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## CONCEPTUALIZING WORKPLACE BULLYING AS ABUSE OF OFFICE

Galia Schneebaum\*

*Workplace bullying—also known as moral or psychological harassment—increasingly captures public and legal attention. Yet its conceptualization as a legal wrong is in its infancy. The anti-discrimination theory utilized for sexual harassment regulation is inappropriate for workplace bullying since this phenomenon is not limited to the victimization of disadvantaged social groups. Existing theoretical frameworks consider bullying either through a notion of dignity, or as a health and safety issue. But these frameworks, it is submitted, are inadequate to capture the wrongdoing involved in bullying and provide little guidance for policymakers in designing anti-bullying regulation. Focusing on the most common type of workplace bullying—supervisor-subordinate harassment—this Article offers a novel legal theory, based on Max Weber’s conception of the authority of office. Borrowing the vocabulary of anti-corruption regulation (particularly, the offense of oppression), the article suggests that workplace bullying takes place “under the color of office” and involves the misuse of organizational power. This conceptualization opens up new possibilities for designing bullying prohibitions and helps to draw a brighter line between what should be prohibited and what should be allowed. At the same time, this conceptualization draws our attention to the profound challenges involved in anti-bullying regulation, in ways that have been largely overlooked so far.*

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## I. INTRODUCTION

The phenomenon of workplace bullying—also referred to as workplace harassment, psychological harassment, moral harassment, or mobbing<sup>1</sup>—growingly captures the attention of sociologists, psychotherapists, occupational psychologists, business ethicists, lawyers and policymakers world-wide.<sup>2</sup> While there is no universally-accepted definition for workplace

1. For the multiplicity of terms in this field, see David C. Yamada et al., *Workplace Bullying and Mobbing: Definitions, Terms, and When They Matter*, in 1 WORKPLACE BULLYING AND MOBBING IN THE UNITED STATES 3, 9–14 (Maureen Duffy & David C. Yamada eds., 2018) [hereinafter *Definitions, Terms, and When They Matter*]. This Article uses the terms bullying and harassment interchangeably. Moreover, while it may be possible to consider sexual harassment as a sub-category of workplace harassment, this Article deals exclusively with non-sexual harassment. In fact, as I show henceforth, a major challenge of conceptualizing non-sexual workplace bullying is that it cannot rely on anti-discrimination theory, which serves as the main framework for conceptualizing sexual harassment.

2. Academic literature will be referenced throughout the article. Outside the academia, workplace bullying has been discussed with growing interest in professional and media reports. See, e.g., Heidi Lynne Kurter, *Employers: 24% of Employees Feel You're Ignoring Workplace Bullying. Here's How to Stop It and Be the Leader Your Team Needs*, FORBES (June 30, 2020, 5:49 PM), <https://www.forbes.com/sites/heidilynnekurter/2020/01/30/employers-24-of-employees-feel-youre-ignoring-workplace-bullying-heres-how-to-stop-it-and-be-the-leader-your-team-needs/?sh=2e56b42620a9> [https://perma.cc/K5W8-8T9J]; Eric Bachman, *The Differences Between Workplace Bullying and a "Hostile Work Environment,"* NAT'L L. REV.

bullying, most definitions refer to it as repeated mistreatment of an employee by one or more co-workers, often involving psychological (rather than physical) abuse, humiliation, or attempts to undermine or sabotage an employee's work.<sup>3</sup> Typical scenarios include verbal abuse, shouting, excessive monitoring, overly harsh and unjustified criticism, threats or intimidation.<sup>4</sup> Studies conducted in recent years point to workplace bullying as a pervasive problem in the U.S., the U.K., Europe and elsewhere (Israel, Canada, South Africa).<sup>5</sup> Prevalence rates vary among different studies,<sup>6</sup> but it is generally accepted that workplace bullying is not a marginal phenomenon that can be ignored or trivialized.<sup>7</sup> Additionally, there are studies documenting not only the psychological harm associated with bullying but also its economic consequences, not only to the bully's direct victims, but also to the workplace, its productivity, and the economy as a whole.<sup>8</sup>

The identification of workplace bullying as a social problem originates in the pioneering work of Swedish social psychologist Heinz Leymann<sup>9</sup> some

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(Aug. 17, 2020), <https://www.natlawreview.com/article/differences-between-workplace-bullying-and-hostile-work-environment> [https://perma.cc/PL9Q-2W5J]; Abby Young-Powell, 'I Was Sworn at and Told I Was Useless': Law's Problem with Bullying at Work, *GUARDIAN* (May 15, 2019, 8:55), <https://www.theguardian.com/law/2019/may/15/i-was-sworn-at-and-told-i-was-useless-laws-problem-with-bullying-at-work> [https://perma.cc/2RER-KMKV].

3. See, e.g., *What is Workplace Bullying?*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org> [https://perma.cc/EB4D-QGJJ] (defining workplace bullying as "repeated, health-harming mistreatment by one or more employees of an employee: abusive conduct that takes the form of verbal abuse; or behaviors perceived as threatening, intimidating, or humiliating; work sabotage; or in some combination of the above").

4. GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 18–33 (1st ed. 2000).

5. See Jordi Escartin, *Insights into Workplace Bullying: Psychosocial Drivers and Effective Interventions*, 6 *PSYCH. RSCH. & BEHAV. MGMT.* 157, 157–58 (2016).

6. For example, a European Union survey indicated that 9% of workers in Europe had been subjected to bullying in the 12 months prior to the survey. C.W. von Bergen et al., *Legal Remedies for Workplace Bullying: Grabbing the Bully by the Horns*, 32 *EMP. REL. L.J.* 14, 16 (2006). Another study reported that up to 90% of employees in the USA suffered abuse in the workplace at some time. HARVEY A. HORNSTEIN, *BRUTAL BOSSES AND THEIR PREY* xiii (1996). See generally Dieter Zapf et al., *Empirical Findings on Prevalence and Risk Groups of Bullying in the Workplace*, in *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE* 75 (Ståle Einarsen et al. eds., 2d ed. 2011) (providing additional data about the prevalence of abuse in the workplace).

7. Crystal Raypole, *How to Identify and Manage Workplace Bullying*, *HEALTHLINE MEDIA* (Apr. 29, 2019), <https://www.healthline.com/health/workplace-bullying> [https://perma.cc/PSK2-2G34].

8. In the United States, the damage is estimated in billions of dollars annually to U.S. corporations. See, e.g., Bennett J. Tepper, *Abusive Supervision in Work Organizations: Review, Synthesis, and Research Agenda*, 33 *J. MGMT.* 261, 262 (2007).

9. See generally Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 *EUR. J. WORK & ORGANIZ. PSYCH.* 165 (1996) (providing an explanation of the development

thirty years ago. It was only later that joint coalitions of social activists, lawyers, and scholars began calling for the adoption of legal tools to tackle the problem.<sup>10</sup> This effort has been productive, at least in certain jurisdictions; for example, in several European countries,<sup>11</sup> workplace bullying is currently actionable as a civil wrong.<sup>12</sup> In some jurisdictions, it is even prohibited as a criminal offense.<sup>13</sup> The entry of workplace bullying to the legal domain is usually discussed in a pragmatic manner—law is perceived as an instrument to tackle a social problem.<sup>14</sup> This Article assumes that much conceptual work is yet to be done to define workplace bullying as a legal wrong. Even if workplace bullying leads to problematic, possibly devastating effects, the identification of harm is insufficient to warrant legal intervention since, in order to prevent harm, the law must engage with the question of responsibility.<sup>15</sup> Put another way, to prohibit workplace bullying legally, we must explicate not only its harmfulness but also its wrongfulness.

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of scholarship regarding mobbing in the workplace). In France, psychologist Marie-France Hirigoyen published another influential book on moral harassment. MARIE-FRANCE HIRIGOYEN, *STALKING THE SOUL: EMOTIONAL ABUSE AND THE EROSION OF IDENTITY* (Helen Marx trans., Helen Marx Books 2004) (1998).

10. For example, consider the cooperation between legal scholar David Yamada and psychologists and activists Gary and Ruth Namie in the United States. David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & C.R. L. REV. 329, 330–31 (2013) [hereinafter *Emerging American Legal Responses to Workplace Bullying*].

11. In the United States, the situation is different: while there have been efforts to advance anti-bullying legislation, they have been largely unsuccessful so far. David C. Yamada, *Workplace Bullying and the Law: U.S. Legislative Developments 2013-15*, 19 EMP. RTS. & EMP. POL'Y J. 49, 51 (2015).

12. In the United Kingdom, courts have interpreted the Protection from Harassment Act 1997, which was originally designed to tackle personal stalking, to apply to workplace bullying. See *Green v. DB Group Services (UK) Ltd.* [2006] EWHC 1898 (QB). In Sweden, the Victimization at Work Ordinance (1993) imposes on employers a duty to take measures to prevent workplace bullying. For discussion of the Swedish legislation, see David C. Yamada, *Workplace Bullying and the Law: Emerging Global Responses*, in BULLYING AND HARASSMENT IN THE WORKPLACE, *supra* note 6, at 474.

13. In France, the Social Modernization Act (2002) proscribes moral harassment (the French wording for bullying) as a tort and as a criminal offense. See Loic Lerouge, *Moral Harassment in the Workplace: French Law and European Perspectives*, 32 COMPAR. LAB. L. & POL'Y J. 109, 111–19 (2010).

14. See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 536 (2000) [hereinafter *The Phenomenon of "Workplace Bullying"*].

15. Chandra Davis, *Workplace Bullying: States Are Taking Action*, EMP. L. SOL. (June 7, 2019), <https://www.theemploymentlawsolution.com/retaliation/workplace-bullying-states-are-taking-action/> [https://perma.cc/Q6GL-F33N].

Notwithstanding some success in promoting anti-bullying regulation,<sup>16</sup> the contemporary legal system in many jurisdictions suffers significant deficiencies,<sup>17</sup> including stagnation and inhibition in fostering initiatives,<sup>18</sup> which reflect a suspicion that bullying regulation might lead to frivolous litigation and abuse of process.<sup>19</sup> While certainly fed by opposition from employers' interest groups,<sup>20</sup> such concerns are profoundly exacerbated by a conceptual ambiguity underlying workplace bullying. Under this obscurity, we find it difficult to delineate the boundaries between offensive bullying and legitimate conflict in the workplace, or to tell the difference between the adverse consequences of workplace bullying and other stress-related problems that are linked to the workplace and are not considered to be legally wrongful.

