

SHAME, RAGE AND FREEDOM OF SPEECH: SHOULD THE UNITED STATES ADOPT EUROPEAN “MOBBING” LAWS?

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I. "MOBBING": AN ALTERNATIVE PARADIGM OF HARASSMENT

"Mobbing" has never carried a positive connotation in U.S. law, although its meaning has shifted over the years. Before the Civil War, "mobbing" was what Southern rioters did to intimidate abolitionists, and the South's violent rioting style apparently led to the North's increased revulsion towards slavery.¹ Only a handful of American cases have used the term "mobbing" since the Civil War, but its basic meaning remained largely the same until recently: dangerous, unruly crowds physically threatening or attacking the vulnerable, who are often racial minorities. *In re Grand Jury*,² an 1886 case that deplored anti-Chinese mobbing, is illustrative. Judge Deady described mobbing as "an evil spirit . . . abroad in this land. . . . It tramples down the law of the country and fosters riot and anarchy."³ He continued:

Lawless and irresponsible associations of persons are forming all over the country, claiming the right to impose their opinions upon others, and to dictate for whom they shall work, and whom they shall hire; from whom they shall buy, and to whom they shall sell, and for what price or compensation. . . . Freedom, law, and order are so far subverted, and a tyranny is set up in our midst most gross and galling. Nothing like it has afflicted the world since the Middle Ages, when the lawless barons and their brutal followers desolated Europe with their private wars and predatory raids, until the husbandman was driven from his ravaged field, and the artisan from his pillaged shop, and the fair land became a waste.⁴

Today, the term "mobbing" is reentering American jurisprudence, albeit with a different connotation.⁵ Although a "many-against-one" dynamic

¹ Christopher Waldrep, Book Review, 19 LAW & HIST. REV. 208, 209 (2001) (reviewing DAVID GRIMSTED, AMERICAN MOBBING, 1828-1861: TOWARD CIVIL WAR (1998)).

² 26 F. 749 (D. Or. 1886).

³ *Id.* at 749.

⁴ *Id.* at 750.

⁵ For legal scholarship that discusses mobbing in its contemporary form, see Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL'Y J. 239 (2004); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of*

remains part of its core meaning, the elements of physical violence and passionate crowds have been replaced with subtle psychological aggression, which is typically carried out over a long period of time in workplaces, schools, and other institutions.⁶ Mobbing was a major focus of the meeting of the labor and employment section at the 2004 annual meeting of the Association of American Law Schools.⁷ The first panelist at that meeting, Gabrielle Friedman, defined mobbing as “the persistent and systematic attempt to destroy someone’s social standing at work.”⁸ Friedman summarizes “mobbing theory” as founded on an “employee’s right to respectful treatment at work, rather than her right to equal treatment.”⁹ The Department of Environmental Quality for the State of Oregon has established the first explicit anti-mobbing policy in the United States.¹⁰ Efforts to add new anti-mobbing

Harassment Law: Discrimination Versus Dignity, 9 COLUM. J. EUR. L. 241 (2003); Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 B.C. INT’L & COMP. L. REV. 477 (2004); Vicki Schultz et al., *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 EMP. RTS. & EMP. POL’Y J. 151 (2004); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) [hereinafter Whitman, *Enforcing Civility*]; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) [hereinafter Whitman, *Two Western Cultures*]; David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).

⁶ Scottish law continues to use the more archaic definition in its criminal law: “mobbing and rioting” include “all those convocations of the lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighborhood in which it takes place.” ARCHIBALD ALISON, *PRINCIPLES OF THE CRIMINAL LAW OF SCOTLAND* 509 (Butterworth Legal Publishing 1990) (1832). Alison adds that the terms “rioting” and “mobbing” have distinct meanings: “the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behaviour of a single individual.” *Id.*

⁷ Schultz et al., *supra* note 5, at 154.

⁸ *Id.* at 156. Friedman also defines mobbing as

a situation where a particular employee is singled out for abuse. Mobbing could lead to what we would call a constructive discharge, but it doesn’t have to. The point is that conditions are intentionally made intolerable for the employee to the point where he or she can no longer function in the job.

Id. at 154.

⁹ *Id.* at 155.

¹⁰ State of Oregon, Dep’t Envtl. Quality, Anti-Mobbing Policy, No. 50.110 (Sept. 19, 2002), available at http://mobbing-usa.com/R_legal.html#Four.

legislation have recently been attempted in California, Hawaii, Oklahoma, and Oregon.¹¹

Heinz Leymann, a Swedish academic who devoted his career to the issue, offers the following case study from Europe as a typical illustration of mobbing:

A canteen supervisor at a large prison went into retirement and a successor was needed. The prospective employer and the personnel department were of the same opinion: the opportunity should be used to bring about certain changes. The canteen needed to economize and at the same time offer healthier food. An individual with suitable training was found. She was employed and assigned to the kitchen where six female cooks — who all knew very well how to prepare a thick cream sauce but nothing about the impending changes — were standing in front of their ovens.

An inevitable conflict soon broke out. How was the new manager in the kitchen going to pursue the desired changes without the support of her employer? Nobody had informed the cooks of any planned change except the new manager herself. The new methods for preparing the food were totally strange to them. The idea of making provision for a relevant training course had never dawned on the employer. The cooks believed that all these new ideas came personally from Eve, their new supervisor. This caused them to turn against her. They started to gossip and counteract her instructions. Even the fact that she had a mentally handicapped child was held against her, as if her own character were responsible for this. There were continuous heated discussions. The cooks, not being willing to listen to Eve and her delegation of assignments, regularly took measures that resulted in differences of opinion. It was maintained that Eve went far beyond the scope of her responsibility, which in fact, was not true.

On a number of occasions, Eve tried to obtain descriptions of her responsibilities from the prison authorities. Top management refused her requests and her continual requests were interpreted

¹¹ David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 476 (2004).

as insubordination. Here we should bear in mind, that job descriptions of this nature are, in fact, a method through which top management can express its [sic] leadership at all levels! By defining institutional hierarchy at a central level, and defining various areas of responsibility, an employer is provided with an indispensable control mechanism through which the various areas of responsibility can be influenced. In Eve's case, the only thing that happened was that top management felt attacked by her requests and defended themselves. This legitimized the cooks' harassment of Eve as they interpreted the situation as if the top management were "on their side." The harassment continued and developed into a serious mobbing process, whereby Eve eventually completely lost her authority. Harsh arguments took place on a daily basis. One of the top managers who accidentally overheard such an argument, called Eve for a report. As she entered the meeting room, she noticed, that she was standing in front of some kind of court, where she was given no chance to explain the situation, but was heavily criticized. Top management ordered her to take a sick leave, which the prison's own physician validated. After having been on sick leave for more than two years, Eve eventually lost her job. She never found another job again.¹²

In an attempt to establish a definition for "mobbing," one organ of the European Parliament defines the German verb "mobben" as the "persistent torment of colleagues (with the intention to dispel them from their posts)."¹³ In the early 1970s, a Swedish physician first used the term to describe hostile behavior observed among schoolchildren.¹⁴ Some of the newfound attention to mobbing never mentions the word because it goes by so many other terms—psychological terrorism, workplace or school bullying, campus hate speech, emotional abuse, etc.¹⁵ Perhaps unsurprisingly, the concept struggles

¹² Heinz Leymann, *The Mobbing Encyclopedia: Bullying; Whistleblowing*, <http://www.leymann.se/English/14100E.HTM> (last visited Nov. 11, 2006).

¹³ Frank Lorho & Ulrich Hilp, *Bullying at Work* 7 (Eur. Parliament, Directorate-Gen. for Research, Working Paper No. 108, 2001), available at http://www.europarl.europa.eu/workingpapers/soci/pdf/108_en.pdf.

¹⁴ Guerrero, *supra* note 5, at 480.

¹⁵ A point about terminology: for purposes of this Article, "mobbing" is equivalent to "non-status-based" harassment, the "European approach," and "generic" harassment. "Status-based"

against an accusation of triviality—as most of us routinely endure varieties of social aggression or insult, of course, and it is sometimes difficult to discern when inevitable workplace conflicts reach the level of psychological destruction needed to qualify as mobbing. On the other hand, it has been argued that a powerful dynamic prevents a candid evaluation of mobbing from reaching personal and public consciousness.¹⁶

Major American print media's attention to mobbing has been uneven. In 2000, *Newsweek* introduced

an ugly, hitherto little-recognized workplace problem that's as corrosive as racial discrimination and sexual harassment. They call it mobbing: repeated attacks that humiliate, isolate and belittle, to the point where the victim can no longer function. Mobbing . . . can be perpetrated by bosses, peers or even subordinates. And it seems to be on the rise. . . . Mobbing help-lines run by unions, churches and former victims have popped up throughout Europe. . . . Big companies like Volkswagen have drawn up rules meant to stamp out mobbing. The Swiss Red

harassment is also referred to as "protected category" harassment or the "American approach." See also Yamada, *supra* note 11, at 479 ("Regardless of what labels are used, the problem itself is too serious and costly on both human and organizational levels to be caught up in an academic debate over naming."). I use the term "harassment" in its broad sense to include harmful verbal (and symbolic) expression and related conduct, e.g., "fighting words," Title VII "hostile environment" harassment, campus "hate speech," etc. As my general aim is to consider the relative psychological harms from a broader set of aggressive expression, I avoid, where irrelevant for my purposes, the nuanced distinctions made, for example, in First Amendment law between different contexts (schools, universities, homes, workplaces, captive audiences, etc.). Cf. Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 357 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

Although an important strand of First Amendment doctrine does intentionally ignore distinctions among institutional settings in the service of the First Amendment's inherently rule-based approach, it is increasingly the case that First Amendment doctrine has become somewhat institution-specific, employing different rules, principles, categories, doctrines, and approaches in some institutions than it does in others.

Id.

¹⁶ See Kenneth Westhues, *SAFS and the Darker Forces*, SAFS NEWSLETTER (Soc'y for Acad. Freedom & Scholarship, London, Ontario, Canada), Sept. 2001, at 1–3, available at <http://www.safs.ca/sept2001.pdf>.

Cross founded a sort of "Mobbees Anonymous," and in Sweden one can cite mobbing in making health benefit claims. . . .¹⁷

The *New York Times Sunday Magazine* has provided comparatively extensive coverage, with cover stories devoted to mobbing-related issues in the weekly magazine in recent years.¹⁸ A best-selling book titled *Mobbing: Emotional Abuse in the American Workplace* has recently been translated into Japanese and Turkish.¹⁹ The leading American journal on university life, *The Chronicle of Higher Education*, exposed the practice amongst academics in a lengthy and comprehensive article titled "Mob Rule" published in April 2006.²⁰ If one searches online databases for the term "mobbing," a significant and increasing amount of attention to the issue is revealed, but a large percentage of such attention appears in non-American literature.²¹

Although the Europeans have enacted legislation against mobbing across the continent, sometimes even in the form of criminal penalties,²² American

¹⁷ Karen Lowry Miller, *They call it "Mobbing,"* NEWSWEEK, Aug. 14, 2000, at 44.

