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Bullying in the Workplace: Lessons from the United Kingdom

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INTRODUCTION

Helen Green was employed as a secretary in Deutsche-Bank's London office. Although she received positive evaluations, promotions, and salary increases, every day at work was terrorizing. Four of her colleagues, including her supervisor, subjected her to a sustained campaign of emotional abuse. They constantly made it difficult for Ms. Green to perform her work by moving her papers, hiding her mail, removing her from document circulation lists, and ignoring and excluding her in meetings and social functions. Ms. Green's supervisor increased her workload to unreasonable and arbitrary levels. In addition, her colleagues burst out laughing when she walked past them and made crude and lewd remarks. Ms. Green complained about the behavior to management, but no action was taken. Ms. Green eventually developed a major depressive disorder and at one point was taken to hospital and

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put on suicide watch. Deutsche-Bank paid for her to undergo stress counseling and assertiveness training but never reprimanded or discharged her colleagues or otherwise intervened. Should Deutsch-Bank be vicariously liable for the psychological terror imposed by its employees on Ms. Green? In 2006, a British court answered this question in the affirmative under its anti-bullying law, and awarded Helen Green $1.6 million in damages.[1] And, according to sixty-four percent of United States workers,[2] there should be a remedy under U.S. law for this type of behavior.

The abuse that Helen Green experienced is called workplace bullying. It is a significant problem in the U.S. and yet has no legal remedy. This comparative article explores how the United Kingdom has tackled the problem of workplace bullying with the goal of drawing lessons for the emerging U.S. workplace bullying movement.

Workplace bullying is a phenomenon that has attracted a considerable amount of domestic and international inter-disciplinary attention. Sociologists, organizational psychologists, and legal scholars have identified and categorized the types of workplace conduct that constitute bullying, surveyed its prevalence, and analyzed the individual and societal costs of workplace bullying.[3] Some have even formulated models for change both in the United States[4] and abroad.[5] This body of inter-disciplinary work of numerous

1. Green v. DB Group Servs. (U.K.) Ltd., [2006] EWHC 1898 (Q.B.).

2. Employment Law Alliance Report, *Abusive Boss Poll*, Mar. 21, 2007, http://www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf (last visited Mar. 3, 2008).

3. *See generally* DUNCAN CHAPPELL & VITTORIO DI MARTINO, VIOLENCE AT WORK 259–72 (3d ed. 2006); STÅLE EINARSEN, HELGE HOEL, DIETER ZAPF & CARY L. COOPER, BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE (2003); Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL'Y J. 239 (2004) (detailing the growing challenge to workplace bullying from within the law, economics, social science and life science). *See also* ROBERT I. SUTTON, THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN'T (2007).

4. *See generally* David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475 (2004); David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for a Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000) [hereinafter Yamada, *Workplace Bullying*].

5. *See, e.g.*, Symposium, *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 EMP. RTS. & EMP. POL'Y J. 151 (2004) [hereinafter *AALS Global Perspectives*]; Debra Parkes, *Targeting Workplace*

scholars and commentators has enriched our understanding of workplace bullying such that we can identify a common definition of bullying, the common forms of abusive behavior, and risk factors for the victim, the bully, and even the organization.[6] Scholars have defined workplace bullying in different ways, but it can broadly be defined as: "repeated offensive behavior through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees."[7] To be identified as bullying, the behavior has to occur regularly, repeatedly, and over a period of time.[8]

Bullying can take the form of overt physical or verbal assaults. Common types of overt behavior are: constant criticism, shouting and verbal abuse, and persistently picking on the victim.[9] Bullying behavior can also take more subtle

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Harassment In Quebec: On Exporting A New Legislative Agenda, 8 EMP. RTS. & EMP. POL'Y J. 423, 448–53 (2004) (reviewing new Quebec harassment legislation and examining social and legal context rendering the developments less "exportable" to other Canadian and American jurisdictions); David Yamada, *Workplace Bullying and the Law: Towards a Transnational Consensus?*, in EINARSEN, HOEL, ZAPF & COOPER, *supra* note 3, at 399; 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, 495 (2004) (proposing new European Union moral harassment directive modeled on existing European Union directives and French and Swedish anti-harassment laws); Rachel A. Yuen, Note, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT'L L.J. 625, 647–48 (2005) (comparing moral harassment laws in France and Quebec and concluding that similar legislation in the rest of North America is unlikely).

6. *See generally* CHAPPELL & DI MARTINO, *supra* note 3; Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315 (2004); Yamada, *Workplace Bullying*, *supra* note 4; HELGE HOEL & CARY L. COOPER, DESTRUCTIVE CONFLICT AND BULLYING AT WORK (2000), http://www.csren.gov.uk/UMISTreportHelgeHoel1.PDF.

7. CHAPPELL & DI MARTINO, *supra* note 3, at 20 (citations omitted). *Cf.* HOEL & COOPER, *supra* note 6, at 6 (defining bullying as "a situation where one or several individuals persistently over a period of time perceive themselves to be on the receiving end of negative actions from one or several persons, in a situation where the target of bullying has difficulty in defending him or herself against these actions"). The Healthy Workplace Bill, referenced in Part I, *infra*, defines "abusive conduct" as malicious "conduct of an employer or employee in the workplace that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interest . . . . Abusive conduct may include, but is not limited to, repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct unless especially severe and egregious."

8. *See, e.g.*, CHAPPELL & DI MARTINO, *supra* note 3, at 21 (citations omitted).

9. *Id.*

forms, such as removing responsibilities and replacing them with trivial tasks, withholding information, and blocking promotions.[10] Indeed, the most common form of bullying is assigning unreasonable or impossible targets or deadlines.[11]

Psychologists have explained that the bully is often driven by a desire to control.[12] The effect on the victim is a form of emotional abuse,[13] and in response the victim often quits.[14] In addition to the emotional toll bullying has on its victim, emerging scholarship is now quantifying other costs incurred as a result of workplace bullying. For example, studies in the U.S. and U.K. estimate that the cost to an organization for every bullied worker who quits is approximately $50,000.[15]

In the U.S., Professor David Yamada's groundbreaking work in defining a gap in U.S. law and drafting a model anti-bullying statute, the Healthy Workplace Bill, has helped place workplace bullying on the legislative agenda in thirteen U.S. states.[16] Comparative scholars have also described developments in anti-bullying law in Sweden, Germany, France, Quebec, and the European Union (EU).[17] These scholars have described European anti-bullying laws as based on a "dignity" paradigm, which can broadly be described as a historical and deep-rooted continental tradition of recognizing respect for individuals at all levels, including at work.[18] In contrast to the European dignity paradigm, U.S. workplace harassment law is based on anti-discrimination law, which has the goal of creating

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10. *Id.*

11. HOEL & COOPER, *supra* note 6, at 3.

12. CHAPPELL & DI MARTINO, *supra* note 3, at 111–36; Namie & Namie, *supra* note 6, at 327–28; Yamada, *Workplace Bullying*, *supra* note 4, at 480.

13. Yamada, *Workplace Bullying*, *supra* note 4, at 480 (citing Loraleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and Empirical Issues*, 1 J. EMOTIONAL ABUSE 85 (1998)).

14. C. Pearson, L. Andersson & C. Porath, *Assessing and Attacking Workplace Incivility*, 29 ORGANIZATIONAL DYNAMICS 123, 123–37 (Fall 2000) (presenting survey findings that among U.S. workers, one target in eight left the job to escape "uncivil" behavior that could be described as bullying).

15. WAYNE F. CASCIO, COSTING HUMAN RESOURCES: THE FINANCIAL IMPACT OF BEHAVIOR IN ORGANIZATIONS 7–8 (2000); EINARSEN, ET AL., *supra* note 3, at 203–18 (cited in CHAPPELL & DI MARTINO, *supra* note 3, at 140–41).

16. The Workplace Bullying Institute has been a major instrumental force in introducing the Healthy Workplace Bills at the state level. For more information, visit: http://www.bullyinginstitute.org. The status of these bills is summarized in Part I.B.1, *infra*.

17. *AALS Global Perspectives*, *supra* note 5, at 151–53; Guerrero, *supra* note 5, at 477; Yuen, *supra* note 5, at 625.

18. *See* discussion at Part I.B.2, *infra*.

equal treatment for minority groups in the workplace.[19] Because U.S. and European workplace harassment laws are grounded in different paradigms, some commentators have expressed doubt that the European model can be exported to the U.S.[20]

The United Kingdom, however, is a useful comparator to the U.S. because the U.K. also lacks a tradition of recognizing workers' dignity-based rights and yet has a well-developed workplace bullying law. In stark contrast to the U.S., the U.K. has been actively identifying and tackling workplace bullying since 1997 at the grassroots, political, organizational, and legislative levels.[21] Despite the U.K.'s richer experience with combating workplace bullying, this experience has neither been fully examined nor drawn upon for comparative purposes.

In the U.K., several factors appear to have coalesced to impact employee expectations and behavior and induce employers to implement and enforce anti-bullying policies. Most significant was the passage of an anti-stalking law, the Protection from Harassment Law of 1997 (PHA).[22] The PHA was enacted to provide criminal and civil redress primarily to combat the "classic" form of stalking—nonconsensual contact with the stalking victim by a love-obsessed individual using a variety of otherwise legal means, such as following or telephoning the victim.[23] Nevertheless, as several members of Parliament recognized during Parliamentary debate of the PHA, the PHA's statutory language was broad enough to apply to harassment in the workplace.[24] Indeed, since its enactment the courts have been instrumental in recognizing additional new rights for claims brought under the PHA, most notably the application of vicarious liability to the employer.[25]

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19. *AALS Global Perspectives*, *supra* note 5, at 151; Guerrero, *supra* note 5, at 495–97; Yuen, *supra* note 5, at 628–30.

20. *AALS Global Perspectives*, *supra* note 5, at 152; *See* Guerrero, *supra* note 5, at 477; Yuen, *supra* note 5, at 628–30.

21. *See* discussion at Part I.B.1, *infra*.

22. Protection from Harassment Act, 1997, c. 40, § 1 (Eng.).

23. *Id.*

24. *See, e.g.*, 287 PARL. DEB., H.C. (6th ser.) (1996) 985 (comments of Hon. Maclean identifying the aim of the Bill to protect against the harm of harassment: "all forms of harassment—whether stalking, racial abuse, neighbour or work disputes—are covered."); *id.* at 802 (comments of Hon. Maddock: "Although the Bill is generally perceived to be about stalking, its tentacles are likely to spread far wider.").

25. See Part II.B., *infra*. Moreover, even before enactment of the PHA, bullied workers had also found support in the English courts. By 1997, the courts were on the verge of recognizing new rights for bullied workers and more recently have been instrumental in recognizing additional new rights for claims brought under the

Second, trade union and grassroots organizations brought workplace bullying into sharp focus for the public and legislature in 1996 by initiating a Dignity at Work Campaign. This campaign resulted in the introduction of the Dignity at Work Bill in the British Parliament, which triggered extensive legislative debate.[26] The election of New Labor in 1997 likely made the government more receptive to this type of anti-bullying campaign. Indeed, New Labor included an anti-bullying message as part of its election manifesto.[27] Although the Dignity at Work Bill was not ultimately enacted, the campaign and debate surrounding the Bill ultimately resulted in the launching of the world's largest anti-bullying campaign, funded largely by the British government.[28]

Alongside these developments, the past decade has seen a shift in organizational behavior in the U.K. Many employers now self-regulate workplace conduct by issuing anti-bullying policies.[29] It is difficult to analyze the importance of the potential for PHA litigation as a factor motivating organizational change. What is clear, however, is the emergence of a social norm that workplace bullying is unacceptable in the workplace.[30]

PHA, most notably the application of vicarious liability to the employer. *See infra* Part II.B.1.

26. Dignity at Work Bill, 1996, H.L. Bill [31] (Eng.). The PHA and Dignity at Work Bill are discussed more fully in Part II.B. and Part II.C., *infra*.

27. Despite New Labor's receptiveness to the anti-bullying and dignity at work campaigns, the Dignity at Work Bill floundered due to lack of government support in 2003. As explained in Part II.B., *infra*, its demise was not, however, because of any lack of a tradition in the U.K. of a dignity approach to workers' rights, but was largely due to the existence of statutory protection under the PHA.

28. Illustrating the increased attention of the government and management on the problem of workplace bullying, the U.K. Department of Trade & Industry recently completed "the world's largest project," worth £1.8 million, to stamp out bullying and discrimination at work. The Department of Trade & Industry, in conjunction with a U.K. trade union, worked with some of the U.K.'s largest employers to develop practical guidance to help all employers tackle bullying and has published a number of policy documents offering guidance to unions, employers, and executives. *See generally* The Dignity at Work Partnership, *Dignity at Work*, http://www.dignityatwork.org/ (guidance documents available at: http://www.dignityatwork.org/downloads.asp (last visited Mar. 2, 2008).

29. *See generally id.*

30. Although beyond the scope of this article, the emergence of this social norm in the U.K. alongside legislative developments raises the question of whether norms shaped the existing U.K. law or the law shaped norms. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 48–50, 82, 138 (1991) (describing movement away from legal centralism—the belief that governments are the chief source of rules and enforcement); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997);

This article describes the development of the notion of a "dignitarian workplace" in the U.K. even in the absence of a dignity tradition, and argues that the U.K. provides useful insight for the U.S. at this formative stage of U.S. workplace bullying law.[31] The most useful lesson is that the U.S.'s lack of a dignity tradition need not be fatal to the workplace bullying movement. In the U.K., employees have successfully utilized anti-stalking legislation to obtain legal relief against their employers for workplace bullying. This potential for litigation has, in turn, spurred organizational change. In addition, recognition of the societal as well as individual costs, not surprisingly, appears to have been another impetus behind trade union and government-funded initiatives to tackle the problem of workplace bullying in the U.K.

Learning from that experience, this article suggests that governmental and management recognition of the widespread nature of the problem is the first step in tackling workplace bullying. This article proposes that employer self-regulation and new workplace bullying legislation would have a better chance of success in the U.S. if preceded by efforts to educate legislators and employers on the individual and societal costs of workplace bullying. This article further proposes that legislative efforts can be bolstered by advocating for bills authorizing studies of the effects of workplace bullying. This approach therefore advocates for the more effective engagement of trade unions, management groups, and legislators to survey and define the problem of workplace bullying as an initial step in tackling workplace bullying in the U.S.[32]

Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Symposium, *Law, Economics & Norms*, 144 U. PA. L. REV. 1643 (1996).

31. The aim of this article is not necessarily to attempt to transplant U.K. law into the U.S., but to explore the potential for developing workplace bullying law and norms in the U.S. *Cf.* Julie Chi-Hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 297 & n.263 (2007) (exploring the role of comparative employment law in exploring paths not taken and the potential for developing new law) (citing ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 5–6 (2001)).

32. Efforts to generalize anti-harassment law might be viewed as premature when the U.S. has not yet adequately addressed sexual and racial harassment in the workplace. But, the efforts to re-focus sexual and racial harassment law on creating workplace equality need not be viewed as competing with status-blind harassment, especially given that many of the more subtle gender and race-based forms of harassment may not be actionable under existing Title VII law but would nevertheless be cognizable under an anti-bullying statute such as the U.K.'s PHA or the U.S. Healthy Workplace Bill. *See, e.g.*, Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88

Part I of this article briefly defines workplace bullying and outlines its prevalence and costs in both the U.K. and the U.S. Part I also summarizes current law in the U.S., Europe, and Canada. Part II outlines the roots of workplace bullying law and the anti-bullying movement in the U.K., and describes the current structure of U.K. workplace bullying law, including governmental, judicial, and voluntary measures to study and tackle the problem. Part II also attempts to identify the key factors that coalesced to propel the anti-bullying movement into organizational culture in the U.K. Part III outlines lessons from the U.K., optimistically concluding that similar progress can be achieved in the U.S. by using existing law and bolstering legislative efforts with increased awareness and effective engagement of key players such as employers, trade unions, and legislators.

