INTRODUCTION

Workplace “harassment” is now regarded as an evil in every western country. But exactly what class of persons is threatened by “harassment”? And exactly what evil does the law forbidding “harassment” aim to combat? The best-known, and internationally most influential, use of the term “harassment” comes from American law. In the American conception, “harassment” is a form of discrimination, a way of tormenting members of minority and other disadvantaged groups seeking upward social mobility through work. Laws forbidding such harassment first appeared as a way of protecting racial minorities in the United States.¹ But today the law’s most frequently discussed target is sexual harassment, harassment inflicted upon people (most especially upon women) on account of sex. This American law of harassment has had a stunning international influence, at least on paper. The American example has inspired the passage of statutes all over the world -- not least in continental Europe where, prodded by the European Union, every country now has law forbidding harassment on the basis of sex.²


Nevertheless, the truth is that most continental lawyers have never been terribly comfortable with the American concept of harassment. Sexual harassment in particular has had a rocky reception. Cases of sexual harassment have probably never been very actively pursued. Moreover, Europeans have never really accepted the doctrinal theory according to which sexual harassment is a form of discrimination. Although continental statutes often declare sexual harassment to be a form of discrimination against women, continental lawyers have always tended to focus on a rather different formula: the “dignity of women.” Moreover, if the American model of harassment law has always been weak in continental Europe, it has started to get a lot weaker over the last few years. Indeed, as we want to report in this essay, continental harassment law is in the midst of a transformation. Instead of condemning the discriminatory harassment of particular protected groups in the American way, continental law is increasingly condemning employee harassment. To the question, what class of persons is threatened by harassment?, continental law today increasingly gives the answer: not just women, not just minorities, but employees in general. At the same time, the continental tendency to speak of “dignity” rather than of “discrimination” is being reaffirmed and deepened. To the question, what evil does the law of harassment aim to combat?, continental law increasingly gives the answer: not discrimination, but violations of individual dignity.

The latest sign of the shift came in France, where the Penal Code was amended as of January 2002. Where the French Penal Code used to include only a paragraph criminalizing sexual harassment, it now includes a paragraph criminalizing “moral” harassment -- criminalizing all forms of harassment that can impair “the rights or the dignity” of any employee. This French shift is only the most recent example of

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3 See Bernstein, supra note 2 (discussing European Union initiatives to combat sexual harassment in the workplace as dignitary harm). For Germany, see esp. the discussion of Susanne Baer, Würde oder Gleichheit?: Zur angemessenen Grundrechtskonzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung im Arbeitsplatz in der Bundesrepublik Deutschland und den USA (Schriften zur Gleichstellung der Frau, vol. 13, 1995). The German federal statute specifies “dignity” as the interest at stake. See Gesetz zum Schutz der Beschäftigten vor sexueller Belästigung am Arbeitsplatz (BeschScgG) art. 10 of the Zweites Gleichberechtigungsgesetz. The law was passed with the intent of “raising awareness” of the problem, and not to create a new cause of action. See Dagmar Schiek, Die Schnecke Fortschritt kriecht rückwärts: Das zweite Gleichberechtigungsgesetz, 1 Streit 3 (1995). German legal theorists are quick to point out that certain cities like Berlin and Hamburg had passed local anti-sexual harassment statutes in the early 1990s in the name of equal protection. See Dagmar Schiek, Berliner Landesantidiskriminierungsgesetz (LADG-Berlin vom 31.12.90), 3 Streit 95 (1991). Those laws also incorporated the language of personal dignity to express the harm of harassment. Under Bürgerliches Gesetzbuch (German Civil Code) [hereinafter BGB] § 611a, a Benachteiligung must be a measure taken in the context of the employment relationship. If a woman is verbally or physically harassed at work because of her sex, German courts have a difficult time understanding this as part of the employment relationship. Rather, courts find that the harasser has misused the increased social contact provided by the employment relationship. For more on the bad fit of sexual harassment to German anti-discrimination law, see Monika Schlachter, Wege zur Gleichberechtigung: Vergleich des Arbeitsrechts der BRD mit der Vereinigten Staaten 163 (1993). For France, see the note cases assembled in the Dalloz Nouveau Code Penal [hereinafter Nouv. C. Pen.] art. 222-33. Although “dignité” as such does not appear in the statute criminalizing sexual harassment, the primary cases cited turn precisely on questions of “dignité.”

4 Nouv. C. Pen. art. 222-33-2:

Le fait de harceler aura pour des agissements répétés ayant pour objet ou pour effet une dégradation des conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d’altérer sa santé physique ou mentale ou de compromettre son avenir professionnel, est puni d’un an d’emprisonnement et de 15000 euros d’amende.
something that is sweeping the continent. Like France, all continental countries continue to maintain some prohibition on sexual, and usually racial, harassment. But these forms of discriminatory harassment are no longer the only target of continental law, nor even the main target. On the contrary, the prohibition on racial and sexual harassment is only one part, and a decreasingly important part, of the continental law forbidding workplace harassment more generally. It is becoming common coin, in continental law, that employers must be forbidden to harass their employees -- to shout at them or humiliate them -- and that they must be forbidden to harass all of their employees. Nor are employers the only target. Continental law is also concerned with the way employees treat each other: It is also becoming common coin that employees must be forbidden to harass their co-workers as well.

This movement is driving continental law in a very different direction from American. In particular, as we want to show, the continental movement against employee harassment is beginning to submerge the movement against sexual harassment: Sexual harassment, in the eyes of most contemporary European observers, is becoming simply one variety of employee harassment -- and not necessarily the most important variety either. This is not because the law of employee harassment is always consciously conceived as a competitor to the law of sexual harassment. Often the shift is simply a de facto one, from a focus on women, to a focus on workers generally. But the shift is taking place. Protection for workers is beginning to swamp protection for women in continental Europe.

Our aim is to explain why this is happening, and to assess its significance for our understanding of the nature and dynamic of "harassment" law. In effect, there are now two paradigms for harassment law in the western world: an American anti-discrimination paradigm and a Continental dignity paradigm. In principle these two paradigms should not be mutually exclusive. It ought to be possible both to condemn discrimination and to further individual dignity. Yet the Continental experience suggests that it may be difficult for these two paradigms to coexist. This is troubling indeed for those American scholars, ourselves among them, who believe that harassment law should be about the protection of dignity. We may not be able to pursue the goals of dignity without sacrificing some or all of the goals of anti-discrimination.

The Continental experience also suggests some lessons about the transplantation of legal institutions. The idea of attacking "harassment" through law was imported into the continental countries from the United States; but that does not mean that American ways of doing things have been accepted in places like Germany and France. Once a legal institution like harassment law has lodged in foreign legal soil, it can flower into almost unrecognizable forms. This may bode ill for the effort to bring American-style feminism to other parts of the world. In particular, European feminists who imagine that they are importing the American law of sexual harassment into their countries may discover that their import disturbs the local legal ecology in wholly unanticipated ways.

Harassment law, as it is conceived in America, is not limited to sexual harassment. On the contrary, it is important to emphasize that American law has
also always targeted harassment on the basis of race.\textsuperscript{5} Nevertheless, it is sexual harassment that today commands the lion’s share of attention both in the law and in popular culture, and we are going to focus on it, too, in describing the growing contrast between American and European regimes. For our comparative purposes, two aspects of American sexual harassment law deserve emphasis. First, American sexual harassment law is law against discrimination, modeled in an obvious way on the campaign against racial discrimination. Second, American sexual harassment litigation focuses primarily on hiring, termination, and advancement, rather than on the terms and conditions of continued employment.

The analysis of sexual harassment as a problem of discrimination follows from the statutory language of Title VII of the Civil Rights Act of 1964, which makes it “an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”\textsuperscript{6} Nevertheless, it has never been wholly uncontroversial. There have always been commentators who thought that calling sexual harassment a form of sex discrimination was odd.\textsuperscript{7} After all, “discrimination,” as American law conceives of it, means putting obstacles in the way of people seeking to gain employment and advancement -- tripping up people who want, in the words of the Supreme Court, to be “allowed to work and make a living.”\textsuperscript{8} Yet “harassment,” in the ordinary sense of the term, involves a different sort of harm. It involves subjecting people to “ridicule and insult,”\textsuperscript{9} in ways that are painful and injurious regardless of whether the victims succeed in their pursuit of a good job. This has led commentators like Anita Bernstein and Rosa Ehrenreich to argue that sexual harassment law should address the evils of dignitary harms as well as, or instead of, the evils of discriminatory harms.\textsuperscript{10} Other commentators see other problems with the anti-discrimination paradigm as well. In particular, they are distressed by any requirement of showing discriminatory intent.\textsuperscript{11} Nevertheless, “discrimination” remains the focus of American law.

American law also shows a distinct focus on problems of hiring, termination and advancement, rather than on problems of the terms and conditions of stable employment. This is a point that is especially important for comparative purposes. American law tends to presuppose a relatively fluid job market, in which employees

\textsuperscript{5} See supra note 1.
\textsuperscript{7} For a thorough history of the genesis of modern sexual harassment jurisprudence defining it as sex discrimination under Title VII, see Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998). The influence of Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979) on sexual harassment doctrine has been tremendous. For an analysis of the development of sexual harassment doctrine that emphasizes the sexualized content of speech and action, see Schultz, supra, at 1704.
\textsuperscript{8} Meritor, supra note 6 at 67.
\textsuperscript{9} Id. at 75.
regularly quit, get fired, get promoted or get denied promotion. To be sure, the language of Title VII speaks of the ‘terms and conditions’ of employment, not of problems of termination and advancement. And to be sure, the Supreme Court has accordingly concluded that litigation over sexual harassment cannot be restricted to cases of hiring, termination and advancement. Nevertheless, the strong focus of American sexual harassment law remains on cases of hiring, termination, or effective denial of career advancement. This is true even of Harris v. Forklift Systems, the Supreme Court’s leading ‘hostile working environment case.’ The Court in that case held that complainants in sexual harassment cases did not necessarily have to show ‘economic’ or ‘tangible’ discrimination.” They could simply show that their working environment was “abusive.” Yet even in this decision, the Supreme Court did not imagine the normal situation as one in which the employee simply stayed at the same job. Unreflectively assuming a world in which employees were on the move, the Court declared that “a discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” Termination and advancement simply seemed to the Court the obviously important issues. The American job market, for the Court, was one in which employees routinely move on or move up.

Continental European sexual harassment law has always been different, on both counts. At the beginning, to be sure, European law was inspired by the American example, and the earliest European efforts did present sexual harassment law as law against discrimination in hiring, termination and career advancement. Much continental law is indeed still styled “anti-discrimination” law. Nevertheless, discrimination, in the American sense, has never been the focus of European sexual harassment law. From an early date, European law turned toward a different target. European sexual harassment law, instead of being law that emphasized discrimination, became precisely the kind of law that Anita Bernstein advocates: law that emphasized the protection of individual dignity. Moreover, as we shall see, it became very much law of the terms and conditions of employment -- law that presupposed a world in which employees generally stayed put in the same job, not a world in which they were regularly fired, regularly quit, or regularly sought promotions. In the words of one acute German feminist, European sexual harassment law became law of “dignity” in a stable job, rather than law of “equality” in a fluid job market.