¹⁸ See, e.g., Margaret Talbot, *Girls Just Want to Be Mean*, N.Y. TIMES, Feb. 24, 2002, § 6 (Magazine), at 24; Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 13, 2002, § 6 (Magazine), at 52 ("More broadly, the whole paradigm of sexual harassment, and in particular its anchoring in discrimination law, is due for reconsideration."); Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 32. Yoshino states:

In recent decades, discrimination in America has undergone a generational shift. Discrimination was once aimed at entire groups, resulting in the exclusion of all racial minorities, women, gays, religious minorities and people with disabilities. . . . Now a subtler form of discrimination has risen to take its place. This discrimination does not aim at groups as a whole. Rather, it aims at the subset of the group that refuses to cover, that is, to assimilate to dominant norms. And for the most part, existing civil rights laws do not protect individuals against such covering demands. The question of our time is whether we should understand this new discrimination to be a harm and, if so, whether the remedy is legal or social in nature.

¹⁹ NOA DAVENPORT ET AL., *MOBBING: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* (2002).

²⁰ John Gravios, *Mob Rule*, 52 CHRON. HIGHER EDUC. 10 (2006), available at <http://chronicle.com/free/v52/i32/32a01001.htm>.

²¹ When references to mobbing do appear in American legal journals, it may be because European professors themselves raise the issue during, for example, published conference proceedings held in the U.S. See, e.g., Stefano Zamagni, Keynote Address, *Religious Values and Corporate Decision Making: An Economist's Perspective*, 11 FORDHAM J. CORP. & FIN. L. 573, 596 (2006). Even as late as 2006, the Italian professor likely left much of his American audience baffled by his reference to the "dirty" practice of "mobbing."

²² That legislation is summarized in The European Parliament's Directorate-General for Research, which recently published a comprehensive study of mobbing. See Lorho & Hilp,

jurisprudence and public awareness are in their infancy.²³ Still, analogies to mobbing regulations undoubtedly exist across the landscape of American law, from Title VII hostile environment jurisprudence, to the common law tort of intentional infliction of emotional distress, to university conduct codes, and so on.²⁴ Title VII, an anti-discrimination statute, has been interpreted to protect against workplace “hostile environment” harassment based on sex, race, religion, or national origin.²⁵ Harassment claims under Title VII must be *because of* one of these four protected categories—a requirement that has engendered much judicial confusion and scholarly commentary.²⁶ Moreover, the expansion of harassment protection—both inside and outside of Title VII—adds to the complexity of what categories are included for purposes of considering “status-based” psychological harm.²⁷ Jurisdictions or judicial decisions currently prohibit harassment based on a multifarious array of

supra note 13. For good English-language summaries of current developments in Europe, see VITTORIO DI MARTINO ET AL., EUR. FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PREVENTING VIOLENCE AND HARASSMENT IN THE WORKPLACE (2002), available at <http://www.eurofound.eu.int/pubdocs/2002/109/en/1/ef02109en.pdf>; Linda Shallcross, The Workplace Mobbing Syndrome, Response and Prevention in the Public Sector (Oct. 16, 2003) (unpublished paper, presented at Workplace Bullying Conference, Brisbane, Australia, available at <http://members.shaw.ca/mobbing/mobbingCA/mobsyndrome-1.htm>).

²³ This Article distinguishes an American approach from a European approach, for simplicity's sake. But a more global perspective would reveal that other countries (Australia, Canada, etc.) are also developing a European-style “mobbing” approach to harassment. Yamada, *supra* note 5; Coleman, *supra* note 5.

²⁴ Yamada, *supra* note 5; Coleman, *supra* note 5. See also Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 432 (1998) (suggesting expanding intentional infliction of emotional distress (IIED) or other tortious remedies to improve protection against harassment); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91 (2003) (opposing non-status-based anti-harassment legislation such as that proposed by Yamada, but sympathetic to broader common law remedies for mobbed employees).

²⁵ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

²⁶ See generally Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997); Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133 (2005); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998).

²⁷ See, e.g., *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998) (holding same-sex harassment actionable).

categories, including use of a guide animal,²⁸ transsexualism,²⁹ source of income,³⁰ whether children occupy one's apartment,³¹ and so on. Graduate students at the University of Massachusetts at Amherst wanted to add to their harassment code "citizenship, culture, HIV status, language, parental status, political affiliation or belief, and pregnancy status."³² Some school codes have prohibited harassment based on "hobbies," "clothing," "social skills," etc.³³ First Amendment scholar Eugene Volokh has listed the following comprehensive list of harassment-protected categories:

race, religion, sex, national origin, age, disability (including obesity), military membership or veteran status, or, in some jurisdictions, sexual orientation, marital status, transsexualism or cross-dressing, political affiliation, criminal record, prior psychiatric treatment, occupation, citizenship status, personal appearance, "matriculation," tobacco use outside work, Appalachian origin, receipt of public assistance, or dishonorable discharge from the military.³⁴

In any case, to paint with a broad brush, U.S. law conceptually divides harassment into different categories, some of which receive protection (or greater protection), and some of which do not. The U.S. version is sometimes termed the "status-based" approach to harassment. The Europeans, on the other hand, typically *have* status-based protection as a later or supplemental guarantee of some form or another, but in terms of actual enforcement and

²⁸ Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 955 (1955) (banning public accommodations harassment on the basis of race, color, religion, national origin, ancestry, age (forty and above), sex, disability, use of a guide animal, or having a GED instead of a high school diploma).

²⁹ See *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding that Title IX prohibits sexual harassment of a transsexual woman).

³⁰ In a Chicago case, the city's Commission on Human Relations found that speaking to a customer in a "derogatory manner" because he was a ticket broker—someone who legally scalped tickets—constituted public accommodations harassment based on "source of income." See Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV. 3 n.79 (citing *In re Ploch*, No. 92-PA-46 (Chi. Comm'n Hum. Rel.)).

³¹ SANTA MONICA MUN. CODE § 4.56.020 (1995).

³² TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 12 (1998).

³³ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 203 (3d Cir. 2001) (holding this code unconstitutional on First Amendment grounds).

³⁴ Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

public imagination, the Europeans view harassment as a non-status-based phenomenon, and focus on "mobbing" or a synonymous concept, like that of "moral harassment" in France.³⁵ Many American scholars (if not most U.S. lawyers and laypersons) are increasingly recognizing the explicit challenge posed by European mobbing laws. James Q. Whitman writes:

The importance of the value of respect in continental law is most familiar to Americans from one body of law in particular: the continental law of hate speech, which protects minorities against disrespectful epithets. But the continental attachment to norms of respect goes well beyond hate speech. Minorities are not the only ones protected against disrespectful epithets on the Continent. Everybody is protected against disrespect, through the continental law of "insult," a very old body of law that protects the individual right to "personal honor." Nor does it end there. Continental law protects the right of workers to respectful treatment by their bosses and coworkers, through what is called the law of "mobbing" or "moral harassment."³⁶

A growing body of literature, from the law and other disciplines, has attempted to explain the reasons for this different approach to harassment taken by the United States and Europe.³⁷ The focus of the present article is quite limited, and the next part (Part II) focuses on only one of those reasons—that the psychic harm from "status-based" harassment (again, harassment based on sex, race, religion, etc.) is more severe than the harm from "non-status-based" or "generic" harassment. Not everyone agrees with

³⁵ See generally, *supra* note 5.

³⁶ Whitman, *Two Western Cultures*, *supra* note 54, at 1164–65. For the most thorough discussion of the historical (and ancient) significance of "honor" and "insult" in European law, see Whitman, *Two Western Cultures*, *supra* note 5, at 1164–71. See also Elena Yanchukova, Comment, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861 (2003); Whitman, *Enforcing Civility*, *supra* note 5; Friedman & Whitman, *supra* note 5.

³⁷ See generally *supra* note 5; see also Susanne Baer, Dignity or Equality?, *Responses to Workplace Harassment in European, German and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 15, at 582; KATHRIN S. ZIPPEL, THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY (2006); Frank Dobbin, *Do the Social Sciences Shape Corporate Anti-Discrimination Practice?: The United States and France*, 23 COMP. LAB. L. & POL'Y J. 829 (2002).

this claim.³⁸ Indeed, many scholars have expressed open skepticism about it. The Article elaborates on a hypothesis: that the dispute could benefit from a distinction between two core emotional responses to harassment, shame and rage. Neither emotion is normally characterized as positively felt, but the claim furthered in Part II is that as a general principle, "status-based" harassment is more likely to generate rage rather than shame, and that shame is a more psychologically harmful emotion. The hypothesis is then rebutted (Part III), but the Article ultimately concludes (Part IV) that the dispute is best bypassed because the free speech advantages of mobbing laws trump other concerns, including those over comparative psychological harm.³⁹

II. THE CLAIM: STATUS-BASED HARASSMENT IS NOT MORE PSYCHOLOGICALLY HARMFUL

A. *The Claim by the Supreme Court*

The Supreme Court clashed over the general question of comparative psychological harm from status-based "fighting words" more than a decade ago in *R.A.V. v. City of St. Paul*.⁴⁰ In particular, Justice Scalia and Justice Stevens fought over the relative emotional trauma caused by racist, sexist, etc., language, as opposed to the damage from communicative assaults that fall outside of such typically protected categories.⁴¹ Justice Scalia's opinion disputed any claim of greater psychological harm from the categories listed in the challenged ordinance. In *R.A.V.*, the City of St. Paul had enacted an ordinance that forbade placing objects, symbols, etc. (specifically including a

³⁸ See discussion *infra* Part III.

³⁹ Quite a lot has been written about the general harms of sexual, racial, and religious harassment and hate speech. Still, no scholarship has elaborated in significant detail on the nature and degree of comparative *psychological* harm posed by mobbing as opposed to "status-based" harassment, and no one has directly addressed the First Amendment advantages of mobbing law, *per se*. This Article initiates an investigation into both issues. Cf. Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL'Y J. 375 ("This study is the first, to the knowledge of the researchers, to empirically examine the potential relations between the incidence of bullying and the everyday, subtly hostile or demeaning experiences of members of ethnic and racial groups in the American workplace.").

⁴⁰ 505 U.S. 377 (1992).

⁴¹ To be clear, they did not speak to the distinction between shame and rage; that hypothesis, which is my own, will be elaborated on below.

burning cross) on private or public property “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁴² A teenage boy was charged with violating the ordinance for burning a cross inside the fenced yard of a black family. The Supreme Court found the St. Paul ordinance facially unconstitutional, but disagreed bitterly over the rationale for doing so. Four members of the court joined with Justice Scalia in holding the ordinance violative of the First Amendment because it was neither content neutral nor viewpoint neutral.⁴³ Justice Scalia wrote:

the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.⁴⁴

Justice Scalia then offered an example to illustrate his point:

One could hold up a sign saying . . . that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would be insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.⁴⁵

The concurring Justices agreed that the ordinance was unconstitutional, but on the alternative grounds that it was overbroad, rather than because of any lack of content or viewpoint neutrality.⁴⁶ Justice Stevens authored one of three minority concurring opinions, arguing that the psychological injuries from

⁴² *R.A.V.*, 505 U.S. at 377.

⁴³ *Id.* at 377–96.

⁴⁴ *Id.* at 391 (emphasis in original).

⁴⁵ *Id.* at 391–92.

⁴⁶ *Id.* at 397 (White, J., concurring).

status-based communication are more severe: "Threatening someone because of her race or religious beliefs may cause particularly severe trauma. . . ." ⁴⁷ And later, Stevens claims:

St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic. ⁴⁸

Justice Scalia directly responded to this point:

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice Stevens suggests that this "fundamentally misreads" the ordinance. It is directed, he claims, not to speech of a particular content, but to particular "injuries" that are "qualitatively different" from other injuries. ⁴⁹

After labeling this distinction mere "wordplay," Scalia continues:

What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. ⁵⁰

Justice Stevens then responds:

The Court contends that this distinction is "wordplay" This analysis fundamentally miscomprehends the role of "race, color,

⁴⁷ *Id.* at 416 (Stevens, J., concurring).