I. DESCRIPTIVE BACKGROUND

A. BULLYING: DEFINITIONS, PREVALENCE, AND COSTS

The phenomenon of workplace bullying—its prevalence, causes, and costs—has been well documented and our understanding of the phenomenon has been enhanced considerably by the growing body of inter-disciplinary work both in the U.S. and abroad. This body of work demonstrates that workplace bullying is an organizational problem that can no longer be ignored.[33]

GEO. L.J. 1, 22–23 (1999) (proposing a pluralistic understanding of harassment that recognizes *all* workers' right to dignity); Parkes, *supra* note 5, at 446–47 (arguing that the issue is not whether we choose to address status-blind harassment over status-based harassment, but what we can learn about the problems of enforcing such laws in the workplace); David C. Yamada, *Dignity, "Rankism," and Hierarchy in the Workplace: Creating a "Dignitarian" Agenda for American Employment Law*, 28 BERKELEY J. EMP. & LAB. L. 305, 322–23 (2007) [hereinafter Yamada, *Dignity & Rankism*] (recognizing the potential for debate on the relationship between generic mistreatment and status-based discrimination but also expressing the opinion that it is not necessary for either side to "win"). *See also* Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 76–92 (2001) (describing harms caused by humiliation at work for all persons and advocating for the law to play a remedial role in workplace disputes).

33. Rather than attempt to exhaustively list the numerous studies from many countries, this article focuses on illustrative studies and reports from the U.K. and U.S. For links to other studies, visit www.bullybusters.org (a U.S. site dedicated to awareness and grassroots lobbying efforts) or www.anonymousemployee.com (Toronto-based on-line service targeting U.S. and Canadian employees).

1. Toward A Common Definition of Workplace Bullying and Bullying Conduct

Workplace bullying can broadly be defined as: "repeated offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees."[34] The Healthy Workplace Bill, discussed in Part I, *infra*, defines "abusive conduct" as:

> [C]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interest. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the conduct. Abusive conduct may include, but is not limited to, repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive contact unless it is especially severe and egregious.[35]

To be identified as bullying, the behavior has to occur regularly, repeatedly, and over a period of time.[36] U.S. pioneers in studying and tackling workplace bullying, Gary and Ruth Namie, liken workplace bullying to domestic violence, explaining that:

> Bullying closely resembles the phenomenon of domestic violence. Both were shrouded in silence before being brought to public attention. . . . Trauma experienced by bullied targets is *caused* by work, by an intentional, systematic campaign launched by one or more people against a target just as a battering spouse causes harm to the victim.[37]

Although workplace bullying can take the form of physical violence, it is more likely to take the form of psychological assault. Gary and Ruth Namie label bullying as "psychological violence," explaining that bullying is "nearly invisible. It is non-physical and nearly always sub-lethal workplace violence."[38] The most common bullying behavior is to assign unreasonable or impossible targets or deadlines.[39] Other common types of

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34. CHAPPELL & DI MARTINO, *supra* note 3, at 20 (citations omitted).
35. H.B. 2142, 60th Leg., §2(1) (Wash. 2007).
36. *See, e.g.*, CHAPPELL & DI MARTINO, *supra* note 3, at 21 (citations omitted).
37. Namie & Namie, *supra* note 6, at 326.
38. *Id.* at 325.
39. HOEL & COOPER, *supra* note 6, at 3.

bullying behavior may include: constant criticism; removing responsibilities and replacing them with trivial tasks; shouting and verbal abuse; persistently picking on people; withholding information; and blocking promotions.[40]

Bullying occurs across all occupations, races, and genders, and between supervisors, co-workers, or clients. Studies indicate that: the bully is most frequently a supervisor; slightly more women are targets than men; and bullying is more common in certain occupations and under certain management styles.[41] The causes of bullying are complex. Risk factors include individual factors (such as the perpetrator's child development, personality, and cultural factors), organizational factors, and societal factors.[42]

Certain organizational cultures are also more prone to bullying. Gary and Ruth Namie have identified several organizational characteristics that increase the risk of workplace bullying, ranging from uncritical adoption of an obsession with outcomes to recruitment, promotion, and reward systems that focus on personality traits like aggressiveness while ignoring emotional intelligence.[43]

2. Studies Show That Workplace Bullying Remains at High Levels in the U.S. and U.K.

Estimates of the prevalence of workplace bullying vary widely, and comparisons are difficult because of methodological differences across studies, including differences in how bullying is defined. Moreover, studies relying on employee self-reporting will naturally yield higher figures than studies relying on organizational representative estimates. Nevertheless, studies across both the U.K. and the U.S. show significantly high levels of workplace bullying such that the problem cannot be ignored.

In 2000, researchers sponsored by the British Occupational Health Research Foundation published the first nation-wide

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40. CHAPPELL & DI MARTINO, *supra* note 3, at 21 (citations omitted).

41. *See, e.g.*, Yamada, *Workplace Bullying*, *supra* note 4, at 486–91 (identifying service-sector work, such as lawyer-paralegal, doctor-nurse, store manager-stock clerk, and bank president-secretary as occupations where bullying is more likely to occur); *see also* HOEL & COOPER, *supra* note 6, at 13, 17 (noting, perhaps unsurprisingly, that "[b]ullying is often associated with an autocratic, insensitive and even abusive management style" typically associated with a U.S. style of management).

42. *Id.* at 111–36.

43. Namie & Namie, *supra* note 6, at 328.

survey of bullying in Britain.[44] The aim of the survey was to increase organizational awareness of the problem and to recommend mechanisms to prevent workplace bullying.[45] The survey concluded that:

> One in ten people (10.6%) reported having been bullied within the last six months, rising to one in four (24.7%) when the period was extended to the last five years. Almost one in two (46.5%) had witnessed bullying taking place within the last five years.[46]

U.S. workers report rates on a par or higher than their U.K. counterparts. For instance, in 2007, the Employment Law Alliance released the results of a nationwide poll of over 1,000 U.S. workers, finding that forty-four percent of workers polled reported they have worked for a supervisor or employer who they consider abusive and that sixty-four percent said that they believe an abused worker should have the right to sue to recover damages.[47] Another 2007 U.S. study found that nearly thirty percent of workers polled met the criteria for being bullied, but only ten percent labeled themselves as bully targets.[48] The study defined "bullying" as at least two negative acts, weekly or more often, for six or more months, in situations where the target finds it difficult to defend itself and stop the abuse.[49] The questionnaire listed twenty-two different negative acts, including withholding information, unmanageable workload, unreasonable deadlines, being ignored, humiliated or ridiculed in their work, and offensive or insulting remarks.[50] Although most studies poll employees, polls conducted by organizational representatives also indicate significant levels of bullying. For example, a study by the National Institute for Occupational

44. HOEL & COOPER, *supra* note 6, at 5. The British government relied heavily on the Hoel & Cooper survey when debating the Dignity at Work Bill in 2002. The advisory board for the Hoel & Cooper survey included Lord Monkswell (sponsor of the Dignity at Work Act), trade union representatives, company representatives and organizations concerned with the issue. The Hoel & Cooper survey studied workers from seventy organizations representing a wide spectrum of occupations and industries. *Id.* at 30. *See* Part II, *infra.*

45. HOEL & COOPER, *supra* note 6, at 5.

46. *Id.* at 3.

47. *Abusive Boss Poll*, *supra* note 2. The types of abusive conduct reported included: supervisors/employers behaving abusively by making sarcastic jokes/teasing remarks, rudely interrupting, publicly criticizing, giving dirty looks to or yelling at subordinates, or ignoring them as if they were invisible. *Id.*

48. Pamela Lutgen-Sandvik, Sarah J. Tracy & Jess K. Alberts, *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. MGMT. STUD. 835, 851–52 (2007).

49. *Id.*

50. *Id.* at 849.

Safety and Health (NIOSH) reported that over twenty-four percent of companies surveyed reported that some degree of bullying had occurred there during the previous year.[51]

3. The Impact of Workplace Bullying On Individuals, Organizations and Society

The economic and non-economic costs of workplace harassment have also been well documented and can be conceptualized in different ways—cost to the victimized employee, cost to the employing enterprise, and the cost to society.[52] Costs to the individual include mental and physical ill health, such as stress and depression, as well as decreased job performance, commitment, and satisfaction with work.[53] Stress caused by workplace bullying causes a multitude of problems and may become sufficiently severe to lead to post-traumatic stress syndrome.[54] In addition, a recent study confirmed that co-workers who *witness* bullying suffer increased stress and job

51. NIOSH, UPDATE: MOST WORKPLACE BULLYING IS WORKER TO WORKER, EARLY FINDINGS FROM NIOSH STUDY SUGGEST (July 28, 2004), http://www.cdc.gov/niosh/updates/upd-07-28-04.html. The study defined bullying as "repeated intimidation, slandering, social isolation, or humiliation by one or more persons against another." *Id.* Workplace bullying has been viewed in some countries as an issue of occupational health and safety. *See, e.g.*, *infra* note 83 (Saskatchewan anti-bullying legislation amending health and safety code). In the U.K., the Hoel & Cooper survey was sponsored by the British Occupational Health and Safety Commission, which has been proactive in issuing guidelines for employers in handling workplace stress. See the discussion at Part II.E., *infra*. As explained by Professor Yamada, however, U.S. occupational health and safety regulations are not a good fit for tackling workplace bullying. *See* Yamada, *Workplace Bullying*, *supra* note 4, at 521–22.

52. *See generally* VITTORIO DI MARTINO, HELGE HOEL & CARY L. COOPER, PREVENTING VIOLENCE AND HARASSMENT IN THE WORKPLACE 61–68 (European Foundation for the Improvement of Living and Working Conditions 2003) (collating European and U.K. based studies examining costs to individuals, organizations, and society); Loraleigh Keashley & Joel H. Neuman, *Bullying In The Workplace: Its Impact And Management*, 8 EMP. RTS. & EMP. POL'Y J. 335, 339–54 (2004) (presenting findings on prevalence and costs of workplace bullying).

53. CHAPPELL & DI MARTINO, *supra* note 3, at 136; HOEL & COOPER, *supra* note 6, at 24–26.

54. Namie & Namie, *supra* note 6, at 320 (citing Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 EUR. J. WORK & ORG. PSYCHOL. 251 (1996)). The Namies reported that a 2003 Workplace Bullying Institute self-reporting survey revealed the following stress-related effects of bullying: severe anxiety (76 percent), disrupted sleep (71 percent), loss of concentration (71 percent), post-traumatic stress disorder (47 percent), clinical depression (39 percent), and panic attacks (32 percent). *Id.*

dissatisfaction.[55]

Costs to the employing enterprise include attrition,[56] outlay and time costs (materials and supervisor time in orienting replacements), absenteeism (including overtime costs incurred because of absenteeism), and profit lost during the replacement process.[57] Economist Wayne Cascio has estimated typical turnover costs for a bullied employee in the U.S. to be $50,000 per exiting employee across all jobs and industries.[58] Although difficult to quantify, healthcare costs must also be considered as both organizational and societal costs—stress caused by workplace bullying undoubtedly leads many workers to seek mental and physical health care.[59]

In the U.K., the 2003 Einarsen study calculated the cost of a "typical" case of workplace bullying in a British local authority as £28,000, including the costs of absence, replacement, and lost management time.[60] The Cascio and Einarsen studies could

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55. Lutgen-Sandvik, Tracy & Alberts, *supra* note 48, at 835–60. *See also* HOEL & COOPER, *supra* note 6, at 25 (U.K. study reporting effect of bullying on observers).

56. Bullied employees frequently respond to the situation by quitting. Pearson, Andersson & Porath, *supra* note 14, at 129–32. *See also* CASCIO, *supra* note 15, at 2–8. Cascio argues that although there are no generally acceptable accounting procedures for valuing human resources, all aspects of human resources can be measured and quantified, even morale. *Id.* (applying the general idea of costing human resources and describing how to estimates the dollar value of human resource programs in a number of key areas). Of particular relevance are the high, quantifiable, costs of employee turnover, *id.* at 26–57, hidden (but no less quantifiable) costs of absenteeism and sick leave, *id.* at 59–81, and the high cost of mismanaging human resources, *id.* at 83–105 ("[f]ailure to treat employees with respect, with dignity, and with procedures that are seen fair by all concerned parties can lead to a host of negative outcomes."). *Id.* at 83. The results of mismanagement may include tangible losses, such as cash payouts, as well as negative publicity. Cascio explains how these types of costs are all quantifiable. *See generally id.* Cascio's solution, in part, is adoption of Employee Assistance and Worksite Health-Promotion programs. *Id.* at 83.

57. *Id.* at 7–8.

58. *Id.* (estimating fully loaded costs of turnover at 1.5 to 2.5 times the salary paid for the job, or $50,000 per exiting employee across all jobs and industries in the U.S.).

59. For example, stress caused by perception of an unpleasant supervisor at work can have a clinically significant impact on workers' cardiovascular functioning. N. Wager, G. Fieldman & T. Hussey, *The Effect on Ambulatory Blood Pressure of Working Under Favourably and Unfavourably Perceived Supervisors*, Occup. Envtl. Med. 60:468-74 (2003), http://www.occenvmed.com. Since cardiovascular disease is a primary cause of premature death in the U.S., savings in health care costs may be realized from a reduction in stress caused by workplace bullying.

60. EINARSEN, HOEL, ZAPF & COOPER, *supra* note 3, at 203–18 (cited in CHAPPELL & DI MARTINO, *supra* note 3, at 140–41). Interestingly, this amount is in line with Cascio's estimate of $50,000 per employee turnover. CASCIO, *supra* note 15, at 7–8.

have a marked impact on organizational self-regulation because organizations may be more receptive to consideration of local cost-data than countrywide data:

> Costing at the organisation level was seen as crucial. Country-wide statistics (e.g. 1.8m days lost to sickness absence in 2004/5 . . .) were insufficient to focus effort within the organisation. A rubric to estimate local costs would be helpful.[61]

In sum, workplace bullying in the U.K. and the U.S. is a recognizable problem impacting anywhere from ten percent to forty-four percent of workers and costing employers potentially millions of dollars per year. Thus, there is a wealth of data supporting the need to tackle this workplace problem, and some countries have responded to the challenge.

B. WORKPLACE BULLYING LAWS IN THE UNITED STATES, EUROPE, AND CANADA

1. United States

U.S. law currently provides no specific recourse for the bullied employee at either the state or federal level.[62] In his ground-breaking article, *The Phenomena of 'Workplace Bullying' and the Need for a Status-Blind Hostile Work Environment Protection*, Professor David Yamada explored the deficiencies in existing legal theories to combat workplace bullying, including Title VII hostile work environment, the National Labor Relations Act, the Occupational Safety and Heath Act, and the Americans with Disabilities Act, as well as the common law doctrine of intentional infliction of emotional distress.[63]

Professor Yamada noted, for example, that federal and state law prohibits status-based harassment based on immutable characteristics such as race, sex, national origin, religion, disability, or age.[64] A victim of workplace bullying may have a cause of action if the bullying amounts to cognizable harassment based on one of these protected characteristics.[65] Bullying

61. Charlotte Rayner & Karen McIvor, *Report to the Dignity at Work Project Steering Committee, Research Findings* (University of Portsmouth Business School May 2006), at 11, *available at* http://www.port.ac.uk/research/workplacebullying/dignityatworkresearch/filetodownload,52783,en.pdf.

62. *See* Yamada, *Workplace Bullying*, *supra* note 4, at 493–522.

63. *Id.*

64. *Id.* at 509.

65. *Id.* at 509–11.

differs from status-based harassment if the workplace bully does not target his or her victim based on the victim's race or sex, or other protected characteristics, or has targeted the victim for a combination of reasons. Consequently, federal and state statutory anti-discrimination and anti-harassment laws do not protect victims of workplace bullying in those cases.[66]

Similarly, tort causes of action such as intentional infliction of emotional distress are woefully inadequate. This is partly due to the high threshold requirement of "outrageousness,"[67] but also because liability does not typically extend to the employer under either traditional *respondeat superior* or more recently-developed negligent hire theories.

Thus, existing U.S. laws do not adequately protect the bullied employee, leading Professor Yamada to propose the enactment of a new statutory cause of action embodied in the Healthy Workplace Bill. The bill has been introduced but has either died or languishes in legislatures in California,[68] Missouri,[69] Kansas,[70] Montana,[71] Washington,[72] Hawaii,[73] Oklahoma,[74] Oregon,[75] and New Jersey.[76] Although some legislatures have proposed the full text of the Health Workplace Bill, others have taken a different route, requesting the legislature to appropriate funds to conduct prevalence studies.[77]

66. *Id.* at 509–14 (detailing Title VII hostile work environment doctrine and the problem of "disaggregation" of sexual conduct from other types of gender-based mistreatment that courts typically do not find to be actionable).