The purpose of this Article is to offer a new direction for conceptualizing workplace bullying as a legal wrong. As acknowledged by many, the starting point of this inquiry is the basic misfit between workplace bullying and the anti-discrimination framework utilized for sexual harassment regulation.<sup>21</sup> Workplace bullying as a phenomenon is not limited to disadvantaged social groups.<sup>22</sup> As observed by David Yamada, the premier legal expert on workplace bullying in the United States, anti-bullying regulation requires a status-blind legal framework.<sup>23</sup> Contemporarily, workplace bullying is

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16. See generally Sandra P. Burga de las Casas, *Psychological Harassment in the Workplace, and the Right to Work in Dignity: A Comparative Review of the Laws in Colombia, Peru, United Kingdom, and the United States*, 25 ILSA J. INT'L & COMPAR. L. 465, 466–67 (2019), for a recent comparative study of legal initiatives to tackle workplace bullying.

17. For example, even in the United Kingdom, where workplace bullying has been recognized as an actionable legal wrong through the Protection from Harassment Act 1997, the contemporary state of the law has been recently described as seriously deficient. See generally Keith Patten, *Law, Workplace Bullying and Moral Urgency*, 47 INDUS. L.J. 169 (2018) (pointing out the deficiencies of the Protection from Harassment Act 1997).

18. In the United States there have been attempts, advocated by Professor David Yamada, to promote anti-bullying regulation in the state level through the "Healthy Workplace Bill." But, so far, only a handful of states have passed laws. David C. Yamada, *The American Legal Landscape: Potential Redress and Liability for Workplace Bullying and Mobbing*, in 2 WORKPLACE BULLYING AND MOBBING IN THE UNITED STATES, *supra* note 1, at 413, 418 [hereinafter *The American Legal Landscape*].

19. *Id.* at 421.

20. *Id.*

21. E.g., Patten, *supra* note 17, at 183.

22. According to Harthill, bullying occurs across all occupations, races, and genders. Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 256 (2008). A more recent survey, conducted by the Workplace Bullying Institute (WBI) in the United States, found that 60% of bullying victims are women, but women are also perpetrators of bullying. Gary Namie & Ruth Namie, *Risk Factors for Becoming a Target of Workplace Bullying and Mobbing*, in 1 WORKPLACE BULLYING AND MOBBING IN THE UNITED STATES, *supra* note 1, at 53, 57.

23. *The Phenomenon of "Workplace Bullying," supra* note 14, at 509, 514–15.

discussed under two conceptual headings: health and safety, and dignity.<sup>24</sup> The health and safety framework essentially analogizes bullying to physical injury, and it conceives bullying as an occupational hazard that needs to be minimized through legal intervention.<sup>25</sup> The dignity-based theory of bullying, which is common in Europe (including the U.K.), fundamentally understands bullying as an act of humiliation and thus frames it as an offense to dignity.<sup>26</sup> The following analysis suggests that both theories fail to capture the wrongfulness of workplace bullying. Instead, I offer a different theory based on the sociology of workplace authority relations. It also draws inspiration from abuse-of-authority offenses in criminal law (particularly the offense of *official oppression*).

The principle notion guiding the study of workplace bullying has been that such conduct, while typically not physically violent, is wrongful because it humiliates the victim.<sup>27</sup> This Article relies on this notion but argues that workplace bullying is not wrongful *merely* because it is humiliating. Rather, we must pay attention to the fact that the most common type of bullying takes place in workplace authority relations—performed by a workplace supervisor toward a subordinate employee.<sup>28</sup> This characterization of workplace bullying is largely overlooked in current legal scholarship. Furthermore, authority relations within the workplace have generally been neglected in the legal regulation of the workplace. As Elizabeth Anderson shows in a recent influential book,<sup>29</sup> such disregard is hardly a coincidence. It reflects the common perception of the workplace as a site of free interaction and transaction among equal human beings, who (supposedly) enjoy freedom of contract and choose employment “at will.”<sup>30</sup> However, Anderson observes, portraying the workplace as an arena of freedom by celebrating the rights of employees to end the contract of employment is much like saying that: “Mussolini was not a dictator, because Italians could emigrate. While emigration rights may give governors an interest in voluntarily restraining their power, such rights hardly dissolve it.”<sup>31</sup> Put another way, the modern

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24. *Id.* at 521–22.

25. See discussion *infra* Section II.A.

26. See discussion *infra* Section II.B.

27. E.g., Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 73–74 (2001).

28. *Definitions, Terms, and When They Matter*, *supra* note 1, at 18–19 (observing that “[s]urveys covering workplace bullying in America consistently show supervisors and bosses as the most likely aggressors by a significant margin over peers and coworkers, with subordinates coming a distant last”).

29. ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017).

30. *Id.* at 53.

31. *Id.* at 55.

workplace is an arena of rule and government, even if employees enjoy mobility in entering or terminating employment.<sup>32</sup>

Modern labor laws barely assume seamless equality in labor relations and do recognize structural power discrepancies.<sup>33</sup> In doing so, however, they regulate mostly the economic terms of employment, concentrate on points of entry (hiring) and exit (firing), and focus almost exclusively on the relationships between employers—the owners of the means of production—and employees.<sup>34</sup> In reality, power relations within the workplace are not restricted to the employer-employee dyad. Following the Industrial Revolution, economic enterprises typically employed mechanisms of centralized power to achieve efficient management and enhance production.<sup>35</sup> Thus, most workplaces today embrace a web of interpersonal authority relations, which empower not only employers but also accord employees with power and authority over other employees.<sup>36</sup> Against the backdrop of a traditional neglect of hierarchical power relations within the workplace, the emerging anti-bullying regulation puts a spotlight on such relationships. Such regulation, moreover, assumes that the power embedded in authority positions within the workplace should be regulated by the state, rather than left at the mercy of self-regulation. Put another way, employers should not be free to decide if, and to what extent, to regulate internal authority positions as they see fit.

The following analysis draws on the work of a prominent social thinker and political theorist—Max Weber—to rethink the conceptualization of workplace bullying as a legal wrong.<sup>37</sup> Relying on Weber's account of authority as a form of power, particularly his conception of the "authority of office," the following analysis further borrows the legal vocabulary of the offense of oppression to suggest that workplace bullying takes place under "the color of office" and involves the oppressive misuse of organizational power.<sup>38</sup> Conceptualizing workplace bullying as abuse of authority opens up new possibilities for designing bullying prohibitions and helps to draw a brighter line between what should be prohibited as bullying and what should be allowed or left for managerial discretion within the workplace. At the same

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32. *Id.* at 41.

33. Guy Davidov & Brian Langille, *Introduction to THE IDEA OF LABOUR LAW* 1, 4 (Guy Davidov & Brian Langille eds., 2011).

34. *Id.* at 58–61.

35. *Id.* at 65.

36. Anderson thus refers not only to employers as exercising government, but also to managers who routinely exercise discretionary authority in the workplace. *Id.* at 67.

37. See Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 369 (2016), for a previous study utilizing Weberian theory for the conceptualization of sexual abuse criminal offenses.

38. *Id.* at 370–74.



time, this new perspective invites a more realistic appreciation of the profound challenges involved in judging workplace bullying.

This Article continues as follows. Part II introduces the existing theoretical frameworks for conceptualizing workplace bullying, considers their advantages, and points to their shortcomings. Part III develops the abuse of office conceptualization based on Max Weber's theory of the authority of office and on the analogy between workplace bullying and the offense of official oppression. It exemplifies the utility of the suggested framework by surveying and analyzing an array of legislative bills, statutory definitions, and case law from various jurisdictions, mainly the U.S. and Israel. Israel proves to be a useful test subject for conducting a conceptual analysis of workplace bullying due to the country's recent judicial and legislative initiatives that have led to a significant development of this area of law.<sup>39</sup> Lastly, Part IV considers the possible implications of the suggested theoretical framework for the design of anti-bullying regulation. Particularly, it advises a distinction between two types of bullying—overt and covert bullying—and suggests that each category requires a different method of legal analysis.

## II. CONTEMPORARY CONCEPTUALIZATIONS OF WORKPLACE BULLYING

It would seem logical that the United States, the birthplace of anti-harassment regulation,<sup>40</sup> would also be a forerunner in cracking down on workplace bullying. But that is not the case.<sup>41</sup> The differences between sexual harassment and workplace bullying, which is sometimes described as *non-sexual harassment*, may provide an explanation for the lack of regulation against workplace bullying in American law.<sup>42</sup> It may also account for the limited success of such initiatives elsewhere.<sup>43</sup> Yamada noted that while sexual harassment laws help protect discriminated social groups, this framework is not appropriate for workplace bullying because it is not limited to behavior against a particular group.<sup>44</sup> Therefore, the option of relying on current anti-discrimination laws—such as the Civil Rights Act of 1964, on which the regulation of sexual harassment is anchored in the U.S.<sup>45</sup>—was

39. See *infra* notes 199–206 and accompanying text.

40. See *1. A Brief History of Harassment*, ATRAIN EDUC., <https://www.etrainedu.com/content/1-brief-history-harassment> [<https://perma.cc/Q6GA-FHW8>].

41. See *id.*

42. Valerie Cade, *Workplace Bullying vs. Harassment: What You Need to Know*, BULLY FREE AT WORK, <https://www.bullyfreeatwork.com/workplace-bullying-vs-workplace-harassment-the-real-damage-you-need-to-know/> [<https://perma.cc/SDE3-H5X8>].

43. de las Casas, *supra* note 16, at 480.

44. *The Phenomenon of "Workplace Bullying," supra* note 14, at 478.

45. Civil Rights Act of 1964, § 7, 42 U.S.C. §§ 2000e *et seq.* (1964).

largely rejected<sup>46</sup> and the search was on to find other doctrinal and conceptual frameworks.<sup>47</sup>

The legal study of workplace bullying is in its early stages of development and has not yet achieved the degree of conceptual analysis and reflection that is obtainable for sexual harassment.<sup>48</sup> The theoretical foundations for considering workplace bullying as a legal wrong are usually not addressed in a direct manner in the literature.<sup>49</sup> Existing accounts have typically assumed that workplace bullying is wrongful, and have concentrated their efforts in locating—sometimes, inventing<sup>50</sup>—proper legal mechanisms to redress the issue and afford victims with the protection they deserve.<sup>51</sup> Nevertheless, it is possible to recover from those existing accounts two core frameworks for conceptualizing bullying as a legal wrong. The following discussion addresses their main features and critically assesses their adequacy for conceptualizing workplace bullying as a legal wrong.

#### A. *The Safety Framework*

One option is to view workplace bullying as a safety issue.<sup>52</sup> Thus, in the American context, researchers have considered the application of the Federal Occupational Safety and Health Act (OSHA) to address workplace bullying.<sup>53</sup> A health and safety framework has also been considered in the U.K.<sup>54</sup> and in

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46. *The Phenomenon of “Workplace Bullying,”* *supra* note 14, at 515. Yamada’s proposed legislative model does include certain elements of sexual harassment jurisprudence, such as the terminology of hostile environment. *Id.* However, the missing element of sex in workplace bullying allowed only for a partial and limited analogy and drove Yamada to design a new legislative scheme for addressing workplace bullying outside the anti-discrimination model. *Id.* at 523. In the United Kingdom, the Equality Act of 2010 prohibits harassment which is related to a “protected characteristic”—such as age, race, gender, disability and so on. *Your Rights Under the Equality Act of 2010*, EQUAL. & HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/advice-and-guidance/your-rights-under-equality-act-2010> [https://perma.cc/Y4HF-TZBB]. The definition of harassment under the Equality Act is thus consistent with anti-discrimination conceptions but is unable to cover harassment which is not directed to any specific social group. *See id.*

47. *The Phenomenon of “Workplace Bullying,”* *supra* note 14, at 524.

