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From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying

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FROM QUEEN BEES AND WANNABES TO WORKER BEES: WHY GENDER CONSIDERATIONS SHOULD INFORM THE EMERGING LAW OF WORKPLACE BULLYING

KERRI LYNN STONE*

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When Jeannie, a female midlevel associate at a nationally known law firm, was asked by Sara, one of the few senior females and the only one in her department with an “of counsel” title, to go to a “mentoring lunch,” she was flattered and hopeful. Sara asked Jeannie who she was working for, and Jeannie said that she had just been assigned to a case with Walter, a notoriously nasty partner. Sara’s eyes lit up. “Walter loves me,” she said. “He’s the one who pushed for me to be made counsel, and he’s gone out of his way to mentor me.” She leaned in. “I’m going to tell you the secret to doing well with Walter. You have to understand a few things about him. He’s completely unreasonable. He’s also forgetful, and he speaks without thinking things through . . . all the time. He’ll give you impossible tasks and deadlines. Just ‘yes’ him to death, and don’t ask too many questions. He’ll jump to a lot of incorrect conclusions and get in your face, swear, and pound the table. You can’t be fazed. The first time he pulled that with me, I knew that he was wrong and I was right. So I swore back at him, raised my voice, looked him right in the eye, insulted him back when he called me names, and wouldn’t back down. Well, wouldn’t you know it . . . he wound up respecting me for holding my own. I became his favorite. He now insists that I get staffed on all cases with him. I’m telling you . . . do what I did, and he’ll love you too . . . Just be ready.”

When the lunch was over, Jeannie smiled weakly and thanked Sara, who really had tried to impart her knowledge of the “inside track” at the firm. She now “understood” the difficult character she’d be working for, and she knew what she could expect and what she needed to do. Moreover, she had found a sincere mentor and a devoted friend in Sara, whose rise at the firm was meteoric, and who would likely be named a partner before too long. When Jeannie got back to her office, however, she was shaking from her encounter, recalling some ominous warnings she’d heard at law school and from some older friends about “the state of the profession.” “I don’t know,” she later confided in a friend at another firm, “it’s like people want me to succeed here, but to succeed, I have to act in ways in which I wasn’t raised to act. I basically have to become a sociopath like some of the people I work for in order to win them over. And I don’t know if I can or want to do that.”

I.
INTRODUCTION

Jeannie’s story is all too common. The phenomenon known as workplace bullying has permeated all types of workplaces in America, including those filled by well-educated professionals.¹

¹. See, e.g., Tara Parker-Pope, When the Bully Sits in the Next Cubicle, N.Y. TIMES, Mar. 25, 2008, at F5 (“A surprising number of bullying cases involve health care settings, where the problem is said to be endemic, with senior hospital workers,
Often, it results in a disconnect between the earnest attitude, respectfulness, and hard work ethic that allow students to succeed in school and the attributes, behaviors, and attitudes that cause one to thrive in the rough-and-tumble, often chaotic orbit of a bullying boss. This Article, building on some very recent and very interesting scholarship about the phenomenon, hopes to advance the discourse on workplace bullying by viewing it through the lens of gender.

At the time of the passage of the Civil Rights Act of 1964, overt sexually harassing behavior of males toward their secretaries, subordinates, and colleagues was emblazoned in the cultural consciousness of this country. It was wholly unremarkable. That would soon change. With the development and evolution of antidiscrimination jurisprudence would come the roll-back of the frontier of socially unacceptable behavior. And so, over time, the harassing boss who fired the employee who rebuffed him became the harassing boss who found more subtle ways of propositioning his employees, and of exacting his retribution. Over time, the boss who would openly express his preference for promoting males became the boss who would proffer pretextual reasons for his preferences. Workplace relations are complex and nuanced to begin with, and, over time, discrimination has become, in many instances, less conscious, less obvious, but more nefarious. In today's world of sensitivity training and heightened awareness, status-blind workplace bullying is the last bastion of legally protected workplace abuse.

Congress and the courts alike have repeatedly intoned that they will not legislate or mandate civility in the workplace, in comportment with the "at-will" employment backdrop against which protective legislation has been drafted. Courts have repeatedly

4. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic
and emphatically refused to sit as "super personnel" boards that make decisions and dictate behavioral norms in the workplace absent protected-class discrimination.\(^5\) However, scholars have repeatedly called for legislation to regulate workplace bullying, which they have identified as invidious, detrimental, and demeaning to everything in the American workplace from company morale, to individual integrity, to the bottom line.\(^6\) These scholars have cited action taken by other countries, including legislation passed in

\(^5\) Scott A. Moss, Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law, 27 Harv. Women's L.J. 1, 24 (2004) (“Indeed, when courts reject employment discrimination claims, they regularly invoke just these sorts of old bromides, such as the admonition that courts not serve as ‘super-personnel departments,’ monitoring employment decisionmaking [sic].” (citing Traylor v. Brown, 295 F.3d 783, 790 (7th Cir. 2002) and Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)).

other countries to address the problem of workplace bullying. Opponents of anti-bullying legislation and regulation, however, are quick to argue that such regulation is, in fact, legislating civility, and thus anathema to American law.

This Article poses Jeannie’s story, injecting it and several questions that it raises into the discourse on workplace bullying. Assume for a moment that an equal-opportunity bully like Walter bullies everyone with whom he works. Assume also that this bullying is non-sexualized in nature. Finally, assume that the bully is not gender (or otherwise) prejudiced either consciously or subconsciously. Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of . . . [an] individual’s . . . sex.” Our hypothetical bully would not seem to be in violation of this or any other federal antidiscrimination law. In fact, were he ever accused of gender discrimination, the fact that he genuinely likes, supports, and assists Sara at work would tend to contravene the allegations levied. Inasmuch as people like Jeannie fail to thrive at work and wind up fired, self-select out of the workplace, fail to get advancements, promotions, or praise at the same rate as others, or simply shrink back from opportunities to be mentored, advance, or shine, has anything illegal occurred? Has anything that should be illegal occurred? If something warranting regulation has occurred, ought a private right of action be afforded, or is there a better way to get at the problem?

One scholar has “wonder[ed]” aloud whether “status-based” harassment targeting members of classes of people protected by legislation, as in “you girls belong in the kitchen not the boardroom” causes more emotional pain than “generic” harassment (“you are a totally unqualified moron”). Several scholars have posited that in fact, it does not, and touted a predominantly European, “dignity”-centered legal view that workplace bullying or

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8. See Mark Larson, Stamping Out Workplace Bullies, WORKFORCE MANAGEMENT, July 2007, http://www.workforce.com/section/09/feature/25/00/29/index.html (addressing experience of anti-bullying legislation proposals in state legislatures, employer attorneys’ resistance to anti-bullying legislation as a supplement to existing harassment, and noting that one attorney suggests that anti-bullying “would make every disciplinary situation open for debate. People can view actions as harassment when in fact it is nothing more than getting the job done”).


“mobbing” of a “generic” sort is an actionable wrong. This Article investigates the proposition that “generic” bullying sustained by females may cause a different “emotional pain” and a different response in the aggregate than the harm sustained by males who are subject to workplace bullying.

To the extent that women are absorbing and responding to bullying differently than men, at least in the aggregate, they are arguably being winnowed out of the workplace and workplace opportunities in a variety of ways and in numbers disproportionate to those of men. This Article juxtaposes current workplace trends with research discussing the ways in which male and female adolescents respond differently to bullying and operate using different social frameworks and dynamics. Much of the recent attention to this issue has stemmed from Rosalind Wiseman’s book, Queen Bees and WannaBes, which includes research about the ways in which men and women respond to bullying at school. If one accepts Wiseman’s conclusion that there are inherent differences in the way boys and girls engage with bullies, conflict, abuse, and one another, one ought to be concerned that those same differences may inhere when adolescents graduate from school and become the men and women that populate the workplace.

For a number of significant reasons, research on bullying in the workplace provides sparse and somewhat clumsy support for any definitive and precise conclusions on the impact of this behavior. Evidence suggesting a disparity between the ways in which

11. See Harthill, supra note 6; Jordan, supra note 6, at 662–66.
12. See, e.g., Coleman, supra note 6, at 98 (suggesting that “[p]erhaps victims of status-based harassment primarily feel rage, whereas targets of generic harassment . . . primarily feel shame”).
14. Id.
15. See Pamela Lutgen-Sandvik, Intensive Remedial Identity Work: Responses to Workplace Bullying Trauma and Stigmatization, 15 ORGANIZATION 97, 115 (2008) [hereinafter Lutgen-Sandvik, Intensive Remedial Identity Work] (“Comparing and/or contrasting men and women’s identity work in the face of workplace bullying, trauma or stigma are important avenues for future research. Whether men’s or women’s identity work differs in these situations has received little attention.”); Pamela Lutgen-Sandvik, Water Smoothing Stones: Subordinate Resistance to Workplace Bullying (Aug. 2005) (unpublished Ph.D. dissertation at 10, 226, Arizona State University), available at http://www.unm.edu/~plutgen/Resistance%20to%20Workplace%20Bullying%20Lutgen-Sandvik%20Dissertation%202005.pdf [hereinafter Lutgen-Sandvik, Water Smoothing Stones] (“Organizations are gendered social constructions, yet most workplace bullying research glosses this issue. Thus, the gendered aspects of bullying dynamics is a rich area for future research.”).
the genders absorb social abuse is largely anecdotal. That said, viewing the workplace as a logical extension of the environments and dynamics at the schools from which new workers recently graduated, what little data has been collected is consistent with and may be harmonized with the notion that there is a demonstrable disparity between the ways in which workplace bullying affects the genders. This Article will explore but ultimately reject the disparate impact claim as a model with which to conceptualize Jeannie’s dilemma. While it concludes that a Title VII disparate impact claim is ultimately an untenable, ineffective vehicle to remedy a practice that is both as nuanced and as diffuse as bullying, it addresses itself to the genesis of the claim and its underlying rationale to give a better exposition of the actual gender-based disparity that is engendered by workplace bullying.

This Article posits that workplace bullying creates an environment in which women are more apt to fail than to flourish. This holds true even if bullying is not targeted at anyone because of sex or having any substantive content that deals with sex or gender. Resultantly, one might expect to see women, in the aggregate, shrink back from interaction, lapse in performance, and flee the workplace in disproportionate numbers to men. The problem and ensuing phenomenon, however, is as ineffable as it is intractable; the precise nature of bullying, the way in which it affects one person versus another, and how victims are supposed to self-identify are difficult to pin down. There are numerous arguments that, even when viewed through the lens of gender, so-called “neutral” workplace bullying ought not be a compensable wrong. Nonetheless, a vehicle of some sort ought to generate awareness of, and hopefully work to remedy, the disparate impact that workplace bullying has on women. This Article concludes by discussing what such an approach might entail.

II. WORKPLACE BULLYING: BACKGROUND AND INFORMATION

A. What Is Bullying?

The study of workplace bullying has been pioneered by scholars like Professor David Yamada, who describes workplace bullying as “the intentional infliction of a hostile work environment upon an
employee by a coworker or coworkers, typically through a combination of verbal and nonverbal behaviors."^{17} Professor Yamada has advocated a statutory cause of action to afford bullying victims compensation against their bullies and employers.^{18} The Healthy Workplace Bill, a model statute drafted by Professor Yamada, defines "abusive" conduct as behavior inflicted "with malice," that "a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."^{19} Examples of abusive behavior are listed in the statute as, among other things, "repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance."^{20}

Professor Yamada identifies Gary Namie, industrial psychologist, educator, and founder of the nonprofit U.S. Campaign Against Workplace Bullying, and Ruth Namie, a psychotherapist who focuses on helping victims of abusive work environments, as the two people most responsible for popularizing the term "workplace bullying" in the United States.^{21} Gary Namie has defined workplace bullying as the "repeated mistreatment by one or more perpetrators of an individual or group" who are "driven by a need to control other people."^{22} Social psychologist and Professor Loraleigh Keashly defines workplace bullying as perpetrated mainly by superiors and marked by "hostile verbal and nonverbal, nonphysical behaviors directed at a person(s) such that the target's sense of him/herself as a competent person and worker is negatively affected."^{23}
Studies have borne out that "bullying behaviors vary widely, covering a variety of overt and covert and verbal and nonverbal acts that undermine a target's ability to succeed at her job," and that "bullies seek out agreeable, vulnerable, and successful coworkers, often motivated by the bullies' own feelings of inadequacy." 24 According to Namie, who in conjunction with Zogby International conducted 7740 online interviews of U.S. adults, bullies can be "cruelly innovative ... vary[ing] their tactics hour to hour, day to day," by employing threatening and intimidating behavior, name calling, malicious sarcasm, and threats to safety, and by tarnishing reputations, giving arbitrary instructions, undermining victims' efforts, threatening job loss, using insults and put-downs, yelling and/or screaming at victims, and stealing credit. 25 Victims, on the other hand, according to Namie, tend to be "nice people" who are zeroed in on because the bullies assume that they will be too nice to resist them or stop them, and "self-starters [who] know the work, have emotional intelligence, are well liked, and are honest and principled ... [t]hey are nonconfrontational to the point that they cannot defend themselves when attacked." 26

B. The Costs of Bullying

As Professor Yamada has stated, "this behavior inflicts harmful, even devastating, effects on its targets and can sabotage employee morale in ways that severely undercut productivity and loyalty." 27 Yet current methods of trying to reach this behavior through legal channels, like intentional infliction of emotional distress claims, have proven unsuccessful and/or have been preempted by workers' compensation statutes. 28 Indeed, bullying can have such grave and devastating effects as psychological and depressive disorders, including post-traumatic stress disorder (PTSD). 29 It is also demon-

24. Yamada, Crafting a Response, supra note 6, at 483 (describing emerging research by Gary and Ruth Namie and Loraleigh Keashley).


