

8-2008

Mobbing in the Workplace and Individualism: Antibullying Legislation in the United States, Europe and Canada

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MOBBING IN THE WORKPLACE: THE LATEST
ILLUSTRATION OF PERVASIVE INDIVIDUALISM IN
AMERICAN LAW

BY

M. NEIL BROWNE* AND MARY ALLISON SMITH**

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I. INTRODUCTION

“Mobbing” refers to systematic behavior directed toward an employee over a long period of time that results in serious harm to the victim. Legislative responses to mobbing behavior in Sweden, France, Canada, and Belgium have responded in various ways to alleviate the conditions that create the psychological harm caused by this workplace phenomenon. The more muted response in the United States is linked to the individualistic assumptions prevalent in American culture that place responsibility for harmful conditions frequently on the choices of the person experiencing the harm.

II. WHAT IS MOBBING?

A flock of birds is gathered by the water, eating. A new bird approaches the established flock, hoping to gain entry. Instead of accepting the new bird, the flock of birds torments the new bird, stealing its food, driving it away. The group attack is known as

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“mobbing.”¹

A group of employees gathers in the office break room, chatting and enjoying the lunch hour. A newly hired employee approaches, hoping to join the conversation. Instead of accepting the new employee, the group ignores the employee, effectively ostracizing her. Upon returning to work, the group of employees greets the new employee with insults to her intelligence, rumors about the reasons she was hired, and total ostracization from their social circle. The group attack is known as “mobbing,” “workplace bullying,” “moral harassment,” “psychological harassment,” and “victimization.”²

Mobbing is not to be confused with an off-hand comment or personality conflict. Rather, mobbing refers to systematic behavior that is consistently directed at an employee over a long period of time, resulting in serious psychological and psychosomatic ailments that render the victim powerless.³ Mobbing traps victims in a

1. See Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003); see also Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European “Mobbing” Laws?* 35 GA. J. INT’L & COMP. L. 53 (2006). The authors of both articles reference “mobbing” as a term that was coined by animal ethologists when describing the behavior of flocks of birds, but was then used to describe schoolyard bullying, and eventually was used to describe behavior in the adult workplace. Friedman & Whitman, *supra*, at 248 (citing KONRAD LORENZ, *HIER BIN ICH, WO BIST DU? ETHOLOGIE DER GRAUGANS [HERE AM I, WHERE ARE YOU? ETHOLOGIE OF THE GREYLAG GOOSE]* (1991); Peter-Paul Heinemann, *Mobbing – Über Gruppengewalt bei Kindern [Extreme Group Harassment among Children]* (1972); Christa Kolodej, *Mobbing: Psychoterror am Arbeitsplatz und seine Bewältigung [Mobbing: Psychoterror in the Workplace and Overcoming It]* 19 (1999); Heinz Leymann, *Mobbing* 14 (2002)).

2. There is currently no consensus among legislators or academics concerning a term for “workplace bullying.” See Rachel A. Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT’L L.J. 625 (2005). Yuen ties the various terms for workplace bullying to different nations: “mobbing” to Sweden, Germany, and Italy; “workplace bullying” to the United States and United Kingdom; “moral harassment” to France; “psychological harassment” to Quebec; “victimization” to Sweden. *Id.* at 627. Maria Guerrero credits Swedish psychologist Heinz Leymann with introducing the term “mobbing” and French psychologist Marie-France Hirigoyen with coining the term “le harcèlement moral,” which translates to “moral harassment.” Maria Isabel S. Guerrero, Note, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 B.C. INT’L & COMP. L. REV. 477, 481, 483 (2004). David Yamada uses the terms “harassment,” “work abuse,” and “workplace aggression.” David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 479, 523-29 (2000). Brady Coleman uses the terms “psychological terrorism” and “emotional abuse.” Coleman, *supra* note 1, at 57. For the purposes of this paper, the various terms for workplace bullying will be used interchangeably.

3. There are currently two prominent definitions of mobbing. See Heinz Leymann, *The Mobbing Encyclopaedia* (2008), at <<http://www.leymann.se/English/frame.html>>. According to Leymann, mobbing is defined as,

Hostile and unethical communication which is directed in a systematic manner by one or more individuals, mainly toward one individual, who, due to mobbing, is pushed into a helpless and defenseless position and held there by means of continuing

vulnerable setting: the workplace. Because victims spend so much time in the workplace, there is ample opportunity for repetition of the harassment; workplace power structures are such that some domination/subordination is expected, which can blur the lines between acceptable management styles and harassing behavior; and when workers invest physical and mental energy into their work, insults to their work can be internalized as affronts to their dignity.⁴

The results of mobbing are symptoms characterized as stress-related health diseases, many the defining symptoms associated with generalized anxiety disorder, clinical depression, and post-traumatic stress disorder.⁵ Empirical studies have also linked a sense of justice

mobbing activities. These actions occur on a very frequent basis (statistical definition: at least once a week) and over a long period of time (statistical definition: at least six months' duration). Because of the high frequency and long duration of hostile behavior, this maltreatment results in considerable mental, psychosomatic and social misery.

Id.; see also Guerrero, *supra* note 2, at 480-81. Guerrero notes that Swedish and French legislation has relied upon Leymann's definition of mobbing even though Marie-France Hirigoyen defines moral harassment such that one incident of harassing behavior, if damaging enough to a person's dignity, could constitute moral harassment. See *id.* at 484-85, 487, 491; see also An Act Respecting Labour Standards, 2002, ch. 80, § 47 (codified at R.S.Q. ch. N-1.1 § 81.18) (Quebec, Can.), available at <<http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp>>. Quebecois legislation nods to both Leymann and Hirigoyen by defining psychological harassment as repeated acts of vexatious behavior, as well as a single severe instance of vexatious behavior, provided that single instance causes lasting harm. *Id.*

4. See Laurent Vogel, *Psychological Harassment at Work and the Law: Wanted: An Integrated Whole-Workforce Approach in Workplace Health Policy*, TUTB NEWSLETTER, September 2002, at 20 (Eur. Trade Union Technical Bureau for Health & Safety), available at <<http://hesa.etui-rehs.org/uk/newsletter/files/2002-19p20-25.pdf>>.

5. See GARY NAMIE, THE WORKPLACE BULLYING INSTITUTE (WBI) 2003 REPORT ON ABUSIVE WORKPLACES 12-17 (2003), available at <<http://bullyinginstitute.org/research/res/2003results.pdf>>. The study collected self-reports of workplace bullying and the resulting health problems from 1000 individuals who visited the Bullying Institute's website and voluntarily filled out a twenty-two-section questionnaire in part or in full. *Id.* at 1. The symptoms were self-reported, and the survey takers self-identified as having been subject to bullying. See *id.* at 12. The author references the thirteen most frequently reported symptoms as being those that define generalized anxiety disorder, clinical depression, and post-traumatic stress disorder: anxiety, stress, excessive worry (reported by 76 percent of respondents); loss of concentration (71 percent); disrupted sleep (71 percent); feeling edgy, irritable, easily startled and constantly on guard (paranoia) (60 percent); stress headaches (55 percent); obsession over details at work (52 percent); recurrent memories, nightmares and flashbacks (49 percent); racing heart rate (48 percent); needing to avoid feelings, thoughts, and situations that remind the victim of trauma or a general emotional "flatness" (47 percent); body aches – muscles or joints (45 percent); exhaustion, leading to an inability to function (41 percent); compulsive behaviors (40 percent); diagnosed depression (39 percent). *Id.* For each of the thirty-three symptoms reported by respondents, at least 50 percent of respondents who reported experiencing the symptom reported experiencing it for the first time after the workplace bullying began. See *id.* at 14-15.

In addition to the physical symptoms, the emotional impact of bullying can have serious repercussions for job performance, which is crucial for employees in safety-sensitive positions. Eliza S. Vanderstar, *Workplace Bullying in the Healthcare Professions*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 455, 464-65, 467 (2004). Vanderstar argues bullying in the medical profession affects the ability of healthcare workers to do their jobs well. Such harassment adds tension to

in the workplace (which mobbing victims lack) to decreased risk of coronary heart disease,⁶ rejection or social exclusion (which mobbing victims feel) to a sense of pain,⁷ and extreme stress (which mobbing victims experience) to accelerated cellular aging.⁸

III. LEGISLATIVE RESPONSES TO MOBBING OUTSIDE THE U.S.

As European researchers have publicized the potentially devastating effects of mobbing in the workplace, legislators have taken action.⁹ Sweden was the first nation to pass anti-bullying

an already stressful work environment, and can affect the quality of patient care. Research suggests that nurses and medical students, individuals responsible for providing patients with most of their basic care, are particularly vulnerable to psychological abuse from superiors and co-workers. Vanderstar also cites patient interviews suggesting a negative correlation “between bullying amongst staff and the type of care they receive.” *Id.* at 465-67.

6. See Mika Kivimäki et al., *Justice at Work and Reduced Risk of Coronary Heart Disease among Employees*, 165 ARCHIVES INTERNAL MED. 2245, 2245, 2248-50 (2005). This study followed a pool of more than 6000 male British civil servants from 1985 to 1999, administering questionnaires regarding perceived justice in the workplace and tracking medical records for coronary heart disease-related death, myocardial infarctions, and angina. *Id.* at 2246. The authors did conclude that employees who perceived high levels of justice in the workplace had lower incidences of coronary heart disease than those who perceived low levels of justice in the workplace. *Id.* at 2245, 2248-49. The study cannot necessarily be generalized to women, *id.* at 2250, or to men who fall outside the age range of the sample (thirty-five to fifty-five years when the study began).