48. *Id.* at 478.

49. *Id.*

50. *Id.* at 491–93.

51. *Id.*

52. Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1251 (2010).

53. de las Casas, *supra* note 16, at 482; Harthill, *supra* note 52, at 1251–56, 1264–78.

54. de las Casas, *supra* note 16, at 478 (discussing health and safety legal frameworks, such as an employer’s common law duty of care, in the U.K. context).

Europe,<sup>55</sup> where general health and safety legislation, or common law offenses, have been discussed as possibly applicable to workplace bullying, though not originally designed for that specific purpose.<sup>56</sup>

Under the safety framework, workplace bullying is perceived as a phenomenon with clear (and problematic) consequences, and its wrongfulness is conceptualized through its harmfulness.<sup>57</sup> Safety regulation is essentially intended to prevent or minimize occupational harm.<sup>58</sup> The aspects of bullying that are emphasized under the safety framework are therefore those of tangible, provable harm.<sup>59</sup> Reference in this context is often made to the high health costs incurred by workplace bullying.<sup>60</sup> Moreover, the implicit assumption in safety-based arguments is that mental harms—which are typically involved in bullying—are analogous to physical injury, which has traditionally been the subject of health and safety regulation.<sup>61</sup> Employers, it is submitted, should be held responsible for all risk-creating practices within the workplace, including offensive conduct by employees, and they must act to prevent or at least minimize them.<sup>62</sup> The Healthy Workplace Bill (HWB), a model legislative bill promoted in the US by Yamada, thus defines bullying as “subject[ing] [an] employee to abusive conduct that causes physical harm, psychological harm, or both,”<sup>63</sup> and imposes strict liability on employers for

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55. Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 BOS. COLL. INT’L & COMPAR. L. REV. 477, 477 (2004).

56. de las Casas, *supra* note 16, at 478; Guerrero, *supra* note 55, at 478.

57. Harthill, *supra* note 52, at 1256–63.

58. *Id.* at 1264–65.

59. *Id.* at 1297–1300.

60. *Id.* at 1261–63.

61. See de las Casas, *supra* note 16, at 478–79. Another example for the stated analogy between mental and physical injuries may be found in the petition of the Association for Civil Rights in Israel to join as an Amicus Curiae to the appeal of the state in the case of Mani Naftali. See Brief for Ass’n for Civil Rights in Israel as Amici Curiae Supporting Respondent at 55–56, CivA (National Labor Court) 23325-03-16 State of Israel v. Naftali, Nevo Legal Database (Nov. 9, 2016) (Isr.). The petition states that:

The employer’s duty, recognized in case law, to provide a fair and safe working environment begins with physical matters - working in a secure space that does not expose the worker to safety hazards. It is the employer’s duty to provide the employee with an air-conditioned or properly heated space. The duty to provide options for evacuation, the provision of times for eating and rest during the shift and more. *Along with physical security, the employer also has the duty to ensure that the workers are not exposed to an environment that harms their lives and dignity.*

*Id.* (emphasis added).

62. See de las Casas, *supra* note 16, at 488.

63. *The American Legal Landscape*, *supra* note 18, at 416. Yamada stresses the potential harms of workplace bullying, such as post-traumatic stress disorder, autoimmune diseases caused by mental stress, etc. *Id.*

actionable bullying behavior by their employees.<sup>64</sup> Under a health and safety approach, moreover, a major goal of legal regulation is achieving ex-ante prevention, rather than ex-post compensation.<sup>65</sup> The law, under this approach, is mainly a mechanism intended to minimize future injuries.<sup>66</sup>

There are, however, several drawbacks to viewing workplace bullying as a safety issue. The first problem with the safety framework is that, it tends to require proof that psychological injury has led to quantifiable disfunction to allow compensation.<sup>67</sup> While such requirement may help to narrow the scope of responsibility or to pacify those who fear massive litigation, it also seems too confining and restrictive: it leaves many instances of wrongdoing unattended and many possible victims unprotected.<sup>68</sup> Another major difficulty with the safety framework is that it fails to distinguish between bullying and other stress-related problems in the workplace.<sup>69</sup> Attributing responsibility to the employer as an efficient risk minimizer, the question arises as to why responsibility should be limited to bullying and not to a host of other stress-causing conditions in the workplace, such as heavy workload, tight schedules, and so-on. To conclude the two previous points centered on stress-related harms, the safety framework seems both under and over inclusive.

### B. *The Dignity Framework*

Dignity is the second conceptual heading that has served to conceptualize bullying.<sup>70</sup> This framework seems, on the face of it, suitable for workplace bullying and is the prevailing model in Europe.<sup>71</sup> When considering Continental Law's historical occupation with the right to dignity, especially after World War II, it is no surprise that the European legal conceptualization

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64. *Id.* It should be noted, however, that the HWB does not fit squarely within a health and safety framework, as it combines elements borrowed from sexual harassment jurisprudence (mainly the concept of a hostile work environment).

65. See *The Phenomenon of "Workplace Bullying,"* *supra* note 14, at 492. Yamada thus observes, in relation to the HWB, that "[t]he most important objective is the prevention of workplace bullying. The law should encourage employers to use preventive measures to reduce the likelihood of bullying. If bullying is prevented, then workers and employers alike benefit, and litigation is reduced. In short, everyone wins." *Id.*

66. See *id.*

67. Joan Squelch & Robert Guthrie, *The Australian Legal Framework for Workplace Bullying*, 32 COMPAR. LAB. L. & POL'Y J. 15, 37–38 (2010); see Harthill, *supra* note 52, at 1279.

68. See *id.* at 1298; Squelch & Guthrie, *supra* note 67, at 37.

69. See Harthill, *supra* note 52, at 1260–61; Squelch & Guthrie, *supra* note 67, at 16.

70. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 243 (2003). See Harthill, *supra* note 22, at 250.

71. See Harthill, *supra* note 22, at 250; Friedman & Whitman, *supra* note 70, at 242.

of workplace bullying turned to this tradition and drew inspiration from it.<sup>72</sup> What is surprising is the adoption of the dignity-based approach in the U.K.,<sup>73</sup> despite the conspicuous absence of a jurisprudential doctrine focused on dignity in the British Islands.<sup>74</sup> Even in the legal literature of the United States, where the dignity-based approach was ultimately unfavored, it was not overlooked.<sup>75</sup>

The prevalence of the conceptualization of workplace bullying rooted in personal dignity can be traced to several characteristics, which I detail below. I also show how the dignity-based discourse cannot afford adequate conceptualization for workplace bullying. However, at this stage, it is worthwhile to dwell on the reasons behind the relative success of this approach, which can illuminate important aspects of the legal regulation of workplace bullying.

The dignitary approach to workplace bullying focuses on the insult, or lack of respect, that is conveyed through the bully's conduct towards his or her target.<sup>76</sup> Unlike sexual harassment, workplace bullying is not discriminatory in nature but rather a form of "humiliation of another person, treating another person as an object to be used."<sup>77</sup> Moreover, unlike the safety model, the wrongfulness of bullying is not derived from its harmful consequences but rather it is embedded in the act itself—a humiliation conveyed either by explicit words or implicitly reflected in nonverbal gestures or course of conduct.<sup>78</sup>

Another important feature of the dignity-based theory is that it views workplace bullying as the injury of one person by another: an injury that results from individual behavior and leads to individual injury.<sup>79</sup> Therefore, the theory of dignity allows, and some may say necessitates, the imposition of personal liability on the bully.<sup>80</sup> The imposition of personal liability does not

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72. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 664 (2008).

73. The legal regulation of workplace bullying in the United Kingdom was accompanied by a publicized campaign titled "Dignity at Work." For a description of the campaign from a critical perspective, see generally Frank Furedi, *Bullying: The British Contribution to the Construction of a Social Problem*, in HOW CLAIMS SPREAD: CROSS-NATIONAL DIFFUSION OF SOCIAL PROBLEMS 89 (Joel Best ed., 2001).

74. See Harthill, *supra* note 22.

75. See, e.g., Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 16 (1999).

76. See Friedman & Whitman, *supra* note 70, at 253–54.

77. See *id.* at 251.

78. See *id.* at 249.

79. See Patten, *supra* note 17, at 187.

80. The Protection from Harassment Act 1997, which is considered the main route for redressing workplace bullying in the United Kingdom, holds the harasser personally liable for the harassment. See *id.* The act imposes both civil and criminal liability. *Id.*

preclude the imposition of liability on the employer as a legal personality. In this case, the liability of the employer will be derived from that of the bully through doctrines like vicarious liability.<sup>81</sup> This is an important distinguishing feature between dignity and safety as two possible frameworks for the conceptualization of workplace bullying; while a safety framework commonly views the employer as a primary source of liability (often perceived as the “cheapest cost avoider”), the dignity theory establishes a legal rivalry between two employees—the bully and the victim.<sup>82</sup>

A key advantage of the dignity-based discourse is that it allows the conceptualization of the wrongfulness embedded in non-physical injury.<sup>83</sup> Thus, proponents of the dignity-based approach often insist that the theory can go beyond the protection of bodily integrity which has been the focus of traditional legal protections.<sup>84</sup> As Rosa Ehrenreich observed: “Modern law embraces the concept of ‘dignitary harm,’ a harm that injures ‘personality interests’ rather than one’s physical well-being.”<sup>85</sup> Moreover, even in cases of workplace bullying with tangible consequences—such as absence from work due to depression, post-trauma, or terminating employment due to the victim’s inability to remain in the hostile environment—the dignity-based theory does not limit itself to situations where these outcomes can be quantified.<sup>86</sup> The dignitary conception of workplace bullying perceives humiliation<sup>87</sup> as the core of bullying and sees it as an injustice in and of itself, even if no other damage has been shown.<sup>88</sup>

The dignitary approach’s primary difficulty is that it focuses almost exclusively on humiliation and assimilates bullying to insult.<sup>89</sup> Although the right to dignity can be interpreted in many ways and may be imbued with diverse meanings,<sup>90</sup> the word “dignity,” at least in the workplace, is understood to be the opposite of humiliation.<sup>91</sup> Legal systems, however, often

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81. In the landmark *Majrowski* case in the United Kingdom, the House of Lords ruled that The Protection from Harassment Act gave rise to vicarious liability on the employer in case of workplace harassment. *Majrowski v. Guy’s and St. Thomas’ NHS Trust* [2006] UKHL 34, [2005] EWCA (Civ) 251 (appeal taken from Eng.).