27. Yamada, Crafting a Response, supra note 6, at 477.

28. Id. at 500 ("In addition to IIED's failure on its face as a weapon in the fight against workplace bullying, it also suffers from infirmities brought about by . . . the interrelation of IIED with sexual harassment law, at-will employment, and workers compensation.").

29. Id. at 483; see also Heinz Leymann & Annelie Gustafsson, Mobbing at Work and Development of Post-traumatic Stress Disorders, EUR. J. WORK & ORGANIZATIONAL PSYCHOL., June 2006, at 251 (linking bullying to PTSD in workers who suffered...
strably "bad for business," involving costs as direct as "a significant increase in medical and workers' compensation claims due to work-related stress and the costs of lawsuits emerging from abusive work situations," to costs as remote but nonetheless attributable to workplace bullying as "high turnover, absenteeism, poor customer relationships, and acts of sabotage and revenge." A workplace rife with and pervaded by bullying deals a blow to productivity and loyalty generally and causes increased attrition.

In a recent survey of 1000 adults, forty-four percent claimed to work for abusive bosses, fifty-nine percent claimed to have witnessed or experienced bosses criticizing employees in front of co-workers, and fifty percent claimed to have been personally insulted by bosses or to have witnessed such insults in the workplace. The survey also showed that sixty-four percent of workers believed that employees should be able to sue their employers for workplace abuse, humiliation, and harassment. A study by Harvey Hornstein of approximately a thousand employees over an eight-year period led him to posit that approximately ninety percent of the workforce

work-induced psychological trauma); Stig Berge Mathiesen & Stale Einarsen, Psychiatric Distress and Symptoms of PTSD Among Victims of Bullying at Work, 32 Brit. J. Guidance & Counseling 335, 343-44 (2004) (demonstrating that work-induced psychological injury is as disruptive of day to day functioning as trauma induced by war); Namie, supra note 22, at 46 (noting that problems include inordinate anxiety, clinical depression in 39 percent of targets and PTSD in thirty percent of women targets, twenty-one percent of men targets).

30. Yamada, Crafting a Response, supra note 6, at 483.
31. Id. at 481 (citing Emily S. Bassman, Abuse in the Workplace: Management Remedies and Bottom Line Impact 138-44 (1992)). "Employee abuse can have major bottom-line consequences" for organizations, including direct costs, indirect costs, and opportunity costs as a result of abusive work environments. Id. Despite the fact that some bullying behavior might engender a legally cognizable claim where the plaintiff is able to allege, for instance, sexual, racial, disability, harassment, or even a state tort claim such as intentional infliction of emotional distress, it is often the case that the bullying will (1) not fall at all within the rubric of protected class harassment; (2) be too incidental to any impermissible animus to meet the standard for protected class harassment; or (3) fail to meet the threshold requirements regarding egregious behavior and severe harm that tort claims typically require. See id. at 484-92.
32. See id. at 45.
34. Id.
35. Id.
falls prey to supervisory abuse from their bosses at least once during their careers. 36

C. Current State of the Law

Currently, there are no laws in the United States that specifically protect victims of workplace bullying, although recourse may be available in certain situations, such as when harassment is directed at a member of a protected class under Title VII, or when a state claim of intentional infliction of emotional distress is successfully made out and not preempted by federal law. 37 While some scholars have suggested that tort law is a better avenue than legislation for the redress of affronts to one’s dignity through bullying in the workplace, 38 other scholars, like Professor Susan Harthill, have noted that due to “enduring deference to the at-will rule,” among other things, this avenue has not proven fruitful because “the tort of outrage has remained static and has historically been of limited value,” and because “use of existing tort remedies might not be an option in states that provide that workers’ compensation as the exclusive remedy for intentional emotional distress injuries.” 39

To the extent that no redress is available for bullying per se under current state or federal law, one leading scholar observed that “the current approach to sexual harassment . . . creates a negative dynamic that encourages women (and sometimes men) to frame their complaints in terms of sexual offense, even when much more—or much less—may be at stake.” 40

Canada and several European countries have enacted anti-bullying legislation that contains no requirement that the victim be a member of a particular protected group. Instead, this legislation operates from the premise that workers possess an unassailable right to a certain amount of dignity in the workplace. 41 In 1994,

36. Yamada, Crafting a Response, supra note 6, at 481–82.
37. See Harthill, supra note 6, at 260–61; Yamada, Phenomenon of “Workplace Bullying,” supra note 17, at 508; see also Workplace Bullying Institute—Legislative Campaign, http://www.workplacebullyinglaw.org (last visited May 10, 2009) (“Employee health-impairing, injurious, career-jeopardizing bullying is STILL LEGAL in ALL U.S. and most Canadian workplaces That’s why There Oughta Be A Law And there well may be one in 2009! WBI-LC Coordinators are hard at work in 26 states and two provinces to introduce and pass into law the anti-bullying Healthy Workplace Bill.”).
39. See Harthill, supra note 6, at 262–63.
41. See Harthill, supra note 6, at 263–67.
Sweden became the first nation to enact legislation against workplace bullying: the Victimization at Work Ordinance.\textsuperscript{42} Quebec, Canada, was the first jurisdiction in North America to enact anti-workplace bullying legislation in June of 2004: the Act Respecting Labour Standards.\textsuperscript{43}

III. HYPOTHESIS: BULLYING AFFECTS WOMEN DIFFERENTLY THAN MEN AND LEADS TO A WIDESPREAD EFFECT OF WOMEN WEEDING THEMSELVES OUT OF THE WORKPLACE AND SHRINKING BACK FROM ADVANCEMENT

A. Gender in the Workplace

Scholars have long noted what has been referred to as the “masculinization” of the workplace, whereby traditionally “male” norms of behavior and interaction predominate and those who do not embody the attributes must learn to navigate the terrain in order to flourish under such conditions.\textsuperscript{44} According to Professor Ann C. McGinley:

Masculinities are not merely practices by individual actors. Rather, masculine identities and norms are associated with the very definition of work, the identity of certain jobs as feminine and masculine, and the value attributed to those jobs. These practices harm women at work, permitting powerful heterosexual white men to define what work is, while denying that the workplace is gendered.\textsuperscript{45}

As Professor McGinley recites, masculinities harm men who are “homosexual, or otherwise do not conform to masculine stereo-


\textsuperscript{44} Ann C. McGinley, \textit{Creating Masculine Identities: Bullying and Harassment Because of Sex}, 78 U. COLO. L. REV. 1151 (2008) (“Masculinities theory can provide the theoretical support for new bullying research regarding gender-neutral bullying of women workers. Bullying researchers recently have found that women are subjected to more gender-neutral bullying than men and that male supervisors manipulate systems designed to protect workers from abuse in order to bully or harass women.”).

types," and "assign[ ] to women or the feminine the most humiliating characteristics," thereby "offend[ing] women's dignity."\(^{46}\) Ironically, women who don a more masculine persona to retain status in the "hegemonic masculinity at work, are punished because they do not comport with the stereotypes traditionally attributed to women."\(^{47}\) Thus, a veritable "catch-22" is created, whereby women have difficulty flourishing in a "masculinized" workplace.

Scholarship has impelled the genesis and evolution of sexual harassment jurisprudence as an outgrowth of Title VII jurisprudence.\(^{48}\) It has done so by generating and raising awareness of the "hostile work environment" created by those who use vulgarity, sexual advances and demands, and sexual stereotypes to demean women in the workplace, whether or not these women are discriminated against with respect to hiring, retention, or promotion.\(^ {49}\) Despite the fact that the term "sexual harassment" appears nowhere in the text of Title VII, the cause of action was recognized for the first time by the Supreme Court in 1986.\(^{50}\) The cause of action is considered to have been propelled by the 1970s' thinking and work of institutes and scholars like the Working Women's Institute,\(^{51}\) Carroll M. Brodsky,\(^{52}\) and Catharine MacKinnon,\(^{53}\) whose collective voice formed a "response to the ways in which the judici-
ary privatized, decontextualized, and normalized the sexual harassment of women in the workplace.”

Catharine A. MacKinnon’s groundbreaking *Sexual Harassment of Working Women: A Case of Sex Discrimination* decried the ways in which women in the workplace were systemically disadvantaged by “sexual conditions” imposed on their terms and conditions of employment. Eventually, the Supreme Court recognized two forms of harassment pursuant to Title VII: “quid pro quo,” which can occur when a victim is asked to trade her submission to her harasser in exchange for any tangible aspect of her employment, and “hostile work environment,” where the victim’s terms and conditions of employment are pervaded by and made rife with harassment.

Over time, however, questions have persisted as to precisely what made sexual harassment illegal pursuant to Title VII, or illegal at all for that matter. The contours of the law have been explored by scholars who have sought to determine whether principles of gender equality indeed underlie the law’s proscription of what has been termed “sexual harassment.” Professor Susan Estrich has argued that the sexual nature of sexual harassment is precisely what makes sexual harassment a Title VII violation. In 1991, Professor Estrich alluded to “an inappropriate spillover into the workplace of the norms of conduct which exist in society generally,” and specifically to “socially accepted forms of male aggressiveness” which “become unacceptable in the workplace because of the additional elements of economic power and dependence.” Thus, the specter of coercion will, according to Professor Estrich, perpetually loom over what may be ostensibly construed as volitional sexual be-

54. See Franke, *supra* note 51, at 702-03.
55. See *MacKinnon, supra* note 53.
56. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (holding that a claim of “hostile environment” sex discrimination is actionable under Title VII where the actions of the respondent’s supervisor were unwelcome, regardless of whether participation was "voluntary," and that it is not a defense to a sexual harassment claim to assert that the plaintiff was not forced to participate against her will if the plaintiff had indicated that the actions were not desired).
57. See Franke, *supra* note 51, at 714 ("The doctrine of formal equality has led many theorists to make the argument that sexual harassment violates the principle 'that people who are the same should be treated the same.' Others have made a different argument: Sexual harassment violates Title VII because it is sexual.").
58. *Id.* at 714–15 (citing Susan Estrich’s works on the social meaning and legal treatment of rape).
behavior or interaction between the sexes in the workplace, and therefore require regulation.60

Professor MacKinnon has advocated for the legal proscription of any behavior that would systemically subordinate women to men by reinforcing socially created norms of behavior that underlie a skewed power dynamic between the sexes.61 She has noted, however, that American “common law has historically reflected social structure, custom, habit, and myth to give legal sanction and legitimacy to men’s social power over women.”62 Thus, a tension inheres between the way in which Professor Mackinnon would have the law shape society and behavior and the ways in which it actually has. Professor Katherine Franke argued in 1997, a year before same-sex sexual harassment was officially recognized as a cognizable cause of action by the Supreme Court,63 that sexual harassment “is a practice, grounded and undertaken in the service of hetero-patriarchal norms. These norms, regulatory, constitutive, and punitive in nature, produce gendered subjects. . . . On this account, sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace.”64 But for the scholars, jurists, and activists who forced gender and the varied and invidious ways in which gender bias affects the workplace to the forefront of consciousness and jurisprudence, the law on gender discrimination might have remained static and failed to protect all of those whom it has.

