GLOBAL PERSPECTIVES ON WORKPLACE HARASSMENT LAW: PROCEEDINGS OF THE 2004 ANNUAL MEETING, ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON LABOR RELATIONS AND EMPLOYMENT LAW

Professor Vicki Schultz*: Good afternoon, and welcome! I'm Vicki Schultz, and I am this year's chair of the Labor and Employment Relations Section. I'm very pleased to see that so many of you have turned out for the terrific panel our section is sponsoring this year.

Our panel is entitled, "Global Perspectives on Workplace Harassment Law." As most of you know, the idea that workplace harassment is a form of discrimination is a concept that was invented by American feminists and civil rights lawyers and inscribed by federal judges into Title VII law. Although the courts first recognized the harm of harassment in the context of race discrimination, it is the concept of sexual harassment that has received the greatest attention, and not only in the United States. Over the past two decades, activism around sexual harassment has sparked developments around the globe, with differing results as each nation has drawn on its own legal and cultural traditions to fashion its own approach to regulating harassment. This panel will discuss developments in the United States, Europe, Latin America, and Australia from an interdisciplinary perspective.

We will hear from four scholars who are doing truly significant, cutting-edge work in this important field. Let me introduce them to you, in the order in which they will be speaking.

First we will hear from Gabrielle Friedman, a recent graduate of the Yale Law School who is now serving as a Law Clerk to the Honorable Gerald E. Lynch, United States District Judge for the Southern District of New York, in New York City. Ms. Friedman received an M.A. in European history from Brown University and, later, a Bosch Foundation Fellowship to conduct research in Berlin. She recently published an article, The European Transformation of Harassment Law: Discrimination or Dignity,1 co-authored with James

* Professor of Law, Yale Law School.
1. 9 COLUM. J. EUR. L. 241 (2003).
Whitman, which compares legal developments in continental Europe, particularly Germany, with workplace harassment law in the United States. Ms. Friedman shows that the U.S. approach, which treats workplace harassment as a form of discrimination, has been rejected in Germany in favor of an approach called "mobbing" theory, which emphasizes the dignity of all workers rather than discrimination against some. In her talk today, Ms. Friedman analyzes the differences between the two approaches and asks whether they can co-exist.

Next, we will hear from Abigail Saguy, Assistant Professor of Sociology at UCLA, who holds an M.A. and Ph.D. from Princeton and a doctorate from the Ecole des Hautes Etudes en Sciences Sociales in Paris. Professor Saguy, whose research takes a comparative approach to women's issues in France and the United States, has published a large body of work on sex harassment, including her recent book, *What is Sexual Harassment: From Capitol Hill to the Sorbonne* (2003). In her talk today, Professor Saguy will report on a cross-national sociological study of why French and American feminists have conceptualized sexual harassment differently, and how the sexual harassment laws enacted in their respective countries have been affected. As she will discuss, American feminists inherited civil rights laws, which enabled them to conceive of harassment as discrimination, while French feminists lacked a robust tradition of anti-discrimination law and turned instead to sexual violence laws to ground sexual harassment regulation – with somewhat differing results.

After examining developments in Europe, we will next hear from Tanya Hernandez, Professor of Law and Justice Frederick Hall Scholar at Rutgers University School of Law in Newark. Professor Hernandez has published widely on comparative race relations, including a recent article, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*. She has also written about racial and sexual harassment, and their intersection, in her piece, *The Next Challenge in Sexual Harassment Reform: Racial Disparity*. In her talk today, Professor Hernandez will examine how racial harassment has been treated in the Latin American/Caribbean region. She will argue that the legacy of conceiving of racial harassment in terms of U.S. "Jim-Crow" style incidents has obscured

the need for protection from broader forms of racial exclusion and harassment, not only in the United States, but also in Latin America.

Broadening our analysis even further will be David Yamada, Professor of Law at Suffolk University Law School in Boston. Professor Yamada, who is a leading authority on the issue of workplace bullying and abusive work environments, serves as an affiliated scholar with the Workplace Bullying and Trauma Institute. He has published a number of articles on the subject, including *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection* and *Workplace Bullying and the Law: Towards a Transnational Consensus?* Today he will tell us about proposed and existing legal protections against workplace bullying, mobbing and harassment in several different countries, including the United Kingdom, Sweden, Australia, and the United States. He will consider the role of the International Labor Organization and other transnational bodies in developing legal and policy responses to abusive work environments.

Finally, I will offer a few comments on the presentations from our panelists. I come to this subject with my own biases, of course, for I have done some work on sex harassment law in the United States. My two major articles in this field are *Reconceptualizing Sexual Harassment* and *The Sanitized Workplace.* I believe we still need to define some types of workplace harassment as discrimination. But I have criticized U.S. courts and companies for equating discriminatory harassment with sexual conduct, while neglecting the underlying, not-necessarily-sexual patterns of hostility and exclusion based on sex and gender (and, by extension, race and other potential markers of difference). I advocate a more structural approach that removes the focus on ridding the workplace of sexual conduct and seeks instead to integrate women and other underrepresented groups equally into all jobs and levels of authority, so that they will have more power to change their workplaces for the better on their own.

DIGNITY AT WORK: HARASSMENT LAW IN GERMANY AND THE UNITED STATES

Gabrielle S. Friedman:

1. INTRODUCTION

Today I'm going to talk about what workplace harassment law, especially sex harassment law, can look like in a legal system that doesn't have a law like Title VII. My subject is mobbing, which is a popular theory of workplace harassment in Northern Europe. I focus on Germany because it highlights some differences between the U.S. and Europe in a particularly clear way. A quick cultural translation of mobbing would be "hostile workplace environment harassment." Basically, mobbing describes a situation where a particular employee is singled out for abuse. Mobbing could lead to what we would call a constructive discharge, but it doesn't have to. The point is that conditions are intentionally made intolerable for the employee to the point where he or she can no longer function in the job.

So far, this sounds familiar, but there is a crucial difference between what Europeans call mobbing and what U.S.-trained lawyers call hostile workplace environment. That difference is discrimination. Basically, mobbing has nothing to do with an anti-discrimination framework. It doesn't ask broader questions about structural inequality, it is unconcerned with protected classes, and it doesn't ask about the sex or race of the parties involved. It is essentially status neutral.

Another way of getting at the difference is to ask: "What's the harm of sex harassment?" A lawyer trained in Title VII will answer that "it is wrong because it discriminates on the basis of sex and

* At the time of the AALS Annual Meeting, Ms. Friedman was Law Clerk to the Honorable Gerard E. Lynch, U.S. District Judge in the Southern District of New York. She is currently an associate with Lankier, Siffert & Wohl LLP in New York City. This presentation is based on material developed in Gabrielle S. Friedman & James Q. Whitman, The European Transformation of Harassment Law: Discrimination Versus Dignity, 9 COL. J. EUR. L. 241 (2003).


violates the principle of equality. The reason we have Title VII is to dismantle segregated labor markets." But a mobbing lawyer in Germany would respond that the harassment is wrong because it violates the dignity of the victim. Basically, mobbing theory rests on the employee's right to respectful treatment at work, rather than her right to equal treatment. It's that difference between dignity and equality that I want to address.

I first heard about mobbing years ago before I went to law school. I was working in a TV production office in Germany as the only American. I could speak German, but I was having a hard time integrating into the office. One day a colleague asked if I had lunch plans. I thought it was finally my chance to become part of the team, and I said I was free. Then she said great, you can take care of the dog. Then she brought me over someone's beagle to babysit and I watched the rest of the office troop off to a lunch meeting. When I got home that night and described the incident to some friends, one of them said "how awful – you're being mobbed" – *gemobbt* in German. When I told him that I didn't know that word, *mobbing*, he said "of course you do – it's English. You Americans invented it. It's when everyone at work gangs up on you and humiliates you, and it's illegal."

I tell this story because it illustrates a few important points:  
First, mobbing theory has mass appeal. By the mid-1990s it was a fairly common way to identify mistreatment at work.

Second, lots of Germans think mobbing is a U.S.-import. In fact, it's not; it was invented by a German industrial psychologist in Sweden.

Third, as I pointed out before, the harm is that the target is insulted, *not* that the target is singled out for abuse on the basis of a protected characteristic.

Fourth, and this is my final point, my German friend was convinced that mobbing is illegal. Well, that's a complicated story. There is no paragraph in the civil code naming mobbing, and that is odd in a civil law system. On the other hand, the German parliament has said that existing labor laws encompass mobbing,10 German law schools teach mobbing in employment law classes, German employers issue anti-mobbing policies, and the labor courts are

talking about mobbing. But before I get to where mobbing stands as a matter of law, I want to describe it in more detail.

II. WHAT IS MOBBING?

Up to now, I've been describing mobbing as workplace abuse that injures the victim's dignity. To U.S.-trained legal ears, dignity may sound like a soft concept. A dignified workplace is a laudable goal, but it seems to be based on a vague, subjective value. But if there's one thing mobbing theory does, it tries to categorize the offending behavior with precision. There is a widely circulated list of forty-five mobbing activities, sometimes called the Leymann List after a prominent theorist. The list is reprinted in company handbooks, articles and self-help books. It is long and rather repetitive. It is particularly striking that harassing behavior that explicitly articulates hostility based on sex or race is in the list, but is just one of many nasty behaviors.

It is also noteworthy that anyone can likely identify a few things on that list that happened to them at some point. But mobbing theorists emphasize that you're not being mobbed if you have one bad interaction, or even a few. Mobbing is defined as the persistent and systematic attempt to destroy someone's social standing at work. Mobbing theorists suggest that people who think they may be targets keep a journal for six months to log the offending behavior. Mobbing lawyers suggest the same thing.11 That brings me to the next section, which is the relationship of the mobbing theorists to the mobbing lawyers.

