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# FIFTY YEARS AFTER THE PASSAGE OF TITLE VII: IS IT TIME FOR THE GOVERNMENT TO USE THE BULLY PULPIT TO ENACT A STATUS-BLIND HARASSMENT STATUTE?

MARCIA L. NARINE<sup>†</sup>

## INTRODUCTION

Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed.<sup>1</sup>

Title VII of the Civil Rights Act of 1964 is a powerful weapon against harassment, discrimination, and retaliation.<sup>2</sup> In addition to reaching direct or tangible employment actions involving hiring, termination, promotion, and demotion, it can also protect employees subjected to a hostile working environment—created by unwelcome conduct on the basis of race, gender, color, religion, or national origin that is sufficiently severe or pervasive.<sup>3</sup> There

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<sup>1</sup> Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981).

<sup>2</sup> The Civil Rights Act of 1964, Title VII, protects against discrimination, harassment, and retaliation based on race, color, national origin, gender, and religion. 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>3</sup> To prevail on a hostile environment claim, an individual must be subjected to unwelcome conduct based on membership in a protected group, and the conduct must be so sufficiently severe and pervasive that it alters the conditions of the

are times, however, when Title VII, because of its jurisdictional and definitional limits, cannot protect an employee who feels trapped in an abusive workplace. Further, Title VII does not apply to employees who are not members of the protected classes mentioned above or those who work for employers with too few employees to be covered by the law.<sup>4</sup> This Article proposes some solutions to one of the gaps in current Title VII jurisprudence.

Consider *Vance v. Ball State University*,<sup>5</sup> the 2013 United States Supreme Court decision limiting the definition of a supervisor in a race-based hostile work environment case.<sup>6</sup> Maetta Vance worked as a catering assistant in the kitchen at Ball State University and alleged, among other things, that, during her tenure, coworkers made racial slurs calling her “Buckwheat,” “Sambo,” and “nigger,” taunted her about a family member’s membership in the Ku Klux Klan, cornered her in a threatening manner in an elevator, called her a “monkey” on the same day that Vance’s complaints led to a disciplinary write up, slammed pots and pans around her, and stared “menacingly” at her in the kitchen.<sup>7</sup> This behavior, which lasted for over a year, led to such a state of fear that Vance sought psychiatric treatment for sleeplessness and anxiety.<sup>8</sup> The university compliance officer tasked Vance’s supervisor with investigating her complaints—the same supervisor who, in an affront to Vance’s dignity, had refused to shake her hand upon their first meeting.<sup>9</sup>

Vance acknowledged that the coworkers that she feared were not supervisors. Still, she filed suit claiming that one of them had created a racially-hostile work environment and that Ball State was liable because the coworker had the power to control her daily work activities, thus acting as a “supervisor” under

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individual’s employment, and creates an abusive working environment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>4</sup> Title VII applies to employers with fifteen or more employees. See *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009).

<sup>5</sup> 133 S. Ct. 2434 (2013).

<sup>6</sup> *Id.* at 2440.

<sup>7</sup> Brief for Petitioner at 6–8, *Vance*, 133 S. Ct. 2434 (No. 11-556).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 7.

Title VII.<sup>10</sup> In *Vance*, the Supreme Court adopted a narrow, outdated view of the workplace by holding that a supervisor is one who has the power to take “tangible employment action.”<sup>11</sup> The dissent’s view, that a supervisor is a person with authority to control a subordinate’s daily work life, is more in line with the realities of the way in which many employees work today. Writing for the dissent, Justice Ginsburg agreed that the alleged harasser in *Vance* would not qualify as a supervisor under any definition; however, she suggested that Congress redress the wrongs to restore protections to workers, as it did with the Lilly Ledbetter Fair Pay Act of 2009 and the Civil Rights Act of 1991.<sup>12</sup>

This Article provides a blueprint for how Congress can accept Justice Ginsburg’s challenge to protect workers, particularly in precarious economic times when employees cannot easily switch jobs and in an era in which the vast majority of workers do not have the protection of a collective bargaining agreement.<sup>13</sup> Not only should Congress redefine “supervisor,”<sup>14</sup> but Congress should also consider a related underlying factor that was not raised in the *Vance* case—the issue of workplace

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<sup>10</sup> In the lower court, *Vance* also alleged discrimination and harassment but those claims were not at issue at the Supreme Court level. The district court dismissed the harassment complaint because the conduct alleged was not sufficiently severe or pervasive. See *Vance v. Ball State Univ.*, No 1:06-CV-1452-SEB-JMS, 2008 U.S. Dist. LEXIS 69288, at \*37–38 (S.D. Ind. Sept. 10, 2008).

<sup>11</sup> *Vance*, 133 S. Ct. at 2439. Tangible employment actions include termination, demotion, and reassignment to less desirable duties. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>12</sup> *Vance*, 133 S. Ct. at 2465–66 (Ginsburg, J., dissenting); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 2(1), 123 Stat. 5; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

<sup>13</sup> In the United States, approximately eleven percent of workers belong to unions. See *Economic News Release: Union Members Summary*, U.S. DEPARTMENT LAB.: BUREAU LAB. STAT. (Jan. 23, 2015), <http://www.bls.gov/news.release/union2.nr0.htm>; see also Donald E. Sanders et al., *Legislating “Nice”: Analysis and Assessment of Proposed Workplace Bullying Prohibitions*, 22 S. L.J. 1, 3–4 (2012) (arguing that the American workplace is “primed for bullying” because of pressures on managers to do more with less after layoffs, the increased use of contingent workers, the rise of the service sector, which places employees in close proximity with each other, and declining union membership rates).

<sup>14</sup> The appropriate definition of a supervisor is beyond the scope of this Article. The *Vance* case defined supervisor because neither of the Court’s seminal cases outlining liability for supervisory harassment provided one. See generally *Burlington Indus., Inc.*, 524 U.S. 742; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Justice Alito noted that the question of who qualifies as a supervisor in a harassment case remained open after those two cases. See *Vance*, 133 S. Ct. at 2439.

bullying.<sup>15</sup> If workplace bullying were a viable cause of action, Maetta Vance likely would have prevailed in a state that entitled her to relief because she could have added that claim to her federal discrimination and hostile work environment claims.<sup>16</sup> Vance is just one of an estimated thirty-seven million victims—twenty-seven percent of the U.S. workforce—of this pervasive problem.<sup>17</sup> The problem extends far beyond the reach of Title VII—indeed, most bullying is same sex—and only twenty percent of bullying cases could also pass muster as cognizable harassment claims.<sup>18</sup> The problem is so serious that legislators in twenty-eight states, Puerto Rico, and the U.S. Virgin Islands introduced bills to ban bullying in the workplace and provide remedies for its victims.<sup>19</sup>

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<sup>15</sup> The courts have been clear that Title VII does not cover this behavior. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“Title VII does not prohibit all verbal or physical harassment in the workplace . . .”).

<sup>16</sup> These are known as Healthy Workplace Bills, and, for the purposes of this Article, they are called antibullying laws. This Article proposes a state remedy because passing a federal law would be too difficult, and because over one-half of the states have already introduced bills.

<sup>17</sup> *2014 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST., <http://workplacebullying.org/multi/pdf/WBI-2014-US-Survey.pdf> (last visited Aug. 9, 2015). The survey notes that while thirty-seven million American workers claim to have been subject to “abusive conduct,” 65.6 million have either been victims or have witnessed the abuse. *Id.*

<sup>18</sup> *Id.*; see also Jay M. Dade, *Workplace Bullying—What Employers Need to Know*, POLSINELLI (June 30, 2014), <http://www.polsinelli.com/~media/Podcasts%20Inside%20Law/Springfield/PodcastFinalBullying.mp3> (providing advice to employers). Dade is inaccurate with the number of states that have considered the Healthy Workplace Bill (“HWB”) as he acknowledged in e-mail correspondence with the author. E-mail from Jay M. Dade to author (July 8, 2014, 14:18 EST) (on file with author).

<sup>19</sup> *State of the Union: State Activity*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states.php> (last visited Aug. 9, 2015). These bills often do not make it out of one chamber of the state legislature, but Puerto Rico’s bill advanced all the way to the governor’s desk for signature, and then the governor vetoed it. *Puerto Rico: 2014 Legislative Session News*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/pr/pr.php> (last visited Feb. 6, 2015).

Tennessee passed the first antibullying law in June 2014, but it only protects public sector employees.<sup>20</sup> Tennessee's law defines abusive conduct as "repeated verbal abuse, threats, intimidation, humiliation or work sabotage."<sup>21</sup> The bill's drafters pointed out that almost one-third of Tennessee's citizens have experienced "health-endangering harassment," which can "inflict serious harm upon targeted employees, including feelings of shame and humiliation, severe anxiety, depression, suicidal tendencies, impaired immune systems, hypertension, increased risk of cardiovascular disease and symptoms consistent with post-traumatic stress disorder."<sup>22</sup> That language is similar to the verbiage in the bills that have not been passed.

Legislators in Tennessee and other states model their legislations' language on Professor David Yamada's Healthy Workplace Bill<sup>23</sup> ("HWB"), which is discussed in more detail in Part III. In addition to language similar to the Tennessee bill, under Yamada's proposal, employees who feel bullied must show evidence through a licensed medical or mental health practitioner that the abusive behavior harmed physical or mental health and that there was intent to cause pain.<sup>24</sup> The HWB does

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<sup>20</sup> H.B. 1981, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/108/Bill/HB1981.pdf>. The law provides an incentive for public sector agencies to adopt the model policy to prevent abusive conduct in the workplace, which will be created before March 1, 2015, by the Tennessee advisory commission on intergovernmental relations. Government employers may create their own policy if the policy (1) assists employers in recognizing and addressing abusive conduct and (2) prevents retaliation. Those who create a policy will receive immunity from lawsuits alleging bullying. But not everyone favors the new Tennessee law. Although individual public sector employees also face personal liability, those who helped draft the bill bemoan the fact that it excludes private sector employers. See Adam Rubenfire, *First State Workplace Bullying Law Has Few Fans*, WALL ST. J. (June 20, 2014, 9:36 AM), <http://blogs.wsj.com/atwork/2014/06/20/first-state-workplace-bullying-law-has-few-fans/> (last updated June 20, 2014, 10:30 AM); April Thompson, *Workplace Bullying Bill Set To Go to Tennessee Lawmakers*, WREG-TV (Mar. 24, 2014, 6:28 PM), <http://wreg.com/2014/03/24/work-place-bullying-bill-set-to-go-to-tennessee-lawmakers/>.