67. *Id.* at 493–509. There may also be free speech implications for any proscription against so-called speaking torts, but these concerns are beyond the scope of this article. *See, e.g.*, Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?*, 35 GA. J. INT'L & COMP. L. 53, 89–98 (2006) (reviewing freedom of speech problems raised by status-blind mobbing laws); John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 554–57 (2006) (describing U.S. jurisprudential reluctance to interfere with free speech rights unless speech would lead to violence and comparing U.S. to European approach which has more dignitarian concerns).

68. Assemb. 1582, 2003-2004 Reg. Sess., No. 29 (Cal. 2003).

69. H.B. 1187, 93rd Gen. Assemb., 2d Sess. (Mo. 2006).

70. H.B. 2990, 2006 Leg., No. 36 (Kan. 2006).

71. H.B. 213, 60th Leg., Reg. Sess. (Mont. 2007).

72. H.B. 2142, 2005 Leg. (Wash. 2005), S.B. 6622, 2005 Leg. (Wash. 2005).

73. *See* http://workplacebullyinglaw.org/states/legis-hi.html (last visited Mar. 26, 2008).

74. A current version of the bill, HB 1467, was referred to a new committee, Economic Development and Financial Services on February 6, 2007.

75. S.B. 1035, 74th Leg. Assemb., Reg. Sess. (Or. 2007).

76. A.B. 3590, 212th Leg. (N.J. 2006).

77. *See* H.B. 2142 (Wash. 2005); H.B. 1850, 185th Sess. (Mass. 2007); S.B. 2715, 2007-2008 Assemb., Reg. Sess. (N.Y. 2007); A.B. 4291, 2007-2008 Assemb.,

Versions of the bills are still active in Vermont, Connecticut, Washington, and New York.[78]

At the local level, city governments appear to be more proactive. For example, the City and County of San Francisco recently adopted a resolution requesting the Department of Human Resources to recognize the detrimental impact of workplace bullying on creating a safe and productive workplace for all employees.[79]

It should be noted that some scholars have argued that tort law is better suited than new legislation for the development of a new status-blind bullying law.[80] Assaults on dignity are arguably the domain of tort law, particularly intentional infliction of emotional distress. Nevertheless, the tort of outrage has remained static and has historically been of limited value in redressing employment abuses, in part due to the enduring

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Reg. Sess. (N.Y. 2007). The Massachusetts bill contained a provision requiring employers with 50 or more employees to develop internal policies to define psychological harassment and prevent its occurrence.

78. *See* H.B. 548, 2007-2008 Leg., Reg. Sess. (Vt. 2007); S.B. 312, 2007-2008 Leg., Reg. Sess. (Vt. 2007) (House Bill 548 will be heard in the 2007-2008 legislative session); S.B. 60, 2008 Gen. Assemb., Feb. Sess. (Conn. 2008); S.B. 2715, 2007–2008 Assemb., Reg. Sess. (N.Y. 2007); A.B. 4291, 2007–2008 Assemb., Reg. Sess. (N.Y. 2007). For updated information on all state workplace bullying bills, see the Legislative Campaign website of the Workplace Bullying Institute. Healthy Workplace Bill Legislative Activity – History at a Glance, http://workplacebullyinglaw.org/hwbgrid.html (last visited Mar. 14, 2008).

79. City and County of San Francisco Resolution on Anti-Bullying (Jan. 24, 2007) (on file with author), *available at* http://www.bullyfreeworkplace.org/id18.html (last visited Mar. 2, 2008); *see also* City of Berkeley Proclamation Regarding Workplace Bullying (Jan. 2006) (on file with author), *available at* http://www.bullyfreeworkplace.org/id17.html (last visited Mar. 2, 2008).

80. *See* William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 107 (2003) (opposing new legislation such as that proposed by Professor Yamada, arguing that the common law is the appropriate tool for developing new torts such as bullying); *see also* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM & MARY L. REV. 2115, 2122–24 (2007) (exploring whether discriminatory and harassing conduct in the workplace should be considered outrageous conduct, actionable under the tort of intentional infliction of emotional distress, and advocating limited migration of norms from civil rights into tort law, but primarily addressing gender and race-based harassment); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 5 (1988) (exploring the possibility of channeling existing cultural resistance against supervisory abuse by low-paid minority workers into tort law and creating a "worker-centric" tort of outrage). *But see* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 391 (1994) (arguing against the "tortification" of employment law as an ineffective tool to vindicate workers' rights, including harassment).

deference to the at-will rule and the reluctance to interfere with employer prerogative in dealing with employment issues.[81] Moreover, use of existing tort remedies might not be an option in states that provide that workers' compensation is the exclusive remedy for intentional emotional distress injuries.[82]

While acknowledging the persuasive force of both these positions, the choice between new legislation or common law is not an either/or proposition. New legislation and common law can and do develop alongside each other. Indeed, as evidenced by the U.K. experience, a multi-pronged effort has the best likelihood of success. In the U.K., for example, tort law was developing toward recognition of a new common law of generalized harassment until it was overtaken by developments under the PHA and the Dignity at Work campaign.

2. *Europe and Canada*

In contrast to the woeful lack of legal remedies in the U.S., workplace bullying is actionable in parts of Europe and Canada. For example, France and Sweden have enacted legislation to address status-blind workplace harassment.[83] As explained by

81. *But see* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 45 cmts. d & m (stating that "[n]othing in this Restatement provides any categorical limitation to claims arising in the workplace") (Tentative Draft No. 6, 2006) (cited in Chamallas, *supra* note 80, at 2181–82).

82. *See* Yamada, *Workplace Bullying*, *supra* note 4, at 506–07 (describing the manner in which workers' compensation statutes with exclusivity provisions further limit relief for bullying victims under existing tort laws). Negligence torts might survive these statutes but have been traditionally disfavored by the courts in work-related claims for much the same reasons as intentional infliction of emotional distress claims.

83. Swedish National Board of Occupational Safety and Health: Ordinance (AFS 1993:2) on Violence and Menaces in the Working Environment, Jan. 14, 1993 and Ordinance (AFS 1993:17) on Victimization at Work, Sept. 21, 1993; French Social Modernization Law (2002), C. Trav. Arts. L. 122-46 to L. 122-154, *available at* www.legifrance.gouv.fr. Additionally, in 2004, Quebec outlawed psychological harassment in the workplace through amendments to its Labour Standards Act. *See* R.S.Q. ch. N-1 (1977). Saskatchewan became the second Canadian province to outlaw workplace bullying, by amending the Occupational Health and Safety Act to expand the definition of harassment. *See* Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007); *see also* Bill 29, Occupational Health and Safety Amendment Act (Harassment and Violence), 2007 (bill to amend Ontario's health and safety laws to add workplace harassment protections. Bill 29 passed a first reading in December 2007), *available at* http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1938 (last visited Feb. 3, 2008); Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, Federal Labour Standards Review, 2006, *available at* http://ssrn.com/abstract=953049 (recommendations by appointed commission for

some comparative scholars, however, European legislation is based on a "dignity" paradigm that recognizes harassment as an assault on human dignity.[84] Moreover, European nations that originally imported the concept of American sexual harassment are increasingly moving away from the concept of harassment as a form of discrimination, and embracing the concept of harassment as an assault on the *dignity* of not just women, but all workers.[85]

"Dignity" rights are frequently referenced in Europe but rarely defined.[86] Generally, the European concept of "dignity"

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amending Canadian Labor Code for federal workers, including a recommendation that "psychological harassment (bullying) should be dealt with as part of a broader program of violence prevention under Part II of the *Canada Labour Code*, which deals with health and safety in the workplace").

84. *See* Guerrero, *supra* note 5, at 487, 491; Anita Bernstein, *Law, Culture, and Harassment*, 142 PENN. L. REV. 1227, 1234–39 (1994) (collecting and analyzing European Union efforts to treat sexual harassment as violations of individual dignity); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 260–67 (2003) (analyzing transformation of continental harassment law from the American discrimination paradigm to the continental dignity paradigm); *see also* Knechtle, *supra* note 67, at 559–64 (describing the lack of tradition in U.S. jurisprudence for recognizing dignity as a basis to interpret or guarantee rights in the context of free speech rights); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L. J. 1279, 1285 (2000) (tracing roots of French and German dignity laws to notions of honor and civility and comparing to the American law's lack of such a tradition in explaining resistance to developing "civility" laws).

85. Bernstein, *supra* note 84, at 1234–39; Friedman & Whitman, *supra* note 84, at 260–67; *see also* James Q. Whitman, *Two Western Cultures Of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1160–64 (2004) (exploring different political and social ideals behind conflicting European and American treatment of privacy issues, explaining that European privacy norms are founded on European ideas of personal honor and dignity versus an American law approach of protecting primarily a liberty interest).

86. For example, although the European Union entitled its sexual harassment recommendations "On the Protection of the Dignity of Women and Men at Work," neither the recommendation nor the council declaration defined the term "dignity." *See* Commission Recommendation 92/131, 1991 O.J. (L 049) 1 (EC), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992H0131&model=guichett; Council Declaration92/C 27/01, On the Implementation of the Commission Recommendation on the Protection of the Dignity of Women and Men at Work, 1992 O.J. (C 027) 1, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992Y0204(01)&model=guichett [hereinafter collectively *EU Recommendations*]. The references to "dignity" were either directly referencing sexual harassment conduct, or loosely seem to have referred to respect for individual integrity. *Id.* For a discussion of the development of the European Commission Code, *see* Bernstein, *supra* note 84, at 1234–39 (describing European Union initiatives on sexual harassment).

encapsulates the modest ideal of respect for the individual and freedom from abuse.[87] It has also been described as "being shown deference and respect in everyday interaction."[88] Dignity in the workplace, or the "dignitarian workplace," is simply a continuation of this concern with human dignity in all its forms.[89]

Comparative scholars writing in this area are pessimistic that the dignity paradigm can serve as a model for the U.S. because U.S. workplace harassment laws, and history, are based on remedying past status-based discrimination.[90] The picture may not be so bleak; a shift to a dignity paradigm has arguably played out in U.K. workplace bullying law, as evidenced by the 2002 debates on the Dignity at Work Bill discussed in Part II, *infra*. This is significant because, like the U.S., the U.K. does not have a tradition of basing harassment law on the concept of protecting individual dignity.[91]

In the U.K., the term "dignity at work" has become part of the lexicon of workplace bullying but is also largely undefined and is generally used to refer to freedom from workplace bullying or harassment. For example, the aim of the Dignity at

87. *Id.* at 1262–64 (contrasting the European model with the American view of sexual harassment and its links to equality and discrimination).

88. Friedman & Whitman, *supra* note 84, at 264 (explaining that, to Europeans, a violation of dignity should be legally actionable).

89. Parkes, *supra* note 5, at 448–53; Yuen, *supra* note 5, at 647–48; *see also* Friedman & Whitman, *supra* note 84, at 267.

90. Bernstein, *supra* note 84, at 1234–39; Friedman & Whitman, *supra* note 84, at 267.

91. Linda Clarke, *Sexual Harassment Law in the United States, the United Kingdom, and the European Union: Discriminatory Wrongs and Dignitary Harms*, COMMON L. WORLD REV. 36 2 (79) (2007) (explaining that sexual harassment law in the United States and the United Kingdom developed within the framework of sex discrimination law, and contrasting to continental Europe conceptualization as an issue of human dignity); *cf.* ROBERT W. FULLER, SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK (2003); ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY (2006) (hereinafter *The Politics of Dignity*). For Fuller, "rankism" is an abuse of power and is the root cause of most forms of indignity, injustice, and unfairness, including workplace bullying. Fuller's goal is "to place[] the goal of universal human dignity in the context of contemporary movements for civil rights." Robert W. Fuller, *Rankism: A Social Disorder*, http://www.breakingranks.net/weblog/rankism (last visited Mar. 2, 2008). *See also* Yamada, *supra* note 32, at 324 (reviewing Fuller's 2006 book, *The Politics of Dignity*, and prescribing additional practical solutions towards a comprehensive dignitarian legal agenda for the workplace). Since it is unlikely that U.S. employers, legislatures, or policymakers will embrace Fuller's dignity concept any time soon, this article has the more modest goal of describing the U.K. model and distilling any useful lessons for bolstering the current efforts of anti-bullying advocates such as Professor Yamada and the Bullying Institute.

Work Project, discussed in Part II, is to "spur on cultural change, to develop a code of conduct where respect for individuals is regarded as integral to the behaviour of employees and managers."[92] Thus, a dignitarian workplace can be described as a work environment where everyone is treated with respect.[93] Because its efforts were not originally based on a "dignity" paradigm, the United Kingdom provides an example of the combination of successful legislation and non-legislative efforts to combat workplace bullying that might be a model for the United States.[94]

3. European Union and International Labor Organization Directives Addressing Workplace Bullying

The U.K. is distinct from the U.S. by virtue of its membership in the European Union and because it is a signatory to numerous conventions and recommendations of the International Labor Organization (ILO).[95] Although both of these organizations have issued reports and directives on workplace bullying, neither has issued any directives binding on the U.K. or the U.S. Although there are a number of conventions addressing sexual and racial harassment and general rights to dignity, the ILO, for example, has not issued a convention or recommendation expressly addressing generalized workplace bullying.[96]

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92. Dignity at Work Partnership, *Dignity – What and Why?*, http://www.dignityatwork.org/the-project/issues/ (last visited Mar. 2, 2008).

93. In Fuller's terms, a dignitarian workplace is free from "rankism," where everyone is free to challenge assertions or conditions. This vision includes equitable compensation ratios, transparent decision-making, accountability and responsibility, and the elimination of unnecessary hierarchy. Yamada, *supra* note 32, at 310 (citing Fuller).

94. The emerging "diginitarian workplace" movement in the United States embraces these same ideals and, in the work of Professor Yamada, necessarily includes an agenda for legal change. Yamada, *supra* note 32, at 316–24 (reviewing Fuller's 2006 book, THE POLITICS OF DIGNITY, and prescribing additional practical solutions towards a comprehensive dignitarian legal agenda for the workplace, including bullying legislation but also extending to job security, collective bargaining rights, freedom of speech).

95. The International Labor Organization (ILO) is an arm of the United Nations and promulgates international standards by adopting conventions and recommendations, which ILO member states ratify. *See* CHAPPELL & DI MARTINO, *supra* note 3, at 266.

96. In 2004, the ILO issued a "code of practice for workplace violence in services sectors and measures to combat this phenomenon." International Labor Organisation, Programme on Safety & Health at Work and the Environment (SafeWork) (2004), http://www.ilo.org/public/english/protection/safework/violence/

Similarly, European Union directives do not directly address workplace bullying; the European Union's position is that existing directives cover "moral harassment."[97] In April 2007, however, the European Union took a step forward when the EU Employment Commissioner signed the "Framework Agreement on Harassment and Violence at Work,"[98] apparently precipitated by new reports on the increasing incidence of workplace bullying and its associated costs.[99] The agreement was signed by the EU Employment Commissioner, European Trade Union Confederation, and high-profile businesses. The agreement's aim is to tackle workplace bullying by "increas [ing] the awareness and understanding of employers, workers and their representatives of workplace harassment and violence, provide employers, workers and their representatives at all levels with an action-oriented framework to identify, prevent and manage problems of harassment and violence at work."[100] The Agreement binds the signatories and "invites" member organizations to implement the agreement by 2010,[101] including the adoption of a statement that harassment and violence will not be tolerated and implementation of internal complaint and resolution procedures.[102]

II. HARASSMENT LAW IN GREAT BRITAIN: STATUTES, POLICIES, AND CASES

A. INTRODUCTION

As noted in Part I, *supra*, the U.K. took the first steps on the path toward tackling workplace bullying in 1997. The U.K. now has a rich experience of addressing the problem through

index.htm. For a full description of ILO conventions, recommendations, codes, and other directives and initiatives, *see* CHAPPELL & DI MARTINO, *supra* note 3, at 259–72.

97. *See* Guerrero, *supra* note 5, at 493–94.