Indeed, soon after the importation of American harassment law into the continent, a striking contrast arose between the legal systems on either side of the Atlantic. European sexual harassment law came to revolve around concepts of “dignity” that have never mustered any real interest, or even sustained attention, in American law. As for American law, it focused on discrimination in ways that often

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13 Id., at 21.
14 Id., at 22.
15 See BGB § 611a.
16 Supra note 2.
17 Baer, supra note 3.
seemed to elicit only lip-service in Europe. To be sure, the letter of European law spoke, and speaks, of "discrimination," just as the letter of American law could be said to speak, if only obliquely, of "dignity." But one cannot read the law by the letter while omitting the emphases, and the emphases already differed much by the mid-1990s.

II

The recent developments that are our topic have opened this divide even wider. The interest in women's workplace "dignity" that has always been the primary stuff of European sexual harassment law is now being stretched to cover the "dignity" of everybody in the workplace, without any particular emphasis on sexual or racial identity whatsoever.

The story of the last several years of change on the continent involves something generally called "mobbing" or "moral harassment." Neither of these terms is familiar to Americans. (The American equivalent, to the extent one exists, is "workplace bullying." ) But the sort of behavior that qualifies as "mobbing" or "moral harassment" is at least somewhat familiar to all of us. A recent French text describes it as follows:

**Moral harassment** has always existed in the workplace. It is not a new practice, but the denomination "moral harassment" is quite recent. Also called psychoterror or "mobbing," it can take a variety of forms:

- **Refusing to communicate with an employee**
- **Absence of instructions** or contradictory instructions
- **Denial of work, or excessive assignment of work**
- **Senseless tasks** or assignments that exceed the employee's competence
- **Shunning ["mise au placard"], degrading working conditions**

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18 One mystery of continental law is the form taken by sexual harassment litigation. Almost every reported case involves a complaint brought by a terminated employee to contest his or her termination on the grounds that there was no statutory cause. This is fairly shocking to American sensibilities. For example, in German case law there is a complete lack of complaints brought by harassed employees against employers. Instead, it appears that employers who became aware of harassing behavior in some cases fired the alleged harasser, who demanded his old job back. There may be a few reasons for this phenomenon. First of all, since under German law the loser pays court costs, there is very little incentive for victims of harassment to initiate litigation against their bosses. Secondly, German labor law is set up to include many levels of dispute resolution. Most companies have Betriebsvereinbarungen - agreements that outline intra-firm grievance procedures which involve the Betriebsrat as a forum for dispute resolution. Thirdly, the lack of cases brought against employers by victims of sexual harassment may also evince the feminist complaint that women are doubtful that they would be taken seriously. At any rate, it is clear that only the most extreme and egregious cases of harassment (where the alleged harasser was fired) make it into a courtroom. In addition, German courts rarely worry about liability allocation as do American courts. First of all, huge sums of money are not at stake in German cases. Secondly, German harassment law does not make any great distinctions between co-employees and supervisors for purposes of employer liability for harassment.
- Incessant criticism, repeated sarcasm
- Bullying, humiliations
- Slanderous comments, insults, threats.

An absence of support or recognition on the part of superiors or colleagues is one of the aggravating factors of the effects of moral harassment in the workplace.  

The notion that these sorts of behaviors should be forbidden has been making tremendous headway in Europe in the last decade. In the name of protecting employee “dignity,” statutes and regulations against “mobbing” have appeared, and conventional legal analysis has been stretched.

The new movement did not begin in the law, though. It began in industrial psychology -- and industrial psychology based upon, of all things, animal behaviorism. “Mobbing” was a term first used by the Austrian ethologist Konrad Lorenz in 1958, to describe the behavior of herd animals towards a newly introduced animal. In some instances, a flock of birds will unite against the newcomer, steal its food and perhaps even attack until it leaves the group. Lorenz and his school were always interested in the lessons of animal ethology for human behavior, and in time these observations made their way into human psychology as well. The application of the word “mobbing” to the human world was first made by a Swedish child psychologist studying the exclusionary tactics of children playing in schoolyards in the early 1970s. Dr. Peter-Paul Heinemann used the term to describe group behaviors that included ridicule, insult, ostracism, and occasional violence.
towards a particular child. He argued that this “syndrome” could even lead to the suicide of the victimized child. It was this extreme response to group harassment that led Dr. Heinz Leymann, a German industrial psychologist working in Sweden, to study adult behavior in the workplace, according to the official mythology of mobbing theory. The story holds that after receiving the diary of a 50 year-old woman who had committed suicide after a prolonged period of harassment at work, Dr. Leymann decided to study the prevalence and effects of workplace abuse. He borrowed the term “mobbing” from the schoolyard and applied it to the adult world to describe what became known as “psychoterror” in the workplace.

In addition to conducting a number of surveys among workers in Scandinavia, Leymann and others began a campaign to popularize the concept of workplace mobbing. Over the course of the 1990s, Leymann’s mobbing concept spread throughout continental Europe. Starting in the early 1990s, Germany, for example, saw an avalanche of advice books, magazine articles, clinics, hotlines and codes of conduct directed against mobbing, all of which can be traced back to a list of 45 mobbing activities identified by Leymann. The movement soon spread elsewhere.

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24 See Heinz Leymann, Mobbing 14 (2002); see Heinz Leymann, Psychoterror am Arbeitsplatz und wie man sich dagegen wehren kann (1993). Another influential researcher is Professor Dieter Zapf at the Institute for Work and Organizational Psychology at the Goethe-Universität in Frankfurt am Main. Leymann notes that the end of the 1970s in Sweden was a particularly propitious time to undertake this kind of research, since the Swedish parliament had just passed a new labor law protecting the psychological well-being of employees. In addition, he notes that the academic framework in Sweden recognized psycho-social workplace medicine as a specialty. One might also add that Sweden’s social democratic political tradition likely emphasized the importance of work and dignity at work to one’s identity.

25 A Westlaw search of German newspapers reveals hundreds of articles containing tips and advice for Mobbing-victims (including how to recognize yourself as such), as well as hotlines set up by private firms, the Deutsche Gewerkschaftsbund, the Catholic Workers Movement, and universities like Göttingen, as well as private anti-mobbing clinics in major cities like Berlin, Frankfurt, Hamburg, and Hannover. Recent books for a general audience include, Kolodej, supra note 20; Kerstin Schlaugat, Mobbing am Arbeitsplatz: Eine theoretische und empirische Analyse (1999); Der neue Mobbing-Bericht: Erfahrungen und Initiativen, Auswege und Hilfsangebote (Heinz Leymann ed., 1995). Companies like Volkswagen and Siemens have entered Betriebsvereinbarungen which set up procedures to resolve cases of sexual harassment and mobbing within the firm. See VW - Betriebsvereinbarung: Partnerschaftliches Verhalten am Arbeitsplatz, effective 1 July 1996, at http://www.igmetall.de/betriebsraete/betriebsvereinbarungen/vw_mobbing.html.

26 The famous Leymann mobbing list is divided into five sections: 1) Attacks on Communicative Ability: supervisor limits employee’s opportunity to express herself; employee is constantly interrupted; colleagues limit one’s opportunity to express oneself; screaming or loud criticism; constant critiques of one’s work; constant critique of one’s private life; telephone terror; verbal threats; written threats; avoiding contact with targeted employee through rude glances or gestures; avoiding contact through gestures without making a direct statement. 2) Attacks on Social Relationships: no longer speaking to targeted person; refusing to respond when victim initiates discussion; placing victim in a work station far away from others; forbidding other employees to speak with the victim; treating the victim “like air.” 3) Attacks on Social Image: saying bad things about victim behind victim’s back; spreading rumors; ridicule; accusing victim of being psychologically ill; trying to force a victim to undergo a psychiatric examination; ridiculing a disability; imitating victim’s walk, voice or gestures as a form of ridicule; attacking victim’s political or religious beliefs; ridiculing private life; ridiculing nationality; assigning work tasks that damage victim’s self-respect; false and insulting evaluations; questioning victim’s decisions; vulgar insults or other demeaning statements to victim; sexual come-ons or verbal sexual
as well. In France, the issue was brought to sudden public prominence with the 1998 publication of a book entitled “Harcelement Moral,” by the French psychotherapist Marie-France Hirigoyen.27 Hirigoyen’s book, soon translated into other Romance languages, stimulated intense interest, and was followed by numerous further books with titles such as “J’ai un Patron Psychopathe” -- “I Have a Psychopathic Boss.” Similar movements have appeared in all the continental countries, attacking what is variously denominated “mobbing,” “moral harassment,” “pesten,” “acoso,” or “molestia morale.”

All of these writings were broadly similar — both in their characterization of “mobbing,” and in their relative subordination of the problem of relations between the sexes. Mobbing or moral harassment, as this literature presents it, falls essentially into three categories of behavior: 1) abusive communications/actions (such as screaming, berating, telephone terror, unjustified criticism, sexual harassment, violence); 2) destruction of the victim’s status at work (through insults, spreading rumors, public humiliation, sabotage, physical isolation); and 3) degrading assignments (assigning senseless tasks, no tasks at all, or tasks for which the target is not qualified). It is by no means limited to abusive treatment inflicted on employees by their supervisors — something that, for Germans, goes under the separate heading of “Bossing.”28 On the contrary: mobbing is most definitely a problem that includes employee-on-employee abuse. Mobbing theorists take pains to explain that the vast majority of cases are not one-time incidents. Rather, mobbing is a process that unfolds over months, and perhaps years.29 The “mobber” may be described by workplace psychologists as being socially dysfunctional, as having a narcissistic personality disorder,30 or simply as indulging an atavistic human instinct to dominate

27 Marie-France Hirigoyen, Harcelement Moral: la Violence Perverse au Quotidien (La Decouverte et Syros, ed. 1998).

28 It is interesting to note that while colloquial German has adopted the English word “boss,” the word “bossing” does have a sort of international sophisticated flair to German ears. We mention this because there has been some confusion in Germany as to where the word “mobbing” comes from. Articles almost always explain that it is an English word meaning “to gang up on or harass.” One of the earliest treatments of mobbing in the German legal press actually explained that the concept of mobbing was borrowed from the United States. See Robert Haller & Ulrike Koch, Mobbing – Rechtsschutz im Krieg am Arbeitsplatz, 8 Neue Zeitschrift für Arbeitsrecht 356 (1995). The irony, of course, is that only those Americans with knowledge of Northern European labor terminology have any idea at all as to what mobbing might mean. Another German legal scholar notes that mobbing is the English word for harassment, and that the good German counterpart would be “Schickanieren.” See Norbert Kollmer, Mobbing im Arbeitsverhältnis (1997). The irony there is that Schickane is not a good German word, it is a good French word (spelled according to German orthography). Professor Kollmer clearly wants to cleanse mobbing theory of the taint of US-association.