B. Bullying and Gender

Numerous studies, coupled with anecdotal evidence, bear out the hypothesis that women are affected differently than men by workplace bullying. Women who are bullied are more likely to quit their jobs than are men.65 Women, more than men, tend to become subject to increased bullying as they move up the management ladder.66 Bullies target women more frequently than men.67

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60. Id. at 831–32 (discussing the argument that “there is no such thing as truly ‘welcome’ sex between a male boss and a female employee who needs her job”).
62. Id. at 815.
64. Franke, supra note 51, at 772.
65. See Namie, supra note 25, at 16 (finding that 45% of bullied women quit, as compared to 32.3% of bullied men).
66. McGinley, supra note 44, at 1182 (“[R]esearch shows that as women move up the management ladder, they become subject to increased bullying; this re-
Female targets are actually sabotaged by bullying more frequently than are male targets. A higher percentage of bullied women suffered stress-related health harm than male targets.

Differences between the ways in which men and women absorb criticism, abuse, and bullying in the workplace, however, are not shocking, and may have their genesis much earlier in the workers' formative years. Studies suggest that school-aged boys and girls, like their adult counterparts, differ in the ways in which they social-

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67. See Namie, supra note 25, at 7 (finding that those surveyed who had witnessed bullying reported that the gender of the targeted individual was female 56.7% of the time).

68. Id. at 12 (finding that female targets were sabotaged 47.1% vs. 43.1% of male targets).

69. Id. at 15 (finding that women targets suffered stress-related health harm 52.6% of the time vs. 35.6% for men targets).

70. See McGinley, supra note 44, at 1178 ("Women, [a British study] found, were more likely to be targets of bullying. [W]omen and men perceived the behavior differently. Some men, but no women, denied the existence of bullying altogether. Men saw some of the behavior as 'strong management,' a technique within the organizational structures. Women, in contrast, saw the behavior as personal and reported experiencing emotional consequences. This study, when compared to the interviews of school children by Gamaliel, signals the different power that women and girls assign to behaviors they label bullying. Men and boys, on the other hand, downplay the behavior as 'horseplay' or 'management techniques...'. Because men view bullying as an organizational technique, they are less likely to see bullying as a cause for concern and may be more reluctant to intervene on behalf of victims. Women are more likely to seek social support, or to report to their manager than to go to personnel. They use a more 'avoidance/denial' coping strategy, which may be counterproductive because it may encourage the bully to escalate the bullying over time." (citing Ruth Simpson & Claire Cohen, Dangerous Work: The Gendered Nature of Bullying in the Context of Higher Education, 11 Gender, Work & Org. 163 (2004))); Namie, supra note 25, at 18. The author details another British study on coping strategies of men and women in workplaces where bullying occurs, noting that "[t]hey found that men are more aggressive and confrontational when bullied than women who are more submissive; women seek more social support in response to bullying. For women, increased bullying is associated with increased avoidance. The authors noted that these differences between men and women's coping strategies mirror those of boys and girls who are bullied at school... Some women, rather than challenging the masculinist discourse, conform to it and employ bullying tactics themselves." (discussing Ragnar F. Olafsson & Hanna L. Johannsdottir, Coping with Bullying in the Workplace: The Effect of Gender, Age and Type of Bullying, 32 Brit. J. Guidance & Counseling 319 (2004)).

71. See infra Part IV (discussing the nexus between workplace bullying and gender).
ize, engage in conflict, and experience and respond to bullying,\textsuperscript{72} with girls engaging in behavior that is less likely to propel them to success later on in a workplace rife with traditional "masculinized" bullying.\textsuperscript{73}

One study found that the girls surveyed were bullied more often than boys.\textsuperscript{74} However, a 1998 study analyzing bullying and the ways in which children are treated at school found that males both bullied others and were bullied themselves significantly more frequently than females.\textsuperscript{75} While males reported being bullied by being pushed, hit, or slapped more frequently than did females, females reported being bullied via rumors and sexual comments more frequently than the males did.\textsuperscript{76} Male adolescents seem to engage in conflict more directly, via a physical confrontation, whereas female adolescents tend to engage in conflict via more subtle, passive-aggressive means, like rumor spreading, and gossip.\textsuperscript{77} Some examples of the more indirect female bullying include hijacking online screen names of others and sending out cruel and fraudulent e-mails and internet instant messages, subscribing victims to or enrolling them in pornographic or embarrassing websites or schemes, and sending notes to others purporting to be the victim in order to damage the victim's social standing.\textsuperscript{78}

It is interesting that greater parental involvement through the schools was reported for males being bullied than for females being bullied.\textsuperscript{79} This suggests that more adolescent males than females are likely to voluntarily identify themselves as victims and seek re-

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\textsuperscript{72} See McGinley, supra note 44; Lutgen-Sandvick, Water Smoothing Stone, supra note 15, at 20 ("[Workplace] bullying is without a specific unified vernacular and is often relegated to the schoolyard. The connection to schoolyard bullying can be stigmatizing through association with childishness or weakness.").

\textsuperscript{73} See Moss, supra note 5, at 4 ("[Women leaving the workplace] may reflect either innate gender differences or 'premarket discrimination—differential treatment by parents, schools, and society at large that points girls toward lowering-paying (including household) pursuits.'" (quoting RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 383 (8th ed. 2003))).


\textsuperscript{75} See Tonja R. Nansel et al., Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment, 285 J. AM. MED. ASS'N 2094, 2095–96 (2001) (15,686 U.S. students from grades six through ten were surveyed in the spring of 1998).

\textsuperscript{76} Id. at 2097.

\textsuperscript{77} See id.

\textsuperscript{78} SIMMONS, supra note 16, at 148.

\textsuperscript{79} Id. at 2097–98.
\end{flushleft}
dress for their problems via official channels, whereas adolescent girls are more likely to allow shame and/or fear to keep them from trying to resolve their problems in a similar manner.

In Rachel Simmons’s book, *Odd Girl Out*, the author reported the results of conversations that she had with 300 girls, ages nine to fifteen, about how they handled relational aggression. She spoke with these girls about their own experiences both being bullying victims and bullying others. Simmons found that “[t]hrough powerful messages sent by parents, teachers, friends, and the media, girls learn that anger will not be tolerated; that they must sit quietly and behave like perfect little angels; that they cannot be ugly to anyone; and that breaking any of these rules will bring swift, severe punishment.” Thus, the girls’ reactions to bullying and abusive behavior by their peers included more “socially acceptable,” passive-aggressive responses, like hiding anger, the “silent treatment,” indirect expressions of their feelings, spreading rumors and engaging in gossip or online discussions of others, becoming depressed, cutting themselves, or developing eating disorders. Even when the girls admitted to “ganging up” in response to bullying, it was not to engage in direct conflict about the behavior, but to threaten to disengage altogether and to cease their friendship with the bully. Simmons reports that an overwhelming number of girls believed that direct conflict would cause people to abandon or hate them. She quotes one of her female interviewees who claimed that boys “don’t stab you in the back,” because “[w]ith guys there’s no drama. It’s less complicated.”

Simmons observes that

[w]hen girls are mean to each other, most people shrug it off. Determined to keep girls “sugar and spice and everything nice,” society turns a blind eye to girls’ aggression. “Girls will be girls,” they say. Or they cluck, “It’s a phase all girls go through.” As a result, most girls suffer alone.

It is this socialization and these hard lessons taught to young, victimized adolescents that give rise to the disparate ways in which

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80. Rachel Simmons, *Odd Girl Out: The Hidden Culture of Aggression in Girls* 21 (Harvest Books 2003). Relational aggression includes acts that “harm others through damage (or the threat of damage) to relationships or feelings of acceptance, friendship, or group inclusion.” Id. 
82. Id. 
83. Id. 
84. Id. at 48. 
85. Id. at 103 (internal quotation marks omitted). 
86. Id. at 4.
these individuals, once grown, will absorb abuse and bullying at work. Simmons continues:

Because girls are taught that expressing anger directly is wrong, many girls (and women) have no choice but to resort to secret acts of meanness. They project an image of themselves that others think is "fake." These "nice" girls separate themselves vehemently from those who have dared to show aggression, calling them bitches and skanks. They turn "mean" girls into unfeeling monsters, rather than the human beings they really are. When "good" girls deny their own anger and punish the ones who don't, they empower the culture that is forcing them to be nice all the time.\(^7\)

Simmons argues that girls will repress their feelings of anger at their treatment until the point at which they will "burst with rage."\(^8\) They believe that "[j]ealousy is the publicly acceptable way to explain female aggression" for these girls because society persists in teaching modern girls that "jealousy and competition are 'babyish,' 'selfish,' and wrong. And if something's wrong, good girls had better hide it—just like they try to hide their other negative feelings."\(^9\)

Why, then, would it strain credulity to believe that these girls grow up, in substantial numbers, to become women who will, after being bullied, retreat to their offices to cry or call a friend behind a closed door, rather than hold their ground and respond to the bullying in a direct way that might earn the bully's respect? Why can we not believe that these girls will, in substantial numbers, become women who will shrink back from future opportunities to be mentored by influential people who display bullying behavior? These girls are likely to become women who may very well decide that the quiet erosion of their dignity over time is not a worthwhile use of their time, and they will ultimately self-select out of high stakes positions or opportunities, flee employment periodically in response to bullying, and may ultimately winnow themselves out of the workplace entirely.

\(^7\) Id. at 107-08.
\(^8\) Id. at 149.
\(^9\) Id. 141-42.
IV.
THE ELUSIVE NEXUS BETWEEN WORKPLACE BULLYING AND GENDER

Although the significance of the nexus between workplace bullying and gender cannot be overstated, the subtle ways in which the phenomenon of workplace bullying operates to disproportionately screen women out of advancement, opportunities, and longevity in the workplace are not readily discernible for a variety of reasons, which are discussed below. Identifying these challenges will help to debunk the myth that non-sexualized, non-targeted bullying is experienced by and affects men and women alike. This exercise will also shed light on the connection between workplace bullying and gender discrimination inasmuch as it has a disparate impact on women. Moreover, the nexus between workplace bullying and gender should signal a need for greater awareness of this phenomenon and the need for an appropriate vehicle through which to rectify it.

A. Challenges Tracing Bullying and Gender to the Workplace

Current research on adolescent socialization, social dynamics, and gender is largely anecdotal, but the recent spate of books published in this area support the notion that there are entrenched differences between the ways in which girls and boys engage with and confront peers. Given these findings, it is hard to imagine that upon entering the workforce, males and females begin to suddenly develop uniform, ungendered reactions to bullying, abuse, and other mistreatment. It certainly makes sense to extend this

90. See McGinley, supra note 44, at 1239 ("Because of the presence of a gender construct that uniformly judges women as inferior, women continue to suffer adverse economic and emotional consequences relative to their male counterparts.").
91. See supra notes 81–89 and accompanying text; infra notes 96–102 and accompanying text.
92. Id.
93. See McGinley, supra note 44, at 1195.
94. See, e.g., Mary Pipher, Reviving Ophelia: Saving the Selves of Adolescent Girls (Putnam Books 1994); Simmons, supra note 16; Wiseman, supra note 13.
95. See Simmons, supra note 16, at 105. Simmons has posited that one of the biggest reasons that women fall behind men at work is the existence of the so-called "Old Boys' Network," an informal but highly stylized mechanism that helps men advance in the workplace due to their extra-curricular, social involvements and interactions with other men. This is not a new idea, and the theory can be extended to other social norms learned during adolescence. When men and women enter the workforce, those who sought redress through adults when they were
burgeoning area of knowledge and connect it with the scant but growing body of evidence about the ways in which men and women deal with social strife and bullying at work.

There are many reasons why the nexus between workplace bullying and unintentional gender discrimination has gone unrecognized. Simply put, there is a dearth of accurate information about the actual numbers and responses of women who experience workplace bullying. Very little has been done in the way of data collection on the subject. Moreover, even to the extent that one were to try to ascertain the identities and responses of bullying victims, successful study will continue to be elusive because unlike screening tests or other, more institutionalized workplace practices historically giving rise to a disparate impact on a protected class, bullying is such a diffuse practice and the evidence is so often anecdotal in nature that the information is not readily collectable.

At a very basic level, victims of workplace bullying often do not voluntarily identify themselves as such, even in their own minds. Thus, many women who fall prey to workplace bullies often do not realize that anything outside of the realm of acceptable workplace behavior has occurred. Not only is the concept of "workplace

96. See, e.g., Carla Goncalves Gouveia, From Laissez-Faire to Fair Play: Workplace Violence & Psychological Harassment, 65 U. TORONTO FAC. L. REV. 137, 146 (“The often subtle nature of workplace bullying makes it at times difficult to distinguish bullying from personality clashes, ‘strong management,’ or constructive criticism, especially in competitive and fast-paced work environments.”).

