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Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress

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The conventional wisdom is that, in the workplace, abuse can be a legitimate instrument of worker control and an appropriate form of discipline.[1] By "abuse" I mean treatment that is intentionally emotionally painful, offensive, or insulting. Rebukes and reprimands are the very sort of "behavior that one would expect from a superior who is dissatisfied with his subordinate's performance."[2] Young black men may indeed be offended by the close surveillance and suspicious scrutiny they receive in the course of performing low-paying, unskilled jobs,[3] but that is "their problem." Furthermore, the white-collar manager who suffers despair as a result of an unexplained denial of the "perks" of exalted status is supposed to get the message and seek employment elsewhere.[4]

It is generally assumed that employers and employees alike agree that some amount of such abuse is a perfectly natural, necessary, and defensible prerogative of superior rank. It assures obedience to command. Bosses do occasionally overstep the bounds of what is considered reasonable supervision, but, apart from contractually based understandings[5] and statutory entitlements to protection from harassment,[6] there are few objective standards of "civility" by which to judge

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1. *See e.g.*, C. BRODSKY, THE HARASSED WORKER 6, 149-50 (1976).

2. Magruder v. Selling Areas Marketing, Inc., 439 F. Supp. 1155, 1166 (N.D. Ill. 1977).

3. *See generally* Anderson, *Some Observations of Black Youth Employment*, in YOUTH EMPLOYMENT AND PUBLIC POLICY 64 (B. Anderson & I. Sawhill eds. 1980) [hereinafter Anderson, *Youth Employment*]; Anderson, *The Social Context of Youth Employment Programs*, in YOUTH EMPLOYMENT AND TRAINING PROGRAMS: THE YEOPA YEARS 348 (1985) [hereinafter Anderson, *Employment Programs*].

4. *See, e.g.*, Wells v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1983); Snyder v. Sunshine Dairy, 87 Or. App. 215, 742 P.2d 57 (1987).

5. Some workers are protected by bureaucratic safeguards that are codified in union contracts and employee handbooks. *See* text accompanying notes 219-236 *infra*.

6. *See* notes 46-51 *infra* and accompanying text.

a superior's treatment of a subordinate. Workers for their part are expected to respond to psychologically painful supervision with passivity, not insubordination and resistance. They must and do develop stamina and resilience. If the supervision is intolerable, they should quit and move on to another job.

In sum, there is little reason for workers to take undue umbrage at the treatment they receive at work. The pain, insults, and indignities they suffer at the hands of employers and supervisors should be met with acquiescence and endurance. That's life.

Who believes this?

My experiences as a "subordinate" and as an observer of life among the "subordinates" who work where I do[7] suggest that employees' attitudes toward, and actions against supervisors are frequently at odds with any concept of deference to authority. The conventional wisdom is reflected in the appellate court opinions applying the tort of intentional infliction of emotional distress in suits brought by employees against their employers and supervisors. It is not, however, reproduced in the everyday actions and attitudes of workers. As I began to read cases applying the so-called tort of outrage to the claims of employees, a passage from Toni Morrison's novel *Tar Baby*[8] often came to mind. Morrison captures the familiar tenor of the banter and behavior of black female workers, especially that occurring in the absence of the boss:

> [I]f ever there was a black woman's town, New York was it. . . . Snapping whips behind the tellers' windows, kicking ass at Con Edison offices, barking orders in the record companies, hospitals, public schools. . . . They jacked up meetings in boardrooms, turned out luncheons, energized parties, redefined fashion, tipped scales, removed lids, cracked covers and turned an entire telephone company into such a diamondhead of hostility the company paid you for not talking to their operators. The manifesto was simple: "Talk shit. Take none."[9]

Sassy rhetoric and a sense of style challenge the status quo and liberate the spirit. They are the sort of cultural devices that many workers employ, if not to conquer the oppressions of the workplace, then at least to create moments of resistance and autonomy from employer

7. As a teenager growing up in black Washington, D.C. (what I call "the vast federal plantation"), I got jobs through summer youth employment programs. I mainly worked in offices and laboratories. Now that I am a law professor, I suppose that I am more of a superordinate than subordinate, but I do not imagine that there is an academic alive who has not engaged in her or his share of "dean-trashing." I have spent most of my professional life as a token, one of two or three or four blacks and/or women occupying high-level positions. I have felt especially comfortable with and supported by the secretaries, office help, library personnel, security guards, and housekeeping staff. I share deep cultural ties with them, and their common sense and critical assessments of their working situations have been of immeasurable instruction and encouragement.

8. T. MORRISON, TAR BABY (1981).

9. *Id.* at 222.

control. Despite all their feisty vitality, informal discourses, practices, and understandings neither fully negate the workers' acquiescence to abusive authority nor fuel sustained warfare against a hierarchical system that differentiates among employees with regard to the oppressiveness of supervisory control. The mechanisms of workplace and group culture are partial, incomplete, and disorganized. They are no match for the seeming inevitability of the dictate that abusive authority be obeyed.

Indeed, the cultural modes and coping mechanisms of minority and female workers are used to justify discipline and discrimination. Every day I see young black women and men working behind the counter or busing tables at fast food restaurants, delivering packages about town, or otherwise engaging in employment requiring few skills. Their positions are essentially dead-end jobs: pay is poor and supervision is tight; there is no opportunity for advancement; turnover is high and workers move from job to job to job without acquiring additional training or an improvement in working conditions.[10] As hard as they try, the work experiences of these young people must be demoralizing for them and others similarly situated. Because of the narrow corridor in which I travel I see less often the vast number of minority young folks who are unemployed or have dropped out of the labor market entirely. News accounts suggest that not only do these prospective minority employees have difficulty satisfying skill requirements, but their demeanor and commitment to the "work ethic" may also be found wanting.[11] The panacea seems to be socializing the workers to appreciate authority. Given the nature of the jobs, and the ubiquity of conflict in the employment relationship, socializing the authority figures to be more respectful and understanding of the ways of young workers would also facilitate the full participation of minority women and men in the labor force.[12] Of course, transforming bosses will be no easy matter.

The focus of concern throughout this article will be the working conditions and experiences of black and Latino employees of both sexes, and female workers, black, brown and white, all of whom occupy the lower tiers of the labor force.[13] To be sure, the sources of the ma-

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10. *See* B. GARSON, THE ELECTRONIC SWEATSHOP 17-39 (1988); Blount, *"If You Got Time to Lean, You Got Time to Clean.,"* SOUTHERN EXPOSURE, Winter 1981, at 73-76; Marriot, *More Jobs, but Not Careers, for Youth*, N.Y. Times, March 19, 1988, at 29.

11. *See* Marriott, *supra* note 10; Daley, *For Dropouts, Finding Jobs Is Tough Task*, N.Y. Times, August 1, 1988, at B4, col.1; W. WILSON, THE TRULY DISADVANTAGED 60-61 (1987).

12. *See* Anderson, *Employment Programs*, *supra* note 8, at 355; Teltsch, *Helping Least-Employable Find Jobs*, N.Y. Times, Aug. 21, 1988, at 20, col. 1 (nat'l ed.).

13. There is no short, concise way to refer to the overlapping categories of workers I will be discussing. The expressions that are typically used seem to exclude minority women. B. HOOKS, AIN'T I A WOMAN 7-9 (1981). It should be understood that in this article the term "minority workers" includes both males and females, while the term "female" includes women who are white and women who are not. My use of "and" to link these words, rather than "and/or" or an expression such as "minority women and men and white women," is intended to be fully inclusive.

terial circumstances of these minority men, minority women, and majority women are not the same. There are dangers in ignoring the particularities of the ideological and economic conditions and cultural responses that separate each group from the others as well as from the group of white male low status workers. Yet many members of these groups historically subject to multiple oppressions share a common experience of abusive supervision. For them, it is not isolated and sporadic rudeness, but a pervasive phenomenon that causes and perpetuates economic and social harm as well as emotional injury. In the places where these workers labor, racism and sexism obscure and are obscured by the perniciousness of class oppression. Mistreatment that would never be tolerated if it were undertaken openly in the name of white supremacy or male patriarchy is readily justified by the privileges of status, class, or color of collar.[14] Moreover, minority and female low status workers appear to have little economic clout with which to combat such supervisory abuse. They do, however, criticize their work situations and resist them to a limited extent. This article explores how the law might be useful in maximizing the affirmative politically progressive potential of their informal, local, and largely defensive cultural opposition to mistreatment on the job.