7. See Naomi I. Eisenberger et al., *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 SCIENCE 290, 290-91 (2003). This study used a computer game to simulate each subject's being socially excluded by a partner while playing a game. The authors found that the same regions of the brain responsible for registering physical pain were also active when subjects experienced “social pain” caused by exclusion. The fMRI images mirrored the subjects' self-reports of distress. The authors admit increased risk of Type I errors due to their inability to obtain more than one control fMRI image without revealing the purpose of the study to the subjects. *Id.*

8. See Elissa S. Epel et al., *Accelerated Telomere Shortening in Response to Life Stress*, 101 PROC. NAT'L ACAD. SCI. 17312 (2004). This study compared the telomere lengths of healthy, premenopausal women who had healthy children living at home to the telomere lengths of healthy, premenopausal women who were caregiving for at least one chronically ill child. *Id.* at 17312. Telomere length was significantly shortened among women who been caring for a chronically ill child for long periods of time, showing a link between cellular aging and increased levels of stress over long periods of time. *Id.* at 17313. Among women with the highest levels of perceived stress, telomere shortening showed as much as the equivalent of more than a decade of additional aging. *Id.* at 17314. The study involved only fifty-eight women, and information about perceived stress was gathered through a standardized ten-item questionnaire, though. *Id.* at 17312.

9. See Friedman & Whitman, *supra* note 1, at 248-54. The authors note the different roles played by books in Sweden, France, and the United States. The first book to address mobbing, *THE HARASSED WORKER*, was published by Carol Brodsky, an American, in 1976; however, the concept failed to transfer to the political arena. *Id.* at 263. When Heinz Leymann published about mobbing in Sweden and Marie-France Hirigoyen published about moral harassment in France, their books were part of the public life, which then transferred to the political sphere. *Id.* at 248-49, 252-53, 259-62. Hence, it should be no surprise that Sweden and France were the first countries to pass anti-bullying legislation.

legislation, enacting the *Ordinance on Victimization at Work* in 1993.¹⁰ Nine years passed before another country enacted legislation to ban workplace bullying. The second country to enact such legislation was France, passing the *Modernization of Employment Act of 17 January 2002*, alternately referred to as *Social Modernisation Law no. 2002-73*.¹¹ Belgium,¹² Quebec,¹³ and the United Kingdom¹⁴ have also passed workplace bullying legislation.

What is notable about the Swedish, French, Quebecois, and Belgian legislation is the focus on mobbing as an employer's problem. The Swedish, French, and Quebecois approaches require employers to create a policy preventing mobbing and place the burden for preventing mobbing solely on the shoulders of the employers.¹⁵ The Belgian legislation goes one step further, requiring employers to hire a prevention advisor who is trained to mediate workplace relations,

10. Ordinance of the Swedish National Board of Occupational Safety and Health containing Provisions on measures against Victimization at Work (Arbetskyddsstyrelsens föfattningssamling [AFS] 1993:17) (Swed.), available at <<http://www.av.se/dokument/inenglish/legislations/eng9317.pdf>>.

11. C. TRAV. arts. L. 1152-1 to L. 1152-6, L. 1154-1, L. 1154-2, L. 1155- 1 to L. 1155-4 (Fr.); C. PEN. art. 222-33-2 (Fr.). The French legislation was incorporated into both the Penal Code and the Labour Code. An English translation of the French Penal Code, but not the Labour Code, can be read at the "Legifrance" website, <<http://195.83.177.9/code/index.phtml?lang=uk>>.

12. Loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail [Law for the Protection against violence and moral or sexual harassment at work], of 11 June 2002, Moniteur Belge, June 22, 2002, pp. 28521-24. The Belgian act encompasses psychological harassment, sexual harassment, and violence in the workplace.

13. See An Act Respecting Labour Standards, 2002, ch. 80, § 47 (codified at R.S.Q. ch. N-1.1 § 81.18) (Quebec, Can.), available at <<http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp>>. The legislation was enacted in 2004 and is now part of the Labour Standards Law.

14. British anti-bullying legislation is actually comprised of three pieces: the Protection from Harassment Act [1997] ch. 40, the Employment Rights Act [1996] ch. 18, and the case of *Walker v. Northumberland County Council* [1995] I.C.R. 702. While the three pieces of legislation can be used to address workplace bullying, none of the three explicitly references workplace bullying. This shortcoming led to the 2001 introduction of the Dignity at Work Bill, which has not been passed.

15. See generally Ordinance of the Swedish National Board of Occupational Safety and Health containing Provisions on measures against Victimization at Work (Arbetskyddsstyrelsens föfattningssamling [AFS] 1993:17) (Swed.), available at <<http://www.av.se/dokument/inenglish/legislations/eng9317.pdf>>; C. TRAV. arts. L. 1152-1 to L. 1152-6, L. 1154-1, L. 1154-2, L. 1155- 1 to L. 1155-4 (Fr.); C. PEN. art. 222-33-2 (Fr.); An Act Respecting Labour Standards, 2002, ch. 80, § 47 (codified at R.S.Q. ch. N-1.1 § 81.18) (Quebec, Can.), available at <<http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp>>. While the Swedish legislation requires employers to create a policy explicitly banning mobbing in the workplace, as well as measures for resolving instances of mobbing, the legislation lacks any sanctions against employers who fail to comply. The *Ordinance* includes no measures whatsoever for punishing noncompliant employers. The French legislation provides procedures for filing both civil and criminal lawsuits against employers, as well as the perpetrators of moral harassment. Quebecois legislation allows employees to petition the Labour Minister to appoint a mediator when attempting to resolve instances of psychological harassment.

including recognizing, preventing, and resolving instances of both psychological and sexual harassment.¹⁶

Belgium's linking psychological and sexual harassment may have been a way to sidestep the current debate about similarities and differences between legislation against psychological and sexual harassment. Some have argued that anti-bullying legislation overlaps with or detracts from sexual harassment legislation.¹⁷ Others have argued that anti-bullying legislation fills a gap left by sexual harassment legislation, as well as legislation prohibiting racial discrimination.¹⁸ Whereas sexual harassment and racial discrimination legislation focus on gender or race, anti-bullying legislation focuses on

16. See Vogel, *supra* note 4, at 24. The Belgian legislation requires all employers, regardless of size, to maintain a prevention advisor. The advisor may be employed either in-house or as part of an external consulting service, but the advisor may not be an occupational health doctor. *Id.*

17. See Friedman & Whitman, *supra* note 1, at 243. Friedman & Whitman express concern that anti-bullying legislation would detract attention from sexual harassment and racial discrimination by placing the focus on all employees rather than historically victimized groups. See generally *id.* Coleman notes that mobbing legislation encompasses the same issues as existing sexual harassment and racial discrimination legislation. See Coleman, *supra* note 1, at 59-62.

18. See Coleman, *supra* note 1, at 89-98. Coleman adds that mobbing legislation would protect workers not currently covered by sexual harassment or racial discrimination legislation. At the 2004 American Association of Law Schools Annual meeting, a panel at the Section on Labor Relations and Employment Law addressed this issue. Vicki Schultz et al., *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 151 (2004). Vicki Schultz argues that both status-based and status-blind legislation have left a gap by ignoring the structural reasons for harassment. *Id.* at 188-89. Schultz points to historical trends promoting workplace domination by males, and the ways in which harassment can be used to maintain that domination. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1756-61 (1998). Schultz argues for a structural approach to harassment legislation that would focus more on prevention than on punishment of individual offenders. Schultz et al., *supra*, at 189. Rosa Ehrenreich argues that sexual harassment is wrong not because the victims are women, but because the victims are human beings; thus, Ehrenreich encourages women to file suit using common law torts, rather than Title VII, to emphasize that harassment is an affront to people in general. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 19-20 (1999). According to George and Ruth Namie, workplace bullying is often overlooked because much of it is same-sex and cannot be regarded in terms of racial or gender discrimination. Gary Namie & Ruth Namie, *Symposium: Introduction to the Symposium on Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315, 324 (2004). Approximately 63 percent of female bullying victims have been harassed by other women, and 62 percent of male bullying victims have been harassed by other men. *Id.* at 324-25. These same-sex bullying targets have few ways to seek recourse under current laws because they usually cannot claim discrimination based on race, religion, or ethnicity. See *id.* Namie and Namie also cite research suggesting that harassment victims belong to a legally protected class in only 25 percent of bullying cases. *Id.* at 324. Similarly, the results of a 2007 Zogby survey conducted for the Workplace Bullying Institute suggested that same-gender or same-race bullying occurs four times more often than other illegal forms of harassment. WORKPLACE BULLYING INSTITUTE, U.S. WORKPLACE BULLYING SURVEY (Sept. 2007), available at <www.bullyinginstitute.org/zogby2007/wbi-zogby2007.html>.

misuse of power, regardless of the victim's gender or race. American courts have conceptualized workplace harassment in terms of unwanted sexual advances and blatant Jim-Crow-style racism.¹⁹ That conceptualization fails to take into account workplace harassment occurring among members of the same sex or race. While a status-blind conceptualization of workplace harassment has the potential to detract from the underlying causes of workplace harassment when that harassment is based on race or sex/gender, status-blind legislation would encompass all instances of workplace harassment.²⁰ It is important to note that advocates of anti-bullying legislation are not attempting to undermine status-based harassment legislation; rather, they view status-blind legislation as a logical extension of existing legislation that seeks to promote the dignity and wellbeing of all workers.²¹

The British courts have begun to hear such status-blind claims, brought by employees against employers who promoted unhealthy work environments. Consider the case of *Walker v. Northumberland County Council*, in which the Court of Appeals held an employer responsible for stress-related illness resulting from workplace organization.²² For seventeen years, Mr. Walker worked for the Northumberland County Council as a social worker, managing four teams of social services fieldworkers in the Blyth Valley district.²³ During the mid-1980s, the population of Blyth Valley grew significantly, which in turn led to an increase in the number of child abuse cases being handled by Mr. Walker's teams. There was no increase in social services staffing during that period.²⁴ Mr. Walker

19. See Friedman & Whitman, *supra* note 1, at 243-44, 265-66. Friedman and Whitman contrast the American conceptualization of harassment with the prevalent view in Europe, which focuses on class and power relations; the authors attribute the different views of harassment to the different historical backgrounds of each country. *Id.* at 265-69. See generally Yuen, *supra* note 2; Schultz, *supra* note 18.

20. See generally Schultz et al., *supra* note 18; Schultz, *supra* note 18.

21. See Schultz et al., *supra* note 18, at 188-89. Schultz credits Tanya Hernandez with describing two models of harassment legislation: discrimination (status-based) and universal (status-blind). Schultz points to Brazil as an example of one nation that has enacted anti-harassment legislation following both models. The Brazilian legislation allows workers to pursue sexual harassment actions when appropriate, and to pursue non-status-based harassment actions when appropriate. *Id.* at 188-89; see also *id.* at 169-79. For a discussion of means of domination in the workplace, linking psychological harassment with excessively high rates of sexual harassment, racial discrimination, and anti-GLBT (gay, lesbian, bisexual, transgender) discrimination, see Vogel, *supra* note 4. See generally Coleman, *supra* note 1; Guerrero, *supra* note 2.