98. European Social Dialogue, Framework Agreement on Violence and Harassment at Work (Apr. 26, 2007), http://www.ueapme.com/docs/joint_position/2007_Framework_Agreement_Harassment_and_Violence_at_Work.pdf (last visited Mar. 2, 2008) [hereinafter *EU Framework Agreement*].

99. European Union Commission, Framework Agreement on Harassment and Violence at Work, http://www.eurofound.europa.eu/eiro/2007/05/articles/eu0705019i.html (last visited Mar. 2, 2008).

100. *EU Framework Agreement*, *supra* note 98, at 1.

101. *Id.* at 3.

102. *Id.* at 2.

various players—the government, trade unions, and employers. The U.K. is a useful comparator for the U.S. in this particular context because both countries lack a tradition of basing harassment law on a dignity paradigm.[103]

Despite some political and socio-economic differences between the U.S. and the U.K., the U.K. is a useful comparator for other, broader reasons. First, the two countries share a democratic form of government with similar political agendas and socio-economic structures. In addition, an argument can be advanced that today we live in a global industrial village where comparative labor law is particularly relevant. The growth of transnational companies and the resultant inter-connectedness of labor markets have led academics, legislatures, and policy-makers to look to the laws of other countries, not only to explore and ensure compliance with different labor laws,[104] but as Clyde Summers and Steven Willborn have recently observed, the law of other nations can play an important role in shaping U.S. employment law.[105]

Any comparison of the U.K. and the U.S., however, involves some appreciation of the underlying differences and similarities in their respective legal systems, culture, and politics. A few observations regarding the legal system, political climate, and union activity in the 1990s will serve as a backdrop to the present discussion.

1. British Legal System

Because the American legal system was based on the English common law system, there are more similarities than differences between them. English law is derived from statutes

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103. *See* Part I.B.2, *supra*.

104. Steven L. Willborn, *Onward and Upward: The Next Twenty-Five Years of Comparative Labor Law Scholarship*, 25 COMP. LAB. L. & POL'Y J 183, 192 (2005) (explaining why comparative employment law is "an essential component of effective and responsible law-making within each country" and arguing that harmonization of laws is one way to address cross-country competitive effects).

105. *See* Clyde Summers, *Comparative Labor and Employment Law and Policy in the Next Quarter Century: Comparative Labor Law in America: Its Foibles, Functions, and Future*, 25 COMP. LAB. L. & POL'Y J. 115, 124–26 (2005) (calling on comparative labor lawyers to not simply describe other systems but to ask the crucial question why the systems are different and recognize the potential for comparative law in evaluating and developing each country's own law and practices); Willborn, *supra* note 104, at 195–96 (predicting a "bright future" for comparative labor law).

and treaties, case law, and the laws of the European Union.[106] Common law develops in much the same way in both countries. Similarly, the passage of a bill through Parliament is analogous to the U.S. congressional system. In the U.K., a statute begins life either as a private bill (affecting individuals or companies) or public bill (affecting the general public),[107] originating either in the House of Commons or the House of Lords.[108] After being introduced, a bill is read twice with debate, and if passed, the bill moves to the other House. If a bill passes both houses, it receives Royal Assent.[109] A statute is subject to judicial application and interpretation and, as in the U.S., courts can take a textual or purposive approach. Despite these common roots, the U.K.'s participation in the European Union has arguably moved the U.K. away from a common law system and into alignment with the continental civil code system.[110]

2. British Political Climate 1997-2007

1997 was a significant year in British politics. The first Labor government in eighteen years was elected, with Tony Blair taking office in May 1997.[111] Tony Blair's "New Labor" introduced a "Third Way" between the Thatcher legacy of free market individualism, which resisted state intervention in the labor market,[112] and the Old Labor's Keynesian approach,[113] marked by regulation of the labor market. New Labor's "Third

106. GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 55–56 (6th ed. 2003).

107. A *private bill* is not to be confused with a *private member's bill*, introduced by a backbencher (as opposed to a government bill, which is introduced by a government minister).

108. For information on the U.K. Parliamentary process, visit the U.K. Parliament website. The United Kingdom Parliament, http://www.parliament.uk/about/how/laws.cfm (last visited Mar. 2, 2008).

109. Here the U.K. system departs from the U.S. Although the Presidential signature is roughly an equivalent, the monarchy has no veto power and has not refused royal assent since 1707. Royal Assent, http://www.parliament.uk/about/how/laws/stages/royal.cfm (last visited Mar. 2, 2008).

110. Nevertheless, international labor directives and codes appear to have had only a marginal influence on the development of U.K. anti-bullying law.

111. 10 Downing Street, PM's in History, Tony Blair, http://www.number10.gov.uk/output/Page12006.asp (last visited Mar. 2, 2008).

112. JOHN DEARLOVE & PETER SAUNDERS, INTRODUCTION TO BRITISH POLITICS 429–34 (3d ed. Polity Press 2000). During the 1980s and 1990s, for example, the United Kingdom resisted extension of European Union employment protection rights by opting out of the Social Chapter to the Maastricht Treaty which Tony Blair signed in 1997. *See infra* note 117, and accompanying text.

113. *See* DEARLOVE & SAUNDERS, *supra* note 112, at 504–05.

Way" incorporated values such as equality and protection of the vulnerable and merged socialist principles, including statutory rights for workers, with a flexible labor market approach.[114]

In accordance with these values, the Labor Party included a commitment to address workplace bullying in its election manifesto:

> We are committed to working with managers and employees to reduce the problems of bullying and violence in the workplace. As a major employer [i.e., a public sector employer] our ambition is to improve the quality of work for our employees—helping recruitment and retention.[115]

New Labor made good on its promise immediately upon election by signing the European Union Charter of the Fundamental Social Rights of Workers, commonly known as the Social Charter.[116] The Social Charter does not specifically reference workplace bullying but "contains *moral obligations* to guarantee the respect of certain social rights . . . related to labour market, vocational training, equal opportunities and the working environment."[117]

Another political development relevant to workplace bullying law occurred in 2002, when New Labor introduced new employment regulations. In the U.K., aggrieved employees may pursue their employment disputes through a specialized Employment Tribunal.[118] As part of a new Employment Act in

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114. *Id.* at 429–34; *see also* Anna Maddalena, *Workplace Bullying, Stress, Employment Law and You*, http://www.workplacebullying.co.uk/Annamad.pdf (last visited Mar. 2, 2008) (masters thesis examining U.K. state social partnership policies to combat bullying and describing Conservative and New Labor approaches to labor market regulation).

115. 633 PARL. DEB., H.L. (6th ser.) (2002) 345, *available at* http://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo020327/index/20327-x.htm (last visited Mar. 2, 2008).

116. European Union Charter of the Fundamental Social Rights of Workers, *available at* http://www.historiasiglo20.org/europe/amsterdam.htm (last visited Mar. 2, 2008).

117. The Social Charter was annexed to the Treaty of Maastricht and was included in the 1997 Treaty of Amsterdam. *Id.* For a thorough description of the history and impact of the Social Charter, see Donald C. Dowling, Jr., *From the Social Charter to the Social Action Program 1995-1997: European Union Employment Law Comes Alive*, 29 CORNELL INT'L L.J. 43 (1996).

118. Employment Protection (Consolidation) Act, 1978, c. 44, § 128, sched. 9 (Eng.). In the absence of a contract or illegal act, American courts defer to the at-will employment rule that an employer may discharge an employee at any time, for any reason or for no reason. In contrast, Britain (and most other European countries) follow a good-cause default rule that requires the employer have good cause to discharge an employee—lack of good cause entitles the employee to lodge a claim of unfair dismissal with the Employment Tribunal. *See* Joseph M. Kelly &

2002, the government introduced standard internal procedures for employees to follow before bringing a claim before the Tribunal. The procedures deal with dismissal, discipline, and grievance issues.[119] These new regulations factored into the government's reluctance to enact additional legislation one year later in the form of the Dignity at Work Bill.[120] As one reason for shelving the Dignity at Work Bill in 2003, the government cited the burden on employers of implementing the 2002 regulations.[121]

3. The Role and Influence of British Trade Unions

Although the Labor party is the traditional ally of the working class, it was unable to halt a decline in union density which began under the Thatcher government. The decline in the U.K. mirrors the decline in the U.S. and other parts of Europe, although overall membership rates are lower in the U.S. This may be due to higher membership in the public

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Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 120–29 (1996) (describing British employment tribunals). Employment tribunals hear a wide variety of employment law claims, including complaints of unfair dismissal, wage claims, discrimination, breach of contract, redundancy payments; claims vary from "simple wage claims worth less than £100 to very complex discrimination cases with unlimited damages." DEPARTMENT OF TRADE & INDUSTRY, A REVIEW OF EMPLOYMENT DISPUTE RESOLUTION IN GREAT BRITAIN, REPORT, 2007, H.C. 07/755, at 9 & 14, n.10, [hereinafter Gibbons Report], *available at* http://www.dti.gov.uk/files/file38516.pdf (last visited Mar. 2, 2008). In March 2007, the government completed a review of the British employment dispute system and issued a consultation document setting forth a number of recommendations, including repeal of the existing legislation governing tribunals, simplification of existing employment laws, and introduction of a new, informal, dispute resolution process for simple claims such as wage disputes. *Id.*

119. Employment Act, 2002, c. 22, sched. 2 (Eng.); Employment Act 2002 (Dispute Resolution) Regulations, 2004, S.I. 2004/752 (U.K.). Employers and employees are required to follow a minimum "three-step procedure" involving: a statement of the grounds for action or grievance, a meeting between the parties, and the right to appeal. Exhaustion of these internal proceedings is mandatory before bringing a claim before the Employment Tribunal.

120. *See* Part II.C., *infra*.

121. Claims brought under the PHA are not referred to the Employment Tribunal because the PHA is an anti-stalking law, not an employment law. Further, regulations in the Employment Act of 2002 expressly provide that they do not apply where one party has subjected the other to harassment. Of course, the parties may dispute whether the conduct constitutes harassment, as opposed to other employment-related conduct that would be referred to the Employment Tribunal Service. *See* Gibbons Report, *supra* note 118, at 8–9 (identifying this jurisdictional overlap as one problem with the increasingly complex Tribunal system).

sector, which is larger in Europe. Rates from 1970 to 2003 declined from 44.8% to 29.3% in the U.K. and from 23.5% in 1970 to 12.4% in 2003 in the U.S.[122]

Despite these declines, trade unions have played an important role in the U.K. both by placing workplace bullying on the legislative agenda and forming partnerships with the government and employers. Trade unions have not been similarly active in the U.S. and their engagement could be a step in the right direction.

The developments described above indicate that by 1997, the British government was both aware of the problem of workplace bullying and receptive to solutions. The lines of communication were open and a trade union—Amicus—entered the dialogue. At the same time, developments in the law placed workplace bullying on the agenda for employers.

B. U.K. ANTI-BULLYING LAW

The mid-1990s marked the beginning of several significant common law and statutory developments in the U.K. The first was a burgeoning recognition of a generalized tort of harassment, which was overtaken by the enactment of the PHA, and the simultaneous development of the Dignity at Work movement. This section describes these developments with a view to drawing any comparisons with U.S. law. For example, although the U.S. has not seen any common law developments equivalent to the U.K., all fifty states have anti-stalking laws, some of which have civil provisions. Part III will more fully discuss the potential for utilizing these laws to provide legal relief for bullied workers, as well as other lessons.

1. Judicial Recognition of a New Civil Tort of Harassment

As noted above, bullying victims in the U.K. found support for their claims in the courts beginning in the 1990s with the emergence of a new common law tort of general harassment.[123] Prior to the 1995 landmark case of *Burris v. Azadani*,[124] there

122. Jelle Visser, *Union Membership in 24 Countries*, 39 MONTHLY LAB. REV., Jan. 2006, at 38, 43, *in* SAMUEL ESTREICHER, GLOBAL ISSUES IN LABOR LAW 175 (2007).

123. TIMOTHY LAWSON-CRUTTENDON & NEIL ADDISON, BLACKSTONE'S GUIDE TO THE PROTECTION FROM HARASSMENT ACT 3 (1997).

124. Burris v. Azadani, (1995) 1 WLR 1372 (Eng.) (upholding injunction against defendant who was stalking a woman and her children).

did not appear to be a recognized tort of this type. Indeed the judiciary was apparently opposed to the creation of a new tort.[125] However, the Court of Appeals in *Burris v. Azadani* stated in dicta that harassment is a tort.[126] Although the Court of Appeals subsequently issued conflicting decisions regarding the emergence of a new common law tort,[127] British legal experts nevertheless recognize that several important principles emerged from that judgment, including the principle that civil courts would restrain behavior that was not criminally actionable in order to protect a plaintiff's "legitimate interests" in freedom from harassment.[128]

Alongside these changes in the civil law of harassment, the criminal law of harassment also saw several significant developments, including the judicial recognition of the doctrine of *psychological* assault, telephone assault, and criminal public nuisance.[129] These doctrines arose in the context of stalking behavior that had not been previously criminally sanctionable. Further, in the 1980s and 1990s, Parliament had passed several

125. LAWSON-CRUTTENDON & ADDISON, *supra* note 123, at 3 (citing comments of Sir Peter Gibson in Khorasandjian v. Bush, [1993] 3 Eng. Rep. (Civ) 669, 683 ("there is no tort of harassment"); 1992 Law Commission Report No. 207, ¶ 3.8 (stating that it did not wish to create a new tort of harassment or molestation)).

126. *Burris*, 1 WLR 1372 (upholding injunction against defendant who was stalking a woman and her children).

127. *See* Wong v. Parkside Health NHS Trust & ANR, [2001] EWCA (Civ.) 1721 (Eng.). The claimant Wong sued co-workers and her employers for a campaign of workplace harassment occurring in 1995, prior to the enactment of a statutory cause of action, the PHA, which was not retroactive. The court was required to consider whether there was a tort of harassment at common law going beyond the tort of intentional infliction of harm, which required actual bodily harm or psychiatric illness. The court analyzed the various authorities for and against the existence of the new tort but concluded it had not developed by 1995 and therefore dismissed Wong's claims, relying heavily on judicial commentary that the development of the tort was best left to Parliament and evidencing a general distrust of back-door attempts to shoe-horn a new tort into existing torts to cover the behavior. *Id.* (citing comments by Lords Goff and Hoffmann in Hunter v. Canary Wharf, [1997] 2 WLR 684 (Eng.)); *cf.* Majrowski v. Guy's and St. Thomas's NHS Trust, [2005] EWCA (Civ) 251, at ¶ 41 (Eng.) (applying PHA but noting that a bullied employee may have a cause of action at common law for "victimi[z]ation and/or harassment against his employer" under theories of either negligent failure to protect him against harassment causing him physical *or psychiatric* injury, or by establishing vicarious liability for an employee's acts of harassment committed in the course of employment causing such injury).

128. LAWSON-CRUTTENDON & ADDISON, *supra* note 123, at app. 2.

129. *Id.* at 4 (citing Regina v. Bristow, TIMES (London), July 30, 1996; Regina v. Ireland, TIMES (London), May 22, 1996; Regina v. Johnston, TIMES (London), May 22, 1996).

anti-harassment criminal laws.[130] These new criminal laws, however, required a showing of intentional wrongdoing—which is difficult to establish for bullying conduct, thus limiting the criminal laws' utility even with the recognition of psychological harm.[131]

Thus, by 1997, the U.K. legal system was primed for a new common law tort governing harassment. The debate over whether the *Burris v. Azadani* decision had in fact created the new tort was, however, mooted by a new statutory cause of action—the PHA, which became effective on June 16, 1997.[132]

2. *The Protection from Harassment Act*

The PHA created a new statutory civil tort and two criminal offenses, and authorizes civil courts to award damages and issue injunctions in harassment cases.[133] The PHA is sometimes referred to as the "Stalker's Act" but the law covers all types of harassment, not just stalking, and not just harassment in the workplace. The PHA has been used to confront many types of harassment, including workplace harassment, racial harassment, domestic violence, and even civil protests.[134]

The PHA creates both criminal and civil liability where a person "pursue[s] a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to

130. *Id.* at 5–6 (citations omitted).

131. *Id.* In contrast, there is no intent requirement under the Protection from Harassment Act, discussed *infra*.