III. WHERE DOES MOBBING COME FROM?

As I mentioned earlier, mobbing theory originated in the social sciences. It is only fairly recently that it made its strange migration into German law. In the 1980s, Dr. Heinz Leymann, a German organizational psychologist working in Sweden, described a syndrome of workplace harassment as mobbing.12 He borrowed the word from animal behaviorism – originally in the 1950s it was used to describe

11. For a mobbing lawyer's practical advice, see the website of Hamburg employment lawyer Peter MacKenzie, at <http://www.mackenzie.de> (last viewed Aug. 27, 2004).
12. Leymann, supra note 8, at 167.
the behavior of herd animals towards a new member. The outsider bird might be denied food or shunned or pecked at. It basically described a pretty brutal group dynamic. In the 70s, a researcher used the word mobbing to describe schoolyard bullying tactics. By the early 90s, Leymann was conducting surveys and publishing books linking mobbing to the workplace.

The organizational theorists had two ways of describing mobbing. First, there are efficiency experts who are like modern-day Taylorites. For them, mobbing is the result of a dysfunctional communication pattern, and causes economic costs to the employers in terms of more sick days and lost productivity. Then there are the psychologists, who emphasize that mobbing results from the collision of victim personalities and abuser personalities; they focus on the psychic costs to the victim. This psychological strain is the popularized version and emphasizes self-help as the solution.

IV. ENTER THE LAWYERS

By the mid-1990s, all of the popular mobbing theory was putting pressure on the German legal industry to figure out a way to talk about mobbing. Mobbing advice clinics were popping up in big cities, staffed by social workers and employment lawyers doling out advice.

This is where dignity enters the picture. German lawyers looking at mobbing didn’t have an anti-discrimination framework to delimit or define the issues. Of course the German constitution prohibits discrimination based on race, religion or sex, among other factors. But it only applies to state action. There is a sex discrimination law

that applies to private companies, but it regulates hiring decisions.\(^{19}\)

On the other hand, there is a long tradition of laws protecting individual dignity. By combining that tradition with existing labor law, mobbing found a way to be legally cognized even without a statute mentioning it by name. I'll describe the legal geography very briefly just to make the point.

First, there are two guiding constitutional principles that are relevant. The first is the basic right in Article I that "[h]uman dignity is inviolable."\(^{20}\) The second is the related principle in Article II that "every person shall have the right to freely develop his personality."\(^{21}\) This is often called the personality right, and is basically untranslatable. You could call it a right to moral autonomy. That may seem vague, but in German law the personality right has specific instantiations in areas like copyright, the right to informational privacy, and the right to be free of insult. This last one is particularly worth mentioning because it points to a crucial difference between the U.S. and Germany – German law protects the individual's right to social respect.

I want to emphasize that the rights to personality and dignity do not boil down to some petty civility code. It might be helpful to think that the personality/dignity principle in Germany carries as much explanatory force as the equality principle in the U.S.

The second relevant area of law is German labor law. In Germany, the employment relationship is construed as a special kind of contract that imposes mutual obligations on the parties. Under the civil code, employers have a duty to care for their employees, and employees have a corresponding duty of loyalty to their employers.\(^{22}\) And very significantly for the mobbing theorists, the employer has a statutory duty to protect the employee's right to develop her personality at work.\(^{23}\) Basically, employers have a duty to provide a workplace free of dignitary harm. To the extent mobbing can be construed as a dignitary harm, it falls within the employer's duty to prevent it.

---

19. **BESCHÄFTIGTENSCHUTZGESETZ [BSchG]** [The Law to Protect Employees from Sexual Harassment in the Workplace].
20. **GG** art. 1, ¶ 1.
21. **GG** art. 2, ¶ 1.
22. **BÜRGERLICHES GESETZBUCH [BGB]** §§ 616-619 (F.R.G.) (defining the employers' duty of care and the employee's corresponding duty of loyalty as ancillary contract terms).
23. **BETRIEBSVERFASSUNGSGESETZ [BetrVG]** 75, ¶ 2 (defining the employer's obligation to protect employees' ability to develop their personalities at work).
Those are the theoretical underpinnings for mobbing law. On a practical level, employment lawyers are bringing more and more cases under these theories and forcing labor courts to name mobbing even where the legislature won't. There isn't a good deal of case law, since Germans aren't as litigious as Americans, and there are structural incentives to resolve conflicts through in-house grievance procedures. But it is clear that German courts are grappling with all the dignity-injuring activity that seems to be happening in German workplaces.

V. RELATIONSHIP TO SEXUAL HARASSMENT LAW

The last thing I want to mention is the relationship of mobbing to sexual harassment law in Germany. Germany actually does have a statute called The Law to Protect Employees from Sexual Harassment in the Workplace. It was passed in 1994, after German feminists lobbied long and hard for something like Title VII anti-discrimination law. But that 1994 law is not an anti-discrimination law. It does not link sex harassment to sex inequality, and in fact it explicitly defines the harm of harassment as a violation of human dignity. That should sound familiar. The 1994 law created no new penalties beyond what already existed under the personality protections in labor law. It is also rarely invoked, certainly in comparison with mobbing.

The situation in Germany is paradoxical in that mobbing, which isn't mentioned in any statute, has subsumed sexual harassment law, which has its own statute. These days, mobbing and sexual harassment are often named side-by-side in company policies and government studies – it's almost as if the sexual harassment activists are trying to gain a little credibility by linking sexual harassment to mobbing. This is especially odd when you realize that there is no love lost between feminists and most mobbing theorists. That antagonism is not at all surprising – feminism aims at social change, and mobbing tends to privilege older and more established workers and traditional ideas of social status.
VI. CONCLUSIONS

I feel like I've been skating across a very broad surface, and I would like to leave you with three points. First, I think the comparison of German and U.S. harassment law pushes the concept of the legal transplant to the limit. We have what appears to be the same phenomenon, workplace abuse, but when it's viewed through entirely different frameworks, the object itself seems to morph beyond recognition. Just look at what happens when Germany purports to pass a sexual harassment law to end sex discrimination – it ends up looking like another dignitary protection.

Second, this is a more normative observation – what can we learn from the German experience? It seems clear to me that sex harassment law in Germany is almost totally drowned out by status-neutral mobbing. I think that when a system defines all harassment as impermissible abuse, regardless of the presence of discriminatory intent, it runs certain risks. Harassment law may become a force for conservatism rather than social change. We may end up with a civility code. On the other hand, I want to suggest that mobbing may have a more radical potential when it is in the right hands. For instance, Vicki Schultz has argued that U.S. lawyers tend to be obsessed with the sexual part of sex harassment – that is, we expect explicit articulations of sexual desire before we see unlawful harassment. Mobbing theory may help us see systematic humiliation or ostracism in the workplace as part of a larger pattern of discrimination. However, under Title VII we still need to be able to infer intent from something.

Third, and finally, I wonder to what extent we already have a de facto understanding of harassment as a dignitary injury. I ask you to consider all the lawsuits rolling into the federal courts, including the pro se complaints. There are an overwhelming number of cases where plaintiffs just feel plain insulted about the treatment they endured at work. It may be that all discrimination visits a dignitary injury on the victim, but the reverse isn't the case. Not all insults constitute discrimination. But when you see the cases where plaintiffs try to shoehorn their stories of abuse into some category cognizable by Title VII, and it's a bad fit, then mobbing theory doesn't seem so foreign after all.

25. Schultz, supra note 7, at 2074-87.
Professor Abigail C. Saguy*: In my talk today, I am going to draw on my book, What is Sexual Harassment? From Capitol Hill to the Sorbonne,26 which examines how "sexual harassment" has been defined differently in the United States and France. Originally coined in 1975 by American feminists, the concept of "sexual harassment" has moved well beyond the small feminist and legal circles where it was born to become a popular topic in the American media, a growing body of law, and an increasingly important concern in American workplaces. This concept has also traveled across the globe, becoming, for instance, harcélement sexuel in France or seku hara in Japan.

France and the United States provide a fruitful national comparison. Both are major industrialized democracies that have historically had a mission of advancing universal concepts of justice and rights. Surveys show that both French and American women face sexual harassment. Yet my work suggests that perceptions of sexual harassment are quite different in these two countries.

For instance, when asked if she thought sexual harassment was a problem in French workplaces, Sophie – a French woman with twenty years of work experience in French corporations – said that she personally had never been sexually harassed:

I have never been harassed in the real sense of the term, where a person ends up tyrannizing you. It's true that we are pestered; it's true that there are men who take advantage of the situation and pinch your rear in the elevator, but that's different ... Where I feel really attacked is when someone puts a knife to my throat and tells me, "if you don't do it, you'll lose your job."27

In my talk today, I attempt to explain two outcomes that put Sophie's response into a larger context. The first is French and American legal definitions of sexual harassment. The second is how French and American employers define and respond to sexual harassment.

I consider how existing laws, legal systems, and cultural repertoires open certain avenues for social actors as they block off others. I further explore the interactions between different institutions in each country and how this affects the meaning of sexual harassment in ways that may not have been foreseen by the social

* Assistant Professor, Department of Sociology, University of California, Los Angeles.
27. Id. at 97.
actors involved. Finally, I show how France and the United States, rather than evolving on separate parallel paths, are interconnected. I point to the particular impact that the United States has had on France. In contrast to a lot of the work done on globalization, however, which points to global diffusion of new norms but does little to explore how issues are transformed as they are imported, I demonstrate how French domestic policy concerning sexual harassment has been informed by the desire to demarcate France from the United States, which is perceived as culturally imperialist.