<sup>21</sup> *Tennessee: 2014 State Activity*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/tn/tennessee.php> (last visited Apr. 5, 2015).

<sup>22</sup> H.B. 1981, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/108/Bill/HB1981.pdf>.

<sup>23</sup> *The Movement: History of the U.S. Legislative Campaign*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/about.php> (last visited Aug. 9, 2015).

<sup>24</sup> *Quick Facts About the Healthy Workplace Bill*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/bill.php> (last visited Aug. 9, 2015).

not require state antidiscrimination agencies to enforce any provisions of the law and, notably, does not use the word "bullying."<sup>25</sup> Victims seek their remedies in state court with either bench or jury trials.<sup>26</sup>

This Article builds upon and proposes some revisions to the HWB through a status-blind harassment statute called the Safety and Dignity in the Workplace Act ("SDWA"). Specifically, it calls for the application of principles from both procedural justice<sup>27</sup> and therapeutic jurisprudence, which encourages the use of the law as a mechanism for healing.<sup>28</sup> Under the SDWA, prior to or instead of filing suit, plaintiffs could avail themselves of a nonmandatory alternative dispute resolution mechanism with specially trained judges, mediators, and arbitrators who would preside over these kinds of cases.<sup>29</sup>

This Article also recommends a two-pronged incentive structure. Congress can and should address non-status-based hostile work environments through providing incentives for both the states and for private businesses. Potential incentives for the private sector include tax credits for those firms that volunteer to institute the provisions that this Article proposes and a requirement for a robust, effective stand-alone internal antibullying program for any government contractor or subcontractor to be eligible to bid on or renew government contracts.<sup>30</sup> Incentives for the states could include federal monies to subsidize training programs, mental health programs,

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<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> Professor Lawrence Solum explains that "procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms." Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004).

<sup>28</sup> Professor David Wexler defines therapeutic jurisprudence as the traditionally underappreciated area of the law's impact on emotional life and well-being. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

<sup>29</sup> Arbitrators are not recommended in this Article's proposal because the arbitration process may appear too overwhelming or formal for a plaintiff, or there may be a perception that the arbitrator favors the employer. However, many employers have mandatory arbitration clauses in employee handbooks or contracts and, thus, these issues may be heard by an arbitrator or panel.

<sup>30</sup> As Part I discusses, many firms that have antibullying policies include them in their antiharassment policies in employee handbooks or codes of conduct, which minimizes the effectiveness of a policy that some employees may already hesitate to use.

antibullying programs for schools and employers, mediators, and hiring of additional personnel in the state agencies that already address discrimination and harassment. States that did not pass legislation would not be eligible for the federal funding. By funding initiatives, Congress may spur legislatures to be innovative in protecting the interests of both employees and employers.

Part I of the Article describes the extent of bullying in American workplaces and why the consequences of bullying justify labeling it a public health issue. Part II briefly considers international approaches to workplace bullying, exploring particularly the European Union (“EU”), which considers the “dignity” of the worker in a number of laws; Quebec, Canada, which has enacted legislation based on a workplace safety model; and Australia, which promulgated a law that took effect in 2014 that established a tribunal to conduct investigations and address injunctive measures but uses separate common law procedures for financial compensation.<sup>31</sup> Part III outlines the HWB and discusses why no version of the bill has passed to date. Part IV details a proposed solution with revisions to the HWB. Finally, Part V concludes by asserting that the United States can not only learn from other jurisdictions, but also that the federal government can provide incentives to states and businesses to eliminate workplace bullying through status-blind protections.

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<sup>31</sup> Due to space limitations, this Article does not provide a detailed analysis of these laws but instead uses them as illustrations of the global perspective on this problem. For more comprehensive discussion of international legislation on bullying, see generally Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 242–43 (2003); Katherine Lippel, *The Law of Workplace Bullying: An International Overview*, 32 COMP. LAB. L. & POL’Y J. 1, 1 (2010); Amanda E. Lueders, Note, *You’ll Need More Than a Voltage Converter: Plugging European Workplace Bullying Laws into the American Jurisprudential Outlet*, 25 ARIZ. J. INT’L & COMP. L. 197, 198–99 (2008); The Japan Inst. for Labour Policy & Training, *Workplace Bullying and Harassment*, JILPT REPORT, June 2013, available at <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf>.



## I. THE SCOPE OF THE PROBLEM

The International Labor Organization (“ILO”) defines bullying as “any incident in which a person is abused, threatened or assaulted in circumstances relating to their work.”<sup>32</sup> The ILO further explains, “These behaviours would originate from customers, co-workers at any level of the organization. This definition would include all forms of harassment, bullying, intimidation, intimidation [sic], physical threats-assaults, robbery and other intrusive behaviours.”<sup>33</sup> The ILO goes as far as to label bullying a form of workplace violence.<sup>34</sup> The Federal Bureau of Investigation also lists bullying, along with stalking, physical assault, domestic violence, and homicide, among workplace violence behaviors.<sup>35</sup> Moreover, the stress from bullying itself can lead to workplace violence.<sup>36</sup>

Victims, or targets as some call them, can experience significant physical and mental health ramifications. In one recent survey, one-half of targets reported a clinical depression diagnosis.<sup>37</sup> Between one-half and three-quarters of respondents indicated that they suffered from disrupted sleep, insomnia, loss of concentration, mood swings, and pervasive sadness. Almost one-third reported a posttraumatic stress disorder diagnosis, and almost twenty percent had an acute stress disorder diagnosis. Sixty percent reported suffering from hypertension or heart palpitations; almost one-half experienced migraines; and about one-third reported irritable bowel syndrome, chronic fatigue syndrome, or sexual dysfunction.<sup>38</sup>

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<sup>32</sup> Ellen Pinkos Cobb, *Workplace Bullying: A Global Health and Safety Issue*, ISOSCELES GROUP, 3 (July 2012), <http://ilera2012.wharton.upenn.edu/RefereedPapers/CobbEllen.pdf> (internal quotation mark omitted).

<sup>33</sup> *Id.* (internal quotation mark omitted).

<sup>34</sup> See *Workplace Bullying: Position Statement by the New Brunswick Advisory Council on the Status of Women*, GOV'T OF NEW BRUNSWICK, CAN. 1 (Mar. 2007), <http://www2.gnb.ca/content/dam/gnb/Departments/eco-bce/WI-DQF/pdf/en/WorkplaceBullying.pdf>.

<sup>35</sup> Stephen J. Romano et al., *Workplace Violence Prevention: Readiness and Response*, FED. BUREAU OF INVESTIGATION (Jan. 2011), <http://leb.fbi.gov/2011/january/workplace-violence-prevention-readiness-and-response>.

<sup>36</sup> See Susan Harthill, *The Need for a Revitalized Regulatory Scheme To Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1263 (2010).

<sup>37</sup> Gary Namie, *The WBI Website 2012 Instant Poll D—Impact of Workplace Bullying on Individuals' Health*, WORKPLACE BULLYING INST. 2 (2012), <http://www.workplacebullying.org/multi/pdf/WBI-2012-IP-D.pdf>.

<sup>38</sup> *Id.*

Bullying is four times more prevalent than illegal harassment.<sup>39</sup> Bystanders also suffer but often remain passive for fear that the bully will turn his attentions toward them.<sup>40</sup> One-half of human resources manager-respondents surveyed admitted that bullying occurred in their workplaces.<sup>41</sup> Notwithstanding what they saw, forty-four percent of respondents had no policy.<sup>42</sup> Only three percent acknowledged having a stand-alone policy.<sup>43</sup> But even these voluntary policies may not address the needs of the target, unless the policy meets the organization's needs by providing cover for legal claims.<sup>44</sup> Stand-alone policies without legal backing may pose another problem for employers, who have faced opposition from the National Labor Relations Board for enforcing antibullying provisions.<sup>45</sup>

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<sup>39</sup> *Results of the 2014 WBI U.S. Workplace Bullying Survey*, *supra* note 17. The Tennessee law does not use the same figure but states that “this form of mistreatment is more prevalent than sexual harassment.” H.B. 1981, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/108/Bill/HB1981.pdf>.

<sup>40</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties To Supervise*, 77 TEMP. L. REV. 641, 649 (2004) (noting that in schools, bystanders views begin to coarsen as they blame the target or join in the bullying).

<sup>41</sup> *Workplace Bullying*, SOC'Y FOR HUM. RESOURCE MGMT. (Feb. 28, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/workplacebullying.aspx>.

<sup>42</sup> *Id.* Forty percent indicated that bullying was part of another policy. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Jerry Carbo, *Exploring Solutions to Workplace Bullying 1* (Jan. 6, 2012) (unpublished manuscript) (on file with Academic and Business Research Institute), available at <http://www.aabri.com/OC2012Manuscripts/OC12037.pdf>.

<sup>45</sup> The NLRB protects both union and nonunion workers and has ruled against employers who attempt to limit certain kinds of speech in the workplace. The NLRB reasons that these policies could inhibit workers' rights under section 7, which provides, among other things, the right to engage in collective bargaining and protected concerted activity. These activities could include meeting with others to discuss workplace conditions and for other “mutual aid or protection.” 29 U.S.C. § 157 (2012); see also *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 37 at 3–4 (2012) (finding that the employer could not implement an antibullying rule that did not consider the NLRA and ruling against an employer who disciplined employees after a coworker complained of online harassment on Facebook); Kerri Lynn Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish To Ban Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 355, 356–57, 374–75, (2013) (observing the lack of analysis by the NLRB and noting that some behavior that rises to protected activity under section 7 of the National Labor Relations Act would be problematic under company policies and that employers would have no power to stop it).