97. See Lutgen-Sandvik, Intensive Remedial Identity Work, supra note 15, at 115 (“Comparing and/or contrasting men and women’s identity work in the face of workplace bullying, trauma or stigma are important avenues for future research. Whether men’s or women’s identity work differs in these situations has received little attention.”).

98. Id. at 102 (noting that there is growing interest in the U.S. on workplace bullying studies and statistics, “but U.S. workers remain understudied” (citing Loraleigh Keashly & Joel H. Neuman, Bullying in the Workplace: Its Impact and Management, 8 EMP. RTS. AND EMP. POL’Y J. 335 (2004))); see also, e.g., Gary Namie, Workplace Bullying: Escalated Incivility, Ivey Bus. J., Nov./Dec. 2003, at 1–6.

99. See Harthill, supra note 6, at 257 (“A 2007 U.S. study found that nearly thirty percent of workers polled met the criteria for being bullied, but only ten percent labeled themselves as bully targets.”).

100. See Lutgen-Sandvik, Water Smoothing Stones, supra note 15, at 19 (“Although employees discuss and recount episodes of bullying, they often have diffi-
bullying” alien to American workers to begin with, such that many victims may not realize that something more than their not being able to “roll with the punches” or “take the heat” actually occurred,¹⁰¹ but once a victim has left employment, she may not realize that her departure was not volitional or that it was the result of a series of incidents or a pattern of behavior.¹⁰² Once a victim has left the workplace, unless she decides to sue her employer, she will typically not have occasion to record her experience or to report on the confluence of factors that led to her departure. This all amounts to data never accumulated.

Many victims of workplace bullying, both male and female, will not identify themselves as such, either in their own minds, or to others for the purposes of data compilation/research or to vindicate their rights due to a fear of retaliation.¹⁰³ This may be due in part to the fact that there exists a potential for retaliation that oc-

101. See Lutgen-Sandvik, Water Smoothing Stones, supra note 15, at 20 (“Workplace bullying has yet to become a regularly utilized term in the U.S. workplace or as a form of mistreatment from which American statutory law provides worker protect.” (citing Yamada, Phenomenon of “Workplace Bullying,” supra note 17)); Harthill, supra note 6, at 297 (discussing the absence of a tradition of dignity as a basis for workplace discrimination laws in the United States).

102. See Moss, supra note 5, at 8 (“[W]omen often face what could be called the direct effects of discrimination in traditionally male fields: men stereotype women and try to exclude them from the workplace, and female workers, less likely to be treated well, are more likely to quit. She argues that to the extent that women prioritize family or leisure over work, they do so because they perceive little opportunity for career advancement. In traditionally male fields, male hostility (e.g., harassment, sabotage, denial of training) makes women less likely to succeed.” (citing Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1827–39 (1990))).

103. See DAVID C. YAMADA, NEW WORKPLACE INSTITUTE, POTENTIAL LEGAL PROJECTIONS AND LIABILITIES FOR WORKPLACE BULLYING 9 (2007), http://www.newworkplaceinstitute.org (“Survey data collected by the Workplace Bullying Institute suggests that retaliation [sic] engaging in some type of whistleblowing behavior or for rebuffing sexual advances is a leading motivation behind workplace bullying.”); Radha Chitale, When Workplace Bullying Goes Too Far, ABC NEWS MEDICAL UNIT, Mar. 10, 2008, http://abcnews.go.com/Health/MindMoodNews/story?id=4410909&page=1 (discussing analysis of data from 110 studies conducted on workplace satisfaction and aggression, which found that “bullies get angry when their targets attempt to report the problem and tend to step up their behavior, making the situation even worse for the target”).
curs outside the purview of the law's protection. For example, badmouthing of current or former employees who seek alternate employment after a dispute or a lawsuit, or even unofficial "black-listing" of workers within entire industries, are commonplace occurrences that may not implicate official acts of a liable actor under the law.104 These acts, however, still serve to chill speech and silence those who might otherwise voice a complaint, legal or otherwise, about bullying that they have experienced.105 Any employee whose ability to find and change jobs hinges upon his or her individual reputation, especially in highly specialized fields, may feel particularly wary of vindicating their rights through lawsuits, or through official channels of complaint. This further impedes the ability of researchers to collect accurate information about the number of victims, their gender, and the ways in which they absorb and respond to workplace bullying.

Another impediment to reporting workplace bullying may be the unique challenge women face when seeking certain workplace accommodations. For example, employers retain the discretion to grant or deny additional leave beyond that granted by the Family and Medical Leave Act ("FMLA"),106 flexible schedules, part-time opportunities, and telecommuting options. To the extent that women are more likely than men to request such accommodations to have and raise children, they may seek to curry favor and either avoid, or be discouraged from, reporting bullying behavior, or from asking for the additional accommodation of not having to work for a bullying supervisor. This is yet another factor to be taken into account when evaluating why women may be disproportionately fearful of identifying themselves as bullying victims and reporting bullying in the workplace.

This is all not to say that men's experiences with workplace bullying have not been obscured just as women's have. However, due to a dearth of accurate information about the true nature and extent of this problem, there has been a concomitant failure of society to consider properly the disproportionate effect of this phe-

104. See Lutgen-Sandvik, Water Smoothing Stones, supra note 15, at 23 ("A bully may spread a negative rumor about the target that harms or destroys the target's professional reputation or even ability to secure future employment." (citing Stale Einarsen, The Nature and Causes of Bullying at Work, 20 INT'L J. MANPOWER 16 (1999)).

105. See generally Marilyn Elias, Bullying Crosses the Line into Workplace, USA TODAY, July 27, 2004, at 7D (discussing how job insecurity is a major reason why bullying victims do not speak up "because if you don't have options, people figure this beats the unemployment line").

nomenon on women. The elusive truth about instances of workplace bullying has made it such that our best evidence of the problem is largely anecdotal. 107 It has been nearly impossible to collect data on individuals, who may or may not still be employed, who will self-identify as having been victimized by a practice that seems as "neutral" and benign as bullying. 108

There are several other factors complicating the matter and obscuring the truth about the effect of bullying on women. Although many women who leave the workplace in their twenties and thirties attribute their exit to a desire to effect a better work/life balance, 109 this Article posits that to the extent that workplace bullying operates to affect women, in the aggregate, more than men, perhaps this is an overattribution. Indeed, inasmuch as the noxious effects of workplace bullying are taken for granted as an immutable reality or even not consciously perceived, there does not appear to be a meaningful way in which to ascertain just what percentage of women who cite "family issues" for their departures from the workplace might have been able and willing to stay and thrive under other, more palatable circumstances. Despite the fact that issues surrounding childcare, household issues, and "balance" have been validly given as reasons for the disproportionate departure of women from the workplace, these issues may have become somewhat of a smokescreen that has obscured other reasons for which women have chosen not to remain employed or been driven out of the workplace. 110 Professor McGinley has posited that research that

107. Moss, supra note 5, at 18 ("A[necdotes rarely reveal whether discrimination was the true reason behind a woman's failing to receive a particular job—and workplace segregation makes it harder to unearth the true reason.").

108. Id. at 18 ("Absent such a smoking gun, discrimination is most provable when there are directly comparable male and female candidates whom the employer treated differently. But often there is no one directly comparable. 'T[he more segregated the labor force, the more difficult it is to find comparative evidence illustrating discriminatory, disparate treatment.' " (quoting Scott A. Moss & Daniel A. Malin, Public Funding for Disability Accomodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA, 33 HARV. C.R.-C.L. L. REV. 197, 211 n.93 (1998))).


110. See Susan Shaw, From the Playground to the Workplace, Bullying Happens Because It's Allowed: Understanding Bullying in the Workplace, The RING, Mar. 20, 1998, available at http://ring.uvic.ca/98mar20/Bullying.html (discussing how workplace abuse "can lead to stress related symptoms" that can leave those being bullied wanting to quit or "fabricating reasons to stay away from work"); Zayda Rivera, Workplace Bullying: Why Women Are Affected More, DIVERSITYINC, Aug. 22, 2008, http://www.diversityinc.com/public/4155.cfm (citing a 2007 study conducted by the
has made “visible the structures and practices that damage women and gender non-conforming men at work . . . is valuable because it contradicts the notion that women ‘choose’ to work in less equal positions.” 111 It may similarly be the case that an appreciation of workplace bullying’s adverse and disproportionate impact on women will contradict the notion that women “choose” to leave the workplace in the midst of their prime professional years.

Another factor that obscures the truth about workplace bullying’s effect on women is the legal community’s resistance to the notion that bullying should be actionable or illegal. Indeed, legislators, scholars, and jurists alike tend to shrink from the idea that “bullying” can be legislated against or somehow be a cognizable harm.112 This is because the “legislation of civility” is anathema to American law.113 Thus, to the extent that non-sexualized, non-targeted, so-called “neutral” bullying practices are employed by so-called “equal opportunity” bullies, American law will tend to want to refrain from legislating against it or in any way asking its judges to sit as a “super personnel board,” exercising discretion and prerogatives regarding workplace conditions that are traditionally reserved for the employer.114 This compounds resistance to recognizing workplace bullying as something that uniquely and illegally affects women in a way in which it does not impact men in the aggregate.

A final obstacle to the recognition of the disparate impact that workplace bullying has on women is strong resistance to the idea that women as a class experience and respond to bullying differently or more to their detriment than men do as a class. Many femi-
nists have decried the idea of "essentializing" women and reducing them to hapless victims of their own biology.\textsuperscript{115}

Certainly, there are many women who are themselves bullies. Moreover, there are many women who respond to bullying by flourishing or at least surviving whereas many of their male counterparts shrink back and flounder by comparison. The disparate impact demonstrated by the limited available information about the ways in which girls versus boys, and later women versus men, respond to bullying must be pursued theoretically and legally. Under employment discrimination law, protected classes may be aided by the law where a neutral practice, absent invidious intent, disproportionately impacts the class by the numbers, though certainly not in all cases.\textsuperscript{116} Moreover, acknowledging that women in the aggregate suffer as compared with men in the face of bullying does not malign women; on the contrary, it emphasizes the nefarious nature of bullying above and beyond interpersonal incivility and it highlights the ways in which the "masculinization of the workplace" has seeped into our collective unconsciousness to the point that it ceases to be recognized.

The significance of this phenomenon of not recognizing the gender implications of bullying is thus great, and begs the question of whether there could be a cognizable legal remedy for the injustices that workplace bullying effectuates. Scholars and legislators who have looked at the problem of workplace bullying as an affront to workers' dignity and to civility and productivity in the workplace generally have made an initial attempt to respond to this question. Since 2003, fifteen states have introduced some version of the Workplace Bullying Institute's anti-bullying Healthy Workplace Bill, conceived of and drafted by Professor Yamada.\textsuperscript{117} These efforts, however, have been to no avail, as no state has ultimately adopted

\textsuperscript{115} See Deserieee A. Kennedy, \textit{Transversal Feminism and Transcendence}, 15 S. Cal. Rev. L. & Women's Stud. 65, 69–70 (2005) (arguing that many legal feminist theorists believe that essentialism should be avoided in hopes of redefining "the scope and boundaries of feminism to make it increasingly more relevant and effective in addressing the needs of all women").


the legislation. 118 Therefore, the field remains a blank slate for a legal solution to this problem.