The analysis that follows considers supervisory abuse from three perspectives. It first describes the approach of courts and commentators in evaluating intentional infliction of emotional distress claims brought by employees. Although the generality of the tort doctrine betokens the possibility of an expansive remedy, the holdings generally support norms justifying abusive supervision. A second, antithetical perspective is supplied by the work and group culture of minority and female low status workers. Rejecting the view that dominates the tort analysis, these workers criticize abuse on the job and oppose it through a wide range of devices and tactics. Through these same mechanisms, however, they ultimately accommodate harsh supervisory oversight. The implications of the disparity between the workers' critical consciousness and their acquiescent behavior will be explored in depth. The third perspective fits authoritative workplace abuse into structural context by linking it to systems of supervisory control and the stratification or segmentation of the labor force. Whereas the cultural perspective emphasizes the way in which workers create opportunities for the exercise of choice in the face of hostile supervision, the structural perspective reveals the coercion that limits the real possibility of achieving freedom through informal means. Because workplace abuse has both a structural and cultural basis, however, reform might be possible if small-scale cultural resistance escalated into broad political activity ac-

14. Although not specifically invoked elsewhere, "color of collar" includes pink-collar workers. Pink-collar workers are those engaged in occupations that are associated with feminine traits and predominantly held by women, such as hairdressers, waitresses, and private household domestics. *See* L. HOWE, PINK COLLAR WORKERS 11-12 (1977).

companied by material structural dislocations that shift the balance of economic factors in workers' favor.

Drawing on the three perspectives of authoritative abuse, the final section of the article considers the role tort law might play in turning the workers' critique into the normative foundation of an oppositional movement led by those who are oppressed not only by their race and sex but also by their class. Movements are built on "real-life stories" that teach, inspire, fortify, and remind the participants of the justness of their cause.[15] The cultural resistance of low status minority and female workers represents a rich lode of true tales to fuel a movement. The tort of outrage would serve a useful pedagogical function if instead of compelling accommodation and surrender it incorporated the wisdom of the critique, extolled the dignity of workers, and legitimated their claims to respectful treatment by supervisors. A "worker-centric" tort of outrage would not convey anything particularly new to the workers; it would merely formulate in a formal, pointed, coherent statement the emancipatory themes of the lessons experience has already taught them.[16] Tort law can do no less if employers are to be brought around to the view that intentionally inflicted emotional distress is an unacceptable tool of worker control.

I. In Support of Authoritative Abuse

This section offers a summary of what the courts and commentators have to say about abuse in the workplace in the context of the tort of outrage.[17] Legal discourse on the subject is largely in accord with the widely disseminated "conventional wisdom" regarding employer su-

15. D. Bell, And We Are Not Saved 253 (1987).

16. *Cf.* S. Aronowitz & H. Giroux, Education Under Siege 107-08, 156 (1985) (radical pedagogy must incorporate aspects of the cultural resistance of students).

17. There are a number of cases in which the courts have not reached the merits of the employees' claims because applicable statutory provisions either preempt the courts' jurisdiction or preclude the application of state tort law. Federal labor law, for example, may provide the sole form of relief for plaintiffs who are covered by collective bargaining agreements. *See* note 278 *infra* and accompanying text. Furthermore, claims of intentional infliction of emotional distress have sometimes been defeated by the exclusivity provisions of state workers' compensation laws. *See, e.g.*, Battista v. Chrysler Corp., 454 A.2d 286, 288-89 (Del. Super. Ct. 1982); Brown v. Winn-Dixie Montgomery, Inc., 469 So. 2d 155 (Fla. Dist. Ct. App. 1985); Simmons v. Merchants Mut. Ins. Co., 394 Mass. 1007, 476 N.E.2d 221 (1985); Foley v. Polaroid Corp., 381 Mass. 545, 413 N.E.2d 711 (1980); Hood v. Trans World Airlines, 648 S.W.2d 167 (Mo. Ct. App. 1983). Many jurisdictions, however, allow such tort suits to proceed since they involve intentional misconduct and emotional (rather than physical) harm. *See, e.g.*, Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983) (applying California law) *rev'd on other grounds*, 473 U.S. 134 (1985); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987); Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (1986); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986). *Compare* Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982) (sexual harassment giving rise to distress claim is too remote from employment to be barred by worker's compensation) *with* Kandt v. Evans, 645 P.2d 1300 (Colo. 1982) (exclusivity provisions bar tort action where conduct is not in course of employment). *See also* 2A A. Larson, The Law of Workmen's Compensation § 68.34(d) (1987) (exclusivity should depend upon whether tort is addressed to non-physical injury and whether plaintiff seeks recovery for substantial physical harm).

pervision.[18] As such, it reflects a view that is neither overtly supportive of workers, nor instrumentally biased in favor of employers.[19] Although employees win cases, the employers somehow come out ahead.

In delineating the requirements of a cause of action for the intentional infliction of emotional distress, the courts generally rely on Section 46 of the *Restatement (Second) of Torts*.[20] Section 46 requires that the plaintiff prove that the defendant's conduct was

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[21]

If the conduct does not rise to the requisite level, it is dismissed as being among those "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" to which the victim "must nec-

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18. Although judicial opinions and law review articles are addressed to a small elite group and are not widely disseminated, their content bears some relationship to the messages that other institutions are spreading. *See, e.g.*, Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 286-87 (D. Kairys ed. 1982); Greer, *Antonio Gramsci and "Legal Hegemony,"* in *id.* at 304. It is not claimed here that the law has instrumental or deterministic control over the broad spectrum of societal groups. The law's most salient purpose may be to "legitimate," in the minds of those who are privy to it, their exercises of power over others. *See* J. MERQUIOR, THE VEIL AND THE MASK 37-38. *See also* Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 543-47.

19. The analysis in this article draws heavily upon the theory of hegemony associated with Antonio Gramsci. *See* A. GRAMCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith eds. 1971). *See also* C. BOGGS, GRAMSCI'S MARXISM (1976); Mouffe, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168 (C. Mouffe ed. 1979); Przeworski, *Material Bases of Consent: Economics and Politics in a Hegemonic System*, 1 POL. POWER & SOC. THEORY 21 (1980); C. WEST, PROPHESY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 112-212 (1982). Gramsci's theory of hegemony rejects the thesis that the ideas or ideological institutions of the dominant class rigidly structure and dictate the lives of ordinary people. *See* Mouffe, *supra*, at 195-96, 189-92. Rather, the existing social order is maintained through the organization of force or coercive power, *see, e.g.*, Anderson, *The Antinomies of Antonio Gramsci*, NEW LEFT REVIEW 5-78 (1976-1977); Przeworski, *supra*, at 25, 58, and through the manufacture of "active consent," A. GRAMSCI, *supra*, at 244, or of "a collective will." Mouffe, *supra*, at 184. *See also* M. FOUCAULT, POWER/KNOWLEDGE 78-108 (C. Gordon ed. 1980); J. GAVENTA, POWER AND POWERLESSNESS (1980). For Gramsci, "ideologies . . . organize human masses, and create the terrain on which [people] move, acquire consciousness of their position, struggle, etc." A. GRAMSCI, *supra*, at 377. At the ideological level, hegemonic dominance is maintained through the ascendancy of a coherent world view which is unified by values related to the role of the hegemonic class, but which also "include[s] elements from varying sources." Mouffe, *supra*, at 193. The effect of this world view on the ideas and beliefs of the subordinate classes may be subtle and indirect, limiting their oppositional potential rather than dictating positive affirmation. *See generally* P. WILLIS, LEARNING TO LABOUR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS (1977).

20. RESTATEMENT (SECOND) OF TORTS § 46 (1965) reads as follows: "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."

21. *Id.* at comment d.

essarily be expected and required to be hardened."[22] As applied to the employment relationship, this means that every practice or pattern of emotional mistreatment except the outrageous, atrocious, and intolerable is treated as the ordinary stuff of everyday work life.

The approach mandated by Section 46 immediately focuses on whether the employer's or supervisor's coercion was excessive and skips the threshold issue of whether any amount of emotional mistreatment was justified. In this regard, it differs from the 1948 version of the section which required that the defendant show that abuse of the plaintiff was privileged.[23] The legal analysis required by the current version of Section 46 thus allows courts to avoid elaborate explanations for their decisions. Beginning with the assumption that some amount of intentionally inflicted pain is acceptable, they need not and often do not go much beyond quoting the comments to Section 46 and offering several conclusory sentences sprinkled with *Restatement* terminology. Courts concentrate on the facts of the appeal at hand, and emphasize or depreciate the nuances that distinguish them from those of previously decided cases.[24]

The very ad hoc nature of the adjudications casts abuse as a conundrum too amorphous, ephemeral, and slippery to be effectively cured with judicial relief. Although the courts acknowledge that abuse can be a problem and invoke an indeterminate test that should be sufficiently malleable to support broad relief,[25] their vague factual analyses belie their expressions of concern. Overall, the legal analysis confirms that abuse cannot really be systematically attacked because it lacks specificity and concreteness. Moreover, in the eyes of the law, abuse seems less a privilege of employers than an intrinsic predicament of the employment relationship. It is part of the natural disorder of work life that cannot be changed.

If the indeterminacy and contradictions the holdings reflect are

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22. *Id.* In addition, First Amendment concerns may dictate that insulting language, slurs, and epithets be immune from liability. *See generally First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985) (student author).