Finally, bullying also imposes a high cost on employers. By one estimate, employers incur \$30,000 to \$100,000 in costs for each bullied employee.<sup>46</sup> The American Psychological Association claims that firms lose \$300 billion in increased medical costs, workers' compensation charges, lost productivity absenteeism, and turnover due to bullying and other stressors.<sup>47</sup> Although bullying has a direct impact on the bottom line, the HWB does not provide an exemption for small businesses nor should it even though these entities may have thinner profit margins.<sup>48</sup> Indeed, many small businesses may lack human resources personnel, training capacity, or internal grievance mechanisms, meaning the employee may have even less protection than a similarly-situated peer in a larger firm.

## II. MOBBING AND MORAL HARASSMENT: HOW THE WORLD LOOKS AT BULLYING

Much of the rest of the world has tried to address workplace bullying to some extent. Although the concepts are not mutually exclusive, the United States has always focused on remedying past discrimination, but not as much on individual dignity in the workplace.<sup>49</sup> The United States jurisprudence focuses more on tangible forms of restoration through monetary damages rather than recognizing and restoring intangibles such as the loss of dignity. Accordingly, Professor Yamada has called for a "dignitarian" focus in the American workplace,<sup>50</sup> which promotes

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<sup>46</sup> TERESA A. DANIEL, *STOP BULLYING AT WORK: STRATEGIES AND TOOLS FOR HR AND LEGAL PROFESSIONALS* 41 (2009).

<sup>47</sup> *Id.* at 42.

<sup>48</sup> See, e.g., Daniel Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 168, 175 (2012) (explaining that bullying occurs in companies of all sizes and that the deterrent effect of the law may be enough to prevent the behavior).

<sup>49</sup> See Friedman & Whitman, *supra* note 31, at 241–42 (comparing U.S. and European perspectives and explaining that European countries have a history of looking beyond protected class to the dignity of all workers). *But see* King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994) ("The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.").

<sup>50</sup> David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 524–25 (internal quotation marks omitted) (tracing the concept of "dignity" from the Enlightenment to John Locke to the Framers of the Constitution and reviewing a number of alternative frameworks to modern employment law).

“healthy, productive, and socially responsible workplaces” that go hand in hand with “robust private, public, and non-profit sectors.”<sup>51</sup>

Many European Union states have adopted the concept of “dignity” in the workplace because they more readily subscribe to the spirit, if not the letter of the Universal Declaration of Human Rights, which specifically states, “All human beings are born free and equal in dignity and rights.”<sup>52</sup> Some countries specifically use the word “dignity” in their constitutions.<sup>53</sup>

Yamada does not call his proposed legislation an antibullying bill. “Bullying,” however, is the word associated with current or proposed legislation in Australia, the United Kingdom, and the United States.<sup>54</sup> France, Belgium, and Spain label it “moral harassment,” with Quebec calling it “psychological harassment.”<sup>55</sup> Denmark, Germany, Italy, Norway, and Sweden use the term “mobbing.”<sup>56</sup>

Although the countries’ legislations have differences, discussed briefly below, the EU provides a framework regarding workers’ rights and an obligation to protect the health, safety, and dignity of workers, which is very different from the one that exists in the United States.<sup>57</sup> For example, the EC Framework Directive 89/391/EEC establishes employers’ obligations related to health and safety risks.<sup>58</sup> There is no specific definition for

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<sup>51</sup> *Id.* at 525.

<sup>52</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III)A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr> (last visited Aug. 9, 2014).

<sup>53</sup> Jerome Hartemann et al., *Bullying, Harassment and Stress in the Workplace—A European Perspective*, PROSKAUER 3 (Jan. 15, 2013), <http://www.internationallaborlaw.com/files/2013/01/Bullying-Harassment-and-Stress-in-the-workplace-A-European-Perspective.pdf>.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Community Charter of Fundamental Social Rights of Workers 1989/19 of 8 Dec. 1989, art. 19, 1989 O.J. (19) (“Every worker must enjoy satisfactory health and safety conditions in his working environment.”); Charter of Fundamental Rights (EU) 2010/C 083/02 of 30 March 2010, art. 31, 2010 O.J. (C 83) 389, 397 (“Every worker has the right to working conditions which respect his or her health, safety and dignity.”); Council Directive 89/391/EEC, art. 5, 1989 O.J. (L 183) 1, 3 (EC) (explaining that employers must “ensure the safety and health of workers in every aspect related to the work” and conduct risk assessment).

<sup>58</sup> Council Directive 89/391/EEC, § 2, 1989 (L 183) 1, 3 (EC). A European Union (“EU”) directive is a goal that the EU member states must achieve through law that the member state chooses to enact to accomplish that goal by a certain date. EU

bullying in the EU, but some common characteristics in EU countries include looking at “negative acts that occur repeatedly, regularly . . . and over a period of time”—typically six months—against a person who has difficulty defending himself because of a power imbalance.<sup>59</sup> Other definitions include harassing, offending, socially excluding someone, or negatively affecting someone’s work tasks.<sup>60</sup>

The EU countries are not monolithic, but they generally have strong unions or work councils.<sup>61</sup> Unless a worker is one of the eleven percent of American employees who belong to a union, he is generally employed at-will, meaning that an employer can terminate him with or without cause as long as the termination does not violate the law.<sup>62</sup>

In 1993, Sweden became the first country to implement legislation specifically outlawing bullying at work. Its legislation also creates a duty for employers to promptly investigate, mediate, and address any instances of bullying, as well as implement preventative mechanisms. Notably, the law does not

regulations are binding law on every EU state as soon as they are passed. *Regulations, Directives and Other Acts*, EUROPEAN UNION, [http://europa.eu/eu-law/decision-making/legal-acts/index\\_en.htm](http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm) (last visited Aug. 9, 2015); *Difference Between a Regulation, Directive and Decision*, U.S. DEPT AGRIC., <http://www.usda-eu.org/eu-basics-questions/difference-between-a-regulation-directive-and-decision/> (last modified Dec. 7, 2014).

<sup>59</sup> Maarit Vartia-Väänänen, *Workplace Bullying and Harassment in the EU and Finland*, JILPT REPORT, June 2013, at 1, 1–2, available at <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> If a business employs 1,000 or more employees within two or more countries in the European Economic Area—twenty-seven out of the twenty-eight countries in the EU plus Iceland, Lichtenstein, and Norway—the business has at least 150 employees in each of two EEA countries, and at least 100 of the company’s workers request creation of a works council, the business must establish one. The works council provides a vehicle for consultation and information between employees and management. See *Regulations, Directives and Other Acts*, *supra* note 58; Council Directive 94/45/EC, arts. 2, 4, 1994 O.J. (L 254) 64, 66–67 (EC). Trade unions are different from workers’ councils and operate across industries rather than through companies. The proportion of employees who belong to unions in countries such as Finland, Sweden, and Denmark is around seventy percent, while it is much lower—eight percent—in countries such as France. *Trade Unions*, EUR. TRADE UNION INST., [http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2/\(language\)/eng-GB](http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2/(language)/eng-GB) (last visited Aug. 9, 2015). A decreasing number of employees belong to unions in Europe. *Id.* However, EU law has a number of requirements related to working conditions that restrict, among other things, layoffs. *Working Conditions*, EUR. COMMISSION, <http://ec.europa.eu/social/main.jsp?catId=706&langId=en> (last visited Aug. 9, 2015).

<sup>62</sup> See *Economic News Release: Union Members Summary*, *supra* note 13.

punish employers, preferring to resolve bullying problems through dialogue and consensus, which many find ineffective as a deterrent and causes some to criticize the Swedish model.<sup>63</sup> The SDWA, in contrast, includes both dialogue and punitive measures for both the bully and the employer.

France has specific laws prohibiting workplace bullying that go beyond the EU Directives. For example, the French Labor Code<sup>64</sup> bans “moral harassment,” defined as “repeated acts leading to a deterioration of the working conditions and that are likely to harm the dignity, the physical or psychological health [sic] of the victim or his professional career.”<sup>65</sup> French law requires repeated acts—a single act cannot constitute bullying.<sup>66</sup> However, bullying may take place over as short of a period of time as a few weeks.<sup>67</sup> Although French moral

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<sup>63</sup> See Helge Hoel & Ståle Einarsen, *The Swedish Ordinance Against Victimization at Work: A Critical Assessment*, 32 COMP. LAB. L. & POL'Y J. 225, 234 (2010) (observing that the legislation is based on a preventative perspective, the dialogue approach is “unrealistic” and ignores the “rights and wrongs in cases of bullying,” that “no attention is paid to the rights of victims to have their case heard and the employer’s responsibility in . . . investigating the facts of a case,” that “the regulation takes a non-punitive approach, with little or no attention paid to potential sanctions against perpetrators or against those whose behavior and action breach the regulation,” and calling for an approach that combines legislation, self-regulation, and initiatives involving employees, unions, and management (footnote omitted)); see also Susan Harthill, *Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis*, 34 HASTINGS INT'L & COMP. L. REV. 253, 289–90 (citing Helge Hoel & Ståle Einarsen, *Shortcomings of Antibullying Regulations: The Case of Sweden*, 19 EUR. J. WORK & ORG. PSYCHOL. 30, 30 (2010) and proposing a regime similar to the Occupational Safety and Health Act (“OSHA”) instead); Harthill, *supra* note 36, at 1254 (arguing that despite the criticisms of OSHA, it is a “singularly appropriate vehicle for such efforts and because preventing workplace bullying through an existing scheme complements efforts . . . such as the Healthy Workplace Bill, that provides a private cause of action for workplace bullying”).