22. *Walker v. Northumberland County Council* [1995] I.C.R. 702 (Eng.).

23. *Id.* ¶ 1.

24. *Id.* ¶ 2.

found himself under increasing pressure and stress, which resulted in a nervous breakdown in November 1986.²⁵ Mr. Walker left work until March 1987, when he was assured by his superiors that an extra staff member would be available to assist him for as long as necessary. Within a month's time, the extra staff member had stopped assisting Mr. Walker, who suffered another nervous breakdown and had to retire in September 1987.²⁶

The question before the Court was whether an employer could be held liable for psychological injury suffered by an employee due to work-related stress. The plaintiff argued that the Council should have known that Mr. Walker's workload was causing undue stress and should have taken steps to decrease the work-related stress.²⁷ The plaintiff pointed to letters that he had written to his employer, asking that fieldworkers be redistributed among districts to provide help to those areas where the number of child abuse cases was increasing most rapidly.²⁸ The plaintiff also argued that employers' duty of care regarding employees' physical health was well established; the employers' duty of care to protect employees' mental health should be viewed no differently.²⁹

The defense argued that Mr. Walker did not make it clear that the amount of stress related to his work was so severe as to cause mental injury.³⁰ Without notice of serious risk, the Council could not be expected to take steps to prevent mental injury. Additionally, the Council argued that providing additional staff to alleviate Mr. Walker's workload was an unreasonable request due to the budget constraints of the County Council.³¹

The Court of Appeals, in a decision written by Colman, found that the Council was liable for the injuries to Mr. Walker's mental health – but only with regard to the second nervous breakdown.³² Prior to the first nervous breakdown, the Council had no notice of the risk to Mr. Walker's health.³³ While Mr. Walker had complained about work-related stress, he had never reported stress-related health

25. *Id.* ¶ 3.

26. *Id.* ¶ 7-8.

27. *Id.* ¶¶ 30.

28. *Id.* ¶¶ 20-24, 49, 52.

29. *Id.* ¶¶ 30, 37.

30. *Id.* ¶. 31.

31. *Id.* ¶¶ 67, 69.

32. *Id.* ¶ 72.

33. *Id.* ¶ 55

problems to his employer; thus, the Council could not have been expected to act to prevent the first nervous breakdown.³⁴ After Mr. Walker returned to work, the Council assured him that he would have an assistant to help decrease his stress level for as long as he felt necessary.³⁵ Within one month's time, that assistant ceased helping Mr. Walker, again putting him at risk of stress-related illness.³⁶ The Council should have known that Mr. Walker could not endure the same level of work-related stress that led to his first nervous breakdown, and therefore should have acted to prevent the second nervous breakdown.³⁷ Thus, the court found that the Northumberland County Council had breached its duty of care for Mr. Walker's mental health and was liable for the damage to Mr. Walker's mental health resulting from his second nervous breakdown.³⁸

While *Walker* was an important decision as it established that employers have a duty to protect the mental health of their employees, it did not directly address workplace bullying. Consider the case of *Waters (A.P.) v. Commissioner of Police for the Metropolis*.³⁹ Ms. Waters, a police officer, was raped by a fellow officer approximately one year after joining the force.⁴⁰ Six years after the assault, Ms. Waters filed suit against the police commissioner, alleging that after she reported the assault to her superiors, she was systematically mistreated by the officers with whom she worked.⁴¹ Ms. Waters reported eighty-nine individual incidents of mistreatment, but emphasized the cumulative effect of what she summarized as, "1. Ostracism including refusal or failures to support her whilst on duty and in emergency situations, 2. Being 'advised' or told to leave the police force, 3. Harassment and victimisation, and 4. Repeated breaches of procedure."⁴² As a result of the mistreatment, Ms. Waters suffered mental injury, for which she blamed her employer's negligence in failing to stop the mistreatment.

The plaintiff's initial complaint was struck because the court ruled that she had no reasonable cause to file suit. The Court of

34. *Id.* ¶¶ 53, 59.

35. *Id.* ¶ 59.

36. *Id.* ¶¶ 60-61, 64.

37. *Id.* ¶¶ 47, 68.

38. *Id.* ¶¶ 73-76.

39. *Waters (A.P.) v. Comm'r of Police for the Metropolis* [2000] 4 All E.R. 934.

40. *Waters (A.P.) v. Commissioner of Police for the Metropolis* (2000) IRLR 720 H, ¶ 1.

41. *Id.* ¶ 1.

42. *Id.* ¶ 4.

Appeals dismissed her appeal as well.⁴³ The issue before the House of Lords was whether the police commissioner owed a duty of care to Ms. Waters, and if so, whether there was a breach of that duty.⁴⁴ In other words, could the police commissioner be held responsible for the actions of his officers, and if so, should the police commissioner have acted to stop the mistreatment of Ms. Waters? If the Lords answered “yes,” then Ms. Waters would be allowed to appeal.

Lord Slynn of Hadley reasoned that, while a police commissioner was not a traditional employer, both statute and case law established that a police commissioner could, in the case of torts, be held liable for the actions of his officers when those actions are committed under his direction during the course of their duties.⁴⁵ Lord Slynn wrote that, if an employer knows that the actions of his employees may cause physical or mental harm to another employee, has the ability to stop such actions, and fails to do so, then the employer may be liable for his negligence.⁴⁶ Lord Slynn also applied a foreseeability test in this case. Could the police commissioner have been expected to foresee harassment of Ms. Waters due to her reporting that a fellow officer had raped her? If such harassment could be reasonably foreseen, then the police commissioner should have taken steps to prevent any harm to Ms. Waters.⁴⁷ While saying nothing about whether the plaintiff’s case was likely to succeed, Lord Slynn found that the Court of Appeals had erred in striking out the plaintiff’s action, and voted to allow the plaintiff’s appeal.⁴⁸

Lord Clyde⁴⁹ and Lord Millett⁵⁰ agreed with Lord Slynn, adding nothing to his argument. Lord Jauncey of Tullichettle disagreed, arguing for public policy reasons that the Police Commissioner should not be viewed as a typical employer.⁵¹ Lord Hutton agreed with Lord Slynn, but was quick to add that not all instances of bullying can be

43. *Id.* ¶ 2.

44. *Id.* ¶ 9.

45. *Id.* ¶ 6.

46. *Id.* ¶ 10.

47. *Id.*

48. *Id.* ¶ 26.

49. *Id.* ¶ 34.

50. *Id.* ¶ 56.

51. *Id.* ¶ 33. The public policy issues cited by Lord Jauncey relate to the investigation that followed the plaintiff’s report that she had been raped. The courts have repeatedly expressed a general unwillingness to impose a duty of care on the police with regards to the way they investigate cases. The other lords found that the duty of care owed to the plaintiff was the duty of care that employers owe to employees – not a duty of care that the police owe to victims of crime or civilians. *Id.*

blamed on employers. When employers do know or ought to know that their employees are harassing or victimizing another employee, then employers should act to stop harassment and victimization.⁵² In this case, the superior officers were notified of Ms. Waters' victimization and did nothing to stop the bullying behaviors of her fellow officers. Lord Hutton emphasized that any other employer would be held liable for such negligence, and the Police Commissioner should be treated in the same way.⁵³ Following Lord Slynn's lead, Lord Hutton said nothing about whether the plaintiff's case was likely to succeed, but agreed that the Court of Appeals was wrong to strike out the case.⁵⁴

Thus, British courts held in *Walker* that employers had a duty to protect their employees' mental health and in *Waters* that employers had a duty to protect their employees from bullying or victimization by other employees. The courts' and legislators' emphasis on employers' responsibility to prevent workplace bullying falls in line with researchers' general unwillingness to place any blame for bullying on the victims.⁵⁵ Rather, researchers repeatedly point their fingers at workplace organization as a cause of bullying.⁵⁶ Researchers' blaming organizational factors is not without a basis; they have interviewed employees who believe they have been victims of bullying, but describe the business or organization itself as the bully, rather than the supervisors who were perpetrating the bullying behaviors.⁵⁷ However, even when exploring the possibility that victims

52. *Id.* ¶ 40.

53. *Id.*

54. *Id.* ¶ 55.

55. See Dieter Zapf, *Organisational, Work Group Related and Personal Causes of Mobbing/Bullying at Work*, 20 INT'L J. MANPOWER 70, 70-71 (1999). While investigating whether victims' behaviors can cause them to become victims, Zapf warns readers to avoid the tendency to link blame and causation. *Id.* at 72. Some causes of workplace bullying, such as workplace organization, cannot necessarily be blamed because an organization does not do anything – people, influenced by the organization, perpetrate the bullying behaviors. *Id.* Similarly, Karl Aquino, who used a victimological framework when studying workplace victimization, cautions readers that when determining whether victims' actions correlate or contribute to their being victimized, one need not blame the victims to understand the relationship. Karl Aquino, *Individual determinants of workplace victimization: The Effects of Hierarchical Status and Conflict Management Style*. 26 J. MGMT. 171, 190-91 (2000).

