

## HUMILIATION AT WORK

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Humiliation has a significant impact on the working lives of many people. That humiliation should be the basis for making certain employment practices or incidents actionable we often take for granted. Yet, we lack an encompassing theory of when humiliation is, or should be, actionable. Courts and scholars have focused on particular forms of humiliation, notably those associated with racial and gender harassment, invasions of privacy, and a few "nearly bizarre" cases of wrongful termination.<sup>1</sup> However, no one has attempted systematically to define when workplace humiliation should be actionable.

The explicit premise of the various laws that address workplace humiliation is that work life is full of humiliating experiences and not all of them can or should be illegal. Therefore, no intentionally inflicted psychological harm is actionable unless the behavior is "outrageous" and the victim suffers distress.<sup>2</sup> Sex-, race-, or other status-based harassment is legal unless it is so pervasive or severe as to render the workplace "unreasonably" hostile.<sup>3</sup> All sorts of annoying or humiliating invasions of privacy are permissible unless a court finds both that the employer led employees to believe they could expect privacy and that the invasion was "highly offensive"<sup>4</sup> or "serious."<sup>5</sup> By condoning less than egregious forms of humiliation, the law systematically underestimates the corrosive effect of workplace humiliation. This largely ad hoc approach to workplace humiliation provides little predictability.

If courts better appreciated the debilitating nature of certain forms of humiliation, it would be more difficult to dismiss certain conduct as insufficiently outrageous or hostile. A broader theory of

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1. The very apt characterization of the intentional infliction of emotional distress cases is Regina Austin's. Her work on this topic is a crucial starting point for anyone interested in this subject. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 18 (1988).

2. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

3. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18 (1993).

4. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

5. The California Constitution protects against private actors who cause "serious" invasions of privacy. See *Loder v. Glendale*, 927 P.2d 1200 (Cal. 1997).

humiliation might also relieve the current stalemate in the literature on whether the law provides too few or too many protections for employees who suffer humiliation at work.<sup>6</sup> Alongside the extensively documented analyses of endemic subordination and harassment<sup>7</sup> and elegantly theorized accounts of why sexual harassment is wrong,<sup>8</sup> there are concerned, and even bitter, analyses of the significant liability employers face and the threat to free speech posed by what some perceive as the law's misguided efforts to stamp out any mention of romance, sex, religion, politics, or culture at work.<sup>9</sup> One has the sense that the authors perceive the world so differently that they cannot even begin to frame common issues, much less to debate them. Even among those who believe that law should remedy humiliation and abuse at work, there is disagreement about whether existing laws and proposed reforms focus too much or too little on status-based harassment as opposed to other forms of, and motivations for, humiliation.<sup>10</sup>

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6. Compare, e.g., Austin, *supra* note 1 (too few), with Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994) (too many).

7. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

8. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (discussing the literature); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

9. See, e.g., Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959 (1999); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Duffy, *supra* note 6; Mark P. Gergen, *A Grudging Defense of the Role of Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693 (1996); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

There have been many critiques of the scholarship that argues for First Amendment protection for sexually or racially harassing workplace speech so many, indeed, that citing even a sample makes for a very long footnote. See, e.g., CATHARINE MACKINNON, *ONLY WORDS* (1993); Frederick Schauer, *The Speech-ing of Sexual Harassment*, in *NEW DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine MacKinnon & Reva Siegel eds., 2001); J.M. Balkin, *Essay, Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Deborah Epstein, *Can a "Dumb-Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Judith Resnik, *Changing the Topic*, 8 CARDOZO STUD. L. & LIT. 339 (1996); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding a Collision*, 37 VILL. L. REV. 757 (1992).

10. Compare, e.g., Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999) (too much), and David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000) (same), with Austin, *supra* note 1 (too little arguing that white women and people of color suffer significantly greater harassment at work, and too little protection from it).

Among practicing attorneys the sense of radically different realities is even greater. Lawyers representing defendant employers are convinced that “slacking” employees can, and frequently do, file suit and “extort” significant settlements over trivial incidents. Plaintiff’s lawyers, alternatively, worry whether law has the ability to stop or remedy endemic humiliation and abuse in the workplace.<sup>11</sup> Without a legal theory built around workplace humiliation, it is difficult to respond to charges that only women and people of color can sue if they are humiliated at work. Without an accepted theory, the “equal opportunity harasser” — the supervisor who is abusive to employees irrespective of race, sex, or gender — is, at best, a problem for equal rights theorists and, at worst, a poster child for the excesses of antidiscrimination law.

For all these reasons, we need a systematic understanding of the nature and causes of workplace humiliation, the various harms it causes, and the available legal remedies. Acknowledging the causes and consequences of humiliation might give us a better understanding of the task ahead: developing an employment law and theory that allows dignity for all while meeting the concerns of those who believe that vague legal standards generate legal expenses without meaningful changes in workplace culture. The book that prompted this symposium and the symposium itself may contribute to that understanding.<sup>12</sup> Close attention to the intersection of gender jurisprudence and emotions jurisprudence is likely to be uniquely helpful in assessing the phenomenon of humiliation at work.

This article is only a preliminary look at the larger project I describe. In Part I, I briefly introduce some of the growing body of psychological literature on humiliation, showing how humiliation — particularly at work — is far more harmful than the law typically recognizes. Part II surveys the law’s treatment of workplace humiliation, cataloging the arbitrariness and bias in existing doctrines and remedies. Finally, Part III suggests directions for future work.

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11. The employer’s perception that there has been an avalanche of meritless harassment and wrongful termination litigation may be in part a product of HR professionals and law firms selling the need for their services rather than a systematic analysis of verdicts. See generally Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *LAW & SOC’Y REV.* 47 (1992).

12. *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999).

## I. THE SIGNIFICANCE OF HUMILIATION AT WORK

Humiliation is one of a number of emotions that have recently garnered significant attention in psychological literature.<sup>13</sup> The literature reveals the tremendous importance of emotions like humiliation and shame in the human psyche and the devastating consequences of systematic humiliation. A thorough review of the literature and its implications for employment law is beyond the scope of this article. This article will simply highlight some of the more significant findings, emphasizing the enormous impact humiliation has in the workplace.