⁴⁸ *Id.* at 424.

⁴⁹ *Id.* at 392 (majority opinion).

⁵⁰ *Id.* at 392–93.

creed, religion [and] gender" in contemporary American society. One need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats.⁵¹

B. The Claim by Legal Scholars

Justice Scalia's view is shared by some legal scholars who have claimed that race or gender-based harassment should not be treated as emotionally exceptional.

David Goldberger agrees with Scalia's analysis:

[I]t is difficult to see how a judge can say, with any sense of objective certainty, that the emotional pain caused by the racist rantings of a neo-Nazi speaking in front of the Skokie Village Hall is automatically more damaging or long-lasting than is the communication that one's spouse wants a divorce because the spouse wants to marry one's best friend.⁵²

In the Skokie litigation, neo-Nazis were allowed to march through an Illinois community (Skokie) with a large Jewish population.⁵³ Although some of Skokie's residents were Holocaust survivors, the court, by declining to grant injunctive relief, explicitly rejected the claims of emotional harm brought by the plaintiffs.⁵⁴ Analyzing the reaction to the Skokie demonstrations, Goldberger suggests that "in many cases the pain from racist, sexist, and ethnically offensive speech may be alleviated by the capacity of offensive speech to illuminate the ugliness of the speaker. This, in turn, makes the speaker the target of criticism and hostility."⁵⁵ Henry Louis Gates, Jr. believes

⁵¹ *Id.* at 434 (Stevens, J., concurring). Justice Stevens is presumably referring to the Los Angeles riots of 1992. See also *id.* at 416 ("Threatening someone because of her race or religious beliefs may cause particularly severe trauma. . .").

⁵² David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165, 1209 (1991).

⁵³ *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir. 1978).

⁵⁴ *Id.* at 1206.

⁵⁵ Goldberger, *supra* note 52, at 1209.

that gutter racial epithets “on many college campuses, to be candid, are more likely to stigmatize the speaker than their intended victim.”⁵⁶

Rosa Ehrenreich concedes that a victim of sexual harassment who is targeted for discriminatory reasons may suffer more, because she is being attacked doubly, as an individual and a woman; but then Ehrenreich also entertains the contrary possibility, that discriminatory harassment

may, instead, diminish her individual suffering, because she may feel better able to brush off the harassment precisely because she knows that nothing she did or could have done would have prevented it; she may feel empowered by her awareness that she is integral to a broader struggle to demand that all women be treated as full persons.⁵⁷

C. Elaborating on the Claim: A Shame/Rage Hypothesis

Although judges and scholars have made the claim that non-status-based harassment is just as (or more) psychologically damaging as status-based harassment, why might this be the case?⁵⁸ The hypothesis this Article seeks

⁵⁶ Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 17, 47 (1994).

⁵⁷ Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 *GEO. L.J.* 1, 19–20 (1999).

⁵⁸ Free speech theory could benefit from a fuller account of the emotional harms from aggressive communication. *But see* R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 *LOY. U. CHI. L.J.* 429 (2003). Fortunately, there is an increasing amount of insightful literature on law and the emotions. *See* MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); Goldberger, *supra* note 52; Eric A. Posner, *Law and the Emotions*, 89 *GEO. L.J.* 1977 (2001). Perhaps lack of awareness of mobbing (until recently) in U.S. legal scholarship is partly a function of the privileged circumstances under which American legal academics work, arguably making them largely immune from the phenomenon (or at least its most damaging effects), including, for example: (1) near total personal control over the schedule, style, and substance (micro-content) of their work; (2) the ready availability of excellent alternative employment options; (3) relatively high salaries and prestige; and of course, for the tenured, (4) lifetime job security. *But see* Michael L. Seigel, *On Collegiality*, 54 *J. LEGAL EDUC.* 406, 416 (2004) (“[P]roblems with collegiality are more prevalent in the academic setting than in other employment spheres, and legal academia appears to experience the phenomenon at its highest levels.”). *But compare* Gravois, *supra* note 20, who argues that the job protection afforded by tenure, and the absence of clear performance indicators, makes mobbing significantly more prevalent in academia.

to explore is rooted in a distinction between the emotional harms from shame and rage. First, if victims of status-based harassment may paradigmatically react with *rage* to harassment (but not shame)—then targets of mobbing may be more likely to experience *shame*. Second, at least according to this hypothesis, *shame* is more psychologically harmful than *rage*.

Is this distinction tenable between the reactions of shame and rage to the two different categories of harassment? *Webster's Dictionary* defines "shame" as "a painful emotion caused by consciousness of guilt, shortcoming, or impropriety" or "a condition of humiliating disgrace or disrepute," and "rage" as "violent and uncontrolled anger."⁵⁹ *Random House* defines "shame" as "the painful feeling arising from the consciousness of something dishonorable, improper, ridiculous, etc., done by oneself or another," and "rage" as "angry fury; violent anger."⁶⁰ Shame and rage exist around a constellation of related emotions. Shame is related to shyness, disgust, contempt, embarrassment, humiliation, and guilt. Rage can be more extreme (fury), or milder (anger, annoyance). It can be ossified powerfully (hate) or ossified mildly (resentment).⁶¹ If we had to place fear within either family, we would put it with shame rather than anger. Indeed, some Australian aborigines used the same word for fear and shame.⁶² It is fear that sometimes keeps us from expressing rage, even allowing it to reach consciousness. Shame is a shrinking, rage an expansion.

In her book-length treatment of shame and disgust in the law, Martha Nussbaum argues that "a basic strategy to counter public shaming of a group is the traditional civil rights strategy of nondiscrimination legislation."⁶³ If this

⁵⁹ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1073, 962 (11th ed. 2003).

⁶⁰ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1758, 1579 (2d ed. unabridged 1987).

⁶¹ See NUSSBAUM, *supra* note 58, at 203–11 (comparing shame and rage); WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 148–49 (1993) (making distinctions between the different emotions within the family in his book-length treatment of humiliation: "Like shame and humiliation, embarrassment is also an emotion of self-attention and self-consciousness. All three suppose some relation to a world in which one's actions, one's appearance, one's very being are being judged. All three are unpleasant and all three figure prominently in the social and psychic mechanisms of social control. . . . If shame's genre is tragedy, and humiliation's is comedy, what could embarrassment be if not also comedy. . . . Humiliation is dark, embarrassment light.").

⁶² Lester R. Hiatt, *Classification of the Emotions*, in AUSTRALIAN ABORIGINAL CONCEPTS 182–87 (Lester R. Hiatt ed., 1978), cited in MILLER, *supra* note 61, at 99–100.

⁶³ NUSSBAUM, *supra* note 58, at 309. On the other hand, other authors have observed that using the law to achieve equality may have a stigmatizing effect. See Christopher A. Bracey, *Race Jurisprudence and The Supreme Court: Where Do We Go From Here?*, 7 U. PA. J. CONST.

is the case, the emotional response to at least some protected category attacks presumably changed over time, as these forms of harassment have lost formal legitimacy through anti-discrimination law. Recall that before sexual harassment was given legal redress, before it was effectively even widely *identified* as a harm by Catharine MacKinnon and others—only relatively recently—it was routinely dismissed as simply an annoyance of working life, or as a kind of boyish pranksterism (unfortunately, of course, it still is in many quarters).⁶⁴ Thus, the countless women (and occasional man) who suffered from sexual harassment before it had been formally recognized were more likely to be suffering from shame and humiliation (and less from anger) than is true today, with the newfound public and legal recognition of the issue.

MacKinnon recently answered her own question as to whether a quarter century of sexual harassment law had changed anything: “The experience has been named, its injuries afforded the dignity of a civil rights violation. . . . Resentment of unwanted sex . . . [is] given more public respect. Women may feel . . . less stigmatized and scared, more like freedom fighters and less like prudes.”⁶⁵ Later she adds that before laws had been enacted, sexual harassment was “an experience of shame for victims that kept them disempowered in the name of protection without protecting them.”⁶⁶ And Abigail C. Saguy, an expert on the comparative approaches to harassment law in France and the United States, argued that because sexual harassment law “is less legitimate in France, victims arguably feel more *shame* about coming forward.”⁶⁷ Indeed, to those of us who were legally and culturally educated over the past couple of decades about the nature and meaning of sexual harassment in the United States, Saguy’s description of the French version proves striking. The French classify sexual harassment with rape, sexual assault, and exhibitionism in their penal code, although there is also a civil

L. 669, 700 (2005) (“Dignitary interest in contemporary race jurisprudence also takes the form of concern over the possible stigmatizing effects of being denoted the ‘beneficiary’ of a racial classification.”).

⁶⁴ See Schauer, *supra* note 15.

⁶⁵ Catharine A. MacKinnon, DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 15, at 673.

⁶⁶ *Id.* at 674; see also Bracey, *supra* note 63, at 669, 671 (“The struggle for racial justice in America, then, is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color. The concepts of dignity and subordination are powerfully linked.”).

⁶⁷ Schultz et al., *supra* note 5, at 168; see also Abigail C. Saguy, *What is Sexual Harassment? From Capitol Hill to the Sorbonne*, 27 T. JEFFERSON L. REV. 45, 48 (2004).

version found in their labor code.⁶⁸ As opposed to the United States, there is no employer liability for sexual harassment, and it is not taken nearly as seriously by human resource departments in French companies, for example. According to Saguy, the French have been reluctant to import American harassment jurisprudence—partly out of a disdain for U.S. cultural imperialism, including what are widely seen in France as hypocritically puritanical attitudes about sex.⁶⁹ The quote Saguy provides from a French woman named Sophie, with twenty years of experience working in French corporations, is especially telling, and my interpretation is that Saguy means it to be representative rather than atypical:

I have never been harassed in the real sense of the term, where a person ends up tyrannizing you. It's true that we are pestered; it's true that there are men who take advantage of the situation and pinch your rear in the elevator, but that's different Where I feel really attacked is when someone puts a knife to my throat and tells me, 'if you don't do it, you'll lose your job.'⁷⁰

But again, for those French women (unlike Sophie) who would want to seek redress for such behavior, the lack of cultural support would imply the likelihood of greater shame on their part, compared to their American counterparts.

Our capacity for shame must be rooted in our evolutionary past, as with all emotions.⁷¹ Paul Gilbert writes:

The evolutionary root of shame is in a self-focused, social threat system related to competitive behavior and the need to prove oneself acceptable/desirable to others. . . . The evolutionary precursors for shame can be traced back to the way all animals must be able to detect and cope with social threats. For many animals, attentiveness to conspecifics that could inflict harm, and are threats to them, is highly adaptive, and social anxiety, flight,

⁶⁸ The French criminalized "moral harassment" (mobbing) in 2002. See Saguy, *supra* note 67, at 47–48.

⁶⁹ *Id.* at 53–54.

⁷⁰ See *id.* at 45–46.