I. METHODS

To address how these various issues play out, this study employs multiple methods and sources of data, including media analysis, legal analysis, and in-depth interviews. I'm not going to get into the details of my methods now but would be happy to answer questions about methods during the question and answer period.

II. OVERVIEW

Let's begin by reviewing some of the most important differences in how sexual harassment is conceptualized in French and American law and corporations. In the United States, sexual harassment is typically addressed by employment discrimination law, in the context of Title VII of the Civil Rights Act of 1964, which makes it illegal for an employer to refuse to hire, discharge, or otherwise discriminate against any individual because of such individual's race, color, religion, sex, or national origin.28

Beginning in 1976, U.S. courts have held employers liable for tolerating or failing to prevent incidents of sexual harassment in the workplace.29 The American courts have recognized two different types of sexual harassment. In "quid pro quo" sexual harassment, sexual relations are exchanged for job benefits. In "hostile environment" sexual harassment, no clear ultimatum is necessary. Rather, repeated sexual comments or behavior may be considered sexual harassment if they unreasonably interfere with an individual's work performance or create an intimidating, hostile or offensive

working environment.\textsuperscript{30} Hostile environment sexual harassment may involve either unwanted sexual contact, propositions or sexist taunts and threats.

By grounding sexual harassment in Title VII, this issue is framed as being about discrimination in employment. According to the discrimination frame, sexual harassment is wrong because it has an \textit{adverse effect on women's employment}, or, more broadly, because it serves to \textit{discriminate} against people of a particular \textit{demographic group} (e.g., women), \textit{because they belong to that group}.\textsuperscript{31}

In France, sexual harassment law takes the form of two main statutes, one in the penal code and the other in the labor code. \textit{Neither of these establishes employer liability}. Instead, penal courts typically make convicted \textit{harassers} pay small fines and/or issue suspended jail sentences. In the French legal system, it is also possible to seek compensatory damages within the criminal trial. In keeping with larger legal traditions, the sums of compensatory damages are typically much smaller in France than in the United States. In France, the labor code offers an added remedy, in the form of back pay and reinstatement, in the event of employment retaliation linked to sexual harassment.

In the penal code, sexual harassment is classified with other forms of sexual violence, including rape, sexual assault, and exhibitionism.\textsuperscript{32} This classification serves to \textit{frame sexual harassment as a form of interpersonal violence}. Until January 2002, hierarchical authority was a necessary condition of sexual harassment under French law. In January 2002, the law was expanded to include harassment among coworkers.\textsuperscript{33}

The legal differences just outlined are closely linked to differences in how French and American employers address the issue of sexual harassment. Sexual harassment in the workplace is a \textit{major concern} for American employers, largely because they can be held liable for it under Title VII. My research suggests that American management sees it as their \textit{responsibility} to prevent and/or resolve incidents of sexual harassment.

However, in "taking ownership," as my respondents call it, of this problem, American HR professionals have adopted a "business
frame," to condemn sexual harassment. Under this logic, they prohibit a wide range of sexual behavior or innuendo because it is not "professional" or "does not contribute to productivity."

In contrast, sexual harassment is not a major concern for French employers. French HR personnel and union reps say that it is not the role of corporations to resolve personal disputes of this kind. Rather that is the responsibility of the state. This is consistent with the fact that they frame sexual harassment as an act of violence occurring among individuals.

III. EXPLANATION

I would now like to offer an explanation for the patterns described, in which I stress how institutions create distinct political, cultural, and legal resources and avenues for particular groups seeking to shape public policy. I begin by considering the American case, where American feminists spearheaded the movement for sexual harassment law. Many feminist jurists favored the discrimination account or frame because they wished to promote an analysis of sexual harassment as a product of sexism and bigotry. However, they did not produce this account from whole cloth but carefully selected from the (limited but varied) elements in their legal cultural repertoire.

Not only was the concept of group discrimination highly accessible and legitimate in the American context but it was institutionalized in law, through, for instance, Title VII of the Civil Rights Act of 1964. Many feminists advocated addressing sexual harassment under Title VII. In order to do so, however, they had to make a case that sexual harassment is a form of sex discrimination. In so doing, they conceptualized the harm of sexual harassment as limiting the victim's employment opportunities because of her sex. This conceptualization has several limitations. For instance, only workers with status of employees are covered under Title VII. Second, cases of same-sex sexual harassment are more difficult to argue under a discrimination frame.34

34. See McCown v. St. John's Health Sys., 349 F.3d 450 (8th Cir. 2003) (although male supervisor's alleged conduct towards male employee, which included grabbing employee by waist, chest and buttocks, grinding his genitals against employee's buttocks in simulated intercourse, telling employee to squeal like a pig or a woman, and making other lewd comments, was inappropriate and vulgar, employee did not show that such conduct was "because of sex," as required for prima facie case of same-sex sexual harassment under Title VII); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003) (male employee failed to
The American legal system offered feminists particular avenues for social change. For instance, in the United States, court precedent has the power of law and American legal rules permit a variety of social actors to shape court proceedings, as lawyers, expert witnesses, or by delivering amicus briefs. American feminists took advantage of this to shape sexual harassment law through the courts.

I would now like to shift the outcome of interest from the law to corporate behavior. Virtually all American firms have some kind of sexual harassment policy. The American human resource managers I interviewed said that sexual harassment is taken very seriously. One explained that she usually has "several balls up in the air," but when she receives a complaint about sexual harassment, she "drops all of them" to deal with the sexual harassment issue promptly.

This can be explained by the fact that, not only was there an elaborate legal mechanism at the disposal of American feminists, but there was a complex corporate system for translating court decisions into corporate practices. This was fostered by the existence in American corporations of internal constituencies - for instance, human resources (HR) departments, affirmative action officers, and diversity managers - that favor the elaboration of civil rights protections, because it is their job to handle these matters. Thus, firms learn about and respond to even obscure court rulings. Media reporting on sexual harassment suits can further raise employer concern about sexual harassment.

Another reason American employees increasingly look to sexual harassment law is that American labor law is very weak, so that employees with grievances have few courses of action besides Title VII. As one American lawyer said, "A lot of people feel harassed, period. It might not be sexual: they don't feel they're treated correctly by their employer, [but] if it's not based on their sex, if it's not based on their race, there's nothing they can do." Contingency fees also facilitate civil suits in the U.S., and the expectation of large monetary damages on the part of plaintiffs and their lawyers, which is fed by media reporting, may also contribute to lawsuits.

demonstrate that he was harassed because of his sex as required for a same-sex sexual harassment claim under Title VII); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001) (although plaintiff's coworker engaged in gross, vulgar male horseplay, plaintiff failed to establish he was harassed because of his sex).

35. SAGUY, supra note 26, at 55.
In creating corporate policy, HR departments redefine the meaning of sexual harassment. Rather than conceptualize it as a form of discrimination, I found that American HR managers condemn a wide range of sexual behavior or innuendo because it is considered "unprofessional" or not conducive to productivity. In other words, they argue that there should be different standards of interpersonal behavior at work than outside of work. They also consider that corporations have the right and duty to govern workplace behavior. One American HR manager puts it like this:

A sexual advance is harassment, as far as I am concerned. And if it is done at a party, when everybody is drinking and having fun, I think it's natural. I think it's going to happen if you go to the country club and no employees are there and there's someone there, of the same or opposite sex, that's attracted to you . . . . I don't have a problem with that, I think that's where it should be done. But I don't think it should be done in the work place; I like to work in a professional environment.36

By including in the rubric of "sexual harassment" all workplace sexual advances, this American manager defines sexual harassment significantly more broadly than does American law. At the same time, he disregards the original point of Title VII, which is to combat gender inequality, not sanitize the workplace of all sexual innuendo. Such rules often do not improve conditions for women at work. For instance, many American respondents said that because management frowns on dating within the company, especially across hierarchical ranks, the lower-ranked employee in the couple is often transferred or encouraged to find another job when an office affair is discovered. Due to patterns of gender segregation in the workplace, the female partner in a heterosexual couple is likely to be in a lower-ranked position than her male partner, so that these practices could worsen, rather than alleviate, gender inequality.

The legal and cultural environment is different in France. There, discrimination laws are less often applied, and discrimination is more narrowly defined, making it less desirable for French feminists to build arguments about sexual harassment into discrimination law.

Instead, French feminists took advantage of the legal and cultural resources available to them. They seized the opportunity to introduce a new penal law on sexual harassment during the penal code reform in 1991. To justify the necessity of a sexual harassment law, they drew on European Union recommendations that urge

36. Id. at 116.
member states to adopt sexual harassment laws. French feminists further drew on American, Canadian, and European scholarship and networks to advance their cause.

Rather than try to make law through the courts, which is not possible in France the way it is in the United States, French feminists operated within French legal and political systems, trying to garner support for their bill among the political parties in legislative debates. However, they met with resistance from certain lawmakers, who drew on media accounts to discredit the issue by saying that discussion of sexual harassment was a "fad," imported from the United States.