Professors Yamada and Harthill have both called for a new legal right for those who fall prey to workplace bullying. 119 Professor Harthill has posited that this right “should be in the form of a statute, as opposed to a new common law tort,” while recognizing that “judicial recognition of a new tort could flow from increased awareness of the problem of workplace bullying—an unremarkable observation to be sure but one which leads full circle back to the premise that increased awareness as an initial step has been side-stepped in the U.S.” 120

Professor Harthill has conducted an exhaustive comparison between the way bullying has been handled in the United States and in the United Kingdom, and now advocates for a United States legal model premised on notions of individual dignity, similar to that of the United Kingdom:

The lack of a U.S. tradition of basing harassment law on individual dignity has been seen by some as fatal to the progress of combating workplace bullying in the U.S. The lesson from the U.K., however, is that a framework to address workplace bullying does not need to develop from any underlying tradition of dignity-based rights. . . . Rather, recognition of workplace bullying in the U.K. grew from a number of other factors. . . . [T]he role of the courts in recognizing workplace bullying and applying existing laws cannot be underestimated. . . . [The UK’s] experience evidences that there is potential for workplace bullying law in the U.S. despite the lack of a dignity tradition. 121

Professor Harthill also advocates employer self-regulation as a vehicle, but notes that in light of the relatively weak reception that Professor Yamada’s Healthy Workplace Bill has received by the states, their legislatures, and unions, employers’ “bottom lines” will need to serve as the primary impetus for such self-regulation. 122 Underlying in her reliance on the bottom line is the notion that litigation avoidance, morale, loyalty, and public relations are crucial to an employer’s maintenance of a good economic bottom line. Professor Harthill concludes that the “gap in the U.S. law undoubtedly needs to be filled, but new employee rights can also emerge

119. See Harthill, supra note 6; Yamada, Crafting a Response, supra note 6.
120. Harthill, supra note 6, at 293.
121. Id. at 297.
122. Id. at 298.
through increased awareness. . . . Recognition of the phenomenon, remedies for victims, and policies and legislation aimed at pre-emptive protection are all part of the solution.\textsuperscript{123}

Viewing the problem of workplace bullying through the prism of gender inequity advances the discourse on this topic further and strengthens the movement to curb and eventually eliminate it. Our understanding about both innate and socially conditioned differences in the ways in which males and females tend to absorb bullying and abuse should inform the way in which society looks at workplace bullying. When the costs of America's relative tolerance of this practice are discussed, the damage that it does to women's careers, in the aggregate, should be factored in. The relative absence of women in the workforce, and especially at the highest levels of employment\textsuperscript{124} should be linked to the prevalence and tolerance of so-called "neutral" bullying. Because "neutral" bullying done by so-called "equal opportunity" bullies is not currently a cognizable cause of action in the United States, it is not seen as an illegal means of weeding anyone out of the workplace, whether it is done intentionally or not.

V. DISPARATE IMPACT MODEL

A. Disparate Impact Approach

[T]o find disparate treatment in any given case, judges essentially have to label the employer as a racist or a sexist, or allow a jury to do so. To find disparate impact, judges need to merely find that the employer was, in effect, careless.\textsuperscript{125}

In thinking about a model within which to analyze the deleterious effect of workplace bullying, even by those bullies that are the most "gender-neutral" in the selection of their targets, Title VII's "disparate impact" cause of action would seem to be a useful model. A plaintiff may, of course, bring a disparate treatment claim, which derives from the statutory language of Title VII, which states that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise

\textsuperscript{123} Id. at 302.

\textsuperscript{124} See U.S. \textit{EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR} 5-6 (2002) (stating that as of 2002, women represented just thirty-six and two-fifths of a percent of officials and managers within the private sector, whereas they made up just over eighty percent of office and clerical workers).

to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's protected class status. Such a claim, however, requires a demonstration of discriminatory intent on the part of the employer. The claim of disparate impact, on the other hand, was judicially crafted, as will be discussed, so that rather than requiring the plaintiff to demonstrate the defendant's discriminatory intent, the plaintiff need only show that a facially non-discriminatory employment policy engendered, literally, a "disparate" or disproportionate impact on members of a particular protected class, as opposed to other classes.

Although at the end of the day, the disparate impact model is not a tenable, effective vehicle to use in the war against workplace abuse and bullying, it is an effective model to demonstrate the rationale for fighting workplace bullying as an instrument of unwitting gender discrimination. The genesis of the claim, its evolution over time and against various factual backdrops, and judges' and scholars' attempts at articulating its goals and impact are all useful in the exploration of workplace bullying's impact on women as a group.

In 1971, the Supreme Court first deemed cognizable a claim of "disparate impact" in Griggs v. Duke Power Co. In that case, African American workers were being disproportionately screened out of employment and opportunities vis-à-vis their white counterparts. The Court evaluated an employer's requirement that applicants and employees who sought to transfer jobs have either a high school education or pass a "standardized general intelligence test" where these criteria were not demonstrably significantly related to success on the job. The Court noted that "the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites."

Emphasizing that Congress's clear intent in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," the Court observed that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they

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129. Id.
130. Id. at 426.
131. Id.
operate to ‘freeze’ the status quo of prior discriminatory employment practices.'\textsuperscript{132} The Court thus gave approbation to the idea that Title VII proscribes certain employment practices, including those effectuated without discriminatory intent, where they function as "artificial, arbitrary, and unnecessary barriers" that "operate invidiously to discriminate on the basis of . . . [an] impermissible classification."\textsuperscript{133} Simply put, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."\textsuperscript{134} Moreover, to the extent that an employer felt that a challenged practice was relevant to job success, the Court noted that as per Congress's mandate, the employer must show the requirement's "manifest relationship to the employment."\textsuperscript{135}

Over fifteen years later, the Court continued to give shape to the disparate impact cause of action in \textit{Watson v. Fort Worth Bank & Trust}.\textsuperscript{136} In that case, the Court noted that the more "obvious" examples of disparate impact that courts had evaluated were engendered "where facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted," \textsuperscript{137} but that it, and lower courts, had also found cognizable claims where "some facially neutral employment practices . . . violate[d] Title VII even in the absence of a demonstrated discriminatory intent," and had refused to confine valid claims to those "in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination."\textsuperscript{138} In \textit{Watson}, however, the Court held for the first time that a disparate impact analysis was applicable in instances where employment decisions were premised upon "subjective" criteria, like inter-

\begin{itemize}
\item \textsuperscript{132} \textit{Id.} at 429–30.
\item \textsuperscript{133} \textit{Id.} at 431.
\item \textsuperscript{134} \textit{Id.} at 432 (emphasis omitted).
\item \textsuperscript{136} 487 U.S. 977 (1988).
\item \textsuperscript{137} \textit{Id.} at 987.
\item \textsuperscript{138} \textit{Id.} at 988 (citing Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (rule against employing drug addicts); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests); Washington v. Davis, 426 U.S. 229 (1975) (written test of verbal skills)).
\end{itemize}
views or other forms of non-standardized evaluation. The Court noted that notwithstanding the fact that subjective decision makers can always act with express, invidious prejudice, they can also, in some cases, harbor no conscious, demonstrable discriminatory intent, but still be guided by “subconscious stereotypes and prejudices.” Thus, the Court announced, “[i]f an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.”

It is the case today that in adjudicating a disparate impact claim, courts require the plaintiff to make a prima facie showing through statistical means that an adverse “disparate impact” was caused by a particular protocol. Then the defendant must show that the practice at issue has “a manifest relationship to the employment,” and is therefore a justifiable “business necessity.” The plaintiff must then show that other tests or selection protocols could serve the employer’s interest absent the discriminatory effect in practice. While it is generally the case that a plaintiff must show that each challenged employment protocol or practice creates a disparate impact, Title VII provides that “if the complaining party can demonstrate to the court that the elements of [the employer’s] decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.”

Professor McGinley has observed that “[j]udging women’s job performance more harshly than men’s because of the woman’s failure to act in the stereotypically female manner is differential treatment because of her sex.” She has exhorted employers and the courts to “become more aware of the ‘built-in headwinds’ women experience because of the ways in which society defines work as masculine,” and to “create an incentive for employers to eliminate the practices that harm women and their families.” Insofar as women are sought out for bullying more often or in more invidious ways than men are, a disparate impact cause of action would appear

139. Watson, 487 U.S. at 990.
140. Id.
141. Id. at 990–91.
142. Albemarle Paper Co., 422 U.S. at 425.
144. Albemarle Paper Co., 422 U.S. at 425.
146. McGinley, supra note 45, at 393–94.
147. Id. at 432–33.
to be the perfect vehicle of redress. What about Jeannie’s story, though? What about the equal-opportunity bully who, at least for argument’s sake, is capable of meting out his abuse in such a way that’s it’s evenly allocated? Is there a further argument to be made that we, or the law, may presume that it’s not evenly absorbed?

Noted scholars have already posited that disparate impact claims might inhere where so-called “non-targeted” sexually charged speech disproportionately affects women.\footnote{See, e.g., Kearney, supra note 4, at 228; Kelly Cahill Timmons, Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?, 81 Neb. L. Rev. 1152, 1257 (2003) (suggesting that courts may “find non-targeted workplace sexual conduct actionable via the disparate impact theory only if the conduct’s disproportionate impact on women is great”).} Professor Robert Kearney has criticized scholars and courts for attempting to anchor affronts to women’s dignity at work to Title VII where these affronts are not specifically targeted at a victim, but rather rife in the air.\footnote{Id.} Professor Kearney has advocated:

Pushing for the recognition of a new sexual harassment claim that, consistent with employment discrimination law, allows for an alternative path through the gate in cases where some groups are profoundly affected by employment practices. . . .\footnote{Kearney, supra note 4, at 228.} [A] disparate impact sexual harassment claim . . . is flawed in part because of the difficulties involved in creating a new, complex claim within existing law. Though if what stands against the alternative is, as it appears to be . . . a re-written Title VII . . . to fit existing claims, then the choice is clear. Arguing for the recognition of a new claim is the legitimate work of scholarship. Re-writing statutory terms is not.\footnote{Id. at 188-89.}

Professor Vicki Schultz has observed that, “[a]t the level of the individual complaint, companies do not attempt to determine whether the alleged sexual harassment was linked to sex discrimination. They simply assume that any sexual conduct covered by their policies is discriminatory or harmful.”\footnote{See Schultz, supra note 40, at 2131.} However, Professor Schultz points out that often where men are found to have violated their employers’ anti-harassment policies, “the women who were the alleged targets of the harassment did not even object (or voiced only vague objections) to the conduct for which the offenders were punished.”\footnote{Id.}
Is the current state of the law flawed inasmuch as it presumes that non-targeted behavior is inflicted on another because of sex, and inasmuch as the employers, themselves, "simply equate[] sexual content with sex discrimination"?\textsuperscript{153} Has the law then, at the very least, deviated from its prescribed course of evolution pursuant to Title VII?

Professor Charles Sullivan, bemoaning his observation that Title VII "plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims," has hypothesized that "the obsession of the legal academy and the plaintiffs' bar with disparate treatment cases, to the wholesale exclusion of the disparate impact alternative, is largely responsible for the present crisis in the field."\textsuperscript{154} He recommends a "return to, and revival of, the disparate impact theory," and has entreated the courts to simply "apply disparate impact as the language of Title VII provides."\textsuperscript{155} Essentially, because discrimination traverses a broad spectrum of consciousness, from explicit invidious prejudice, to various degrees of subconscious discrimination engendered, evinced, and betrayed by stereotyping, the clean bifurcation of claims into disparate impact and disparate treatment claims has outlived its plausibility and its utility.\textsuperscript{156}

Professor Sullivan's approach holds special appeal as the precepts underlying disparate impact theory are more useful than overt disparate treatment in a world in which paradigms of discrimination and the extent to which they evince discriminatory intent have shifted drastically toward the inscrutable, the subtle, and the unprovable.\textsuperscript{157} Indeed, Professor Sullivan has noted that

[the common ground of the cognitive bias scholarship, and much of the old concern with the "basic assumption" underlying McDonnell Douglas, is that women and racial minorities get the short end of the stick in a wide range of workplaces. Although the precise causal mechanisms are contested, dispa-
rate impact analysis focuses on this reality and asks the employer to justify it by its business needs.\footnote{158}

The very legitimacy of offering legal recourse to victims of subconscious or unconscious bias has been challenged by scholars who have argued that the research buttressing such causes of action falls short of the accuracy, reliability, and tenability required of legislative authority and litigation evidence.\footnote{159} Indeed, such scholars have admonished their peers, advocates, and courts alike about the grave "societal consequences of setting thresholds of proof for calling people prejudiced so low that the vast majority of the population qualifies as prejudiced."\footnote{160} A response to such arguments, however, has been to point out that the precepts of implicit bias research have been informing antidiscrimination scholarship and jurisprudence since their inception.\footnote{161} Indeed, as antidiscrimination jurisprudence and social awareness have evolved since the passage of the Civil Rights Act of 1964, bias has become increasingly covert and tacit, and therefore harder to discern. It has also become less obvious and explicit in its presence, even in the very minds of those who harbor it, as social forces and complex interpersonal interactions conspire to obscure less-than-conscious bias even as they generate it. Subconscious and unconscious biases sometimes defy the rigid causes of action defined by the law. The dangers of ignoring them are grave and numerous.