56. See Vogel, *supra* note 4, at 21. Vogel cites changing workplace organization as a cause of workplace bullying. As workplaces become more competitive, especially within the same company or department, employees are given less free time and pushed to produce more, creating an environment in which bullying is prone to occur. *Id.*

57. See Andreas P.D. Liefoghe & Kate Mackenzie Davey, *Accounts of Workplace Bullying: The Role of the Organization*. 10 EUR. J. WORK & ORG. PSYCHOL. 375, 377 (2001). Liefoghe and Davey conducted group interviews with call center employees to study how those employees used the term "bullying" when describing their working conditions. *Id.* at 379-

contribute to their being bullied, researchers are sure to incorporate workplace organization as a causal factor.⁵⁸

Perhaps the greatest impediment to determining whether victims cause their own victimization is the victims themselves.⁵⁹ Zapf administered questionnaires to self-identified victims of workplace

80. When reporting bullying behaviors, the employees notably blamed upper management policies, rather than the supervisors who used bullying behaviors to carry out those policies. *Id.* at 380-89. The researchers/interviewers introduced the term “bullying” at the beginning of the group conversations, which begs the question whether those same employees would have described the behaviors as “bullying” if the term had not been introduced. *See id.* at 379-80; *see also* Dieter Zapf et al., *What Is Typical for Call Centre Jobs? Job Characteristics, and Service Interactions in Different Call Centres*. 12 EUR. J. WORK & ORG. PSYCHOL. 311 (2003). Zapf et al., compared working conditions in call centers to conditions experienced by employees in other customer service positions, as well as those experienced by employees not responsible for customer satisfaction. Zapf, et al., found that call center employees were not subject to unusually poor working conditions, but that their jobs were characterized by low complexity and high levels of emotional dissonance, which is compounded by the fact that call center employees tended to have good verbal skills and some level of education, leaving them prone to find the work boring and undemanding. *See id.* at 333-36.

58. *See* Aquino, *supra* note 55, at 183. Aquino questioned employees about their personal styles of conflict management, as well as their positions within their workplaces’ organizational hierarchies, then asked whether they had ever been victims of workplace bullying. *See id.* at 178. Aquino concluded that employees who lack hierarchical power are prone to be victims of workplace bullying regardless of their personal conflict management styles; whereas employees with higher levels of status can reduce their risk of being victimized by using different conflict management styles. *Id.* at 183. Aquino acknowledged that employees with higher levels of status may have underreported being victimized due to a sense of shame that they could not use their power to effectively protect themselves. *See id.* at 190; *see also* Zapf, *supra* note 55. Zapf linked possible causes of workplace bullying (workplace organization, victim characteristics, perpetrator characteristics, and social system characteristics) to show how the various causes feed into one another and create an environment in which bullying can take place. Zapf acknowledged that victim characteristics resulting from being victimized (such as becoming withdrawn, depressed, or hostile) may help to perpetuate bullying behaviors, but was careful to say that we cannot determine whether victim characteristics play a role in causing the initial bullying behaviors. *Id.* 77-81, 83. Namie and Namie also has stressed that certain workplace environments can be conducive to bullying. These include businesses that have “an obsession with outcomes” and focus on “short-term planning” to meet the expectations of management and investors. Such a climate may reward bullies for unduly pressuring their co-workers to work harder and faster, or meet deadlines. In these environments, employees are guided by fear for their jobs. Namie & Namie, *supra* note 18, at 328-29. Similarly, Vanderstar has suggested that the medical workplace environment, in particular, leaves employees particularly susceptible to bullying. Because the medical system is hierarchical, workers can face psychological abuse and demeaning treatment from superiors. Also, healthcare providers are increasingly pressured to treat more patients with less time and fewer resources, creating a high-stress environment conducive to bullying. *See* Vanderstar, *supra* note 5, at 457-58.

59. *See* Paul E. Spector et al., *Why Negative Affectivity Should not Be Controlled in Job Stress Research: Don’t Throw out the Baby with the Bath Water*. 21 J. ORG. BEHAV. 79, 79 (2000). Spector, et al., wrote as a reaction to researchers who have begun controlling for what is referred to as “negativity affectivity.” When researching job stress, researchers noticed that many of the individuals they interviewed seemed especially prone to experience and report stress and strain. To cancel out individuals’ general pessimism, researchers began “partialling” the data they collected. Spector, et al., argued that it is not clear whether negativity affectivity is a bias in the research, rather than a substantive factor in the very relationships researchers seek to understand when studying job stress. Regardless, the debate itself should give researchers pause when relying on self-reports of stress or victimization. *Id.*

bullying, asking those victims what caused the bullying.⁶⁰ Zapf noted that victims were reluctant to identify any causal factors that were related to their own personal characteristics – race, nationality, religion, inadequate job performance, antisocial behavior, aggressiveness, pedantic tone, etc.⁶¹ The cause of the victim's unwillingness is unknown; it could be that personal characteristics were not the cause of the bullying (at least to the victims' knowledge) or the victims could be afraid that they will be blamed for their being bullied.⁶²

Regardless, researchers and legislators alike have largely ignored any potential role victims play in causing their own victimization, shifting the responsibility for bullying to the employers' shoulders. Perhaps that is the appropriate resting place for responsibility. When interviewing victims about how they resolved instances of workplace bullying, Zapf and Gross found that victims were unable to resolve workplace bullying without the help of upper management.⁶³ Similarly, Aquino found that employees who lack hierarchical status in the workplace do not have the power necessary to resolve bullying

60. See Zapf, *supra* note 55, at 73-75. The study falters immensely in assuming that the victims of workplace bullying understand the various causal factors that led to their being bullied. No attempt was made to interview the actual perpetrators of the bullying behavior about their motivation, nor to interview supervisors or managers who may have a better understanding of the organizational factors in play. Indeed, Zapf made no effort to distinguish victims who perhaps had some training in organizational psychology or interpersonal communication, or who were perhaps especially perceptive and intuitive. Rather, Zapf assumed that all victims understood what had led to their victimization and were willing to report honestly. See *id.* at 73 (reporting that the study group was made up of ninety-six mobbing victims and the control group made up of people they knew).

61. *Id.* at 76-78. Notably, victims were not shy about reporting that they had been victimized due to "above average" job performance. *Id.* at 76.

62. See Namie & Namie, *supra* note 18, at 321-22. Namie and Namie stress that the emotional effects of bullying often prevent targets from seeking mental health treatment for months or years. Targets often feel a great deal of shame associated with the bullying, and believe they were somehow at fault for the mistreatment. As a result of this shame, victims tend to downplay their symptoms and emotions once they enter therapy, leading treatment professionals to believe the victim's condition is less serious than in actuality. *Id.*

63. See Dieter Zapf & Claudia Gross, *Conflict Escalation and Coping with Workplace Bullying: A Replication and Extension*. 10 EUR. J. WORK & ORG. PSYCHOL. 497, 505, 517 (2001). Zapf and Gross conducted a quantitative and a qualitative study to determine whether individuals could successfully resolve workplace bullying by employing certain coping and conflict resolution strategies. *Id.* at 497, 506-07. The authors found that those individuals who were successful in resolving the conflict avoided the bullies and avoided behaviors that were likely to worsen the bullying behavior (involving supervisors, filing complaints, etc.). *Id.* at 505-06, 515-18. The bullying did not end until the victims had taken extended leave from work to compose themselves, involved members of upper management, and been separated from the bully (by having either the victim or the bully relocated within the workplace). *Id.* at 506, 517-18. Those victims who attempted to talk to the bully or resolve the conflicts by themselves faced escalated conflicts with the bullies. *Id.* at 517.

through the use of conflict management techniques.⁶⁴ When victims of mobbing are, by definition, powerless, it follows that someone other than the employee must help to resolve the conflict.⁶⁵

In 2002, the European Parliament called on all European nations to help victims of mobbing by passing anti-bullying legislation.⁶⁶ The European Parliament based its argument on studies about the incidence of workplace harassment throughout Europe, as well as the severe health consequences for victims. Almost as an afterthought, the European Parliament mentioned, but did not emphasize, the costs of workplace harassment in terms of lost productivity.⁶⁷ This approach stands in direct conflict with the approach of American proponents of anti-bullying legislation, who emphasize that employers lose when their employees are being harassed.⁶⁸

64. See Aquino, *supra* note 55, at 188-89. When studying conflict management styles, Aquino determined that the most effective method of resolving a conflict was to exercise a dominating style, followed by an integrating style. See *id.* at 185. This method is largely off-limits to low-status employees, who may provoke bullies when using a dominating style because they lack the power to dominate, and if low-status employees use too many integrating styles, they may appear weak and therefore good targets. *Id.* at 188-89.

65. See Zapf & Gross, *supra* note 63, at 515-17. Zapf and Gross acknowledge that there is an inherent problem in asking victims of mobbing to employ conflict resolution strategies because those strategies require some element of control or power. *Id.* at 498, 504, 515. Additionally, studies of conflict resolution methods have been restricted to those individuals who fit Leymann's definition of a mobbing victim, meaning the bullying behavior occurred at least once per week for a period of at least six months. *Id.* at 498-99. While individuals may actually be capable of ending bullying before it escalates to a level that fits Leymann's definition, any individuals who were able to successfully end bullying behavior before it escalated to such a severe level or continued for so long have been excluded from the studies, depriving researchers of insights that could be gained from their experiences.

66. See European Parliament Resolution on Harassment at the Workplace 2001/2339 (INI), arts. 1, 3, 6, 8, 12, 2002 O.J. (C 77) 138 (EC), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:077E:0138:0141:EN:PDF>>.

67. *Id.* In a list of twenty-five points, the costs of workplace harassment to employers are not mentioned until point number twenty-one, whereas the costs of workplace harassment to employees/victims are mentioned in point number three.