29 For statistical studies, and in order to give limits to a potentially limitless phenomenon, theorists argue that a case of mobbing occurs when the victim is exposed to at least one of the listed activities at least once a day for a period of six months.

30 For a recent American discussion of this theory, see Judith Wyatt & Chauncey Hare, Work Abuse: How to Recognize and Survive It (1997).
As for the victim, while some researchers maintain that weak-willed people are more likely to be victimized, mobbing therapists are loathe to cite a "victim personality", and often insist that any personality type can become the target of a campaign of abuse. The dominant view in the German research is that mobbing is not the problem of a distinct minority with certain personality traits, but rather is a result of particular organizational structures. The most common symptoms are described as stress-related problems, such as sleep disorders, stomach conditions, severe depression leading to suicidal thoughts, and anxiety attacks. It is also now common to associate the effects of workplace abuse with post-traumatic stress disorders.

And the victims may include women as one of mobbing's many classes of sufferers. The first studies in Sweden, which indicated that between 2.5 and 3.5% of the population was affected at any given time, were fairly inconclusive as to the gender analysis, a point of much criticism among later feminist writers. Since that time, mobbing advice centers regularly present statistical studies that report seemingly conflicting results: that the incidence of mobbing among men and women is equal, that women are 2/3 more likely than men to be mobbed, or that women over 50 are the most likely victims. Be the statistics as they may, the theorists of

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31 Some researchers have suggested that in conflict-averse Scandinavian cultures, individuals are more likely to repress open conflict, which returns as patterns of exclusion and psychological terror at work. See Helge Hoel et al., Workplace Bullying, 14 Int'l Rev. of Indus. & Organizational Psychol. 195 (1999).

32 See, for example, the discussion in Noa Davenport et al., Mobbing: Emotional Abuse in the American Workplace 70 (1999). The authors there take pains to praise victims as often being independently minded creative people who threaten others' complacency with their new ideas. This US book is typical of the European popular advice books on how to recognize and resolve mobbing conflicts.

33 See for example the research by Klaus Niedl, Mobbing/Bullying am Arbeitsplatz (1995). See also the summary of a number of German and Scandinavian studies in Schlaugat, supra note 25, at 22. The specific organizational qualities that can lead to an unhealthy mobbing environment are aptly summarized by Davenport et al., supra note 32, as traits of bad management, such as: highly hierarchical structures; no open door policy; inefficient channels of communication; weak leadership; scapegoating mentality; little emphasis on team work. What is most interesting here is not the specific traits themselves (which read like a personnel management handbook), it is the fact that the origin of harassment is located in management structures, rather than in a broader culture of social inequality. This very functionalist approach is common to all mobbing theory.

34 See Davenport et al., supra note 32, at 94; Kolodej, supra note 20, at 103; Schlaugat, supra note 25, at 115.

35 Feminist legal scholar of sexual harassment Susanne Baer rejects Mobbing theory out of hand as methodologically unsound, (a reaction, perhaps, to Leymann's rejection of most sexual harassment research). See Susanne Baer, Würde oder Gleichheit (1995). Baer argues that Leymann's research underestimated the incidence of sexual harassment by overemphasizing traditional medical diagnoses of stress-related disorders, and thus missed the majority of cases where the targeted person does not exhibit the symptoms sought. She argues that Leymann's estimation that less than 1% of workers are sexually harassed is based on faulty research. Leymann's hostility towards sexual harassment theory is more than mere accident, it seems to indicate a fundamental characteristic of the theory -- that it insists on isolating the economy of workplace interaction from its social context. Kolodej, supra note 20, has written perhaps the best recent book on mobbing, and also criticizes Leymann's lack of receptiveness to issues of gender and discrimination.

36 The incidence of mobbing in general is also highly contested -- but the German Association of Labor Unions has estimated that 1.5 million people are currently victims of workplace harassment known as mobbing. (Not all studies include sexual harassment in mobbing statistics. For instance, the same association may keep separate sexual harassment statistics.) The Deutsche Angestellten Gewerkschaft estimated that at least 3% of the population was victimized by mobbing. See Mobbing - waaat nu?, Berliner Tageszeitung, Nov. 11, 1994, at 23.
mobbing all maintain that what Americans call sexual harassment is simply one type of mobbing behavior. Dr. Hirigoyen's choice of the term "moral harassment" is the most forceful statement of this position. The import of the phrase is precisely that harassment is a grander problem than anything attacked by feminists -- a problem that can afflict the lives of all employees, regardless of sex. Hirigoyen herself found that seventy per cent of the victims of moral harassment are women. Moreover, she observed, there were often "macho and sexist connotations" in the forms of abuse inflicted upon women. Nevertheless, she concluded that sexual harassment was just "one step further" in the practice of moral harassment: "Both cases involve the humiliation of another person, treating another person as an object to be used." Nonetheless, "harassment" is not a problem for women, according to the movement. It is a problem for everybody.

III

All of this began as psychological theory, not as law. Indeed, it may not seem obvious that mobbing should be a matter for the law at all. Psychologists discovered, or created, the "mobbing syndrome," and the response could have been restricted to medical treatment. And indeed, there has been quite a bit of medical treatment in Europe. Mobbing advice and treatment centers have sprung up like mushrooms in German cities. In what seems almost a parody of German health culture, a mobbing sanatorium was established in the spa town of Bad Lippenspringe by a neurologist, offering a 6-week program of relaxation exercises, group and individual therapy, as well as sport and physical therapy. Similar programs have appeared all over Europe.

Nevertheless, it is a remarkable fact that these medical approaches are not alone. On the contrary, the anti-mobbing movement has migrated almost instantaneously into continental law.

37 Marie-France Hirigoyen, Malaise dans le Travail, Harcèlement Moral: Démêler le Vrai du Faux (La Découverte et Syros, ed. 2001).
38 Id.
39 Even researchers on sexual harassment in Europe now find their subject curiously limited. Thus Greetje Timmerman and Cristien Bajema note, in a study of the incidence of sexual harassment, the strangeness of not seeing it within a larger context that includes "mobbing and bullying." Greetje Timmermann & Cristien Bajema, Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison, 6 Eur. J. of Women’s Stud. 419, 422 (1999).
40 See Ina Hoenicke, Wo der Scherz endet und der Terror beginnt: Kollege gegen Kollege, Süddeutsche Zeitung, Nov. 19, 1993, for an interview with Dr. Michael Becker. This is not quite as bizarre as it may sound to Americans. German health insurance regularly sends individuals suffering from a variety of conditions and illnesses (for instance, cancer patients) to clinics in spa towns to "take the waters" and undergo therapies in addition to a normal course of medical treatment. Readers of The Magic Mountain by Thomas Mann will be familiar with the 19th century concept of holistic medical sanitaria, which continue in a modified form today. However, it is fair to guess that even in the case of severe psychosomatic stress disorders caused by workplace abuse, many Germans would likely think a 6-week Kur (spa-treatment) somewhat excessive-- especially when their taxes are paying for it.
41 And in the venerable tradition of socialized medicine, the patient's health insurance paid the bill, at least until the federal health care cost-cutting measures in 1996. See Dagmar Schediwy, Mobbing-Beratung nur für Reiche, Berliner Tageszeitung, July 23, 1996, at 24 (Mobbing advice center organizers complained that after the federal cost-cutting, only the wealthy would be able to afford mobbing treatment, which includes stress management, role playing exercises, and psychological therapy).
This re-casting has taken different forms from country to country. In fact the penetration of the anti-mobbing movement into the law makes a fine study in how much legal traditions differ within Europe. In Sweden anti-mobbing law was produced through bureaucratic regulation, whereas in Germany it was produced through juristic reasoning. Meanwhile, in France, it was produced through the politically charged passage of new statutes. Nevertheless, if the legal forms differ, the underlying substantive legal concerns are much the same. In part, the regulation of mobbing has been treated as a workplace health issue -- as the regulation of the threat of psychic injuries comparable to the threat of physical ones. But in the hands of European lawyers, mobbing has quickly become an issue, not only of employee health, but also of employee dignity. Indeed, the critical operative legal terms throughout continental Europe have to do with dignity much more than with health. Mobbing seems, to the eye of continental lawyers, to pose the danger of “insulting” or “dishonoring” or “degrading” treatment.

The first legal attack on mobbing came in Sweden in 1993, almost as soon as the mobbing movement had begun in the psychological literature, and it came in the form of new bureaucratic regulations. Promulgated pursuant to a statute empowering the National Board of Occupational Health and Safety to supervise the workplace “environment,” these regulations characterized mobbing as “kränkende särbehandling” in the workplace -- “singling someone out for insulting or disrespectful treatment.” These regulations were framed, in the manner of Swedish corporatism, as a rather vague directive to employers. Employers were to “plan and organize work so as to prevent ‘kränkende särbehandling,’ and to “make clear that kränkende särbehandling cannot be accepted in the activities [of the workplace].”\footnote{Ordinance of the Swedish National Board of Occupational Safety and Health containing Provisions on measures against Victimization at Work, Sept. 21, 1993, AFS 1993:17 §§ 2-3 [hereinafter Swedish Ordinance on Victimization at Work.]}

Employers were further directed to establish “routines” and “measures,” none of which were specified\footnote{Id. at §§ 4-6.} -- all typically “soft” Swedish law, as one of our informants described it.\footnote{Interview with Prof. Ronnie Eklund, University of Stockholm.}

But what exactly was “kränkende särbehandling”? Following the research of industrial psychologists, the new Swedish regulations began by specifying the medical harms that could be expected to result from mobbing. But the legal definition they gave was mostly about “insulting” and “degrading” behavior -- behavior that was expressly said to include sexual harassment:

> **Kränkende särbehandling** in the form of various kinds of reprehensible behavior can be committed both by employees and by the employer personally or his representatives. The phenomena commonly referred to, for example, as adult bullying, mental violence, social rejection and harassment -- including sexual harassment -- have come to be seen more and more as problems of working life in their own right and will be collectively referred to here as **kränkende särbehandling**.

These are difficult and sensitive problems. What is more, they can have serious and harmful effects on individual employees and on entire working groups if not carefully assessed and handled. Harmful effects on exposed
persons may be revealed by both mental and physical pathological states - sometimes chronic - and also by social rejection from working life and the workplace community.

The following are some instances of victimization:
- Slandering or maligning an employee or his/her family.
- Deliberately withholding work-related information or supplying incorrect information of this kind.
- Deliberately sabotaging or impeding the performance of work.
- Obviously insulting ostracism, boycott or disregard of the employee.
- Persecution in various forms, threats and the inspiration of fear, degradation, e.g. sexual harassment.
- Deliberate insults, hypercritical or negative response or attitudes (ridicule, unfriendliness etc.).
- Supervision of the employee without his/her knowledge and with harmful intent.
- Offensive “administrative penal sanctions” which are suddenly directed against an individual employee without any objective cause, explanations or efforts at jointly solving any underlying problems. The sanctions may, for example, take the form of groundless withdrawal of an office or duties, unexplained transfers or overtime requirements, manifest obstruction in the processing of applications for training, leave of absence and suchlike.