<sup>64</sup> CODE DU TRAVAIL [C. TRAV.] art. L1152-1 (Fr.). Article L1152-4 of the French Labor Code requires employers to take “all necessary steps to prevent bullying behavior.” *Id.* Under French law, employers must “(1) establish[] internal policies prohibiting bullying in the workplace; and (2) display[] in the workplace a copy of . . . the Criminal Code concerning the criminal offense of bullying.” Philippe Thomas, *French Law Prohibiting Bullying in the Workplace*, HR DIRECTOR (Nov. 15, 2013), [http://www.thehrdirector.com/business-news/diversity\\_and\\_equality/french-law-prohibiting-bullying-in-the-workplace/](http://www.thehrdirector.com/business-news/diversity_and_equality/french-law-prohibiting-bullying-in-the-workplace/).

<sup>65</sup> CODE DU TRAVAIL [C. TRAV.] art. L1152-1 (Fr.). For an excellent discussion of French law, see Loïc Lerouge, *Moral Harassment in the Workplace: French Law and European Perspectives*, 32 COMP. LAB. L. & POL'Y J. 109 (2010); Thomas, *supra* note 64.

<sup>66</sup> Hartemann et al., *supra* note 53, at 3.

<sup>67</sup> *Id.* at 3–4.



harassment law does not have an intent requirement,<sup>68</sup> harassment must be “likely to harm the dignity, the physical or psychological health [sic] of the victim or his professional career.”<sup>69</sup> An employee who claims to be a victim of moral harassment must first establish facts consistent with the legal requirements. The burden of proof then shifts to the employer to demonstrate that the acts complained of did not constitute bullying and were justified by objective elements that had nothing to do with bullying. Once a complainant has made allegations of fact, the judge may order steps to investigate the situation.<sup>70</sup> The burden of proof shifts to the employer to disprove bullying.<sup>71</sup> Employers may not discipline, terminate, or discriminate against employees for reporting bullying or for being or refusing to be subject to bullying measures. More importantly, the law voids any retaliatory employment actions taken against those who report in good faith.<sup>72</sup> In addition to the concept of strict liability for bullying in some circumstances, French law also imposes criminal penalties.<sup>73</sup> Additionally, France provides for a mediation mechanism that either the target or the accused bully can initiate. If mediation does not succeed, the mediator informs the parties of their legal rights.<sup>74</sup>

The United Kingdom has no specific bullying legislation, but trade unions, the government, and companies made efforts to address the problem; thus, workers receive some measure of protection through the 1997 Protection from Harassment Act.<sup>75</sup> In addition, the UK government provides guidance for employers and employees on its national health and safety website. It also cofunded the Dignity at Work project where the UK's largest union and businesses work together to combat bullying.<sup>76</sup> These programs focus on allowing employees to focus

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<sup>68</sup> *Id.* at 4.

<sup>69</sup> CODE DU TRAVAIL [C. TRAV.] art. L1152-1 (Fr.); Thomas, *supra* note 64.

<sup>70</sup> Hartemann et al., *supra* note 53, at 11.

<sup>71</sup> *Id.*

<sup>72</sup> CODE DU TRAVAIL [C. TRAV.] art. L1152-2 (Fr.).

<sup>73</sup> CODE PÉNAL [C. PÉN.] art. 222-33-2 (Fr.) (providing for up to two years in prison and a fine of 30,000 euros for the perpetrator).

<sup>74</sup> CODE DU TRAVAIL [C. TRAV.] art. L1152-6 (Fr.).

<sup>75</sup> See Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 251–52 (2008).

<sup>76</sup> *Advice for Organisations*, HEALTH & SAFETY EXECUTIVE, <http://www.hse.gov.uk/stress/furtheradvice/bullying.htm> (last visited Aug. 9, 2015); see also *Dignity at Work Project*, NHS SCOTLAND STAFF GOVERNANCE,

on achieving their full potential rather than on the physical and emotional toll of workplace bullying that may lead to costly workplace tribunal proceedings and damage to workplace reputation.<sup>77</sup>

The German Constitution provides for the protection of personality, honor, health, and equal rights of individuals.<sup>78</sup> Although there is no single statutory definition of bullying, German courts have defined it as “systematic hostility, harassment and discrimination with the goal of systematically harming the other with respect to his or her feeling of worth.”<sup>79</sup> In contrast to other countries’ definitions, Germany’s definition of bullying does not apply to a single, isolated incident, no matter how severe.<sup>80</sup>

There is no legislative action specifically designed to prevent “mobbing.” The German Civil Code (“GCC”) provides for contractual and tort liability, which may also serve as a basis for claims for bullying and stress at work.<sup>81</sup> Other sources of law include the General Equal Treatment Act of 2006 (“ETA”), which prohibits discrimination at work;<sup>82</sup> the Occupational Health and

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<http://www.staffgovernance.scot.nhs.uk/improving-employee-experience/dignity-at-work-project/> (last visited Dec. 31, 2015).

<sup>77</sup> *Dignity at Work Project*, *supra* note 76.

<sup>78</sup> See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. II(1) (Ger.) (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”); *id.* art. I(1) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”).

<sup>79</sup> Hartemann et al., *supra* note 53, at 5 (internal quotation marks omitted).

<sup>80</sup> Philipp S. Fischinger, “*Mobbing*”: *The German Law of Bullying*, 32 COMP. LAB. L. & POL’Y J. 153, 157. Although a single incident cannot be classified as mobbing, it may still be subject to criminal sanctions. *Id.*

<sup>81</sup> See *id.* at 159–60. See generally BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, BUNDESGESETZBLATT [BGBl], as amended, (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html).

<sup>82</sup> Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], Aug. 14, 2006, BUNDESGESETZBLATT, Teil I [BGBl. I], last amended by Gesetz [G], Apr. 3, 2013, BGBl. I at 610, art. 8 (Ger.).



Safety Act of 1996, which governs measures to improve the health and safety of employees;<sup>83</sup> and the Works Constitution Act of 2001, which promotes workplace equality.<sup>84</sup>

Individual companies design all antibullying policies and procedures; trade unions do not utilize collective bargaining to achieve any antibullying policies.<sup>85</sup> Generally, company policies provide for both prevention and intervention, allowing the company to sanction bullies through warnings, transfers, or dismissals.<sup>86</sup>

The Spanish Constitution establishes personal “dignity,” as well as the right to “mental (or moral) integrity” as inalienable rights for every citizen.<sup>87</sup> In protecting these rights, Spain has established three distinct types of bullying behavior: (1) civil liability for bullying not in relation to protected characteristics; (2) civil liability for bullying related to protected characteristics; and (3) criminal liability for bullying.<sup>88</sup> Although no legislation specifically prevents workplace bullying, victims of harassment have remedies available through various general civil provisions,<sup>89</sup> such as the Act on Prevention of Occupational Risks<sup>90</sup> and Rule 39/1997 on Preventative Services, which establish a broad duty for employers to maintain a safe workplace.<sup>91</sup>

Spain's labor administration defines bullying as occurring “[w]here an unwanted conduct occurs with the purpose or the effect of violating the dignity of a person, and of creating an effect of violating the dignity of a person, and of creating an

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<sup>83</sup> Arbeitsschutzgesetz [ArbSchG] [Occupational Safety and Health Act], Aug. 7, 1996, BUNDESGESETZBLATT, Teil I [BGBl. I], at 1246 last amended by Gesetz [G], Oct. 19, 2013, BGBl. I, at 3836, art. 8 (Ger.).

<sup>84</sup> Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, BUNDESGESETZBLATT, Teil I [BGBl. I], at 2518, last amended by Gesetz [G], July 29, 2009, BGBl. I, at 2424, art. 9 (Ger.).

<sup>85</sup> Martin Wolmerath, *Workplace Bullying and Harassment in Germany*, JILPT REPORT, June 2013, at 77, 88, available at <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf>.

<sup>86</sup> *Id.* at 89.

<sup>87</sup> Hartemann et al., *supra* note 53, at 6 (internal quotation mark omitted).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Act on Prevention of Occupational Risks (B.O.E. 1995, 31) (Spain).

<sup>91</sup> Regulations for Prevention Services, (B.O.E. 1997, 39), available at <http://www.insht.es/InshtWeb/Contenidos/Documentacion/FichasPublicaciones/LegisNormalizacion/TextosLegales/Ficheros/rd39-en-serv%20prevencion-consolidado%20CON%20CARATULA%20sin%20NIPO.pdf>.

intimidating, hostile, degrading, humiliating or offensive environment.”<sup>92</sup> For conduct to qualify as bullying not in relation to a protected characteristic, an employee must satisfy three elements. First, the acts must be carried out with “the purpose or the effect” of violating the victim’s rights.<sup>93</sup> There is no intent requirement, but there must be a causal connection between the unwanted behavior and the harm suffered.<sup>94</sup> Second, the behavior must create an intimidating, hostile, humiliating, or offensive environment.<sup>95</sup> Finally, the bully’s conduct must be both repetitive and capable of harming the victim’s health.<sup>96</sup> If an employee is able to establish the required elements, his employer may either be held directly liable for his own actions or vicariously liable for the acts of other employees or unrelated third parties.<sup>97</sup> To be held liable for the actions of others, the employer must have had knowledge of the bullying and failed to protect the victim.<sup>98</sup>

One report about the prevalence of bullying in Spain characterized the conduct:

[B]y more than 40 negative ways of behaviour, such as isolation of the victim at the workplace (no communication), questioning/criticising the way he/she carries out his/her tasks, not assigning job tasks to the victim, or assigning too heavy a workload so that it cannot possibly be finished on time, or spreading rumours about the victim.<sup>99</sup>

Workplace bullying in Canada is often discussed as “psychological or personal harassment” and is a distinct cause of action from harassment on the basis of a protected characteristic.<sup>100</sup> The Canada Safety Council defines bullying as

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<sup>92</sup> Hartemann et al., *supra* note 53, at 6 (quoting CODE OF PRACTICE FOR THE SPANISH LABOR INSPECTORS ON BULLING AND VIOLENCE AT WORK 69 (2009), available at [http://www.ceoe.es/resources/image/Criterio\\_tecnico\\_69-2009.pdf](http://www.ceoe.es/resources/image/Criterio_tecnico_69-2009.pdf)) (internal quotation marks omitted).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 13–14.