Ultimately, Professor Sullivan has decided that "the difficulties of dealing with . . . biases" that defy classification by residing in the large chasm between explicit and invidious and wholly unconscious "do not change by describing them as problems of disparate treatment or disparate impact," and it is the disparate impact theory of suit that "offers an opportunity to explicitly weigh the necessity of

\footnote{158. Sullivan, supra note 125, at 987 (discussing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Under the traditional McDonnell Douglas framework employed to adjudicated allegations of discrimination in violation of Title VII, a plaintiff will set forth a prima facie case stating that she is qualified for the job in question and other circumstances giving rise to an inference of invidious discrimination. Then, the burden will shift to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse action or decision that befell the plaintiff. Then, the burden shifts back to the plaintiff, who must ultimately persuade the trier that discrimination did occur, to demonstrate that that which was proffered by the defendant is a pretext for actual discrimination.


\footnote{160. Id.}

current practices that are shown to enable bias." 162 While acknowledging the myriad problems concomitant to employing the disparate impact doctrine, Professor Sullivan has concluded that disparate impact theory is the optimal way in which to "begin addressing a deep-rooted problem and thereby continue the process of 'debiasing' the workplace."163 Countering criticism of the types of evidence contemplated by the increased usage of the doctrine, Professor Sullivan has pointed out that "[t]he legal system certainly has no lack of ad hoc balancing methods, often camouflaged under the term 'reasonable,'" and has posited that "[i]n the discrimination arena, this balancing will be done in terms of business necessity, and most likely in terms of whether the employer is dealing as effectively as possible with the phenomenon in light of the currently available alternatives."164

B. Difficulties with Disparate Impact

The question then becomes whether the seemingly intractable problem of workplace bullying could ever be remedied through disparate impact claims. After all, if scholars feel as though it is an underutilized vehicle to handle complex phenomena like unconscious bias, might it aid in grappling with an equal opportunity bully who truly engages in behavior that has a disparate impact on his or her female victims? Several factors seem to militate strongly in favor of the doctrine's use to combat workplace bullying.

In the first place, the limited data that we have available to work with does seem to bear out the proposition that males and females do, from a relatively early age, absorb conflict and criticism differently.165 Males tend to engage their adversaries in open conflict that is more likely to lead to a definitive resolution, while females tend to shrink back from direct conflict and employ more passive-aggressive means for reckoning with social and verbal attacks levied on them.166 Certainly this information, in addition to the information collected on gender and workplace abuse,167 could support the proposition that workplace bullying as a practice tends to affect women in a manner disproportionate to the way in which it affects men.

162. Sullivan, supra note 125, at 995.
163. Id. at 997.
164. Id.
165. See supra Part III.B.
166. See supra note 78.
167. See supra Part IV.
Moreover, using disparate impact as a weapon against workplace bullying comports with a key rationale upon which disparate impact theory is premised: the “use of the disparate impact concept is regarded as indispensable for removing barriers that prevent members of protected classes from gaining access . . . they want and, but for the unjustified barriers, would be able to obtain.” 168 Indeed, disparate impact has been an essential vehicle for keeping protected class members from getting screened out of contention for opportunities, promotion, and retention at work. 169 To the extent that workplace bullying is contributing to women being winnowed out of the workplace and out of contention for accolades and opportunities within the workplace, redressing this gender-based harm would seem like an appropriate use of a disparate impact claim.

Recent jurisprudence from the Ninth Circuit has evinced a willingness on the part of at least one court to evaluate not only whether men and women are treated differently, but whether they are affected differently by abusive behavior. In Ellison v. Brady, the Ninth Circuit held that in the context of sexual harassment jurisprudence, conduct may rise to the level of “unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.” 170 In Steiner v. Showboat Operating Co., the Ninth Circuit held even in an instance in which a supervisor “used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby ‘cure’ his conduct toward women,” and that the relevant query is whether conduct is that which would be “offensive and hostile to a reasonable woman.” 171

In E.E.O.C. v. National Education Ass’n, Alaska, the Ninth Circuit framed the disparate impact question as “whether harassing conduct directed at female employees may violate Title VII in the absence of direct evidence that the harassing conduct or the intent that produced it was because of sex.” 172 In that case, female employees complained that a director of a labor union for teachers and other public school employees engaged in abusive behavior

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168. Ronald A. Lindsay, Should We Impose Quotas? Evaluating the “Disparate Impact” Argument Against Legalization of Assisted Suicide, 30 J.L. MED. & ETHICS 6, 8 (2002).
170. 924 F.2d 872, 880 (9th Cir. 1991).
171. 25 F.3d 1459, 1464 (9th Cir. 1994).
172. 422 F.3d 840, 842 (9th Cir. 2005).
that was cruel, intimidating, and unprovoked.\textsuperscript{173} The portrait that emerged of the abuser was one of a hostile, volatile, and physically intimidating man, whose shouting was frequent, profane, and often public.\textsuperscript{174} The court concluded that his "behavior clearly intimidated female employees" and gave weight to testimony that the women in the office felt physically threatened and abused by this director.\textsuperscript{175} Notably, however, "[n]o one testified that Harvey made sexual overtures or lewd comments, that he referred to women employees in gender-specific terms, or that he imposed gender-specific requirements upon women employees."\textsuperscript{176}

The Ninth Circuit, however, distilled the "because of . . . sex" requirement down to the issue of whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."\textsuperscript{177} Applying what it called the "differential effects standard," the court further refined the question to ask whether the abusive behavior "affected women more adversely than it affected men."\textsuperscript{178} On one hand, it must be noted that the court gave weight to the plaintiffs' allegation that the director actually treated women in a worse manner than he

\textsuperscript{173} Id. at 843. The court recounted what it said was a first-person account "illustrative incident" of this abuse as follows:

\begin{quote}
I had a sister who was dying in California . . . [w]e were all taking turns going to take care of her, and be there just in case she died, so I asked for—[I] went over Labor Day weekend so I wouldn't get in trouble, so I had the legitimate days off, and then I think I took an extra day . . . and when I got back, we had a meeting at the get go, right in the morning, we had a meeting, and Tom came in and said, so how's your sister? And I said, not very good at all. And I said, do I need to bring anything to this meeting, Tom? And he said, if you would have read your fucking e-mail, you would have known, but, no, you were out of town, so we've lost a day there. And again I just went, my sister is dying. I was with a sister who's dying, and he's saying that to me? Like people take days off—all the men take days off there to go fishing and hunting and that's okay. He knows my sister is dying. He knows how heavy my heart is, and he can say that? It was—so it was so astonishing and so cruel at the same time, I just again just started crying and I left the room.
\end{quote}

The court also noted that other plaintiffs in the case "testified to Harvey regularly 'yelling' at them loudly and publicly for little or no reason."\textsuperscript{179} (emphasis omitted); \textit{see also id.} at 844 (alleged behavior included "repeated and severe instances of shouting, 'screaming,' foul language, invading employees' personal space, (including one instance of grabbing a female employee from behind)" (citation omitted)).

\textsuperscript{174} Id. at 843-44.
\textsuperscript{175} Id. at 843.
\textsuperscript{176} Id. at 844.
\textsuperscript{177} Id. (quoting \textit{Oncale v. Sundowner Offshore Servs., Inc.}, 523 U.S. 75, 80 (1998)).
\textsuperscript{178} Id. at 845.
treated men, "subjecting the women to more severe, more frequent, more physically threatening abuse." 179 The court in this case, however, went further than this when it held that "the reasonable woman standard, previously invoked only against the backdrop of explicitly sex- or gender-specific conduct or speech," could now be invoked outside of that context. 180 The court held that "evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex or gender specific." 181

Significantly, in evaluating the case, the court took careful note of not only "objective differences in treatment of male and female employees," but also of differences in the subjective effects that the behavior had upon members of both genders. 182 Thus, the court considered testimony given by a male employee stating that not only did the abusive director raise his voice to him less frequently, but that they were "able to talk it out," and it did not recur. 183 Even more salient, the court found that

there is no evidence in the record that any male employee manifested anywhere near the same severity of reactions (e.g., crying, feeling panicked and physically threatened, avoiding contact with Harvey, avoiding submitting overtime hours for fear of angering Harvey, calling the police, and ultimately resigning) to Harvey's conduct as many of the female employees have reported. 184

It thus appears that this court was willing to factor in the different ways in which members of both genders experienced and absorbed alleged harassment that was not sex or gender specific.

The road to a cognizable theory of gender discrimination, however, is not smoothly paved by National Education Ass'n. 185 Two years after its issuance, in 2007, a district court in the Ninth Circuit, evaluating a case involving a supervisor who confronted male and female employees with profane, angry, but non-sexual language

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179. Id.
180. Id. at 845-46.
181. Id.
182. Id. at 846.
183. Id. at 846 (reciting male employees' testimony that the behavior, when inflicted on men, "had the quality of 'bantering back and forth with somebody, and being with the boys . . . at the end of the day, I would go in and he and Bob and Rich and Jeff are all laughing in Tom's office, talking, talking, talking, laughing, laughing,'" and that the abusive director "shar[ed] a 'we're all guys here' relationship with male employees").
184. Id.
185. 25 F.3d 1459.
daily, held that “[a] changed interpretation of previously non-threatening verbal abuse is no substitute for evidence of gender-based harassment.”186 Rejecting a hostile work environment plaintiff’s invocation of National Education Ass’n (as she argued that she felt intimidated and disgusted by her supervisor’s constant vulgarity, screaming, and yelling), the district court distinguished the case before it from that which was before the Ninth Circuit Court of Appeals in National Education Ass’n. The district court explained that the Ninth Circuit had adjudicated a case in which “the verbal abuse experienced by female employees was accompanied by overt physical acts such as violent lunging, fist shaking and pumping, stalking, grabbing female employees by the shoulders, and other physical acts testified to by male and female employees and documented by police reports.”187 In contrast, the district court explained, “[t]he only physical act alleged here is [the supervisor’s] ‘yelling and screaming’ at a close distance.”188 Moreover, the district court noted that because the director in National Education Ass’n did actually treat women and men differently, and the plaintiff in the case before it “has not identified any evidence, whether circumstantial or direct, tending to show a qualitative or quantitative difference in treatment between male and female employees during the relevant . . . period,” the analysis employed by the court in National Education Ass’n was not applicable to the case before it.189

It is thus clear that while there has been some attention paid by courts recently to the different impact that abusive, bullying behavior has on members of one sex as opposed to the other, gender and sex-neutral bullying behavior is simply not recognized as presenting a cognizable legal claim.190 To the extent that courts like the Ninth Circuit Court of Appeals have tried to pay heed to the disparate effects of even an equal-opportunity bully, the lower court made much of the fact that the Ninth Circuit was dealing with a bully who

187. Id. at *39.
188. Id.
189. Id. at *40.
190. See, e.g., Kreamer v. Henry’s Towing, 150 Fed. App’x. 378, 383 (5th Cir. 2005) (noting that the defendant had taken reasonable and prompt care to end alleged harassment and noting that “most of Carrere’s behavior was bullying rather than sexual in nature, a fact reflected in Kreamer’s own notes and contemporaneous accounts of the incidents to his superiors. Even though Kreamer never specifically complained of sexual harassment, Tetra put an end to the behavior in less than a week”).
engaged in disparate treatment, and who made women around him feel physically threatened.

One might argue that it behooves an employer, within its legitimate business prerogative, to retain and promote those who cultivate business, please clients, win cases, and outshine others, despite their sometimes thorny personalities. However, any benefit to permitting abusive behavior may not be sufficient to overcome a growing trend in the law recognizing such abuse as an actionable wrong. With the notion of a “dignitarian workplace” gaining momentum in Europe and in the consciousness of legal scholarship in this country, 191 and with a clear congressional mandate in the drafting of Title VII to rid the workplace of invidious discrimination, 192 is it too off-base to presume that there may be intolerance by the law of this abusive behavior nonetheless?

Having explored the disparate impact model of discrimination in connection with workplace bullying, it seems a bit anti-climatic to reject it. Nonetheless, too many practical problems with its use appear to persist. At the core of these problems is the complex and sometimes chameleon-like nature of the practice of workplace bullying. It is perpetrated by individuals at certain moments in time. It often occurs behind closed doors. It may pervade one employee’s workplace experience, based upon her particular assignments and interactions, and yet fail to manifest itself at all, let alone in a rife or pervasive manner, on a project, in a workspace, or in a department, let alone in a workplace. It thus becomes incredibly difficult to collect the statistics that would demonstrate that workplace bullying actually had a disparate impact sufficient to support a Title VII claim.