23. The 1948 version of section 46 provided that "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF THE LAW: 1948 SUPPLEMENT, TORTS § 46 (1948). Daniel Givelber, in his extensive article on the tort, suggests that the privilege approach was subsequently rejected because it required that "issues such as the legitimacy of coercion" be directly addressed. 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, 62 (1982).

24. *See, e.g.*, Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988); Salazar v. Furr's Inc., 629 F. Supp. 1403 (D.N.M. 1986); Surrency v. Harbison, 489 So. 2d 1097, 1105-06 (Ala. 1986); Dorr v. C.B. Johnson, 660 P.2d (Colo. App. 1983); Jackson v. Sun Oil Co. of Pa., 521 A.2d 469 (Pa. 1987); Hurst v. Farmer, 40 Wash. App. 116, 697 P.2d 280 (1985).

25. Givelber lauds the seeming indeterminacy of the outrageousness standard on the ground that it "has facilitated [the tort's] development by freeing courts of the necessity of rationalizing results in terms of rules of universal applicability." Givelber, *supra* note 23, at 43.

deemphasized, and the opinions are read as a single body united by common ideological threads, patterns do emerge. These patterns bespeak the conventional wisdom regarding authoritative abuse.

A. *Traditional Employer Prerogatives*

The courts accord employers wide latitude in directing their employees' activities in ways that cause them emotional distress. The courts leave little doubt as to who is in charge of the workplace.[26] The employer is free to ignore any interest workers may have in performing particular tasks, using particular skills, or doing a job at a particular level of proficiency or ease.[27] Thus, work assignments are "managerial decisions . . . [that do] not qualify as intentional infliction of severe mental distress."[28] Similarly, while imposition of an inordinate work load may "creat[e] an environment which is oppressive to function

26. Employers have attempted to extend their control beyond the workplace into the homes and private lives of their employees. The courts in outrage cases have sometimes allowed workers a sphere of privacy in which the employers' concerns are not given priority. *See* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (false diagnosis of fatal illness communicated by team physician to sportswriter); Baltz v. County of Will, 609 F. Supp. 992 (N.D. Ill. 1985) (deputy sheriff forcibly removed from home and jailed by employer); Collins v. General Time Corp., 549 F. Supp. 770 (N.D. Ala. 1982) (injured employee badgered in her home about malingering); Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (supervisor demanded that subordinate end personal relationship with employee of competitor). *But see* Woodring v. Board of Grand Trustees, 633 F. Supp. 583 (W.D. Va. 1986) (plaintiff's job required wife; not outrageous to terminate plaintiff after he was widowed); Salazar v. Furr's Inc., 629 F. Supp. 1403 (D.N.M. 1986) (pregnant employee fired for being married to employee of competitor does not state a claim for infliction of emotional distress); Pemberton v. Bethlehem Steel Co., 66 Md. App. 133, 502 A.2d 1101 (1986) (employer's disclosure of union business agent's criminal conviction to union members and infidelities to wife in retaliation for his activities was not actionable as an invasion of privacy), *cert. denied*, 107 S. Ct. 574 (1986); Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986) (supervisor fired for fraternizing with subordinate: no tort action allowed). *Cf.* Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791 (D. Utah 1984) (church employer not barred from inquiring about sexual activities, contributions to church, and obedience and allegiance to church leaders to determine fitness for employment), *rev'd on other grounds*, 107 S. Ct 2862 (1987).

27. *See, e.g.*, Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 74 Cal. Rptr. 216 (1968) (injured employee denied assistance of co-workers during absence from work and upon return); Burgess v. Chicago Sun-Times, 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1985) (delivery driver fired for persisting in request for route reassignment after being robbed); Frye v. CBS Inc., 671 S.W.2d 316 (Mo. Ct. App. 1984) (design artist assigned to job of cameraman). Nor will loyalty to the employer or actions taken in reliance on the prospect of continued employment support an outrage claim. *See* Pudil v. Smart Buy, Inc., 607 F. Supp. 440 (N.D. Ill. 1985); Cautilli v. GAF Corp., 531 F. Supp. 71 (E.D. Pa. 1982); Widdifield v. Robertshaw Controls Co., 671 P.2d 989 (Colo. Ct. App. 1983); *see also* Crawford v. ITT Consumer Fin. Corp., 653 F. Supp. 1184 (S.D. Ohio 1986) (twenty-three year employee has performance rating lowered and is threatened with demotion and discharge because she refuses to accept firm's promotion/relocation policy from which she thought she was exempt).

28. Hall v. May Dep't Stores, 292 Or. 131, 139, 637 P.2d 126, 132 (1981); *see also* Lynn v. Smith, 628 F. Supp. 283 (M.D. Pa. 1985) (changing supervisor, headquarters, and assignments of employee active in union does not give rise to emotional distress claim); Howard University v. Best, 484 A.2d 958 (D.C. 1984) (preventing department chairperson from attending workshops, recalling proposals to the board of trustees, and dismissing faculty without consultation constituted disagreement over administration, not actionable outrageous conduct; sexual harrassment, however, was actionable outrageous conduct).

within . . . it is not the type of action to arouse resentment, by the average member of the community . . . ."[29]

The courts recognize that emotional disturbance is an inherent aspect of being reprimanded, demoted, or discharged. But they allow the victim no cause of action if the emotional harm is an unintended or incidental result of an exercise of legitimate workplace authority, civilly undertaken.[30] The courts are particularly wary of attempts to use Section 46 to evade the rules sanctioning the summary discharge of at-will employees.[31] Assertions to the effect that "if the firing of . . . [plaintiff] was done in an outrageous manner, then every firing that occurs would be considered outrageous," are quite common.[32]

Liability does not always follow, even when the supervisor is rude or insensitive in carrying out a personnel action.[33] For example, a salesman complained that his supervisor cursed him, took over sales presentations, and otherwise embarrassed him in the presence of customers and fellow workers.[34] The court condoned the behavior; the supervisor's "intentions, much as any supervisor's in a similar situation, were pretty clearly to motivate a recalcitrant employee."[35] In another case, the head of an employer's legal department cursed, hollered at, and fired a secretary for taking the initiative in contacting a person

29. Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151, 1155 (E.D. Pa. 1984); *see also* Petersen v. First Fed. Sav. & Loan Ass'n, 617 F. Supp. 1039 (D. St. Croix 1985) (employer not guilty of outrageous conduct where bank branch manager worked late at night without assistance, used her personal car for bank business, was not paid for overtime, and lost the opportunity to be with her family).

30. *See, e.g.*, Pelizza v. Readers' Digest Sales & Serv., Inc., 624 F. Supp. 806 (N.D. Ill. 1985); Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480 (E.D. Mich. 1983); Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983); Ray v. Edwards, 557 F. Supp. 664 (N.D. Ga. 1982), *modified*, 725 F.2d 655 (5th Cir. 1984); Harrell v. Reynolds Metals Co., 495 So. 2d 1381 (Ala. 1986); Harris v. Arkansas Book Co., 287 Ark. 353, 700 S.W.2d 41 (1985); Ledl v. Quik Pik Food Stores, 133 Mich. App. 583, 349 N.W.2d 529 (1984); McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107 (1987); Elias v. Youngken, 493 A.2d 158 (R.I. 1985); Bringle v. Methodist Hosp., 701 S.W.2d 622 (Tenn. Ct. App. 1985); Armstrong v. Richland Clinic, Inc., 42 Wash. App. 181, 709 P.2d 1237 (1985); *see also* RESTATEMENT (SECOND) OF TORTS § 46 comment g, comment i (1965).

31. *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

32. Meierer v. E.I. Dupont De Nemours & Co., 607 F. Supp. 1170, 1182 (D.C.S.C. 1985); *see also* Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263 (1982); Santa Monica Hosp. v. Superior Court, 218 Cal. Rptr. 543 (1985), *review granted*, 711 P.2d 520, 222 Cal. Rptr. 224 (1986); Heying v. Simonaitis, 126 Ill. App. 3d 157, 466 N.E.2d 1137 (1984); Richey v. American Auto. Ass'n, Inc., 380 Mass. 835, 406 N.E.2d 675 (1980); Sperber v. Galigher Ash Co., 747 P.2d 1025 (Utah 1987).

33. *See, e.g.*, Corum v. Farm Credit Servs., 628 F. Supp. 707 (D. Minn. 1986); Moye v. Gary, 595 F. Supp. 738 (S.D.N.Y. 1984); Cushing v. General Time Corp., 549 F. Supp. 768 (N.D. Ala. 1982); Magruder v. Selling Areas Mktg., Inc., 439 F. Supp. 1155 (N.D. Ill. 1977); Harris v. First Fed. Sav. & Loan Ass'n., 129 Ill. App. 3d 978, 473 N.E.2d 457 (1984); Witkowski v. St. Anne's Hosp., 113 Ill. App. 3d 745, 447 N.E.2d 1016 (1983); Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985). *But see Intentional Infliction of Emotional Distress in the Employment at Will Setting: Limiting the Employee's Manner of Discharge*, 60 IND. L.J. 365 (1984-1985) (arguing for a motive versus methods distinction) (student author).