<sup>98</sup> *Id.*

<sup>99</sup> Anna-Maija Lehto & Anna Pärnänen, *Violence, Bullying and Harassment in the Workplace*, EURWORK 14 (June 1, 2004) [http://eurofound.europa.eu/sites/default/files/ef\\_files/ewco/reports/TN0406TR01/TN0406TR01.pdf](http://eurofound.europa.eu/sites/default/files/ef_files/ewco/reports/TN0406TR01/TN0406TR01.pdf).

<sup>100</sup> Susan Coldwell, *Addressing Workplace Bullying and Harassment in Canada, Research, Legislation, and Stakeholder Overview: Profiling a Union Program*, JILPT

“an abuse of power, a violation of an employee’s rights and a betrayal of the trust that should exist between an employer and employee.”<sup>101</sup> The council elaborated, “Bullying is a trespass of an individual’s freedoms, a denial of the right to earn a living and, eventually, the destruction of an individual.”<sup>102</sup> Throughout the country, legislative responses to the issue of workplace bullying have varied widely. Federal legislation includes the Canada Labour Code and the Canada Occupational Health and Safety Regulations, which define workplace violence as “any action, conduct, threat or gesture . . . that can reasonably be expected to cause harm, injury or illness.”<sup>103</sup> Several territories have established stronger protections against workplace bullying, such as Quebec’s Psychological Harassment at Work Act<sup>104</sup> and Ontario’s Occupational Health and Safety Act.<sup>105</sup> One year after the law was put into effect, the Labour Standards Commission received approximately 2,500 complaints, less than one percent of which were deemed frivolous.<sup>106</sup>

Despite individual response from territories within the country, Canada lacks a uniform legal remedy to the problem of workplace bullying. Awareness of this issue is growing within

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REPORT, June 2013, at 135, 138, *available at* <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Canada Occupational Health and Safety Regulations, SOR/2008-148 (Can.), *available at* <http://laws.justice.gc.ca/eng/regulations/sor-86-304/page-114.html>.

<sup>104</sup> Act Respecting Labour Standards, R.R.Q., c. 80, s. 47 (Can.), *available at* <http://www.cnt.gouv.qc.ca/en/interpretation-guide/part-i/act-respecting-labour-standards/labour-standards-sect-391-to-97/psychological-harassment-sect-8118-to-8120/index.html> (“Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behavior, to put a stop to it.”); Coldwell, *supra* note 100, at 142 (defining psychological harassment as “humiliating or abusive behaviour that lowers a person’s self-esteem or causes him/her torment . . . . Most analysts maintain that the existence of psychological harassment is determined by the effects on the target who experiences the harassment rather than on the intent of the perpetrator.”).

<sup>105</sup> Occupational Health and Safety Act, R.S.O., 1990, c. O.1 (Can.) (defining “workplace violence” as “(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker” (internal quotation marks omitted)).

<sup>106</sup> Coldwell, *supra* note 100, at 143.

the country, as shown by the recent case brought in Ontario by Meredith Boucher against her employer, Wal-Mart.<sup>107</sup> Although this case brought much needed awareness to the issue, it still required the victim to bring claims of intentional infliction of mental suffering instead of allowing a separate cause of action for bullying.<sup>108</sup>

In 2009, Australia developed the Fair Work Act. This Act created Fair Work Australia—now designated the Fair Work Commission (“Commission”)—a national workplace tribunal that investigates complaints of unsafe and unfair work environments.<sup>109</sup> The Fair Work Amendment Act of 2013, which added protection against bullying in the workplace, became effective January 1, 2014.<sup>110</sup> This Act created the Commission, which is designed to investigate all reports of bullying, and if the complaint is found to be substantiated, the Commission is authorized to award injunctive relief.<sup>111</sup> If the victim wants to seek financial compensation, the victim must sue at common law for personal injury, breach of contract, or breach of a statutory duty.<sup>112</sup>

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<sup>107</sup> Craig Pearson, *Record Workplace Bullying Award Against Walmart Reduced on Appeal*, WINDSOR STAR, (May 27, 2014), <http://blogs.windsorstar.com/2014/05/27/record-workplace-bullying-award-against-walmart-reduced-on-appeal/> (last updated May 27, 2014, 2:22 PM).

<sup>108</sup> *Id.* Boucher was awarded \$200,000 for intentional infliction of mental suffering, \$1 million in punitive damages, \$10,000 for assault from Wal-mart, as well as \$100,000 for intentional infliction of mental suffering, \$150,000 in punitive damages from her supervisor, and \$10,000 for assault by another supervisor. This award was recently reduced from \$1.46 million to \$410,000. *Id.*

<sup>109</sup> *About Us*, FAIR WORK COMMISSION, <https://www.fwc.gov.au/about-us/overview> (last updated Mar. 27, 2014).

<sup>110</sup> FAIR WORK COMMISSION, ANNUAL REPORT 2012–13, at 24 (2013), *available at* [https://www.fwc.gov.au/documents/documents/annual\\_reports/ar2013/fwc-ar-2013-web.pdf](https://www.fwc.gov.au/documents/documents/annual_reports/ar2013/fwc-ar-2013-web.pdf).

<sup>111</sup> Ellen Pinkos Cobb, *Workplace Bullying Issues a Worldwide Concern*, EMP. BENEFIT NEWS (May 27, 2014, 9:14 AM) <http://ebn.benefitnews.com/blog/ebviews/workplace-bullying-issues-a-worldwide-concern-2741776-1.html?zkPrintable=true>.

<sup>112</sup> *Id.*

According to the Fair Work Ombudsman,<sup>113</sup> bullying is repeated unreasonable behavior that creates a risk to health or safety, where unreasonable behavior is defined as “behaviour includ[ing] victimising, humiliating, intimidating or threatening. Whether a behaviour is unreasonable can depend on whether a reasonable person might see the behaviour as unreasonable in the circumstances.”<sup>114</sup> The effects of creating a provision specifically designed to address the prevalence of workplace bullying remains to be seen, as statistics on the effectiveness of the new legislation have not yet been compiled.

The international cases provide some context and guidance. Legislators do not need to tie bullying protection to protected characteristics. Indeed, all of the countries mentioned have status-based protections. Further, although many countries have stronger labor protections than the United States, even countries such as France, where unions only represent eight percent of the workforce, have developed mechanisms to protect all employees regardless of union membership. This brief international tour has also shown that governments, industry groups, labor unions, and nongovernmental organizations can collaborate to combat bullying because it is in everyone's best interests to eliminate it from the workplace. Many countries have a more dignitarian concept, which is discussed in the next Part, but nonetheless, they have adopted different approaches to provide protections that do not rely solely on a constitutional or other legal right to human dignity.

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<sup>113</sup> The Fair Work Ombudsman is an organization dedicated to providing information regarding the policies of the Fair Work Act. The Ombudsman enforces compliance with the Act but does not investigate complaints. All investigations are handled by the Fair Work Commission. See *The Fair Work Commission and Us—What's the Difference?*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/about-us/the-fair-work-commission-and-us-whats-the-difference> (last visited Aug. 9, 2015).

<sup>114</sup> *Bullying & Harassment*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/employee-entitlements/bullying-and-harrassment> (last visited Aug. 9, 2015).

### III. IS THE HEALTHY WORKPLACE BILL THE RIGHT SOLUTION?

#### A. *Opposition to the Antibullying Legislation*

Antibullying legislation has its critics, of course. Some worry about a flood of frivolous litigation that could arise from creating a new cause of action. Some claim that workplace policies already cover this in the private sector.<sup>115</sup> They also remind proponents that the courts cannot dictate civility in the workplace<sup>116</sup> and that current law adequately protects bullying plaintiffs. One could argue, for example, that the bully unreasonably affects the target's employment relationship and should therefore face liability for tortious interference with a business relationship or expectation.<sup>117</sup> One Florida court even found that a supervisor, who allegedly made "hostile statements" and committed "hostile acts," could tortiously interfere with her employee's relationship with the employer if the supervisor "act[ed] solely with ulterior purposes and . . . not in the principal's best interests."<sup>118</sup> While this unusual legal development could appear promising—and appears to be an exception—it could also backfire by allowing employers to escape liability if courts deem that bullying supervisors acted outside the scope of their authority.

Others believe that state tort law already provides an adequate remedy through the intentional infliction of emotional distress claim.<sup>119</sup> However, plaintiffs rarely recover for intentional infliction of emotional distress due to the high burden requiring conduct that is so "extreme and outrageous" and

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<sup>115</sup> Rubenfire, *supra* note 20.

<sup>116</sup> See *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 80 (1998).

<sup>117</sup> See *Huff v. Swartz*, 606 N.W.2d 461, 466 (Neb. 2000) ("The elements of tortious interference with a business relationship or expectancy are '(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.'" (quoting *Koster v. P & P Enters.*, 539 N.W.2d 274, 278–79 (Neb. 1995)).

<sup>118</sup> *Alexis v. Ventura*, 66 So. 3d 986, 987–88 (Fla. Dist. Ct. App. 2011) (quoting *Sloan v. Sax*, 505 So. 2d 526, 528 (Fla. Dist. Ct. App. 1987) (internal quotation marks omitted)).

<sup>119</sup> The Second Restatement of Torts defines intentional infliction of emotional distress as "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

“beyond all possible bounds of decency” to be “regarded as atrocious, and utterly intolerable in a civilized community.”<sup>120</sup> Further, employers have more latitude to act unreasonably because of the at-will status of their nonunionized employees.