The discussion that follows provides empirical support from the psychological literature for the proposition that workplace humiliation should be a legally cognizable harm. The research described in this section establishes three reasons for legal intervention. First, the psychological harm of workplace humiliation can itself be as devastating as the physical or economic harms that are legally actionable in employment and other settings. Second, humiliation can seriously affect the job performance of the victim, leading to routinely compensable economic harms, such as underemployment or unemployment. Finally, certain data suggest that employees do not suffer humiliation and its attendant injuries equally. Women, minorities, and some "outsider" groups may suffer disproportionately. Thus, basic principles of fairness suggest the need to level the playing field.

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13. See, e.g., FRANCIS J. BROUCEK, *SHAME AND THE SELF* (1991); JOSEPH M. JONES, *AFFECTS AS PROCESS: AN INQUIRY INTO THE CENTRALITY OF AFFECT IN PSYCHOLOGICAL LIFE* (1995); GERSHEN KAUFMAN, *THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAME-BASED SYNDROMES* (2d ed. 1996); HELEN MERRELL LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* (1958); RESEARCH AGENDAS IN THE SOCIOLOGY OF EMOTIONS (Theodore D. Kemper ed., 1990); SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE (June Price Tangney & Kurt W. Fischer eds., 1995); SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE (Paul Gilbert & Bernice Andrews eds., 1998); THE WIDENING SCOPE OF SHAME (Melvin R. Lansky & Andrew P. Morrison eds., 1997); Linda M. Hartling & Tracy Luchetta, *Humiliation: Assessing the Impact of Derision, Degradation, and Debasement*, 19 J. PRIMARY PREVENTION 259 (1999); Lorealeigh Keashly, *Interpersonal and Systemic Aspects of Emotional Abuse at Work: The Target's Perspective*, at <http://www.worktrauma.org/foundation/research/Loraleigh.htm>; Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93 (1991); Herman Sarphatie, *On Shame and Humiliation: Some Notes on Early Development and Pathology*, in THE DUTCH ANNUAL OF PSYCHOANALYSIS (Hans Groen-Prakken & Antonie Ladad eds., 1993); *Special Issue — The Humiliation Dynamic: Viewing the Task of Prevention from a New Perspective, Part I*, 12 J. PRIMARY PREVENTION 87 (1991); Julian L. Stamm, *The Meaning of Humiliation and Its Relationship to Fluctuations in Self-Esteem*, 5 INT'L REV. PSYCHO-ANALYSIS 425 (1978).

"To be humiliated is to be put down."<sup>14</sup> To be humiliated is, figuratively, to have one's face forced into the ground and be made to eat dirt. To be humiliated is to have one's "significance," that is, "one's sense of having value in the eyes of others," undermined.<sup>15</sup> As used in the psychological literature, "significance" is an enormously powerful and socially important construct: it is vital to the emotional well-being of every person and can be fostered "by exposing people to environments in which they can realize their potentials because they know they're needed, wanted, and valued by others who are important to them."<sup>16</sup>

Humiliation is an emotion that is usually interpersonal rather than wholly internal to the person. "Humiliation tends to be a triadic affair, requiring one who humiliates, one who is humiliated, and one witness (or more) whose good opinion is important to the one humiliated."<sup>17</sup> As personality theorist Karen Horney argues, "[w]e will feel ashamed if we do, think, or feel something that violates our pride. And we will feel humiliated if others do something that hurts our pride, or fail to do what our pride requires of them."<sup>18</sup> Humiliation typically occurs in relationships of unequal power where the humiliator has power over the victim,<sup>19</sup> although it can happen — and humiliation can be most intense — when a person of lower status criticizes and thus humiliates one of higher status.<sup>20</sup>

In general, psychological research reveals that people experience humiliation when others treat them as objects or as having worth not equal to that of the humiliator or witnesses. Humiliation and shame occur, concluded one study, "when one is trying to relate to the other as a subject but feels objectified."<sup>21</sup> Being ignored by others is an example of such objectification. "[R]eceiving no response from the other whom one is addressing is a form of rejection; it is characteristic of an object that it can be ignored, and shame, as we have emphasized, is intimately connected with the sense of being objectified or dehumanized."<sup>22</sup> The pain felt by the objectified

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14. Klein, *supra* note 13, at 97.

15. *Id.* at 100.

16. *Id.* at 101.

17. BROUCEK, *supra* note 13, at 75. See also Klein, *supra* note 13, at 101.

18. KAREN HORNEY, NEUROSIS AND HUMAN GROWTH: THE STRUGGLE TOWARD SELF-REALIZATION 95 (1950).

19. Hartling & Luchetta, *supra* note 13, at 261.

20. Klein, *supra* note 13, at 104 (quoting Karen Horney as saying: "Criticism from people of lower status is the ultimate humiliation").

21. HORNEY, *supra* note 18, at 47.

22. BROUCEK, *supra* note 13, at 90.

individual precisely justifies prohibiting status-based harassment and discrimination.

The recurring infliction of humiliation and shame can be extremely corrosive for the psyche of the victim. Even if the individual incidents are minor, repetition magnifies the effect.<sup>23</sup> When humiliation occurs in an institutional setting like the workplace, it can be destructive for the organization as a whole.<sup>24</sup> Victims tend to feel "degraded, confused, powerless, paralyzed, ostracized, violated, or assaulted."<sup>25</sup> Humiliation becomes a barrier to the full realization of the self and to the ability of people within the organization to work with each other.<sup>26</sup> Victims sometimes adopt the strategy of acting the part that the humiliator forces the victim to play as if playing were their choice. In fact, devoting oneself to the role of "object" may be a paradoxical attempt to eliminate the shame of objectification.<sup>27</sup> Such a strategy can be inimical to gaining respect and competence in a work setting.<sup>28</sup>

Scholars and practitioners have linked a number of psychopathologies, some quite severe, to humiliation. Humiliation has been "implicated — directly or indirectly — in many, if not most, clinically recognized emotional and social disorders."<sup>29</sup> Humiliation can cause depression, paranoia, violence, generalized and social anxiety, and suicide.<sup>30</sup>

Humiliation at work can also cause less severe effects. Psychological literature notes that destructive criticism can prevent the recipient of the criticism from working effectively and can lower self-esteem.<sup>31</sup> Workplace stress associated with humiliation can interfere

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23. See, e.g., Hartling & Luchetta, *supra* note 13, at 261 (noting the profound psychological disorders resulting from minor humiliation).