Offensive administrative sanctions are, by definition, deliberately carried out in such a way that they can be taken as a profound personal insult or as an abusive power and are liable to cause high, prolonged stress or other abnormal and hazardous mental strains on the individual.

The attitudes involved in offensive acts are, briefly, characterized by gross lack of respect and offend against general principles of honorable and moral behavior towards other people. The actions have a negative effect, in both the short and long term, on individuals and also on entire working groups.

For the sake of clarity, it should be added that occasional differences of opinion, conflicts and problems in working relations generally should be regarded as normal phenomena - always provided, of course, that the mutual attitudes and actions connected with the problems are not intended to harm or deliberately offend any person. *Kränkende särbehandling* does not occur until personal conflicts lose their reciprocity and respect for people's right to personal integrity slips into unethical actions of the kind mentioned above and individual employees are dangerously affected as a result.\(^45\)

The tone of these regulations, with their emphasis on “insults, “gross lack of respect,” “degradation,” “respect for people’s right to personal integrity,” and so on,

\(^{45}\) Swedish Ordinance on Victimization at Work, supra note 42, at 7-8. We have slightly altered the official English translation of the Ordinance, eliminating the translation of *kränkende särbehandling* to “victimization.” “Victimization” does not fully capture the connotations of the term.
is noteworthy. It is quite far from the tone of American law. It is also, let us remark, quite far from the tone of the industrial psychology that had spurred the anti-mobbing movement. The industrial psychology of mobbing drew upon animal ethology, and it continued to treat workers as a variety of herd animal. The harms that it identified were medical harms to the individual, and efficiency losses to the organization. When Swedish lawyers set out to translate this into the language of the law, they altered the underlying image of human beings, and recharacterized the harms that mobbing threatened. Human beings became individuals with "personal integrity," and the harms that threatened them were harms of "lack of respect." No longer flocks of birds or herds of seals, they were vulnerable persons, hungry to maintain their "dignity."

What happened in Sweden happened elsewhere in continental Europe as well. Books and articles about psychological theories of herd behavior were eagerly consumed everywhere in the 1990s. But those books and articles did more than nourish changes in the practice of psychotherapy. They also nourished new legal theories about "dignity," "insults" and "respect" -- legal theories that were applied, not only to the problem of mobbing narrowly conceived, but also to the problem of sexual harassment.

In Germany, for example, the mobbing question was rapidly brought into the mainstream of traditional legal thought about dignity and respect. This was not done through the promulgation of new regulations or the passage of new statutes. Rather, legal scholars did the work. Legal scholars often manage to steer the development of German doctrine, much in the way that courts are often said to make law in the United States, and they have done so in the case of mobbing. Thus there is no statutory norm defining "mobbing" as such in Germany. 46 But there are plenty of articles and handbooks on the topic in the legal literature, and in practice "mobbing" has penetrated swiftly and easily into German law. As it turned out, German jurists found it easy to conceptualize mobbing as a legal problem: It fit comfortably into some quite traditional German juristic concepts.

Two aspects of German law are of particular importance here: the traditional analysis of the labor contract, and the law of the protection of "personality." German society has a long history of discomfort with the idea that ordinary freedom of contract ought to apply to the employment relationship. In this, of course, Germany is simply typical of a continental world that has always regarded anything like the American tradition of at-will employment with queasiness. First of all, discharging employees is, by American standards, extraordinarily difficult in German law. 47 German employment law, unlike American employment law,
assumes a very stable working environment, and German doctrine frowns on firings. Nor is the German hostility to freedom of contract limited to the question of termination. To German lawyers, the employment relationship is not something that can be crafted from whole cloth by the contract parties. On the contrary, the employment contract is said necessarily to import two correlative duties, which protect both the interests of the employer and the interests of the employee. On the one hand, the employee has a duty of Treue, “loyalty,” which consists (among other things) in the duty to obey orders. On the other hand, the employer has a duty of Fürsorge, or “care,” a sort of patronal obligation to assure that all is well with the employee. These correlative duties were first postulated in the later nineteenth century by Otto von Gierke, the famous “juristic socialist,” whose ideas appealed strongly both to left-wingers and to right-wingers. Gierke favored a kind of employment socialism that would reinvigorate and update old attitudes of communal solidarity and noblesse oblige. He wanted employers to care for their employees in the way that medieval Germans had cared (as he thought) for members of their community. Gierke’s doctrine of the two correlative duties of loyalty and care was embraced and manipulated by Nazi legal theorists, and largely as a result it has always faced substantial opposition within progressive post-war German labor law scholarship. Nevertheless, the doctrine of the two duties has survived in German doctrine. And indeed, it was the second of the Gierkean duties, the employer’s duty of care, that provided the initial point of entry into German law for the anti-mobbing movement. It was easy to assert that the duty of care included a duty to guarantee that employees not suffer workplace harassment, and by 1993 a German legal scholar had already said so.

But there was more to it than that. As German jurists worked through the problem of mobbing, they subsumed it under one of the oddest and most interesting branches of German law, the law of the protection of “personality.” Often up to labor court judges to decide when a termination is justified. In addition to laws protecting labor unionization, these included the Termination Protection Law of 1950 (amended in 1969) which is probably the single most litigated statute in all of German labor law. See International Labor and Employment Laws, § 4-10 - 4-19 (William L. Keller et al. eds., Bureau of National Affairs, 1997).

The two duties are often declared dead. See most recently Michael Gotthard, Arbeitsrecht Nach Der Schuldrechtsreform 10 (Beck, 2002).


Standard German doctrine holds that it was in the 1950s that the German high court carved out a “general personality right” protected by the general statement of tort liability in §823 BGB as an expression of the state’s concern for human dignity, though in fact the greatest systematic efforts to enshrine the protection of personality in German law date to the Nazi period. See Stefan Gottwald, Das Allgemeine Persönlichkeitsrecht: ein zeitgeschichtliches Erklärungsmodell (1996); Thomas Thees, Das
translated as a "right to privacy," the right of personality is much more far-reaching. It includes not only "the right to be let alone," but also something with a grander philosophical pedigree: the right to freely develop one's self. The idea of "free self-development" has very deep roots in the traditions of German liberalism, which has always tended to define itself as fostering spiritual freedom as much as, or more than, economic freedom. "Freedom," within the thought-world of the German law of personality, has to do less with unfettered participation in the marketplace than with unfettered creation of the self. This implies, to German legal minds, that true freedom includes such things as protection of one's privacy and control of one's public image. The history of the development of the protection of personality reaches far back in modern German history, but today it is especially associated with the post-war German constitutional order. In particular, it is associated with Art. 2, Section 1 of the German Basic Law, which famously pronounces that "every person shall have the right to free development of his personality insofar as he does not violate the rights of others." This, in conjunction with the first enumerated basic right that "human dignity shall be inviolable," is generally understood as the foundation of the law of personality, and indeed of the whole post-war German legal order. The idea of the protection of personality is also closely connected with one of the most striking of traditional German rights: the right to be free from insults. It is, in German law, a criminal offense to insult other persons, and it is a part of the right of "personality" that no one should have to suffer insulting or disrespectful...
treatment. In all of these instances, the personality right is closely related to principle of human dignity.

This mysterious and grand right of personality also has its place in German employment law. By the 1930s, workers were protected against insults in the workplace. That tradition continued into the postwar period. But even beyond the law of insult, the employer is now obligated to guarantee that employees can fully develop their personality at the workplace as an aspect of the duty of care. "Respect the employee as a person!" is now the indefeasible maxim of the protection of personality in the workplace, as one commentator declares. All of this makes it easy for German jurists to create protections against the newly fashionable harms of mobbing -- they are, in the eyes of German tradition, violations of the right of personality in the workplace. It has also proven easy for German jurists to submerge protection against sexual harassment. A standard 2001 handbook on German labor law will now devote a couple of sentences to sexual harassment as "a special legislative expression of the protection of personality" -- and then go on to devote several pages to mobbing.
It is not entirely easy to say how much impact this has had on German practices. Because of the strong structural incentives to resolve disputes early, it is likely that mobbing theory has had the greatest effect in the early stages of conflict between harassed employees and their employers. Nevertheless, it has created some striking doctrine. Perhaps most intriguing to American eyes is the unilateral strike right (Leistungsverweigerungsrecht) afforded to a harassed employee if the employer does not take appropriate measures to prevent the personality-right injuring activity (§ 273 BGB). Failure to provide a respectful workplace is analogized to failure to pay an employee’s salary -- in either case the employee is entitled to cease actively working for the employer, while still accruing pay and benefits, until the situation changes. However, as radical as this may seem, it may ultimately be an empty right, since the penalties to the employee are severe if the court does not find that workplace conditions justified the unilateral strike. For this reason, attorneys advise clients not to make use of this option.

Despite that, there is no doubt that the German legal industry has been stirred. Some lawyers remain wary of what they see as a fad at best, and as a production of the self-help industry at worst. Nevertheless, an increasing number of attorneys have joined forces with mobbing advice clinics and begun to advise large corporations in the negotiation of anti-mobbing collective agreements. Ordinary employees who feel that they are being mishandled, i.e. that they suffer a dignitary injury at work, have a basic right to complain directly to their employer (§ 84 Betriebsverfassungsgesetz [hereinafter BetrVG]), or to the Works Council, if one exists (§ 85 BetrVG). If the employer finds that the complaint is justified, she is obligated to take action to prevent the harassing activity. This includes warning, transferring, or even terminating the harasser. The employee can sue the employer if the employer does not take the necessary action. In addition, the employer has a contractual duty to protect the employee’s personality development at work (§ 75 BetrVG). If this obligation is violated, the employee can theoretically sue for compensation, probably limited to costs for therapy or for finding a new job if the employee quits. It is theoretically possible for an employee to receive damages for pain and suffering if the injury to the personality right is grave, but even then, German courts come nowhere near American juries in awarding monetary damages.

In one case, the Labor Court in Munich found that complete video surveillance of the workplace amounted to a grave personality injury to the employees, and confirmed the right of the employees to withhold their labor. LAG München (February 5, 1986), cited in Frauenrechtsgesetz des Bundes und der Länder: Kommentar für die Praxis 949 (Dagmar Schiek et. al. eds., 1996). The German Parliament reaffirmed employees’ right to withhold their labor in cases of sexual harassment in the § 4 Gesetz zum Schutz der Beschäftigten vor sexueller Belästigung am Arbeitsplatz [BSchG] (BGBI. 1 S.1412), but this protection is identical to the already existing personality protection in § 273 BGB, and introduces no additional protections for the employee.

If a court finds that the workplace conditions did not justify the unilateral strike, then the unjustified absence of the employee from her job would serve as good cause for termination. Attorneys who represent clients in mobbing cases as well as sexual harassment cases counsel clients against taking this tremendous risk. See MacKenzie, supra note 65; see also Schiek, id.