Criminal antistalking laws, which have also been used in the UK to combat bullying, may also provide some measure of relief.<sup>121</sup> Employees may also file an assault charge against the bully if they have reasonable fear of an unlawful touching<sup>122</sup> or a battery charge if they actually experience an unlawful touching.<sup>123</sup>

Borrowing from European counterparts, some countries propose alternatives such as the use of Occupational Safety and Health Act (“OSHA”), which has state and federal mechanisms to protect workers’ health.<sup>124</sup> OSHA, however, does not provide a private right of action and has a significant backlog of investigations and inspections.<sup>125</sup> In fact, OSHA must protect 130 million workers with only 2,200 inspectors.<sup>126</sup>

<sup>120</sup> See *Polay v. McMahon*, 10 N.E.3d 1122, 1128 (Mass. 2014) (internal quotation mark omitted) (noting that “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities” are insufficient (internal quotation marks omitted)); *Clayton v. Wisener*, 190 S.W.3d 685, 693 (Tex. Ct. App. 2005) (dismissing a case, noting the difficulty in prevailing, and quoting the Texas Supreme Court’s recent statement that “[f]or the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort” (internal quotation marks omitted)).

<sup>121</sup> Florida’s law provides, “A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree . . .” Fla. Stat. § 784.048(2) (2012).

<sup>122</sup> See, e.g., Fla. Stat. § 784.011(1) (2012) (defining misdemeanor assault as “an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent”).

<sup>123</sup> See, e.g., Fla. Stat. § 784.03(1)(a) (2001) (defining felony battery as “(1) [a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other; or (2) [i]ntentionally caus[ing] bodily harm to another person”).

<sup>124</sup> See Susan Harthill, *supra* note 63, at 256–57 (arguing that the shift from OSHA from physical health and safety to psychological health and well-being makes OSHA an appropriate agency to address bullying).

<sup>125</sup> Professor Orly Lobel argues that “OSHA’s lack of resources, political weaknesses, and flawed legislative mandate have all contributed to low inspection rates, low penalties, and low levels of prosecution, which in turn have failed to lower workplace injury rates.” Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1074, 1083–84 (2005). The Department of Labor is working to remedy these issues and the Whistleblower Protection Advisory Committee has a mandate to make recommendations to the Secretary of Labor on streamlining policies and approving



Others note that that the workers' compensation scheme should suffice, but it does not. It serves as the exclusive remedy in most states for workplace injuries, and workers give up the right under this no-fault system for recovery under any common-law negligence claims.<sup>127</sup> In most states, employees also face a high burden to meet the intentional tort exception for workers' compensation exclusivity.<sup>128</sup> In addition, the aggressor would escape punishment under this regime.

### *B. Filling the Gap with the HWB*

The HWB attempts to fill the gaps in protection for targets caused by the high hurdles of intentional infliction of emotional distress, the lack of a private right of action and enforcement resources in OSHA, the exclusivity provision of workers' compensation law, and the requirements for protected status under Title VII. Indeed, the drafters of the Tennessee bill specifically noted that bullying claimants had no remedy under the aforementioned laws.<sup>129</sup>

The HWB makes it unlawful to subject an employee to an "abusive work[ing] environment," which "exists when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm, or both."<sup>130</sup> The bill defines abusive conduct:

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effectiveness. *Whistleblower Protection Advisory Committee*, U.S. DEP'T LABOR, <http://www.whistleblowers.gov/wpac.html> (last visited Aug. 9, 2014).

<sup>126</sup> *Commonly Used Statistics*, U.S. DEP'T LABOR, <https://www.osha.gov/oshstats/commonstats.html> (last visited Aug. 9, 2015).

<sup>127</sup> See Fla. Stat. § 440.015 (2012).

<sup>128</sup> In Florida, for example, the employee must show:

(1) The employer deliberately intended to injure the employee; or (2) [t]he employer engaged in conduct that the employer knew, based . . . [upon] explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment . . .

Fla. Stat. § 440.11(1)(b) (2013). The employee must also show that the conduct was a legal cause of the employee's injury or death. See *id.* Workers' compensation is generally the exclusive remedy for employees injured in the workplace; they cannot sue for tort damages.

<sup>129</sup> H.B. 1981, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/108/Bill/HB1981.pdf>.

<sup>130</sup> These definitions come from the most recent iterations of the HWB as it is proposed in state legislatures for the 2013 to 2014 legislative sessions. David C.



Abusive conduct is defined as: acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct . . . [and may] include, but is not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee's work performance. It shall be considered an aggravating factor that the conduct exploited an employee's known psychological or physical illness or disability. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.<sup>131</sup>

Unlike the Tennessee law, the HWB would extend to private employers. Employees must bring an action within one year of the alleged conduct, provide proof of medical or psychological care,<sup>132</sup> and are entitled to reinstatement, back pay, front pay, medical expenses, compensatory damages, injunctive relief, punitive damages, and attorney fees.<sup>133</sup> Courts can also order the bully removed from the workplace,<sup>134</sup> which generally does not happen in a Title VII case unless the employer chooses to do so. If there is no adverse employment action, a judge or jury can only award emotional distress or punitive damages from the employer if the conduct was "extreme and outrageous," and emotional distress damages are capped at \$25,000 even though there is no absolute cap on damages.<sup>135</sup> The individual perpetrator, however, faces liability for both punitive and emotional distress damages whether or not the employee experienced a tangible employment action.<sup>136</sup>

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Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 329, 334 (2013) (internal quotation marks omitted).

<sup>131</sup> *Id.* Employers subject to Title VII will recognize the reasonableness standard from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993), which established the hostile environment standard. *See supra* note 3.

<sup>132</sup> Yamada, *supra* note 130, at 351, 353. This requirement for documentation from a medical professional would not be onerous for most plaintiffs. According to the Workplace Bullying Institute, seventy-one percent of targets surveyed sought treatment from a physician and sixty-three percent saw a mental health professional to deal with the bullying. *WBI Survey: Workplace Bullying Health Impact*, WORKPLACE BULLYING INST. (Aug. 9, 2012), <http://www.workplacebullying.org/2012/08/09/2012-d/>.

<sup>133</sup> Yamada, *supra* note 130, at 336, 353.

<sup>134</sup> *See id.* at 336.

<sup>135</sup> *Id.*; David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 504 (2004).

<sup>136</sup> Yamada, *supra* note 130, at 336.

As with the *Ellerth* case, as long as there is no tangible employment action, the HWB provides affirmative defenses if “the employer exercised reasonable care to prevent and correct . . . [the] actionable behavior,” and the employee “unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.”<sup>137</sup> Yamada eschews administrative agencies such as the EEOC for adjudicating claims because the existing backlog and financial burden to cases would hamper efforts to pass legislation.<sup>138</sup> Additionally, he borrows a page from harassment and discrimination laws and has an antiretaliation provision.<sup>139</sup> But Yamada also allows employers to escape liability if adverse employment decisions are based on poor performance, misconduct, economic necessity, a reasonable performance evaluation, or as the result of a reasonable investigation about inappropriate activity, such as an ethical or legal violation.<sup>140</sup> Finally, the HWB does not preclude relief under any other law, except that when the plaintiff also receives workers’ compensation for medical costs for the same injury, the workers’ compensation costs will be reimbursed from compensation in an HWB cause of action.<sup>141</sup>

The HWB has critics who claim that it goes too far and those who feel that the well-intentioned law does not go far enough to protect workers because of the affirmative defenses and intent standard.<sup>142</sup> Some of these criticisms are addressed below with a proposed alternative that draws from the HWB and goes beyond it.

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<sup>137</sup> *Id.* at 335. Employers who have policies in place to comply with Title VII will be familiar with this requirement because it comes from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which discussed employer liability for tangible employment actions by a supervisor and the affirmative defenses if no tangible employment action had been taken.

<sup>138</sup> Yamada, *supra* note 130, at 337.

<sup>139</sup> See *Facts About Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (last visited Aug. 9, 2015), <http://www.eeoc.gov/laws/types/facts-retal.cfm>; Yamada, *supra* note 130, at 337.

<sup>140</sup> Yamada, *supra* note 130, at 338.

<sup>141</sup> *Id.* at 353–54.

<sup>142</sup> See Jerry Carbo, *Strengthening the Healthy Workplace Act—Lessons from Title VII and IIED Litigation and Stories of Targets’ Experiences*, 14 J. WORKPLACE RTS. 97, 105–06 (2009).

#### IV. MODIFYING THE HEALTHY WORKPLACE BILL THROUGH THE SAFETY AND DIGNITY IN THE WORKPLACE BILL AND THE USE OF THERAPEUTIC JURISPRUDENCE AND PROCEDURAL JUSTICE

An employee's perception of fairness in process is paramount both for employee engagement and for the success of any remedy relating to bullying in the workplace.<sup>143</sup> Under a procedural justice theory, an employee perceives a process to be fairer when he is "a voice in the development of the outcome" of a proceeding.<sup>144</sup> The perception of fairness is critical because whether the workplace bully is a boss, supervisor, or subordinate, the target believes that there is an inherent imbalance of power. The target also suffers a loss of dignity—a concept ingrained in much of the EU bullying legislation, but, unfortunately, not a factor in most U.S. employment law jurisprudence.

David Yamada discusses therapeutic jurisprudence ("TJ"), which employs a holistic and healing focus, in his work on a dignitarian concept of the workplace. However, the HWB does not adequately integrate the TJ principles in its remedial structure.<sup>145</sup> Yamada encourages lawyers who provide legal counsel to employees to consider physical and mental health, financial viability, future employment options, and legal rights.<sup>146</sup> He recommends that management-side employment counsel use TJ to facilitate discussion around organizational climate in addition to legal risk.<sup>147</sup> Although he discusses TJ in the context of drafting legislation, his focus remains on remedies and the need to balance the interests of all of the stakeholders by

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<sup>143</sup> See Anne-Marie Kontakos, *Employee Engagement and Fairness in the Workplace*, CENTER FOR ADVANCED HUM. RESOURCE STUD. 18 (2007), available at <http://www.uq.edu.au/vietnampdss/docs/July2011/EmployeeEngagementFinal.pdf> ("Procedural justice refers to an employees' [sic] perceptions of fairness in the means and processes used to determine the amount and distribution of resources." (citation omitted)).