24. See, e.g., *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991) (finding it "difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees."); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Robert A. Baron, *Negative Effects of Destructive Criticism: Impact on Conflict, Self-Efficacy, and Task Performance*, 73 J. APPLIED PSYCHOL. 199 (1988).

25. Hartling & Luchetta, *supra* note 13, at 261. See generally Klein, *supra* note 13 (describing the basis for Hartling and Luchetta's theory).

26. Keashly, *supra* note 13.

27. *Id.*

28. See Toni M. Massaro, *Show (Some) Emotions*, in *THE PASSIONS OF LAW* 80 (Susan A. Bandes ed., 1999).

29. Klein, *supra* note 13, at 106.

30. *Id.* at 107-12; see also Digby Tantam, *The Emotional Disorders of Shame*, in *SHAME*, *supra* note 13, at 161-75 (discussing the many disorders associated with shame).

31. Baron, *supra* note 24.

with job performance, which of course has long-term economic and psychological consequences.<sup>32</sup> The anger, lowered self-esteem, and reduced ability to perform tasks may cause the victim's employment evaluations to deteriorate. If law were to force full compensation for the harm, defendants would be required to compensate for the psychological distress as well as the diminished employment opportunities.

Anecdotal evidence from cases illustrates the many and varied psychological injuries that workplace humiliation can cause. In one well-known case, the employee suffered such severe psychological injuries that doctors hospitalized and treated him with electro-shock therapy.<sup>33</sup> The reported cases routinely note that plaintiffs testified to suffering anxiety, depression, weight-loss, insomnia, and the like. In one case I was involved with as a lawyer, a previously healthy plaintiff in a hard-fought employment discrimination suit suffered such severe anxiety that she was unable to leave her house for weeks at a time, a debilitating condition that persisted for years.

Psychological literature further suggests that the victim is not the only one to feel the harm of humiliation; humiliation may harm co-workers as well.<sup>34</sup> Witnesses to humiliation "may develop a fear of humiliation that influences their behavior to an equal or greater degree as those who have been victims of humiliation."<sup>35</sup> Victims of humiliation frequently respond with rage. The victim sometimes turns the rage inward in the form of depression and despair, or outward in efforts to exact revenge.<sup>36</sup> For the most part, the collateral harms suffered by co-workers go unrecognized by current law.<sup>37</sup>

Psychological literature notes the particular vulnerability of women, minorities, and any outsider group to humiliation.<sup>38</sup> Dominant groups in society define the standards of normality by which they measure subordinated groups inferior, and it is in the interest of the dominant group to maintain its social control through humiliation.<sup>39</sup> The outsider's status, or awareness of differentness, is an integral part of humiliation: "Minorities are made poignantly aware of being

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32. Stephan J. Motowidlo, John S. Packard & Michael R. Manning, *Occupational Stress: Its Causes and Consequences for Job Performance*, 71 J. APPLIED PSYCHOL. 618 (1986).

33. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991).

34. Hartling & Luchetta, *supra* note 13, at 262.

35. *Id.*

36. Klein, *supra* note 13, at 119.

37. A few cases have allowed suits by employees who were not victims of harassment but who suffered retaliation for opposing harassment, or who had diminished job prospects because the victim of harassment obtained more favorable job treatment as part of a quid pro quo.

38. KAUFMAN, *supra* note 13, at 272; see also *infra* notes 105-08 and accompanying text. See generally Austin, *supra* note 1.

39. Hartling & Luchetta, *supra* note 13, at 272.

different from others in various critical scenes around which shame accrues. In every instance there is a lasting impression of one's essential differentness from others, a difference that translates immediately into deficiency, into shame."<sup>40</sup> As this scholar explained:

The development of any group-based identity is rooted in both positive and negative identifications with one's group. Shame is a principal source of identity for minorities because shame lies at the root of all negative self-images. These internalized negative cultural images have to be consciously confronted and assimilated in a search for a coherent, positive identity. The striving for identification is a need to feel a sense of pride in oneself precisely because of belonging to one's group.<sup>41</sup>

To the extent that law has focused more systematically on the humiliation of women and people of color at work, the focus is justifiable because of the extraordinary destructiveness of being shamed for one's very identity and because of the pervasiveness of such humiliation that members of the dominant group never need confront.

Psychological research also confirms what feminist scholars have long maintained: humiliation is frequently visited upon people who depart from traditional gender roles.<sup>42</sup> Women and men who act in ways considered appropriate only for members of the opposite sex frequently experience humiliation.<sup>43</sup> To succeed in the workplace, women may need to depart from their assigned gender roles more often and more sharply than men. Thus, women may be particularly at risk.

The discussion thus far has examined the nature and consequences of humiliation. Here I explore the unique harms caused by humiliation in the workplace as compared to humiliation in other areas of life, such as school, social relations, or families. It is important to recognize that whatever the desirability of making humiliation in social or school settings actionable, workplace humiliation is uniquely harmful and should also be actionable.

Humiliation at work can be an especially toxic phenomenon because work is a place where so much of one's "significance" is fostered. Many people find identity, community, and self-respect at

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40. KAUFMAN, *supra* note 13, at 274.

41. *Id.* at 272.

42. See, e.g., Carolyn F. Swift, *Some Issues in Inter-Gender Humiliation*, 12 J. PRIMARY PREVENTION 123 (1991).

43. *Id.*



work.<sup>44</sup> A wave of recent scholarship on the importance of community and dignity at work canvasses the array of legal and other scholarship documenting the social and psychological importance of workplace culture.<sup>45</sup> The infliction of shame or humiliation is a particularly significant issue in a setting where status is crucial.<sup>46</sup> Most workplaces have explicit or implicit economic and social hierarchies and one's status within the hierarchy is of considerable concern to all involved.<sup>47</sup> Inasmuch as humiliation is an effort to lower another's status within the hierarchy, one would expect such acts to be particularly threatening in an organization where hierarchical status is critical.