In that vein, Professor Sullivan has noted on one hand that “from the traditional statistical perspective, impact might not be provable if ‘the numbers’ are too small to draw statistical conclusions.” 193 On the other hand, however, he points out that “Griggs itself did not look to the effect of the employer’s test and high school diploma requirement on Duke Power’s present employees or applicants,” meaning that evidence beyond that which has been collected in the defendant employer’s workplace is potentially available in a disparate impact case. 194 For decades, scholars and judges have recognized the potential for “general research conclu-

191. See Harthill, supra note 6; Yamada, Crafting a Response, supra note 6, at 477–78.
193. Sullivan, supra note 125, at 989.
194. Id.
sions [of socio-scientific research] to set a background context for deciding crucial factual issues at trial."  

In fact, in *Dukes v. Wal-Mart*, the plaintiff class was permitted to proffer the social framework analysis to help demonstrate Wal-Mart's alleged corporate culture of "corporate uniformity, and gender stereotyping." So-called social framework evidence is "the product of social science research that an expert compiles and uses to construct a frame of reference for specific issues central to the resolution of a case" and it has been referred to by scholars as "especially useful in employment discrimination cases, where the expert constructs such a framework to examine whether an organization's policies and practices are vulnerable to stereotyping and bias." While there has been much debate over the utility and viability of social framework evidence, it would still be difficult to apply in the context of equal-opportunity workplace bullying and disparate impact.

This Article, as stated, presumes an equal-opportunity bully with no conscious or demonstrable gender bias. To the extent that women in a workplace could actually demonstrate that they were singled out for harsh treatment, discipline, and criticism vis-à-vis male comparators, using any kind of admissible evidence, a cognizable claim of disparate treatment in contravention of Title VII could be levied, and the dilemma of workplace bullying's legality in this country would not be relevant. However, the evidence is elusive when one seeks to show that equally inflicted and "neutral" bullying that is non-sexualized and directed at both men and women generates a disparate impact on women.

To date, sound data has not been collected on bullying’s effect on women’s success at work. Because bullying victims, especially women, tend not to self-identify as such, it is hard to imagine how such research could proceed. Even in the context of a single workplace, a law firm for example, how might one go about assembling the recent law graduate who no longer works because she left what she saw as a professional arena too vicious for her personality; the senior associate who goes back to her office and cries after each

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198. *See Walker & Monahan, supra* note 195, at 598.
public chastising she receives from her assigning partner; the sum-
mer associate who never returned to work at the firm after she
passed the bar and re-interviewed because she heard too many sto-
ries depicting her chosen department as a “frat house”; and the
midlevel who rarely calls her assigned mentor because of the harsh
and abusive language and put-downs he uses when conferring with
her on her work? How might one even go about educating such
people as to the fact that it is not necessarily their own shortcom-
ings, weakness of character, thinness of skin, or simple preferences,
but an illicit, unacceptable phenomenon that has set them each
upon their individual trajectories away from their goals and profes-
sional success?199

Because bullying is so diffuse a practice, it may not permeate
an employee’s environment the way the law requires traditional
harassment to be such that it is redressable. It may only occur when
the employee does assignments for a particular partner or man-
ger. It may only occur a few times a month when a would-be bully
is under the proverbial gun. However, because it rises to meet the
working definitions we now use,200 it is just as nefarious. Where a
complex confluence of “verbal and nonverbal behaviors” serves to
demean, humiliate, and undermine an employee at work, the sub-
tlety of the practice can nonetheless make it look more benign than
it is. As Professor Harthill has astutely pointed out: “Bullying behav-
ior can also take more subtle forms, such as removing responsibili-
ties and replacing them with trivial tasks, withholding information,
and blocking promotions. Indeed, the most common form of bul-
lying is assigning unreasonable or impossible targets or dead-
lines.”201 Bullying thus, in addition to being a status-blind harm,
doesn’t necessarily always “look” like behavior that has been found
actionable under Title VII.

Courts have always resisted the idea that the enforcement of
any workplace legislation should resemble their “legislating civility”
or functioning as a “super-personnel board.”202 It can be argued
that it is anathema to American law that behavior so purportedly
“neutral” be actionable under Title VII. Claims brought under the

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199. See David Armstrong, Observers Describe Workplace Harassment as a ‘Silent
org/press/foxnews1.html (discussing how many individuals have misdiagnosed
workplace abuse “as part of having a job,” and the minimizing of such abuse by
some human resource departments as they tell abused employees that they have
thin skin and must learn to take it).
200. See supra Part II.A.
201. Harthill, supra note 6, at 250–51.
202. See supra note 4 and accompanying text.
disparate impact theory of recovery under Title VII have consistently been rejected for being too tenuous where an inferential leap was required by the court from a subtle, difficult to prove practice like nepotism, to a concrete impact on a protected class.\textsuperscript{203}

Using Title VII to protect victims of workplace bullying also seems impracticable because due to the nature of the problem, it would be difficult to get the kind of large-scale injunctive relief that typically results from a successful disparate impact case.\textsuperscript{204} For the reasons discussed, it does not seem practical to think that a vehicle like Title VII will be effectual against workplace bullying, then. The issue here seems to be one of a need for increased awareness, education, and self-regulation by employers.

VI.
OTHER POTENTIAL APPROACHES

A. \textit{New Statutory Cause of Action}

This Article aims to advance the discourse on workplace bullying by filtering it through a new lens and shedding light on problems it is likely engendering, in addition to those already identified. Clearly, a viable vehicle for combating this problem is still needed, and the reasoning expounded here can and should be added to the collective voice of support for the legislation proposed by Professor Yamada. To the extent that a legislative response has

\textsuperscript{203} See, e.g., \textit{Youngblood v. Astrue}, 281 F. App'x 726, 728 (9th Cir. 2008) ("Although [plaintiff] argued that . . . managers made hiring decisions based on familiarity with applicants, she failed to introduce evidence establishing such a policy or practice. Moreover, even had [plaintiff] demonstrated such a policy or practice, she failed 'to supply any admissible or reliable evidence showing how the policy adversely impacts African-Americans.'"); \textit{Barrow v. Greenville Indep. School Dist.}, 480 F.3d 377, 382–83 (5th Cir. 2007) (affirming grant of summary judgment on plaintiff's claim that school's patronage policy operated more harshly on people patronizing private school for religious belief than people opting for private schooling for other reasons. The district court had held that the plaintiff needed to demonstrate that "facially neutral employment standards operate more harshly on one group than another. This initial burden includes proof of a specific practice or set of practices resulting in a significant disparity between the groups. Statistical disparities between the relevant groups are not sufficient. A plaintiff must offer evidence isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities").

\textsuperscript{204} See, e.g., \textit{Carpenter v. Stephen F. Austin State University}, 706 F.2d 608 (1983) (ordering the University to "validate and reform job qualification descriptions, placement, and compensation" as well as change other critical hiring and promoting regulations).
not yet happened, it is critical that advocates generate awareness of the fact that workplace bullying reinforces gender inequality.\textsuperscript{205}

There are several reasons why the law has been and may continue to be resistant to the idea of anti-bullying legislation. In the first place, legislation against workplace bullying implicates potential First Amendment concerns in workplaces where it is relevant.\textsuperscript{206} Noted scholars have posited that because "the dignitary torts still generally survive First Amendment scrutiny in the workplace, as elsewhere, and the workplace is obviously not our purest example of a setting for public discourse," it is the likely case that "mobbing prohibitions should survive First Amendment challenge—even in cases of mobbing involving only speech."\textsuperscript{207} One noted scholar counsels that

[a] spacious reading of Title VII "hostile environment" harassment cases suggests that many judges are quite prudently interested in some aspect of control over both forms of social evil: invidious group discrimination and vicious interpersonal cruelty—particularly in captive environments. But we need distinct regulatory mechanisms for these different harms, or we end up with a befuddled jurisprudence that (among other things) creates imprecision in an area of law (free speech) where vagueness and overbreadth are particularly problematic. The most effective way to avoid such problems for First Amendment purposes, then, is to have clearly expressed aims.\textsuperscript{208}

Professor Yamada has pointed out that private speech is unregulated by the First Amendment and that public employees' speech

\textsuperscript{205} Cf. Harthill, supra note 6, at 298–99 (urging for further awareness of workplace bullying through continued studies).

\textsuperscript{206} Coleman, supra note 12, at 73–74 ("Some courts have been concerned that holding an employer liable on ostracism grounds might violate the First Amendment right to associate freely."); \textit{id.} at 94 ("In the first years following the creation of Title VII 'hostile environment' harassment, there was almost no discussion—by judges or academics—of any First Amendment dangers with this area of law. That has changed significantly in recent years . . . ."); \textit{cf.} Laurie Bloom, \textit{School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut's Anti-Bullying}, 7 CONN. PUB. INT. L.J. 105, 112 (2007) (discussing anti-bullying legislation in the context of public education and noting that "[t]he constantly changing technologies of the internet age pose new First Amendment challenges to a civilized society and a healthy school environment, and noting that new generation of 'cyberbullies' are now anonymously manipulating the psyche and emotional stability of victims via text message, instant message, and cruel and hateful customized websites").

\textsuperscript{207} Coleman, supra note 12, at 94. "Mobbing" has been defined as "the persistent and systematic attempt to destroy someone's social standing at work."

\textsuperscript{208} Id. at 97.
only warrants First Amendment protection when it touches upon matters of public concern.\textsuperscript{209} Ironically, he has made these points in the context of explaining why one who engages in "self help" and stands up to a bully at work enjoys little to no protection under the law. He has noted that while "[f]reedom of expression is one of the cornerstones of individual dignity," it is the case that "few employees enjoy anything close to comprehensive, legally protected rights of free speech in their workplaces."\textsuperscript{210}

Another concern attendant to the enactment of anti-bullying legislation is that of a floodgates effect, whereby the courts would be "flooded" with demands for compensation by aggrieved plaintiffs who construed their plights to be those of bullying victims. This concern has been tied to the so-called "civility code" objection to anti-bullying legislation.\textsuperscript{211} As recited by one scholar, the argument would be that "dignitary harm torts are simply too fuzzy and ill-defined and that encouraging the use of these causes of action to remedy workplace abusiveness risks creating a workplace 'civility code' that will operate to the detriment of free expression and open and easy workplace interactions."\textsuperscript{212}

Scholars have concluded, however, that such concerns are "overblown," in light of the fact that extant status-blind tort causes of action have not created a "floodgates" effect or imposed a code of civility on places of employment; "[t]he biggest danger with a tort approach to harassment, as MacKinnon noted . . . is not that courts will tend to let too much in: the danger is that they will not be flexible enough."\textsuperscript{213}

\textsuperscript{209} Yamada, \textit{Phenomenon of "Workplace Bullying"}, supra note 17. Professor Yamada notes that "[o]nly one state, Connecticut, provides general statutory protection for employee speech, but the proper breadth of that protection is an unsettled issue among the state's courts." \textit{Id}.


\textsuperscript{212} \textit{Id.} (explaining that "[h]ere, the fear is not that courts will make recovery difficult by defining terms like 'outrageous' or 'offensive' in impossibly narrow ways. Instead, the fear is that courts will lower the bar too far, and plaintiffs will be able to recover too easily, diluting the requirements of the dignitary harm torts until any minor irritation or misunderstanding becomes actionable and all workplace comments and actions will have to be self-censored").

\textsuperscript{213} \textit{Id.} (adding that "unless one is willing to argue that there should be no tort recovery at all for injuries that are not physical in nature, it is hard to claim that these causes of action should exist everywhere but in the workplace").
A related concern is whether or not workplace bullying ought to be a compensable harm, or merely remedied at a broader level. Should a private right of action be afforded? On one hand, affording victims of bullying direct recourse and a right to collect damages from those who facilitate the infliction of their harm provides a healthy deterrent to bullies and would-be bullies.\textsuperscript{214} Professor Yamada has explicitly stated that his Healthy Workplace Bill is solely enforceable via a private right of action and that it "does not contemplate the creation or involvement of a state administrative agency for adjudicating or deciding claims."\textsuperscript{215} This is done to "disourage the filing of weak claims . . . in two ways":

First, eschewing the use of an administrative agency avoids the common practice of providing agency representation for pro se litigants who cannot afford legal representation. Although there is considerable merit to providing such assistance to alleged victims of discrimination, the risk of opening the floodgates to marginal bullying claims by providing free legal representation is too great to justify doing so. Second, by limiting bullying actions to the judicial system, the plaintiffs' bar will play an important triage role in screening out non-meritorious claims. Simply put, potential litigants with weak cases will encounter difficulty getting an attorney to represent them, particularly in light of the limitations on damages discussed above. Of course, this also means that some people with viable claims will find themselves unable to secure legal representation. This further reflects the reluctant but necessary decision to err on the side of caution in terms of the amount of litigation brought under the statute.\textsuperscript{216}

Because workplace bullying includes innumerable combinations of verbal or physical conduct that a "reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance," its manifestation may or may not appear to rise to the level of traditionally compensable harms like Title VII harassment or the tort of inten-

\textsuperscript{214} Cf. Paul M. Secunda, \textit{At the Crossroads of Title IX and a New "Idea: Why Bullying Need Not Be "A Normal Part of Growing Up" for Special Education Children}, 12 \textit{Duke J. Gender L. \\& Pol'y} 1, 21-22 (2005) (suggesting that an effective way to guard against bullying in the educational setting is to hold individual supervisory school officials liable under § 1983, and noting that "[t]he § 1983 cause of action may be more appealing than a Title IX action because it potentially permits a student plaintiff to seek money damages from supervisory school officials responsible for permitting the bullying in question to continue").