132. Protection from Harassment Act, 1997, c. 40, § 1 (Eng.). Note that the PHA covers England and Wales. Scotland has a comparable law. For ease of reference, this article will refer to the PHA as a U.K. law. Some Scottish lawyers have reacted that Scottish law already provided a remedy for harassment and that the English solution was unnecessary. *See, e.g.*, 287 PARL. DEB. H.C. (6th ser.) (1996) 971 (Hon. Helen Liddell's references to comments by Professor Alan Miller of Strathclyde University, that the Bill did not add to existing civil tort liabilities); *see also* 287 PARL. DEB. H.C. (6th ser.) (1996) 976 (comments made by Lord James Douglas-Hamilton, explaining that the types of stalking discussed in the House were actionable under the common law criminal offense of breach of the peace).

133. It applies to Great Britain, making special provisions for Scotland. PHA, 1997, c. 40, §§ 8–11. It does not apply to Northern Ireland, *id.* § 14 (3), unless extended by Order in Council. *Id.* § 13.

134. Enjoining protesters from harassing a mink-farmer, Mr. Justice Collins recognized: "[w]hatever may have been the purpose behind the Act, its words are clear, and it can cover harassment of any sort." Dir. of Pub. Prosecutions v. Moseley, Selvanayagam, and Woodling, [1999] EWHC Admin 528, *available at* http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/1999/528.html (last visited Mar. 2, 2008).

know amounts to harassment of another."[135] The PHA was directed at the perpetrator of the alleged harassment, not employers, but the British courts and employment tribunals have subsequently interpreted the PHA to impute to employers liability for their employees' bullying behavior.[136] As a result, plaintiff employees are increasingly utilizing the PHA to seek redress, and as illustrated by the case of Helen Green, employees can recover large monetary awards against the employer.

a. Background to the PHA

Commentators generally agree that the gap in the criminal and civil law addressing stalking was brought into focus by four high-profile acquittals that occurred during the passage of the Bill in 1996.[137] In each case, the court found that although the defendants had engaged in a pattern of compulsive stalking, they lacked sufficient intent.[138] The acquittals threw into sharp relief the fact that the criminal law was inadequate to deal with stalking-type behavior. At the same time, courts and commentators were recognizing the psychological harm that harassment can cause and the common law was fashioning a patch-work solution in the form of new civil and criminal doctrines, discussed in Part II.B.1.[139]

Another major impetus behind the PHA was the National Anti-Stalking and Harassment Campaign (NASH—now called the National Association for the Support of Victims of Stalking and Harassment). Ironically, NASH imported the term "stalking" from American usage and attempted to track U.S. state anti-stalking legislation.[140] NASH's focus was on the

135. Protection from Harassment Act (PHA) § 1 (1).

136. Majrowski v. Guy's and St. Thomas's NHS Trust, 2005 EWCA (Civ) 251 (Eng.).

137. *See, e.g.*, LAWSON-CRUTTENDEN & ADDISON, *supra* note 123, at 6–7.

138. *Id.* Two of the cases involved acquittals of compulsive stalkers of members of the Royal family, including an attempt to breach a security cordon placed around Princess Anne. *Id.*

139. Interestingly, U.S. anti-stalking laws do not currently focus on psychological trauma, but the National Center for the Victims of Crime has proposed a new model stalking code that defines harassing conduct, *inter alia*, as conduct that causes emotional distress. NATIONAL CENTER FOR THE VICTIMS OF CRIME, THE MODEL STALKING CODE REVISITED 11 (Jan. 2007) [hereinafter MODEL STALKING CODE], *available at* http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822.

140. Evonne von Heussen, *The Law and 'Social Problems:' The Case of Britain's Protection from Harassment Act 1997*, [2000] 1 Web JCLI, *available at*

classic form of stalking as obsessive pursuit.

In light of these developments, in July 1996 the Home Office published a report on stalking entitled "Stalking—The Solutions."[141] The paper was concerned with stalking only as a specialized aspect of the general problem of harassment, but broadly described harassment as a series of acts which are intended to, or in fact, cause harassment to another person.[142]

The legislative response was the Protection from Harassment Bill. The Bill was first published in the House of Commons on December 6, 2006 by then-Home Secretary, Michael Howard.[143] Mr. Howard noted that the Bill did not define harassment because the courts had regularly interpreted that concept since 1986.[144] Debate in the House was extraordinarily brief—just two days. There was extensive discussion of the intent of the PHA to primarily address the problem of stalking, but also discussion of racial harassment[145] and harassment caused by feuding neighbors.[146] Although workplace bullying was not expressly debated and was clearly not the intended target of the Bill, the Bill was clearly broad enough to encompass harassment in the workplace.[147] Indeed,

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http://webjcli.ncl.ac.uk/2000/issue1/vonheussen1.html (referring to U.S. federal and California legislation, as well as Australia and Canada).

141. Diana Lamplugh & Paul Infield, *Harmonizing Anti-Stalking Laws*, 34 GEO. WASH INT'L L. REV. 853, 857 (2003) (citing U.K. HOME OFFICE, Stalking—the Solutions: A Consultation Paper ¶ 1.4 (1996)). The Home Office, headed by the Home Secretary, has oversight of policing, national security, and immigration.

142. Lamplugh & Infield, *supra* note 141, at 857.

143. 287 PARL. DEB. H.C. (6th ser.) (1996) 781. Michael Howard later became the Conservative Party leader and Leader of the Opposition from 2003–2005. Interestingly, Mr. Howard made his initial mark in the Conservative Party with a speech commending the Conservative government's attempts to curb trade unions.

144. *Id.* Stalking had previously been raised as a private Member's Bill in the House of Commons in the summer of 1996 by the Hon. Ms. Anderson but had not been discussed and had been the subject of criticism for attempting to list prohibited conduct and for the lack of defenses. *Id.* (comments of Michael Howard) (referring to criticism of the earlier proposal by Dr. Evonne von Heussen-Countryman, Director of the National Anti-Stalking and Harassment Campaign).

145. The U.K. already had laws prohibiting racial harassment and discrimination at work, in public functions, and for the provision of services, but these laws did not reach general racially harassing behavior in society at large. *See* Race Relations Act, 1976, c. 74 (Eng.). *See also* Public Order Act, 1986, c. 64 (Eng.) (creating a criminal offense to use threatening, abusive, or insulting language or behavior in order to stir up racial hatred).

146. *See generally* 287 PARL. DEB. H.C. (6th ser.) (1996) 781–988.

147. *Id.* at 985 (comments of Hon. Maclean) ("[A]ll forms of harassment—whether stalking, racial abuse, neighbour or work disputes—are covered."); *id.* at 802 (comments of Hon. Maddock) ("Although the Bill is generally perceived to be about stalking, its tentacles are likely to spread far wider.").

as a former employment lawyer, Mr. Howard was presumably familiar with the potential application of the PHA to the workplace. The House of Lords read the Bill on January 24, 1997[148] and it received royal assent March 21, 1997, becoming effective June 16, 1997.[149]

Thus, the legislative history and the events leading up to the enactment of the PHA clarify that it was never specifically intended to address workplace bullying. The main concern was with the *effects* of harassment on the victim and the focus was on perceived anti-social behavior.[150]

b. Civil Remedy

The PHA's general prohibition is of "a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other."[151] The PHA does not, however, further delineate what conduct might constitute "harassment" beyond a provision that harassment includes: "alarming the person or causing the person distress."[152] The Act does provide an arguably objective, albeit circular, standard that "the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."[153] Courts have therefore been left to interpret what constitutes harassment.

148. 577 PARL. DEB. H.L. (6th ser.) (1997) 917–43.

149. 579 PARL. DEB. H.L. (6th ser.) (1997) 1182.

150. *See* 287 PARL. DEB. H.C. (6th ser.) (1996) 825–826 (comments of Hon. Mrs. Fyfe); Thomas v. News Group Newspapers Ltd., [2001] EWCA Civ 1233, ¶ 29 ("Section 7 of the Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems to me that s. 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than the types of conduct that produce that effect.") (emphasis added); *see also* Majrowski v. Guy's & St. Thomas's NHS Trust, [2005] EWCA Civ 251, ¶ 102 (Court of Appeal) (finding that the focus of §1(2) is the effect on the victim). Interestingly, even shortly after the PHA's passage, prominent legal commentators recognizing the breadth and potential of the Act failed to predict its relevance to workplace bullying. *See generally* LAWSON-CRUTTENDEN & ADDISON, *supra* note 123.

151. PHA, 1997, c. 40, § 1(1). The PHA provides an affirmative defense if the defendant can show that the conduct was pursued (a) for the purpose of preventing or detecting a crime; (b) under any enactment or rule of law; or (c) in the particular circumstances, such pursuit was reasonable. *Id.* § 1(3).

152. *Id.* § 7(2).

153. *Id.* § 1(2).

A course of conduct "must involve conduct on at least two occasions,"[154] although language in the PHA suggests that a single incident of harassment may be sufficient.[155] British courts follow the standard of pervasiveness familiar in U.S. hostile work environment law: "The fewer in number and the more distant those occasions are in time from each other the more difficult it will be to find a course of conduct."[156]

A victim of harassment may bring a claim in civil proceedings,[157] and damages may be awarded, including compensatory damages and emotional distress damages.[158] Proceedings lie in either a county court or the High Court and an injunction may be granted to proscribe further misconduct.[159]

As more fully explained in Part III.A., the PHA's broad prohibition sets it apart from most U.S. anti-stalking laws. Of note, where the PHA focuses exclusively on the *psychological effect* of the conduct, U.S. law typically focuses on conduct that puts the victim in fear of death or bodily injury.[160]

c. Criminal Remedy

The PHA makes harassment a criminal offense in certain situations,[161] subjecting an offender "on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both."[162] The PHA includes an additional offense of putting people in fear of violence,[163] which subjects a convicted offender to more severe punishment of "imprisonment for a term not exceeding five

154. *Id.* § 7(3). Conduct includes speech. *Id.* § 7(4).

155. The civil remedy provision states that "an actual *or apprehended* breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question." *Id.* § 3(1) (emphasis added). The term "apprehend" may be interpreted as "anticipate, esp. with fear or dread." 1 THE SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002).

156. Daniels v. Comm'r of Police of the Metropolis, [2006] EWHC 1622 (Q.B.) ¶ 5(e).

157. PHA, 1997, c. 40, § 3(1). Because the PHA applies to harassment both inside and outside the employment context, this provision allows the bullied worker to bypass the employment tribunals discussed in Part II.A.1 *supra*. Employees may perceive this as advantageous.

158. PHA, 1997, c. 40, § 3(2) ("[D]amages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.").

159. *Id.* § 3(3).

160. See discussion *infra* Part III.A.

161. PHA, 1997, c. 40, § 1(1).

162. *Id.* § 2(2).

163. *Id.* § 4. This provision does not have a statutory civil remedy equivalent.

years, or a fine, or both."[164]

In addition to the penalties of imprisonment and/or fines, a court may issue a restraining order on a person convicted under either of the criminal sections referenced above.[165] It is an offense for the defendant, without reasonable excuse, to do anything which is prohibited in the order,[166] further subjecting the defendant to penalty.[167]

The PHA also creates a criminal offense of breaching a civil injunction by providing that, if the defendant does anything prohibited by a civil injunction, the plaintiff may obtain a warrant for the arrest of the defendant.[168] It is an offense for a defendant, without reasonable excuse, to do anything prohibited by the injunction.[169]

3. Judicial Application of the PHA to Workplace Bullying

The PHA was predicted to lead to only an additional 200 prosecutions per year but from April 2000 through June 2001, there were 30,314 offenses brought under the Act in London alone.[170] Because the PHA covers a broad range of harassment outside the workplace, Home Office statistics have not tracked the number of either civil or criminal cases of workplace bullying. As of 2008, a LEXIS search revealed less than thirty reported cases of workplace bullying brought under the PHA.[171]

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164. *Id.* § 4(4). This section also provides a defense to a person charged under section 4 if the conduct in question was pursued (a) for the purpose of preventing or detecting crime; (b) under any enactment or rule of law; or (c) reasonable for self protection or protection of property. *Id.* § 4(3).

165. *Id.* § 5.

166. *Id.* § 5(5).

167. If convicted on an indictment (as opposed to summary conviction), violating a restraining order carries a maximum penalty of "imprisonment for a term of up to five years, or a fine, or both." *Id.* § 5(6).

168. *Id.* § 3(3)(b). Although this intermingling of civil and criminal law is familiar in U.S. law, for example in domestic violence law, it has caused some concern among members of the English bar. Tim Lawson-Cruttenden & Catherine Atkinson, *DIY Harassment Law*, 157 NEW L.J. 19, 19 (Jan. 5, 2007). *See also* 287 PARL. DEB. H.C. (6th ser.) (1996) 847 (comments of Hon. Andrew Bennett) (expressing concern over potential confusion over whether to apply civil or criminal standard of proof in the civil court for breach of a civil injunction).

169. PHA, 1997, c. 40, § 3(6).

170. *See* Womens' Aid Key Facts on Child Contact and Domestic Violence (2003), *available at:* http://www.womensaid.org.uk/landing_page.asp?section=0001000100090005000500090006 (last visited Mar. 2, 2008).

171. One of the most effective LEXIS search phrases was "protection from harassment act & workplace!" and was run in the UK cases combined courts database. Broader searches in the same database using phrases such as "protection

Although not reflected in the number of reported cases, what is certain is that the PHA is gathering steam as a tool of the British worker against workplace bullying.[172]

It quickly became clear that the courts adopted a textual interpretation of the new law. As Mr. Justice Collins explained in an early decision: "Whatever may have been the purpose behind the Act, its words are clear, and it can cover harassment of any sort."[173] Indeed, as one jurist astutely recognized, "the work-place is much closer to stalking than [other types of harassment such as journalism intrusion]. It is the very place where harassment is often encountered and from which its victim is often powerless to escape."[174] Early decisions under the PHA followed this maxim and applied the PHA against individual workplace bullies.[175] Not all courts, however, found that the alleged behavior constituted harassment even under the PHA's broad prohibition.[176]

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from harassment act" & "(workplace or employ!)" reveal significantly more cases but these cases include claims under the PHA of harassment that did not take place in the workplace or were other types of harassment (such as racial harassment which is also actionable under the PHA).

172. The low number of cases may seem surprising to those familiar with U.S. litigation statistics, but cultural differences are undoubtedly part of the explanation. U.K workers, and citizens in general, are less litigious than their U.S. counterparts; the majority of employment disputes are resolved in-house. Britain's rate of employment litigation is in fact one of the lowest in Europe—in 2002, only 0.4% of workers filed an employment law claim, compared to 1.5% in Germany and 0.7% in France. *See* GIBBONS REPORT, *supra* note 118, at 15, n.13.

173. DPP v. Selvanayagam, TIMES (London), June 23, 1999, CO/664/99, 1999 WL 477416. The elements of a PHA claim were set forth in a non-workplace case: (i) conduct must be calculated (i.e., likely) to produce the consequence that the claimant is alarmed or distressed; (ii) conduct must be oppressive and unreasonable; (iii) conduct has foreseeably caused distress; and (iv) more than foreseeability is needed. Sharma v. Jay, [2003] EWHC 1230, ¶ 22.

174. Majrowski v. Guy's & St. Thomas's NHS Trust, [2005] EWCA Civ 251, ¶ 56. (Court of Appeal).

175. *See, e.g.*, Merelie v. Newcastle Primary Care Trust, [2004] EWHC 2554 (Q.B.) (denying employer's motion for summary judgment). Plaintiff claimed individual co-workers and a supervisor allegedly lodged a campaign to falsify information about the plaintiff and to orchestrate complaints and grievances against the plaintiff resulting in his discharge. *Id.* ¶¶ 13–15. The court cautioned that courts should allow harassment claims founded on abusive use of investigations to proceed only in "exceptional cases." *Id.* ¶¶ 20–21; *see also* First Global Locums Ltd. v. Cosias, [2005] EWHC 1147, ¶ 33 (Q.B.) (granting restraining order against defendant employee who allegedly was aggressive and abusive to other employees by swearing, shouting, and threatening to have them killed). The Court noted that PHA restraining orders should impose the least possible restraint and have a time limit. *Id.* ¶ 35.