Contempt, by its very nature, "is an affect that partitions any social group into two distinct classes: the superior and the inferior. Whoever becomes the target of contempt is thereby rendered lesser, and the minority group employing contempt as a strategy feels superior."<sup>48</sup> Those who use contempt to enhance their own status must find, of course, a particular group to continually render inferior.<sup>49</sup> The danger is of a constant cycle. "Contempt for others will usually go hand in hand with the desire or willingness to humiliate them."<sup>50</sup> The insights of sexual harassment theorists — that people sexually harass those whom they feel are weak, sexually inexperienced, too masculine, or not masculine enough in order to preserve male power in the workplace from the perceived threat of integration by women and "outsider" men — suggest that a cycle of anxiety and fear of humiliation associated with loss of status prompts men to hold women in contempt as targets of humiliation.<sup>51</sup>

Legal scholars have also recognized the above psychological phenomena. Kathryn Abrams' work, for example, shows that the workplace is an especially likely site for humiliation and that systematic humiliation of some workers is uniquely destructive to the psyche of the victims and to their prospects for full participation at work.<sup>52</sup> Yet law remains skeptical about the nature and extent of the harm caused by psychological injury even though law is not skeptical about the nature and extent of financial injury caused by

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44. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000).

45. *See id.*; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 10 (2000).

46. Massaro, *supra* note 28, at 81.

47. Bandes, *supra* note 12, at 80; Estlund, *supra* note 45, at 66.

48. KAUFMAN, *supra* note 13, at 276.

49. *Id.* at 278.

50. BROUCEK, *supra* note 13, at 75.

51. Abrams, *supra* note 8, at 1192, 1219-20 (1998); Franke, *supra* note 8, at 725-29.

52. Abrams, *supra* note 24, at 1207-09.

misrepresentation or breach of contract, or the nature or extent of physical injury to persons or property caused by battery or trespass. Nowhere is this truer than in the realm of employment law. Legal scholars have remarked on the differential treatment of emotional and physical injuries for generations, and the causes of action for intentional infliction of emotional distress tort and sexual harassment are products of that critique.<sup>53</sup> The rapidly growing field of social-psychological research on humiliation provides empirical support for assertions that courts may have been tempted to regard as political rather than factual.

## II. THE LAW'S TREATMENT OF WORKPLACE HUMILIATION IS ARBITRARY AND BIASED

The law offers a patchwork of claims for challenging humiliation at work. The claims have different elements. Some make only extreme humiliation actionable,<sup>54</sup> while others recognize the wrong in less severe humiliations.<sup>55</sup> All of them, however, share pervasive and usually unacknowledged reliance on gendered norms of behavior, reflecting a widespread societal aggrandizement of a masculine agency.

The law of sexual harassment has done much of the heavy lifting in the last two decades in bringing to legal and public consciousness the pervasiveness of humiliation at work. The scholarship on sexual harassment has demonstrated myriad different ways that harassment humiliates: victims are turned from competent subjects into sexual objects; victims are denied training, tools, and the other tangible and intangible things needed to get the job done; victims are shunned, taunted, intimidated, assaulted, and sometimes raped.<sup>56</sup>

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53. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Calvert Magruder, *Mental and Emotional Disturbance and the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

54. *Wimberly v. Shoney's, Inc.*, 39 FEP Cases 444 (Ga. 1985) (finding that some inadvertent touching or flirtation was not enough to create a cause of action).

55. James C. Chow, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 LOYOLA L.A. L. REV. 133 (1999).

56. Schultz, *supra* note 7, at 1721. See also Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1833-38 (1990) (discussing the treatment of women in male-dominated sex-segregated workplaces). Women are not the only victims of these forms of harassment. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

Other legal doctrines also examine humiliation. Scholars have long considered the autonomy-denying, objectifying humiliation of status-based discrimination — whether based on race, gender, disability, or other status — a justification for prohibiting such discrimination.<sup>57</sup> Yet, the legal system does not protect all employees against such humiliations; it remains legal in most states to discriminate against or harass employees based on sexual orientation. The humiliation of intrusive screening and invasions of privacy — through drug-testing, personality-testing, and electronic recording — has been the justification for developing a jurisprudence of privacy at work.<sup>58</sup> Furthermore, the tort of intentional infliction of emotional distress concerns suffering humiliation vis-à-vis the outrageous behavior of another.<sup>59</sup> In sum, employment law has been “tortified”<sup>60</sup> because the legal system is receptive to arguments about the many and varied ways in which people deliberately and destructively humiliate others at work. Courts have now begun to see that workplace humiliation can be uniquely destructive both economically and psychologically.

Courts have explicitly and unapologetically refused to articulate any standard of what humiliations are actionable as outrageous torts, with the exception of those that strike the judge as being “outrageous” as a matter of law.<sup>61</sup> One could despair of explaining why certain incidents of sexual harassment strike judges as outrageous<sup>62</sup> and others do not.<sup>63</sup> One wonders why some interrogations strike judges

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57. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10 (1976) (“Racial generalizations usually inflict psychic injury whether or not they are in fact premised on assumptions of differential moral worth.” Furthermore, “[t]he psychological injury inflicted by generalizations based on race is compounded by the frustrating and cumulative nature of their material injuries.”).

58. The California Supreme Court, even though currently dominated by Republican appointees, has been reasonably sensitive to the humiliation of intrusive searches of employees. See, e.g., *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997) (describing the humiliation of drug-testing); *Sanders v. Am. Broad. Co.*, 978 P.2d 67 (Cal. 1999) (ruling that employees have a “limited” expectation of privacy); see also *Soroka v. Dayton-Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (holding that personality testing is humiliating and violates California constitutional right of privacy), *dismissed*, 862 P.2d 148 (Cal. 1993); cf. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (suggesting drug tests, without suspicion, of some categories of current employees may be unreasonable).

59. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

60. See *supra* note 6.

61. RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

62. *Bustamento v. Tucker*, 607 So. 2d 532 (La. 1992) (driving a forklift at the victim and using the fork to pin her to the wall).

63. *Gearhart v. Eye Care Ctrs. of Am., Inc.*, 888 F. Supp. 814 (S.D. Tex. 1995) (telling an employee she could get promoted only by sleeping with her boss, wearing a particular type of pantyhose, and allowing her boss to touch her breasts and kick her in the buttocks).

as outrageous and others do not,<sup>64</sup> or why arbitrarily firing employees in alphabetical order to force a suspected thief to confess is actionably outrageous whereas just arbitrarily firing employees for no reason is not.<sup>65</sup>

The courts' difficulty in discerning which humiliating incidents at work should be actionable transcends the much-noted problem of defining "hostile and pervasive" in sexual harassment law and "outrageous" in tort. In cases challenging discrimination in terms of employment, courts have begun suggesting that certain incidents are either too trivial to be actionable<sup>66</sup> or too trivial to be used as evidence of employer bias.<sup>67</sup> Both of these developments suggest that courts do not appreciate why Jim Crow laws were so successful: "small" incidents of discrimination, like segregated drinking fountains and buses, can be as demeaning as "big" ones.