68. See Yuen, *supra* note 2, at 628. Yuen notes that employers face an estimated 2 percent loss of productivity due to workplace bullying and should therefore view anti-bullying legislation as a "sound business idea." *Id.*; see also Yamada, *supra* note 2, at 478. Yamada cites the devastating effects of workplace harassment that "undercut productivity and loyalty." *Id.*; see also Allyce Bess, *Whipping the Work Force Out of Shape*, S.F. BUS. TIMES, July 19, 1999, at 1, available at <<http://sanfrancisco.bizjournals.com/sanfrancisco/stories/1999/07/19/story8.html?page=1>>. Bess cites costs to employers who lose valuable employees due to bullying, as well as employers who have to engage in lawsuits resulting from bullying. *Id.* However, some proponents of anti-bullying legislation have also focused on the costs to employees. See Namie & Namie, *supra* note 18, at 321. Namie and Namie stress the high percentage of employees who lose their jobs following an episode of workplace bullying, stating that 70 percent of bullied employees are eventually constructively discharged or quit voluntarily. *Id.*

IV. U.S. APPROACHES TO BULLYING

It is no surprise that American proponents of anti-bullying legislation feel the need to sell their product to employers.⁶⁹ Anti-bullying legislation has been introduced in only thirteen of the American states, where the states' respective Chambers of Commerce have branded the legislation a "job killer."⁷⁰ Since 2003, anti-bullying legislation has been introduced a total of twenty-nine times in those thirteen states, and it has never passed.⁷¹ The Bully Busters advocacy group cites legislators' continuing shift toward corporate rights, corporations' increasing funding of political campaigns, and the deaths of unions as motivating legislators' resistance toward the legislation.⁷²

In response to the criticism that anti-bullying legislation is a "job

69. This trend is not exclusive to American proponents of anti-bullying legislation. Canadian proponents have also repeatedly emphasized the cost of workplace bullying in terms of lost productivity due to lack of concentration, absenteeism, and low morale. See Mike Dempster, *Turning Blind Eye to Bullies Hurts Business: Growing Disability Claims Linked to Workplace Abuse*, BUSINESS EDGE (Ontario ed.), May 19, 2005, available at <<http://www.businessedge.ca/article.cfm/newsid/9505.cfm>>; Sarah B. Hood, *Workplace Bullying*, CAN. BUS., Sept. 13, 2004, at 87; Kenneth Westhues, *At the Mercy of the Mob: A Summary of Research on Workplace Mobbing*, OHS CANADA: CANADA'S OCCUPATIONAL HEALTH & SAFETY MAGAZINE, Dec. 2002, at 30-36, available at <<http://members.shaw.ca/mobbing/mobbingCA/mercyofmob-1.htm>> (posted Jan. 2003); Astrid Van Den Broek, *Bully in the Boardroom: Workplace Bullying Takes Its Toll on Employee Health and Productivity*, CROSSCURRENTS: J. ADDICTION & MENTAL HEALTH, Summer 2004, at 9; Canada Safety Council, *Bullying in the Workplace*, <<http://www.safety-council.org/info/OSH/bullies.html>> (last viewed May 13, 2008); Canada Safety Council, *Targeting Workplace Bullies*, <<http://www.safety-council.org/info/OSH/bully-law.html>> (last viewed May 13, 2008); Canadian Centre for Occupational Health & Safety, *Bullying in the Workplace*, <<http://www.ccohs.ca/oshanswers/psychosocial/bullying.html>> (updated Mar. 2005).

70. See Bullyfreeworkplace.org, *Stop Workplace Bullying: Job Killer Myths*, <<http://www.bullyfreeworkplace.org/id9.html>> (last viewed May 13, 2008) (describing efforts by the California Chamber of Commerce to defeat the Healthy Workplace Bill). Bullyfreeworkplace.org emphasizes that, the Bill protects employers, too. Bullies are liable first, and employers have an affirmative defense if they exercise reasonable care to prevent and correct abusive conduct, for example, by having an anti-bullying policy that is enforced. Bullyfreeworkplace.org, *Healthy Workplace Bill*, <<http://www.bullyfreeworkplace.org/id8.html>> (last viewed May 13, 2008); see also Connecticut Chamber of Commerce, *Workplace "Bullying," other Bills Die* (Apr. 20, 2007), <<http://www.cbia.com/gov/gar/0407/042005.htm>> (praising the death of the anti-bullying legislation as a bill that was "counterproductive to Connecticut's business climate").

71. See generally Bullyfreeworkplace.org <<http://www.bullyfreeworkplace.org>> (last viewed May 13, 2008); Bullyfreeworkplace.org, *Healthy Workplace Bill*, <<http://www.bullyfreeworkplace.org/id8.html>> (last viewed May 13, 2008). The states include California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Vermont, and Washington. Bullyfreeworkplace.org, *Stop Workplace Bullying: Healthy Workplace Legislative Bill History*, <<http://bullyfreeworkplace.org/id7.html>> (last viewed May 13, 2008).

72. See *Political Partisanship and the Healthy Workplace Bill*, maintained by the Bully Busters advocacy group, available at <<http://www.bullybusters.org/advocacy/partisan.html>>.

killer,” proponents of anti-bullying legislation refer to the Political Economy Research Institute’s Workplace Environment Index (WEI), which measures the general quality of workplace environments on a state-by-state basis.⁷³ When compared to available data about job growth and poverty, the WEI rankings have shown that states with better workplace environments (high WEI scores) consistently have lower poverty rates than states with low WEI scores, and that there is a moderate positive relationship between economic growth and WEI rankings.⁷⁴ Despite what one may expect, states that have introduced the anti-bullying legislation did not fare especially well in the WEI rankings, being scattered throughout the top forty.⁷⁵

In an attempt to differentiate their ranking system as a rarity that focuses on conditions for employees rather than employers, the authors of the WEI report contrast their ranking system with seven other existing systems for ranking states’ business climate.⁷⁶ Because the other seven ranking systems gauge the business climate for employers, one may expect the thirteen states where anti-bullying legislation has been introduced to rank poorly in those systems.⁷⁷ In

73. See JAMES HEINTZ ET AL., POL. ECON. RES. INST., UNIV. MASS. AMHERST, DECENT WORK IN AMERICA: THE STATE-BY-STATE WORK ENVIRONMENT INDEX (2005), available at <http://www.peri.umass.edu/file_admin/pdf/DWA.pdf>. The Work Environment Index (WEI) ranks states based on job opportunities, job quality, and workplace fairness (which incorporates pay equity between genders and between the state and national averages, as well as the general regulatory environment of the state). *Id.* at 1.

74. HEINTZ ET AL., *supra* note 74, at 8-9. The authors found no overall relationship between job growth and WEI scores nor between new business start-ups and WEI scores. *Id.* at 6-7.

75. See *id.* at 2-3. In terms of overall WEI rankings, only two of the thirteen states, Vermont and Connecticut, were ranked in the top ten. *Id.* at 2. When considering only the workplace fairness component of the WEI rankings, the thirteen states ranged from number one to number thirty-eight with five, California, Massachusetts, Oregon, Vermont, and Washington in the top ten. See *id.* at 2-3.

76. *Id.* at 8. The authors reference *Fortune’s*, “Best States for Business” index, *Site Selection’s* “Top 25 State Business Climate” index, the Small Business and Entrepreneurship Council’s “Small Business Survival Index,” the Tax Foundation’s “State Business Tax Climate Index,” the Cato Institute’s “Fiscal Policy Report Card,” the Pacific Research Institute’s “U.S. Economic Freedom Index,” and the Beacon Hill Institute’s “Competitiveness Index.” *Id.*

77. Because of the way their rankings are calculated, four of those seven ranking systems should be of particular interest when examining how the thirteen states where anti-bullying legislation has been introduced fared. *Fortune Magazine* tracks the corporate headquarters of the 500 largest corporations in the country by state. See *Ranked within States*, FORTUNE, Apr. 18, 2005, at F-34; see also *Fortune*, Fortune 500, <<http://money.cnn.com/magazines/fortune/fortune500/2008/states/CA.html>>. *Site Selection* analyzes business climate by measuring corporate real estate expansion and construction and asks corporate site seekers where they would want to open a new business.. See Mark Arend, *Site Selection Online*, Business Climate Rankings (Nov. 2005), <<http://www.siteselection.com/issues/2005/nov/p701/>>. The Small Business and Entrepreneurship Council evaluates by using government imposed costs in the form of taxes and regulatory requirements related to unionization and the Regulatory Flexibility Act (which requires agencies to consider economic impact before imposing regulations). RAYMOND J. KEATING, SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL,

fact, while the thirteen states' rankings were not clustered in the bottom thirteen, they rarely edged into the top 25.⁷⁸ Until anti-bullying legislation actually passes, it may be impossible to accurately gauge how such legislation would affect the business climate in any given state.

SMALL BUSINESS SURVIVAL INDEX (2005), available at <http://www.sbsc.org/Media/pdf/SBSI_2005.pdf>. The Pacific Research Institute's ranking system gauges states' relative levels of regulation. See Lawrence J. McQuillan, *Executive Summary in* YING HUANG ET AL., PACIFIC RESEARCH INSTITUTE, U.S. ECONOMIC FREEDOM INDEX (2004), available at <http://special.pacificresearch.org/pub/sab/entrep/2004/econ_freedom/index.html> (select Executive Summary by Lawrence J. McQuillan).

78. Five of the thirteen states, California, Connecticut, Massachusetts, Washington, and Oklahoma were in *Fortune's* top 25. *Ranked within States, supra* note 77, at F-34. Only five of the thirteen states, California, New York, Kansas, Missouri, and Oklahoma ranked at all in *Site Selection's* top-twenty-five list, and two of those five states, Missouri and Oklahoma, were tied for number twenty-four. *Site Selection Online, supra* note 77. Only four of the thirteen states, Washington, Missouri, Oklahoma, and Kansas ranked in the top thirty-five on the Small Business and Entrepreneurship Council's list. KEATING, *supra* note 77, at 2. Three of the thirteen states, Kansas, Oklahoma, and Missouri made it into the top ten in the Pacific Research Institute's rankings; however five of the thirteen states, Massachusetts, New Jersey, Connecticut, California, and New York were also in the bottom ten according to the same ranking system. McQuillan, *supra* note 77.

Table 1. States introducing anti-bullying legislation, as ranked by business groups.

State ⁷⁹	WEI Overall 2005 ⁸⁰	WEI Fairness 2005 ⁸¹	Fortune Overall 2005 ⁸²	Forbes Regulatory Environment 2006 ⁸³	Site Selection 2005 ⁸⁴	SBEC 2005 ⁸⁵	Pacific Research Institute 2004 ⁸⁶
California	33	9	2	41	16	50	49
Oklahoma	39	35	25	13	tied for 24	29	6
Hawaii	tied for 18 – 19	25	higher than 40	38	—	46	35
Washington	tied for 21 – 22	7	19	5	—	4	31
Oregon	tied for 36 – 37	5	38	33	—	37	29
Massachusetts	tied for 18 – 19	10	15	37	—	42	41
Missouri	tied for 16 – 17	26	16	9	tied for 24	18	10
Kansas	tied for 27 – 30	38	34	10	20	31	1
New York	tied for 36 – 37	22	1	21	19	44	50
New Jersey	15	19	7	23	—	45	42

Continued on next page

79. States are listed in the order of their introducing anti-bullying legislation, from the earliest to the most recent. Bullyfreeworkplace.org, Stop Workplace Bullying: Healthy Workplace Legislative Bill History, <<http://bullyfreeworkplace.org/id7.html>> (last viewed May 13, 2008).