82. See Friedman & Whitman, *supra* note 70, at 249; Maryam Omari, *Towards Dignity and Respect at Work: An Exploration of Bullying in the Public Sector* (Jan. 18, 2007) (Ph.D. dissertation, Edith Cowan University) (on file with Edith Cowan University Research Online).

83. See Friedman & Whitman, *supra* note 70, at 252, 269; Omari, *supra* note 82, at 2.

84. See Friedman & Whitman, *supra* note 70, at 252, 269; Omari, *supra* note 82, at 1–2.

85. Ehrenreich, *supra* note 75, at 22.

86. See Friedman & Whitman, *supra* note 70, at 252; Omari, *supra* note 82, at 48–49.

87. For an argument linking the right to dignity to the right not to be humiliated, see AVISHAI MARGALIT, *THE DECENT SOCIETY* 39–40 (Naomi Goldblum trans., 1996).

88. *Id.*

89. See Friedman & Whitman, *supra* note 70, at 253–54; Omari, *supra* note 82, at 13, 29.

90. For an excellent review, see Tatjana Hornle, *Criminalizing Behaviour to Protect Human Dignity*, 6 CRIM. L. & PHIL. 307–25 (2012).

91. See MARGALIT, *supra* note 87, at 43–44.

find it difficult to prohibit humiliation as such.<sup>92</sup> First, being humiliated is a subjective experience; while one person might feel offended, another person might not have the same reaction.<sup>93</sup> Subjective experiences, it is generally assumed, should not guide objective standards of justice and are insufficient to justify the attribution of legal responsibility.<sup>94</sup> Secondly, perceiving bullying as humiliation portrays the act of bullying as a message—a form of speech communicated from speaker to hearer.<sup>95</sup> However, this type of conceptualization immediately raises the concern that to defend the humiliated party, we must sacrifice the harasser's freedom of speech.<sup>96</sup> Since the dignitary approach to bullying is essentially understood as a form of speech, and since freedom of speech is highly valued in liberal democracies, many jurisdictions are reluctant to place limitations on speech and to prohibit bullying.<sup>97</sup>

Bearing in mind the difficulties with both the safety-based and dignity-based conceptualizations, I now offer a new direction for conceptualizing workplace bullying as a legal wrong. The suggested conceptualization treats a central feature of bullying which is missing in existing legal accounts—namely, that most bullying cases involve top-down harassment and are perpetrated by a supervisor towards a subordinate employee.<sup>98</sup> Statistics aside, the paradigmatic case that comes to mind whenever one considers the phenomenon of workplace bullying is supervisor or “boss” harassment.<sup>99</sup>

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92. Fisk, *supra* note 27, at 73.

93. See MARGALIT, *supra* note 87, at 9.

94. A significant criminal law literature discusses the problems of prohibiting “offense.” Lindsay Farmer, *Disgust, Respect, and the Criminalization of Offense*, in CRIME, PUNISHMENT, AND RESPONSIBILITY 273, 275 (Rowan Cruft et al. eds., 2011). As Joel Feinberg famously defined it, offense is a non-violent act that generates disliked mental states (such as disgust, embarrassment, or anxiety) at the hearer. *Id.* The discussion of offense often refers to the problems of criminalizing offensive expressions in terms of the liberal commitment to toleration and freedom of speech. *Id.*

95. See Jessica R. Vartanian, *Speaking of Workplace Harassment: A First Amendment Push Toward a Status-Blind Statute Regulating “Workplace Bullying,”* 65 ME. L. REV. 175, 185 (2012).

96. *Id.* at 184–85.

97. See *id.* at 184–86.

98. According to Tepper, “75% of incidents of workplace bullying are perpetrated by hierarchically superior agents against their subordinate targets.” Tepper, *supra* note 8, at 267. Harthill similarly mentions that bullying occurs between supervisors, co-workers, or clients, but studies indicate that the bully is most frequently a supervisor in the workplace. Harthill, *supra* note 22, at 256. Similar data appears in Dina Maria Smit’s thesis, containing a comprehensive literature review on workplace bullying. Dina Maria Smit, *Bullying in the Workplace: Towards a Uniform Approach in South African Labour Law* (Jan. 2014) (Legum Doctor thesis, University of the Free State) (on file with University of the Free State KopsieScholar Repository).

99. See, e.g., Jacquelyn Smith, *How to Deal with a Bullying Boss*, FORBES (Sept. 20, 2013, 3:01 PM), <https://www.forbes.com/sites/jacquelynsmith/2013/09/20/how-to-deal-with-a-bullying-boss/?sh=772aa6203d37> [<https://perma.cc/EE3V-UDBF>].

Therefore, the conceptualization of workplace bullying as a legal wrong should assign a central role to authority relations and to the issue of abuse of power. The following analysis situates the discussion of workplace bullying within a larger understanding of authority positions in modern organizations—within what Weber referred to as *offices*.

### III. SUGGESTED CONCEPTUALIZATION: WORKPLACE BULLYING AS ABUSE OF OFFICE

#### A. *The Workplace as a Social Institution*

Under the framework of dignity, bullying is perceived as a phenomenon of pathological interpersonal relations, in which one party humiliates and victimizes another.<sup>100</sup> Yet the workplace should not be understood as a web of interpersonal relationships. Granted, people constantly interact with one another in the workplace, and in this sense, they may be described as having relationships. But this individualistic account fails to capture the institutional dimension that is crucial to the workplace as a locus of professional as well as personal relationships. Workplace bullying, I argue, is not an act that *happens to take place* in the workplace; it is a type of wrongdoing that is strongly related to the structure and to the culture of the workplace as a social institution.

The concept of a “social institution” is a central notion in sociology; it denotes a set of norms that shape commonly accepted ways of performing social functions.<sup>101</sup> Many governmental institutions are considered both social institutions as well as private bodies such as corporations, workplaces, and schools.<sup>102</sup> Moreover, even informal social structures—such as the family unit—are considered social institutions.<sup>103</sup> Given this information, I argue that the emergence of workplace bullying regulation is a subpart of legal regulation of authority in social institutions. Such regulation arose as a trend in the Western world in recent decades.

It is worth referring, in this context, to the expanding regulation of behavior in authority relations as they play out in a variety of social institutions. Naming workplace bullying as a legal wrong should be contemplated in association with other legal regulations that have abolished prerogatives entitled to authority figures—such as the permission to use

100. See Friedman & Whitman, *supra* note 70, at 249; Omari, *supra* note 82, at 13.

101. See generally JONATHAN H. TURNER, THE INSTITUTIONAL ORDER: ECONOMY, KINSHIP, RELIGION, POLITY, LAW, AND EDUCATION IN EVOLUTIONARY AND COMPARATIVE PERSPECTIVE (1997). See also Seumas Miller, *Social Institutions*, STAN. ENCYC. PHIL. (Jan. 4, 2007), <https://plato.stanford.edu/entries/social-institutions/> [<https://perma.cc/VR22-54AC>].

102. *Id.*

103. *Id.*



corporal punishment by parents against their children, teachers against students/pupils,<sup>104</sup> and master's prerogatives to use physical discipline to "correct" servants.<sup>105</sup> In fact, the new sensitivity to workplace bullying should be considered as a step in a long course of development. To be sure, workplace bullying is not mainly about physical injury and attack on the body.<sup>106</sup> It typically involves words, not physical assault.<sup>107</sup> Yet the concern motivating both developments is essentially the same: how to prevent authority figures from turning their vested power into tyranny and oppression.<sup>108</sup>

As will be further elaborated, the workplace as a functional social institution situates people into power positions.<sup>109</sup> The terms power and authority are the conceptual environment within which workplace bullying must be formulated as a legal wrong. The term "power" has no universally accepted definition in social and political theory.<sup>110</sup> For the purposes of this Article, I will use one of the commonly accepted definitions from the Max Weber school of thought. According to Weber, power is the ability of one person to realize his aims despite resistance or against the will of others.<sup>111</sup> Authority is a common type of power used in social institutions.<sup>112</sup> It is characterized by routine instruction (dictated by the authorities) and obedience (supplied by the subordinates), which is made possible by the subordinates who lend legitimacy to the entire social order of authority (as opposed to obedience stemming from fear of the use of violence, for example).<sup>113</sup> The relationship between parent and child, teacher and student, physician and patient, and rabbi and audience of devotees, are clear cases of

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104. E.g., Deanna Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 575 (2003).

105. E.g., Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 728–29 (2016).

106. See MAX WEBER, *ECONOMY AND SOCIETY* 212 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922).

107. See *id.* at 217.

108. See *id.* at 225.

109. See *id.* at 215–16.

110. See *id.* at 53.

111. Or, as written originally by Weber: "the ability to exercise one's will over others." *Id.* Weber famously considered authority as a type of domination, and domination as a type of power. *Id.*

112. For a comprehensive discussion of various types of power, among them is authority, see generally DENNIS H. WRONG, *POWER: ITS FORMS, BASES, AND USES* (1979).

113. WEBER, *supra* note 106, at 212. A similar view is expressed in Hannah Arendt's account of authority. HANNAH ARENDT, *What is Authority?*, in *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 91, 92–93 (Penguin Books 1993) (1961).

authority relations—as are relations between the supervisor and employee in the workplace.<sup>114</sup>

Thinking about power relations in the workplace is of course not new in law.<sup>115</sup> As it is often stated, the main purposes of labor law are to offset the imbalance of power between employers and employees and to improve the bargaining positions of employees vis-à-vis employers.<sup>116</sup> The new prohibitions on workplace bullying arise out of new sensitivities relating to the exercise of power in the workplace.<sup>117</sup> Unlike the traditional focus of labor law on the power of employers over employees, or the Marxist oriented sensitivity toward capitalistic power (the power of those controlling the means of production), the new bullying regulations do not focus mainly on the employer as a locus of power; rather, they take interest in a whole host of power positions in the workplace—an entire hierarchy of authority relations that is typical of modern workplaces.<sup>118</sup> The new bullying regulations assume that far beyond the legal entity of the employer, numerous people, who routinely exercise power and authority in the workplace, might lapse into abusing their power and might offend their subordinates.<sup>119</sup>

The word “abuse” is worth pausing over. It often appears in accounts relating to workplace bullying, where it is used matter-of-factly as synonymous to harassment or bullying (the employee was *abused*, meaning she was *harassed* or *bullied*).<sup>120</sup> In these accounts, abuse is usually understood in terms of its impact on the harassed victim.<sup>121</sup> But the term abuse has a

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114. The consideration of authority relations in employment is not common in legal literature, which often focuses on the relationship between employees and employers (rather than on the relationships between employees and other employees who are authority figures in the workplace). Referring to workplace supervisory relationships as relations of authority is commonplace in the sociological literature, however. For a classic source of this sort, see RALF DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* (Stanford Univ. Press 1959) (1957). For a more recent account of supervisory authority relations in the workplace see Scott Schieman & Sarah Reid, *Job Authority and Interpersonal Conflict in the Workplace*, 35 *WORK & OCCUPATIONS* 296 (2008).