A recent decision of the Federal Labor Court recognized mobbing as a general social phenomenon. See BAG Beschluss (January 15, 1997) 7 ABR 14/96.

See e.g. Gralka, supra note 65. It seems to be the case that lawyers who represent clients who are the victims of workplace harassment are fighting an uphill battle in the legal community.

See Volkswagen Betriebsvereinbarung, supra note 25.
Germans are filing claims, too.74 Academic interest is also on the rise. Until recently, one was more likely to find mobbing as the subject of a television film-of-the-week,75 or in the title of a self-help guide.76 Now mobbing is not only mentioned in the standard commentary on the Labor-Management Act,77 but it is also a regular subject of study in the labor law courses at many German universities.78 Within only a few years, mobbing has made it into German law.

Mobbing has also made it into French law -- though not through German-style juristic reasoning. In France, typically, anti-mobbing law was principally the product of politics (as well, perhaps, as some mild anti-Americanism). What this political movement produced, in typical French fashion, was a statute which amended the French Codes.

In France, as in Germany, the idea of "human dignity" had been more or less in the air since World War II. But the 1990s saw a kind of release of intellectual and political energy, and "dignity" became a hot topic in French law in a new way.79 The New Penal Code, promulgated in 1992, included a section on "offenses against the 'dignity' of the person," which covered, among other things, discrimination and pimping.80 New legislation on bioethics gave Conseil Constitutionel the occasion to declare that "human dignity" was "a principle of constitutional value" in 1994.81 A couple of much-discussed cases followed, most notably a 1995 decision that upheld a ban on dwarf-throwing as a violation of "human dignity" -- over the objections of the dwarf in question, who was deprived of his livelihood.82 "Dignity" was coming

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74 See, for example, Jeanette Goddar, Magenweh, Angst und Herzrasen: Mobbing hält auch in Chefetagen Einzug, Berliner Tageszeitung, April 29, 1998, at 24, noting that Berliners are increasingly bringing mobbing claims before the courts. One case mentioned is that of an employee of a construction materials firm claiming that the personnel director of the firm was harassing him by, among other things, spilling hot coffee on him. In a recent decision, the Federal Labor Court ruled that an employer can be required to pay the costs of a preventive training program for supervisors if it could be demonstrated that there was a series of mobbing phenomena in the office. See BAG Beschluss, supra note 71.

75 For instance, see the documentary "Cold War at Work" (television broadcast, March 30, 1994) (cited in Süddeutsche Zeitung, 30 March, 1994; "Mobbing: die lieben Kollegen" (television broadcast, November 27, 1995 on ZDF) (cited in Berliner Tageszeitung, November 27, 1995).

76 There are a plethora of examples, for instance: Ralf D. Brinkmann, Mobbing Bullying Bossing: Treibjagd am Arbeitsplatz (1995); Ulrike Brommer, Psycho-Krieg am Arbeitsplatz und was man dagegen tun kann (1995), Henry Walter, Mobbing, Kleinkrieg am Arbeitsplatz (1993); Linda Waniorek & Axel Waniorek, Mobbing: Wenn der Arbeitplatz zur Hölle Wird (1994).

77 See Betriebsverfassungsgesetz: Kommentar für die Praxis, 5th ed. (Wolfgang Däubler et al. eds., 1996) § 75, 1173 (explaining that mobbing, psychological terror, chicanery and harassment all fall under the employer's obligation to prevent activities that injure the employee's right to develop their personality at work).

78 See note 65 in Däubler, supra note 63, mentioning a final exam in his labor law class where students were asked to assess a hypothetical involving workplace harassment and describe the possible legal recourses open to the victim, the harasser, and the employer. Professor Däubler is a very influential employment law figure, who not only edited the major commentary on employment law, supra note 77, but who also has his own press. Recent graduates of German law schools confirm that mobbing is a regular subject of study. Conversation with Roland Wig, who received his Law Degree from the Universität Köln in April 1999 (Apr. 3, 2000).

79 For Literature see especially two collections of essays: Marie-Luce Pavia & Thierry Revet, La dignité de la personne humaine (1999); and Philippe Pedrot, Ethique, Droit et Dignité de la personne: Mêlages Christian Bolze (1999).

80 Nouv. C. Pen. Livre II, Titre II, Chapitre V.


into its own in French law, and by the latter 1990s, interest began to grow in the "dignity" of employees in particular. This included both scholarly discussion of the "dignity" of employees in the French workplace, and a few scattered judicial decisions.\footnote{For discussion, see Olivier de Tissot, La protection de la vie privée du salarié, 3 Droit Social 222 (March 1995); Thierry Revet, La dignité de la personne humaine en droit du travail in La Dignité de la Personne Humaine 137 (Marie-Luce Pavia and Thierry Revet eds., 1999) and Laurence WeiI, La dignité de la personne humaine en droit administratif in id., 94, 94-95. For a leading decision, see Conseil d'Etat, July 11, 1990, Ministre des affaires sociales et de l'emploi c/ Syndicat C.G.T. de la Société Griffine-Marechal, Rec. Lebon 215.} For example, one 1996 case held that it was a violation of constitutional norms of "dignity" when a retail store required its employees to display a receipt proving that they had paid for the goods they wanted to take home; and, a year later, another held that it violated the same norms of "dignity" to subject employees to surveillance by fellow employees who were not their hierarchical superiors.\footnote{Both discussed in Bertrand Mathieu and Michel Verpeaux, Jurisprudence Constitutionnelle, La Semaine Juridique No. 34, 4066 (J.C.P. III, 1997).} Finally, in 1998, the continent-wide anti-mobbing movement reached France, with the publication of Marie-France Hirigoyen's book.

French politics is often driven by public scandals and causes célèbres, and new statutes are not infrequently the result of some highly-publicized book. In the year 2000, for example, the publication of an exposé on prison life created a political battle that lasted for months, both in the press and in politics, eventually producing a major prison reform.\footnote{Described in James Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (Forthcoming).} The public sphere is small in France, and intellectual events tend to resound loudly there, easily becoming political events; and once intellectual events become political events, they easily produce statutes. This is true in the case of mobbing as well.

Indeed, Hirigoyen's book created a political-journalistic sensation -- a sensation that fell, as it happened, in the middle of a political battle over terms and conditions of employment in France. The result, within a couple of years, was the amendment of both the labor code and the penal code.

Hirigoyen is a French psychotherapist and not a German industrial psychologist, and her book had less ethological theory than the literature east of the Rhine; it was as much a book for people on the couch as for people in the workplace.\footnote{See for example Marie-France Hirigoyen, Le Harcèlement Moral: la Violence Perverse au Quotidien, 210-211 (1998) where the author recommends that the victim consult the firm physician in order to learn better to "verbalize" the consequences of the psychological violence he has experienced.} Nevertheless, Hirigoyen's concept of "harcèlement moral" was, for the most part, little different from the concepts of mobbing that had been presented elsewhere in Europe, citing the familiar literature.\footnote{Id., at 246 (citing Leymann).} What set her book apart, though, was the choice of the word "harcèlement." This was the French equivalent of "harassment," and it had become associated with the American law of sexual harassment. Hirigoyen's choice of "moral harassment" thus contained an implicit polemic against the American notion that the primary form of harassment was the sexual kind. That indeed is how her readers received what she wrote. As the conservative Le Figaro pointedly put it, in describing her book with its "record-breaking sales," Hirigoyen had documented the vast range of cases of "harcèlement," and rendered the service
of showing that "not all harassment is sexual harassment." The left-wing *Le Monde* also responded to her book by deploring the fact that only sexual harassment had been taken into account by the law, when all other forms of workplace harassment ought to be sanctioned as well.

From its first publication, Hirigoyen’s book thus tapped into French resentment of the American idea of sexual harassment, offering its readers a seemingly better and more capacious “harassment” concept. Perhaps this would have been enough in itself to provoke some statutory redrafting. As it happened, though, events conspired to magnify its impact. The public sensation created by Hirigoyen’s book came at a propitious political conjuncture. The socialist government of Lionel Jospin was then in power, committed to a program of labor reform, of which the most prominent aspect was the introduction of the 35-hour workweek. The 1997 introduction of the 35-hour workweek did not, however, end political controversy and anxiety over regulation of the labor relationship. The issue was ripe for politics, and the French communist party introduced a measure to end “all deliberate degradation in the conditions of the workplace” in 1999. In 2001, the government introduced some amendments into the labor code intended to safeguard employees against “moral harassment.” This was not yet the end, though. In the same year, mass layoffs by the yogurt maker Danone, and a decision by the retailer Marks & Spencer to close its French outlets, volatilized Jospin’s left-wing ruling coalition. Jospin’s government prepared a new “Law on Social Modernization,” intended to aid laid-off workers. Nevertheless, the communist party, Jospin’s coalition partners, having suffered some serious electoral losses, seized on the layoff issue. The communists organized mass demonstrations, and threatened to defect from the coalition unless the law imposed higher costs on employers who wished to liquidate. The communists also grabbed the high-profile “moral harassment” issue, and made it, at least for a while, their own. As part of the price for maintaining communist support, the Jospin government introduced the new paragraph into the Penal Code, criminalizing “moral harassment” as of January, 2002.

So it was that Jospin’s coalition did hold together, for a little while longer; and so it is that French law now includes both labor law and criminal law provisions forbidding mobbing. These provisions define “moral harassment” in terms that draw on all available conceptions: “Moral harassment” represents a violation of dignity, and a danger to health, and a species of discrimination. The Penal Code threatens a fine and term of imprisonment -- the same fine and term threatened for sexual harassment. The Labor Code requires employers to maintain a handbook forbidding moral harassment, confers a cause of action on harassed employees, with the burden of proof upon the employer, and encourages mediation by a third party, drawn from “a list of persons designated on account of their moral authority

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90 Supra note 37, at 12.
92 Id.
93 In both cases, one year of imprisonment and a fine of EUR 15,000. See Nouv. C. Pen., articles 222-33, 222-33-2.
95 Id., art. L-122-52.
and their competence in the prevention of moral or sexual harassment.  

By contrast with the parallel laws of Germany or Sweden, discrimination plays a notably large role in the French scheme:

No employee may be subjected to repeated activities which intentionally or unintentionally result in a degradation of the conditions of work tending to injure that employee's rights or dignity, to alter that employee's physical or mental health, or to compromise his professional future.

No employee may be sanctioned, discharged, or made the object of a discriminatory measure, whether direct or indirect, particularly to wages, training or placement, promotion and status on the job, changes or renewal of the contract of employment, on account of having been subjected, or refusing to be subjected, to activities such as are described in the previous paragraph, or on account of having testified about or reported such activities.

Every breach of contract that results from such circumstances, every disposition or contrary act, is null and void as a matter of law.

This is certainly a little more like American law than anything to be found in Sweden or Germany. The French are much more ready than their easterly neighbors to focus on hiring, termination and promotion -- on "l'avenir professionnel," "professional future," as the statutes put it. Nevertheless, this is law of a piece with the law elsewhere on the continent. As for its impact, it is difficult to know, if only because it is too early to judge. Nevertheless, French bookshops, like the French popular press, remain full of discussions and descriptions of "moral harassment." And in French parlance, "sexual harassment," is now coupled in the phrase "moral and sexual harassment."