<sup>144</sup> *Id.*

<sup>145</sup> Yamada, *supra* note 50, at 547 ("Employment law has been largely invisible, however, in the developing scholarly and practice-related commentary on therapeutic jurisprudence [and] [u]nder a dignitarian framework, this would change dramatically . . . ." (footnote omitted)).

<sup>146</sup> David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257, 282–83 (2010).

<sup>147</sup> *Id.* at 283–84.

including a cause of action, high standards for recovery, incentives for employers to prevent and remediate harm, and affirmative defenses for employers.<sup>148</sup>

Yamada sees therapeutic jurisprudence as addressing the lack of a remedy for targets who are told that no law addresses bullying in the workplace; but the HWB falls short in providing a complete remedy. Although it removes some hurdles by providing a basis for relief, it does not go far enough in affording the sense of healing that TJ proponents espouse. If there are not appropriate procedures in the workplace to address bullying, TJ can promote healing for the victim and possibly, when appropriate, a treatment plan for the offender, as described below.

This Article's proposed SDWA adopts most of the components of the HWB but with some differences. It supports the one-year statute of limitations as a way to spur the victim to come forward in a timely manner, particularly if the process is, as outlined below, more conducive to promoting dignity and healing than the current litigation system. It also supports the limitations on emotional distress damages and the notion that the affirmative defenses are reasonable and practical. Like the HWB, the SDWA would not preclude plaintiffs from bringing other causes of action for state torts, such as intentional infliction of emotional distress. Plaintiffs would also be expected to include negligent supervision,<sup>149</sup> or constructive discharge claims, when appropriate.<sup>150</sup> Both of the bills would allow redress in state courts.

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<sup>148</sup> *Id.* at 284–86.

<sup>149</sup> Plaintiffs in discrimination, harassment, and intentional torts cases often bring negligent supervision claims as well. A plaintiff must prove that the employer knew or should have known that an employee's conduct would subject third parties to an unreasonable risk of harm, that the negligent supervision or retention was the proximate cause of the injury, and that the harm was foreseeable. *See e.g.*, *Med. Assurance Co. v. Castro*, 302 S.W.3d 592, 595 (Ark. 2009).

<sup>150</sup> Almost one-quarter of targets reported being constructively discharged, and forty percent indicated they resigned to preserve their health or safety in a 2011 survey. *Economic Harm*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/impact/economic-harm/> (last visited Aug. 9, 2015); *see also* *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1317 (11th Cir. 1989) (“To prove constructive discharge, the employees must demonstrate that their working conditions were so intolerable that a reasonable person in their position would be compelled to resign.”); *see, e.g.*, *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1025–30 (Cal. 1994) (defining the cause of action and outlining the burden of proof).

The proposed SDWA differs, however, in its approach to a proposed remedy. One way to improve the perception of fairness in both process and remedy is through the use of therapeutic jurisprudence in alternative dispute resolution mechanisms and in the court system using some of the lessons from problem-solving courts. Contrary to the traditional court system, which focuses on the specific dispute or controversy, problem-solving courts look to the underlying problem in an effort to avoid recurrence.<sup>151</sup> These courts often deal with parties with substance abuse or mental health issues and were first employed in drug courts in Miami, Florida in 1989. They have now expanded to domestic violence, youth, mental health, and dependency courts.<sup>152</sup> The judges in these courts play an enhanced role in directing the parties to appropriate resources and monitoring the progress and effectiveness of treatment mechanisms.<sup>153</sup>

To effectively implement therapeutic justice in current problem solving courts, these judges receive specialized training.<sup>154</sup> This additional training enables judges to develop subject-matter expertise and the skills to handle emotionally charged cases outside of the traditional format. Moreover, judges who currently use TJ principles emphasize the importance of

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<sup>151</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1055 (2002).

<sup>152</sup> *Id.* at 1055–56.

<sup>153</sup> *Id.* at 1061; see also Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *VAND. L. REV.* 831, 833–34, 833 n.2 (2000) (discussing the references to drug courts as examples of “therapeutic jurisprudence” but cautioning that “a therapeutic attitude, if unconnected to systemic monitoring mechanisms, risks capriciousness”).

<sup>154</sup> For example, Congress created the Court Improvement Program to facilitate training for state dependency judges, where a team staffed by attorneys, court analysts, and system programmers provides training and assistance through Benchbooks and virtual court. Benchbooks consist of state and national laws, rules of court, and subject-specific bench practices, which are updated as new practices or policies are employed. The virtual court program places a judge in a simulated courtroom, where the judge hears testimony and then must rule on a variety of issues. *Dependency Benchbook*, FLA. COURTS, <http://www.flcourts.org/resources-and-services/family-courts/dependency/dependency-benchbook.shtml> (last visited Aug. 9, 2015); *AJA Offers Online Domestic Violence Tool*, NAT'L CENTER FOR ST. COURTS, <http://www.ncsc.org/Education-and-Careers/DV-Education-for-Judges.aspx> (last visited Aug. 9, 2015); Robert V. Wolf, *Reentry Courts: Looking Ahead: A Conversation About Strategies for Offender Reintegration*, BUREAU JUSTICE ASSISTANCE 7–8 (2011), [http://www.courtinnovation.org/sites/default/files/documents/Reentry\\_Courts.pdf](http://www.courtinnovation.org/sites/default/files/documents/Reentry_Courts.pdf).

having a creative, problem-solving skill set for effective intermediaries; training, education, and experience aid in development of this important attribute.

Judges who preside over traditional employment law cases should also receive training in TJ principles because if mediation fails, victims of bullying may still seek redress in a traditional court. A study on integrating TJ principles into a traditional court setting pointed out numerous practices that could be successfully implemented in traditional courts.<sup>155</sup> The authors found that judges could more proactively seek information about cases and use that information to craft individualized orders, and they could engage more directly with defendants. Further, they found that judges have more opportunities to incorporate and increase a defendant's access to social service programs; could integrate ongoing supervision to monitor a defendant's progress; and could create resolutions agreeable to all parties involved, thereby increasing trust between the parties and the court.

One proposed remedy for the effective management of judicial time and resources was for judges to choose only those cases that would benefit most from the increased attention and supervision.<sup>156</sup> This solution makes sense, as there may be some bullying cases for which TJ would be inappropriate—such as one in which the victim suffered a physical attack thereby involving the criminal justice system. Further, as discussed below, the federal government can allocate funding to states that incorporate therapeutic principles into their traditional court systems. States could then disburse the money as they see fit to support community resources and local social service programs. More importantly, studies have shown that using problem-solving principles results in more positive outcomes, such as lower recidivism rates.<sup>157</sup> Courts could, for example, require anger management courses or other counseling for the offender as part of a binding settlement or judgment.

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<sup>155</sup> Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 58 (2005).

<sup>156</sup> *Id.* at 67.

<sup>157</sup> Shannon Carey & Janice Munsterman, *Challenges and Solutions to Implementing Problem Solving Courts from the Traditional Court Management Perspective*, BUREAU JUSTICE ASSISTANCE 1 (June 2008), [https://www.bja.gov/Publications/AU\\_ProbSolvCourts.pdf](https://www.bja.gov/Publications/AU_ProbSolvCourts.pdf).

Just as therapeutic jurisprudence principles improve the way judges in problem-solving courts address sensitive issues related to addiction, mental illness, and domestic violence, so too would these principles benefit mediators who intermedicate bullying in the workplace. Mediators, like problem-solving court judges, also need additional training to develop creative strategies in which to solve such unique disputes and must have an understanding of what causes and prompts bullying. The training programs already in place for judges would, thus, provide a framework for establishing similar programs for mediators.

This Article's proposal also addresses criticism from Dr. Gary Namie of the Workplace Bullying Institute ("WBI"), who objects to the use of mediation in these cases because, first, employers often mandate mediation or arbitration and, second, he believes that bullying is a form of violence and, therefore, is not an appropriate subject for mediation.<sup>158</sup> He also correctly observes that domestic violence cases do not go through mediation. A 2011 WBI survey found that following mediation, fifty-two percent of aggressors suffered no consequences, while thirty-three percent of targets quit or were fired, and only seven percent of the aggressors suffered any adverse action at all.<sup>159</sup>

Dr. Namie, who has played a critical role in drafting and promoting workplace bullying legislation, raises valid points. However, the SDWA does not require mediation; it only strongly recommends it.<sup>160</sup> Further, if mediators receive the correct training and both employers and aggressors face liability for their actions, they will have more incentive to resolve the matter through voluntary mediation rather than taking chances with a

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<sup>158</sup> See *WBI Survey: Mediation and Workplace Bullying*, WORKPLACE BULLYING INST. (2011), <http://www.workplacebullying.org/multi/pdf/2011-D.pdf> (last updated Jan. 24, 2013). Note the survey consisted of one question: "If your employer required you to engage in mediation and/or arbitration to address your workplace bullying situation, what was the outcome? Choose up to 2 responses." *Id.* Four hundred and seventy-three targets responded. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> In fact, some suggest that adding an alternative dispute provision to the HWB would facilitate passage. See generally, Florence Z. Mao, Note, *Is Litigation Your Final Answer? Why the Healthy Workplace Bill Should Include an ADR Provision*, 21 J.L. & POL'Y 679 (2013) (outlining the types and purposes of various ADR mechanisms, including the EEOC mediation program, and noting that many state and federal courts require mediation for certain kinds of harassment and discrimination claims).



potentially sympathetic jury in court. Mediation also provides a quicker, more efficient resolution than traditional courts, which can help targets heal faster.<sup>161</sup> Finally, although some factual scenarios may rule out mediation, experienced mediators successfully handle employment law cases all the time when there is a perceived power imbalance and the issues are complex, sensitive, and emotional.<sup>162</sup> Remedies can include agreements to attend anger management or receive psychological counseling. Those trained in TJ would have the resources to craft solutions that address the target's need for justice and the aggressor's need for treatment.