Such opponents argued that passing a sexual harassment law in France would lead to alleged "American excesses," such as the Battle of the Sexes, an overload of litigation, and "Puritan" sensibilities. To calm these fears, Yvette Roudy, the Parliamentary sponsor of the bill, limited the scope of harm to only instances of sexual coercion by a person with "official authority." Though she was familiar with feminist analyses, in which sexual harassment is conceptualized as harm inflicted by men against women that perpetuates occupational segregation, she framed the issue differently to sway her colleagues. To them, she presented sexual harassment as an abuse of (hierarchical) power:

When I proposed it to the socialist group, the first reaction was: "You aren't going to prohibit flirting. We aren't in the United States," I explained to them. Sexual harassment . . . is . . . abuse of power, exploitation. If there wasn't a hierarchical dimension, the group would not have accepted it, fearing that it would be penalizing flirtation.37

Anti-American rhetoric has been amply supplied by the French media. Only 43 percent of the full French media sample I coded discussed sexual harassment in France.38 (In contrast, 97 percent of the American sample focused on the United States).39 French media representations of the United States were often negative, associated with stereotypes of "American excesses" of feminism, litigation, and lack of respect for privacy. The message of these articles to the French public is, "Beware not to mimic American excesses."

The legal and extra-legal cultural patterns just described have important consequences in French corporations. Compared with American firms, virtually all of which have formal policies,

37. Id. at 43.
38. Id. at 84.
39. Id.
respondents, from all twenty-three French branches of large multinationals surveyed, informed me that sexual harassment was not an important concern in their company.40

Most of the HR personnel surveyed were unaware of the existence of any corporate policy on sexual harassment, even though French labor law requires employers to include sexual harassment in their internal regulations.41 Even the few that did have internal regulations on sexual harassment, said that these were not taken seriously. In the words of one respondent:

There isn't the same psychosis here that exists in the United States. The law says that we have to include sexual harassment in the internal regulations. When I told our internal regulations committee that, it made them laugh. Because I said that we were required by the law to adopt [the new internal regulation] we all voted yes, but it was considered a big joke.42

These patterns can be partly explained by the fact that French law does not impose employer liability for sexual harassment. This means that French employers do not have the same incentives as their American counterparts to adopt sexual harassment policies.

This reinforces different cultural attitudes about the role of employers versus the state. French HR managers and union representatives argued that it is not right for an employer to discipline workers. That is the role of the state. According to one, "[T]he firm should not substitute itself for the responsibility of the society. I'm not against creating greater criminal penalties [for sexual harassment], but that's a decision for society."43

French respondents were more concerned than their American counterparts about going beyond the scope of the law in disciplining sexual harassers. This fear is reinforced by French Labor Law, under which French employers are at greater legal risk than their American counterparts for firing an alleged harasser without sufficient proof of his guilt.44

In addition, there do not exist in France internal constituencies equivalent to American affirmative action officers or diversity managers, whose job is to elaborate and execute civil rights protections in corporations. Most unions, which otherwise play an

40. Id. at 60.
41. Id.
42. Id. at 61.
43. Id. at 125.
44. Id. at 63-64.
important role in defending employee rights in France, have done little to address the issue. With their weak record on women's rights, unions, which play an important role as arbitrator in French workplaces, often come to the defense of the alleged harasser, rather than the alleged victim. The way the French media represent sexual harassment as an American issue of little concern in France also serves to trivialize the issue.

French corporations are also unlikely to take action because there are few sexual harassment lawsuits or trials. Several factors impede sexual harassment victims from appealing to the law in France, including the small monetary awards typically granted, the fact that the high cost of lawyers cannot be offset by contingency fees, and that French Labor Law provides several alternative courses of action for workers.

Also, in that the law is less legitimate in France, victims arguably feel more shame about coming forward. Lack of action also means French employers have not redefined sexual harassment, as American employers have.

Professor Tanya K. Hernandez*: My remarks provide a comparative assessment of racial harassment in the Americas.

I. INTRODUCTION TO THE LEGAL CONCEPT OF RACIAL HARASSMENT

Before examining the issue of racial harassment in Latin America and the Caribbean, I would like to briefly discuss the definition of racial harassment in the U.S. context to have a baseline for comparison. In the United States, racial harassment is a form of racial discrimination that is a violation of Title VII of the Civil Rights Act of 1964. While claims may also be brought under Section 1981 and state tort laws, Title VII is the predominant claim and thus what I will use for purposes of my transnational comparison. Although Title VII does not specifically use the words "racial harassment," courts have held that racial harassment is racial discrimination and thus violates the law. 45 Title VII specifically prohibits an employment

---

* Professor of Law & Justice Frederick W. Hall Scholar, Rutgers University School of Law – Newark, and Scholar-in-Residence at the Schomburg Center for Research in Black Culture.

45. Allegations of racial discrimination due to racial harassment are presented as hostile environment claims. Nat'l RR Passenger Corp. v. Morgan, 536 U.S. 101, 115-16 (2002); see also
practice where an employer "fail[s] or refuse[s] to hire or . . . discharge[s] any individual, or otherwise [discriminates] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race [or] color . . . ." 46 EEOC materials define Title VII racial harassment as discriminatory treatment based on race or color that may evidence itself in "ethnic slurs, racial jokes, offensive or derogatory comments, or other verbal or physical conduct based on an individual's race or color." 47 However, simple teasing, offhand remarks, or isolated incidents that are not extremely severe or frequent do not constitute unlawful harassment because they do not rise to the standard of creating an intimidating, hostile or offensive working environment that either interferes with the employee's work performance or results in tangible employment action such as hiring, firing, promotion or demotion. 48

While this is a broad definition, in practice U.S. legal actors seem to view racial harassment as stemming from a very narrow set of cultural references. For instance, EEOC press release reports that tout the success of agency enforcement of racial harassment law indicate that the EEOC is successful primarily in cases that are rooted in Jim Crow cultural references. Specifically, these were cases in which coworkers displayed hangman nooses, Ku Klux Klan materials, or graffiti, in addition to using racial epithets. 49 While the cases that the EEOC chooses to litigate, successfully settle and then issue press releases about, cannot be said to be indicative of the universe of racial harassment cases that exist, what is suggestive is the way in which the pattern is also prevalent in many of the recent cases I examined. Indeed, just three years ago the then-Chairwoman of the EEOC, Ida Castro, noted that the EEOC had witnessed "a disturbing

Williams v. Waste Mgmt. of Ill., Inc., 361 F.3d 1021, 1029 (7th Cir. 2004); White v. Honeywell, 141 F.3d 1270, 1276 (8th Cir. 1998).
48. See, e.g., Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994).
national trend of increased racial harassment cases involving hangman's nooses in the workplace." 50 Nor were the cases confined to a particular geographic region of the country. The EEOC press releases addressed racial harassment incidents in locations as varied as Missouri, Ohio, Pennsylvania, and Washington. In February 2002, the EEOC confirmed that noose-related racial harassment cases were continuing to rise. 51

To assess the extent to which the EEOC cases might be considered representative, I systematically examined recent cases from a single geographic area. The vast majority of the incidents described in the EEOC press releases were in such southern states as Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, and Texas. I chose to look at New York federal district court cases, in addition to Second Circuit appellate decisions available on the Westlaw and Lexis electronic databases, to minimize considerations of the role of "southern culture" in the manifestation of racial harassment.

In the timeframe from 1998 to the present, what is striking is not the prevalence of Jim Crow cultural references in the total number of New York area reported cases, but rather the way in which those cultural references seem to be about the only thing that can save a racial harassment case from being disposed of on summary judgment in favor of the defendants. 52 To be specific, of the forty-seven total number of district court cases I reviewed, thirty-six were disposed of on summary judgment or otherwise dismissed. That is 77 percent of all cases filed. Of the ten Second Circuit cases I reviewed, only four had judgments that vacated a district court judge's summary dismissal of the racial harassment claim. Thus, 60 percent of the Second Circuit appeals affirmed the district court dismissals. These numbers are pretty astounding even in the context of a world in which employment discrimination cases are disproportionately disposed of on summary judgment. By way of comparison, it is useful to note that

50. EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention, at <http://www.eeoc.gov/press/7-13-00-b> (July 13, 2000).
51. Tonya Root, Harassment Over Race Up, Officials Say, MYRTLE BEACH SUN NEWS, Feb. 8, 2002, at Cl.
52. This would make racial harassment part of the larger pattern of judges making employment discrimination law applicable to only the most egregious of fact patterns. See John Valery White, The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law, 53 MERCER L. REV. 709, 756-57 (2002) (illuminating the trend in employment discrimination cases in which only fact patterns which "shock the conscience" trigger liability).
in Theresa Beiner's 1999 article reviewing hostile environment sexual and racial harassment cases, she found that of 302 such cases reported on Westlaw from 1987-1998, 58 percent were disposed of on summary judgment in favor of the defendant. Because the majority of the cases Beiner examined were sexual harassment cases, her analysis focused upon the ways in which the huge surge in sexual harassment cases filed in the years since the 1991 Hill-Thomas hearings, has motivated mostly male conservative judges to clear their docket of the "women-issue" cases for which they have less affinity. What was left unexamined was the possibility that a higher rate of dismissal exists for racial harassment cases than for sexual harassment cases, and the distinct reasons for that phenomenon.

While the New York case analysis is a very small snapshot of the entire universe of racial harassment cases litigated in the country over time, it is alarming that so many get dismissed, and that the few that survive summary judgment review have either exhibited repeated uses of the "N" word, or actual displays of nooses or KKK paraphernalia. It is also telling that the principal racial harassment precedent for applying the Meritor standard, in which a single incident of harassment, if sufficiently severe, can form the basis of an actionable legal claim, sets out the following hypothetical scenario to describe what sort of single incident of racial harassment would be sufficiently severe to be actionable: "If a Black worker's colleagues came to work wearing white hoods and robes of the Klan and proceeded to hold a cross-burning on the premises."