The extent to which inconsistencies in existing law are attributable to insufficient appreciation of the significance of humiliation at work is indeterminable. Even in the areas where lawyers have attempted to educate courts about the harms of particular forms of harassment, the law's reaction has been disappointing. Advocates for victims of sexual harassment and discrimination have used expert social-psychological evidence to educate judges and juries about the harm of sexual stereotyping, sexual harassment, and sex segregation. Scholars have described and explained the full range of harm.<sup>68</sup> This careful and necessary illumination of the unique harms of sex-based discrimination and harassment has perhaps had unintended consequences, particularly in light of the lack of similar focus on the debilitating effects of systematic humiliation on any worker.<sup>69</sup> Scholars have suggested that women suffer uniquely and severely from humiliation at work and have singled out a particular source

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64. Compare *Smithson v. Nordstrom, Inc.*, 664 P.2d 1119 (Or. Ct. App. 1983) (interrogating 19-year-old employee for three hours in small windowless room is actionable), and *Gen. Motors Corp. v. Piskor*, 381 A.2d 16 (Md. 1977) (finding a thirty-five minute interrogation actionable), with *Leahy v. Fed. Express Corp.*, 613 F. Supp. 906 (E.D.N.Y. 1985) (denying the actionability of an employee's claim of being interrogated in a small room where the security guard showed the employee that he had a gun).

65. Compare *Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976) (threatening to fire waitresses in alphabetical order until one confessed to stealing is outrageous), with *Harris v. Ark. Book Co.*, 700 S.W.2d 41 (Ark. 1985) (firing an employee after forty-nine years of service without a pension or severance pay is not outrageous).

66. See generally Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

67. See generally Chow, *supra* note 55.

68. See *id.* at 140-41.

69. *Id.* at 142-43 (noting the consequences of a failure to recognize women's differences in workplace harassment).

of humiliation for remedy.<sup>70</sup> Focusing on the psyches of women may perpetuate a protectionist assumption when courts do not consider this kind of expert evidence about the corrosive effect of workplace humiliation on the psyches of men.

Moreover, the courts' focus on sexual harassment as the principal or only form of humiliation at work has allowed employers to inflict further humiliations on employees in an effort to stop it. Law firms now drum up business for their services by advocating that employers prohibit dating among employees, or force dating employees to sign so-called "consensual relationship agreements" that would be laughable if they were not so demeaning.<sup>71</sup> The absence of an encompassing legal prohibition of workplace humiliation enables employers to monitor and control even the minutest details of work life in the name of reducing liability. Surely the sum total of humiliation at work is increased rather than decreased when an employer insists that its employees exchange the following correspondence when they commence a dating relationship:

Dear (Name of Object of Affection):

As we discussed, I know that this may seem silly or unnecessary to you, but I really want you to give serious consideration to the matter as it is very important to me. . . .

I very much value our relationship and I certainly view it as voluntary, consensual and welcome. And I have always felt that you feel the same. However, I know that sometimes an individual may feel compelled to engage in or continue a relationship against their [sic] will out of concern that it may effect [sic] the job or working relationships.

It is very important to me that our relationship be on an equal footing and that you be fully comfortable that our relationship is at all times fully voluntary and welcome. I want to assure you that under no circumstances will I allow our relationship or, should it happen, the end of our relationship, to impact on your job or our working relationship. Though I know you have received a copy of (our) company's sexual harassment policy, I am enclosing a copy . . . so that you can read and review it again. Once you have done so, I would greatly appreciate your signing this letter below, if you are in agreement with me.

(Add personal closing)

Very truly yours,

(Name)

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70. *Id.* at 143.

71. See Tom Kuntz, *Consensual Relationship Agreements for Water Cooler Paramours*, N.Y. TIMES, Feb. 22, 1998, § 4, at 7.

I have read this letter and the accompanying sexual harassment policy and I understand and agree with what is stated in both this letter and the sexual harassment policy. My relationship with (name) has been (and is) voluntary, consensual and welcome. I also understand that I am free to end this relationship at any time and, in doing so, it will not adversely impact on my job.

(Signature of Object of Affection)<sup>72</sup>

Employers claim a need to protect women, and themselves, by monitoring every single e-mail employees send to anyone and every web site they access so as to prevent the possibility that someone might circulate a sexist joke on e-mail or access pornographic or erotic web sites at work.<sup>73</sup> One can therefore blame the imposition of endless scrutiny and the humiliation it causes on the presence of hypersensitive women, thus further stigmatizing and humiliating women.

That is not to suggest that women and people of color do not suffer uniquely and encounter more humiliation at work.<sup>74</sup> Rather, what I suggest is that the law has attended too little to all the ways in which people humiliate and are humiliated at work and to the question of which humiliations should be actionable for everyone.

For all the many possible causes of action and for all the employer alarm about the risk of liability and the huge windfall recoveries awarded to thin-skinned, malingering, or vindictive employees, however, the remedies for workplace humiliation are severely inadequate.<sup>75</sup> Most people who have disputes never assert a claim, even against the wrongdoer. Of those who do, few hire a lawyer.<sup>76</sup> Of those, only a small number ever file suit.<sup>77</sup> Employment law remedies are expensive and slow in coming, to put it mildly.

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72. *Id.*

73. See, e.g., Mark Isman, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. SCI. & TECH. L. 6 (2000); Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 RICH. J.L. & TECH. 25 (2000); Caitlin Garvey, Comment, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 DAYTON L. REV. 133 (1999); cf. *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035 (9th Cir. 2001) (regarding an employer who violated federal wiretap statute by accessing employee's password-protected website on which employee criticized employer).

74. Hartling & Luchetta, *supra* note 13, at 271 (finding that, indeed, empirical studies suggest that women do suffer more humiliation).

75. See generally Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099-1101, 1103 (1996) (applying general theories of harassment and discrimination to the workplace).