⁷¹ Paul Gilbert, *Evolution, Social Roles and the Differences in Shame and Guilt*, SOC. RES., Winter 2003, available at http://www.findarticles.com/p/articles/mi_m2267/is_4_70/ai_112943741 (internal citations omitted).

or submission/appeasement are salient defenses. Social threats (unlike nonsocial threats) often involve communicating signals that impact on the state of mind of the threatening other(s); for example, a submissive display may be sufficient to stop a more dominate [sic] from seriously attacking a subordinate. Although shame requires a symbolic sense of self, it too is regulated by social threats and automatic defenses to protect the self from threats posed by others. Indeed, there is now evidence that shame can act as an inner warning signal of threats and challenges to the self, with a triggering of automatic defenses--especially desires to escape (flight) and submissive behavior, anger, and concealment.⁷²

But Gilbert acknowledges the enormous significance of the role of historically and culturally specific values in giving meaning to "social emotions" like shame:

The power of shame to "construct" social values and behaviors can be seen in how it affects social interactions. For example, female promiscuity is far more acceptable in, for example, wealthy California than a Taliban-controlled Afghanistan. Divorce is easier in the West than it was 50 years ago, is less shameful, and men are increasingly expected, by law, to provide for offspring. For a thousand years Chinese foot binding, by which the feet of infant girls were broken and bound, thus sentencing them to a life of pain, was regarded as creating attractiveness as marital partners, status, control, and sexual attractiveness. These behaviors clearly do not lie in any innate or genetic process, but emerge from value systems loosely linked to sexual strategies. Importantly, Mao Zedong outlawed foot binding because women with bound feet made poor soldiers or workers. Within 20 years, women with bound feet, who were once esteemed, were now stigmatized as parasites on society.⁷³

⁷² *Id.*; see also Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 658-59 (1997) ("In other words, shame and pride are one part of a larger, biologically driven social structure of status and competition that results from the species' struggle for survival. Shame is simply 'a way of discouraging the repeat of status-reducing behaviors, however status may be defined by a particular social group.'").

⁷³ Gilbert, *supra* note 71; see also Massaro, *supra* note 72, at 658 ("That shame can link up

Gilbert includes homosexuality as another example of culturally imposed shame, because although it is seen as shameful in some cultures, in others (e.g., ancient Sparta), it has been approved of or encouraged.⁷⁴ But the general point is that shame is necessarily a *highly politicized* emotion because if we have violated whatever the contemporary social norms happen to be, evolution has prepared us to naturally feel “prepared for contrition”—the state of low-grade social anxiety or fear that is experienced as shame.

D. Mobbing, Ostracism and Shame

Ostracism and shame play important roles in mobbing theory. Most technical definitions of mobbing do not require a “ganging up” dynamic (to constitute a legal violation, for example), but isolation from a group is a significant element in the overall analysis. For example, for the International Labour Organization (ILO), mobbing “involves ganging up on . . . a targeted employee and subjecting that person to psychological harassment. Mobbing includes constant negative remarks or criticisms, isolating a person from social contacts, and gossiping or spreading false information.”⁷⁵

Academic attention to mobbing highlights the importance of exclusion and isolation. Sociologist Kenneth Westhues defines mobbing as “an impassioned, collective campaign by co-workers to exclude, punish, and humiliate a targeted worker. Initiated most often by a person in a position of power or influence, mobbing is a desperate urge to crush and eliminate the target.”⁷⁶ The word appears in descriptions of animal behavior, especially ornithology, where it describes the behavior of a group of birds attacking a single bird.⁷⁷ Leymann, who is credited with borrowing the term “mobbing” from the field of animal ethology to human workplace behavior, defined it as “hostile and unethical communication, which is directed in a systematic way by one or a few

so variably to external inputs makes Darwinian sense, insofar as this enables the individual to adapt to his or her social surroundings. Consequently, shame’s variability does not necessarily undermine the claim that shame is innate.”).

⁷⁴ Gilbert, *supra* note 71.

⁷⁵ Int’l Labour Org., *When Working Becomes Hazardous: Punching, Spitting, Swearing, Shooting: Violence at Work Goes Global*, WORLD OF WORK, Sept.–Oct. 1998, available at <http://www.ilo.org/public/english/bureau/inf/magazine/26/violence.htm>.

⁷⁶ Kenneth Westhues, *At the Mercy of the Mob*, OHS CANADA, Dec. 2002, at 30–36, available at <http://www.arts.uwaterloo.ca/~kwesthues/ohs-canada.htm>.

⁷⁷ See, e.g., I.G. McLean, J.N.M. Smith & K.G. Stewart, *Mobbing Behaviour, Nest Exposure, and Breeding Success in the American Robin*, 96 BEHAVIOUR 171 (1986).

individuals mainly towards one individual who, due to mobbing, is pushed into a helpless and defenseless position, being held there by means of continuing mobbing activities.”⁷⁸

So, it seems that the European approach to harassment implicitly acknowledges the power of ostracism, usually independent of the categories of gender or race so important to American jurisprudence. In comparing the two approaches, Friedman and Whitman have written:

It *hurts* to be shunned in Europe, and it hurts so much that the law must come in. . . . That does not mean that individual Americans are incapable of thinking about such issues. There is no law of radical legal cultural differences—no legal Sapir-Whorf hypothesis—that holds that the individual is imprisoned in the mental cage created by the law of his country. What it means is that ideas like the theory of mobbing simply do not fall on fertile cultural soil in the U.S. as they do in countries like Sweden, France or Germany.⁷⁹

My own view is that more work needs to be done to determine whether American culture is generally more dismissive of “ostracism” per se as a matter of legal concern; although in at least one area of law, there are results that support Whitman’s argument: in claims for retaliation following allegations of harassment under Title VII, American courts have not been very receptive to ostracism as a sufficiently adverse employment action.⁸⁰ Some

⁷⁸ Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 EUR. J. WORK & ORG. PSYCHOL. 165, 168 (1996), available at <http://www.ste.uji.es/mobbing/LeymannEI.pdf>. Westhues writes about Leymann’s application to adults of the term that had previously been limited to animals and children:

Leymann’s contribution was to document beyond any doubt the same reality among adults, even in the cool, rational, professional, bureaucratic, policy-governed setting of a workplace. The tactics differ. Workplace mobbing is normally carried out politely, without any violence, and with ample written documentation. Yet even without the blood, the bloodlust is essentially the same: contagion and mimicking of unfriendly, hostile acts toward the target; relentless undermining of the target’s self-confidence; group solidarity against one whom all agree does not belong; and the euphoria of collective attack.

Westhues, *supra* note 76.

⁷⁹ Friedman & Whitman, *supra* note 5, at 270 (emphasis added). But see Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006).

⁸⁰ I should be clear that these are not Whitman’s points, but my own. See, e.g., *Marrero v.*

courts have been concerned that holding an employer liable on ostracism grounds might violate the First Amendment right to associate freely.⁸¹

The general relationship between social power and social alliances is much studied and highly interdisciplinary.⁸² Many cultures have employed ostracism as an extreme form of criminal punishment, from the ancient Greeks (who gave us the term from *ostrakismos*), to tribal civilizations like the Pathans of

Goya of Puerto Rico, Inc., 304 F.3d 7 (1st Cir. 2002); *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) ("Because an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action."); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (employment actions that were sufficiently adverse to sustain a retaliation claim include tangible change in duties, or working conditions that constituted a material employment disadvantage or an ultimate employment decision, such as termination, demotion, reassignment, but not merely hostility, disrespect, or ostracism); *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) ("[M]ere ostracism in the workplace is not enough to show an adverse employment decision."). Similarly, ostracism and disrespect by supervisors do not rise to the level of an adverse employment claim. *See, e.g., Manning*, 127 F.3d at 692–93; *see also Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 505 (W.D. Pa. 1988) ("snubbing" by supervisors does not amount to unlawful retaliation). Finally, shunning of plaintiff by co-workers at the direction of a supervisor does not, as a matter of law, rise to the level of an adverse employment action for Title VII purposes. *See Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997); *Miller*, 679 F. Supp. at 505 (plaintiff must show more than occasional unkind words, snubs and perceived slights by defendant's agents to prove adverse employment action).

⁸¹ "The First Amendment prevents the government, *except in the most compelling circumstances*, from wielding its power to interfere with its employees' freedom to believe and associate." *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000) (emphasis in original) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990)).

⁸² *See, e.g., Michael Harris Bond, Culture and Aggression—From Context to Coercion*, 8 PERSONALITY & SOC. PSYCHOL. REV. 62 (2004), available at http://www.leaonline.com/doi/abs/10.1207/s15327957pspr0801_3; Tod Chambers, *Participation as Commodity, Participation as Gift*, AM. J. BIOETHICS, Spring 2001, at 48; Neil Fligstein, *Social Skill and the Theory of Fields*, 19 SOC. THEORY 105 (2001); Robert Paynter, *Historical and Anthropological Archaeology: Forging Alliances*, 8 J. ARCHAEOLOGICAL RES. 1 (2000); Hayagreeva Rao, Calvin Morrill & Mayer N. Zald, *Power Plays: How Social Movements and Collective Action Create New Organizational Forms*, 22 RES. IN ORG. BEHAVIOR 239 (2000), available at <http://webuser.bus.umich.edu/organizations/smo/protected/resources/raomorrillzald.pdf>; Hean Tat Keh & Seong Y. Park, *An Expanded Perspective on Power in Distribution Channels: Strategies and Implications*, 8 INT'L REV. RETAIL DISTRIBUTION & CONSUMER RES. 101 (1998); Marion K. Underwood et al., *An Observational Study of Social Exclusion Under Varied Conditions: Gender and Developmental Differences*, 75 CHILD DEV. 1538 (2004); Kristien Van Laere & Aime Henne, *Social Networks as a Source of Competitive Advantage for the Firm*, 15 J. WORKPLACE LEARNING 248 (2003).

Pakistan and the Slavic tribes of Montenegro.⁸³ The Amish version is translated as “shunning.”⁸⁴ The necessity of alliances, and the dangers of isolation, inform everything from international relations theory to corporate business strategy. In an article discussing, *inter alia*, the biological origins of ostracism as a form of punishment, Judge Hoffman and Professor Goldsmith remind us that

one need not be an anthropologist, an historian, or Amish to know that ostracism is continuously operating in every set of human relations in all cultures. Every time we give our spouse the silent treatment, or send an unruly student to the principal's office, or don't invite one of our co-workers to our usual Friday lunch, we are practicing mild forms of ostracism.⁸⁵

Kipling Williams, an Australian academic and author of an extensive study on ostracism, argues that it is a unique form of aggression because it threatens all four of the fundamental human needs identified in psychological literature: to belong, to control, to maintain high self-esteem, and to buffer against the realization of one's mortality and meaningless existence.⁸⁶ He observes: “The additional feature that explains ostracism's apparent ubiquity and frequency is that sources can employ it without a great deal of effort and in such a way that they can deny that they are doing it.”⁸⁷

Formal and informal social alliances provide structural defenses against mobbing. Membership in peer networks allows retribution through gossip and other norms of social control.⁸⁸ Racial and sexual minorities have written extensively about the use of ostracism as a tool of workplace discrimination—often drawing from their own personal experiences.⁸⁹ Indeed,

⁸³ KIPLING D. WILLIAMS, *OSTRACISM: THE POWER OF SILENCE* 7–8 (2001).

⁸⁴ *Id.*

⁸⁵ Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627, 637 (2004).

⁸⁶ WILLIAMS, *supra* note 83, at 245. “Our sense of connection and belonging is severed; the control we desire between our actions and outcomes is uncoupled; our self-esteem is shaken by feelings of shame, guilt, or inferiority; and we feel like a ghost, observing what life would be like if we did not exist.” *Id.* at 6.