Furthermore, even in the few cases brought by non-Black plaintiffs, ethnically-charged derogatory commentary alone doesn't seem to meet the judicial view of racial harassment. But when a Paskistani-born Muslim was called "nigger" and "sand nigger" his case survived summary judgment review. As Randall Kennedy notes in his excavation of the uses of the "N" word, it is a racial insult with a long history of denoting denigrated status, and has thus evolved into

54. Id. at 119.
57. Hussain v. Long Island R.R., 91 Fair Empl. Prac. Cas. (BNA) 427 (S.D.N.Y. Sept. 20, 2002). But see, Taj v. Safeway, Inc., No. 01-4172-RDR, 2003 U.S. Dist. LEXIS 14550 (D. Kan. May 22, 2003) (allegations that Pakistani plaintiff was called "nigger" and "sand nigger" were hearsay, and did not establish a hostile environment claim; however, employee did not claim that the discrimination was based on his race).
"the paradigmatic slur" for generating epithets against non-Black racial group members as well.58 The term's explosive use during Jim Crow segregation makes it an especially loaded racial insult.59 But what is particularly ironic about this state of affairs in which only racial harassment which resonates with a picture of our Jim Crow legacy or anti-Black racism is superimposed upon other ethnic groups as well, is that the first legal decision to specifically recognize the claim of racial harassment as creating a hostile work environment, was brought in 1971 by a Latina plaintiff in Texas.60

II. RACIAL HARASSMENT IN LATIN AMERICA

After examining the status of racial harassment litigation in Latin America, it is my belief that the U.S. Jim Crow history similarly casts a long shadow across the Americas. Specifically, it is my thesis that Latin American legal actors similarly conceive of racial harassment as principally an engagement of the U.S. Jim Crow legacy and thus are impervious to other manifestations of racial harassment and the need for rigorous enforcement.

In fact, there is very little legal discourse at all about the concept of racial harassment within Latin American legal contexts. Unlike the claim of sexual harassment, which is generally incorporated into Latin American labor codes or penal code provisions, and has become an increasingly popular subject of Latin American legislation,61 racial harassment is not specifically part of the elaborated legal canon. As I have argued elsewhere, the general legal structure for combating racial discrimination within the Latin American context is woefully inadequate.62 This is due in part to the longstanding myth that there is no racism in Latin America, and the cultural belief that focusing on

59. Id. at 13-16. "[F]or many blacks the N-word has constituted a major and menacing presence that has sometimes shifted the course of their lives." Id. at 12.
60. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("By the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.").
race in any way itself fosters racism. Similarly, the conviction that racism does not exist in Latin America is rooted in the historical comparison with the United States publicized Jim Crow violence and the lack of de jure segregation in Latin America. These perspectives all come to bear on racial harassment in interesting ways.

III. THE BRAZIL CASE EXAMPLE

To be more concrete in the elaboration of my thesis, I will focus on Brazil's experience with racial harassment. I have chosen Brazil because it is the Latin American country with perhaps the most published literature regarding issues of race and the deployment of legal strategies in a racial justice movement.63 Thus, any weaknesses of the Brazilian anti-discrimination framework that are revealed will only be more extreme in other Latin American countries with more nascent racial justice movements. For instance, as of 1985, Brazil was one of the few Latin American countries with a Public Minister authorized to investigate and defend group-based collective interests such as race-based group interests.64 In a fashion parallel to the EEOC, the Public Minister's investigation and prosecution is publicly funded and therefore a more accessible venue for racial minorities to litigate their legal issues.

From the outset it is important to note that Brazilian law, like most Latin American countries that address racial discrimination, centers its enforcement of anti-discrimination within the penal code. The penal code focuses on the refusal of access to public or private establishments as a practice of racism, and imposes a range of imprisonment from one to five years depending on the kind of establishment.65 A separate provision permits victims of race crimes to seek monetary damages.66 In addition, the penal code makes it a misdemeanor to malign someone's honor using racial insults, and the penalty is imprisonment of one to three years and a fine.67 What these

63. Id., at 1163 ("Brazil is the country in Latin America with probably the most articulated racial justice movement today.") (citations omitted).
provisions fail to do is directly address the racial harassment that exists in the labor market.

The general concept of moral harassment ("assedio moral") that harms an individual's dignity or honour is thought to encompass harassment based on gender and race. Yet despite the existence of the concept of moral harassment, legislators in 2001 enacted a specific sexual harassment provision into the penal code to further the prosecution of quid pro quo sexual harassment. 

Hostile work environment sexual harassment was not addressed by the law. So it is not so surprising that nothing was specifically legislated for racial harassment.

In fact, the one published racial harassment decision that I could locate does not rely upon any of these provisions; nor does the case rely upon the general discrimination law enacted in 1989, which prohibits the "practice of discrimination." Instead the judge supported her condemnation of racial harassment with the general equality principles located in the Brazilian Constitution. The Constitution provides that one of its basic objectives is the diminishment of social inequality along with promoting the common good free from any prejudices regarding origin, race and color. And its equality provision states that all persons are equal before the law and have the right to equality. But interestingly enough, the judicial opinion spends less time elaborating how racial harassment is racial discrimination prohibited by Brazilian law, and more time lambasting the defendant for tolerating racism that would not be tolerated in the United States.

70. Mylene Pereira Ramos v. McDonald's, Sao Paulo Lab. Ct. Dist. 31, Case No. 562/02, Nov. 27, 2002; see Debora Pinho, McDonald's E Condenado a Indenizar Ex-Funcionaria por Discriminacao, CONSULTOR JURIDICO, Dec. 4, 2002.
73. Because Brazil is a civil code jurisdiction that incorporates a framework for stare decisis, it would not have been incompatible with Brazilian law for the judge to elaborate upon her own analytical understanding of racial harassment in the interpretation of Brazilian discrimination law. See THOMAS H. REYNOLDS & ARTURO FLORES, 1 FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, § Brazil 5 (1989 & Supp. Nov. 1995) ("Case law plays a much greater role in the evolutionary process of legal development in Brazil than elsewhere in the civil law world. It has recognized the possibility of stare decisis in the application of the Sümula, a 'unique quasi-precedential device[.]"). Furthermore, the Brazilian "Lei de Boa Razao" (Law of Good Sense) encourages
The facts of the case are fascinating for the connections made between the United States and globalization. The plaintiff was an Afro-Brazilian female employee of a McDonald's franchise in the cosmopolitan city of Sao Paulo. The plaintiff's female supervisor (race not specified) was found to have called the plaintiff "a smelly black woman" ("preta fedida") in addition to having had occasion to sniff around her to emphasize the characterization. The supervisor also stated that she did not like black people ("pretos") and poor people. When the plaintiff asked her supervisor what the problem was with her work performance, the supervisor pointed to her arm to indicate her skin color. When the plaintiff made an internal complaint about the matter, no corporate action was taken.

While the actions of the supervisor are certainly distasteful and race specific, I suspect many U.S. judges would not find they met the severity standard of a hostile work environment. And in a Latin American context, commentary about Blacks and foul smells related to animals is commonplace.

Why, then, the judicial outrage throughout the opinion? It would seem to be the outrage against a U.S. based company and symbol of U.S. culture abroad that would tolerate mistreatment of an employee in Brazil that it presumably would not tolerate in the U.S. The judge specifically states that:

globalization does not dispense with the equality of employment practices in the different countries in which the company does business. The high standards for the company's employees in the business's country of origin, should also be applied to its other employees throughout the world, lest a discrimination amongst employees be practiced by the company. The danger of social dumping, a condition in which multinational companies exploit the labor of developing countries to guarantee larger profits with the cheapening of the worker, is totally unacceptable.74

Thus, the most extensive judicial commentary is reserved for what the judge views as the hypocritical stance of a U.S. company having a general corporate policy against racial discrimination, while tolerating its existence outside of the U.S. borders. Indeed, even though the judge imposes a damages award of 12,000 reais (approximately $3,336.16 in U.S. currency at that date in time) for the breach of Brazilian laws, for support she makes reference to Title

*judges and lawyers to look to common sense, custom, comparative legislation and the spirit of the law as the basis for decision" Id. (internal citation omitted).

74. See supra note 70.
VII, the EEOC, NAFTA, and even Paul Brest's article, *In Defense of the Antidiscrimination Principle*. In short, the focus of the one published opinion specifically employing the racial harassment concept in Brazil, is not racial harassment in Brazil, but the disparate treatment of Brazilian workers by foreign multinational businesses that come from Jim Crow contexts that know what "real racism" looks like.

This may also help explain why those Brazilian cases which effectively describe what is racial harassment, do not employ the concept of racial harassment - when done by Brazilians within the Brazilian context, it is not recognized as related to a Jim Crow past, the true face of racism. For example, in a typical employment discrimination case in which a Black woman was allegedly fired after the employer's contractor threatened to cancel the contract if "that little Black woman" ("naguinha") continued to be employed, the public prosecutor dropped the case after the defendant claimed to be using the term "naguinha" affectionately, as is often done in Brazil. As one expert on Brazilian discrimination cases observes, those defendants who effectively show the "Brazilianness" of their conduct, are successful in disputing allegations of discrimination. Thus the use of racialized terms in the workplace is only relevant when viewed as un-Brazilian. This is what makes the McDonald's case particularly peculiar - it is so common for Brazilian racial jokes to equate Blacks as stinking like animals that it pervades popular music. What made the McDonald's racial commentary un-Brazilian was that it emanated from a U.S. company representative.

An underlying comparison to U.S. racism also influences the conduct of other legal actors. The police officers and prosecutors who log the complaints of discrimination often classify workplace discrimination as simply an injury to honor ("injuria") that uses racial insults, thereby obviating an analysis of the racial discrimination manifested to exclude a person of color from the workplace.

75. *Id.*


77. *Id.* at 32.