34. Byrnes v. Orkin Exterminating Co., 562 F. Supp. 892, 895 (E.D. La. 1983).

35. *Id.* at 896.

whose qualifications suggested that she might fulfill a personnel need and passing the pertinent information on to another lawyer in the office.[36] Although the supervisor's conduct was "not above reproach," the court would not characterize it as "so extreme and outrageous as to be tortious."[37]

In lieu of the relatively straightforward, aboveboard forms of discipline, supervisors sometimes engage in indirect methods of disapproval that take their toll on the employee's psyche because they are insidious and underhanded. Instead of firing an employee, supervisors may undertake a campaign to make the job so unbearable that she or he will resign.[38] The law of outrage poses little or no impediment to the indirect, "constructive discharge" approach. The plaintiff in *Beidler v. W. R. Grace, Inc.*[39] was subjected to such treatment. He was allegedly excluded from meetings necessary to his job performance and given an assistant without his consultation. Moreover, he found materials and papers on his desk rearranged, received no information on his job performance except through nonsupervisory employees and rumors, and was denied a meeting with his superiors. The plaintiff, who was ultimately fired, thought this conduct atrocious, but the court did not.[40]

In addition, the outrage cases suggest that an employer generally has the right to demand obedience to commands, and loyalty to the enterprise when threatened by outside forces. Notwithstanding the new wisdom that lauds the benefits of dissent and whistleblowing for the health of productive enterprises,[41] management can deal harshly with subordinates who challenge supervisory authority or otherwise impede the work of the firm, however principled their objections.[42] The

36. Rooney v. National Super Mkts., 668 S.W.2d 649, 650-51 (Mo. Ct. App. 1984).

37. *Id.* at 651.

38. *See, e.g.*, Well v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1985) (hospital personnel director lost job title, private office, and secretary; was given first poor performance rating in 25 years; and was told that others would have resigned under similar circumstances); Shewmaker v. Minchew, 504 F. Supp. 156 (D.D.C. 1980), *aff'd*, 666 F.2d 616 (D.C. Cir. 1981); Snyder v. Sunshine Dairy, 87 Or. App. 215, 742 P.2d 57 (1987).

39. 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd*, 609 F.2d 500 (3d Cir. 1979).

40. *Id.* at 1016.

41. *See, e.g.*, D. EWING, "DO IT MY WAY OR YOU'RE FIRED!": EMPLOYEE RIGHTS AND THE CHANGING ROLE OF MANAGEMENT PREROGATIVES 23-25 (1983). *But see id.* at 30 (noting that bosses are justified in firing whistleblowers).

42. Kirwin v. N.Y. State Office of Mental Health, 665 F. Supp. 1034 (E.D.N.Y. 1987) (psychologist reassigned after cooperating with investigation of hospital unit about which she had complained); Polson v. Davis, 635 F. Supp. 1130 (D. Kan. 1986) (discharge of employment supervisor who objected to city's failure to abide by anti-discrimination laws and guidelines); Collins v. Gulf Oil Corp., 605 F. Supp. 1519 (D. Conn. 1985) (insurance accountant discharged for nonparticipation in concealment of funds); Avallone v. Wilmington Medical Center, Inc., 553 F. Supp. 931 (D. Del. 1982) (head nurse disciplined after pointing out dangers in patient treatment procedure); Sossenko v. Michelin Tire Corp., 172 Ga. App. 771, 324 S.E.2d 593 (1984) (employee reported alleged defects in experimental tires); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983) (company officer and assistant treasurer fired after reporting illegal accounting practices); *see also* Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980) (foreman fired when he indicated intention to proceed with malpractice action against company-owned hospital de-

few exceptions involve employee disobedience or disloyalty in response to management fraud or breach of statute.[43]

When investigating theft and dishonesty, employers frequently use emotionally distressful techniques. The courts have often condoned interrogation techniques and summary dismissals that the employees have felt to be arbitrary, insulting, humiliating, embarrassing, and painful.[44] But they have also given victims a few victories.[45] The successful claimants have been almost uniformly innocent, and most have been young female service workers. It may be that courts are somewhat more sympathetic to workers in this context, but a more likely explanation is that they consider the female plaintiffs especially deserving of

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spite warning that it would be bad for employee relations); Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 477 A.2d 1197 (1984) (employee who informed on co-workers not given assurance of safety and forced to resign). On the issue of loyalty in the context of federal labor law, see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 84-86 (1983).

43. Pollard v. City of Chicago, 643 F. Supp. 1244 (N.D. Ill. 1986) (harassment of black male who reported racial and sexual harassment of co-workers supports cause of action); Maggio v. St. Francis Medical Center, 391 So.2d 948 (La. Ct. App. 1980) (employee harassed for reporting superior's illegal transfer of funds; summary judgment for defendant reversed); Beasley v. Affiliated Hosp. Prods., 713 S.W.2d 557 (Mo. Ct. App. 1986) (fired employee who refused to predetermine winner of advertised raffle stated claim); *see also* Kassel v. U.S. Veterans Admin., 682 F. Supp. 646 (D.N.H. 1988) (psychologist threatened with firing, transferred because misquoted in paper; claim upheld). *But see* Pratt v. Caterpillar Tractor Co., 149 Ill. App. 3d 588, 500 N.E.2d 1001 (1986) (discharge in retaliation for refusal to violate federal statutes regulating foreign trade does not implicate state public policy and will not sustain an outrage claim), *appeal denied*, 506 N.E.2d 959 (1987).

44. *See, e.g.*, McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D.W. Va. 1986) (six day investigation of shortage in layaway receipts ends with interrogator calling plaintiff "a liar" and banging his hands on table; not outrageous); Jackson v. J.C. Penney Co., 616 F. Supp. 233 (E.D. Pa. 1985) (accusation in the presence of two security guards, followed by summary dismissal, not outrageous); American Road Serv. Co. v. Inmon, 394 So. 2d 361, 367 (Ala. 1980) (no cause of action although evidence showed that plaintiff was "harassed, investigated without cause, accused of improper dealings, treated uncustomarily, and terminated without justification"); Food Fair, Inc. v. Anderson, 382 So. 2d 150 (Fla. Ct. App. 1980) (cajoled confessions and consents to polygraphing based on threats of discharge); Gibson v. Chemical Card Serv. Corp., 157 Ill. App. 3d 211, 510 N.E.2d 37 (1987) (assistance given Secret Service agent who threatened employee with accusations against husband within employer's legitimate right); Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985) (employee who passed lie detector test nonetheless fired pursuant to policy of discharging all employees on shift on which shortfall occurs); Gibson v. Hummel, 688 S.W.2d 4, 6 (Mo. Ct. App. 1985) (employee unable to control foot tapping or deep breathing during polygraph session, likened machine to an "octopus" that she feared would shock or electrocute her); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984) (insurance agent falsely accused of conspiracy fails illegally administered voice stress test; no outrage).

45. *See* Shipkowski v. U.S. Steel Corp., 585 F. Supp. 66 (E.D. Pa. 1983) (26-year employee fired for theft one month before retirement benefits vested; court refuses to dismiss claim); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (employee fired on suspicion of stealing and paycheck withheld; court overturns summary judgment); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (employee forced to undergo polygraph test; claim is stated); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (waitress fired in alphabetical order upon discovery of theft; claim is stated); Kaminski v. United Parcel Serv., 120 A.D.2d 409, 501 N.Y.S.2d 871 (1986) (employee fired for theft not reinstated after actual thief was discovered; claim is stated); Hall v. May Dep't Stores, 292 Or. 131, 637 P.2d 126 (1981) (employee accused of stealing and interrogated by security officers; claim is stated); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981) (employee forced to undergo strip-search).

compassion because of the emotional vulnerability that is associated with their sex and age.

B. *Abuse and Status Group Distinctions*

The nature of the employee's work setting, the color of her or his collar, and the employee's age, sex, race, or ethnicity can explicitly affect the kind and amount of abuse the employee is expected to bear. In general, the claims that are most likely to survive court review are those attacking harassment based on race,[46] ethnicity,[47] national origin,[48] and sex.[49] The cases involving minority group members generally involve overt racist or ethnocentric slurs. Similarly, the suits of the successful female plaintiffs have included conduct that falls squarely within the definition of sexual harassment developed by the Equal Employment Opportunity Commission[50] under Title VII.[51] The courts will act positively when there is blatant conduct, but do not extend protection against forms of discriminatory abuse that are less explicit or demonstrative.[52]

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46. Robinson v. Hewlett-Packard Corp., 183 Cal. App. 3d 1108, 228 Cal. Rptr. 591 (1986); Alcorn v. Anbro Eng'g, Inc., 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970). *See also* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Denis, *Race Harassment Discrimination: A Problem That Won't Go Away?*, 10 EMPLOYEE REL. L.J. 415 (1984); Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982).

47. Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (1982); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).

48. Agarwal v. Johnson, 25 Cal.3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (1981); Gulati v. Burlington N.R.R., 364 N.W.2d 446 (Minn. Ct. App. 1985), *cert. denied*, 107 S.Ct. 1616 (1987).

49. *See, e.g.*, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307 (M.D. Pa. 1988); Clay v. Quartet Mfg. Co., 644 F. Supp. 56 (N.D. Ill. 1986); Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986); Shaffer v. National Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983); Stewart v. Thomas, 538 F. Supp. 891 (D.D.C. 1982); Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984); McCaila v. Ellis, 341 N.W.2d 525 (Mich. Ct. App. 1983); O'Reilly v. Executone of Albany, Inc., 121 A.D.2d 772, 503 N.Y.S.2d 185 (1986); Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116 (1986). *See also* Hart v. National Mtg. & Land Co., 189 Cal. App. 3d 1420, 235 Cal Rptr. 68 (1987) (male encounters harassment of a sexual nature from a male supervisor).

50. Guidelines of Sexual Harassment, 29 C.F.R. § 1604.11 (1986).

51. 42 U.S.C. §§ 2000(e)(1)-2000(e)(17) (1982).

52. *See, e.g.*, Oldfather v. Ohio Dep't of Transp., 653 F. Supp. 1167 (S.D. Ohio 1986) (female fired for immoral behavior while supervisor with whom she had extramarital affair was retained; not outrageous); Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984) (verbal disparagement and work overload of employee who was a wife and mother not actionable outrage); Kersul v. Skulls Angels, Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. 1985) (employee discharged for complaining about special treatment accorded employer's lover; court allows claim for sexual discrimination but not outrage); Belanoff v. Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91 (App. Div. 1984) (allegation of poor evaluations and termination following announcement of impending marriage did not satisfy egregiousness standard); Lewis v. Oregon Beauty Supply Co., 302 Or. 616, 733 P.2d 430 (1987) (employer's tolerance of his son's harassment of employee-plaintiff not sufficiently oppressive). *See also A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1481-85 (1986) (student author). With regard to race and ethnicity, *compare* Patterson v. Mc-

The courts' formalistic perspective means that employees of the same race or sex who work together and see themselves as similarly abused may be accorded different degrees of legal protection. *Hogan v. Forsyth Country Club Co.*,[53] for example, involved three female plaintiffs who worked in the defendant's dining room. While all were verbally harassed by superiors,[54] one was also subjected to suggestive remarks and physical sexual contact.[55] The second was given assignments she could not perform because she was pregnant.[56] The third had menus thrown in her face and her duties were interfered with, but there was no specific explanation given for this treatment.[57] The intentional infliction of emotional distress claim of the first plaintiff withstood defendant's motion for summary judgment because it was easily identified as "sexual harassment."[58] The claims of the remaining two plaintiffs did not.[59] The court suggested that it could not draw a connection between the harassment they encountered and impermissible sex discrimination in the absence of explicit allegations.[60]

Status group characteristics can sometimes increase the amount of abusive behavior a worker must tolerate. More endurance is expected from males in general and from blue-collar employees in particular than from women, for example. This point is well illustrated by *Harris v. Jones*.[61] A supervisor mimicked and harassed the plaintiff, an automobile assembly line worker who stuttered severely.[62] Trial testimony revealed that others at the plant imitated the plaintiff's speech impediment and that life there included "profanity, namecalling and roughhousing among the employees."[63] The court stated that "[i]n determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred."[64] Moreover, it suggested that an employee's sex

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Lean Credit Union, 805 F.2d 1143 (4th Cir. 1986) (directed verdict against plaintiff who alleged close supervision, lack of promotions, assignment of domestic duties, public criticism, and disparaging remarks about blacks by supervisor) *cert. granted*, 108 S.Ct. 65, *rearg. sched.*, 108 S.Ct. 1419 (1987) (on whether to reconsider Runyon v. McCrary, 427 U.S. 160 (1976)) *and* Bradley v. Consolidated Edison Co., 657 F. Supp 197 (S.D.N.Y. 1987) (summary judgment against plaintiff who alleged negative evaluations, harassment, job reassignments, and disparaging statements) *with* Robinson v. Vitro Corp., 620 F. Supp. 1066 (D. Md. 1985) (plaintiff states claim by alleging unfair complaints, harassment, and discharge in retaliation for filing state racial discrimination complaint).

53. 79 N.C. App. 483, 340 S.E.2d 116 (1986).
54. *Id.* at 490-94, 340 S.E.2d at 121-23.
55. *Id.* at 490, 340 S.E.2d at 121.
56. *Id.* at 494, 340 S.E.2d at 123.
57. *Id.* at 493, 340 S.E.2d at 122-23.
58. *Id.* at 491, 340 S.E.2d at 121.
59. *Id.* at 493-94, 340 S.E.2d at 122-23.
60. *Id.* at 500, 340 S.E.2d at 126-27.
61. 281 Md. 560, 380 A.2d 611 (1977).
62. *Id.* at 562, 380 A.2d at 612.
63. *Id.* at 563, 380 A.2d at 612.
64. *Id.* at 568, 380 A.2d at 615; *see also* Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) ("The outrageous and extreme nature of the conduct to be examined should not be consid-

and occupation were indications of her or his emotional vulnerability. It quoted approvingly from an article by William Prosser to the effect that " '[t]here is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine.' "[65]

However, where the abuse is racial in form, the rough nature of the work and the workplace may not suffice to insulate an employer from liability. That the plaintiff in *Alcorn v. Anbro Engineering, Inc.*,[66] was a truck driver (and a Teamster shop steward)[67] did not deprive him of a cause of action stemming from the behavior of a supervisor who apparently objected to a person of plaintiff's race being in a position of authority.[68] The plaintiff informed the supervisor that a nonunion member could not drive a certain truck from the job site, and the supervisor responded with a string of racial insults uttered "in a rude, violent, and insolent manner" and summarily fired plaintiff.[69] The Supreme Court of California reversed the lower court's dismissal of the plaintiff's outrage claim.[70] It rejected the "defendants' contention that plaintiff, as a truckdriver must have become accustomed to such abusive language."[71] It instead directed the trier of fact to consider plaintiff's particular sensitivity to racial insult.[72]

In granting relief to employees, the courts sometimes make reference to the weaker bargaining power of employees as a group, the special nature of the employment relationship, and the limitations on the free mobility of labor.[73] Said the court in *Blong v. Snyder*,[74] "[p]laintiff's status as an employee entitled him to more protection from insultive or abusive treatment than would be expected in interactions between two strangers."[75] *Hall v. May Department Stores Co.*[76] carried the compari-

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ered in a sterile setting, detached from the milieu in which it took place. [footnote omitted]. The salon of Madame Pompadour is not to be likened to the rough-and-tumble atmosphere of the American oil refinery.").

65. *Harris*, 281 Md. at 568, 380 A.2d at 615 (quoting Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 887 (1939)). This same language was invoked in *Moniodis v. Cook*, 64 Md. App. 1, 17, 494 A.2d 212, 220 (1985), on behalf of a female clerk who was described as being "a middle-aged lady who did not have the hardened character of a 'butte miner' or a 'United States Marine.' "

66. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

67. *Id.* at 496, 468 P.2d at 217, 86 Cal. Rptr. at 89.

68. *Id.* at 498-99, 468 P.2d at 219, 86 Cal. Rptr. at 91.

69. *Id.* at 496, 468 P.2d at 217, 86 Cal. Rptr. at 89.

70. *Id.* at 499, 468 P.2d at 219, 86 Cal. Rptr. at 91.

71. *Id.* at 498 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.

72. *Id.*

73. *See, e.g.*, Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986). The generally cited source of this line of reasoning is comment e to section 46 which indicates that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." RESTATEMENT (SECOND) OF TORTS § 46 comment e.

74. 361 N.W.2d 312 (Iowa Ct. App. 1984).

75. *Id.* at 316.

76. 292 Or. 131, 637 P.2d 126 (1981).

sons further in distinguishing outrage claims arising in other contexts: "In our view, the duty to refrain from abusive behavior in the employment relationship comes closer to that of the physician toward a patient [in need of immediate emergency treatment] than to that of the police officers toward a citizen not in custody and free to terminate the encounter."[77] Drawing on language from a wrongful discharge case, the court in *Milton v. Illinois Bell Telephone Co.*[78] argued that, " 'relatively immobile workers who often have no other place to market their skills,' do not stand on equal footing with the large corporations which employ them. . . . It is the alleged abuse of power by a large corporation over one of its front line employees which aggravates the outrageousness of the conduct alleged in this case."[79]

The language in these cases was invoked to justify minor reforms.[80] The dominant view is still that "in many respects employment remains an arm's length, adult relationship between parties intent on securing divergent rather than joint interests."[81] Worker powerlessness is considered the exception and not the rule. The abuse that is not declared tortious, then, seems to bear the imprimatur of the victim's consent.[82]

C. *Severe Harm and the Implicit Requirement of Surrender*

Whether they agree or not, workers are by and large expected to develop the fortitude and stamina to endure intentionally inflicted distress on the job. Their best protection is their own emotional mettle. In the courts' view, learning to accept abuse is necessary because personal liberty and good mental health require that employers, like all individuals, have the "freedom to get mad or be impolite."[83] Furthermore, a certain amount of rudeness simply has to be tolerated. "[I]ncivility is so pervasive in our society that it is inappropriate for the law to attempt to provide a remedy for it in every instance. . . . Public adjudication of common irritations and arguments would dignify most

77. *Id.* at 138, 637 P.2d at 131; *see also* Bodewig v. K-Mart, Inc., 54 Or. App. 480, 486, 635 P.2d 657, 661 (1981).