⁸⁷ *Id.* at 245. See also Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151 (2000).

⁸⁸ For a discussion of the evolution of such networks, see ROBIN I.M. DUNBAR, *GROOMING, GOSSIP AND THE EVOLUTION OF LANGUAGE* (1996).

⁸⁹ See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII:*

we might view the growth of Title VII "hostile environment" harassment protection as partially flowing from a recognition of the need to avoid discrimination-based ostracism. In this sense, anti-discrimination law redresses numerical imbalances in workforces so that ostracism on status-based grounds becomes (at least numerically) less possible.

In sum, then, one wonders if European anti-mobbing law recognizes a psychological truth that U.S. harassment law implicitly dismisses: that being in a group, *any* group, is one of the best defenses against harassment occurring in the first place, and if it does occur, it is one of the best emotional defenses against its damaging effects. Mobbing is defined as group harassment of an ostracized individual.⁹⁰ Such an individual is more likely to feel shame than rage, according to mobbing theory.⁹¹ Strong social alliances, whether in the workplace, university, or school, provide a bulwark against feeling shame, and participation in these alliances helps individuals replace shame with the arguably healthier emotion of anger. There is an apparent irony here: the Europeans might see the term "protected group" as redundant for purposes of harassment law, since a group (any cohesive social group—regardless of its composition) is *by definition* afforded greater protection—sociologically, organizationally, and psychologically, if not legally.⁹²

Some Contemporary Influences, 92 MICH. L. REV. 2370 (1994); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002); Pamela J. Smith, *Failing to Mentor Sapphire: The Actionability of Blocking Black Women from Initiating Mentoring Relationships*, 10 UCLA WOMEN'S L.J. 373 (2000).

⁹⁰ See discussion *supra* Part II.D.

⁹¹ See discussion *supra* Part II.C.

⁹² This observation is limited to the institutional setting (workplaces and so on). With respect to speech outside of the workplace harassment context, the American approach cannot generally be stereotyped as "status-based" and the European as "non-status-based." Indeed, it is only because the Europeans lack any real equivalent to our First Amendment, *de facto* if not *de jure*, that they are able to enforce national rules against racial and religious "hate speech" (e.g., public arena speech that inflames "status-based" divisions) to a degree that would be impossible under U.S. free speech law as currently interpreted. See Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 21 (2002) ("The American legal system prohibits hate speech as late as possible—only when an imminent danger of illegal acts exist [sic]. German jurisprudence cracks down on hate speech as early as possible."). See generally John C. Knechtel, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006).

E. Comparing the Damage: Shame v. Rage

Is shame more emotionally damaging than rage? Silvan Tomkins, a pioneer in the study of shame, writes: "While terror and distress hurt, they are wounds inflicted from the outside which penetrate the smooth surface of the ego; but shame is felt as an inner torment, a sickness of the soul."⁹³ Michael Lewis tells us that with shame, "the self is seen as small, helpless, frozen, emotionally hurt."⁹⁴ In the tradition of the Abrahamic religions, shame (not guilt, anger, envy, greed, fear, etc.) is the emotion that begins the very story of humankind. Paradise is a place without shame; before Adam and Eve are expelled from the Garden of Eden, they "were not ashamed."⁹⁵

Most of the attention to shame in legal literature comes from a discussion of shaming penalties, e.g., car bumper stickers that attest to a drunk driving conviction, or publishing names of johns in the local newspaper. Discussing the legitimacy of such penalties, Sharon Lamb distinguishes anger from fear:

In Western society, anger and outrage are more acceptable emotions to individuals than fear because as one experiences anger and outrage, and one has the option to act on those feelings, one often feels powerful. For Westerners, anger and outrage are associated with strength rather than weakness . . . in the United States, one need only look at the last few decades worth of Schwarzenegger movies to understand that anger is action. It is force.⁹⁶

She goes on to say that anger offers superiority and strength: "In experiencing anger, we rarely feel like 'the victim.' In fact, therapy with victims frequently involves getting in touch with one's anger as a form of self-empowerment."⁹⁷

David Goldberger provides an enlightening example of how anger is not recognized as being as harmful as other kinds of emotional reactions—and that plaintiffs (or at least their lawyers) know this when claiming damages:

⁹³ Massaro, *supra* note 72, at 645.

⁹⁴ Michael Lewis, *The Role of the Self in Shame*, SOC. RES., Winter 2003, at 231.

⁹⁵ *Genesis* 2:25 (King James).

⁹⁶ Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression on Condemning and Shaming*, 68 BROOK. L. REV. 929, 937 (2003).

⁹⁷ *Id.* See also Posner, *supra* note 58, at 1979 ("An angry person feels a kind of warmth and agitation. . . .").

[A]nger is easily confused with pain. As a result, an offended listener may be tempted to assert that he has been harmed even though he is instead experiencing anger. This is encouraged by the law's tendency to be more sympathetic to redressing harm than to redressing anger. The distorting impact of an angry desire for retaliation on the assessment of harm is illustrated in the events that preceded the filing of *Hustler Magazine v. Falwell*. During a press interview, the plaintiff Jerry Falwell told reporters that he was riding on an airplane when he first saw the offensive ad parody and that as a result of reading it, he was deeply hurt and incensed. However, the actions that he took following the reading of the parody make him sound more like an angry person than an aggrieved one. He stated that following his reading of the Campari parody, "I landed in Lynchburg, called [attorney] Roy Grutman and said, 'Get him.' " His lawyer responded by filing a lawsuit premised in large part on the claim that Falwell had suffered intentionally inflicted emotional harm.⁹⁸

The case law is mixed, and generally only implicit, when discussing the comparative psychological harm from different negative emotions, an issue that arises, for example, when courts ascertain damage claims. For example, Texas law apparently considers shame more painful than anger:

[T]he term 'mental anguish' implies a relatively high degree of mental pain and distress. It is more than mere disappointment, *anger*, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, *shame*, despair and public humiliation.⁹⁹

Alabama courts have cited *Black's Law Dictionary* for the authority that shame is a more "poignant and painful emotion" than anger.¹⁰⁰

⁹⁸ Goldberger, *supra* note 52, at 1200-01.

⁹⁹ *Gant v. Dumas Glass and Mirror, Inc.*, 935 S.W.2d 202, 209 (Tex. App. 1996) (emphasis added); *see also Phar-Mor, Inc. v. Chavira*, 853 S.W.2d 710, 712 (Tex. App. 1993).

¹⁰⁰ *See, e.g., Volkswagen of Am., Inc. v. Dillard*, 579 So. 2d 1301, 1305-06 (Ala. 1991).

It is also worth recalling a common justification of strong free speech guarantees: the notion of the “safety valve”—that freedom of expression allows for resentments and disagreements to be aired, rather than bottled up to putrefy.¹⁰¹ The safety valve rationale for free speech implicitly prefers rage to shame or humiliation; shame is hidden, silent, dangerous, festering, and private. Rage can be expressed; it is an inherently public emotion, and can be met (with calm tolerance, or counter-rage) when released. When bottled up, rage is dangerous, but when it is bottled up, it is more likely to be entwined with the emotion of shame. Thomas Scheff, who has written of the hidden nature of shame in the context of shaming penalties, claims that discussing (at conferences, for example) shame dynamics as a major factor is difficult “because of the repression and suppression of shame in Western societies.”¹⁰² Scheff adds that “shame is subject to disguise and hiding in modern societies . . . one can feel shame about shame, and shame about that, and so on, without end. This idea that one can be ashamed of being ashamed leads to the concept of continuous loops of shame. . . .”¹⁰³

¹⁰¹ See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME - BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* 18–41 (1992); see also Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternal Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994).

¹⁰² Thomas J. Scheff, *Honor and Shame: Local Peace-Making Through Community Conferences* (Aug. 4, 1997), <http://www.soc.ucsb.edu/faculty/scheff/6.html>.

¹⁰³ Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 106 (1998).

For two millennia, Eurocentric societies have been nourishing values on freedom, individual rights, human dignity, and tolerance. . . . In my lectures on workplace mobbing, I sometimes say there are three basic appetites in a normal person: for food, for sex, and for humiliating somebody else. Our civilization affirms the first two cravings and facilitates their satisfaction. The third craving is taboo [W]e are sometimes gripped by the eliminative impulse, lust to put another down, but our hands are tied by rules protecting human dignity. . . . The result is camouflage, subterfuge, self-deception, denial, disguise, circumlocution, labyrinthine plots—much like the antics of Catholic priests who are overcome by sexual desire in an organization that forbids them to satisfy it. René Girard, arguably today’s most perceptive analyst of the eliminative impulse, calls it the ‘persecutory unconscious.’ . . . Girard describes ‘a new level of cunning,’ wherein we practice ‘a hunt for hunters of scapegoats. Our society’s obligatory compassion authorizes new forms of cruelty.’

Westhues, *supra* note 16, at 1–2. If the imposition of humiliation and shame are hidden, their emotional and social consequences often are as well.

III. THE REBUTTAL: STATUS-BASED HARASSMENT IS MORE PSYCHOLOGICALLY HARMFUL

A. *The Rebuttal by the Supreme Court*

Are the Europeans more psychologically sophisticated in their emphasis on mobbing, instead of on “status-based” harassment? In particular, is there something “qualitatively unique”—to use Justice Stevens’ minority view in *R.A.V.*—about the psychological and other harms from status-based speech that make it less deserving of constitutional protection? If a majority of the *R.A.V.* justices (in a 5 to 4 split) signed on to Scalia’s view that—at least in the “fighting words” context—claims of greater psychological harm from status-based speech were mere “wordplay,” they appeared to reverse their view about the nature of such harm in *Wisconsin v. Mitchell*.¹⁰⁴ In *Mitchell*, the constitutionality of Wisconsin’s enhancement penalty for bias crimes was challenged.¹⁰⁵ Writing for a unanimous court, Rehnquist claimed, “the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to *inflict greater individual and societal harm*. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, *inflict distinct emotional harms on their victims*, and incite community unrest.”¹⁰⁶

The reason given by the Court for requiring content neutrality in *R.A.V.* but not in *Mitchell* was that the former involved government regulation of speech, while the latter involved special treatment of conduct.¹⁰⁷ It is an established principle of First Amendment jurisprudence that conduct receives less constitutional protection than speech, so the Court’s distinction is technically consistent with its earlier rulings on this issue. Yet what does the speech/conduct distinction have to do with the status-based/non-status-based emotional harm distinction? The Court does not elaborate, but it seems incongruous to dismiss the distinction between the two kinds of emotional harms in a speech case (*R.A.V.*) while giving it credence in a conduct case (*Mitchell*). To borrow Scalia’s example in *R.A.V.*, no qualitative difference in emotional harm can be alleged between calling someone a “papist” (which would presumably have been illegal under the St. Paul ordinance) rather than

¹⁰⁴ 508 U.S. 476 (1993).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 487–88 (emphasis added).

¹⁰⁷ *Id.* at 483–87.

an “anti-Catholic bigot” (presumably not illegal).¹⁰⁸ Yet if one uses these same terms in the context of a bias-motivated crime under the Wisconsin statute (say, while engaging in the conduct of punching a victim in the face), why should the emotional harm distinction suddenly become plausible? It is not enough to say that aggressive conduct is itself usually more psychologically damaging than aggressive speech; we would have to assume some kind of multiplier effect, presumably. But if the distinction is null (*R.A.V.*) then any multiplier of such distinction should also be null. In sum, there can only be an inconsistency between Scalia’s position in *R.A.V.* and his view in *Mitchell*—at least with respect to the claim about comparative psychological harm.