176. *See, e.g.*, Crossland v. Wilkinson Hardware Stores Ltd., [2005] EWHC 481 (Q.B.) (granting summary judgment for defendant on claim that plaintiff was

A victim's redress against the individual workplace bully was therefore a literal application of the statutory language. Naturally, it was only a matter of time before the courts were confronted with the question of whether an employee's misconduct could be imputed to the employer. English law, like U.S. law, accepts the doctrine of vicarious liability. This doctrine provides that an employer bears legal responsibility for the torts of an employee, such as intentional infliction of emotional distress, if committed within the scope of employment.[177] Liability can also be directly imputed to the employer under agency principles.[178]

Similarly, under U.S. federal and state anti-discrimination law, an employer may also be liable for employee "hostile work environment" harassment that is otherwise actionable. Under Title VII, for example, the U.S. Supreme Court set forth the contours for employer liability for hostile work environment in *Burlington Indus., Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.[179] Employers may be vicariously liable for an actionable hostile work environment created by a supervisor with immediate authority over the victim.[180] The employer is strictly liable if the victim suffers a "tangible employment action" such as discharge or demotion.[181] If no tangible employment action is taken, the employer may raise an affirmative defense that (1) the employer exercised reasonable care to prevent and correct harassing behavior (usually shown by proof of an anti-harassment policy with a complaint procedure) and (2) the employee unreasonably failed to take advantage of any such

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harassed). The Court expressed concern that a broad interpretation of PHA could interfere with free speech rights under Article 10 of the European Convention on Human Rights). *Id.* ¶¶ 80–81. Daniels v. Comm'r of Police of the Metropolis, [2006] EWHC 1622 (Q.B.) (finding single incident lacked sufficient degree of seriousness required).

177. *See* BLACK'S LAW DICTIONARY 1566 (6th ed. 1991) (defining vicarious liability as "the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee . . . ."). *See generally* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109 (2003) (surveying variations in approaches to the application of vicarious liability to the tort of intentional infliction of emotional distress in the workplace).

178. *Id.*

179. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

180. *Ellerth*, 524 U.S. at 762–65.

181. *Id.*

policies or procedures.[182]

Although English courts had previously applied the doctrine of vicarious liability to common law claims, its application to *statutory* breaches—such as PHA claims—was undecided. Although U.K. courts initially attempted to side-step the issue of vicarious liability,[183] the Court of Appeals answered the question head-on in *Majrowski v. Guy's & St. Thomas's NHS Trust.*[184]

4. Vicarious Liability and a U.S.-Style Award Under the PHA

In *Majrowski*,[185] the Court of Appeal ruled that the National Health Service was vicariously liable for the harassment of employee William Majrowski by his department manager, despite a finding that the employer had neither caused the behavior nor failed to prevent it.[186] Majrowski claimed that the manager targeted him because he was gay. The manager's alleged harassment consisted of excessive criticism of Majrowski's work, excessive strictness about his time-keeping, isolating Majrowski by refusing to talk to him, being rude and abusive to him in front of other staff, treating him differently compared to other staff, imposing unrealistic goals for his performance, and threatening Majrowski with disciplinary action if he did not achieve these goals.[187] Majrowski sued his employer under the theory that an employer is civilly

182. *Id.* at 765. The employer may also be directly liable for an employee's conduct because the employer had actual knowledge, or the harassing employee was sufficiently high-ranking to be the employer's alter ego. *Faragher*, 524 U.S. at 807. Further, if the harassing employee is not a supervisor, courts typically apply a negligence standard to determine employer liability. *See, e.g.*, Dunn v. Washington County Hosp., 429 F.3d 689 (7th Cir. 2005).

183. *See, e.g.*, Banks v. Ablex Ltd., [2005] EWCA 173 (Court of Appeal) (finding a single incident of shouting and swearing at plaintiff accompanied by gesticulating and finger pointing did not constitute a "course of conduct" under the PHA); Crossland v. Wilkinson Hardware Stores Ltd., [2005] EWHC 481 (Q.B.) (finding of no harassment mooted issue of employer's vicarious liability).

184. Majrowski v. Guy's & St. Thomas's NHS Trust, [2005] EWCA Civ 251 (Court of Appeal).

185. *Id.*

186. *Id.* The House of Lords subsequently dismissed the employer's appeal from the Court of Appeals' decision, holding that unless the statute expressly or impliedly indicated otherwise, the principle of vicarious liability applied when an employee, acting in the course of his employment, committed a breach of a statutory obligation. Majrowski v. Guy's & St. Thomas's NHS Trust, [2006] UKHL 34, I AC 224 (House of Lords).

187. *Majrowski*, [2005] EWCA Civ 251, ¶¶ 1, 8. Majrowski did not claim negligence or breach of contract, and did not sue the manager. *Id.* ¶ 9.

vicariously liable for harassment in breach of the PHA committed by one of its employees in the course of his or her employment.[188]

The issue of vicarious liability for a *statutory* breach was an issue of first impression for the Court of Appeal, which rejected the employer's argument that vicarious liability only applies to common law, not statutory, claims. The court held that unless there was something in the statute that expressly or impliedly indicated otherwise, the ordinary rules of common law tort—including vicarious liability—applies.[189]

In so holding, the court acknowledged that the development of vicarious liability was "strongly influenced by academic authority of great distinction" that extended the concept of vicarious liability from the traditional agency test of "in the course of employment" to a broader test of "the sufficiency of the connection between the breach of duty and the employment and/or whether the risk of such breach was one reasonably incidental to it."[190] Interestingly, Lord Justice Auld's reasoning echoes the Supreme Court's vicarious liability analysis in *Ellerth/Faragher* applying vicarious liability doctrine to hostile work environment claims.[191] This parallel between U.K. and U.S. vicarious liability jurisprudence suggests that U.S. anti-stalking law could similarly adapt.

The *Majrowski* Court rebutted the argument that employer liability would open the floodgates to litigation by pointing to several built-in safeguards for employers: (i) the PHA prohibits "a course of conduct" requiring more than a single act; (ii) claimants must establish an *objective* standard that the conduct constitutes harassment; and (iii) employer liability must be "just and reasonable in the circumstances" using the aforementioned test of "close connection."[192] The Court indicted that lack of a policy and procedure for handling workplace harassment would be a factor,[193] again paralleling U.S. hostile work environment law and the *Ellerth/Faragher* defense.

The *Majrowski* Court also addressed the meaning of harassment under the PHA.[194] Quoting from an earlier

188. *Id.* ¶ 1.
189. *Id.* ¶ 28.
190. *Id.* ¶ 37.
191. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
192. *Majrowski*, [2005] EWCA Civ 251 at ¶ 57.
193. *Id.* ¶ 59.
194. *Id.* ¶¶ 81–83. This holding was not appealed to the House of Lords.

judgment by Lord Phillips of Worth Matravers MR, the court stated that:

> The Act does not attempt to define the type of conduct which is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in Section 7 and which is oppressive and unreasonable.[195]

Subsequent decisions have followed and expounded on the *Majrowski* Court's rule.[196] Of particular note is a landmark decision in August 2006, when Helen Green won £800,000[197] in damages from Deutsche-Bank.[198] Ms. Green apparently did not sue any of the individuals who bullied her; rather she was able to hold the employer, Deutsche-Bank, vicariously liable under *Majrowski*.[199]

Ms. Green worked as a secretary assistant in the international banking firm Deutsche-Bank Group Services (UK) Ltd. Starting as soon as she was hired in October 1997 until October 2001, Ms. Green alleged that four female colleagues subjected her to a campaign of harassment and bullying[200] which took the form of moving her papers, bursting out laughing when she walked past them, making crude and lewd remarks, hiding her mail, removing her from document circulation lists, ignoring and excluding her, undermining her personal and professional authority, and increasing her workload to unreasonable and

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195. *Id.* ¶ 82 (quoting Thomas v. News Group Newspapers Ltd., [2001] EWCA Civ 1233, ¶ 30).

196. Daniels v. Comm'r of Police of the Metropolis, [2006] EWHC 1622, ¶ 9 (Q.B.) (finding an employer vicariously liable for acts proven to constitute harassment under the Act but underlying harassment must first be established "against at least one employee who is shown on a least two occasions to have pursued a course of conduct amounting to harassment, or by more than one employee each acting on different occasions in furtherance of some joint design").

197. An amount equal to $1,517,608.00 U.S. dollars in Aug. 1996, based on exchange rates at http://www.oanda.com/convert/fxhistory (last visited Mar. 2, 2008).

198. Green v. DB Group Services (UK) Ltd., [2006] EWHC 1898 (Q.B.). Also of note, a U.K. Employment Tribunal recently awarded a lawyer £1.3 million on her claims of sexual discrimination and harassment. Although the judgment is unpublished and is on appeal, the claims appear to have included a bullying claim. *See Top Female Lawyer Destroyed By City Bullies Could Get Record £1.3 Million Payout*, EVENING STANDARD, Mar. 12, 2008, *available at* http://www.thisislondon.co.uk/news/article-23451644-details/Top+female+lawyer+destroyed+by+City+bullies+could+get+record+%C2%A313m+payout/article.do.

199. Majrowski v. Guy's & St. Thomas's NHS Trust, [2005] EWCA Civ 251 (Court of Appeal).

200. *Green*, [2006] EWHC 1898, ¶¶ 23–43, 70.

arbitrary levels.[201] Ms. Green presented evidence at her trial from other Deutsche-Bank employees who were also victims of harassment, plus evidence that she had complained about the behavior.[202]

Ms. Green based her claims on both negligence and the PHA. In finding Deutsche-Bank vicariously liable under the PHA and *Majrowski*, the court summarized cognizable harassment as conduct: (a) occurring on at least two occasions, (b) targeted at the claimant, (c) calculated in an objective sense to cause distress, and (d) which is objectively judged to be oppressive and unreasonable and negligent.[203] Ms. Green's total damage award of £800,000 included emotional distress damages.[204]

Thus, in the relatively short period from 1997 to present, the development of a cause of action under the PHA has emerged as a significant weapon against workplace bullying. The courts have applied an anti-stalking law to workplace bullying by fleshing out the vague statutory definition of "harassment," applying the doctrine of vicarious liability, and recognizing an *Ellerth/Faragher*-type employer defense. Part III.A., *infra*, examines the potential for U.S. anti-stalking laws to be similarly utilized.

The potential for legal sanctions can play an important role in shaping individual and organizational behavior, although only the passage of time will tell how much impact the PHA will have in eradicating bullying in the U.K. workplace. During this same time period, however, the PHA was not the only piece of legislation addressing workplace bullying. The Dignity at Work Bill, although ultimately not enacted, has also impacted the

201. *Id.* Ms. Green claimed that, as a result of the bullying, she developed a major depressive disorder and at one point was taken to hospital and put on suicide watch. Deutsche-Bank paid for stress counseling and assertiveness training for Green during her employment, but she had a nervous breakdown and was ultimately unable to return to work. The parties disputed the cause of the depressive disorder. Deutsche-Bank argued that Green had had a predisposition to mental illness and she conceded she had suffered physical and sexual abuse as a child. *Id.* ¶¶ 46–48.

202. *Id.* ¶¶ 79–88.

203. *Id.* ¶ 152.

204. *Id.* ¶¶ 172–90. The court found the employer was vicariously liable under the PHA but did not make a separate award of damages under the PHA because her damages were subsumed by those awarded under her common law negligence claim. The court ordered the bank to pay her costs, plus £35,000 for pain and suffering, £25,000 in respect of her disadvantage in the labor market, £128,000 for past loss of earnings and about £640,000 for future loss of earnings, including pension. *Id.*

British workplace.

C. THE DIGNITY AT WORK BILL

While the PHA was stealthily impacting the British workplace, a direct attack on workplace bullying was launched in the form of the Dignity at Work Bill.[205] The Bill was drafted in 1996 by a trade union, the Manufacturing, Science and Finance Union (MFS, now called Amicus). The draft Bill built on the 1991 European Commission "Protection of Dignity of Women and Men at Work Code," which highlighted the need for employers to develop and implement coherent policies to prevent sexual harassment.[206]

The Dignity at Work Bill created a statutory right of dignity at work for all employees, including independent contractors.[207] The Bill encompassed the PHA's civil cause of action for harassment but also expanded employee rights by providing a cause of action for "victimization"[208] (retaliation) and vicarious liability against an employer (pre-*Majrowski*), albeit with a modified version of a *Faragher/Ellerth*-type defense.[209] Like the PHA, the Bill provided for injunctive relief and damages, including "injury to feelings."[210] Claims would be brought in the Employment Tribunal, as opposed to direct access to the courts under the PHA.[211]

The MSF launched a lobbying effort, the Campaign Against Bullying at Work, which propelled the Bill into the House of Lords in December 1996.[212] When Lord Monkswell introduced the Bill, he stated that: "The Bill is the workplace equivalent of the anti-stalking Bill [the PHA] which the Government [is] to bring in later this year."[213]

The Bill's journey through the British Parliament from

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205. Dignity at Work Bill 1996, H.L. Bill [31] (Eng.).

206. 576 PARL. DEB., H.L. (6th ser.) (1996) 755 (comments of Lord Monkswell). *See* EU Recommendations, *supra* note 86, at 1. For a discussion of the development of the European Commission Code, *see* Bernstein, *supra* note 84, at 1234–39.

207. The Bill also expressly inserts a contractual right to dignity at work into all employment contracts. Dignity at Work Bill 1996, § 1(1).

208. *Id.* § 2.

209. *Id.* § 5 (granting the employer the defense that it had a Dignity At Work policy and grievance procedure and employer followed the policy, "repudiated" the complained-of acts and took remedial action).

210. *Id.* § 6.

211. *Id.* § 4. The Bill, however, does not preempt any private remedies for breach of the contract of the right to dignity at work. *Id.* § 4(1).

212. 576 PARL. DEB., H.L. (6th ser.) (1996) 755 (comments of Lord Monkswell).

213. *Id.*

1996 to present reflected both the changing political climate of the period and the changing social norms and legal developments surrounding workplace bullying. Although the Bill was read in the House of Lords, the Conservative government blocked initial attempts to introduce the Bill in the House of Commons in February 1997.[214] The Bill was shelved for lack of time during the general election of 1997, until re-introduction in the House of Lords in December 2001.[215] By that time, New Labor was in power and the courts and practitioners had started to recognize the PHA's potential application to harassment in the workplace.

The Bill was extensively debated during its second reading in the House of Lords in March 2002. The debates acknowledged existing legislation such as the PHA and questioned whether additional legislation was the appropriate response to what was acknowledged as an increasing problem.[216] As would be expected, advocates argued that the bullying culture had not dissipated and that legislation was the best way to increase awareness and good practices.[217] Comments in House of Lords debate on March 27, 2002 indicate that there was no decline in workplace bullying from 1996 to 2000.[218]

In response to the question why a separate statute was necessary, Baroness Gibson responded:

> The current laws are not only inadequate for the employee, they also expose employers to a wide range of liabilities without providing the

214. *See* 629 PARL. DEB., H.L. (6th ser.) (2001) 583.

215. The Bill was reintroduced by Baroness Ann Gibson in the House of Lords in December 2001. 629 PARL. DEB., H.L. (6th ser.) (2001) 583.

216. *See, e.g.*, 633 PARL. DEB., H.L. (6th ser.) (2002) 343 (comments of Lord Rotherwick).

217. *Id.* at 334 (comments of Baroness Gould of Potternewton). Suggestions that further research was needed were countered by the fact that there had already been an enormous amount of research between the introduction of the Bill in 1996 and 2002. *Id.*

218. *Id.* at 332 (comparing results from the 2000 Hoel & Cooper survey (*supra* note 6) with a 1996 report by the Institute of Personnel and Development that one in eight people had been bullied in the previous five years). The most recent survey of U.K. bullying has, however, shown a decline in bullying rates. In 2005–2006, 3.8% of British workers reported experiencing workplace bullying in the past two years, compared to 10% in the 2000 Hoel & Cooper survey. *See* HEIDI GRAINGER & GRANT FITZNER, DEP'T OF TRADE AND INDUS.: THE FIRST FAIR TREATMENT AT WORK SURVEY 2007, *available at* http://www.dti.gov.uk/files/file38386.pdf (last visited Mar. 2, 2008) [hereinafter DTI Report]; *see also* HOEL & COOPER, *supra* note 6, and accompanying text. Although it is beyond the scope of this article to analyze these results, this reduction in reported experiences of bullying suggests that the PHA and Dignity to Work campaigns may have had an impact from 2000–2006.