78. 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981).

79. *Id.* at 79, 427 N.E.2d at 832 (quoting Palmateer v. International Harvester Co., 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981)). *See also* Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 741, 565 P.2d 1173, 1176-77 (1977) (employee "not free to leave but [forced to] remain in physical proximity to others who continually make racial slurs and comments" has cause of action).

80. *See generally* Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 614-24 (1982).

81. Hall v. May Dep't Stores, 292 Or. 131, 141-42, 637 P.2d 126, 132-33; *see also* Bradshaw v. General Motors Corp., 805 F.2d 110 (3d Cir. 1986) (employment relationship not special like that between landlord and tenant or parent and child); Aquino v. Sommer Maid Creamery, Inc., 657 F. Supp. 208 (E.D. Pa. 1987) (nothing about the employment relationship justifies relaxation of the outrageousness standard).

82. Kennedy, *supra* note 80, at 620-22.

83. Givelber, *supra* note 23, at 57.

disputes far beyond their social importance."[84] It is best to leave the "minor annoyances" that are a part of "the field of bad manners" to "instruments of social control other than the law."[85]

In order to recover under Section 46, the plaintiff must show that the extent of her or his harm is exceptional.

> The tort of outrage was not developed to provide a person with a remedy for the trivial emotional distresses that are common to each person in his everyday life. Such distress is the price of living among people. [citation omitted] . . . Thus, in order to prevent the tort of outrage from becoming a panacea for all of life's ills, recovery must be limited to distress that is severe.[86]

In the words of the *Restatement*, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."[87]

The severe harm requirement presents formidable obstacles to recovery. As one court indicated, "[i]f the claimed distress is of the type that people commonly encounter and endure in their lives, the claim should not even be submitted to the jury."[88] The result of this reasoning is that the more pervasive the form of abuse, the more ordinary it is, and the more it must be tolerated. The humiliation and embarrassment endured by the many who are disciplined or dismissed simply will not be considered sufficiently egregious to warrant relief.[89] Furthermore, the injury of the plaintiff who survives without seeking treatment by doctors or psychiatrists and gets on with her or his life may not satisfy the standard.[90] If the employee reasonably suffers more than normal psychic harm because of a pre-existing condition, she or he may be stymied in establishing a causal connection between even a part of it and the employer's abuse.[91] Finally, the employee whose suffering ex-

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84. *Id.*

85. Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

86. U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098, 1101 (Ala. Civ. App. 1982).

87. RESTATEMENT (SECOND) OF TORTS § 46 comment j.

88. Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853 (Minn. Ct. App. 1985); *see also* Polk v. Yellow Freight Systems, 801 F.2d 190, 196 (6th Cir. 1986) (being offended, crying, and going to church more are consistent with common reactions to "an unhappy or unpleasant work situation"; not evidence of severe distress).

89. *See, e.g.*, Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 379 (Minn. Ct. App. 1984).

90. *See* George v. Hilaire Farm Nursing Home, 622 F. Supp. 1349 (S.D.N.Y. 1985); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985); Leese v. Baltimore County, 64 Md. App. 442, 497 A.2d 159 (1985); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983); Evrard v. Jacobson, 117 Wis. 2d 69, 342 N.W.2d 788 (Ct. App. 1983).

91. *See, e.g.*, Green v. American Broadcasting Cos., 647 F. Supp. 1359, 1363-64 (D.D.C. 1986); U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098, 1101 (Ala. Civ. App. 1982); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977); *see also* Givelber, *supra* note 23, at 49 (the suffering attributable to the employer in such cases may not be considered severe). The employer's or supervisor's obligations may be increased if she or he knows that the employee "is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." RESTATEMENT (SECOND) OF TORTS § 46 comment f. *See, e.g.*, Priest v. Rotary, 634 F.

ceeds that which the hypothetical reasonable person would incur will be adjudged maladjusted or supersensitive and denied a recovery.[92] The psychological frailty of such a person may even be advanced as the explanation for the supervisor's behavior.[93]

Moniodis v. Cook[94] illustrates how anomalous the results justified by the severe harm requirement can be. Plaintiff Cook was one of four employees required to submit to illegal polygraph testing by their employer Rite-Aid, a drugstore chain.[95] A jury found that all four had been the victims of intentionally inflicted emotional distress, but on appeal the court concluded that only Cook's claim should have survived defendants' motions for a directed verdict because only she suffered severe emotional distress.[96] Plaintiff Torres, for example, told her absent husband in letters that "she was going through the worst times of her life during the period when Rite-Aid was forcing her out," yet she managed "by herself an entire household including several children and her father-in-law, as well as tend[ed] to renovations to the family home." Ms. Cook, by contrast, was so "deeply disturbed" by her employer's conduct that she cried, wrung her hands, took medication, and slept most of the time. A pre-existing condition worsened. Her relatives did the housework and she became a recluse. The court did not find her reaction unreasonable; in fact, her reaction "was in part attributable to her laudable (though in retrospect misplaced) devotion to Rite-Aid. Further, the jury properly may have inferred that Moniodis, Rite-Aid's agent, was aware of her dedication when he chose the working conditions that would cause her to leave."[97]

Notwithstanding *Moniodis*, the law will not generally protect workers who are so unquestioning and obedient that they court psychic collapse if they are abused. Although *Moniodis* penalizes the worker who displayed greater resourcefulness and adaptability, her resilience was of the sort the law generally seeks to encourage through the requirement that the distress experienced be both severe and reasonable. The court in *Moniodis* seems torn between the need to encourage functional fortitude and the contradictory desire to compensate those individuals who are truly injured.

Contentious assertiveness and counteraggression are clearly not preferred reactions. Plaintiffs who immediately replied to their supervi-

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Supp. 571, 582-83 (N.D. Cal. 1986); Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312, 315-17 (1984).

92. RESTATEMENT (SECOND) OF TORTS § 46 comment j; *see, e.g., Cafferty*, 375 N.W.2d at 853-54.

93. *See, e.g.*, Continental Casualty Co. v. Mirabile, 449 A.2d 1176, 1180, 1187 (Md. Ct. Spec. App. 1982).

94. 64 Md. App. 1, 494 A.2d 212 (1985).

95. *Id.* at 6, 494 A.2d at 214.

96. *Id.* at 15-16, 494 A.2d at 219.

97. *Id.* at 16-17, 494 A.2d at 220.

sors' abuse did not fare well in their subsequent tort actions.[98] For example, a cashier who was accused by her employer's security supervisor of giving unauthorized discounts became angry and hysterical during the course of a polygraph session, and she responded with "strong language."[99] In denying her claim the court concluded that her "language and tone of voice were at least as bellicose and lacking in delicacy as [the supervisor's]."[100] It appears that the law encourages employees to adopt a stance of emotional detachment from their jobs and the supervisory mistreatment they may incur.

D. *Conventional Wisdom and Unconventional Warfare in The Workplace*

The gist of the story the courts tell about abuse in the workplace can be summarized as follows: Only the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less "trivial" in the terminology of the *Restatement of Torts*. The very ordinariness of such conduct and the ubiquity of the experience of pain at the hands of supervisors are justification enough for the law's refusal to intervene. At the same time, the genesis of the problem makes it largely inescapable. Little can be done about the vagaries of human nature. Moreover, the efficient operation of the workplace depends on employers' having broad privileges with regard to discipline and control of the work force. Thus, abuse is a predicament that is not susceptible to, let alone demanding of, a more thoroughgoing legal remedy.

Rather, the solution lies principally in individual workers shrugging off petty insults. Worker self-reliance and stamina are repeatedly touted in the outrage cases. Courts see toughness and strength as such positive attributes that they simply assume that the capacity to tolerate abuse, and the propriety of dishing it out, vary with the nature of the work, the workplace, and the characteristics of the workers. Males and blue-collar workers, for example, may be subjected to harsher supervision than females or white-collar workers because of the acceptability of sex and class distinctions and the implications of group pride that underlie the disparate treatment.