80. See HEINTZ ET AL., *supra* note 74, at 2-3.

81. *Id.*

82. See *Ranking within States*, *supra* note 77, at F-34.

83. Kurt Badenhausen, *The Best States for Business*, FORBES.COM (Aug. 16, 2006), <http://www.forbes.com/business/2006/08/15/best-states-business_cz_kb_0815beststates.html> (select Complete List: The Best States for Business link). The data from this list are provided as another popular ranking system that measures regulatory climate.

84. See Arend, *supra* note 77.

85. See KEATING, *supra* note 77, at 2.

86. See McQuillan, *supra* note 77.

Montana	tied for 27 – 30	22	higher than 40	48	—	38	21
Connecticut	6	14	12	43	—	36	48
Vermont	4	1	higher than 40	46	—	43	36

Opponents of the legislation rest on this uncertainty about the legislation's effects on the economy. It means that opponents of the legislation can freely claim that government regulation, such as anti-bullying legislation, harms business, which harms everyone when businesses move out of the state.⁸⁷ Opponents of the legislation rarely dare to stand up in favor of workplace bullying itself; it allows proponents of the legislation to easily distort and exaggerate their opponents' arguments. Proponents of the legislation use Jeff Tannenbaum as the face of their opponents, presumably because of his saying (during an interview about anti-bullying legislation) that, "This country was built by mean, aggressive, sons of bitches. Would Microsoft have made so many millionaires if Bill Gates hadn't been so aggressive?"⁸⁸

Applying the principle of charity, one could construe the strawman portrayals of anti-bullying legislation created by its opponents as concern about potential abuses of the legislation. Opponents of the legislation allege that the legislation would force employers to make their employees "be nice" to one another,⁸⁹ police snide remarks among employees,⁹⁰ and battle lawsuits with employees

87. See Workplace Bullying Institute, Legislative Campaign, Legislator Education: The Need for Workplace Bullying Legislation, Legal Rationale, <<http://healthyworkplacebill.org/legalrationale.html>> (last viewed May 14, 2008) (citing Bess, *supra* note 68). This web page provides an overview of arguments offered by opponents of anti-bullying legislation. The arguments tend to focus on the idea that legislators should avoid regulating businesses so that businesses will stay in their states, provide jobs to individuals in those states, and thereby benefit the economies of those states. The assumption seems to be that businesses are ready to pack up and leave the state if legislators pass a bill that the businesses do not like.

88. See Bess, *supra* note 68. Adding to Tannenbaum's statements, Bess writes, "Tannenbaum says that inappropriate bullying is in the eye of the beholder. Some people may need a little appropriate bullying in order to do a good job. Others assert that those who claim to be bullied are really just wimps who can't handle a little constructive criticism."

89. See Connecticut Business & Industry Association, Bill Would Make Employers Liable for Workplace "Bullying" (Feb. 23, 2007), <<http://www.cbiam.com/gov/gar/0207/022304.htm>> ("Without clear guidelines, an employer would be required to establish policies that make employees be 'nice' to one another, and that is simply impossible to do.")

90. *Id.* The Connecticut Chamber of Commerce describes the anti-bullying legislation as "a bill to end bullying in the workplace by making employers police – and be accountable for – any behavior that another employee simply doesn't like." *Id.*

who feel they have been “picked on.”⁹¹ While the legislation would undoubtedly result in some frivolous lawsuits,⁹² one can look to the European nations that have enacted anti-bullying legislation for examples of how to safeguard against abuse of the legislation.⁹³ British courts have required employees to follow the standard model for a negligence action⁹⁴ by proving that their employers should have reasonably foreseen the harm to the employee’s mental health,⁹⁵ could have taken reasonable steps to prevent that harm,⁹⁶ did not take

91. See Oklahoma State Chamber of Commerce (Feb. 16, 2007), <<http://www.okstatechamber.com/ceo/2-16-07.html>> (reporting that H.B. 1467, the “Abusive Work Environment Act” was defeated in the Oklahoma House Subcommittee on Commerce & Industry and warning that if it had passed, “if one [an employer’s] employees felt that they had been picked upon by another employee they could sue . . . the employer.”).

92. See Angelo Soares, *The Anti-Bullying Law: The Quebec Experience*, Address at the Work, Stress, and Health Conference 11-12 (Mar. 2-4, 2006), available at <<http://healthyworkplacebill.org/pdf/SoaresQuebec.pdf>>. Between June 1, 2004, and March 31, 2005, 2067 complaints of workplace bullying were filed in Quebec. Of those complaints, 15.3 percent were deemed inadmissible, in 14.7 percent bullying criteria were not met, and 3.7 percent were deemed to be unfounded. However, David Yamada stresses that his draft of the Healthy Workplace Bill is designed to focus only on instances of severe harassment. See David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475, 501-07 (2004). Under Yamada’s bill plaintiffs can only file in state courts, a measure intended to prevent frivolous suits since only those with strong claims will be able to secure a lawyer. While Yamada admits some plaintiffs with legitimate claims may not have the resources to secure legal representation, he argues it is better to exercise caution rather than open the door to unnecessary claims. *Id.* at 505. Additionally, while the Healthy Workplace Bill allows employers to be held liable for damages if employees file a case, businesses may use an affirmative defense to prove they “exercised reasonable care to prevent and correct promptly any actionable behavior” and the “complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.” *Id.* at 501-03.

93. As previously noted, Sweden’s legislation does not include any provisions for punishment of employers who fail to implement measures for the prevention of workplace victimization, nor for the punishment of perpetrators of workplace victimization.

94. *E.g.* *Barber v. Somerset CC*, [2002] EWCA (Civ.) 76, [12, 16-19], (2002) I.C.R. 613 (holding that “employee[s] agrees to run the inevitable risks of the job, although not those which are the result of his employers’ negligence” and that “the ordinary law of negligence governs”), *rev’d on other grounds by Barber v. Somerset CC*, [2004] UKHL 13, (2004) I.C.R. 457; *Pratley v. Surrey CC*, [2003] EWCA (Civ) 1067, [15-16, 23-29], (2004) I.C.R. 159 (relying on *Barber* and applying a negligence standard); *Long v. Mercury Commc’ns*, [2002] P.I.Q.R. Q1 [21-22, 31-38] (holding an employee’s former employer liable for psychiatric damages from bullying of former supervisor).

95. *E.g.* *Taplin v. Fife Council*, [2003] S.L.T. 653, [1-5] (holding that an employer is “under a duty to take reasonable and effective measures to avoid foreseeable risk of psychological injury to [its] employees”); *McLoughlin v. Grovers*, [2002] EWCA (Civ) 1743, [29-35], (2002) P.N.L.R. 21 (“It has for a long time been recognised that negligent [employers] might be liable to pay their [employees] compensation for foreseeable consequences” of a breach of duty); *Bonser v. UK Coal Mining Ltd.*, [2003] EWCA (Civ) 1296, [3-4], (2004) I.R.L.R. 164 (holding that the “crucial question” is “[w]hether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned.”).

96. *E.g.* *Foumeny v. Univ. of Leeds*, [2003] EWCA (Civ) 557, [20] (2003) E.L.R. 443 (holding that “[i]n all cases . . . it is necessary to identify the steps which the employer both could and should have taken before” holding the employer liable and that the “employer is only

reasonable steps to prevent the harm,⁹⁷ and thus the workplace conditions were the actual cause of the employee's mental injury⁹⁸ in order to recover. Before beginning disciplinary procedures or any other action, French legislation requires employers to first investigate allegations of moral harassment, at which point the employer may either take steps to end the harassment or refer the case to a labour tribunal to dispute the existence of the harassment.⁹⁹ While French anti-bullying legislation has also been incorporated into the Penal Code, the burden of proof in criminal proceedings includes proof of the perpetrator's intent when committing the alleged harassing behaviors.¹⁰⁰ Even more basic than requiring mediation or describing the burden of proof, perhaps the best safeguard against abuse of the legislation has already been included in each bill and law: a relatively narrow definition of precisely what the legislators consider "workplace bullying."

Tannenbaum and the Connecticut and Oklahoma Chambers of Commerce have argued that anti-bullying legislation will lead to frivolous lawsuits because bullying is any little bit of criticism that is a little bit too aggressive for an employee's tastes; but these portrayals of workplace bullying ignore the definition of bullying put forth in the proposed legislation. All twenty-nine pieces of anti-bullying legislation introduced in the United States have been versions of the Healthy Workplace Bill, written by David Yamada of the Workplace Bullying and Trauma Institute.¹⁰¹ According to Yamada, the bill

in breach of duty if he has failed to take the steps which are reasonable in the circumstances."); *Williams v. Reckitt & Colman plc*, (July 2, 2000) (Derby County Court, Eng.) (unreported); *Witham v. Hastings & Rother NHS Trust* (2002) 66 B.M.L.R. 20, 2001 WL 1346938 (holding that the employer had failed to take reasonable care to protect its employee from foreseeable workplace stress).

97. *E.g.* *Young v. Post Office*, [2002] EWCA (Civ) 661, [12-20], (2002) I.R.L.R. 660 (holding that the employer failed to implement reasonable measures to prevent foreseeable harm); *Unwin v. West Sussex County Council* (July 13, 2001) (High Court, Eng.) (unreported).

98. *E.g.* *Stevenson v. East Dunbartonshire Council* (2003) S.L.T. 97, 2002 G.W.D. 39-1312; *Harrison v. Tex Industrial Plastics Ltd*, (2001) C.L.Y. 4494, 2001 WL 1347069 (Derby County Court, Eng.); *Frewin v. Consignia plc*, (2003) IRS Employ. Rev. 789, 2003 WL 21729304 (unreported); *Woodrup v. Southwark LBC*, [2002] EWCA (Civ) 1716, [5-26], (2003) I.R.L.R. 111.

99. Vogel, *supra* note 4, at 23.

100. *See* Guerrero, *supra* note 2, at 491 n.104.