76. *Id.*

77. *Id.*

Many people decline to press a claim because, as Kristin Bumiller's work shows, it is sometimes difficult for victims even of significant civil rights violations to cease seeing themselves as disempowered.<sup>78</sup> As critics of sexual harassment doctrine and plaintiffs' lawyers often complain, the process of bringing a sexual harassment suit can be extremely humiliating in itself, as the plaintiff's psychology, motives for suing, past sexual history, and work performance routinely are subject to withering attacks in depositions and at trial.<sup>79</sup> The psychological literature confirms that workplace humiliation compounds when litigation allows questioning of the motives, actions, and integrity of the victim of harassment.<sup>80</sup> The humiliation may be reenacted at many steps along the way, especially if the plaintiff loses the suit. The humiliation of being told that the sexual overtures were not unwelcome because the plaintiff acted as if she enjoyed being sexually taunted;<sup>81</sup> the humiliation of being told by a judge that the plaintiff should have had a thicker skin;<sup>82</sup> the humiliation of losing a claim for intentional infliction of emotional distress on the ground that the conduct, while obnoxious, or boorish, or cruel, was not so far "beyond all possible bounds of decency . . . and utterly intolerable in a civilized community."<sup>83</sup>

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78. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 2-4 (1988) (summarizing research showing why victims of discrimination fail to challenge wrongful actions through law).

79. See Louise Fitzgerald et al., *Junk Logic: The Abuse Defense in Sexual Harassment Litigation*, 5 *PSYCHOL. PUB. POL'Y & L.* 730 (1999) (critiquing the increased use of plaintiff's history of childhood sexual abuse as a defense to issues of unwelcomeness, reasonableness, and damages and arguing that the studies on which the defense is based are faulty).

80. Hartling & Luchetta, *supra* note 13, at 272.

81. *Stephens v. Rheem Mfg. Co.*, 220 F.3d 882, 886 (8th Cir. 2000); *Kraft v. Ekco Housewares Co.*, 16 F.3d 1225, 1994 WL 43806, at \*3 (7th Cir. 1994), *cert. denied*, 513 U.S. 840 (1994) (unpublished opinion) (affirming district court's determination that plaintiff might have welcomed defendant's sexual advances); *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990) (finding no harassment where defendant's sexual advances toward plaintiff were not unwelcome); *Christensen v. Bozart*, 879 F.2d 865, 1989 WL 79827, at \*2 (9th Cir. 1989); *Lucas v. South Nassau Communities Hosp.*, 54 F. Supp. 2d 141, 148 (E.D.N.Y. 1998); *Jensen v. Kellings Fine Foods, Inc.*, 1987 WL 54411, at \*11 (D. Kan. 1987); *Kresko v. Rulli*, 432 N.W.2d 764, 768 (Minn. App. 1989).

82. *Baskerville v. Culligan Int'l, Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (explaining by J. Posner that "only a woman of Victorian delicacy" would find that the defendant's comments rose to the level of sexual harassment); *Lucas*, 54 F. Supp. 2d at 148 (cursing and stating that plaintiff wanted to go to bed with defendant are insufficient to state a claim — expletives and comments which might be considered crude and vulgar when "falling on vestal ears" are unfortunately commonplace in most current vocations); *Lamanna-Berman v. Names & Addresses, Inc.*, 1997 WL 803865, at \*7 (finding that only a woman of "Victorian delicacy" would find behavior in this case sexual harassment — comments about thong bikinis, rumors about having an affair to get hired, and client asking for kisses).

83. *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. d (1965).

Existing legal regulation of humiliation at work is worse than arbitrary. In some respects, it is gender-, class-, and race-biased. Intentional infliction of emotional distress invites judges to make subjective judgments about what conduct is "extreme and outrageous," whether explicitly or unconsciously biased.<sup>84</sup>

The inadequacies of existing law and theory are apparent in a pair of cases that are favorites of employment law casebook editors.<sup>85</sup> In one case, *Wilson v. Monarch Paper Co.*, a Texas company was trying to force out an executive.<sup>86</sup> The company demoted him from one job to another and finally to the position of "warehouse supervisor," whose principal task was to clean up the employee cafeteria.<sup>87</sup> Eventually, the executive-turned-janitor sued for intentional infliction of emotional distress.<sup>88</sup> The court held that the humiliation deliberately inflicted on him was outrageous:

We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete.<sup>89</sup>

What does this case say about "menial jobs" in America? What constitutes a humiliating demotion?<sup>90</sup> Without a greater understanding of humiliation, it is difficult to rationally explain why working as a janitor may have dignity for some, be humiliating but not actionable for others, and constitute actionable humiliation for a few.

When I teach *Monarch Paper*, I compare it with another casebook chestnut, *Bodewig v. K-Mart*, in which a male K-Mart manager subjected a young female cashier to a strip search when an evidently crazy female customer accused her of stealing twenty dollars.<sup>91</sup> Emphasizing that the plaintiff was a shy and modest young woman,

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84. Legal scholarship has long criticized the indeterminacy of the outrageousness requirement of the emotional distress tort. See, e.g., Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982); see also Austin, *supra* note 1, at 6-18 (critiquing the gendered and race-biased nature of the tort).

85. See, e.g., MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* (4th ed. 1998).

86. 939 F.2d 1138, 1138 (5th Cir. 1991).

87. *Id.* at 1140.

88. *Id.* at 1141.

89. *Id.* at 1145.

90. See generally White, *supra* note 66 (describing the growing phenomenon in employment discrimination cases that some discriminatory actions are too minor to be illegal).

91. *Bodewig v. K-Mart, Inc.*, 635 P.2d 657 (Or. Ct. App. 1981).



the court held that the employer's conduct was outrageous.<sup>92</sup> The humiliations that courts deem outrageous enough to be actionable seem heavily influenced by the court's notions of status, gender, and class. Humiliation occurs in part because of the enormous psychological salience of social status. Status is a complex amalgam with race, gender, wealth, education, charm, charisma, and multiple other factors as constituent parts. Why is strip-searching humiliating to a "shy, modest, young woman" working as a K-Mart cashier,<sup>93</sup> but not to a prison guard?<sup>94</sup> Why is working as a janitor humiliating to an executive, but not to a janitor?

If the case makes it to the jury, the jury will make similarly arbitrary and biased judgments. The problem of fact-finder bias is compounded and magnified as plaintiffs' lawyers assess which cases are even worth pursuing: Is this plaintiff sufficiently young, naïve, vulnerable, and clean-cut to make a compelling witness? Will it come out during the course of the litigation that the plaintiff has previously engaged in behavior that the jury will find objectionable? When the lawyer tries to establish that the plaintiff's acute emotional distress is due to the workplace abuse, will cross-examination attempt to show that it was a result of childhood sexual abuse, drug or alcohol abuse, spousal abuse, a history of mental illness, or just the spite of a lazy worker?