> legal tools or guidance to deal with potential bullying problems before they become serious. The existing laws do not help employers to deal with the problem of bullying in the workplace. At best they can provide only a certain financial compensation to an employee who by then has lost his or her health, job or both.[219]

Moreover, proponents argued that the existing laws that potentially covered workplace bullying only led to confusion as to what types of conduct were prohibited, if any, and what forms of legal redress might be available, without providing any clear guidance.[220]

The Bill was extensively debated but does not appear to have been strenuously opposed and on June 5, 2002, received an unopposed third reading in the House of Lords. The Bill reached the House of Commons on March 25, 2003.[221] The debates acknowledged the prevalence and costs of bullying but the Bill nevertheless floundered for lack of government support.[222] At first blush, this would seem a defeat for a continental-style dignity-based law, but the debates signify otherwise. The legislators unabashedly and unequivocally acknowledged British workers' rights to dignity,[223] and the government minister stated:

> [I]t is clear that we all share the same objective; we want bullying and other forms of degrading treatment to come to an end. That is an essential part of good employment relations and of a good culture in a workplace, but it is also inherent in the concept of human dignity and people's right to lead their lives free from harassment.[224]

The government acknowledged that bullying is a major concern, agreed with the estimates of the prevalence and costs, and agreed with the Bill's proponents about the need to address bullying.[225] Nevertheless, the government determined that

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219. 633 PARL. DEB., H.L. (6th ser.) (2002) 331 (comments of Baroness Gibson of Market Rasen).

220. *Id.* at 334.

221. 402 PARL. DEB., H.C. (6th ser.) (2003) 1WH (comments of Valerie Davey).

222. *Id.* at 21WH–23WH (comments of Mr. Brian Wilson).

223. *Id.* at 15WH–18WH (comments of Dr, Vincent Cable and Lady Hermon). "Under article 3 [of the European Convention of Human Rights, which was adopted by the U.K.] the Government have an obligation to protect everyone, irrespective of their nationality, within the jurisdiction of the United Kingdom from, among other things, degrading treatment." The government's position on the EU Convention on Human Rights as a source of such rights was, however, unclear. *See id.* at 22WH (comments of Mr. Brian Wilson).

224. *Id.* at 21WH (comments of Mr. Brian Wilson).

225. *Id.*

existing legislation adequately provided recourse,[226] and that the government's efforts should therefore be directed at awareness campaigns and self-regulation through codes of practice.[227] Summarily, the government did not support additional legislation even though they supported measures to combat bullying, and had already started working on such measures with the unions and a major workplace bullying organization, the Andrea Adams Trust.[228]

Thus, the demise of the Bill cannot fairly be said to be due to reluctance on the part of the British government to tackle the problem, and probably owes more to the existence of the PHA than governmental lack of recognition of dignitarian ideals. Today, the PHA anti-bullying movement in the U.K. seems to have blended with the concept of dignity at work for all, and the government has lived up to its Parliamentary promise, evidenced in part by the Department of Trade and Industry's funding of £1 million towards the Dignity at Work project, launched in 2005 and jointly funded by Amicus, to tackle the problems of bullying and harassment in the workplace.[229] The project has been touted as the "the world's largest anti-bullying project."[230]

D. THE U.K. DIGNITY AT WORK PROJECT AND OTHER GOVERNMENT INITIATIVES

The developments described above and New Labor's vision of social partnerships coalesced in the formation of the Dignity at Work project. The Project's aim is:

> To encourage employee representatives and employers to build cultures in which respect for individuals is regarded as an essential

226. *Id.* at 22WH–23WH (comments of Mr. Brian Wilson); *see also id.* at 15WH–18WH (comments of Dr. Vincent Cable and Lady Hermon) (highlighting PHA, other separate pieces of legislation, and Article 3 of the EU Convention).

227. *Id.* at 23WH (comments of Mr. Brian Wilson). The DTI Report showed a decline in reported experiences of workplace bullying from 10% in 2000 to 3.8% in 2005–2006, suggesting that the government's position was not misplaced. *See* DTI Report, *supra* note 218 at 5.

228. *See* 402 PARL. DEB., *supra* note 221 at 23WH (comments of Mr. Brian Wilson).

229. *See generally* The Dignity at Work Partnership, http://dignityatwork.org (last visited Feb. 25, 2008).

230. Comments by Amicus, *available at* http://www.dignityatwork.org/news/amicus-press-release.htm. The project's findings are available in full at: http://www.port.ac.uk/research/workplacebullying/dignityatworkresearch/filetodownload,52783,en.pdf.

> part of the conduct of all those who work in the organisation. The project will also increase awareness and knowledge of 'dignity at work' issues, and encourage the development of partnership working in the workplace through the promotion of joint working on dignity at work.[231]

The launching partners included the Royal Mail, BT, other private employers, trade unions, a trade association, and the Andrea Adams Trust.[232] Employers and employee representatives voluntarily sign the partnership agreement to abide by the aims referenced above, and receive Human Resource and employee training on bullying and dignity at work, and assistance in drafting anti-bullying policies and with other anti-bullying measures.[233]

The project also completed a study of unfair treatment at work, including discrimination, harassment, and bullying.[234] This study revealed that 3.8% of British workers reported being bullied or harassed at work in the past two years and found that particular groups are more vulnerable to bullying—women and the disabled.[235] More than one in ten employees said they were aware of another person at their place of work being bullied or harassed in the last two years.[236] In light of the project's findings, the Secretary of State for Trade and Industry urged businesses to take a zero tolerance approach to bullying in the workplace.[237]

Thus, although the Dignity at Work Bill has floundered, U.K. companies and organizations have voluntarily adopted Dignity at Work policies.[238] Recognizing that the effectiveness

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231. The Dignity at Work Partnership, http://www.dignityatwork.org/default.htm (last visited Mar. 2, 2008).

232. Dignity at Work Partnership, http://www.dignityatwork.org/the-project/partnership/launch-partners.htm (last visited Mar. 2, 2008).

233. The Dignity at Work Partnership, *Joining the Partnership*, http://www.dignityatwork.org/the-project/partnership/default.htm (last visited Mar. 2, 2008).

234. DTI Report, *supra* note 218, at 6. The survey covered the period November 2005 to January 2006. *Id.* at 3.

235. *Id.* at 5. For an interesting discussion of the relationship between workplace abuse, interpersonal conflicts and the definition of "disability" under the ADA and workplace bullying, see Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795 (1998).

236. DTI Report, *supra* note 218, at 5.

237. *See* The Dignity at Work Partnership, *Amicus and the DTI Launch the World's Largest Anti-bullying Research*, Oct. 2, 1996, *available at*: http://www.dignityatwork.org/news/amicus-press-release.htm (last visited Mar. 2, 2008).

238. For an example of such a policy, see City University of London, *Harassment*

and impact of voluntary measures and employer-initiated policies has its supporters and detractors,[239] nevertheless such self-regulation is at the very least a stepping stone to increased employee and employer awareness and may provide one mechanism for combating bullying that is often overlooked.

The Dignity at Work project, and the European Union's Framework Agreement, discussed in Part I.B.3., are models of workplace bullying partnerships between government, trade unions, and employers that could be utilized in the U.S. These inclusive projects do not currently have a U.S. equivalent. The work of Drs. Ruth and Gary Namie through the Workplace Bullying Institute and Professor Yamada's New Workplace Institute in Massachusetts are two grassroots organizations that have been active in raising awareness, providing support and strategies, and pushing for legislative reform.[240] These organizations, however, are not allied to trade unions (although some trade unions have used the WBI's services) and have not received any trade union or government funding or support. As the U.K. experience illustrates, these could be key players in providing renewed impetus for these important U.S. initiatives.

At the same time as the DTI launched its Dignity at Work Project, the British government launched a public education effort aimed more generally at stress in the workplace. The Health and Safety Commission (HSC) is the agency responsible for health and safety regulation in the U.K. HSC has not issued any laws or regulations for employers in dealing with stress,[241] but has relied upon a social partnership approach, issuing guidelines and tools for employers to utilize on a voluntary basis.[242] Thus, there are no specific health and safety laws or

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and Dignity at Work Policy, 2007, *available at*: http://www.city.ac.uk/hr/policies/harass_list.html (last visited Mar. 2, 2008).

239. *See generally* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005). Professor Estlund characterizes self-regulation as a movement, noting the potential of self-regulation in combination with state-made law provided there is independent oversight and an employee voice. *Id.* at 324–25.

240. For more information, visit http://www.bullyinginstitute.org/ and www.newworkplaceinstitute.org. The author serves as a member of the New Workplace Institute's Advisory Committee.

241. The HSC's view is that employers have duties to tackle work-related stress under existing regulations; the Management of Health and Safety at Work Regulations of 1999 require employers to assess the risk of stress-related ill health arising from work activities, and the Health and Safety at Work Act of 1974 requires employers to take measures to control that risk. *See* http://www.hse.gov.uk/stress/standards/before.htm.

242. This social partnership framework fits within New Labour's general vision

regulations addressing stress or workplace bullying but in November 2004, the HSE issued its Management Standards on Work-Related Stress (Management Standards).[243]

The Management Standards provide tools for employers: (1) to self-evaluate the risk of work-related stress within their organization against six stressor areas; (2) to assess their performance against a benchmark; and (3) to develop interventions to achieve the goals identified.[244] HSC's website and Management Standards provide information on why employers should implement the standards, including the costs associated with stress—the same types of costs that are associated with bullying, a major cause of work-related stress.[245] Despite this education effort, HSC recognized that workplace bullying has not decreased and that the Management Standards offered little guidance for forms of intervention. In 2006, HSC prepared the first in a series of planned reports reviewing current research on workplace bullying and identifying gaps in current knowledge to further define areas of HSC research.[246] These HSC efforts have clearly indicated to businesses that the government regards bullying as a health and safety issue that must be addressed, even if the HSC does not, at least for now, adopt a mandatory compliance approach.

III. LESSONS FROM THE U.K.

At first blush, one might conclude that the U.K.'s advanced recognition of workplace bullying reinforces the notion that the law shapes workplace norms—organizational change in the U.K. occurred because employers were alerted to their potential for liability under the PHA. In turn, this supports the view that enactment of the Healthy Workplace Bill is required to force

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for regulating the labor market, discussed in Part II.A.2., but also comprised the government's implementation of an agreement between the Social Partners of the European Union to tackle harassment at work. The EU effort ultimately produced the EU Framework Agreement on Harassment and Violence at Work. *See supra* note 98 and accompanying text.

243. JOHANNA BESWICK, HEALTH & SAFETY LABORATORY, BULLYING AT WORK: A REVIEW OF THE LITERATURE (2006), *available at* http://www.hse.gov.uk/research/hsl_pdf/2006/hsl0630.pdf. The standards were launched on November 3, 2004, National Stress Awareness Day. *Id.*

244. *Id.*

245. U.K. Health & Safety Commission, *Management Standards on Work-Related Stress*, July 30, 2007, *available at* http://www.hse.gov.uk/stress/standards/before.htm (last visited Mar. 2, 2008).

246. BESWICK, *supra* note 243, at 2.

employers to deal with the problem of workplace bullying. This conclusion would be easier to draw if the PHA was the only factor influencing the British workplace. This was not the case. The other significant factors in the U.K. were trade union and grassroots "Dignity at Work" initiatives that placed workplace bullying on the government's agenda. These initiatives, in turn, required recognition and awareness of the prevalence and costs of the problem.

Similarly, in the U.S., a new legal right would undoubtedly significantly impact organizational behavior and employee expectations. This new legal right should be in the form of a statute, as opposed to a new common law tort. Because the enactment of the PHA in the U.K. overtook the burgeoning development of a new common law tort of harassment, it is difficult to draw any firm comparative predictions for the development of a new U.S. common law tort addressing workplace bullying. Nevertheless, what is clear is that the common law in the U.S. has remained static and simply does not provide legal relief. Nor does it appear likely to so do any time soon, given the various problems associated with the existing torts of intentional infliction of emotional distress and the exclusivity provisions of workers' compensation statutes.[247] Of course, judicial recognition of a new tort could flow from increased awareness of the problem of workplace bullying—an unremarkable observation to be sure but one which leads full circle back to the premise that increased awareness as an initial step has been side-stepped in the U.S.

The future for a judicially created new tort in the U.S. therefore looks bleak, leading to the conclusion that a legislative response may be required. The U.K. experience certainly supports the call for a new statute aimed directly at workplace bullying, but it is also clear that that legislation is only one part of the solution. This part of the paper attempts to draw modest lessons from the U.K. experience for additional, non-legislative efforts.

A. ANTI-STALKING LEGISLATION

Workplace bullying in the U.K. has admittedly ridden on the coat tails of anti-stalking legislation, but has allowed victims to find redress for psychological harm against the bully,

247. *Compare* Yamada, *Workplace Bullying*, *supra* note 4 *with* Corbett, *supra* note 80.

and against the employer who fails to implement appropriate safeguards. Undoubtedly, the potential for litigation under the PHA has also played an instrumental role in organizational awareness and change. This begs the question of whether workplace bullying could similarly be actionable under existing U.S. state or federal anti-stalking laws.

Unfortunately, most state anti-stalking laws are a poor fit for victims of workplace bullying. As an initial matter, although all fifty states and the District of Columbia now have a criminal anti-stalking statute,[248] few have a civil version that could encompass workplace bullying.[249]

Additionally, U.S. anti-stalking laws typically require the victim fear death or bodily injury, reflecting the level of fear required under the Model Anti-Stalking Code.[250] In contrast, the PHA requires only that the harasser pursue a course calculated to harass another—there is no requirement of threat or fear of physical harm. Some state laws, however, require a lower level of fear that might arguably encompass workplace bullying. For example, some states require that the victim feel "terrorized, frightened, intimidated, or threatened."[251] Other states have enacted an amorphous requirement that the victim fear for his

248. MODEL STALKING CODE, *supra* note 139, at 11.

249. *Id.* at 63. The federal anti-stalking law is unlikely to apply to most workplace bullying scenarios because it requires interstate activity, including electronic communications. However, a 2006 amendment expanded the law to include conduct which causes the victim substantial emotional distress. *See* 18 U.S.C. §§ 2261A, A(2)(A), & A(2)(B) (2000) . Similarly, the federal Violence Against Women Act also has a civil liability provision but, in addition to only protecting female victims, is unlikely to apply to most workplace bullying scenarios. *See* 42 U.S.C. §§ 13701–14040 (2000).

250. *See* MODEL STALKING CODE, *supra* note 139, at 38, *see also id.* at nn. 39–43 (citing state anti-stalking statutes). The Model Code was drafted by the National Institute of Justice at the U.S. Department of Justice, in conjunction with other organizations, upon direction by Congress. *See id.* at 11 (citing U.S. Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102–395, § 109(b)). The Model Code was drafted in 1993 and required that the offender engage in a course of conduct that is intended to, and actually does, place the victim in reasonable fear of death or bodily injury to themselves or a member of their immediate family. *Id.* at 24. A "course of conduct" is defined as "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threat implied by conduct." *Id.*

251. MODEL STALKING CODE, *supra* note 139, at 38, n.40 (citing as examples MICH. COMP. LAWS § 750.411h (2005); MICH. STAT. ANN. § 609.749 (West 2005); NEB. REV. STAT. § 28-311.03 (2005); NEV. REV. STAT. ANN. § 200.575 (Michie 2005); N.D. CENT. CODE § 12.1-17-07.1 (2005); OKLA. STAT. ANN. tit. 21, § 1173 (West 2005); and TENN. CODE ANN. § 39-17-315 (2005)).

or her "safety."[252] And some states have a generalized "harassment" law that does not appear to be directed at stalking in particular.[253] The language of these statutes could be broad enough to include workplace bullying.