\textsuperscript{215} Yamada, \textit{Crafting a Response}, supra note 6, at 504-05.

\textsuperscript{216} Id. at 505.
tional infliction of emotional distress. Workplace pressures and politics are complex, and maneuvers within them often take forms that are subtle or passive aggressive.

It is interesting to realize that ignoring or ostracizing someone can be a critical component of bullying and of how a reasonable person can be made to feel threatened, intimidated, humiliated, sabotaged, or undermined. It may appear in many cases that one who has truly been bullied does not appear to have been bullied under the standards proscribed by existing law and with the traditional indices of actionable behavior in other contexts, like threats, slurs, and persistent overt ridicule. This, compounded with the failure of any proposed bullying statute to require that a plaintiff demonstrate any type of protected class-based animus, may lead some to say that there are legitimate concerns about so-called "floodgates."

B. Administrative Solution

To the extent that concerns about opening the proverbial "floodgates of litigation" persist, and to the extent that it is determined that bullying, while a deleterious practice, is not individually compensable like status-based discrimination, perhaps something other than a private right of action may be proposed. A federal agency charged with the monitoring, investigation, and remediation of bullying as a widespread practice may also be effective. A useful model could be the Occupational Safety and Health Administration, which was created by the Occupational Safety and Health Act of 1970 ("OSHA"), which was itself enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."217 OSHA does not afford aggrieved individuals a private right of action in the face of an alleged health or safety violation in their places of work, but it does enable the agency to investigate allegations and mete out financial sanctions where workers' health and safety on the job is jeopardized.

However, OSHA, as it currently operates, is not likely to provide an effective conduit for combating workplace bullying. Professor Yamada has lamented that "[e]ven if certain types of workplace bullying fall within the regulatory reach of OSHA, this statute does not satisfy the policy goals of prevention, self-help, compensation, and punishment."218 He has concluded that "[a]dding workplace

218. Yamada, Phenomenon of Workplace Bullying, supra note 17, at 522.
bullying to the enforcement agenda of a regulatory agency that already is severely understaffed would guarantee enforcement difficulties, especially because it is patently unrealistic to believe that OSHA inspectors would be able to conduct adequate investigations of workplace bullying.”

Insofar as OSHA cannot effectively engage with the problem of workplace bullying, maybe another agency premised on OSHA's model could be charged with the collection of information about bullying problems in workplaces, and interventions into such workplaces for the purposes of education, awareness raising, and, potentially, the imposition of sanctions. Upon complaints from employees (who would stand to gain no monetary gain from their reports), information could be collected via reports from individual workers, exit interviews done by human resources departments with departing employees, upward evaluates done by employees of their supervisors, and employer self-reporting. Intervention by the agency could result in institutional change via bad publicity and ensuing peer pressure exerted on bullies to reevaluate and modify their behavior. It could also result in increased educational training and awareness programs, as well as the imposition of sanctions in non-complying workplaces.

VII. MOVING THE LAW FORWARD

Professor MacKinnon has argued that sexual harassment jurisprudence, unlike other jurisprudence, has "led social movements," rather than the other way around, noting that:

In the last half of the twentieth century, litigation on issues that involve unequal social groups has rarely preceded social movements and legislatures. More typically, issues surfaced first through outspoken individuals and activist grassroots groups; protest then reached the public agenda and achieved momentum and public awareness through organized mobilization and media initiatives; official and private studies and more visible pressure groups followed. Legislative proposals and mass consciousness then emerged, resulting in beachheads in legislation and still later victories in courts. . . . To a significant extent, . . . anti-sexual harassment law impelled social awareness . . . rather than the reverse.

219. Id.
220. MacKinnon, supra note 61, at 816.
Indeed, civil rights law and its sometimes contorted evolution have worked to dismantle the mistreatment of women at work by pushing back the frontier of that which is tolerated by society and continually changing the paradigm of acceptable workplace behavior. The law has operated to transform notions of that which is humorous, that which is aggressive, and that which is anti-social when it comes to the treatment of women at work. The hazy, black-and-white, 1950s image embedded in our cultural consciousness of the older, male boss, chasing his secretary around her desk has been supplanted by one of a workplace in which physical assaults are not tolerated. The notion of the appropriateness of admonishing a female job applicant that her presence in the workplace was unwelcome because she was “taking a job away from a man” or “trying to find a husband” has been transformed; articulation of such sentiments is now frowned upon by society and the law. Sexual harassment law has made it such that the archetypal vulgar, jocular, sexually aggressive supervisor whose brand of “humor” was a bitter pill to be swallowed by his targets in the past is now seen as a liability—legally and professionally.

This Article was written to convey the point that workplace bullying, in addition to everything else scholars have identified and defined it as, is the next frontier of gender discrimination—its last bastion of unregulated gender-based harm inflicted. The confluence of many and varied combined factors, including pure interpersonal clashes, illicit discrimination—conscious and subconscious—and the intractable problems of high-pressure workplaces can lead people to feel as though they have been victims of workplace bullying. The confluence of a multitude of other factors can lead one who has been bullied to fail to identify as one who has. Due to workplace bullying’s extremely nuanced, subtle, and diffuse nature, and its clumsy fit into any existing law, it is nearly impossible to target and even harder to cure using existing weapons in this country’s legal arsenal.

VIII. CONCLUSION

Employment discrimination law aims to negotiate the fine boundary between shielding members of protected classes from in-

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221. See generally id.
223. See Harthill, supra note 6.
tentional discrimination and the discriminatory effects of neutral practices, on one hand, and impermissibly "legislating civility" on the other hand. At the core of any individual's treatment in the workplace, however, is his or her interactions with supervisors, coworkers, support staff, and clients, and these interactions are informed and shaped by many factors. The complex interplay of differing sensibilities, human frailties, biases, social norms, and personality differences is often difficult to unpack in order to discern illicit behavior. With the passage of time, changing social norms and awareness, evolution of technology, and new protective legislation and jurisprudence, traditional paradigms of discrimination and harassment have been eroded, cast aside, and reformed. The 1950s' paradigm of the male boss unabashedly chasing his female secretary around his desk is all but obsolete in the American consciousness and in the workplace, but harassment and discrimination have become more subtle and veiled. Workplace bullying is the last bastion of wholly unregulated, albeit unwitting gender discrimination.

This Article submits that the documented phenomenon of workplace bullying operates to stymie the retention and advancement of women in the workplace just as ostensibly "neutral" but nefarious and artificial barriers in the 1960s and the 1970s hampered the hiring, retention, and advancement of people of color. Focusing on professional workplaces in particular, this Article submits that there are many reasons that this phenomenon has not and might not be recognized and well received. It also shows why Title VII, the vehicle used to combat the systemic displacement of a protected class through an ostensibly neutral employment practice, is too clumsy a vehicle to engage this intractable and somewhat ineffable problem. Whereas the practices deployed in the 1970s were defined and looked like screens that could be dismantled, workplace bullying is a fractured matrix or mosaic, comprised of isolated harmful incidents that occur behind closed doors, across offices, geography, and industries.

It is interesting to note that most workplaces, especially professional offices and firms like that posited in this Article's initial hypothetical, go to incredible lengths to recruit and retain female employees in this age of increased awareness of the benefits of diversity and equality of opportunity in the workplace.224 These em-

224. See Donald J. Polden, Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom, 36 U. MEM. L. Rev. 67 (2005) ("The prevalence of women and minorities in key governance positions—positions of responsibility that, while not covered by Title VII's reach—signal the extent to which
Employers go to similarly great lengths to ensure an atmosphere that is free of sexual or any other harassment prohibited under Title VII, not only to remain in compliance with the law, but to maintain good morale, to afford personal integrity to members of protected classes of individuals, and to keep up a good image, both internally and externally, for public relations purposes. It is simply thought unseemly, as well as negligent, to run operations in an environment rife and charged with sexual or racial hostility. Employers appear to be increasingly loath to retain individuals whose behavior would appear to be a persistent liability under Title VII. Sexual harassment education and so-called “sensitivity training” seem to be par for the course in most professional workplaces.

Nonetheless, these very same employers, perhaps due to their complacent belief in the fact that workplace bullying is “neutral,” typically fail to stem or discourage workplace bullying. Perhaps the office bully is a great rainmaker or efficient worker, actually impelled, rather than hindered by his or her approach to others. Perhaps the presence of the bullying behavior serves to intimidate and exploit employees in such a way as to make them more profitable to the employer. Workplace bullying may not be an issue of which most employers are aware or have any apparent desire to curb, possibly because of a lack of public awareness of the issue and the law’s failure to condemn it.

And yet, this is precisely the problem. Sexual harassment has become a mainstay in public discourse on the workplace and is discussed as a primary impediment to women’s collective advancement. It is a more likely scenario, however, that workplace bullying, being just as pervasive but permissible as it is, is a more significant but wholly undetected factor in women’s feelings of discomfort in the workplace. Bullying is thus also a more likely cause of women’s subsequent shrinking back within, and ultimately fleeing from, the workplace. As many resources and hours as employers put into ensuring that women are recruited into the workplace and mentored, retained, and promoted once they get there, and as the underlying national policy of Title VII has created an atmosphere conducive to increased opportunities for women... 

225. Workplace Bullying Inflicts More Harm than Sexual Harassment, http://www.anxietyinsights.info/workplace_bullying_more_harmful_than_sexual_harassment.htm (Mar. 9, 2008). Researchers have found that workplace bullying “appears to inflict more harm on employees than sexual harassment.” Id. In contrast to sexual harassment, “non-violent forms of workplace aggression such as incivility and bullying are not illegal, leaving victims to fend for themselves.” Id. (citing M. Sandy Hersjcovis, Remarks at the Seventh International Conference on Work, Stress and Health (Mar. 8, 2008)).
many of the same as they put into preventing and punishing sexual harassment, something is not adding up. This Article ultimately submits that many, though not all,\(^\text{226}\) of these persistent gaps between the efforts put into women’s advancement and retention and the resulting low numbers of women at high or senior levels of employment in the professional workplace can be accounted for by a general lack of awareness of workplace bullying’s presence and effects.

It is interesting to think about the workplace of the young female associate posited in the opening anecdote to this Article. Today, it is clear that a bullying boss like the one described would likely not have broken any law simply by being verbally abusive. The odds that he would ever be found by a trier of fact to have hampered anyone’s career in any way on the basis of her gender are incredibly slim, especially because of his proven support of the more senior female associate. To the extent, however, that it could be established that behavior like his does, in fact, detrimentally impact protected class members in a disproportionate and deleterious way, this behavior could be outlawed and certainly curbed. At this point, we simply know too much, documented by studies and books like *Queen Bees and WannaBes*, about innate differences between the sexes to ignore the likely impact that workplace bullying has on women, as a group, in the workplace.

Today, though, it appears that the paradigmatic boss who punishes his subordinates for not submitting to his advances has gone the way of the 1950s era boss who’d chase his secretary around her desk. More and more workplace behavior and interactions are now deemed intolerable, as well as illegal, because the law has aided in the spreading of awareness of the harm, legal and otherwise, that can result from it. Only by connecting the seemingly disjointed dots that form the constellations of that which we know about the different behavior and socialization of males and females, the types of bullying behavior that a great number of employees face in the modern workplace, and the deleterious effects that this behavior has on women, in the aggregate, will we begin to see and to combat the widely drawn universe of equal opportunity bullying in the workplace.

\(^{226}\) Clearly, family pressures and concerns, as well as overt sexism, continue to contribute to the disproportionate representation of women in the highest levels of employment nationwide. Workplace bullying is set forth in the Article as a third, lesser-recognized cause of the premature departure of women from the workplace.