101. *See* Bullyfreeworkplace.org, Stop Workplace Bullying: The U.S. Campaign for Workplace Bullying Laws, <<http://bullyfreeworkplace.org/id29.html>> (last viewed May 14, 2007); Workplace Bullying Institute Legislative Campaign, Past Versions of the Healthy Workplace Bill, <<http://workplacebullyinglaw.org/states/past.html>>; *see* Yamada, *supra* note 92, at 476-77. Under the bill drafted by Yamada, it is unlawful to require employees to work in "an abusive work environment," defined as "when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant." *Id.*

“seeks to give severely bullied employees who have suffered concrete psychological, physical or economic effects the right to sue the bully or the company.”¹⁰² The full definition of workplace bullying used by the Workplace Bullying Institute describes “repeated, health-harming mistreatment” that abuses, threatens, humiliates, offends, and/or sabotages the victim(s).¹⁰³

The American definition of workplace bullying is very vague compared to the definitions used by European and Canadian legislators. One could argue that American proponents of anti-bullying legislation have taken the bite out of their definition of workplace bullying. Unlike Leymann and Hirigoyen, they do not specify how frequently bullying behaviors must be repeated, nor for how long those behaviors must be repeated, nor how serious the health harms suffered by victims must be. Additionally, unlike European legislators, they do not require intent on the part of the perpetrators of the bullying behavior.

There may be a logical reason why American legislation does not impose a time requirement on its definition of workplace bullying. The at-will employment doctrine, prominent in America but absent in Europe, encourages much more frequent job changes in America than in Europe.¹⁰⁴ In America, where employees tend to see frequent job changes as normal, legislation has focused on discrimination and equality during hiring, promotion, and firing.¹⁰⁵ Conversely, in Europe, where employees are accustomed to high levels of job stability, legislation has shifted toward ensuring the dignity and health

at 498. To be granted relief under this bill, the plaintiff must prove she has been tangibly harmed by the harassment, either psychologically or physically. *Id.* at 500. In contrast to Yamada’s bill, Quebec’s Labour Standards Act (LSA) does not require plaintiffs to meet the same burden of proof when bringing a bullying case to court. See Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 EMP. RTS. & EMP. POL’Y J. 423, 435 (2004). Parkes states that under the LSA, bullied employees do not have to prove that their health was affected by the harassment, but that the mistreatment affected their “dignity or psychological or physical integrity and [resulted] in a harmful work environment.” *Id.* Further, the LSA does not focus on what the harasser intended, but the effects of the harassment. This idea runs counter to Yamada’s Healthy Workplace Bill, which states harassers must act with “malice.” Yamada, *supra* note 92, at 476-77.

102. Laurie Meyers, *Still Wearing the “Kick Me” Sign*, MONITOR ON PSYCHOL., July/Aug. 2006, at 68.

103. Workplace Bullying Institute, *The Workplace Bullying Institute’s Definition of the Phenomenon*, <<http://bullyinginstitute.org/education/bbstudies/def.html>> (last viewed May 15, 2008). All twenty-nine pieces of anti-bullying legislation that have been introduced in American states have been variations of the Healthy Workplace Bill prepared by the Workplace Bullying Institute, making their definition the closest one could come to a universal American definition.

104. See Yuen, *supra* note 2, at 629-30.

105. *Id.* at 629.

of employees while in the workplace.¹⁰⁶ Due to the significant differences between labor laws in America and Europe, it may be helpful to use Canadian, rather than European, anti-bullying legislation as a model for the United States.

Canada provides a helpful example when considering proposed American legislation primarily because Canada and the United States share an ideological emphasis on individualism.¹⁰⁷ The brand of individualism practiced in each culture varies only slightly.¹⁰⁸ While both nations place an emphasis on the individual's responsibility to become self-reliant, Canadians do not make a key assumption common in America: that individuals actually are self-reliant.¹⁰⁹ The Canadian acknowledgment of aleatory factors' influence in individuals' lives flies in the face of the American belief that individuals have control over their lives.¹¹⁰ The Canadian view, blurring the line between the self and others, is known as "ensembled individualism;" whereas the American view, focusing on the individual, is referred to as "self-contained individualism."¹¹¹

Canadian individualism leaves much more room for government action, such as anti-bullying legislation, than does American individualism. Canada's ensembled individualism allows legislators to view victims of workplace bullying as victimized people who need help.¹¹² The Canadian view mirrors the tone of European legislation,

106. *Id.* at 630; *see also* Coleman, *supra* note 1, at 61-62; Friedman & Whitman, *supra* note 1, at 242-43; Yamada, *supra* note 2, at 508. The authors all point to the conflict between the focus on discrimination and the focus on dignity as a key divide between American and European legislation.

107. *See* SEYMOUR MARTIN LIPSET, *NORTH AMERICAN CULTURES: VALUES AND INSTITUTIONS IN CANADA AND THE UNITED STATES* 1-7 (1990).

108. *See generally* HERBERT J. GANS, *MIDDLE AMERICAN INDIVIDUALISM: THE FUTURE OF LIBERAL DEMOCRACY* 1-22, 98-121, 154-56 (1988) for a discussion of normative individualism, which takes two forms: "popular individualism," which emphasizes freedom from interference in one's economic, social, political, and cultural decisions, as well as a second form that emphasizes individuals' duty to become self-reliant.

109. *See* M. Neil Browne et al., *Divergent Reactions to Individualism in Canada and the United States: The Case of Comparable Worth* (Nov. 1995) (unpublished speech on file at the William T. Jerome Library at Bowling Green State University).

110. *See* Edwards E. Sampson, *The Debate on Individualism: Indigenous Psychologies of the Individual and Their Role in Personal and Societal Functioning*, 43 *AM. PSYCHOL.* 15, 15-19, 21 (1988); *see also* ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 44-84, 142-163, 275-96 (1985) (discussing of how Americans may acknowledge that external factors play a role in shaping our lives, but that acknowledgment does nothing to detract from the emphasis on self-reliance and personal responsibility).

111. *See* Sampson, *supra* note 110, at 15-16.

112. *See* M. Neil Browne & Michael D. Meuti, *Individualism and the Market Determination of Women's Wages in the United States, Canada, and Hong Kong*, 21 *LOY. L.A. INT'L & COMP. L. REV.* 355, 372-87 (1999) for a discussion of Canada's ready embrace of pay equity legislation, as opposed to American resistance to similar legislation. Pay equity legislation, which sought to

which portrays mobbing victims as vulnerable, powerless individuals who need to be protected to maintain their dignity.¹¹³ Conversely, America's self-contained individualism leaves victims standing alone, bearing the weight of the responsibility for their own victimization.¹¹⁴ One might reasonably expect Americans to ask a victim, "Why didn't you just quit if you were really being treated that badly?"¹¹⁵

Considering the American emphasis on personal responsibility, it is not surprising that anti-bullying legislation has failed to pass in a single state, let alone as a federal law. What may be surprising is that Canada has not yet passed federal anti-bullying legislation – especially considering the media attention given to workplace bullying in 1999, when a victim committed suicide after killing four coworkers who had bullied him for years.¹¹⁶ The coroner's inquest revealed workplace bullying as a cause of the shooting, bringing the

protect women from workplace discrimination, provides a helpful parallel to anti-bullying legislation, which seeks to protect all employees from workplace harassment.

113. See Friedman & Whitman, *supra* note 1, at 246-65; see also LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* 29-51, 117-57 (1997) (arguing that when we see weak and vulnerable creatures, a sense of justice requires that we act to protect those who are vulnerable).

114. See E.K. HUNT, *PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES* 44-51 (7th ed. 2003). Hunt links the American market system to classical liberal ideology, and specifically the classical liberal creeds. The psychological creed describes people as being atomistic, essentially inert, coldly calculating, and egoistic. Eventually, an element of psychological hedonism was added by thinkers like Jeremy Bentham, portraying people as seeking pleasure and avoiding pain whenever possible. Following from the psychological creed, the economic creed put forth the belief that markets are the best way to distribute resources and focus energy. The political creed limited the role of government, granting it only three tasks: protecting citizens from other nations, protecting citizens from their fellow citizens, and operating those industries that could not reasonably be expected to draw a profit and were thus unattractive to individuals engaged in the market (such as road maintenance and utilities). Following from these three creeds, the typical human is an individual who participates in market transactions only when he deems those transactions beneficial (or at least not harmful) to himself, who avoids pain and seeks pleasure, and who constantly seeks out the best use of his capital (employment) possible. Under this system of thought, employees do not continue working in a hostile environment with abusive coworkers; under this system of thought, employees refuse to engage in a market transaction, such as employment, if that transaction is not the most advantageous arrangement available. The idea that an individual would willingly submit to months or years of workplace harassment is befuddling to a thinker who has embraced classical liberal ideology.

115. See generally ROBERT N. BELLAH ET AL., *INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE: READINGS ON THE THEMES OF HABITS OF THE HEART* (1987). Individualism follows from an atomistic view of humans, which in turn places heavy emphasis on personal responsibility. If every person controls her own life, then she has no one to blame but herself when she does not like her life.

116. See Westhues, *supra* note 69; Canadian Centre for Occupational Health & Safety, *supra* note 69; Anton Hout, Mobbing.ca, Workplace Violence: Why It Happens, Why It Will Continue, <<http://members.shaw.ca/mobbing/mobbingCA/workplaceviolence.htm>> (last viewed May 15, 2008).

potential dangerousness of workplace bullying to light.¹¹⁷ Despite the sensational story, Quebec is the only Canadian province that has enacted anti-bullying legislation. In April 2007, Saskatchewan introduced a bill that would add the term “workplace harassment” to its Occupational Health and Safety Act, along with a definition; but the proposed legislation lacks the power of standardized procedures for processing complaints or resolving instances of workplace bullying.¹¹⁸

The lack of clear procedures for resolving workplace harassment opens the door for abuse of anti-bullying legislation. Schultz sees potential for employers to use the legislation to essentially frame individuals who otherwise would become victims of bullying, and push those individuals out of the workplace by alleging that they (the victims in this instance) were perpetrating bullying behaviors.¹¹⁹ While Canada did not pass the *Workplace Psychological Harassment Act*, the proposed legislation offers one model of how to deter the abuse of anti-bullying legislation that Schultz foresees.¹²⁰ The legislation establishes a committee for the specific purpose of processing and resolving complaints of psychological harassment,¹²¹ and outlines a specific reporting procedure for both victims and witnesses of psychological harassment.¹²² While employees are required to report known instances of psychological harassment even if they are not the victims, the *Act* threatens a fine of up to \$10,000 if an employee makes a false report in bad faith.¹²³

Though the proposed Canadian legislation does express some appreciation for personal responsibility by requiring victims to take reasonable steps to end the bullying before filing a complaint,¹²⁴ the

117. See Westhues, *supra* note 69; Canadian Centre for Occupational health & Safety, *supra* note 69; Hout, *supra* note 116.