The issue of psychological harm from “status-based” harassment was also addressed by the Supreme Court in *Harris v. Forklift Sys., Inc.*¹⁰⁹ Prior to *Harris*, there had been a split in the Courts of Appeal as to whether plaintiffs alleging “hostile environment” harassment under Title VII needed to show psychological injury flowing from the status-based harassment.¹¹⁰ A unanimous Supreme Court resolved the split in *Harris*, holding that no requirement of psychological harm was needed to recover for sexual harassment.¹¹¹ By removing such requirement, however, the Court was not suggesting that psychological harm might not be the consequence of status-based harassment; indeed, it explicitly left open the possibility that such harm could be a part of a showing of “hostile” or “abusive” conduct. Nonetheless, it is difficult to read *Harris* in a way that offers any further clarification of the Court’s view of the comparative psychological harm from status-based attacks. *Harris* surely does not stand for the proposition that status-based harassment is automatically psychologically damaging. Might it be interpreted conversely, to rebut any suggestion that targets of status-based aggression are more emotionally vulnerable to such aggression? Kathryn Abrams has argued that by rejecting the “serious psychological injury” requirement in sexual harassment cases, the Supreme Court in *Harris* wanted to define a victim of sexual harassment as not necessarily “psychologically damaged” or

¹⁰⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992).

¹⁰⁹ 510 U.S. 17 (1993).

¹¹⁰ Noelle C. Brennan, Comment, *Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom*, 44 DEPAUL L. REV. 545 n.298 (1995).

¹¹¹ *Harris*, 510 U.S. at 22 (“Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”).

"compromised."¹¹² Abrams writes: "On a constructive level, the Court projected an image of a victim of sexual harassment—perhaps a victim of sexualized injury more generally—as a woman who is not entirely compromised by her mistreatment, who is capable of acts of self-protection and self-assertion, even in the midst of oppressive treatment."¹¹³ It is worth observing that implicit in Abrams' analysis of *Harris* is the notion that the self-assertion/anger/rage spectrum of emotions is a healthier response to sexual harassment than the shame/fear/humiliation family of emotions.

In any case, if the Supreme Court has not provided a coherent analysis of the comparative psychological harms from status-based harassment, it has been generally reluctant to accept the regulation of (otherwise protected) speech when such regulation is founded solely in a concern over emotional injury.¹¹⁴ In *Chaplinsky v. New Hampshire*, the Court created a "fighting words" exception to the First Amendment when such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹¹⁵ However, most observers believe the first prong of the *Chaplinsky* test—excluding from First Amendment protection language which by its "very utterance inflict[s] injury"—has not survived the test of time.¹¹⁶ That is, the Court appears increasingly willing to tolerate a fair degree of personal psychological harm when free speech principles are at stake. The Court provided a long list of authority to support its holding in *R.A.V.* that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."¹¹⁷ Still, in those cases in which the Court has shown some solicitude for the psychic harm that may flow from speech, it certainly has not explicitly recognized the emotional harms from rage as more significant than the emotional harms from shame, or vice versa. Some unprotected speech relates to concerns of rage rather than shame (fighting words, incitement to violence); other unprotected speech is more likely to involve the emotions of shame or disgust rather than rage (obscenity, child

¹¹² Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 15, at 116–17.

¹¹³ *Id.*

¹¹⁴ See Goldberger, *supra* note 52.

¹¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹¹⁶ Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 509 ("In *Gooding*, as well as in every subsequent fighting words case, the Court disregarded the dictum in which the first prong of *Chaplinsky's* definition was set forth. . .").

¹¹⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992).

pornography);¹¹⁸ and still other forms of provisionally unprotected speech (IIED, invasion of privacy, defamation) can generate shame and/or rage, but the Court has never overtly balanced the relative harms from these two psychological reactions.

B. The Rebuttal by Legal Scholars

Legal scholars have argued that status-based verbal aggression is more harmful. Arguing for an independent tort for racial epithets, Delgado and Stefancic claim that racial insults differ fundamentally from generic insults because of the unique emotional harm they cause victims by conjuring up "the entire history of racial discrimination in this country."¹¹⁹ Delgado asserts that "[r]acial insults, and even some of the words which might be used in a racial insult, inflict injury by their very utterance. Words such as 'nigger' and 'spick' are badges of degradation even when used between friends; these words have no other connotation."¹²⁰ Likewise, Mari Matsuda distinguishes hate speech as having a message that is: (1) of racial inferiority; (2) directed against a historically oppressed group; and (3) persecutory, hateful, and degrading.¹²¹ The pain caused by racist speech depends on a history of racial subordination, according to Matsuda, and "[v]ictims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."¹²² Thomas Grey, who wrote a harassment code for Stanford University that was later held unconstitutional on First Amendment grounds, justified the code's "status-based" protections with the following argument:

¹¹⁸ The Court's test for obscenity in *Miller* defines a prurient interest as a "shameful . . . interest." *Miller v. California*, 413 U.S. 15, 18 (1973).

¹¹⁹ RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 15–16 (1997).

¹²⁰ Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 173–74 (1982), quoted in Goldberger, *supra* note 52, at 1193.

¹²¹ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

¹²² *Id.* at 2336; see also Brendan P. Lynch, *Personal Injuries or Petty Complaints?: Evaluating the Case for Campus Hate Speech Codes: The Argument From Experience*, 32 SUFFOLK U. L. REV. 613 (1999).

[I]n this society at this time, [status-based] characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of *cumulative* discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling. . . .¹²³

Kent Greenawalt writes about the First Amendment protections that might be accorded to insults and epithets:

Although repetition of some personal insults, such as "you fat slob," can undermine self-esteem, the effect of most such insults is contained and dissipates fairly quickly. Epithets and more elaborate slurs that reflect stereotypes about race, ethnic group, religion, sexual preference, and gender may cause continuing hostility and psychological damage.¹²⁴

But Greenawalt goes further and argues that even within a particular protected category (e.g., race and religion), certain epithets are more harmful than others: " 'Honkey hurts a lot less than 'nigger,' and 'WASP' hurts a lot less than 'kike.' " ¹²⁵ Charles Lawrence recounts a story told by one of his students, a gay male from a working-class Irish family in Boston.¹²⁶ This student had been called a "faggot" by a stranger in a subway and "found himself in a state of

¹²³ Thomas C. Grey, *Civil Rights Vs. Civil Liberties: the Case of Discriminatory Verbal Harassment*, J. HIGHER EDUC., Sept.-Oct. 1992, at 81.

¹²⁴ Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 302 (1990).

¹²⁵ *Id.* at 300.

¹²⁶ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 455 (1990).

semi-shock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate rejoinder he was accustomed to making.”¹²⁷ Lawrence then asked the student if he had ever been called a “honkie,” “chauvinist pig” or “mick,” and “[h]e said that he had been called some version of all three and that although he found the last one more offensive than the first two, he had not experienced—even in that subordinated role—the same disorienting powerlessness he had experienced when attacked for his membership in the gay community.”¹²⁸ Charles Lawrence argues that “[t]here is a great difference between the offensiveness of words that you would rather not hear . . . and the *injury* inflicted by words that . . . evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed. . . .”¹²⁹

C. A Rebuttal of the Shame/Rage Hypothesis

It is worth emphasizing again that this Article is not concerned with evaluating the significant non-emotional harms of status-based harassment or “fighting words” or hate speech (that such harassment maintains gender subordination, or is more likely to lead to riotous violence, or worsen social tensions, and so on). But on the issue of psychological harm alone, this part argues that we can rebut the claim that non-status-based harassment is more emotionally harmful, at least based on the shame/rage hypothesis. First, the shame/rage distinction is too imprecise, as a practical matter, because the two emotions are often inextricably intertwined. James Gilligan, who has spent thirty-five years investigating the causes and prevention of various forms of violence in prisons and mental institutions, writes about the relationship between shame and violent rage:

[T]he basic psychological motive, or cause, of violent behavior is the wish to ward off or eliminate the feeling of shame and humiliation—a feeling that is painful and can even be intolerable and overwhelming—and replace it with its opposite, the feeling of pride. . . . When people suffer an indignity, they become

¹²⁷ *Id.*

¹²⁸ *Id.* at 455–56.

¹²⁹ *Id.* at 461; see also Hugh Butts, *The Mask of Humanity: Racial/Ethnic Discrimination and Post Traumatic Stress Disorder*, 30 J. ACAD. PSYCHIATRIC L. 336, 339 (2002).

indignant (and may become violent); our language itself reveals the link between shame and rage.¹³⁰

Humiliated fury is then a major cause of aggression. Because of the overlap between shame and rage, and because either can remain unexpressed, or expressed with social costs and consequences, comparing relative psychological harms risks either futility or triviality.

It is also physiologically simplistic (and inaccurate) to characterize rage as, *prima facie*, a medically healthier emotion than shame. Anger has been linked to coronary heart disease and hypertension, for example, even when it is expressed rather than bottled up.¹³¹ Terry Smith provides a comprehensive and detailed summary of the unique impact of racial discrimination on the physical and psychological health of its victims, much of it based on relatively recent scientific findings.¹³² Drawing on studies in the fields of medicine, psychology, and sociology, Terry Smith argues that legal scholarship must "reconceptualize discrimination in more realist terms, attempting to make the law as vigilant against subtle discrimination as it purportedly is against overt bias."¹³³

In addition, more than the emotions of shame and rage are involved in both status-based and generic harassment. Emotion theorists generally agree on the identification of the following fourteen universal, major emotions: joy, grief, fear, anger, hatred, pity or compassion, envy, jealousy, hope, guilt, gratitude, shame, disgust, and love.¹³⁴ Is rage/anger the major consequence of status-based harassment? Consider that emotion theory suggests that it is possible for

¹³⁰ James Gilligan, *Shame, Guilt and Violence*, SOCIAL RESEARCH, Winter 2003, available at http://www.findarticles.com/p/articles/mi_m2267/is_4_70/ai_112943739 ("I have been struck by the frequency with which I received the same answer when I asked prisoners . . . why they assaulted or even killed someone. Time after time, they would reply "because he disrespected me" or "he disrespected my visitor [or wife, mother, sister, girl-friend [sic], daughter, etc.]." . . . Whenever people use a word so often that they abbreviate it, it is clearly central to their moral and emotional vocabulary. But even when they did not abbreviate it, references to the desire for respect as the motive for violence kept recurring.").

¹³¹ Robert A. Anderson, *Aspects of Anxiety and Anger in Regard to Coronary Artery Disease*, TOWNSEND LETTER FOR DOCTORS AND PATIENTS, Aug.-Sept. 2004; Susan A. Everson et al., *Anger Expression and Incident Hypertension*, PSYCHOSOMATIC MED., Nov.-Dec. 1998, at 730-31; Murray M.ittleman et al., *Triggering of Acute Myocardial Infarction Onset by Episodes of Anger*, 92 CIRCULATION 1720 (1995).

¹³² Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

¹³³ *Id.* at 552.