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96 Id., art. L-122-54.
97 Id., art. L-122-49:

Aucun salarié ne doit subir les agissements répétés ayant pour objet ou pour effet une dégradation des conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d'altérer sa santé physique ou mentale ou de compromettre son avenir professionnel.
Aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat pour avoir subi, ou refusé de subir, les agissements définis à l'alinéa précédent ou pour avoir témoigné de tels agissements ou les avoir relatés.
Toute rupture du contrat de travail qui en résulterait, toute disposition ou tout acte contraire est nul de plein droit.
98 For typical examples, see Isabelle Mercier and Monique Osman, J'ai un patron psychopathe: le harcèlement moral dans l'entreprise (2001); and Christophe Dejours, Travail, usure mentale, 2nd ed. (2000).
Similar stories can be told about other continental countries; what is going on in Sweden, Germany and France is going on elsewhere as well. Moreover, the European Union has now taken up the mobbing issue. But no similar story can be told about the United States. None of this has found much purchase in America.

This is not because the basic ideas are not there. They most certainly are. Indeed, a good seventeen years before Heinz Leymann published his work on mobbing, Carol Brodsky published her own book, The Harassed Worker. Brodsky used much the same ethological language that Leymann would later use:

Whether it occurs among nations or among individuals at the highest or lowest socioeconomic and political levels, harassment seems to be a social instinct. In the same way that ... an animal trained to hunt rodents goes through the entire ritual even though there are... no rodents around, human beings fall easily into harassment behavior even when there seems no rational objective.

If ideas were all it took to change the law, Brodsky's book would surely have introduced the anti-mobbing movement into American law in the late 1970s. Strikingly, though, it did nothing of the kind. Brodsky's work was received -- but it was received by feminists, who made it a part of the movement against sexual harassment. American legal culture was receptive to the idea that women were endangered by harassment, much more than to the idea that workers in general were endangered. And this despite the very title of Brodsky's book.

What was true in the 1970s is, moreover, still true today. The ideas are there, both in psychology and in law. The first American book about mobbing aimed at a broad audience was published in the summer of 1999, and Professor David Yamada is supporting a bill in Massachusetts that would create a state action

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100 See id., Working Paper.


102 Id., at 4.

103 See, inter alia, Noa Davenport et al., Mobbing: Emotional Abuse in the American Workplace (1999); Gary Namie & Ruth Namie, Bullyproof Yourself at Work: Personal Strategies to Stop the Hurt from Harassment (1999).

104 David Yamada, The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Workplace Environment, 88 Geo. L.J. 475 (2000) (arguing for the creation of “intentional infliction of a hostile work environment” cause of action that draws from sexual harassment hostile work environment doctrine and tort law.). For other recent arguments concerning a tort cause of action for workplace harassment see Dennis P. Duffy, Intentional Infliction of Emotional Distress and Employment at Will: The Case Against “Tortification” of Labor and Employment Law, 74 B.U.L. Rev. 387 (1994) (arguing that increasing use of tort law to resolve disputes will only lead to individualized and episodic change, and will delay the search for effective methods of enforcing workers’ rights); Mark McLaughlin Hager, Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed, 30 Conn. L. Rev. 375 (1998) (arguing that sexual harassment be viewed as an offense to personal dignity and
under tort for the kind of hostile workplace environment comprehended by mobbing. As for American law, it certainly has plenty of doctrine that could be used to construct an American law of mobbing, even if it doesn't have the wealth of conceptual resources that German law has. Robert Post in particular has devoted great efforts to showing that American tort law and constitutional law can accommodate the protection of individual "dignity" in a way that parallels European concepts of dignity. 105 Regina Austin, too, argued eloquently in 1988 for protecting workers in general against harassment, through the tort law of the intentional infliction of emotional distress. 106 Following Warren and Brandeis, American law does have its vague "common law of protecting personality." 107 The ideas are there.

Ideas as such do not make living law, though. They have to seem compelling in the societies in which they appear. The mobbing idea, as we have seen, seemed instantly compelling in Sweden and Germany, and the "moral harassment" slogan instantly captured public attention, and the political process, in France. Nothing like that is happening in the United States. Employee dignity of the continental kind does not seem compelling in the same way to Americans -- or at least it does not seem as obviously appropriate a subject for the law. Moreover, even when Americans do talk about dignity, they tend, in a typically American way, to focus on women rather than on employees.

Thus Americans have a hard time grasping the legal significance of the kind of dignity at stake in harassment law. That kind of dignity is the kind described by Erving Goffman. It is the kind of dignity involved in being shown deference and respect in everyday interaction -- the kind of dignity involved in being treated by others in a way that makes us feel good about ourselves, even when neither our lives nor our material well-being is necessarily at stake. 108 It is not, to come back to the language of the Supreme Court, the dignity of being "allowed to ... make a living." 109 It is the dignity of being shown everyday respect. To continental Europeans, it seems unproblematically obvious that that kind of dignity is something the law can and should protect. As one Swedish interlocutor said to us, describing the mobbing problem: "If everybody else leaves the coffee room when you walk in, that's a violation of your dignity, and the law should do something about it." 110 To Europeans, a legally cognizable injury takes place when your dignity is violated in this way, even if neither life, limb, nor livelihood is any way endangered. American perceptions are simply different. Judge Posner and Gertrud Fremling can write, for example, that an approach focusing on dignity "is too vague to be helpful in dealing with anything as concrete as the psychology of sexual autonomy, not as a species of gender discrimination, and that Title VII requires a morally untenable distinction between discriminatory and non-discriminatory harassment).
harassment or the proper scope of legal protection against it.\textsuperscript{111} Similarly, in the law of defamation, the Supreme Court can hold that a dignitary standard would be inherently subjective and therefore unacceptable.\textsuperscript{112} It is "discrimination" that seems to be the \textit{hard} concept in America, the concept with real content. Once livelihoods are at stake, we see a legal injury looming.

To be sure, there are Americans who perceive the legal world differently. But it remains the case that American law is overwhelmingly concerned with women and minorities, not with employees in general. Thus both Anita Bernstein and Rosa Ehrenreich worry that dignity has gotten short shrift in our law,\textsuperscript{113} and both of them recognize that "dignity" is, in principle, something to which all workers can lay claim. At the end of the day, though, both of them remain preoccupied with sexual harassment. Women and minorities are what ultimately matter in American "harassment" culture, much more than employees in general. Other critics of American sexual harassment law remain strongly attached to the discrimination paradigm. Thus Vicki Schultz has argued energetically against the domination of sex in our law of sexual harassment. We should not be condemning sexual approaches as such, she claims; rather, we should be condemning behavior that blocks women from succeeding in male-dominated workplaces, whatever form that behavior may take.\textsuperscript{114} This is a powerful argument, but its emphasis is still on career advancement, not on dignity in the European sense. Even American scholars who abandon the focus on women do not see the world Europeans do. In particular, there is Regina Austin, who mounts an argument that, in principle, covers all employees. But her focus is not the continental European focus. To Austin, the most compelling cases involve protected classes and minorities -- the "marginalized" of society.\textsuperscript{115} In the end, it is at least as much the problem of discrimination as the problem of dignity that drives Austin's analysis.

\textbf{V}

So why does the mobbing idea seem so much more compelling in Europe than in the United States? America has, at least potentially, the industrial psychology, the legal doctrine, and the bureaucratic institutions. What exactly is it that is missing? What is it that makes the plant "harassment" grow so differently in American soil?

The most important factor is obvious. American law has been shaped by the effort to create racial equality, where continental law has not. The experience of race is clearly key. But there are other factors at work too. As we want to suggest, the relative European disinterest in "discrimination" also has to do with the European tradition of job stability, and opposition to at-will employment. Europeans

\textsuperscript{111} Gertrud M. Fremling & Richard A. Posner, Status Signaling and the Law, With Particular Application to Sexual Harassment, 147 U. Penn. L. Rev. 1069, 1084 (1999). "Incivility is so pervasive in our society that it is inappropriate for the law to attempt to provide a remedy for it in every instance... Public adjudication of common irritations and arguments would dignify most disputes far beyond their social importance", Calvert Magruder, Mental and Emotional Disturbances in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936).

\textsuperscript{112} See Boos v. Barry, 485 U.S. 312 (1988) (rejecting a statute that regulated speech offensive to the dignity of foreign diplomats).

\textsuperscript{113} See, inter alia, Bernstein, supra note 3; Ehrenreich, supra note 10; and Austin, supra note 11.

\textsuperscript{114} Schultz, supra note 7.

\textsuperscript{115} Austin, supra note 11.
talk less about “discrimination” than Americans do partly because in the less mobile European labor market there is, traditionally, less hiring and termination. This carries an important lesson about the sources of American anti-discrimination law. The cultural context of the American concern with “discrimination” is not just race conflict; it is also the tradition of mobility in American job markets. As for the European focus on “dignity,” it reflects a deeply rooted tradition of the protection of “dignity” for all, which is by no means confined to employment law. Last of all, we want to suggest tentatively that the sociology of sensitivity to pain may be different in continental Europe from what it is in the United States.

Let us begin with race. Race -- more particularly, the slow process of coming to terms with the history of black slavery -- is of course what primarily drives American law against “discrimination.” This is clear enough in the history of the 1964 Civil Rights Act itself. Protection against “harassment” for women rests on a legal foundation laid to end discrimination against African-Americans. The fact that “discrimination” matters more in America than in continental Europe is partly a reflection of the fact that race matters more in America.

But there is more to it than that. “Discrimination” also matters more in America because of the structure of the American employment market. America has more at-will employment. Here it must be emphasized that at-will employment is not just a doctrine of the law. It is also a cultural phenomenon. In continental Europe in particular, resistance to at-will employment is not just a legal tradition, but a deeply rooted socio-cultural pattern. People have traditionally stayed longer in their jobs. It is neither normal for employers to discharge employees, nor for employees to quit. The importance of this socio-cultural pattern for the rise of workplace harassment legislation is clear. The tradition of stable employment on the continent makes for a distinctive focus on the quality of life in the workplace -- just as it also makes for a distinctive focus on the problems of discipline in the workplace. It is precisely because jobs are traditionally stable that European jurists have produced doctrines like those of the employer’s “duty of care” and the employee’s “duty of loyalty.” German workplaces (like Swedish workplaces, where there is also a duty of loyalty) need an elaborate law of the employee’s duty to obey orders, as people who cannot be fired must be subject to other forms of discipline. The same is true in France, where lawyers are well aware that having a well-developed law of workplace discipline is essential to the maintenance of a legal order without at-will employment. Discipline is not the only issue, though. Alongside law of workplace discipline comes law of workplace dignity. Employees who do not routinely quit are employees who are pro tanto more likely to demand protections against workplace harassment. When the workplace is an unhappy place, it is not normal for the continental worker to vote with her feet. Her ordinary recourse is to insist, in whatever way possible, on more pleasant working conditions. It is thus no accident that mobbing theory penetrated German law through the doctrine of the employer’s “duty of care,” just as it is no accident that the French communists promoted “moral harassment” in the context of legislation limiting mass layoffs.