118. See Mark Sabourin, *Sask Bill 66 to Ensure Harassment-Free Workplace: Changes to Public Service Policies as Well*, OHSCOMPLIANCE.CA, Apr. 1, 2007, <http://www.ohs.compliance.ca/issues/PrinterFriendly.asp?story_id=22167103215&id=186704&RTtype=&PC=&is_sue=04012007>.

119. See Schultz et al, *supra* note 18, at 193-94.

120. See Bill C-451, An Act to Prevent Psychological Harassment in the Workplace and to Amend the Canada Labour Code, 2d Sess., 37th Parl. (Sept., 24 2003), available at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-451&parl=37&ses=3&language=E>>.

121. *Id.* §§ 8-9, 17-18.

122. *Id.*, §§ 10-16.

123. *Id.*, §§ 3, 19-22.

124. *Id.* §§ 3(2), 10. Employees must provide notice either verbally or in writing, personally or through a representative, to the perceived perpetrator of psychological harassment, asking that the behavior stop, before filing a formal complaint with the Psychological Harassment

legislation may still be too paternalistic for American tastes.¹²⁵ The legislation interferes with employees' ability to choose what kind of workplace conditions they are willing to tolerate and with employers' ability to choose what kind of workplace conditions they are willing to offer their employees. According to American market theory, if individuals are engaged in a market transaction, such as an employment contract, the transaction must be mutually beneficial;¹²⁶ hence, the legislation seems to be an unnecessary interference in individuals' private choices.¹²⁷

V. CONCLUSION

Despite American's knee-jerk reaction to paternalism, anti-bullying legislation should not be dismissed simply because it may be viewed as paternalistic; paternalistic legislation can be justified.¹²⁸ The idea that individuals should be allowed to make their own decisions without government interference is premised on the idea that individuals are rational and have access to all information necessary to evaluate available options before making a choice.¹²⁹ If we can move past that premise to see individuals as sometimes lacking the information or resources necessary to make the decisions that would be best for themselves, then we may be able to justify interfering with

Complaints Committee. *Id.*

125. See generally GANS, *supra* note 108; DON A. HABIBI, JOHN STUART MILL AND THE ETHIC OF HUMAN GROWTH 158-72 (2001); JOHN KULTGEN, AUTONOMY AND INTERVENTION: PATERNALISM IN THE CARING LIFE (1995); DONALD VANDEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE 10-40, 302-34, 345-426 (1986); Douglas N. Husak, *Legal Paternalism*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 387 (Hugh LaFollette ed., 2003); Heidi Malm, *Feinberg's Anti-Paternalism and the Balancing Strategy*, 11 LEGAL THEORY 193 (2005); Russ Shafer-Landau, *Liberalism and Paternalism*, 11 LEGAL THEORY 169 (2005). While normative individualism emphasizes the importance of negative liberty (freedom from interference or regulation), paternalistic legislation by definition impinges upon individuals' liberty.

126. See HUNT, *supra* note 114.

127. However, there is evidence to suggest that many American workers might support anti-bullying legislation. See Employment Law Alliance, *Nearly 45% of U.S. Workers Say They've Worked for an Abusive Boss*, <<http://www.employmentlawalliance.com/en/node/1810>> (updated Dec. 5, 2007). The Employment Law Alliance conducted a public opinion survey on workplace bullying in 2007. Of the respondents, 45 percent reported they had been abused on the job, and 64 percent strongly supported anti-bullying legal protections.

128. See KULTGEN, *supra* note 125; VANDEVEER, *supra* note 125; Husak, *supra* note 125; Malm, *supra* note 125. Each author notes the significance of individuals' autonomy, while also noting that interference in an individual's life is sometimes necessary to preserve the conditions that allow an individual to be autonomous (such as preserving the individual's physical and mental health or financial stability).

129. See HUNT, *supra* note 114; see also DAVID C. COLANDER, MICROECONOMICS 417-21 (5th ed., 2004).

those decisions affected by misinformation or lack of resources.¹³⁰ The view that interference is justified when individuals are acting without full information or resources is referred to as “soft paternalism.”¹³¹

Assume for a moment that American legislators have adopted soft paternalism as a lens through which to read proposed anti-bullying legislation. Would they be any more likely to pass the legislation than they currently are? The answer to that question relies largely upon how the legislators conceptualize the individuals affected by the legislation.¹³² Take, for instance, the average competent employee, who has willingly and voluntarily entered into an employment contract with a firm.¹³³ Interfering with the voluntary decisions made by a competent individual would be unjustified in most instances. Alternatively, consider the average victim of workplace bullying, who suffers symptoms of stress-related disorders such as depression and post-traumatic stress disorder, yet continues to maintain employment while being continually harassed in the

130. See KULTGEN, *supra* note 125; VANDEVEER, *supra* note 125; Husak, *supra* note 125; Malm, *supra* note 125.

131. See KULTGEN, *supra* note 125, at 132; VANDEVEER, *supra* note 125, at 81-92; Husak, *supra* note 125; Malm, *supra* note 125. The concept is also sometimes referred to as “weak paternalism.” The authors disagree about precisely how to identify situations in which individuals lack sufficient knowledge or resources, but a general theme is distinguishable. Husak follows a model proposed by Joel Feinberg, which defines voluntary decisions as occurring when the actor has full knowledge and information, complete understanding of the consequences of the action and the other options available, and is free from coercion or pressure. Husak, *supra* note 125, at 395. VanDeVeer quotes Joel Feinberg, “With a ‘fully voluntary assumption of risk’ . . . one shoulders it while fully informed of all relevant facts and contingencies, with one’s eyes wide open, so to speak, and in the absence of all coercive pressure of compulsion. There must be calmness and deliberation, no distracting and unsettling emotions, no neurotic compulsion, no misunderstanding. To whatever extent there is impetuosity, clouded judgment (as e.g., from alcohol), or immature or defective facilities of reasoning, to that extent the choice falls short of voluntariness. Voluntariness is then a matter of degree.” VANDEVEER, *supra* note 125, at 82 (quoting JOEL FEINBERG, 4 HARMLESS WRONG-DOING: THE MORAL LIMITS OF THE CRIMINAL LAW (1990)). Kultgen quotes Gerald Dworkin’s definition, “By soft paternalism, I mean the view that (1) paternalism is sometimes justified, and (2) it is a necessary condition for such justification that the person for whom we are acting paternalistically is in some way not competent.” KULTGEN, *supra* note 125, at 132 (quoting Gerald Dworkin, *Paternalism: Some Second Thoughts*, in PATERNALISM 105, 107 (Rolf Sartorius ed., 1983)). The authors seem to agree that when a person does not have adequate knowledge or understanding of his options and the consequences thereof, or is currently impaired (by drugs, alcohols, duress, etc.), then the individual is not acting voluntarily.

132. See KULTGEN, *supra* note 125; VANDEVEER, *supra* note 125; Husak, *supra* note 125; Malm, *supra* note 125. Scholars generally agree that legal interference is justified when preventing one citizen from (or punishing one citizen for) harming another; thus, our example will assume that the debate about whether to impinge upon individuals’ autonomy and negative liberty refers to employees and employers who do not perpetrate bullying behaviors, as well as employees who become victims of bullying.

133. For the sake of this example, assume that the employee’s decision to accept employment conforms with Joel Feinberg’s requirements for a voluntary decision. See Husak, *supra* note 125.

workplace.¹³⁴ Considering the mental health of the victim, can the decision to maintain employment be seen as fully (or even largely) voluntary?¹³⁵ If the decision is not voluntary, are legislators then justified in passing anti-bullying laws?

The problem that our hypothetical legislators face is one of generalization. Ideally, to avoid unnecessarily interfering in an individual's life, we would want laws to be tailored to each person's unique circumstances.¹³⁶ Obviously, this is impractical. Legislators may consider the circumstances and experiences of the majority of people who will be affected.¹³⁷ However, this solution may also be inadequate. The majority of employees do not become victims of workplace bullying, which would lead legislators to avoid passing laws to protect those employees who do become victims. Legislators may then apply a balancing test, weighing the potential harm resulting from workplace bullying if the laws are not passed with the potential harm to individuals' autonomy resulting from anti-bullying legislation if passed.¹³⁸

The question for our legislators then becomes, "Who will suffer more harm: victims of workplace bullying if we do not pass the legislation, or employees and employers in general who have to comply with the terms of the legislation if we do pass it?" Legislators around the globe – in thirteen American states, two Canadian provinces, Canada as a whole, the European Parliament, France, Belgium, Sweden, the United Kingdom, and Brazil, among other jurisdictions – have balanced the scales and weighed their options. It should be no surprise that the most individualistic among those legislators are the lawmakers who found that the right of employees and employers to dictate workplace relations weighed more than the right of employees to maintain their mental and physical health while

134. See NAMIE, *supra* note 5, at 12-17.

135. See Husak, *supra* note 125, at 387-97. Feinberg's definition of voluntariness is so demanding that even he acknowledged that a fully voluntary decision may never exist. Rather, Feinberg views voluntariness on a spectrum, with some decisions being so close to fully voluntary as to warrant being called simply "voluntary." Other decisions are so far from the ideal of a "fully" voluntary decision as to warrant questions of the actor's competence. Of course there are shades of gray between the ends of the spectrum. In instances where it is not clear whether the decision is sufficiently involuntary to warrant interference, Feinberg urges examination of the potential consequences of the decision. As the risk and seriousness of harm resulting from a decision increases, the level of voluntariness required to allow that decision should increase as well.

136. See *id.* at 387-431.

137. *Id.*

138. *Id.*

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in the workplace. In America, individualism, self-reliance, and personal responsibility are far heavier than civility, respect, and dignity.

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