¹³⁴ NUSSBAUM, *supra* note 58, at 23.

a target of conduct potentially actionable as “quid pro quo” sexual harassment to feel every single one of the major emotions (though some might be felt as barely conscious, others painfully deep) in response to an offer by a supervisor to exchange job benefits for sexual services: joy (at the prospect of the benefits, before realizing they were attached to the services); grief (at recalling the historical suffering of sexual exploitation of women); fear (at losing one’s job, or of being sexually assaulted); anger (for being viewed as a sexual object rather than a worker); hatred (towards an employer that allows abusive supervisors to remain); pity (towards the supervisor and/or towards oneself); envy (towards others at work not so burdened as oneself and/or towards the supervisor); hope (for a less exploitative working environment, for oneself, for women, for humanity); guilt (for not immediately challenging an abuse of authority); gratitude (that it could be worse); shame (at the indignity of the sexualized offering); disgust (towards the supervisor); love (towards oneself for the strength to endure and resist), and so on. Some of these emotions are more culturally acceptable than others, of course, and some of them would be rare in “quid pro quo” cases—but again, theoretically possible.¹³⁵ Most importantly, rage is not the inevitable (or even largest) emotional consequence of such harassment.

After amendments in 1991 to the Civil Rights Act (CRA), compensatory damages for emotional harm have been allowed in Title VII cases.¹³⁶ Under the CRA of 1991, in cases of “unlawful intentional discrimination,” recovery may be granted for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” Plaintiffs have claimed a range of specific emotional harms as a consequence of status-based harassment under the CRA.¹³⁷ These include “embarrassment and humiliation,”¹³⁸ being “highly upset,”¹³⁹ being “emotionally scarred,”¹⁴⁰ and being “very embarrassed, very belittled, very disgusted, hopeless, about two inches high.”¹⁴¹

¹³⁵ Presumably, if one felt *only* joy, or jealousy, for example, the requirement in Title VII sexual harassment law that offers be “unwelcome” would unlikely be met.

¹³⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

¹³⁷ See Lewis R. Hagood, *Claims of Mental and Emotional Damages in Employment Discrimination Cases*, 29 U. MEM. L. REV. 577 (1999).

¹³⁸ Walker v. MacFrugals Bargains, Closeouts, Inc., 66 Fair Empl. Prac. Cas. (BNA) 1085 (E.D. La. Dec. 9, 1994).

¹³⁹ Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1252 (6th Cir. 1985).

¹⁴⁰ Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 940 (5th Cir. 1996).

¹⁴¹ Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 809 (5th Cir. 1996) (internal

The range of psychological reactions in non-status-based harassment claims also includes a complex brew of emotions, of which shame and humiliation may play minor, or non-existent, roles. Although non-status-based harassment is not recognized under Title VII, analogies are available in claims for emotional harm in cases alleging the intentional infliction of emotional distress. Comment j to Section 46 of the Restatement 2d of Torts for IIED includes within emotional distress "all highly unpleasant mental reactions, such as fright, horror, grief, *shame*, humiliation, embarrassment, *anger*, chagrin, disappointment, worry, and nausea."¹⁴² In South Dakota, jury instructions defining "emotional distress" have included most of this same list of emotions, although (for reasons unstated) they add "mortification," but drop "nausea" and "chagrin."¹⁴³

We can also make the common sense observation that people exchange barbs and epithets with each other in an infinite variety of contexts, and if we define "harassment" in its broadest sense as a kind of assaultive communicative act, we would realize that the vast majority of such harassment has nothing to do with status-based categories. Where would we find the best examples of such harassment? Consider the language that (1) spouses, friends, or enemies use when they are arguing; (2) parents use when they scold their children; (3) automobile drivers use against other drivers who anger them; (4) impatient restaurant patrons use when waiters disappoint them, and so on *ad infinitum*. The target of such aggressive language may react with all sorts of emotions (including shame and rage, of course). Is it plausible that along the shame/rage continuum, status-based attacks are more likely to lead to rage rather than shame, because of an arguable psychological strength gained from group solidarity—whether actual or symbolic? Perhaps, but the issue of the content of the harassment will often be dwarfed by the particular emotional makeup of the target (temperamental sensitivity to slights, etc.) and the social context (presence of onlookers, nature of relationship between the aggressor and target, etc.) in which the harassment was communicated.

So, to summarize, how does all this relate to the justification for mobbing laws? If an implicit assumption of the European approach to harassment is that a non-status-based approach (mobbing) rests in part upon recognition of the particular emotional damage (shame) that victims experience, then does the above rebuttal diminish this justification? If shame is no worse than rage in

quotation marks omitted).

¹⁴² RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (emphasis added).

¹⁴³ *Maryott v. First Nat'l Bank*, 624 N.W.2d 96, 109 (S.D. 2001).

our context, and there is insufficient evidence that victims of racial or sexual harassment suffer more from rage than shame, does the European approach lose force? Yes, but again, *only* with respect to the shame/rage hypothesis, which is only one of the many issues in any comparative argument.¹⁴⁴ In any case, my intention is to throw out a trump card in the next part and argue that the First Amendment must dominate any dispute over the relative psychological harm from status-based harassment.¹⁴⁵

IV. MOBBING AND FREEDOM OF SPEECH

This Part switches gears and asserts that mobbing laws are preferable because they avoid the free speech problems inherent in a status-based approach. But it is important to stress that a mobbing-centered approach by no means *eliminates* harassment protection for certain categories.¹⁴⁶ A choice is not necessary between offering redress for “status-based” harassment, and offering no protection at all. Much—even most, in some contexts—mobbing takes a “status-based” form, so these categories would come under a mobbing umbrella. Moreover, as some European laws have done, mobbing legislation might, in its most egregious forms, be enacted in the United States to create criminal penalties. Such potential criminal penalties would apply equally (or perhaps even more easily) in cases of sexual and racial mobbing. So a mobbing scheme could in limited cases be *more* punitive than existing protection against status-based harassment. What should make a prohibition on mobbing uncontroversial is that a status-neutral approach does not involve a zero-sum game. That is, moving from a “status-based” to a “status-neutral” approach enlarges the pie rather than leads to battles over the size of slices—and in this way should be less divisive than “status-based” fights over

¹⁴⁴ See *supra* note 5.

¹⁴⁵ If a decision were necessary, I would hazard the guess that the hypothesis can be successfully rebutted. That is, assuming an empirical test could precisely measure comparative emotional harm, I would predict that status-based harassment is, as a general rule, both quantitatively worse and qualitatively unique on the issue of psychological harm.

¹⁴⁶ A notable exception is quid pro quo sexual harassment, as opposed to hostile environment harassment. In the former, sexual favors are requested as part of an employment decision by someone in a supervisory position (“sleep with me or you’re fired”). Quid pro quo harassment should unquestionably be actionable under some form of redress, but it is arguably a form of extortion or coercion—even if reasonably felt as harassment—and so fits uncomfortably into a “mobbing” framework. See Gertrud M. Fleming & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U.P.A.L. REV. 1069 (1999); Hager, *supra* note 24.

issues such as legislative redistricting, affirmative action, or minority set-asides.¹⁴⁷ A larger pie in this context is likely a less expensive pie as well, in terms of both internal and external economic savings.¹⁴⁸

Moreover, enacting mobbing prohibitions in no way requires that existing status-based, anti-discrimination legislation be made status-neutral. In fact, it would be absurd to make anti-discrimination laws generic—for on what grounds is discrimination even possible if not in the form of *some* kind of category or status? In other words, if an employer was forbidden from discriminating *on any grounds*, such employer could not make any hiring or promotion decisions at all. But this same absurdity points to the historical mistake of tying legal redress for harassment (which is about dignity) to anti-discrimination legislation (which is about equality). As Mark Hager has convincingly argued at length, “[d]iscrimination law as an anti-harassment weapon is morally and legally confused, dubious in effectiveness, and deeply troubling in its unintended consequences.”¹⁴⁹ Yet, although harassment should be legally divorced from discrimination, the continued enforcement of, for example, Titles VI, VII, IX, the Americans with Disabilities Act,¹⁵⁰ and other status-based, anti-discrimination laws would not be unrelated as a practical matter to the prevalence of status-based harassment. For example, the very existence of anti-discrimination legislation may serve as formal recognition that no shame is attached to a certain status, as Nussbaum has suggested.¹⁵¹ Moreover, by increasing the numbers of certain groups in employment sectors where they are underrepresented, the chances of mobbing occurring (through ostracism and isolation) are reduced.¹⁵² Rosa Ehrenreich, who favors a more expansive understanding of harassment, has written about the dilution caused by our current approach of combining discrimination law with harassment law:

¹⁴⁷ Yamada, *supra* note 11, at 507–08.

It is understandable and laudable that, given the history and continuing experience of discrimination and difference in America, scholars are alert to attempts to dilute or minimize the importance of these critical issues. However, speaking as someone who remains actively involved in fighting discrimination and bias, I believe there is plenty of room in our public and scholarly discourse about the workplace to include bullying along with status-based mistreatment.

¹⁴⁸ See, e.g., Coleman, *supra* note 5.

¹⁴⁹ Hager, *supra* note 24, at 376.

¹⁵⁰ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990).

¹⁵¹ NUSSBAUM, *supra* note 58.

¹⁵² See *supra* note 89.

Title VII was enacted primarily to remedy discrimination against members of groups that had historically been excluded from equal access to social, political, and economic power. While a formalistic interpretation of what it means to be discriminated against on the basis of sex may satisfy linguists, it undermines the goals of Title VII. Title VII was designed to prevent women, along with members of certain other disadvantaged groups, from facing disproportionate barriers to workplace success—it was not designed to protect men in the workplace from the abusive behavior of other men.¹⁵³

For Ehrenreich, then, it follows that disentangling harassment law from discrimination law permits us to simultaneously recognize the possibility of harm from non-status-based harassment, without diminishing the reality of historical discrimination against particular groups or within certain categories. But the point elaborated on below is that mobbing prohibitions—ironically, because they are of European origin—better satisfy American constitutional requirements.

A. Content-Neutrality

Content-neutrality is the most important First Amendment advantage of mobbing prohibitions over most existing attempts to regulate harassment in the United States. A content-based government regulation is one that depends on the message being communicated, and is presumptively invalid.¹⁵⁴ In *R.A.V.*, the Court reiterated the rationale for content neutrality as “rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”¹⁵⁵ Because mobbing prohibitions are content-neutral, rather than

¹⁵³ Ehrenreich, *supra* note 5, at 62.

¹⁵⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). See also *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991); *Boos v. Barry*, 485 U.S. 312 (1988); *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

¹⁵⁵ *R.A.V.*, 505 U.S. at 387 (quoting *Simon & Schuster*, 502 U.S. at 116); *Leathers v. Medlock*, 499 U.S. 439, 448 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383–84 (1984); *Consol. Edison Co.*, 447 U.S. at 536; *Mosley*, 408 U.S. at 95–98.

limited to certain categories of harassment (sex, race, religion, etc.), such prohibitions should be preferred on constitutional grounds.¹⁵⁶

In educational settings, status-based approaches to harassment have been explicitly held unconstitutional on content and viewpoint-based First Amendment grounds.¹⁵⁷ The same has not been true for the private employment context, but as the U.S. Court of Appeals in *DeAngelis v. El Paso Municipal Police Officers' Ass'n* observed:

Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults,

¹⁵⁶ The claim about mobbing prohibitions being “content-neutral” should not be interpreted to suggest that Europeans have not also enacted status-based harassment prohibitions. Indeed, every country in Europe also has status-based, anti-harassment legislation (on the books at least). Friedman & Whitman, *supra* note 5, at 243. But specific anti-mobbing laws are best defined as lacking content specificity in the American sense. For articles (in English) illustrating the relative content-neutrality of some of these European laws, see generally David C. Yamada, *Workplace Bullying and the Law: Towards a Transnational Consensus?*, in BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 399 (Stale Einarsen et al. eds., 2003); ABIGAIL SAGUY, WHAT IS SEXUAL HARASSMENT?: FROM CAPITOL HILL TO THE SORBONNE (2003); Guerrero, *supra* note 5; Rachel A. Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT'L L.J. 625 (2005); Coleman, *supra* note 5, at 261–62.