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Law against workplace harassment and traditional rejection of at-will employment belong together — they are two sides of the same employment coin.

The converse is true of the American conception of harassment as a problem of “discrimination.” At-will employment is much more familiar and well-accepted in America than on the continent — both in American law and in the mobile culture of American employment markets. By tradition, Americans routinely leave jobs, moving on to something else, just as they routinely leave one part of the country to move to another. In such a social setting, it is only natural for employment law to focus on the problems of hiring and termination, rather than on problems of maintaining pleasant and dignified circumstances in the workplace. The unarticulated assumption is that employees are constantly on the move. So it is that the Supreme Court, when it begins thinking about the nature of an “abusive workplace,” quickly slips into discussion of “remaining on the job, or ... advancing in [one’s] career [...]”. We don’t instinctively think in terms of long-term relationships, in which employees remain subordinated to one employer with whom they must get along. So it is that we ask, not whether employees are being accorded dignity in “their” workplace, but whether they are being given a fair chance to move on or to move up. Race is thus not the only factor in our fascination with “discrimination” in employment law. “Discrimination” is a problem that is more naturally emphasized in a mobile society; “dignity” is a problem more naturally emphasized in a stable one.

At the same time, the obsession with “dignity” has other sources as well in the European world. “Dignity” is a prime concern throughout continental law. Caring about employee dignity in the workplace is part and parcel of a larger tendency to care about human dignity in the law of international human rights, and indeed about dignity in all of its forms. As one of us has argued at great length, continental law shows a much more powerful commitment to “dignity” than American law in essentially every respect. This is true of the law of hate speech, just as it is true of criminal law, just as it is true of the law of privacy. In all these areas, continental law aims to guarantee that all persons will be treated with respect.

Why is this so? The primary answer is historical. In its briefest form, that answer is that continental law has developed in the shadow of a long history of resentment of status-differences of the past. The continental countries are places where high-status persons used to lord it over their inferiors in insulting and degrading ways. As a reaction against this history, continental law now often aims to guarantee that all persons will be treated with respect. This is an urge that shows up in the law of insult, in the law of hate speech, in the law of punishment, and it shows up in European employment law as well. Continental employment law is driven by the idea that European workers, like all formerly low-status persons, are now entitled to “respect”.

This is an idea with little resonance in the United States. Our law is certainly driven by a sense of the evil of the past. But the evil for us is not so much the fact that a privileged class once lorded it over the vast majority of the population. The

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118 Harris, 510 U.S. at 22.
119 See Whitman, supra note 58.
120 Id., at 1384-1394.
evil for us is the evil of black slavery.\textsuperscript{121} For us, this means that the task of the law is to end discrimination for particular historically disfavored groups, not to ensure respect for everybody. The consequence is that "dignity" simply does not carry the weight, for most of us, that it does for continental Europeans. For continental Europeans, the collective memory of past indignities gives content to the elusive concept "dignity." If asked to explain what "dignity" in the workplace means, Europeans can easily answer, "it means not being treated the way we were treated a hundred years ago." For Americans, by contrast, the concept of "dignity" often remains unconquerably vague, unfillable with meaningful content. This is why Americans like Judge Posner grope helplessly for a meaningful concept of dignity. It is "discrimination" that seems the hard concept in America, the concept with real content. "Dignity" is by no means completely without meaning in American legal culture, of course. Nevertheless, it weighs far more lightly than it does in continental Europe. Despite the writings of social and legal theorists, despite the resources of American tort law, "dignity" too often seems vague and soft to Americans, and the cases are therefore many where Americans fail to perceive a meaningful dignitary interest. Germany in particular could almost serve, in an exaggerated sense, as an ideal-typical inversion of the United States in the context of workplace harassment. The US has a strong body of civil rights jurisprudence based on statutory anti-discrimination provisions, but only a vague notion of dignitary protections. Germany, on the other hand, has traditionally had little by way of anti-discrimination laws that apply to private actors in the realm of employment, housing, or other arenas of daily life,\textsuperscript{122} while placing a strong emphasis on guaranteeing "dignity" as the remedy for historic exclusion.\textsuperscript{123}

\textsuperscript{121} We note here that some American historians have argued that the US egalitarian idea of "equality of all citizens" was worked out in the context of a slaveholding society as equality among only white people. See Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (1975). This is interesting when we consider that in the German context the "honor of all Germans" developed during the fascist period and exclusively pertained to "Aryans," while non-Aryan populations were enslaved by the hundreds of thousands in the Reich and occupied territories.

\textsuperscript{122} This lack of anti-discrimination laws applied to private actors has come under increasing attack in recent years, particularly as immigration has changed the demographic composition of the country. For a proposed new law, see http://www.bmj.bund.de/ger/themen/wirtschaft_und_recht/10000453/?sid=edd2b0899a8770bcedf6d9d95be9b2a. Although there is a Constitutional prohibition on discrimination, ("No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability." Equality before the law, art. 3(3) GG (Christian Tomuschat & David P. Curry, trans.)) it applies only to state actors. See Josephine Shaw, 'Positive Action for Women in Germany' The Use of Legally Binding Quota Systems in Discrimination: the Limits of the Law 388 (Bob Hepple & Erika M. Szyszczak eds., 1992) and the Civil Code provision against sex discrimination in employment applies only to discrimination in hiring. § 611 BGB, which prohibits sex discrimination in employment, was enacted to implement the 1976 EU directive on Equal Treatment of Men and Women, and has a tortured history of bouncing between the German Supreme Court and the European Court of Justice. The law was essentially forced on Germany by the EU, and met with some resistance from lawmakers. The law entitles individuals who can prove that they were discriminated against on the basis of sex to claim compensation. Originally, the compensation was the amount that the applicant had spent on the job application. Known as the notorious "Porto-Paragraph" because the victim of hiring discrimination was merely entitled to the price of a postage stamp as compensation, it was invalidated by the European Court of Justice on the grounds that the EU Directive was not effectively implemented by the German legislator. See further Natasha Minsker, "I Have a Dream -- Never Forget": When Rhetoric Becomes Law: A Comparison of the Jurisprudence of Race in Germany and the United States 14 Harv. BlackLetter L.J. 113 (1998); Legal instruments to combat racism and xenophobia: comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia.
Finally, there is perhaps something else at work as well. In the tale of mobbing, we can see quite clearly that continental societies show a diminishing tolerance for psychic pain. Here we must keep in mind the historical sociology of the sensitivity to pain. As Nietzsche argued long ago, and as modern scholars like Pieter Spierenburg and Robert Darnton agree, one of the master themes of modern history is the diminishing tolerance for physical pain.\textsuperscript{124} In punishment, and indeed in everyday life, people in the west have become dramatically more sensitive to the infliction of pain over the course of the last centuries. Pain no longer seems bearable, and it is inflicted more and more rarely. One consequence of this was the abolition (in Europe far earlier than in the United States) of painful and violent punishments in the prisons. Another was the abolition of employers' authority to beat their employees.

What the last ten years of anti-mobbing movements suggests is that the tolerance for pain has continued to diminish in continental Europe. Indeed, it has extended beyond physical pain to include psychic pain. At the risk of overgeneralizing about the many societies of Europe, we can perhaps say that, to Europeans, it no longer seems bearable that people should suffer psychically in their everyday lives. Indeed, it seems so unbearable, that Europeans think that the law

\textsuperscript{123} This appears particularly in the tradition of personality protection prohibiting speech that arouses hatred against a segment of the population (§§ 130, 131 StGB) or denies the fact of mass murder of the Jews during the Holocaust (§ 194). See Eric Stein, History against Free Speech: The New German Laws Against the "Auschwitz" and Other "Lies," 85 Mich. L. Rev. 277, 302-313 (1986); Whitman, supra note 58. German critics criticize the legal system's treatment of hate-crime offenses as the actions of isolated individuals rather than as group-based harms. See e.g. Juliane Wetzel, The Judicial Treatment of Incitement Against Ethnic Groups and the Denial of the National Socialist Mass Murder in the Federal Republic of Germany in Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries 83, 93 (Louis Greenspan and Cyril Levitt eds., 1993). German labor courts do regularly hear cases concerning racial harassment which are brought under the same personality protecting paragraphs as sexual harassment. It appears that after the unification of Germany and the resulting incidents of xenophobic violence, employers were more sensitive to issues of harassment at work. See Christoph Krummel and Woldieter Küttner, Antisemitismus und Ausländerfeindlichkeit im Betrieb, 2 NZA 67 (1996); Michael Korinth, Arbeitsrechtliche Reaktionsmöglichkeiten auf ausländerfeindliches Verhalten, 4 Arbeit und Recht 105 (1993). Like the sexual harassment cases, the racial harassment cases are almost all cases where the harasser has been fired by the employer for harassing another employee, and is suing under the Termination Protection statute to get his job back.

What is interesting about the racial harassment cases is that they commonly involve the crudest form of Holocaust-related insults. Comments to the effect that Turkish or Jewish employees (or employers) should be sent to crematoria become the basis for terminations that are upheld by the courts. See LAG Hamm (November 11, 1994), 13 BB 678 (1995) (affirming the extraordinary termination of an employee on the basis of comments like: "Turkish women ought to wear asbestos because they will all be incinerated", because the comments offend the Ehrgefühl [feelings of honor] of German colleagues and insult foreign workers); Arbeitsgericht [ArbG] Bremen (June 29,1994), 22 BB 1568 (1994) (affirming the extraordinary termination of an employee on the basis of comments about his employer like: "That old Jewish sow, that stupid Jewish swine, they forgot to gas him back in the old days", because they violate § 75 BetrVG and offend the human dignity clause of the Basic Law); ArbG Siegenburg (November 4, 1993), 15 NZA 698 (1994) (affirming the extraordinary termination of an employee on the basis of comments to Turkish co-workers like "foreigners and Turks should be burned; the Brownshirts ought to come back; we need a little Adolf to clean up around here" because they violate the labor contract and the personal Ehre [honor] of the listener).

ought to intervene when one's co-workers walk out of the coffee room on one. It *hurts* to be shunned in Europe, and it hurts so much that the law must come in. The idea of the legal intolerability of psychic pain is of course not wholly absent from the American scene. In particular, we do have our tort of the intentional infliction of emotional distress. We are much less ready to bring in the law, despite the existence of our tort doctrines. In Nietzsche's terms, we have not been as successfully tamed as our European cousins.

Respect, employee dignity, the legal intolerability of psychic pain -- these are just not themes that stir the soul of the law in the United States. That does not mean that individual Americans are incapable of thinking about such issues. There is no law of radical legal cultural differences -- no legal Sapir-Whorf hypothesis\textsuperscript{125} -- that holds that the individual is imprisoned in the mental cage created by the law of his country. What it means is that ideas like the theory of mobbing simply do not fall on fertile cultural soil in the U.S. as they do in countries like Sweden, France or Germany. Our legal culture is not receptive to such ideas in the way that continental legal cultures are.