Furthermore, the absence of a judicial analysis of racial harassment in Brazil is mirrored in the Afro-Brazilian social movement's lack of focus on the issue of racial harassment. It may very well be that the extreme racial segmentation in the Brazilian labor market and overwhelming social exclusion of Afro-Brazilians from the arenas of politics, higher education and the like,\(^80\) relegates the issue of racial harassment to a later time. Moreover, it is the racial segmentation of the labor market that may also contribute to the dearth of racial harassment litigation. In other words, because the social racial hierarchy is so effective at limiting the opportunities of Afro-Brazilians, there may be fewer occasions to use what Vicki Schultz terms "competence-undermining harassment" to drive Afro-Brazilians away.\(^81\) Simply put, Afro-Brazilians haven't been integrated enough into the service industry or skilled-labor market to threaten many other employees and thereby motivate harassing conduct as a tool of exclusion. Afro-Brazilians are already effectively excluded from all but the most menial job tasks, by such hiring screens as "boa aparencia," that is "good appearance" requirements that are universally understood as requiring a white or light color appearance, but which employers characterize as a "cultural preference" rather than being discriminatory.\(^82\) In addition, when accused of bias, employers successfully use a "Moreno/pardo" defense of being racially mixed and thus impervious to racial bias.\(^83\)

IV. CONCLUSION

In short, Brazilians, like the majority of Latin Americans, do not perceive their racially-specific mechanisms of social exclusion, like racial harassment, to be discriminatory when it does not fit their preconceived vision of discrimination as solely related to Jim Crow violence. Yet it will be difficult to reform such a narrow vision of discrimination in Latin America as long as legal actors in the United States also continue to be held captive to the same perspective on


\(^{81}\) See Schultz, supra note 6, at 1755 (articulating a new account of hostile work environment harassment through a "competence-centered paradigm, for it understands harassment as a means to reclaim favored lines of work and work competence as masculine identified turf – in the face of a threat posed by the presence of women (or lesser men) who seek to claim these prerogatives as their own.").

\(^{82}\) Castro & Guimarães, supra note 80.

\(^{83}\) Racusen, supra note 76.
what is actionable racial harassment. This is an area in which both regions will need to mutually work towards transforming the legal understanding of racial harassment to transcend the focus on the extremes of the history of Jim Crow discrimination.

**Professor David Yamada**

I. INTRODUCTION

Since 1998, much of my research and writing has focused on the legal and policy implications of workplace bullying, which can be defined as the deliberate, hurtful, repeated mistreatment of an employee, driven by a desire to control that individual. Workplace bullying comes in many forms. It may be a boss who mistakenly believes that high-pressure, high-decibel treatment of subordinates yields the best results. It may be a group of co-workers who gang up on another employee and who repeatedly sabotage the employee's ability to do her job. The behavior may be overt, covert, or a combination of methods.

Social psychologist Loraleigh Keashly has identified a cluster of abusive behaviors that may fall within the rubric of workplace bullying:

- aggressive eye contact, either by glaring or meaningful glances;
- giving the silent treatment; intimidating physical gestures, including finger pointing and slamming or throwing objects; yelling, screaming, and/or cursing at the target; angry outbursts or temper tantrums; nasty, rude, and hostile behavior toward the target;
- accusations of wrongdoing; insulting or belittling the target, often in front of other workers; excessive or harsh criticism of the target's work performance; spreading false rumors about the target; breaching the target's confidentiality; making unreasonable work demands of the target; withholding needed information; taking credit for the target's work.

* Professor of Law and Director, Project on Workplace Bullying and Discrimination, Suffolk University Law School, Boston, MA. These remarks have been edited and revised for publication purposes. Much of this talk was distilled from my previous work on this topic, and wherever possible I have cited to those materials. Those who seek more detailed information, references, or documentation are invited to consult the cited works or to contact me (dyamada@suffolk.edu) for further guidance.

Of course, taken individually, many of these behaviors do not constitute workplace bullying. However, when they are repeated or particularly severe, inflicting harm upon the targeted worker, then it is fair to say that bullying has occurred.

In any event, it is clear that these behaviors can exact a tremendous cost on employers and employees alike. Research is showing that hostile work behaviors result in decreased productivity and loyalty and higher workplace attrition. Bullying also can inflict serious harm upon a targeted employee. Common effects include stress, depression, high blood pressure, and digestive problems. Some targets have developed symptoms resembling Post-Traumatic Stress Disorder.

Unfortunately, this problem of generic bullying, harassment, and abuse at work is underappreciated in the U.S. and elsewhere, although several other countries are far ahead of us in comprehending this topic. And while I do not suggest that the law should offer a remedy for every instance of bullying, it has become clear to me that too many targets of severe bullying are without legal redress. Accordingly, my remarks here will focus on the question of workplace bullying and the law. In keeping with the transnational theme of this panel, I will conclude with references to developments in other countries. I will apologize for committing a cardinal conference sin in that I will be more descriptive than analytical here. However, because this topic may be new to many of you, I want to introduce it at the ground level.

Before I go further, I want to say a word about nomenclature. I use the term workplace bullying because it seems to represent accurately the underlying behaviors and because it seems to resonate with people. However, there are many terms that are being used to characterize these behaviors. For example, in her remarks, co-panelist Gabrielle Friedman used the term "mobbing," which is commonly employed in several European countries. Workplace harassment, work abuse, and workplace aggression are other terms that are frequently invoked. Rather than engaging in what may be a futile attempt to settle on a single term, there appears to be an unstated agreement among scholars and practitioners who are working on

87. See generally NAMIE & NAMIE, supra note 84, at 53-67 (summarizing effects of workplace bullying on targeted employees).
these issues to live with these different terms and to continue to reference and benefit from one another's work. I hope that will continue.

II. THE STATE OF U.S. LAW

Several years ago I set out to analyze the degree to which modern American employment law provides some protection against at least the most severe instances of workplace bullying. My conclusions, which I would only slightly alter today, were published in a law review article in 2000. Here is an updated summary of what I found.

A. Emotional Distress Claims

Some bullied employees have pursued personal injury lawsuits for intentional infliction of emotional distress (IIED) as a possible avenue of legal relief. The heart of my research was an extensive analysis of state judicial decisions on work-related IIED claims. I concluded that typical workplace bullying seldom results in liability for IIED.

My "poster case" example of the reluctance of courts to grant relief even to the most severely bullied employees came in Hollomon v. Keadle, a 1996 Arkansas Supreme Court decision. This dispute involved a female employee, Hollomon, who worked for a male physician, Keadle, for two years before she voluntarily left the job. According to Hollomon, "Keadle repeatedly cursed her and referred to her with offensive terms," used profanity in front of his employees and patients, and called women who worked outside of the home "whores and prostitutes." Keadle threatened Hollomon's life "if she quit or caused trouble." She suffered from "stomach problems, loss of sleep, loss of self-esteem, anxiety attacks, and embarrassment." Unfortunately for Hollomon, the Arkansas Supreme Court found

89. For a more complete analysis of the potential application of the tort of intentional infliction of emotional distress to workplace bullying, see id. at 493-509.
90. 931 S.W.2d 413 (Ark. 1996).
91. Id. at 413.
92. Id.
93. Id.
94. Id.
that even if all these allegations were true, Keadle's behavior did not amount to outrageous conduct and dismissed her case. The court based this determination in part on the fact that it was not shown that Dr. Keadle was aware of Hollomon's emotional vulnerability.95

The most successful types of workplace-related IIED claims are those grounded in allegations of severe status-based harassment or discrimination, or in allegations of retaliation for engaging in reporting or whistleblowing. These scenarios also raise the specter of existing statutory protections, such as employment discrimination laws and various anti-retaliation provisions, meaning that potential plaintiffs may have some choice of legal theories to raise. Targets of "garden variety" workplace bullying, however, often have neither common law nor statutory avenues of relief.

B. Intentional Interference with the Contractual Relationship96

Another possible cause of action is intentional interference with the contractual relationship. For example, in my home state of Massachusetts, the Supreme Judicial Court has held that a supervisor could be liable under this theory for engaging in a course of abusive, bullying conduct towards an employee.97 However, many states do not allow this cause of action in situations involving an employer or its agent interfering with the employment relationship.

C. Workers' Compensation98

Workers' compensation is a potential source of relief when workplace bullying has caused an employee to suffer partial or full incapacity. However, such claims are more likely to be contested where the injury is a psychological one, and often this will trigger an inquiry into the employee's past emotional state. Workers' compensation is also noteworthy in the context of bullying because in certain states it may preempt tort lawsuits brought against employers.

95. Id. at 417.

96. For a more detailed analysis of the potential application of the tort of intentional interference with the employment relationship to workplace bullying, see David Yamada, Brainstorming About Workplace Bullying: Potential Litigation Approaches For Representing Abused Employees, EMPLOYEE ADVOCATE, Fall 2000, at 49, 51-52.