¹⁵⁷ See, e.g., *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206 & n.6 (3d Cir. 2001) (Alito, J.) (citation omitted).

But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.

... Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an “hostile environment”—and thus come within the ambit of anti-discrimination laws—precisely because of its sensitive subject matter and because of the odious viewpoint it expresses Most commentators including those who favor and oppose First Amendment protection for harassing speech, agree that federal anti-discrimination law regulates speech on the basis of content and viewpoint.

Id.

pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.¹⁵⁸

Judge Edith Jones, writing for a unanimous Fifth Circuit in *DeAngelis*, went on to state: “Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court’s offhand pronouncements are unilluminating.”¹⁵⁹ The “offhand pronouncements” that Judge Jones alludes to are dicta from *R.A.V.*, in which Justice Scalia unconvincingly tried to protect Title VII hostile environment harassment from his own ruling in *R.A.V.*, by adding this comment:

[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.¹⁶⁰

Yet this statement—although legitimate enough as a claim about how a majority of the Supreme Court currently envisions the reach of the First Amendment—is merely a tautology about the Court’s recognition of a distinction between conduct and expression; it fails to address the mess underlying the tautology. After all, it is the impact of the communication on its target that hostile environment law seeks to regulate, and such harassment is commonly carried out in the form of “pure” speech. Quite a few commentators have argued that the majority opinion in *R.A.V.* must be seen as constitutionally hostile to Title VII harassment law;¹⁶¹ indeed, one such

¹⁵⁸ 51 F.3d 591, 596–97 (5th Cir. 1995).

¹⁵⁹ *Id.* at 597 (citation omitted).

¹⁶⁰ *R.A.V.*, 505 U.S. at 389–90 (citations omitted).

¹⁶¹ For a thorough critique of this dictum in *R.A.V.*, see Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL’Y & L. 127, 210–11 (1996).

commentator was no less than Justice White himself, who wrote in his *R.A.V.* concurrence that Justice Scalia's majority opinion "glosse[d] over the . . . regulation governing hostile working environment, which reaches beyond any 'incidental' effect on speech."¹⁶²

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, as First Amendment scholar Frederick Schauer writes:

Fourteen years after *Meritor*, the situation looks quite different. Hostile environment claims are now routinely met with First Amendment defenses, and indeed the entire concept of hostile environment sexual harassment is equally routinely challenged, by commentators and pundits even if less often in the courts, as an infringement of the First Amendment rights of the managers and employees whose verbal and pictorial conduct has created the hostile environment.¹⁶³

Robert Post has claimed that to the extent that sexual harassment laws involve infringements of dignity (as opposed to equality), they "appear to raise some of the same First Amendment concerns as do the dignitary torts," such as defamation, intentional infliction of emotional distress, and invasion of privacy.¹⁶⁴ Post argues that *New York Times v. Sullivan* (and its progeny) changed the view that the abusive communication regulated by these torts should be considered conduct, rather than speech, at least within the realm of "public discourse."¹⁶⁵ Now, 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 (although, as Post agrees, it has elements thereof). Consequently, *mobbing* prohibitions should survive First Amendment challenge—even in cases of mobbing involving only speech. But eliminating content-specific (and *de facto* viewpoint-specific) workplace speech regulations is now necessary to adapt to this broader view of the free speech guarantees. In fact, because of their

¹⁶² *R.A.V.*, 505 U.S. at 410.

¹⁶³ Schauer, *supra* note 15, at 352.

¹⁶⁴ Robert Post, *Sexual Harassment and the First Amendment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 15, at 389.

¹⁶⁵ *Id.*

content-neutrality, prohibitions on mobbing qualify under First Amendment doctrine as “time, place, and manner” regulations, which are valid if they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹⁶⁶

B. Vagueness and Overbreadth

A regulation is facially overbroad if there is “a likelihood that the statute’s very existence will inhibit free expression” by “inhibiting the speech of third parties who are not before the Court.”¹⁶⁷ *Saxe* found a school district’s harassment code unconstitutional on First Amendment grounds, holding that “[t]o render a law unconstitutional, the overbreadth must be ‘not only real but substantial in relation to the statute’s plainly legitimate sweep.’”¹⁶⁸ *Kingsley Browne* has highlighted the vagueness and overbreadth problems of Title VII hostile environment law:

A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of “harassment” leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression.¹⁶⁹

Moreover, because of employer liability under Title VII, the chilling effect is exacerbated because employers have a powerful incentive to substantially overregulate the speech of their employees.¹⁷⁰

Several substantive and procedural alternatives are available to reduce these problems with overbreadth and vagueness: (1) requiring that the harassment be “directed at” or “targeting” a victim;¹⁷¹ (2) adding a “malice” component;¹⁷²

¹⁶⁶ *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

¹⁶⁷ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)).

¹⁶⁸ *Id.* at 214 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

¹⁶⁹ *Kingsley Browne, The Silenced Workplace*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 15, at 399.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 409–10 (calling the targeted standard an unquestionable improvement, but still problematic, and preferring to eliminate employer liability). It is worth observing that Supreme

(3) requiring evidence of physical or psychological harm;¹⁷³ (4) shifting to a tort-based model;¹⁷⁴ (5) limiting recovery to "one-to-one" abuse;¹⁷⁵ (6) eliminating employer liability;¹⁷⁶ (7) adding a specific notice requirement (and necessarily barring liability for first offences); (8) and so on.¹⁷⁷ These options have been discussed already in some detail by their proponents (and others). Naturally, none of these alternatives are without disadvantages of their own. Significantly, however, by redefining the boundaries for recovery under a mobbing framework—in the pursuit of free speech principles—we would not necessarily be reducing the viability of legitimate status-based claims compared to their viability under existing law. And that is because the theoretical collage of Title VII "hostile environment" law is not only over-inclusive (and thereby often constitutionally troublesome), it is also under-inclusive. Clever harassers may simply target women for harassment, but carefully avoid any mention of sex or gender, making a plaintiff's case much more difficult to prove. Alternatively, supervisors can avoid the "discrimination because of sex" requirement of Title VII by targeting men and women for equally offensive sexual harassment; or supervisors can be equally abusive to all employees, on matters both sexual and non-sexual.¹⁷⁸

Court case law since *Chaplinsky* has also emphasized that "fighting words" be directed at an individual.

¹⁷² Model legislation drafted by Yamada, "The Healthy Workplace Bill" to address non-status-based harassment, includes, *inter alia*, requirements of both "malice" ("the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification") and the presence of "tangible" (physical or psychological) harm. I hasten to add that Yamada would keep existing status-based "hostile environment" Title VII harassment law, and his model legislation, the Healthy Workplace Bill, would be supplemental. That is, he does not envision his bill (which has been drafted for state level enactment) as a replacement to current law. See Yamada, *supra* note 11.

¹⁷³ *Id.* at 499. Note that some circuits required evidence of psychological harm before *Harris* eliminated it.

¹⁷⁴ See Hager, *supra* note 24; Mark M. Hager, *Harassment and Constitutional Tort: The Other Jurisprudence*, 16 HOFSTRA LAB. & EMP. L.J. 279, 320 (1999) [hereinafter Hager, *Harassment and Constitutional Tort*].

¹⁷⁵ See Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 313 n.49 (2000).

¹⁷⁶ Browne, *supra* note 169, at 409–10.

¹⁷⁷ For a recent proposal for a model EU-wide mobbing definition, see Guerrero, *supra* note 5, at 495.

¹⁷⁸ Although the decisions are inconsistent for these scenarios, strictly speaking, none of them should constitute "discrimination because of sex." See Browne, *supra* note 169; Kyle F. Mothershead, Note, *How the "Equal Opportunity" Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 VAND. L. REV. 1205 (2002).

In this context, it is easier to understand why U.S. status-based harassment regulations suffer from constitutional challenges of vagueness and overbreadth: the *stated purpose* of the existing legal rules (to compensate, deter, and punish *discrimination* against certain groups) has been confused with the typically *unstated purpose* of the rules' common application (to compensate, deter, and punish individual *cruelty*, sometimes calculated, often gratuitous). The *Oncale* decision, in which the Court recognized same-sex harassment as a form of discrimination, represents well the outcome of such confused thinking.¹⁷⁹ After *Oncale*, many commentators realized the decision inevitably led to theoretical confusion over results in the variety of subsets of plaintiffs and offenders: compare the outcomes with a gay perpetrator/gay victim, gay perpetrator/straight victim, straight perpetrator/straight victim (teasing and offensiveness), straight perpetrator/gay victim (hostility and persecution).¹⁸⁰

So just what is it that we want to compensate for, deter, and punish? 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. Statutory interpretation depends upon an investigation into language and/or legislative purpose. But since linguistic imprecision is inevitable in the highly contextual and subtle arenas in which harassment occurs, legislative purpose must be particularly well-defined.¹⁸¹ Prohibitions against mobbing achieve this improved precision of legislative purpose.

It might be useful in a concluding paragraph to bring together some of the disparate and subtle points raised in this Article. I began by posing the (increasingly common) question "why does the U.S. approach to harassment law differ so much from that of other countries (and in particular, the Europeans)?" Although I urge any interested reader to review the growing

¹⁷⁹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁸⁰ Hager, *Harassment and Constitutional Tort*, *supra* note 174, at 320.

¹⁸¹ The definition of "malice," for example, is likely to be necessarily vague, but not in a way that is as harmful to the boundaries of free speech as the vagueness of current doctrine.

literature that offers a variety of explanations for this difference, I intentionally focus in the first parts of the Article on a rather narrow hypothesis. That hypothesis is multidimensional: first, it wonders whether "status-based" harassment ("you girls belong in the kitchen not the boardroom") causes more emotional pain than "generic" harassment ("you are a totally unqualified moron"). If we *could* answer that question with great certainty, it seems to me we might then favor the European or American version with more confidence. But as we saw, jurists and academics disagree on this first point, although sometimes without deep analysis. So I hypothesized that perhaps the difference between the legal treatment of harassment ("mobbing," with which the Europeans are primarily concerned and "status based," with which U.S. law is concerned) is rooted in a fundamentally different emotional response to the content of the two forms of aggression. Perhaps victims of status-based harassment primarily feel rage, whereas targets of generic harassment ("mobbing") primarily feel shame. As a corollary to this point, it seemed natural to wonder whether rage could be said to be somehow "worse" than shame, or vice versa. Again, I presented arguments for and against these points, but my purpose was not so much to resolve them, as it was to add some new observations to the scholarly and legislative conversation (particularly in the comparative law arena) on these issues. But then, in the fourth and final part, my position gained more certainty, as I argued that fundamental free speech principles (based on a consistent and honest view of their primacy under contemporary U.S. First Amendment jurisprudence) argued strongly in favor of the European approach to harassment, regardless of one's views of the issues presented in the first three parts of the Article.