In other respects, however, self-assertiveness and collective perspectives among workers are discouraged. For example, just as the employers themselves denigrate whistleblowers and employees expressing preferences as to assignments, the opinions too seem to discourage a worker's affective engagement with her or his work. Furthermore, as

98. *See, e.g.*, McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W.Va. 1986); Bridges v. Winn-Dixie Atlanta, Inc., 176 Ga. App. 227, 335 S.E.2d 445 (1985); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, 123 (1986).

99. *Bridges*, 176 Ga. App. at 228, 335 S.E.2d at 446.

100. *Id.* at 231, 335 S.E.2d at 448.

Hogan v. Forsyth Country Club[101] and *Moniodis v. Cook*[102] illustrate, the distinction between the outrageous and the mundane in the way of supervision and between the severe and the mild in the way of emotional reaction leads to anomalous legal results, and apparently contradicts the experiences of workers who view their plight as a common one. Furthermore, the cases give little indication of how employees as individuals are supposed to achieve and maintain emotional distance and passivity.

While the legal community customarily thinks about the impact of the law on workers and of workers on the law in vague and global terms, such an analysis ignores the role that real, ordinary working people play in perpetuating and attacking abuse on the job. Where do the workers I know fit into the courts' ideal of workplace rapprochement? "Labor-management conflict" is too abstract and generic a term to provide a full and nuanced description of what occurs on the shopfloors and in the offices where abuse is actually meted out and experienced. Although the law may structure the employment relationship and help to contain worker dissatisfaction with supervision, it does not control life in the workplace in a static and absolute way. Submission, talking back, and bringing a civil suit do not exhaust the arsenal of responses available to unorganized workers.

Workers are not a monolith, united in interest without regard to color of collar or color of skin. Neither they nor their bosses are mere tools instrumentally driven to fulfill assigned roles in a capitalist economy. Crass economic concerns do not dictate their perceptions of and reactions to abuse any more than they explain the legal story.[103] Furthermore, sweeping pronouncements of workers' interests are of questionable authenticity. If workers are responsible agents of social change and not simply stick figures driven by necessity or commanded by elites, a detailed analysis is required to explain both how their opposition is organized and how their legally sanctioned oppression is maintained.[104] Consideration must be given to the actual consciousness and behavior of workers in the face of abuse. Only after such an examination will it be possible to speculate about the impact law and other sources of ideology and legitimated coercion have on what workers think and do, and vice versa.

There are many versions of the workers' story of abuse. The next section provides an elaboration of one of them. It shows how in some work environments the legitimating impact of the more or less formal conventional wisdom is mediated by informal practices and vernacular discourse and how, despite the economic necessity that keeps some

101. *See* notes 53-60 *supra* and accompanying text.

102. *See* notes 94-97 *supra* and accompanying text.

103. *See generally* Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

104. H. GUTMAN, POWER AND CULTURE: ESSAYS ON THE AMERICAN WORKING CLASS 344-45 (1987).

workers tied to bad jobs with bad supervisors, mistreatment is met with local resistance.

II. Authoritative Abuse From the Workers' Perspective

Workers' opinions about supervisory abuse will not be found in formal manifestos or treatises. Rather, they surface in ethnographic studies by sociologists and anthropologists, as well as in fiction, popular books employing interview techniques, and newspaper and magazine accounts. This literature portrays ordinary people responding to and coping with emotionally painful, degrading, and insulting working conditions and supervision as a matter of everyday life.

The people who are the particular focus of attention here, as indicated in the introduction, are black and Latino women and men and white women, all of whom hold low-paying, low-status, unskilled, or low-skilled jobs. These workers theoretically have the least to gain from adhering to the prevailing wisdom regarding authoritative abuse but, perhaps, the most to lose from defiance of its message. Their understanding of and response to abuse stand in opposition to the outlook of the law and suggest why anyone interested in justice should be less tolerant of supervisory abuse than the courts presently are.

The minority and female workers discussed below rely on rich and complex, but informal, cultural devices to critique the excesses of supervisory control as well as to insulate themselves from its insults and indignities. Their words and actions (as recounted by social scientists and journalists) are the product of their cultures and represent the nearest approximation of a nonelitist view of what oppression on the job is and what greater freedom would entail. The stories of their struggles on the job also explain how "consent" to coercive supervision is achieved through a process that appears to allow the workers a measure of dissent and choice, but ultimately leads them to entrap themselves.[105] More importantly, they reveal that workers in even the lowest tiers of the labor force nonetheless remain resisters, if not guerrilla fighters, in their own cause.

A. *The Cultural Critique of Workplace Supervision*

The informal practices and values that allow minority and female workers to tolerate the emotional trauma of workplace mistreatment have two sources. One is work life itself, while the second is the responses of creative human beings to pervasive group oppression.

For many low-status and blue-collar workers (white males included), the collective activities, rituals, and informal shared values that are sustained in the workplace create a sphere of autonomous action "which mediates the formal authority structure of the workplace and distances

105. *See* P. Willis, *supra* note 19, at 173-74.

workers from its impact."[106] "Work culture" has a critical component that is manifested in concrete mundane experiences that unself-consciously "act to expose and cast into doubt the workings of the larger ideologies, institutions and structural relationships of the whole society."[107]

In addition, minority and female workers in particular rely on their group cultural norms in accommodating and resisting the demands and adverse effects of their jobs. The sexual division of labor encourages both females and males to create a sense of group solidarity and superiority with which to absorb and challenge the strictures of workplace authority. The cultural devices that minorities employ to deal with the racism and ethnocentricity that permeate society allow them to endure low-paying, low-status work. Constantly confronted with insults and abuse that are the product of white supremacist thinking, minority people have developed mechanisms for maintaining their dignity and fighting for their self-respect without endangering their jobs. The values and activities of these overlapping sexual, racial, and ethnic communities provide alternative "localized" standards for determining self-worth and the worth of one's work.[108] Group culture's critique, like that of work culture, is criticism affirmatively lived out, not elaborated in grand theories or systematically formulated radical ideology.

Workers would agree with the law's assessment that supervisory abuse is an ordinary, everyday occurrence in the workplace. They would, however, part company with the courts and commentators when the latter argue that it is so mundane and commonplace that it should escape severe censure. On the contrary, from the workers' perspective, the frequency with which they encounter supervisory mistreatment means that it cannot be warranted or justified in the way the law and the conventional wisdom assert.

Among workers, there is widespread condemnation of close, coercive supervision. It is not acceptable behavior. The hostility to this sort of abusive authority is manifested in the words and actions of workers performing disparate jobs, in disparate workplaces.[109] A tuna factory worker interviewed in Barbara Garson's book *All The Livelong Day*[110] elaborated on the techniques used by the line ladies trying to meet the

106. Benson, *"The Clerking Sisterhood": Rationalization and the Work Culture of Saleswomen in American Department Stores, 1890-1960*, in WORKERS' STRUGGLES, PAST AND PRESENT 101 (J. Green ed. 1983); *see also* S. WESTWOOD, ALL DAY, EVERY DAY 89 (1984).

107. P. WILLIS, *supra* note 19, at 125.

108. R. HOROWITZ, HONOR AND THE AMERICAN DREAM: CULTURE AND IDENTITY IN A CHICANO COMMUNITY 51 (1983).

109. *See, e.g.*, L. RUBIN, WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY 168 (1976) (former file clerk complains someone was always looking over her shoulder); S. TERKEL, WORKING 202-03 (1971) (bus driver complains of constant and surreptitious overseeing and of discipline at the "whims of the superintendent"); P. ZAVELLA, WOMEN'S WORK AND CHICANO FAMILIES 104-05, 112-17 (1987) (Chicana cannery workers criticize close, unfair, discriminatory, and disrespectful supervision).

110. B. GARSON, ALL THE LIVELONG DAY (1975).

day's production quotas. She said that "they figure out who they can push—the ones who really need the job. And believe me they push them. They're on their backs . . . ." She continued, "Now some women can't work any faster no matter how much they're pushed. They get upset. You can see their eyes tearing. Others speed up and those are the ones the line ladies will go for."[111] As discipline for not working fast enough, workers were sent to other lines or made to count bones. Of such treatment, the worker said that "you feel like a kid in school being stepped out by the monitor" and "[e]veryone knows you're being punished."[112] Studs Terkel's *Working*[113] describes a black woman employed as a telephone solicitor for a newspaper who disliked the way the chief supervisor treated the women under his command. She said he was a "bully, a gorilla of a man" who would stomp, holler, harass, and threaten to replace the workers with the bums on the street.[114] A black domestic worker also interviewed by Terkel expressed her sentiments regarding close supervision as follows:

> The younger women, they don't pay you too much attention. Most of 'em work. The older women, they behind you, wiping. I don't like nobody checkin' behind me. When you go to work, they want to show you how to clean. That really gets me, somebody showin' me how to clean. I been doin' it all my life. They come and get the rag and show you how to do it. (Laughs.) I stand there, look at 'em. Lotta times I ask her, "You finished?"[115]