115. See Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. STATE L. REV. 579, 580 (2009).

116. Cornell L. Sch., *Labor*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/labor> [<https://perma.cc/S9ZJ-6978>].

117. See Bergen et al., *supra* note 6, at 18.

118. See *id.* at 20.

119. See *id.*

120. For example:

[I]n 2007, the Employment Law Alliance released the results of a nationwide poll of over 1,000 U.S. workers, finding that forty-four percent of workers polled reported they have worked for a supervisor or employer who they consider *abusive* and that sixty-four percent said that they believe an *abused* worker should have the right to sue to recover damages.

Harthill, *supra* note 22, at 257 (emphasis added).

121. See *id.* at 258–59.

double meaning that signifies not only the impact of harassment but also the course of its coming about—abuse in the sense of misuse of power.<sup>122</sup> The abuse of the victim is carried out through an abuse of the power of office.<sup>123</sup> This second meaning is absent from contemporary conceptualizations of workplace bullying, and I wish to illuminate it in this Article.

*B. The Workplace as an Organization and the Authority of Office*

To see the centrality of abuse of office in regulating workplace bullying, we must acknowledge the workplace as a specific type of social institution—an “organization.” An organization is defined in sociological theory as a formal structure of human relations designed to serve defined purposes.<sup>124</sup> Most modern workplaces meet this definition and include, as part of their structure, a functional assignment of roles.<sup>125</sup> These roles have been referred to in Weberian theory as “offices.”<sup>126</sup> Weber considered the authority of office as part of a larger taxonomy of different types of authority.<sup>127</sup> Central to Weber’s consideration of authority is a historical account describing a significant move from traditional models of authority to what Weber referred to as “rational authority”—which is typical of modern times.<sup>128</sup> According to Weber, rational authority is attached in modern organizations to offices.<sup>129</sup> Through the comparison between traditional forms of authority and the authority of office, Weber is able to illuminate some of the crucial characteristics of the authority of office.<sup>130</sup> These characteristics are highly valuable in considering workplace bullying as abuse of authority.

A prominent feature of the authority of office is precisely that it is the authority “of office”—rather than the authority of the person exercising it.<sup>131</sup> Unlike traditional authority (think, for example, of the medieval authority of feudal lords or of patriarchal heads of the household), which was perceived as a gift in which some human beings were endowed or inherited, the authority of office is granted to people by virtue of their fulfilling a certain role at a

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122. *See id.* at 280.

123. *See id.*

124. Philip Selznick, *Foundations of the Theory of Organization*, 13 AM. SOCIO. REV. 25, 25 (1948); *see also* Cynthia Hardy & Stewart Clegg, *Some Dare Call It Power*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES 754 (Stewart R. Clegg et al. eds., 2d ed. 2006).

125. Selznick, *supra* note 124, at 25.

126. *See* WEBER, *supra* note 106, at 220.

127. Weber famously identified a tripartite of authority, including traditional authority, rational (or bureaucratic) authority, and charismatic authority. For an elaboration of these three types, *see* Schneebaum, *supra* note 37, at 369.

128. WEBER, *supra* note 106, at 215.

129. *Id.* at 218.

130. *See id.* at 217–23.

131. *Id.* at 219.

specific point in time: it is granted to them only in their capacity as officeholders.<sup>132</sup> The authority of office, therefore, indicates a fundamental separation between the authority (which, as stated, belongs to the position) and the person holding it.<sup>133</sup> From this separation follows yet another important distinction between two spheres of life: the professional sphere and the personal sphere; the authority that is granted to people in the workplace is designed to serve professional purposes and is limited to the workplace.<sup>134</sup> Hence, in contrast to historical models of traditional authority, two people who are in authority relations in the professional sphere are perceived as being completely equal in their personal lives.<sup>135</sup> Tellingly, the word “office” simultaneously marks a distinct normative domain of authority, and a physical space of activity, which is distinct from other physical spaces where people lack professional authority (most obviously, Weber notes, is the separation between the office and the home).<sup>136</sup>

The separation between the authority and the person exercising it is a manifestation of what Weber famously described as the rationalization of authority.<sup>137</sup> The basic assumption regarding power and authority in modern society is that the use of power requires justification and legitimacy.<sup>138</sup> Unlike premodern times, the presence of an authority relation—in which one person holds power and dominates another person—cannot simply be accepted as a matter of natural necessity or divine privilege.<sup>139</sup> The justification for giving someone authority of office has to do with the efficiency of modern administration: constructing a hierarchy of authority positions within organizations is perceived essential for achieving efficient management, thus allowing economic growth.<sup>140</sup> The authority of office is therefore legitimate, but the type of legitimacy offered above also defines its boundaries: the authority of office can be legitimate only if it is restricted to a specific

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132. *Id.* at 217–18. Weber thus observes that, in modern organizations “the person who obeys authority does so, as it is usually stated, only in his capacity as a ‘member’ of the organization” and “there is an obligation of obedience only within the sphere of the rationally delimited jurisdiction.” *Id.*

133. *Id.* at 218.

134. *See id.* at 219. Weber notes that each office entails a “rationally delimited jurisdiction” and “sphere of obligations” corresponding to the systematic division of labor. *Id.* at 218.

135. *See id.* at 218–19, 225.

136. *Id.* at 219.

137. *See* KENNETH ALLEN, *EXPLORATIONS IN CLASSICAL SOCIOLOGICAL THEORY* 152–55 (2d ed. 2010).

138. *Id.* at 153.

139. *See id.* at 155.

140. *See* WEBER, *supra* note 106, at 223. “[I]t would be sheer illusion to think for a moment that continuous administrative work can be carried out in any field except by means of officials working in offices. The whole pattern of everyday life is cut to fit this framework.” *Id.*

domain—the domain of the office—and only if it is used to serve specific, and usually professional, purposes.<sup>141</sup>

Weber's historical account regarding the move from traditional authority to the authority of office, depicts not only a project of rationalization, but also, and perhaps more fundamentally, a project of restraint of power.<sup>142</sup> The idea that some people may exercise power and authority over other people is not accepted as natural but rather treated with suspicion or even with anxiety in modern society.<sup>143</sup> Since authority is power, and power is suspicious yet necessary, granting authority to human beings gives rise to a constant fear that people holding power might use it beyond its acceptable boundaries—that their power might spill over the abstract outlines of the office.<sup>144</sup> The attachment of authority to the office on the one hand, and the acknowledgment that in practicality, it is flesh and blood human beings that are going to operate offices, gives rise to the identification of a basic tension—between the professional dictates of the office, and the private interests, appetites, whims, and desires, of the office holder as a person.<sup>145</sup> A new ethic, which may be referred to as the ethics of the office,<sup>146</sup> requires officeholders to use the authority vested in them solely to achieve professional purposes.<sup>147</sup> It requires that officeholders will resist any temptation to misuse it for personal interests that are not always consistent, and often conflict, with organizational and professional purposes.<sup>148</sup> This entails two specific ethical dictates that, as we shall see, are very relevant to workplace bullying regulation: First, an officeholder might not use organizational resources to serve personal goals that are incompatible with professional goals; Second, an officeholder may not act as a tyrant toward her subordinates since authority relations in the workplace must be distinct from the personal domination that characterized traditional forms of authority.<sup>149</sup>

### C. *Workplace Bullying as Abuse of Office*

The language of abuse of power occasionally appears in the literature on workplace bullying. For example, Andrea Adams, who authored one of the

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141. *Id.* at 217–20.

142. *Id.* at 218.

143. *See id.*

144. *See id.* at 221.

145. *See* Selznick, *supra* note 124, at 27–28.

146. *See, e.g.,* Paul du Gay, *Max Weber and the Ethics of Office*, in *THE OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES* 146, 150 (Paul S. Adler ed., 2009).

147. *See id.* at 150–51.

148. *See id.* at 153–54.

149. *See* WEBER, *supra* note 106, at 218–19.

first books on workplace bullying,<sup>150</sup> mentions “abuse of power or position” as one of the main features of bullying.<sup>151</sup> Keashly similarly stresses the importance of power differentials between bully and victim.<sup>152</sup> Yet legal accounts of bullying have not focused on power imbalance and have not considered abuse of power as a relevant conception to workplace bullying. The common assumption, moreover, has been that bullying may be perpetrated by supervisors or co-workers, and in principle it can also be carried out by subordinates toward their supervisors (bottom-up bullying).<sup>153</sup> Nevertheless, research shows that the most common type of bullying is top-down bullying.<sup>154</sup> For example, Bennett Tepper, writing in the field of organizational studies, has introduced the term “abusive supervision” in this context,<sup>155</sup> and Randy Hodson and his co-authors have used the language of abuse of power.<sup>156</sup> These accounts, however, do not contain a thorough analysis of abuse of power and do not attend to its conceptual underpinning.<sup>157</sup> The disciplines of the social sciences typically do not deal with the formulation of norms.<sup>158</sup> Rather, they mostly concern themselves with the description of social phenomena and the identification of relevant factors.<sup>159</sup> Nevertheless, the term “abuse of power” is essentially a normative term,<sup>160</sup> and I argue that it should serve as a key term in the conceptualization of workplace bullying as a legal wrong.

There is a tradition of legal thinking about the abuse of power, specifically abuse of the power of office, which has been developed in criminal law and in disciplinary acts that regulate the actions of public officials.<sup>161</sup> A similar language (*mutatis mutandis*) should be developed with respect to workplace bullying. In the context of public administration, criminal laws typically

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150. ANDREA ADAMS, BULLYING AT WORK: HOW TO CONFRONT AND OVERCOME IT (1992).

151. Andrea Adams, Speech to a British Trade Union MSF Conference (May 24, 1994) (transcript available at <https://www.workplacebullying.org/multi/pdf/adams.pdf> [<https://perma.cc/B5GM-KB96>]).

152. Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and Empirical Issues*, 1 J. EMOTIONAL ABUSE 85, 109 (1997).

153. *E.g.*, de las Casas, *supra* note 16, at 469.

154. *See, e.g.*, *id.* at 467–68.

155. Tepper, *supra* note 8, at 262.

156. Randy Hodson et al., *Chaos and the Abuse of Power: Workplace Bullying in Organizational and Interactional Context*, 33 WORK & OCCUPATIONS 382, 382 (2006).

157. *Id.* *See also* Tepper, *supra* note 8.

158. *See* Hodson et al., *supra* note 156, at 395.

159. *See id.* at 390.

160. *See* Leonard Hoeft et al., *Normative Perception of Power Abuse 1* (Max Planck Inst. for Rsch. on Collective Goods, Working Paper No. 2019/6, 2019).

161. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 540 (3d ed. 1982). For a recent account of Official Misconduct Offenses in the United Kingdom, see JEREMY HORDER, CRIMINAL MISCONDUCT IN OFFICE: LAW AND POLITICS (2018).

proscribe two types of abuse of authority: the misuse of authority to achieve personal gain or fulfill personal interests which are incompatible with the interests of government; and the abuse of authority towards those with less power in an exploitive or tyrannical manner.<sup>162</sup> One of the criminal offenses involving excessive use of power by public officials towards subordinate citizens is called oppression.<sup>163</sup> The paradigmatic example of oppression is the excessive use of police violence, whether in cases where there is no basis for using it (for example, the arrest of a person knowing that there is no basis for his detention), or in cases where police use excessive force.<sup>164</sup> I argue that the offense of oppression is a successful analogy to top-down workplace bullying. This is true even though workplace bullying typically does not involve physical violence.<sup>165</sup> Like oppression, top-down workplace bullying involves an abuse of authority that offends people who are subordinated to the authority figure.<sup>166</sup>

Like the traditional common law offense of oppression, the focus of workplace bullying is the wrong toward a subordinate victim.<sup>167</sup> Considering this emphasis, a dignitary theory of workplace bullying might seem compelling, since dignity too revolves around the rights and interests of the individual employee.<sup>168</sup> But to see the difference between a dignitary model and an abuse-of-office framework, let us consider the example of a performance evaluation in the workplace. Think of a supervisor who delivers a particularly harsh evaluation to a subordinate employee, zealously depicting his every failure, observing his incompetence, and measuring the damage caused to the firm or organization as a result. The employee might have a different appreciation of his performance and might feel humiliated in the face of the supervisor's harsh critique. Under the dignity model, the essence of

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162. 5 C.F.R. § 2635.702 (2020); *see also* GA. CODE ANN. § 45-11-4 (2016) (“Using oppression or tyrannical partiality in the administration or under the color of his or her office” constitutes “tyrannical partiality”).

163. The offense of Oppression appeared already at Blackstone's, which referred to it as a “crime of deep malignity” consisting in “the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the color of their office.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*140. The Model Penal Code, Art. 243.1, defines the offense of “official oppression.” It applies whenever a person “acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity,” “knowing that his conduct is illegal,” “denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.” MODEL PENAL CODE. § 243.1 (AM. L. INST. 1962).

164. *See* David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 168–69 (1996).

165. Tepper, *supra* note 8, at 262.

166. Note also the definition of oppression in the Merriam-Webster Dictionary as an “unjust or cruel exercise of authority or power.” *Oppression*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/oppression> [<https://perma.cc/6D6J-6NUJ>].

167. Hodson et al., *supra* note 156, at 383.

168. *See* Ehrenreich, *supra* note 75, at 3–4.

workplace bullying is humiliation,<sup>169</sup> and so we might suggest that the above-mentioned scenario—where a supervisor treats an employee harshly—amounts to bullying. But humiliation, which easily translates into a *sense* of humiliation, is clearly not enough to turn a demanding performance evaluation into an act of bullying. A performance evaluation harshly criticizing an employee would not count as bullying even if the employee subjectively felt under-valued or humiliated by it, unless we were to suspect that, in any particular case, the evaluation was intentionally designed by the supervisor to sabotage a subordinate's work; that is, unless we suspect it served no legitimate professional goal under the circumstances.<sup>170</sup> Therefore, whenever a workplace practice is perceived as harassing and wrongful, it is not merely because it humiliates the victim, but because the humiliation takes place “under the color of office”—a term borrowed from criminal corruption offenses.<sup>171</sup> We perceive harsh treatment as bullying only if it is performed under a pretense of using professional, official, or organizational powers—when, in fact, it serves no legitimate professional purpose.

Although theoretically designed out of dignity or safety conceptions, contemporary laws (e.g., statutory definitions and case-law) occasionally, and implicitly, endorse abuse of office notions and contain abuse of office wording, even if these currently do not take center stage.<sup>172</sup> Take, for example, the recent Israeli draft bill on workplace bullying.<sup>173</sup> Article 3, the main section of the bill, defines bullying as “repeated behavior against a person, in a number of separate incidents, which can create a hostile environment for him/her,” and it includes a series of subclauses that identifies various forms of workplace bullying.<sup>174</sup> One of these forms is defined in Article 3(2) as follows:

Disruption of a person's ability to perform his duties, including by placing unreasonable demands or creating unreasonable conditions for his performance, which are not necessary for the performance of the position and are not for practical reasons, such as provocative manipulation of his actions, demands or changes that cannot be dealt with, unreasonably tight control of his or her work activity, narrowing, in practice or by force, of the employees' powers or

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169. *Id.* at 16.

170. See Tepper, *supra* note 8, at 264–65.

171. 18 U.S.C. § 242.

172. See, e.g., *infra* note 173 and accompanying text.

173. Draft Bill for the Prevention of Workplace Bullying, 5780-2020 (Private Member Bill) (Isr.), [http://fs.knesset.gov.il/23/law/23\\_1st\\_569618.docx](http://fs.knesset.gov.il/23/law/23_1st_569618.docx) [<https://perma.cc/9LSK-FX5K>].

174. *Id.* § 3.



responsibilities for irrelevant reasons, and when the performance of the work does not require it.<sup>175</sup>

This definition implicitly recognizes the idea of abuse of office.<sup>176</sup> It deals with the apparent action of exercising authority in the workplace (e.g., making demands, narrowing responsibilities), but in the context in which it occurs, it constitutes abuse precisely because it does not serve the purposes for which the authority was granted.<sup>177</sup>

The United States' Healthy Workplace Bill also contains abuse of office ideas, although these play a marginal role, if any.<sup>178</sup> The bill stipulates that subjecting an employee to an abusive work environment is an unlawful employment practice and defines abusive conduct as "acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct."<sup>179</sup> The Bill further specifies that abusive conduct may include conduct like "repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee's work performance."<sup>180</sup> Another article in the Bill provides the defendant with an affirmative defense if:

(a) The complaint is based on an adverse employment action reasonably made for poor performance, misconduct, or economic necessity; or (b) The complaint is based on a reasonable performance evaluation; or (c) The complaint is based on an employer's reasonable investigation about potentially illegal or unethical activity.<sup>181</sup>

This wording acknowledges that humiliating conduct may still be legal if it can be shown to serve a legitimate professional purpose.<sup>182</sup> However, the defense seems to be limited only to specific types of workplace practices—

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175. *Id.* § 3(2).

176. *See id.*

177. *Id.*

178. *See* David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 498 (2004) [hereinafter *Crafting a Legislative Response*]. Massachusetts is one of two states where the bill has been introduced in the current session. HEALTHY WORKPLACE BILL, <https://healthyworkplacebill.org/> [https://perma.cc/4KS9-8X3F]. The other state is West Virginia. *Id.* Twenty-nine other states have previously introduced some form of the Healthy Workplace Bill. *Id.* Massachusetts has also introduced versions of the bill in the past. *Id.*

179. S. 1200, 192nd Gen. Ct., Reg. Sess. § 2 (Mass. 2021).

180. *Id.*

181. *Id.* § 6.

182. *See id.*

such as evaluation performance or an employment decision made for poor performance, misconduct, or an investigation about unethical activity.<sup>183</sup> Moreover, the Bill does not recognize abuse of office as the rationale for prohibiting workplace bullying; instead, it borrows the language of hostile environment known from sexual harassment jurisprudence in its definition for bullying.<sup>184</sup> It is doubtful, however, whether such transplant is of much use considering the profound dissimilarity between sexual and non-sexual harassment.<sup>185</sup>

Although existing bills and case law have occasionally reflected the intuition that conduct experienced as offensive should nevertheless not be proscribed as bullying if it served legitimate professional purposes, abuse of office has not been acknowledged as the guiding rationale of anti-bullying regulation.

Abuse of office can carry important implications for the design of anti-bullying regulation. I turn to discuss them now.

#### IV. IMPLICATIONS FOR DESIGNING REGULATION

Reviewing existing attempts at designing anti-bullying regulation reveals that policymakers and judges have addressed mainly two questions: one relating to the definition of the proscribed conduct—how should bullying be defined—and one concerning the question of intention.<sup>186</sup> With respect to the former, the common assumption is that workplace bullying entails conduct that people might experience as offensive or humiliating, but that we should limit responsibility by referencing some objective standard rather than relying solely on the subjective sensibilities of victims.<sup>187</sup> For example, the Healthy Workplace Bill limits responsibility only to “acts, omissions, or both, that a reasonable person would find abusive.”<sup>188</sup> With respect to the latter question, experts and policymakers have been divided on whether proof of malicious intent by the bully should be required to establish liability.<sup>189</sup> The following discussion suggests that an abuse of office conceptualization would make significant contribution on both of these fronts. The henceforth analysis is not meant to be exhaustive or provide a detailed legislative model for workplace bullying. Its aim, rather, is to sketch out initial directions for further

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183. *Id.*

184. *Crafting a Legislative Response*, *supra* note 178, at 502.

185. *See id.* at 492.

186. *Id.* at 499.

187. *Id.*

188. *Emerging American Legal Responses to Workplace Bullying*, *supra* note 10, at 334.

189. For example, the Healthy Workplace Bill requires proof that the defendant acted “with intent to cause pain or distress to an employee.” *Id.*

development based on the conceptualization of workplace bullying as abuse of office.

#### A. *Overt Bullying*

The prohibition of top-down bullying is concerned with situations where a person holding a position of authority in the workplace misuses her power of office by turning her authority into oppression that goes beyond what is necessary for the purposes of fulfilling the requirements of the office. This insight allows us to formulate a basic matter that should be inquired in the adjudication of top-down workplace bullying. Judging such instances requires an examination not only of what might harm or humiliate subordinate employees but also of the professional standards themselves. The question of what constitutes abusive behavior is linked to the way we understand what is required to fulfill roles in the workplace; it comes down to how we, as a society, formulate the “ethics of the office.”

Judging workplace bullying requires an examination of whether, in any given case, the power of office has been used to achieve the purposes for which it was granted, or rather misused in a manner that deviates from professional goals to serve extraneous interests or agenda.<sup>190</sup> Based on this insight, I propose a distinction between two types of bullying: overt bullying and covert bullying.<sup>191</sup> The first category deals with situations in which a workplace supervisor behaves in an offensive or exploitive manner, which overtly does not conform to professional standards of conduct—such as using swearwords or throwing objects. The second category deals with situations in which a supervisor in the workplace acts in a manner that appears on its face to conform with professional behavior, but in which the circumstances reveal that the power of office has been used to fulfill foreign, conflicting interests. Each of these categories requires a different method of legal analysis.

