they act as a group or with clear group interests to improve working conditions. *See* Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. No. 12, at *3–*4 (2014). Advocates largely agree, however, that the law is inadequate in practice. *See* Hallett, *supra* note 1, at 476–477. Much of that conclusion has to do with the National Labor Relations Act's weak and delay-plagued remedial scheme. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002) ("[T]he Act has been faulted for its paltry and easily delayed remedies . . . .").

14. *See* Wendi C. Thomas & Frederick McKissack Jr., *How New York's 'Fight for $15' Launched a Nationwide Movement*, AM. PROSPECT (Jan 4, 2016), http://prospect.org/article/how-new-yorks-fight-15-launched-nationwide-movement ("What began with a small group of workers in the nation's largest city grew into a major movement that included groups of fast-food workers, as well as underpaid folks from Walmart workers and child-care assistants to adjunct professors. At least six local governments have raised minimum wages to $15 an hour with proposals pending in others.").

15. Target's tactics worked well. Management initially "worked hard to isolate and intimidate known prounion employees, making it almost impossible for them to approach their coworkers, even off-the-clock, on company property." Benjamin Becker, *Taking Aim at Target* in NEW LABOR IN NEW YORK 25, 45 (Ruth Milkman & Ed Ott eds., ILR Press 2014). From there a petition campaign was abandoned when even the core supporters "were afraid to sign." *Id.* at 44. By the time one of the strongest pro-union leaders was illegally fired, *id*. at 45, the union recognized that the campaign was already over but went ahead with the vote to honor "the workers who had committed so much time to the drive." *Id.* at 39. Workers voted 137 to 85 against representation. *Id.* at 25.

16. Alt-labor generally refers to organizing campaigns focused on workers who are outside the scope of employment and labor laws or who have legal protections but are particularly vulnerable, such as undocumented immigrants. *See* Eidelson*, supra* note 3.

17. *Id.*

18. Adaptive preferences, the psychological concept that "what people want is sometimes a product of what they can get," is broadly relevant here. *See* Cass R. Sunstein, *Legal Interference with Private Preferences,* 53 CHICAGO L. REV. 1129, 1147 (1986). That is to say, a worker who thinks that an introductory conversation with an organizer is unlikely to lead to positive consequences because the law is weak or likely to be broken will probably be reticent to answer questions genuinely or stick around much longer than would be considered polite. *See also* Cynthia Estlund, *Freeing Employee*

This is because the vast majority of employees, not necessarily inclined to challenge authority,[19] will see through the "it's complicated" hedge and start formulating an exit. But kicking the discussion off with a clear rule that acknowledges vulnerability and then does something definite about it drives a different result. While workers may not be thinking about lawsuits at this early stage, they will be wondering about the nature of the relationship with the organizer in front of them. The mere existence of a privilege conveys a sense that the law takes what is being communicated seriously and, by implication, so should they.[20] So in a world where the privilege exists, it is not hard to envision an organizer or colleague opening a first encounter with a declaration like, "I'm here because the law says that our campaign, and what we are fighting for in our campaign, is so important that it's our right to keep what we talk about private, even in court." The statement is non-technical, affirming, inviting, and, most importantly, law-based in a way that does not overstate organizing realities and is not easily replicable under current doctrine. From there, what might otherwise have been an awkward few minutes standing on the porch might well turn into coffee on the couch.

Choice: The Case for Secrecy in Union Organizing and Voting, 123 HARV. L. REV. F. 10, 13–14 (2010) ("Rational employee preferences regarding unionization will reflect expectations about both employers' future bargaining behavior and what the law will or will not do about it.").

19. The inclination is entirely rational. As Jennifer Gordon notes, "[i]n the United States, the chances that the worker will lose her job as a result of organizing are high, the protections are low, and the payoff unpredictable at best." GORDON, *supra* note 12, at 194. Steven Greenhouse, longtime labor reporter for the New York Times, states bluntly that "usually when you interview workers, they're very scared to [give their names]." *Fight for $15: Tens of Thousands Rally as Labor, Civil Rights, and Social Justice Movements Join Forces,* DEMOCRACYNOW! (Apr. 16, 2015), http://www.democracynow.org/2015/4/16/fight_for_15_tens_of_thousands.