Legal scholarship alludes to the cultural biases inherent in deciding which forms of workplace humiliation are acceptable and which are legally outrageous, but it has not yet persuaded courts to be more explicit or self-aware in their judgments or to organize the vast and unruly mass of cases. A clearer understanding of the nature and causes of humiliation might help everyone understand courts' unexamined reactions to some employer practices and their concerns about providing legal remedies, even for those practices they deplore.

### III. DIRECTIONS FOR FUTURE RESEARCH

Humiliation is more pervasive and destructive than the law currently acknowledges.<sup>95</sup> Part of its destructiveness is in the pervasive powerlessness that the victim experiences.<sup>96</sup> Creating institutions

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92. *Id.*

93. *Id.* at 662.

94. See *McDonnell v. Hunter*, 809 F.2d 1302, 1306 (8th Cir. 1987) (permitting strip searching of prison employee if based on "reasonable suspicion based on specific objective facts and rational inferences").

95. Austin, *supra* note 1, at 5, 30.

96. Hartling & Luchetta, *supra* note 13, at 261.

where one can quickly and readily obtain justice could ameliorate powerlessness. Psychological literature has asserted that a "strategy for preventing the humiliation dynamic from running its course is to alter either the *reality* of the power relationships among the triad of participants, or the *perception* of the power relationships."<sup>97</sup> Law plays this role in some circumstances, by allowing the intended victim to confront or thwart the humiliator's plan by asserting a countervailing power.<sup>98</sup> From the perspective of a lawyer, however, the optimism expressed in some of the psychological literature about the humiliation-thwarting potential of laws identifying humiliation as actionable<sup>99</sup> seems misplaced, at least in some cases. Law may empower in some cases, but it may simply compound the humiliation in others.

An additional difficulty with the law's treatment of workplace humiliation is the challenge of proving damages. To prove that an act was outrageous in tort, the plaintiff must show that she experienced severe emotional distress.<sup>100</sup> Plaintiffs typically testify to their symptoms: loss of sleep, anxiety, depression, and sometimes worse.<sup>101</sup> Although proof of severe emotional distress or psychological injury is not required to prove sexual harassment, other status-based harassment,<sup>102</sup> or invasion of privacy,<sup>103</sup> such evidence is necessary to recover damages for emotional distress even where liability for the underlying claim does not require proof of distress.<sup>104</sup> This causation requirement is deeply troubling.

The ability to recover will depend on the fortitude, the culture, and the gender-role of the plaintiff. Men in some subcultures may

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97. Swift, *supra* note 42, at 140.

98. *Id.* at 141.

99. *Id.* at 144 (noting that some women counteract humiliation by pursuing justice through legal means).

100. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (providing in pertinent part: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm"). Courts tend to find that the outrageousness of the conduct proves the requisite distress because courts have difficulty discerning whether the plaintiff's asserted emotional distress is genuine. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965); William Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44-45 (1965). A discussion of cases in Givelber, *supra* note 84, at 47-48, demonstrates this point.

101. See, e.g., *Wilson v. Monarch Paper Co.*, 939 F.2d at 1141 ("Wilson's emotional illness was severe and long-lasting. Doctors diagnosed him with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression."); see also *Bodewig v. K-Mart*, 635 P.2d at 662 (observing that plaintiff testified "she had two or three sleepless nights, cried a lot and still gets nervous and upset when she thinks about the incident.").

102. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

103. RESTATEMENT (SECOND) OF TORTS § 65 2.A-E (1977).

104. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

have more trouble either displaying the required distress or later testifying that they experienced it. Men who have been bullied because of their perceived weakness<sup>105</sup> or women working in male-dominated occupations may display such emotions at their peril. Any sign of emotion may be taken either as vulnerability and invitation to further harassment, or as weakness that might cause their superiors to lose confidence in their competence. Furthermore, there is support in the psychological literature for the proposition that men and women may experience harassment differently,<sup>106</sup> and that victims and perpetrators of interpersonal conflict perceive it *very* differently.<sup>107</sup> Some cultures allow displays of affection that white American culture considers evidence of emotional distress; others discourage such displays.<sup>108</sup> Law should not declare humiliation to be more or less wrongful depending on the gender or culture of the victim, yet when proof of liability or damages rests on evidence of certain culturally determined behaviors or affects, it does precisely that.

Moreover, when the law gives employees clues to the emotions they should display, opportunistic people may display emotions for instrumental reasons. Professor Sanger made precisely this point at this symposium. In her view, the danger of such clues is that emotions will lose the authenticity that makes them interesting in the first place.<sup>109</sup>

A conservative critic of antidiscrimination law makes the same point, but draws different conclusions.<sup>110</sup> In his view, liability for status-based humiliation simply will cause employees to feel more distress than they would otherwise and will cause employers to censor racist, sexist, and other speech and conduct that he evidently considers either unobjectionable or a necessary part of life in a free society.<sup>111</sup> In other words, liability for humiliation is simply a subsidy for weakness: "As economists point out, if you subsidize something, you get more of it. If the legal remedies of the antidiscrimination law, particularly monetary remedies, subsidize feelings of outrage and

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105. See, e.g., *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

106. See Christopher W. Williams, Richard S. Brown & Paul R. Lees-Haley, *An Attributional (Causal Dimensional) Analysis of Perceptions of Sexual Harassment*, 25 J. APPLIED SOC. PSYCHOL. 1169 (1995).

107. Roy F. Baumeister, Arlene Stillwell & Sara R. Wotman, *Victim and Perpetrator Accounts of Interpersonal Conflict: Autobiographical Narratives About Anger*, 59 J. PERSONALITY & SOC. PSYCHOL. 994 (1990).