98. For a more complete analysis of the potential application of workers' compensation provisions to workplace bullying, see Yamada, The Phenomenon of "Workplace Bullying," supra note 88, at 506-08.
D. Discriminatory Harassment

Obviously, harassment that is grounded in a target's protected class membership may be actionable under both federal and state discrimination statutes. In particular, hostile work environment theory offers some potential relief to employees who are subjected to severe bullying at work on the basis of protected class membership. For example, in 2000 a Commissioner of the Massachusetts Commission Against Discrimination, in *Lule Said v. Northeast Security, Inc.* took "judicial notice of the emerging body of law relative to ‘workplace bullying’" in awarding damages to an employee who endured severe religious harassment because he practiced Islam.100

This type of finding, however, is unusual, as for the most part bullying behaviors have not been grounds for relief in status-based harassment claims. To illustrate, Professor Vicki Schultz noted in her analysis of the evolution of sexual harassment law that many courts refuse to consider any harassing conduct that is not sexually explicit.101 For those courts, more generic harassment that is motivated by gender animus does not fall within the rubric of hostile work environment doctrine. In addition, although some employees who have suffered psychological harm due to abusive conduct at work potentially could invoke the Americans with Disabilities Act,102 Professor Susan Stefan's research has shown that many employees "are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment . . ."103

E. Retaliation and Whistleblowing

Retaliation for rebuffing sexual advances, complaining of discrimination, participating in union organizing activities, or engaging in some type of whistleblowing behavior is a common motivation behind workplace bullying. Bullying tactics have been used in an attempt to push out an employee who has complained

99. For a more complete analysis of the potential application of employment discrimination laws to workplace bullying, see id. at 509-17.
about or reported allegedly illegal or unethical behavior. As I noted earlier, the anti-retaliation provisions of protective statutes may be applicable in such circumstances.

**F. Occupational Safety and Health Laws**

Potentially the Occupational Safety and Health Act\(^\text{104}\) (OSH Act) and its state counterparts could provide greater legal protections against bullying, especially now that workplace safety agencies are paying more attention to occupational stress. Furthermore, the OSH Act can be used as the rationale for developing effective human resources programs to safeguard employees from bullying. For example, the Osram Sylvania Corporation has cited the OSH Act approvingly in incorporating bullying prevention into its strategies for maintaining employee health.\(^\text{106}\) For now, however, manufacturing and construction sites remain the primary focus of enforcement efforts in America, and most employers are concerned mainly with preventing purely physical injuries.

**G. Employer Policies**

Although employer sexual harassment policies have become an employment relations standard, workplace bullying policies are a rarity. However, a small number of employers, including IBM, the Oregon Department of Environmental Quality, and the Massachusetts Institute of Technology, proscribe general harassment and bullying behaviors in their employee policies and include them in their internal complaint procedures.\(^\text{107}\) This can implicate liability issues, for courts increasingly are holding that written employment policies are enforceable as contractual agreements.

---

104. For a more detailed analysis of the potential application of occupational safety and health standards to workplace bullying, see Yamada, *The Phenomenon of "Workplace Bullying,"* *supra* note 88, at 521-22.
107. See *id.*
For the most part, organized labor has yet to recognize fully the problem of workplace bullying, although a small number of union activists and officers have been raising the issue. I believe that organized labor and American labor law can play an important role in responding to bullying. First, unions can and should bargain for contract provisions that protect members against abusive supervision. Second, the concerted activity provision of the National Labor Relations Act is a potential source of protection for union members and non-union employees alike who collectively address problems with abusive supervision. Third, shop stewards can serve a valuable mediating role in bullying situations, including those between union members.

I. Law Reform Efforts in the U.S.

Several years ago, I began drafting model anti-bullying legislation, drawing heavily upon hostile work environment and tort law doctrine. Through the efforts of Dr. Gary Namie, founder of the Workplace Bullying & Trauma Institute, this bill was introduced in February 2003 in the California Legislature. Although in my judgment it may be some time before such legislation is ever enacted into law, the very fact that it has been introduced for deliberation is a small milestone. Legislators in other states have expressed interest in carrying the bill as well.

III. INTERNATIONAL RESPONSES TO WORKPLACE BULLYING

Several other countries are way ahead of us in recognizing and understanding workplace bullying, to the point where the term enjoys a much more prominent presence in their industrial relations vocabularies. These nations also tend to be ahead of us in academic
research and writing on the topic. For example, in the fall of 2002, the University of London and the University of Manchester co-sponsored an international conference on bullying and harassment at work that attracted presenters and participants from around the world, with a heavy concentration from Great Britain and the European continent.\footnote{See generally Proceedings, INTERNATIONAL CONFERENCE ON BULLYING AT WORK (Sep. 23-24, 2002) (containing abstracts of presentations).}

In terms of legal and policy developments, there is a growing amount of activity on a global scale. I see four emerging types of responses:

1. Proposed legislation, a sort of hybrid blending of tort law and hostile work environment law;
2. Administrative and regulatory involvement through occupational safety and health agencies;
3. Some judicial and administrative recognition of bullying and work abuse, referencing existing common law, statutory, and administrative law; and,
4. Recognition of workplace bullying by transnational bodies who influence or engage in policy making.

Here are a few examples:

\textbf{A. Sweden}

In 1993, the National Board of Occupational Safety and Health promulgated the Victimization at Work ordinance, which requires employers to institute measures to prevent and respond to bullying, harassment, and other forms of abusive behavior.\footnote{Ordinance of the Swedish National Board of Occupational Safety and Health Containing Provisions on Measures Against Victimization at Work, Ordinance AFS 1993:17, § 1 (adopted Sept. 21, 1993, entered into force Mar. 31, 1994).}

\textbf{B. United Kingdom}

Employment tribunals and courts have demonstrated a growing receptivity to bullying-related claims. In addition, a Dignity at Work Bill supported by labor unions has been introduced in the House of Lords,\footnote{H.L. Bill 31 (introduced Dec. 31, 2001), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/dbills/031/2002031.htm> (last viewed June 28, 2004).} and a blue-ribbon panel of legal scholars at Cambridge
University has recommended the enactment of a "statutory tort of harassment and bullying at work."115

C. Australia

Workplace bullying is gaining increasing attention in ways that are relevant to the law. For example, the Queensland Government's Workplace Bullying Taskforce has issued a major report on bullying and harassment at work,116 and the Queensland Supreme Court has imposed liability on an employer for subjecting an employee to an ongoing course of abusive treatment.117

D. Transnational Organizations

In addition, transnational bodies that address labor policy issues are acknowledging workplace bullying. The International Labor Organization has recognized bullying in the broader context of workplace violence.118 The ILO lacks authority to impose and enforce labor standards on its member nations, but it can play a significant role in raising consciousness about the need for legal reform. In addition, the European Foundation for the Improvement of Living and Working Conditions, a research and policy arm of the European Union, recently released a report on all forms of harassment and aggression at work, including bullying.119 The report surveys research, program development, and regulatory efforts on these topics that are being conducted within member nations.

IV. CONCLUSION

Here in the United States, we are just beginning to understand the significance of workplace bullying. As a scholar and advocate, it has been tremendously rewarding to work with an emerging,


multidisciplinary group of academicians and practitioners who are committed to building awareness of this topic. There is plenty of room for more quality research and analysis on this topic, and I hope you will consider joining the fray.

Vicki Schultz: Thank you so much to all our panelists for such informative, interesting presentations. I'm sure the audience has learned a great deal, as I have.

Taken together, your papers raise a number of common themes. To me, the most striking point is that, despite the diversity in regulatory systems that have been discussed, no legal system we've heard about seems to do a good job of preventing harassment by changing the structural features of the workplace that foster it. In fact, it's not clear that any country even tries such a structural approach. Instead, legal systems seek to change individual behavior by punishing harassers and/or paying off those who've been harassed – without confronting the more systemic conditions that create a climate conducive to harassment in the first place. From what we have heard today, the behaviorist approach predominates, regardless of the underlying conception of harassment.

As Gabrielle Friedman told us, there are two different paradigms for regulation: one that treats harassment as a form of discrimination against some workers based on their group status, and another that treats harassment as a harm against any and all workers who experience it, regardless of the reason. Let's call these the discrimination and universal models, respectively. As we have heard, the United States has a discrimination model, although David Yamada and others are working to enact legislation that would supplement it with a universal, anti-bullying model. In continental Europe, by contrast, despite the existence of anti-discrimination laws, the dominant paradigm is the universal one. In Germany, for instance, the target behavior is mobbing, or the systematic attempt to destroy someone's social standing at work. In France, as Abigail Saguy explained, it's the abuse of authority (or solidarity) through the imposition of sexual coercion or interpersonal violence. In the European tradition, the laws exist to protect the individual dignity of the harasssee; in the U.S., the law aims to restore the harasssee's (and by extension, the harasssee's group's) equal status. In Brazil, according to Tanya Hernandez's account, the system is something of a hybrid: the law treats harassment as a form of group-based discrimination, as it does in the United States, but discrimination is considered an insult
to individual dignity or honor, more in line with the European tradition.

Both the discrimination paradigm and the universal one could be conceived and implemented using a structural approach that is designed to get at the underlying sources of the harassment. But, unfortunately, this is not what seems to be happening. First, consider the discrimination model as it has played out in the United States. Title VII could have been read (and still could be read) to support a structural account of harassment, and to impose appropriate solutions. Such an approach would recognize that sex- or race-segregated employment (and the accompanying inequalities in pay, status and authority) creates conditions in which sex- or race-based harassment flourishes. As a host of social science research reveals, a history of segregated employment creates a context in which the workers who have held the job traditionally often will feel threatened by the entrance of new groups, and will harass the newcomers in an effort to drive them out of the job or put them in their place. The harassment may take the form of unwanted sexual overtures or a variety of other non-sexual actions; in either case, the effect is to label the newcomers "different" and inferior.

What's the appropriate solution? Prohibiting and punishing the harassing behavior may be necessary sometimes, but it will not cure the underlying problem; we may punish one harasser, but sooner or later, another one will appear. To prevent the harassment, we must eliminate the underlying structures of sex-segregation and inequality that bred the harassment in the first place. For, so long as the potential harassees remain stuck in a segregated job context, they will lack the participatory parity needed to protect themselves, to dispel stereotypes about their group, and to influence their own work cultures for the better. Thus, a structural approach would seek to eliminate the harassment by ending the employment practices that lead to segregation and hierarchy. The goal would be to create an equal playing field in which no group of employees has the power to dominate another, behaviorally or otherwise.