Adjudicating cases of workplace bullying is relatively simple in some cases and more complicated in others. Cases of overt bullying are easier to discern and adjudicate because the supervisor plainly behaves in a manner that cannot be construed as serving any legitimate professional purpose.<sup>192</sup> For example, the use of obscene language.<sup>193</sup> Thus, an employee in a position of authority who calls a subordinate a “bitch” or “dumb” (assuming that this is

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190. *See id.*

191. Several distinctions appearing in the sociological literature might seem similar to the overt/covert distinction, but they differ from my suggested classification in that they do not center on what appears to be within the standard exercise of the office (covert harassment) and what clearly stands outside it (overt harassment). For example, there often appears a distinction between blatant and subtle forms of bullying. Hodson et al., *supra* note 156, at 384–85.

192. *See Crafting a Legislative Response*, *supra* note 178, at 498.

193. *Id.*

not a one-time case) should be labelled a bully.<sup>194</sup> This is also true of a supervisor who makes violent threats or racist comments.<sup>195</sup> A recent Israeli case adjudicated before the labor court is a case in point.<sup>196</sup> In that suit, the supervisor referred to the ethnic origin of his subordinate by telling her to “go back to Yemen!”<sup>197</sup> He also threatened her by saying “If you don’t get out of here, I will throw you out the window” and “I’ll murder you.”<sup>198</sup> Recognizing such conduct as a prohibited form of workplace bullying,<sup>199</sup> the court accorded the plaintiff with monetary compensation.<sup>200</sup>

Asking or demanding that a subordinate perform any type of personal service unrelated to the workplace should similarly be categorized as overt bullying. A provision in the previously discussed Israeli draft bill is on point here.<sup>201</sup> Article to the bill includes several subclauses that specify forms of workplace bullying, one of which prohibits “[t]he imposition of tasks on a person whose purpose is to fulfill the personal needs of another and that do not concern the areas of his job.”<sup>202</sup> Imposing service tasks which fulfill the personal interests or whims of the officeholder (think, for example, of a workplace supervisor who imposes on a person subject to him the task of writing a seminar paper for the purpose of the supervisor’s academic studies) stands clearly outside the legitimate boundaries of exercising workplace

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194. *See id.*

195. *See id.*

196. CivC (Regional Labor Court TA) 1201-02-11 Yamit Michal Valani v. Asaf Videslavsky, Nevo Legal Database (July 7, 2014) (Isr.).

197. *Id.* at 36.

198. *Id.* at 5, 18.

199. The court did not use the term workplace bullying (or bullying) because Israel has not enacted legislation against workplace bullying. *See* Draft Bill for the Prevention of Workplace Bullying, 5780–2020 (Private Member Bill) (Isr.), [http://fs.knesset.gov.il/23/law/23\\_lst\\_569618.docx](http://fs.knesset.gov.il/23/law/23_lst_569618.docx) [<https://perma.cc/9LSK-FX5K>]. The labor courts, however, have recognized a common-law cause of action akin to harassment, based in the contractual obligation of an employer to provide employees with a safe environment and to comply with the employer’s general bona fide obligations. *Yamit Michal Valani*, 1201-02-11, at 34–37.

200. *Yamit Michal Valani*, 1201-02-11, at 37. It should be noted that although the supervisor used racist remarks, the court did not rely on anti-discrimination or equal opportunity laws, but rather held the employer liable under a workplace bullying theory. *Id.*

201. *See* § 3(3), Draft Bill for the Prevention of Workplace Bullying, 5780–2020 (Private Member Bill) (Isr.), [http://fs.knesset.gov.il/23/law/23\\_lst\\_569618.docx](http://fs.knesset.gov.il/23/law/23_lst_569618.docx) [<https://perma.cc/7HQL-GEFX>]. Until now, the Bill has not yet become law. However, the national labor courts of Israel, inspired by the bill, have acknowledged a common-law workplace bullying cause of action, grounded in an employer’s contractual duty to provide a safe work environment. *See Yamit Michal Valani*, 1201-02-11, at 34–37. A lively scene of workplace bullying litigation and case law is therefore currently available in Israel, which affords a useful lab for legal scholars interested in anti-bullying regulation. *See id.*

202. § 3(3), Draft Bill for the Prevention of Workplace Bullying, 5780–2020 (Private Member Bill) (Isr.), [http://fs.knesset.gov.il/23/law/23\\_lst\\_569618.docx](http://fs.knesset.gov.il/23/law/23_lst_569618.docx) [<https://perma.cc/9LSK-FX5K>].

authority.<sup>203</sup> It corruptly leverages the power of office to achieve private gain for the officeholder. Such conduct should, therefore, be labelled and prohibited as an overt form of workplace bullying.

Beyond words, certain types of physical gestures may also fall into the category of overt bullying, even if not aimed at another person's body. The following example is taken from an ethnographical study of a Japanese apparel factory.<sup>204</sup> An employee at the factory described her suffering due to her supervisor's conduct.<sup>205</sup> She testified that whenever the employees were sewing labels on garments and needed more labels the supervisor "would take a bunch and throw them at [her], so they'd fall all over the place, and then [she'd] have to pick them up. It takes time to pick them up, and then [she'd] have to rush like crazy to catch up to [her] quota. [She] cried a lot."<sup>206</sup> Another telling example is the Israeli landmark case of Manny Naftali, an employee at Prime Minister Netanyahu's residence, who claimed to have been bullied by the First Lady Sara Netanyahu.<sup>207</sup> The labor court ruled that Sara Netanyahu's conduct, which included, among other things, forcibly pulling the tablecloth off a table so that everything on it fell to the floor<sup>208</sup>—constituted offensive employment practice and accorded the plaintiff with monetary compensation.<sup>209</sup>

Instances involving the act of throwing objects are indicative of the essence of workplace bullying as non-violent abuse of power because they are not directed towards the body, and supposedly do not risk the physical well-being of subordinate employees. Note, moreover, that the sense of humiliation experienced by victims in such cases is not attributable to the offensive content of words per se. Rather, the experience of humiliation and terror derives from the authoritarian nature of the relationship. Conduct that could have been perceived as testifying mainly to the lost senses of the actor, gains its meaning as offensive and tyrant due to the identity of the actor as an authority figure. It probably would not have been experienced as bullying had it been performed outside an authority relation. Nevertheless, acts of throwing objects should be considered overt bullying when they are performed by authority figures in the workplace.

203. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, YALE L.J. F. 22, 37 (2018).

204. Hodson et al., *supra* note 156, at 384.

205. *Id.*

206. *Id.*

207. Raoul Wootliff, *Livid Sara Netanyahu Threw Plates Across Patio, Says Ex-Cook*, TIMES ISR. (Sept. 21, 2015, 6:26 PM), <https://www.timesofisrael.com/livid-sara-netanyahu-threw-plates-across-patio-says-ex-cook/> [<https://perma.cc/Y7RK-CZAU>].

208. *Id.*

209. Adiv Sterman, *Ex-Caretaker Wins Abuse Case Against Sara Netanyahu*, TIMES ISR. (Feb. 10, 2016, 4:23 PM), <https://www.timesofisrael.com/ex-caretaker-wins-abuse-case-against-sara-netanyahu/> [<https://perma.cc/7ACZ-YE8K>].

The above examples do not exhaust the types of behaviors that would constitute overt bullying. The importance of distinguishing between overt and covert bullying, rather, lies in acknowledging that the two categories require different types of regulation-design and adjudication. Overt bullying consists of conduct that, already on the face of it, cannot be construed to serve any legitimate professional purpose.<sup>210</sup> To tackle overt bullying, it is therefore possible to come up with a list of per se rules that prohibit certain pre-defined conduct in the workplace (i.e., using swear words or demanding personal services). Furthermore, whenever such conduct is performed, proof of intent by the perpetrator should not be required. Overt bullying implies a type of misconduct that is simply unacceptable in supervisory employment relations, irrespective of malicious intent.<sup>211</sup> The legal responsibility of a workplace supervisor who uses obscene language should not be mitigated on the argument that he or she did not mean to cause pain. As I show *infra*, the question of intent or motive may be relevant to covert bullying, as opposed to overt bullying. From this follows an important conclusion to the design of anti-bullying regulation, namely, that regulatory schemes containing an across-the-board malicious intent requirement,<sup>212</sup> are inappropriate.

#### *B. Covert Bullying and the Question of Intention*

The use of blatant verbal and physical violence<sup>213</sup> does not exhaust all types of workplace bullying. While such conduct is easily identifiable as inconsistent with proper professional conduct, other cases are more complex and open our eyes to the profound challenge of anti-bullying regulation. Scholarship dealing with workplace bullying commonly cites instances of sabotaging or undermining an employee's work performance as instances of workplace bullying.<sup>214</sup> I suggest that such cases fall under the category of covert bullying—actions which represent themselves as routine supervisory procedures, such as performance evaluations or the assignment of tasks to subordinates—but in which the suspicion arises that they are not performed inside the parameters of a legitimate exercise of authority.

Instances in which the defendant's behavior adheres, on the face of it, to standard professional practices are much more difficult to judge than overt bullying cases. The main question to be addressed in these cases is whether the appearance of professional conduct was manipulatively misused to

210. See *supra* notes 190–195 and accompanying text.

211. See *supra* notes 190–195 and accompanying text.

212. See *Crafting a Legislative Response*, *supra* note 178, at 501.

213. In the case of physical violence, such behavior is expressly prohibited by other laws – including criminal laws. See, e.g., S.C. CODE ANN § 16-8-240 (2007).

214. See, e.g., Rickey E. Richardson et al., *Workplace Bullying in the United States: An Analysis of State Court Cases*, 3 COGENT BUS. & MGMT. 1, 2–3 (2016).

disguise a tyrannical, vindictive, or oppressive exercise of the powers of office. The underlying assumption of anti-bullying regulation is that a mere *sense* of humiliation or disappointment by a subordinate employee does not in itself warrant legal intervention.<sup>215</sup> Therefore, whenever a supervisor's conduct can be construed as following the general outlines of known professional practices and activities, a much more complex inquiry is required. We would need to investigate the motivation behind the supervisor's conduct, or the totality of the circumstances of the case, to determine whether the supervisor had indeed corruptly misused the power of office or rather manifested demanding, but non-abusive, supervision.