108. See generally Austin, *supra* note 1, at 11 (noting that workers are not a "monolith").

109. See Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107 (2001).

110. David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 171 (1999).

111. *Id.*

insult, we will get more feelings of outrage and insult, a net social loss."<sup>112</sup> In his view, therefore, the problem with antidiscrimination law's effort to prohibit humiliating discrimination is that it weakens the fortitude that is necessary to live in a free society: "Not only is certain thickness of skin necessary for a successful free society, but a society that has a legal system that expects such thick skin is likely to get it."<sup>113</sup>

Will law prompt people to *display* emotions irrespective of whether they feel them, as Professor Sanger suggests, or will it go farther and prompt people to *feel* emotion they would not otherwise feel, as Professor Bernstein suggests? Professor Bernstein is patently wrong if he believes that people would experience less humiliation if law did not regard discrimination as actionably humiliating.<sup>114</sup> Sexual harassment was humiliating even when it was legal. It does not follow, however, that law has *no* influence on how people think and feel about their world. Is the illegality of discrimination empowering to victims, by making them understand that their misfortune is not attributable to their own failings and is not unique to them? Or, is it disempowering by making them assume the role of the traumatized victim as the price of obtaining redress? Emotions jurisprudence may help us understand whether law facilitates the feminist project of making the personal political and the consciousness-raising effort of "naming and blaming," or whether law has undermined the efforts of disempowered workers to redistribute wealth, power, and prestige in the workplace.

The law compounds the humiliation by having a remedial structure that is arbitrary, expensive, and difficult. Millions of dollars to one secretary who is sexually harassed can operate to humiliate the winning plaintiff — accused of receiving a huge windfall she does not deserve — other plaintiffs who recover little or nothing, and others who are implicitly and explicitly condemned for never having had the gumption, tenacity, time, energy, or money to assert a claim at all. Now that a generation of feminist and critical race scholarship has illuminated the many forms of workplace humiliation and the gendered, racialized, and class-bound nature of much of it, we should attend to the failure of the remedial structure of employment law to uncover, prevent, and remedy such humiliation. In short, we should study the role that law plays in perpetuating that humiliation and

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112. *Id.*

113. *Id.*

114. *Id.*

how legal remedies might be re-imagined to effectively and affordably stop workplace humiliation.

The particular form of legal intervention is as important as its existence. Too much of existing employment law plays only a deterrent and a vengeance role; there is too little law playing a remedial role.<sup>115</sup> By remedial, I mean that legal intervention should be available in the context of an ongoing relationship, not merely once the firing or driving out of the employee occurs. The great achievement of collective bargaining in a unionized workplace is the grievance arbitration system that allows a worker an immediate, affordable, remedy for "small" incidents of abuse or unfairness, as well as large ones.<sup>116</sup> Part of the function of the grievance system is to protect workers from the humiliation of arbitrary supervisory action.<sup>117</sup> Employees in a non-union workplace have no such institutional antidote to "small" humiliations, and, indeed, the irregular patchwork of legal protections described above shows that they often have no legal remedy for large ones either.<sup>118</sup>

In advocating that law play a remedial role in workplace disputes, I do not mean to suggest that ADR should supplant all employment law and litigation. The spread of mandatory pre-dispute arbitration of all employment claims could lead to the end of employment law, because the lower damages, absence of procedural protections, and total privacy of arbitration undermine the role of litigation as the process by which society articulates and enforces norms of acceptable behavior. What I suggest instead is the creation of fair mechanisms to adjudicate disputes during ongoing employment relationships as a supplement to, not a substitute for, courts' traditional role in enforcing tort, contract, and statutory rights at the end of a relationship.

The unfairness of the current regime is harmful not only to those whose humiliation goes without remedy. The impression that law will aid only some people in the quest for a workplace free of harassment and humiliation provides a cover of legitimacy, and perhaps even fuel, for a backlash that may undermine all anti-discrimination law. Law reviews lately have lavished significant attention on the argument that enforcement of antidiscrimination law to prevent humiliation is a significant deprivation of the civil

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115. See Austin, *supra* note 1, at 30-31.

116. *Id.* (noting that only legal "upheaval on a larger scale is likely to produce structured change").

117. *Id.* at 31 (stating that "causes of action are not the ideal structural response to unrestrained supervisory discretion").

118. *Id.*

rights of employers, men, whites, and others.<sup>119</sup> Some contend that greater legal protection for women deprives men of equal protection.<sup>120</sup> Some argue that civil rights laws infringe unacceptably on the right of persons to associate with whom they choose, to speak as they wish, and to impose their religious views in their workplace.<sup>121</sup> The widespread perception that only women and people of color have legal protection against humiliation at work fuels the perception that the Constitution should protect the rights of some groups to humiliate others by calling it freedom of religion, speech, or equal treatment for men or whites.

#### IV. CONCLUSION

This symposium asked us to contemplate the significance of the emerging jurisprudence of emotions for the ongoing project of gender jurisprudence. Thus, it is appropriate to conclude by suggesting that without a generation of feminist jurisprudence, it would be neither possible nor intelligible to advocate the development of an encompassing legal theory of workplace humiliation.

One of the accomplishments and insights of feminist legal theory has been to draw attention to the ways that gender, as well as race and class, are systematically used to humiliate women, poor people, and people of color. Beyond that, feminist theory has, by showing that the personal truly *is* political, introduced the previously invisible sphere of interpersonal emotional dynamics into legitimate academic discourse. Thus, courts and scholars can now see how subordinated groups disproportionately suffer workplace humiliation, and how the experience of humiliation transcends gender, race, and class lines.

Today's gender jurisprudence demonstrates the importance of gendered norms in the construction of power and powerlessness.<sup>122</sup> It does more than that, however. It helps us see the enormous influence that social status has in determining which experiences are humiliating and on the law's partial and inconsistent remedies for workplace humiliation.<sup>123</sup> Humiliation occurs when the humiliator

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119. See, e.g., Bernstein, *supra* note 110; Eugene Volokh, *supra* note 9 (citing literature that exemplifies the amount of attention paid to this aspect of employment law).

120. Brian Lehman, *The Equal Protection Problem in Sexual Harassment Doctrine*, 10 COLUM. J. GENDER & L. 125 (2000).

121. Bernstein, *supra* note 110; Tung Yin, *How the Americans with Disabilities Act's Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 LAB. LAW. 107 (2001).

122. See discussion *supra* notes 91-93 (noting the court's emphasis on typical gender demeanor in *Bodewig*).

123. See generally Austin, *supra* note 1, at 10, 25.

denies the agency and autonomy of the object of humiliation. The long-term project of feminism has been to claim autonomy and agency for women; to transform them from objects controlled by men into subjects with their own control. The development of a jurisprudence of workplace respect for all persons is the unfinished business of the project of feminist jurisprudence.