Michigan's stalking law is illustrative. The Michigan statute defines "stalking" as:

> [A] willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.[254]

"Harassment" is further defined as:

> [C]onduct directed toward a victim that includes, *but is not limited to,* repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.[255]

The Michigan stalking law includes an equivalent civil course of action against an individual who engages in stalking (or aggravated stalking) as proscribed in the penal code.[256]

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252. MODEL STALKING CODE, *supra* note 139, at 38, n.42 (citing ARIZ. REV. STAT. § 13-2923 (2005); CAL. PENAL CODE § 646.9 (Deering 2005); COLO. REV. STAT. § 18-9-111 (2005); CONN. GEN. STAT. § 53A-181D (2005); FLA. STAT. ANN. § 784.048 (West 2005) (in definition of "credible threat"); GA. CODE ANN. § 16-5-90 (2005); KAN. STAT. ANN. § 21-3438 (2005); MO. REV. STAT. § 565.225 (2005) (in definition of "credible threat"); N.H. REV. STAT. ANN. § 633:3-A (2005); N.M. STAT. ANN. § 30-3A-3 (Michie 2005); N.C. GEN. STAT. § 14-277.3 (2005); OR. REV. STAT. § 163.732 (2005); VT. STAT. ANN. tit. 13, § 1061 (2005)).

253. Kentucky, for example, makes it a Class B misdemeanor offense to, *inter alia,* use coarse or abusive language in a public place, or to engage "in a course of conduct or repeatedly commit acts which alarm or seriously annoy such other person and which serve no legitimate purpose." Intent to harass, annoy or alarm is required. KY. REV. STAT. ANN. § 525.070(1)(c), (e) (2006).

254. MICH. COMP. LAWS § 750.411h(1)(d) (2007). The offense is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000.00, or both. *Id.* at § 750.411(2)(a). If the victim is a minor and the offender is more than five years older than the victim, the offense is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both. *Id.* § 750.411h(2)(b). The court can also order probation up to five years, including as a condition of probation, psychiatric counseling.

255. *Id.* § 750.411h(1)(c) (emphasis added).

256. *Id.* § 600.2954. A victim may bring a civil cause of action even if the defendant has not been charged or convicted. *Id.* § 600.2954(2). Damages include compensatory and punitive damages, and attorneys' fees and costs. *Id.* § 600.2954(1). For discussion of the legislative history and anticipated challenges to the law, *see generally* James C. Wickens, *Michigan's New Anti-Stalking Laws: Good*

Thus, a bullied worker in Michigan may attempt to seek recourse under the existing anti-stalking law. As was the case with the PHA, as described in Part II, the courts would need to take two significant steps before the bullied worker could find redress. First, the court would need to apply the statutory definition of "harassment" to bullying conduct. Second, the court would need to apply the doctrine of vicarious liability to the statutory breach in order to provide full relief to the victim. Again, the U.K. experience with the PHA suggests that courts might well be receptive to application of the doctrine under this type of statute.

Thus, there appears to be an untapped option for bullying victims to adapt existing law to address workplace bullying. This was the case with the PHA in the U.K. and could be a potential avenue for an enterprising plaintiff's attorney in a state with a sufficiently broad anti-stalking law.

Another approach would be legislative reform of existing anti-stalking laws to better fit all forms of harassing conduct. Interestingly, the National Center for the Victims of Crime has proposed revisions to the Model Anti-Stalking Code. These revisions are proposed to take into account new information about the ever-evolving types of stalking conduct and problems encountered through implementation of state laws.[257] Section Two of the proposed Model Code revised definition of the offense of stalking is reminiscent of the PHA, and is sufficiently broad to encompass workplace bullying:

> [A] course of conduct directed at a specific person and [the person] knows or should know that the course of conduct would cause a reasonable person to: (a) fear for his or her safety or the safety of a third person; *or (b) suffer other emotional distress.*"[258]

This proposal does not, however, specially address the

Intentions Gone Awry, 1994 DET. C. L. REV. 157 (1994). *See also* WYO. STAT. § 6-2-506 (2007) (criminal anti-stalking law with similarly broad language encompassing harassing behavior); WYO. STAT. § 1-1-126 (2007) (civil liability based on criminal code, regardless of whether the defendant has been charged or convicted).

257. MODEL STALKING CODE, *supra* note 139, at 12–16.

258. *Id.* at 24 (emphasis added). "'Course of conduct' means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property." *Id.* at 24–25. The Code provides it shall not be a defense that: (a) the actor was not given actual notice that the course of conduct was unwanted; or (b) the actor did not intend to cause the victim fear or other emotional distress. *Id.* at 25.

workplace and does not include reference to vicarious liability.

A state-by-state review of statutory language, legislative history and judicial interpretation and application of the doctrine of vicarious liability would be required to more accurately predict the chances of success of using existing law. Nevertheless, the PHA teaches us the potential for judicial application of *existing* anti-stalking law to workplace bullying. Efforts at legislative *reform*, on the other hand, should remain focused on appropriations bills and, ultimately, the Healthy Workplace Bill because it explicitly addresses workplace bullying, provides for vicarious liability, and provides an employer defense that makes it more palatable to opponents.[259]

B. TOWARDS A DIGNITY MODEL FOR THE U.S.

As discussed in Part I.B.2, the progress of workplace bullying legislation in some European countries has rested on the notion of dignity for all workers. The lack of a U.S. tradition of basing harassment law on individual dignity has been seen by some as fatal to the progress of combating workplace bullying in the U.S. The lesson from the U.K., however, is that a framework to address workplace bullying does not need to develop from any underlying tradition of dignity-based rights. A review of the development of anti-workplace bullying efforts in the U.K. evidences that although "dignity" is now part of the U.K. workplace bullying lexicon, the U.K.'s previous lack of a tradition of dignity-based rights has not proved fatal.

Rather, recognition of workplace bullying in the U.K. grew from a number of other factors, such as the potential for PHA litigation, as well as the consciousness-raising impact of campaigns like the Dignity at Work project, which in turn was made possible by governmental funding and research into the problem of workplace bullying. In addition, the role of the courts in recognizing workplace bullying and applying existing laws cannot be under-estimated. These factors coalesced to raise awareness of the costs of bullying and have ultimately resulted in organizational changes and new legal rights. This experience evidences that there is potential for workplace bullying law in the U.S. despite the lack of a dignity tradition.[260]

259. *See* Yamada, *Workplace Bullying*, *supra* note 4.

260. Indeed, review of the development of the U.K. law of workplace bullying indicates that the concept of individual dignity rights has now worked its way into the British workplace. This is further cause for optimism for the U.S. dignitarian

C. SELF-REGULATION

Self-regulation has also been a key factor advancing the anti-bullying and dignitarian workplace movement in the U.K. Self-regulation has arguably been achieved through awareness/consciousness-raising by private groups, trade unions, and individual legislators, and the potential for PHA litigation is an obvious factor. What can the U.S. learn from these developments? At present, legislative efforts to pass Professor Yamada's Healthy Workplace Bill at the state level are sporadic, funding at the governmental level is non-existent, and union involvement appears to be minimal. Until all these players are involved, legislation and self-regulation is unlikely.

What motivates employers to self-regulate? The economic "bottom line" is undoubtedly the primary motivator, and U.S. employers need to appreciate the adverse economic consequences associated with workplace bullying, as well as litigation avoidance.[261] As Wayne Cascio points out,[262] low employee morale and bad publicity caused by bullying are quantifiable organizational costs that can be avoided with good workplace practices. In short, U.S. employers need both a carrot and a stick approach.

Although some "enlightened" employers are becoming more attuned to workplace bullying, there is no indication that self-regulation is occurring in the U.S. to the extent it has developed in the U.K. The initial step of consciousness-raising that was so significant in the U.K. appears to be absent in the U.S. Although U.S. studies are now becoming available,[263] neither the U.S. Department of Labor nor any state equivalent has

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movement.

261. Additionally, globalization impacts U.S. practice in myriad ways. U.S. transnational corporations with operations in the U.K, EU, Australia, or Canada are increasingly likely to develop global codes of conduct that include zero tolerance. There may also be an emerging trend by jurists (much to the chagrin and outrage of Justice Scalia) to comment on international and foreign domestic law, at least in the constitutional arena. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572–77 (2003) (citing to British laws and European Convention on Human Rights to support proposition that laws criminalizing private consensual homosexuality are invalid). *See generally* Joan L. Larson, *Importing Constitutional Norms from a 'Wider Civilization': Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); *cf.* Richard Posner, *No Thanks, We Already Have our Own Laws*, LEGAL AFFAIRS, July/Aug. 2004, *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

262. CASCIO, *supra* note 15, at 83–94.

263. *See, e.g.*, Employment Law Alliance Report, *supra* note 2.

independently conducted a study on the prevalence of workplace bullying or attempted to define the phenomena, although appropriations bills are pending in a handful of states.[264] At the risk of stating the obvious, existing grassroots organizations and employee representatives might have more success in advocating for appropriations bills to study the problem at the local level than they are currently experiencing with the full text version of the Healthy Workplace Bill. A Massachusetts bill provides an intriguing model.[265] The bill requires the Division of Occupational Safety to "conduct a study analyzing the direct and indirect costs of workplace psychological harassment for workers and their families as reflected in healthcare and insurance rates."[266] The bill also mandates that the Division develop a program requiring larger employers to establish internal policies addressing psychological harassment.[267] This approach, combining state funding for cost-impact studies with a minimally intrusive employer mandate, provides an interesting middle ground between the Healthy Workplace Bill's legal rights and voluntary self-regulation, an approach that more approximates the U.K. model.

D. THE ROLE OF TRADE UNIONS AND UNION CLOUT

David Yamada has posited that the decline of unionization in the U.S. is one reason that the American workplace is "primed" for bullying because of lack of employee representation.[268] Indeed, the American workplace arguably has a greater power imbalance between employers and employees than in European and U.K workplaces, due in part to lower union density, but also due to the enduring at-will rule and lack of social welfare safety nets.[269]

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264. *See* 2005 WA H.B. 2142; 2007 Bill Text MA H.B. 1850; N.Y. S2715 & A04291.

265. 2007 Bill Text MA H.B. 1850; *see also* Estlund, *supra* note 239, at 344–45 (describing Clinton administration's Reinventing Government initiative to develop a self-regulatory program and British-style social partnerships under OSHA and state initiatives developed after attempts at the federal level floundered).

266. H.B. 1850, 2007 Gen. Assem. (Mass. 2007), *available at* http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01850.pdf.

267. *Id.*

268. Yamada, *Workplace Bullying*, *supra* note 4, at 488–89.

269. *Id.* The author expresses gratitude to Brian Foley for offering the suggestion that workplace bullying legislation is even more necessary in the U.S. than in Europe or the U.K. because of this power imbalance. The average American worker might be more willing to endure bullying than a worker in the U.K. who might be less fearful of unemployment because of the existence of the security nets

Lack of union involvement in the U.S. anti-bullying movement is also one reason why workplace bullying lacks recognition. Union membership in the U.K. is only slightly above U.S. levels and in the past decade, has seen the same declines.[270] Despite the decrease in unionization, British trade unions appear to have a more visible presence in shaping the political agenda than U.S. labor. Significantly, the British trade union MFS, now Amicus, appears to have played a pivotal role in propelling workplace bullying onto the legislative agenda.[271]

Unions can play an important role in pushing the U.S. anti-bullying movement forward. Indeed, there are some early signs that U.S. unions are becoming aware of the problem and addressing it, at least at a superficial level. For example, the AFL-CIO's affiliate, Working America, organized an annual "Bad Boss" contest, which began after the organization received stories about workplace bullying.[272] The Amicus Dignity at Work Campaign could be a useful model for Working America's lobbying arm in channeling this fledgling anti-bullying message into a more proactive campaign. Even in the largely non-unionized American setting, unions might act in an advisory or even outside monitoring capacity to employer/employee partnerships contemplating addressing workplace bullying or adopting policies.[273]

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of unemployment benefits, state-funded pensions, and the like.

270. *See* Visser, *supra* note 122, at 43. Although New Labour held great promise for rolling back some of the restrictions on union activity implemented through the Conservative Party government in the 1970s and 1980s, particularly strikes, New Labour has come under criticism for not repealing more restrictions. *See, e.g.*, Alan L. Bogg, *Employment Relations Act 2004: Another False Dawn for Collectivism?*, 34 INDUS. L.J. 72 (2005); Sandra Fredman, *The Ideology of New Labor Law*, *in* THE FUTURE OF LABOR LAW 9, 32 (Catherine Barnard et al. eds. 2004). Differences in the development and decline of trade unions in the U.K. should be considered when determining whether trade union involvement in the U.S. anti-bullying movement could be a precipitating factor in legislation here, and the role of the unions is a fertile area for further study.

271. *See* Part II.C., *supra*. Moreover, the House of Lords member who reintroduced the Dignity at Work Bill in 2001, Baroness Ann Gibson, was a former union activist.

272. Working America, *My Bad Boss Contest*, 2007, *available at* http://www.workingamerica.org/badboss/ (last visited Mar. 2, 2008). Working America is a community affiliate of AFL-CIO for non-unionized workers. *See* http://www.aflcio.org/mediacenter/prsptm/pr07312007b.cfm.

273. *See* Estlund, *supra* note 239, at 364, n.205 ("[u]nions might help supply independence and expertise to employee committees—such as the health and safety committees that are mandatory in some states—even in workplaces in which they do not represent the majority of employees." (citations omitted)).

CONCLUSION

Although bullying in the U.K. is still a major problem affecting millions of workers and is still part of the workplace culture, the anti-bullying movement, which has apparently now merged with the idea of a dignitarian workplace for all, has seen great strides in the past decade. The U.S., on the other hand, has only recently begun to recognize the problem. Legislation in the form of the Healthy Workplace Bill is a significant step, yet to be taken, but if the U.K. experience teaches us anything, it is that legislation is just one part of what needs to be a multi-pronged solution for the problem of workplace bullying. The gap in the U.S. law undoubtedly needs to be filled, but new employee rights can also emerge through increased awareness.

Indeed, the potential role for norms decrying workplace bullying on worker expectations and behavior is a largely untapped resource in the movement toward a dignified workplace for all.[274] Awareness and social norms against bullying can also lead to employer self-regulation, and can also shape courts' and legislatures' views on what is considered unacceptable behavior.[275] Increased awareness, however, will

274. Although a discussion of whether and how norms fashion law, or vice versa, is beyond the scope of the present article, insight from the comparative experience of the U.K. may be gleaned to add to the discourse of the complex relationship between laws and norms. *See* von Heussen, *supra* note 140 (suggesting that the PHA will have a long-term impact on "socially held and socially defined values); S. Lewis & J. Lewis, *Work Family and Well-Being: Can the Law Help?*, 2 LEGAL & CRIM. PSYCHOL. 155, 167 (1997) (suggesting that when employers are legally compelled to change the workplace environment, workers not surprisingly develop a sense of entitlement to an improved or altered workplace environment, which in turn can generate changes in both worker and employer attitudes and behavior) (cited in von Heussen, *supra* note 140). Professor Pauline T. Kim has provided thoughtful insight into how employer practices influence employee expectations and understanding of their rights, in the context of workers' perceptions that they are subject to a good cause employment rule. Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 449 (1999) (reporting wide-spread misperception of workers in New York, Missouri, and California of the at-will nature of their employment relationship, consistently overestimating their employment rights to something akin to a good cause standard). Professor Kim posited that workers' erroneous beliefs about the law were not influenced by variations in state law or the workers' own experience, theorizing that workers confuse norms and law—a fairness norm having being developed through common internal employer practices and policies, such norms in turn shaping worker expectations of their legal rights. *Id.* at 448 ("It appears that workers do not readily distinguish between informal norms and enforceable legal rights, between what they believe the law should be and what it actually is.").

275. *See* Ellickson, *supra* note 30, at 82, 138; Sunstein, *supra* note 30, at 1643; McAdams, *supra* note 30, at 338.

need more effective engagement of several players—the government, unions, and employers. More studies may be needed to drive the point home, suggesting increased utility of appropriations bills at the state and/or federal level.

Clearly, the potential for litigation under the PHA has been instrumental in the anti-workplace bullying advances in the U.K. Similarly, enactment of the Healthy Workplace Bill in the U.S. would undoubtedly be a significant contribution toward providing protection for U.S. workers, as would increased use of existing state stalking laws. There is, however, reason to believe that organizational change can also be achieved through awareness and effective engagement and the author's modest hope is that this paper will, at least, revitalize the discourse on workplace bullying. Recognition of the phenomenon, remedies for victims, and policies and legislation aimed at pre-emptive protection are all part of the solution.