The SDWA includes specially-trained personnel in either an informal setting—mediation—or a court so that the target can raise his grievances in a neutral setting if internal company measures have failed. In either a court or a mediation setting, the target has the opportunity to be heard and obtain some measure of redress without relying on Title VII's traditional status-based harassment protections. This proposal combines the benefits of procedural justice with the concept of therapeutic jurisprudence.

## V. THE SOLUTION: THE ROLE OF CONGRESS AND THE PRESIDENT

### A. *Incentives for the States To Act*

Admittedly, the overlay of voluntary alternative dispute resolution and special training adds costs that could provide additional ammunition to the opponents of new legislation. Accordingly, this Article proposes an incentive structure that requires Congress to appropriate funds to states that pass a version of the SDWA for private sector employees and strongly encourages bills for state government employees. The United

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<sup>161</sup> See Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL'Y & L. 880, 883 (2000) (discussing the delays in traditional courts for tort claims and arguing that certain kinds of tort claims should resolve more quickly through speedy trials so that plaintiffs and defendants can move forward with their lives).

<sup>162</sup> For example, the EEOC, which does not charge for mediations, had a seventy-two percent settlement rate in 2008, and almost one-half of the cases included a nonmonetary solution. *Questions and Answers About Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Aug. 9, 2015).



States has a vested interest in reducing bullying in the workplace. High turnover and medical costs make American firms less competitive in the global marketplace. The federal government also incurs a share of these medical costs through its subsidy of various governmental programs and through subsidies under the Affordable Care Act ("ACA"), which requires people to procure health insurance.<sup>163</sup> One of the ACA's stated goals is to assist communities in preventing disease and lowering the incidence of chronic conditions, many of which are caused by stress.<sup>164</sup>

Although this Article's proposal does not require it, some states may use federal funding to establish specialized tribunals<sup>165</sup> that could address and adjudicate disputes related to bullying through the entire life cycle of a person from schools through employment, and even through elder care.<sup>166</sup> States could use the funding to train mediators and judges, provide grants to small businesses that may not have resources to educate employees, and fund mental health programs or anger management classes. States would also benefit from using the funding to develop more effective antibullying programs in schools, as studies show that bullying can start early and have consequences for the criminal justice system, which is overtaxed in most states.<sup>167</sup> In fact, sixty percent of boys who bullied others as children have been convicted of a criminal offense by their midtwenties, with forty percent of those having three or more

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<sup>163</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 145 (2010).

<sup>164</sup> *Building Healthier Communities by Investing in Prevention*, U.S. DEP'T OF HEALTH AND HUM. SERVICES (Feb. 9, 2011), <http://www.hhs.gov/healthcare/facts/factsheets/2011/09/prevention02092011.html>.

<sup>165</sup> For example, England, Scotland, and Wales have employment tribunals. *Make a Claim to an Employment Tribunal*, GOV.UK, <https://www.gov.uk/employment-tribunals> (last updated Oct. 5, 2015); *Workplace Bullying and Harassment*, GOV.UK, <https://www.gov.uk/workplace-bullying-and-harassment> (last updated Nov. 12, 2014). As of April 2014, in the UK, employees must first go through a free early conciliation process before going to the tribunal. ADVISORY, CONCILIATION, ARBITRATION SERV., BULLYING AND HARASSMENT AT WORK 9 (2014), available at <http://www.acas.org.uk/media/pdf/o/c/Bullying-and-harassment-at-work-a-guide-for-employees.pdf>.

<sup>166</sup> Nancy J. Knauer, *Bullying Across the Life Course: Redefining Boundaries, Responsibility, and Harm*, 22 TEMP. POL. & CIV. RTS. L. REV. 253, 254 (2013); Weddle, *supra* note 40, at 700.

<sup>167</sup> See Harthill, *supra* note 36, at 1258 (noting that one risk factor for bullying is the perpetrator's childhood development).

convictions.<sup>168</sup> There is no doubt that these young men commit both state and federal crimes; thus, any program that reduces the crime rate lowers costs for the federal government, as well. Indeed, the Centers for Disease Control classifies youth bullying as a public health problem.<sup>169</sup>

*B. Incentives for Corporations To Act with or Without State Action*

Independent of the passage of any state laws, the federal government can also use the carrot of tax incentives and training grants and the stick of denial of government contractor status, to push companies to do more. Smaller businesses, which already receive some tax credits under the ACA, could receive a larger increase after instituting appropriate programs to provide access to the healthcare services that victims and bystanders need.<sup>170</sup> The government can also provide direct subsidies for those employers without the resources to develop policies, procedures, and training to comply with the law and can publicly recognize firms that go above and beyond in developing innovative ways to combat bullying.<sup>171</sup> This recognition could serve as a valuable recruiting tool for new employees and could enhance a company's corporate social responsibility reporting as well.

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<sup>168</sup> Weddle, *supra* note 40, at 649–50, 674, 677–78 (explaining that a number of states have antibullying statutes in the schools and that schools often lack the funding for training for teachers and administrators).

<sup>169</sup> *Understanding Bullying*, NAT'L CENTER FOR INJURY PREVENTION AND CONTROL, [http://www.cdc.gov/violenceprevention/pdf/bullying\\_factsheet.pdf](http://www.cdc.gov/violenceprevention/pdf/bullying_factsheet.pdf) (last updated Sept. 24, 2015).

<sup>170</sup> Certain businesses receive a small business tax credit; amending and increasing the amount would provide an incentive for smaller businesses to implement antibullying programs. See e.g., *Get To Know the Small Business Health Care Tax Credit*, IRS (July 1, 2015) <https://www.irs.gov/Affordable-Care-Act/Employers/Get-to-Know-the-Small-Business-Health-Care-Tax-Credit>.

<sup>171</sup> Others in Congress have recognized the power of public recognition for firms. Representative Carolyn Maloney has proposed a bill that would, among other things, require companies with over \$100 million in gross revenue to publicly disclose the measures they take to prevent human trafficking, slavery, and child labor in their supply chains as part of their annual reports. Representative Maloney also proposes listing the names of the top 100 complying companies. Business Supply Chain Transparency on Trafficking and Slavery Act of 2014, H.R. 4842, 113th Cong., 2d Sess. (2014).

Finally, as the nation's largest procurer of goods and services, the federal government has significant leverage in the marketplace.<sup>172</sup> The President can issue an executive order requiring contractors to establish a robust program, which could include, among other things, the payment of mediation fees for all parties.<sup>173</sup> Companies that do not establish a credible program would be ineligible to bid on government contracts, serve as subcontractors on contracts of a certain size, and be ineligible for the renewal of existing contracts.

## VI. CONCLUSION

Hardly a day goes by when bullying does not appear in the news,<sup>174</sup> yet only one state has passed a law to protect workers. Through federal funding, the SDWA provides incentives for both states and employers to tackle bullying head on. State governments can look to the EU, Canada, and Australia for guidance on what has and has not worked. For example, France has shown that mediation can play a role. The UK works with unions and employers for joint stakeholder initiatives. Various EU countries and Canada use a health and safety approach. Neither the federal nor the state OSHA agencies are equipped to handle the enforcement of the SDWA; but, OSHA inspectors could also benefit from training so that they can recognize the

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<sup>172</sup> The federal government spends \$530 billion per year for goods and services. *Office of Federal Procurement Policy*, WHITE HOUSE: OFF. MGMT. & BUDGET, [http://www.whitehouse.gov/omb/procurement\\_mission](http://www.whitehouse.gov/omb/procurement_mission) (last visited Aug. 9, 2015).

<sup>173</sup> There is precedent for issuing such an order for labor-related issues. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (prohibiting federal contractors and subcontractors with contracts in excess of \$10,000 from discriminating on the basis of race, color, religion, sex, or national origin and requiring affirmative action to ensure equal employment opportunity); Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (June 12, 1999); Exec. Order No. 1,365,879, 79 Fed. Reg. 9,851 (Feb. 12, 2014) (establishing a minimum wage of \$10.10 per hour for contractors on covered contracts).

<sup>174</sup> In one of the most controversial bullying stories of 2014, a Miami Dolphins linebacker claimed that he was bullied by his teammates. Many of the alleged bullies were the same race as him; thus, he likely would not have been able to recover under a Title VII claim. *See e.g.*, Bernadette Starzee, *The Legal Ramifications of Workplace Bullying*, LONG ISLAND BUS. NEWS (Apr. 17, 2014), <http://libn.com/2014/04/16/the-legal-ramifications-of-workplace-bullying/>. There was evidence that his teammates took advantage of what he admitted were his vulnerabilities, which would count as an aggravating factor under the HWB and the SDWA. *See* Ryan Van Bibber, *The Worst of the Richie Incognito/Jonathan Martin Report*, SB NATION (Feb. 14, 2014, 11:27 AM), <http://www.sbnation.com/nfl/2014/2/14/5411608/worst-of-the-richie-incognito-jonathan-martin-report-miami-dolphins>.

signs of bullying during their already-scheduled investigations and inspections and then educate employers and employees about the law. Although it is too early to tell, states may learn lessons from Australia's Fair Work Commission.

This Article builds on David Yamada's groundbreaking work by adding a more robust therapeutic jurisprudence and procedural justice overlay. Under the SDWA, Maetta Vance could have received injunctive relief or financial compensation from her Ball State coworkers and the university as well as sought the removal of her tormenters from the worksite. More importantly, Vance could have found refuge in a justice system that does not impose insurmountable burdens for relief but instead focuses on restoring dignity to the victim.