Consider, for example, a supervisor who imposes a particularly large number of tasks on an employee already on a tight schedule. Assume that this scenario repeats itself several times within a six-month period. If we know that the tasks assigned are unreasonable (they may be menial tasks clearly unrequired for the job), and that the supervisor secretly resents his subordinate employee (say the subordinate employee is highly accomplished and the supervisor feels threatened by her presence), we might suspect that he is using the power of the office for personal whims or interests—domination, revenge—that are incompatible with that of the office. In that case, we may want to prevent such behavior by proscribing it as bullying. But the circumstances for increasing a subordinate employee's workload could be misinterpreted. If the backdrop for the supervisor's behavior is a high standard of work ethic, an unforeseen surge in the workload, or the supervisor's desire to grant his subordinate important opportunities to prove herself—we probably would not consider it bullying and would not want to prohibit it. In the words of Israeli psychologist Eitan Meiri, our mission in these cases is to distinguish between “demanding management” and “destructive management”<sup>216</sup>—a distinction not easily drawn. Therefore, while policymakers should consider drafting a list of per se prohibitions to prevent overt bullying, the judgment of covert bullying does not lend itself to a pre-determined list of prescriptions. Only an open-textured statutory definition which allows a case-by-case assessment is feasible, with respect to covert bullying cases, and adjudication would likely compel the investment of significant judicial resources.

The need to distinguish between legitimate and oppressive conduct “under the color of office” is also related to the question of intention that has

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215. See *Emerging American Legal Responses to Workplace Bullying*, *supra* note 10, at 334.

216. EITAN MEIRI, *THE SILENT EPIDEMIC OF THE WORKPLACE* (2013).

engaged anti-bullying regulation efforts.<sup>217</sup> Various jurisdictions are debating if, and to what extent, malicious intent is material to bullying.<sup>218</sup> In the U.S., for example, the Healthy Workplace Bill defines bullying as subjecting an employee to abusive conduct out of “intent to cause pain or distress to an employee.”<sup>219</sup> In Israel, the draft bill for the prevention of workplace bullying does not include an intent element.<sup>220</sup> French Law requires proof of malicious intent to impose criminal liability for workplace harassment but forsakes the requirement whenever civil liability is concerned.<sup>221</sup>

An abuse of office conceptualization can shed new light on the question of intent. An across-the-board requirement of intent (or, for that matter, an across-the-board renouncement of it) is inappropriate considering the distinction between overt and covert bullying. In overt bullying—for example, a workplace supervisor repeatedly calling a subordinate employee “dumb”—proof of intent should not be required because the wrongfulness of bullying is embedded in the act itself. An argument such as “I did not *mean* to hurt or upset the complainant by calling her a ‘dumb’” should not be accepted as an excuse. Things are different, however, in instances of covert bullying. In these cases, it may well be the case that in order to distinguish between wrongful bullying and legitimate exercise of authority, it is crucial to understand the subjective motive of the supervisor. In certain cases, objective circumstances might be telling as well (such as in the hypothetical case described above, when the tasks assigned are menial and obviously unrequired for the job). But in other cases, the difference between bullying and non-bullying will not reveal itself simply by observing the circumstances, and knowledge concerning the motivation behind the supervisor-harasser actions would be key.

This leads to another implication of an abuse of office conceptualization: recognizing the importance of drawing inspiration from existing abuse of office offenses and their jurisprudence for the design of bullying prohibitions

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217. Arthur Cox, *Workplace Bullying – The Supreme Court Settles the Law*, LEXOLOGY (June 16, 2017), <https://www.lexology.com/library/detail.aspx?g=7db09ea6-d26f-4c6d-99f8-36abfcce4335> [https://perma.cc/SKB3-AJ8R].

218. *Id.*

219. *Emerging American Legal Responses to Workplace Bullying*, *supra* note 10, at 334.

220. Draft Bill for the Prevention of Workplace Bullying, 5780–2020 (Private Member Bill) (Isr.), [http://fs.knesset.gov.il/23/law/23\\_1st\\_569618.docx](http://fs.knesset.gov.il/23/law/23_1st_569618.docx) [https://perma.cc/9LSK-FX5K]. Quebec similarly does not require intent. The Psychological Harassment Act defines harassment as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee.” Psychological Harassment Act, 2002, c. 80, s. 47 (Can); *see also* Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 EMP. RTS. & EMP. POL’Y J. 423 (2004) (explaining absence of the intent element in Quebec legislation).

221. *See* Lerouge, *supra* note 13, at 127, 129.



and for the development of bullying jurisprudence. A full exploitation of this potential is outside the scope of this Article, but suffice it to say that in the common law, the subjective element required to prove guilt in an abuse of office offense is often not referred to as “intent” but rather as “corrupt intent.”<sup>222</sup> Corrupt intent refers to the motive of the actor in fulfilling her own interests which are incompatible with the goals of the organization or office.<sup>223</sup> Under an abuse of office conceptualization, workplace bullying is wrongful precisely because it is guided by a desire to dominate or humiliate rather than to supervise another person for professional purposes.<sup>224</sup> Hence, the question of intent should essentially be understood as referring to a corrupt motive. In any case, legislative schemes should consider the distinction between overt and covert bullying in debating the element of intent.

## V. CONCLUSION

Workplace bullying is an emerging area of legal regulation. While it gained some support and attained several persistent advocates, progress has been slow and regulation efforts have been hindered in many respects. To take a close area of legal invention, the recognition of sexual harassment certainly required remarkable efforts and was treated with suspicion if not outright antagonism by many.<sup>225</sup> Movements such as the #MeToo movement further demonstrate that what presumably had been achieved still requires more work to become effectual.<sup>226</sup> Yet the comparison between workplace bullying and sexual harassment also testifies to an important distinction between them: while the introduction of sexual harassment relied on a robust, anti-discrimination theory, the introduction of workplace bullying has yet to develop a viable conceptual basis.

Recent illustrations of workplace bullying, such as the complaints against Harvey Weinstein, demonstrate the need to conceptualize workplace bullying as a legal wrong—a conceptualization that cannot rely solely on existing sexual harassment jurisprudence. While Weinstein is often portrayed as a sexual predator, “a closer look reveals that even his predations were part of a broader campaign of *nonsexual* abuse” (emphasis added).<sup>227</sup> According to one complaint, in addition to overtly sexist comments and sexual touching,

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222. PERKINS & BOYCE, *supra* note 161, at 541–42.

223. *Id.* at 542.

224. *Id.*

225. See 1. A *Brief History of Harassment*, *supra* note 40.

226. *Id.*

227. Schultz, *supra* note 203, at 34–35. Schultz argues that the above incidents still constitute a gendered form of harassment as even Weinstein’s non-sexual abuse was consistently targeted at female employees. *Id.* at 35. According to the analysis suggested here such conduct should be defined as workplace bullying irrespective of the victim’s gender. *Id.* at 36.

Weinstein also threatened to fire assistants if they did not perform such roles as babysitting for his children or obtaining his prescriptions of medicine.<sup>228</sup> He also yelled at employees for purported incompetence, cursed in their faces, and threatened to end their career.<sup>229</sup> Although such harassment is clearly wrong, existing laws in the U.S. do not prohibit such conduct unless it carries the attributes of sexual harassment.<sup>230</sup> The point is not merely that victims of such abuse are currently deprived of adequate legal remedy but also that an entirely new theoretical basis is required to address non-sexual—as opposed to sexual—harassment.

While many will identify with the sense of offense and humiliation experienced by Weinstein's employees,<sup>231</sup> it is difficult to articulate what precisely is wrongful about it. The frameworks of dignity and safety fail to capture the centrality of hierarchical power relations to workplace bullying. The aversion and injustice we sense when faced with paradigmatic cases of bullying is not best understood as a taste for more civility in the workplace. Framing Weinstein's bullying as an unsafe or risky workplace practice is awkward. It does not capture the essence of bullying. Instead of analogizing workplace bullying to hazardous workplace practices, we should acknowledge it for what it is—a form of abuse of power.

The problem of abuse of power, and the conviction that legal systems should proscribe such abuse, is well-known to lawyers in the context of public administration.<sup>232</sup> Typically referred to as corruption or official misconduct offenses, various provisions prohibit the misuse of authority by public officials.<sup>233</sup> The underlying assumption of regulating workplace bullying is that the role of legal systems in preventing abuse of authority is not restricted to government institutions but extends to social institutions that are considered "private." Thus, the emerging regulation of workplace bullying should be considered as part of a broader movement towards restraining the power accorded to authority figures in non-governmental social institutions—including education institutions and the workplace. Most notably, anti-bullying regulation should be considered as part of a broader course of historical development, in which employer prerogatives with respect to subordinate employees—such as the use of physical correction in the master-servant relationship—have been placed under legal scrutiny, if not abolished altogether.

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228. *Id.* at 37.

229. *Id.* at 36.

230. *See id.* at 24.

231. *Id.* at 34–38.

232. *See generally* Mark Quiner, *Ethics and Public Corruption Laws: Penalties*, NAT'L CONF. STATE LEGISLATORS (Aug. 3, 2021), <https://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx> [<https://perma.cc/55QS-G7RT>].

233. *Id.*

Of course, the type of workplace bullying that contemporarily occupies our attention usually does not involve physical violence. Hence, its conceptualization cannot rely on established notions of physical assault. Weber's account of authority in modern organizations, and the process of its rationalization, are particularly useful to account for the wrongdoing involved in non-violent workplace bullying. His depiction of the authority of office as an essentially delimited sphere of power, in which legitimacy is anchored in the professional functioning of an organization, helps to conceive workplace bullying as an abuse of office—a misuse of professional powers in a tyrannical or oppressive manner, that transgresses the legitimate outlines of the office.

Based on this conceptual analysis, this Article offers a way forward in designing anti-bullying regulation. It advises a distinction between two types of bullying—overt and covert bullying—and argues that each category requires a different method of legal analysis. While it is possible to deal with instances of overt bullying by composing a list of per se rules that prohibit predefined offensive conduct (for example, the use of swearwords), instances of covert bullying would require an open-texture statutory definition. Cases under the latter category would necessitate the application of a totality of circumstances appraisal for their adjudication, and in all probability, would also involve an inquiry into a supervisor's intent or bona fide motivation.

Distinguishing between overt and covert bullying is important not only as a practical guide for law drafters; it also opens our eyes to the profound challenge of dealing with the latter, as opposed to the former, category. While overt bullying consists of conduct that cannot reasonably be construed as serving a legitimate professional goal, covert bullying consists of conduct carrying the appearance of standard professional practice.

The workplace is an arena of unceasing divergence and tension between human beings. We should bear in mind that anti-bullying regulation is not meant to sanitize the workplace nor turn it into a conflict-free zone. Aside from the reluctance of employers to embrace external inquiry into their internal dynamics, those who manifest hesitation or express skepticism toward anti-bullying regulation are not completely erroneous. Nevertheless, the distinction between overt and covert bullying helps draw a brighter line between two classes of bullying cases. In turn, such division facilitates a distinction between two types of anti-bullying regulation that would not generate identical levels of doubts as to their feasibility. While the category of covert bullying is admittedly more open to challenge, it would be more difficult to contest the justifiability of proscribing the use of obscene language, throwing objects, or demands for personal service by a workplace supervisor. Even more importantly, conceptualizing workplace bullying as abuse of office provides a new set of terms and principles to guide the

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conversation on the desired scope and inherent limitations of anti-bullying regulation.