For the most part, U.S. courts and agencies have not taken a structural approach. Rather, they have attempted to regulate harassing behavior directly. Even worse, they have tended to limit the definition of harassment to unwanted sexual conduct. This

behavioral, sexually-oriented approach has had some real costs. In the name of preventing harassment, companies have not taken steps to integrate their workplaces and incorporate women and other traditionally underrepresented groups into fully equal positions within the organization. Instead, as Abigail Saguy and I have shown, managers have responded to harassment law by monitoring and suppressing sexual advances and other sexual conduct (including sexual remarks and jokes and, in many organizations, dating). Indeed, in many cases I encountered, managers pointed to sexual conduct as a pretext for firing employees for different, and often far less benign, reasons. As a result of these trends, the transformative potential of the discrimination paradigm has not been realized. Although the discrimination paradigm might have been used to restrict managers' power to engage in employment practices that lead to segregation, ironically, it has been used instead to give managers more power to discipline individual employees' sexual behavior.

In Tanya Hernandez's account, racial harassment law exhibits a pattern analogous to the one I have just described for sex harassment law. In the context of race discrimination, a structural anti-discrimination approach would recognize that, even though racism may not take the form of Ku Klux Klan-style violence and humiliation, race and color do operate to exclude people of African heritage from many jobs and workplaces. Racially segregated employment is the result. When segregation finally comes under challenge and African descendants begin to enter jobs formerly closed to them, the non-Black incumbents will often harass the newcomers in an effort to drive them away from the job or incorporate them only as inferiors. In order to root out harassment, then, proponents of a structural approach would have to complete the job of abolishing the old patterns of segregation and hierarchy while, at the same time, making clear that in the new workplace order, those who oppose racial equality, rather than those who practice it, will be the outcasts.

At least in recent years, neither the U.S. nor the Brazilian courts have taken such an approach. Instead, according to Professor Hernandez, they've adopted a behavioral approach that looks for the analytical equivalent of the overt sexual overtures courts want to see as proof in sex harassment cases: individual expressions of overt, Jim-

121. See Saguy, supra note 26; Schultz, supra note 7, at 2061.
122. See Schultz, supra note 7, at 2113-19.
Crow style racism (such as uses of the "N" word or displays of Ku Klux Klan paraphernalia). By focusing on these overt incidents as the "real" racism, American courts have missed more common, everyday forms of racial injustice. Fascinatingly, even in Latin American countries such as Brazil that do not share the U.S. history of Jim Crow-style segregation, this same pattern prevails. In Brazil, courts overlook the sorts of racial injustices that occur every day in their own culture, punishing harassment only when they believe U.S. companies are tolerating abroad the precise forms of racial abuse that they would not permit at home. Ironically, of course, Professor Hernandez's analysis suggests, the Brazilian courts are probably wrong in assuming that many of these incidents would be punishable in the U.S. In any event, in both regions, the legal system is failing to address the underlying problems of racial exclusion and hierarchy.

It seems that in many settings, the universal approach may also be failing to address the underlying structural problems that foster more generalized forms of harassment. Consider, for example, the German approach to mobbing. Certainly, it is an advance to recognize that in many workplaces, bosses or employees may gang up on one or more of their colleagues to deprive them of social acceptance or respect. We can all recognize mobbing as a genuine real-world phenomenon, and can applaud efforts to provide remedies for such abuse. But, there may be costs to the way the issue is being approached. In Germany, for example, as Gabrielle Friedman has suggested, anti-mobbing efforts have drowned out feminist attempts to analyze sex harassment as part of a larger set of gender-based inequities between men and women. Although the reasons for this drowning out aren't clear, I suspect that the reason has something to do with the fact that the prevailing economic and psychological theories offered by organizational theorists to explain mobbing are at odds with the more structural theories of gender-based discrimination offered by many feminists to explain sex harassment. The economic explanation attributes mobbing to a dysfunctional communication pattern between workers that results in lost productivity to the firm, while the psychological explanation sees mobbing as a collision between victim and abuser personalities that the victim should address through self-help. Not only do these theories obscure the link between discrimination and some mobbing behavior; they also deflect deeper analyses of even the more status-neutral forms of mobbing. This is because they are behavioral theories that identify individual conduct – rather than structural features of the workplace – as the
problem. Not surprisingly, these theories have led to the promulgation of detailed codes of conduct that employees can be punished for violating.

A structural approach wouldn't deny the wrongfulness of the harassing conduct, but it wouldn't stop there. It would also seek to identify the structural features of the workplace that are likely to bring out such bad conduct, and to alter them for the purpose of creating a better working environment. I concede that it is not always easy to identify the problematic structures, and, of course, more research and activism is needed. But there are some clear examples of how problematic structures can elicit bad behavior. If, for example, an organization gives its supervisors unfettered authority over employees, imposes no accountability for how that authority is exercised, and provides employees with no avenues for challenging orders, we can expect patterns of supervisory abuse to develop (particularly where the employees have few other job options or are otherwise structurally vulnerable). Similarly, if a firm organizes its work into horizontal teams of employees who compete against each other upon penalty of being fired, and these employees have no supervisors to structure the rules of the game, to ensure fair play, or to guard against bad behavior, we can expect peer harassment to develop as the dominant employees bond together to penalize or ostracize those they believe are bringing them down. In response to complaints about supervisory or peer abuse, then, a structural approach wouldn't simply make sure that individual offenders are punished; it would also try to ensure that the structures of supervision, work and reward are not organized in a way that is likely to evoke abuse. Furthermore, as Gabrielle Friedman's talk suggested, a structural approach would also avoid structures that privilege older, established workers over newer ones.

Germany isn't the only country that has taken a behavioral, as opposed to a structural, approach to the universal paradigm. From Abigail Saguy's description, it seems that France, too, has adopted a primarily behavioral approach. Rather than linking harassment to larger systems of workplace discrimination or other institutional structures, Professor Saguy tells us, the French penal code treats harassment as a crime of sexual or interpersonal violence. Although French feminists have fought for recognition that sexual violence is a form of society-wide gender subordination against women, it is nevertheless the case that criminalizing harassment makes it difficult
to hold institutions, as opposed to individuals, responsible. Without pinpointing the institutional structures that encourage or permit violence, the system is left with punishing bad behavior – an approach that American feminists have learned isn't likely to lead to real social change.

It isn't only the European universal systems that have shortcomings. I fear that, in the United States, the anti-bullying legislation might encounter more severe limitations, due to the legal and managerial culture in which it would be implemented. In continental Europe, as we have learned, employees at least have the benefit of a legal system that places great emphasis on individual dignity. In Germany, Friedman tells us, the legal system even expects employers to safeguard an individual's right to be treated with social respect in the workplace: A person's dignity as a worker is accorded legal recognition. There is, of course, no such tradition in the United States. 123 Here, the absence of a structural approach is accompanied by the lack of any real commitment to worker dignity. As a result, as I have already discussed, sex harassment law is often mobilized by managers to serve their own interests in rationalizing the workplace and purging it of what is seen as "unproductive" (even if it isn't discriminatory or harmful) sexual behavior. This trend is not surprising, for in the U. S., employment discrimination laws are often deployed in this fashion, as legal sociologists have shown.124

In light of these historical tendencies, there is reason to be concerned about how some versions of anti-bullying legislation might play out in the United States. If, for example, employers are held vicariously liable when their employees bully or abuse their coworkers, would employers gain an incentive to discipline or fire employees who are simply unpopular with their colleagues, in the name of protecting harmonious relations in the workplace? Even worse, would employers gain a progressive justification for firing employees whose colorful language or aggressive styles threaten management authority, even if those employees aren't genuinely abusive to anyone? Furthermore, can we predict that such disciplinary measures will be used disproportionately against groups

123. Back in 1976, when sex harassment law was not yet established, at least one important book, Caroll M. Brodsky, THE HARASSED WORKER (1976), advocated universal protections from workplace harassment similar to the anti-mobbing protections in Germany. But the U. S. rejected such an approach, in favor of the discrimination approach that soon emerged under Title VII.

124. See my discussion of this phenomenon in Schultz, supra note 7, at 2113-19.
of employees, such as African-Americans, who are already negatively stereotyped as overly aggressive?

These sorts of concerns are not reasons to jettison anti-bullying laws, but they are reasons to think carefully about how to structure them. In my view, it seems increasingly crucial these new status-neutral harassment laws, as well as the anti-discrimination harassment laws that preceded them, be implemented with input from diverse groups of employees in addition to management. Crafting appropriate anti-harassment policies and creating the best in-house processes for handling harassment complaints is too important to be left to human resource managers alone. With well-thought out forms of employee representation, perhaps we could be more confident that harassment laws will be used to benefit the workers they were designed to protect, rather than primarily to serve managerial interests. Some countries already have established models of employee representation that the U.S. could emulate. In addition, of course, we have to think about the background legal structures in which harassment laws operate. The fact that they operate in an employment-at-will environment in the U.S., for example, leaves American workers more vulnerable to managerial misuses of the law.

Ultimately, whether we are working with a discrimination model or the universal model – or both – we must think about how anti-harassment laws, and other legal and social initiatives, might be harnessed to identify and alter the underlying workplace structures that foster supervisor and co-worker abuse. As the presentations today have revealed, this won't be an easy endeavor. Although there are impressive anti-harassment initiatives occurring around the globe – ones worthy of studying and emulating in a variety of respects – few if any seem to have succeeded in addressing the structural features of the workplace that contribute to harassment. Until we do that, we will be left with the unpleasant task of punishing individual bad behavior, time and time again.