20. Some rights-based dynamics are relevant here. On the one hand, legal protections can be powerfully symbolic, legitimizing or altering the way that a relationship—such as that between a worker and an organizer—or an institution—such as a union—is viewed. As Michael McCann has written, rights push us to engage in an "ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world." MICHAEL W. MCCANN, RIGHTS AT WORK 7 (1994). From this perspective, law is less about "operative controls" than figurative "communication . . . providing threats, promises, models, persuasion, legitimacy, stigma, and so on." *Id.* at 6 (quoting Marc Galanter, *The Radiating Effects of Courts, in* EMPIRICAL THEORIES OF COURTS 117, 127 (Keith D. Boyum & Lynn Mather eds., 1983). Alternatively, the existence of a right allows groups "to capitalize on the perceptions of entitlement associated with [legal] rights to initiate and to nurture political mobilization." Michael W. McCann, *How Does Law Matter for Social Movements*, *in* HOW DOES LAW MATTER 76, 83 (Bryant G. Garth & Austin Sarat eds., 1998) (quoting STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974)). Together the concepts suggest that an organizing privilege could validate the presence of an organizer who attempts to engage an otherwise disinterested worker in conversation, as well as provide the organizer with an opportunity to influence how the worker perceives the meaning of the protection relative to the campaign.

The coffee is crucial because, as organizers know, courage does not generally just "happen." It has to be created.[21] There are emails to be sent, meetings to be arranged, lunches to be ordered, and small assertions of collective will to be practiced, all with the goal of gradually transitioning supporters from secluded church basements to sidewalks where, under management's glare, the growing network of connections will be tested.[22] Hallett's proposal gets at the truth that all of those relationships start with a back-and-forth that today is necessarily defensive, but tomorrow does not have to be. An organizing privilege would let activists and organizers approach that crucial moment of mobilization from a position of legal strength for the very first time.

Of course, as Hallett acknowledges, none of this is an organizing "magic bullet."[23] A privilege does not fix labor doctrine. Whether corporate blow-back is subtle and difficult to prove or brazen and open-and-shut, the legal fixes are generally limited to back-pay, reinstatement, and a posted apology—months or years after the offense.[24] Existence of an evidentiary safeguard or not, that reality is always a part of the discussion. But ultimately, Hallett's proposal points to a bigger insight: yes, the law plays a broadly important role protecting—or failing to protect—the freedom to organize; but it can also facilitate—or fail to facilitate—the very decision to act in the first place.

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21. *See* Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 348–355 (2012) (detailing the various steps and strategies used by unions "to overcome workers' skepticism towards or fears of organizing").

22. As Brishen Rogers has explained, modern campaigns place an initial premium on secrecy to avoid employer resistance while worker interest is assessed and assembled. *Id.* at 349–350. Only after the campaign's leadership and participatory infrastructure has been secured does the effort truly emerge through a series of "escalating public tactics." *Id* at 352. Such tactics "reinforce commitment among pro-union workers and can help to convince undecided workers that they can safely support the union." *Id.* At least, this is what the union hopes, for the campaign's public stage is also the point at which the employer's anti-union response gains considerable momentum. *See* Sachs, *supra* note 6, at 666.

23. HALLET, *supra* note 1, at 524.

24. *See* Michael Weiner, *Can the NLRB Deter Unfair Labor Practices: Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 U.C.L.A. L. REV. 1579, 1590–1603 (2005) (describing the "traditional remedies" of back pay and reinstatement); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 143, 152 (2002) (describing the back pay and reinstatement remedies as well as the "conspicuous[] post[ing] of a notice to employees setting forth their rights under the NLRA and detailing [the employer's] prior unfair practices").