VI

Two questions remain, and they are the two questions with which we will close. First, why is it that Americans focus so much more on the harassment of women than Europeans do? Second, is there really any necessary tradeoff between the rights of employees and the rights of women?

The first is the challenging question thrown at us by Hirigoyen's defiant choice of the term "moral harassment." In effect, her books demand that Americans overcome their obsession with women and sex, and recognize that all employees suffer. This has an obvious origin in the long-established French, and more broadly continental, habit of regarding American society as "puritanical." The American concern with sexual harassment, according to this widespread continental point of view, is of a piece with the American inability to accept bare breasts on television or on public beaches, with the illegality of prostitution in most American jurisdictions, with Americans' comical ineptness in flirting and their excessive horror at adultery. Americans simply cannot handle sex.

How much truth is there in this? That is a question that requires a different essay from this one, and we do not propose to explore it fully here. Still, we think the challenge deserves a response. Maybe there is something to the idea that sexual

\textsuperscript{125} See Edward Sapir, *Culture, Language and Personality* 69 (David G. Mandelbaum ed., 1956):

Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society. It is quite an illusion to imagine that one adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the 'real world' is to a large extent unconsciously built upon the language habits of the group. No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached... We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation.

harassment matters in American society partly because of the way Americans deal with sex, or fail to deal with it. In particular, seen in large sociological perspective, the United States does seem to be a country whose ideas of personal honor are more sexualized than European ideas. Everyday “honor” is what is at stake in harassment law, and “honor” comes in two primary varieties. There is sexual honor, of the kind expressed in obsessions with virginity, and with such “honor crimes” as the killings of dishonored women in the Islamic world or the killings of adulterers everywhere. The obsession is especially associated with the male-dominated clan societies of the Mediterranean world. But sexual honor is not the only kind. There is also honor as comparative social dignity. Honor in this second sense includes the right to demand deference and privilege.

The American focus on sexual harassment does bring our society closer on the spectrum to societies of sexual honor. In both the United States and continental Europe there is an old tradition of protecting women’s “honor” against seducers. From a certain perspective, we can perhaps say that the tradition is proving stronger here than it is in the European countries. Perhaps we are a little more like Mediterranean societies in which honor and virginity are closely associated. The focus on employee harassment in the continental countries, by contrast, places them closer on the spectrum to places where honor is primarily a matter of social dignity. It is not one’s sexual identity that primarily matters in the workplace law of Sweden, France or Germany, it is one’s social standing.

Nevertheless, we think our research paints, on balance, a different picture. It is a silly canard to claim that the American law of sexual harassment stems simply from some American inability to deal with sex and flirting. Sexual harassment law is manifestly a child of the civil rights movement, the slow-maturing twin of racial harassment law, and the goal of sexual harassment advocates is to eradicate social structures that disadvantage disempowered groups. That is a lofty goal, that Europeans by and large simply do not understand. At core, the issue is not that Europeans deal differently and better with sexual activity than Americans do. The real issue is that Europeans have a different model entirely of sexual equality that does not embrace anti-discrimination as a principle.

What finally, about discrimination versus dignity? Is there really any necessary conflict between the interests of harassed women and minorities and the interests of harassed employees? Why can’t we protect both? Certainly, there is no logical necessity that we identify any single class of harassed persons. To the question, who are the harassed, our answer could perfectly well read: both workers and women. Indeed, continental law everywhere purports to protect both classes.

Nevertheless, the letter of the law, here as elsewhere, makes a poor guide to its social meaning. People in Europe perceive the mobbing movement as presenting a conflict between women and workers -- and Americans are likely to perceive it the

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127 For the United States: Lea Vandervelde, The Legal Ways of Seduction, 48 Stanford L. Rev. 817 (1996). For Germany: Barbara Degen, Gewalt am Arbeitsplatz, 4 Streit 139 (1991); Rudolf Quanter, Die Sittlichkeitsverbrechen (1925). Such laws are by no means artifacts of the last century in Germany, though. Indeed, § 174 Abs. 1 Nr. 2 StGB which makes it a crime to misuse a labor relationship to have sexual relations with someone under the age of 18 was passed in 1973.
128 German feminists claim that archaic notions of sexual honor still dominate there. See Brigitte Sick, Sexuelles Selbstbestimmungsrecht und Vergewaltigungsverhütung (1993).

same way as well. These perceptions are part of the way the law works, and we are not entitled to ignore them. So why is there a perception that moral harassment and sexual harassment are at odds with each other?

Our answer has to do with two features of harassment law: its strongly expressive character, and its nature as "protective" law.

First, harassment law, which is law about day-to-day conduct, inevitably has a heavily expressive effect. Harassment law is law about interpersonal interaction -- something that we all engage in, something that is so routine that only the tiniest fraction of disputes could possibly reach the courts. It closely resembles etiquette, and indeed is likely to have as much effect on the culture of etiquette as it does on the culture of litigation. Moreover, it is law that attracts tremendous public attention. Journalists are as fascinated by questions of mobbing as they are by questions of sexual harassment, and magazine articles and television shows are legion. All of this means that the impact of harassment law -- whether it is law of sex harassment or law of workplace harassment -- is likely to be felt in cultural trends that go far beyond any actual record of court-ordered remedies. Forbidding sexual harassment, or workplace harassment, has its main effect outside the world of active litigation. It is, if you like, consciousness-raising, or consciousness-altering, law.

Correspondingly, the debates surrounding harassment law easily degenerate into debates about who really matters -- into political, more than juristic, debates about who really counts as the subordinated class in society. Both workers and women may have causes of action in Europe. But the main arena of debate is not in the treatises on the logic of law. It is in a much wider world of cultural conflict -- a world in which the camera is typically only trained on one spot. Within the intellectual world of the law, it makes no logical sense to respond to the claim "women are being harassed" with the riposte, "well everybody else is harassed too." But that kind of riposte is devastating indeed within the logic of everyday political argument.

Harassment law thus tends to create a zero-sum conflict between women and workers because of its expressive character. It also tends to create conflict because of its character as "protective" law. Law that aims to protect the "disadvantaged" inevitably stir up competition among the classes of potential "disadvantaged" beneficiaries. This is a pattern that is familiar in the rise of "middle-class entitlements" -- in the tendency of social welfare protections that were originally designed for the most destitute to breed a social welfare state that benefits persons of relative privilege. Any time that we announce the commitment of the state to offering protection, we can expect clients to begin queuing up -- and they will be clients of many descriptions. What is more, we can expect potential clients to begin fighting among themselves. Protective legislation is always an apple of discord.

Now, of course, not every class of persons is a potential candidate for the protections offered by every statute. Something always depends on how the legal culture in question defines the rights that are being protected. This indeed is what

129 There is a great disparity between what the average German thinks is actionable dignity-injuring behavior at work, and what the courts will recognize. Telephone conversation with Stefan Korb, attorney affiliated with an anti-mobbing clinic in Hannover (November 1999).

130 For this so-called "Matthew Effect," see Herman Deleeck, L'effet Mathieu: De la répartition inégale des biens et services collectifs, 3 Recherches Sociologiques 301 (1978).
we see in the comparative histories of the law of sexual harassment in the United States and in Europe. The American law of sexual harassment revolves around the right to be free from impositions based on sex or gender. This was originally conceived as protection for women, but men, gays and others quickly crowded in to claim their own protected status. Sexual harassment law in Europe, by contrast, was conceptualized from the beginning as protecting an interest in dignity. The inevitable consequence was that "moral harassment" appeared as a competitor to sexual harassment. After all, within the cultural traditions of continental Europe, it seemed obvious that any employee could suffer damage to his or her "dignity." What justification could there be for limiting protection against harassment to the single class of women?

This, we suggest, presents feminists like Anita Bernstein or Rosa Ehrenreich with a painful dilemma. These are scholars who think that American sexual harassment law has taken a wrong turn. To them, the injury suffered by women in the workplace is "really" an injury to their dignity, at least in part, and accordingly it is women's dignity that the law of sexual harassment in large measure ought to protect. There is a lot that is attractive in this position. Yet Kathryn Abrams has accused the theorists of dignity of fatally depoliticizing the issue of sexual harassment, and the continental experience suggests that she may be quite right. The claim that sexual harassment is "really" about dignity is a claim that would carry a great danger with it, even if "dignity" had the compelling appeal in America that it has in continental Europe. Say "dignity," and you have opened the class of women to the competition of a numberless population of those who feel themselves no less oppressed. "Dignity" is a standard behind which the wrong army may rapidly collect.

The difficulty for Bernstein and Ehrenreich is ultimately the difficulty of founding any legal theory on a claim about what injuries people "really" suffer. To talk in such terms gravely underestimates the complexity of the forces that create felt

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Imagine the following hypothetical: Maria works in an office that is predominantly female. In the course of a management restructuring program, she gets a new supervisor named John. After the first few days on the job, John seems to have selected Maria as the object of his special attention. He takes every opportunity to make critical comments about her work performance that seem unjustified. This begins in private, but soon John starts berating Maria in public, shouting that her work is sloppy, that only an idiot would make these kinds of mistakes, and that she is clearly unqualified. In front of the entire office he slowly tears up a report she had written, saying that it was a perfect example of what he wasn't looking for. Other workers begin to pick up on John's behavior and start to avoid Maria. When it comes time for routine evaluations, John writes an exceedingly negative evaluation of Maria, and tells her he doubted she would last much longer at the company given her work performance. As a result of this treatment, Maria begins to dread work, and starts to perform less well due to the strain. She starts to suffer from insomnia, and her doctor tells her that she is developing an ulcer. The personnel department tells her that she just has to toughen up and get used to John's "style." Maria starts to call in sick more often, and eventually quits her job. For examples of similar situations, see the case studies collected in Harvey Hornstein, Brutal Bosses and their Prey (1996.) In the United States, John's behavior would be considered an uncivil and perhaps even cruel management style, but unless Maria were subjected to verbal harassment with a sexual or racist content, Maria would have little chance of success in a courtroom. She might have a tort action for intentional infliction of emotional distress, but it is unlikely that the judge would find her situation aberrant enough to warrant the description "outrageous!". In addition, if the harasser were not a supervisor but rather Maria's co-worker, equally positioned in the company hierarchy, it would be even more difficult to establish a claim that the employer is liable for the behavior. Additional potential complications: what if Maria and the supervisor were of the same sex? Same race or ethnicity? Mobbing theory, by contrast, can handle this situation without difficulty.

injuries. The sense of injury is the product of complex social traditions. It is also a product of the definitions offered by the law itself. If lawyers are entitled to bring any measure of political shrewdness to what they say, then they have to acknowledge that the way they define “injuries” also defines the universe of complainants who will compete over the relevant remedies. This means that our loyalty to a certain concept of “rights” may stand in irresolvable conflict with our loyalty to a certain class of persons; protecting both women and dignity may be more than any society can realistically manage.