As the comments of the domestic worker indicate, abuse can be objectionable to workers because it does not reflect objective assessments of their productivity. Whereas the law assumes that abuse is utilized because workers are not contributing to the enterprise as they should be, workers view abuse as a calculated devaluation of themselves and their work. For example, the clerical employees interviewed by Roberta Goldberg for her book *Organizing Women Office Workers*[116] objected to the close supervision of their work and time away from their desks because it indicated that they were not trusted.[117] They also complained about low pay because it meant that their work was considered trivial and unimportant.[118] They resented the demeaning terms (like "girl" and "honey") others used in referring to them.[119] They especially objected to being asked to do "menial" domestic chores because it meant that their employers did not take them seriously with

111. *Id.* at 38.
112. *Id.*
113. S. TERKEL, *supra* note 109.
114. *Id.* at 94-95.
115. *Id.* at 117.
116. R. GOLDBERG, ORGANIZING WOMEN OFFICE WORKERS (1983).
117. *Id.* at 74.
118. *Id.* at 72.
119. *Id.* at 73.

regard to the tasks they were hired to perform.[120]

In the workers' view, employers deny them due regard and control over their work lives in order to belittle their worth as productive persons and reinforce their economic dependency on the employers. A supervisor in a shower curtain factory who points to his supervisees and says "Look, there are the horses working" is treating them as mere laboring objects, and the worker who hears this comment naturally resents it.[121] In some workplaces, the production quotas or explicit commands so regulate workers' time that they must restrict their trips to the bathroom if they want to keep their jobs or avoid supervisory disapproval.[122] There are myriad ways that employers can remind employees of their vulnerability and deter them from jeopardizing their already inferior status through collective resistance. The Wisconsin Education Association Insurance Trust, for example, tried (unsuccessfully) a number of techniques to quell union fervor among its clerical staff, including "direct[ing] the union employees to use the side door and the stairway, reserving the front door and the elevator for management," separating the workers with carrels, monitoring their phone calls, and denying them leave to deal with personal family crises.[123] The workers did not accept the propriety of any of this conduct.

Minority and female employees have reason to suspect that the disparagement and mistreatment they receive on the job is motivated by racial prejudice and sexist animosity, not merely by a concern for productivity and profits or by individualized assessments of merit. The young black men investigated by Elijah Anderson for his essay, *Some Observations of Black Youth Employment*,[124] indicated that they were especially oppressed by the distrust and suspicion which pervaded their working environments. Their supervisors and co-workers watched them closely to see if they displayed the inadequacies of the blacks who had preceded them and to prevent them from stealing.[125] Anderson reports that

> it is not uncommon for many black workers to be treated as outsiders . . . even though they have been working on the job for a long time. Among black workers who face such problems on a common job, a standing phrase is the "can I help you?" routine. . . . "When a black

120. *Id.* at 71; *see also* E. CASSEDY & K. NUSSBAUM, 9 TO 5: THE WORKING WOMAN'S GUIDE TO OFFICE SURVIVAL 25-39 (1983). In many workplaces the performance of personal services is considered an integral part of the female secretarial role. *See, e.g.*, R. KANTER, MEN AND WOMEN OF THE CORPORATION 79-80 (1977). Because her duties can extend from making coffee to running personal errands and providing emotional support, the executive secretary has been dubbed "the office wife." *Id.* at 89-91.

121. B. STOLZ, STILL STRUGGLING 107 (1985).

122. Junkerman, *Nissan, Tennessee*, THE PROGRESSIVE, June 1987, at 20; Schoonmaker, *Wearing Down the Workers*, IN THESE TIMES, July 10-23, 1985, at 10.

123. Costello, *"Wea're Worth It!" Work Culture and Conflict at the Wisconsin Education Association Insurance Trust*, 11 FEMINIST STUDIES 497, 501-02 (1985).

124. Anderson, *Youth Employment*, *supra* note 3.

125. *Id.* at 73-75.

> arrives at work, some white employee is ready with 'can I help you?' " The blacks interpret this question as a "nice" way of saying "what business do you have here?" . . . It appears to be a device of someone who is very concerned about outsiders committing a crime on the work premises. To be black and young is to be suspect. Black youth understand the nuance here, and they joke about such slights during lunch or breaks. They often gather together on the job for purposes of social defense, telling "horror stories" and communing in what they see as a hostile social and work environment.[126]

The exclusionary treatment about which these workers complain is, of course, not the sort of overt discriminatory behavior that the tort of outrage reaches.

Consider as well the work experiences of the black hospital ward secretaries described by Karen Brodkin Sacks.[127] The ward secretaries were the victims of the compound interaction of racism, sexism, and occupational elitism. Jobs at the hospital were segregated by both race and sex.[128] Secretarial positions, which were allocated to women, were further segregated by race; the higher paid administrative and medical secretaries were white, while the ward secretaries who were two pay grades beneath the other secretaries, were predominately black.[129] The ward secretaries coordinated patient care, integrated the activities of white professionals, and thereby performed functions far beyond the record maintenance tasks specified in their job descriptions.[130] Yet despite their effectiveness and their shared consciousness that they kept things moving,[131] the ward secretaries felt that both their positions in the occupational hierarchy and their abilities were demeaned.

Because of their race, low status, and unrecognized coordination role, the ward secretaries were particularly vulnerable to abuse from doctors, nurses, and supervisors.[132] Sacks quotes the views of one of the secretaries as being representative of their feelings in general:

> Their attitudes are really, really nasty. You have to count to fifty. Sometimes I just walk away. I don't like being yelled at. I'm an adult; I'm grown. If you can't speak to me without yelling, don't speak to me at all. Often they yell about something the ward secretaries don't know about. It's really the big ones that think you're, excuse the expression, shit. What they're saying is that they think you're ignorant; and they never apologize when they accuse you wrongly. They don't try to learn your name; they call us 'hey you.' Very few say 'good morning.' It takes everything to keep this job.[133]

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126. *Id.* at 75.

127. Sacks, *Computers, Ward Secretaries, and a Walkout in a Southern Hospital*, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME 173 (K. Sacks & D. Remy eds. 1984).

128. *Id.*

129. *Id.* at 173-74.

130. *Id.* at 174, 176, 178.

131. *Id.* at 178, 184.

132. *Id.* at 180.

133. *Id.* at 181.

Abuse was a way of pulling institutional and racial rank on the secretaries. "For some doctors, tantrums and loud abuse were an automatic response to anything other than instant gratification; they acted as though they had a *right* to yell without regard for anyone's feelings and felt no obligation to apologize when they were wrong."[134] In other words, those occupying superior status in the hospital viewed abuse of subordinates as a prerogative. The ward secretaries also felt that racism accounted for their mistreatment (as well as the disrespect and negligent care accorded black patients).[135] The institutional organization of the hospital staff reinforced the racism. Sacks asserts that "[i]t is not easy to distinguish abuse generated by snobbish attitudes from abuse generated by racist attitudes. But the systematic underrating of a complex job by hospital administration could only reinforce racist ideas about the abilities of black women."[136]

In sum, although the law and the conventional wisdom see something wrong with the workers that justifies their abuse, the workers know that it is the employers, supervisors, and bosses who are wrong, and on two counts. They are wrong in using slurs, close scrutiny, and onerous or insulting assignments to push workers to work harder, demand less, and know their place. And they are wrong again if they think that these tactics are wholly effective. The rude, insensitive behavior the courts condone is the very sort of behavior the workers criticize by their words and their actions. The melding of racism, sexism, class bias, and occupational elitism generates a critique that does not finely differentiate among the possible sources of worker oppression.

B. *The Mechanisms of Worker Resistance*

Although the workers by and large conform to the dictates of abusive authority, they do not necessarily feel compelled to do so either because they accept its legitimacy or because there seem to be no alternatives. Relying on cultural mechanisms that allow them to deflect some of the pain and to resist some of the abuse, they actively turn compliance with orders into a matter of their own choice. Work and group culture stand in opposition to abusive authority by creating alternative standards for judging performance[137] and the status and importance of jobs.[138] As redefined, the significance of their work vindicates

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134. *Id.*

135. *Id.* at 181-82.

136. *Id.* 185.

137. For example, where Louise Lamphere worked as a sleeve sewer, management propaganda about the money one could make under the piece rate pay system was met with doses of cynicism. Lamphere, *On the Shop Floor: Multi-Ethnic Unity Against the Conglomerate*, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME, *supra* note 127, at 247, 253-55. Moreover, the workers enforced informal rules for distributing the work equitably among themselves according to garment size. *Id.* at 259-60. They were thereby able to reduce some of the individual competitiveness that the pay system encouraged.

138. *Dirty Work, Race and Self-Esteem* is an ethnographic study by Edward Walsh of black

the workers' acquiescence. Moreover, their informal culture supports a number of resistance tactics that limit the effectiveness of supervisory coercion. The devices employees use to challenge authority range from shirking off[139] to making a game of work[140] to sabotage of various sorts.[141] Although the law might not approve of many of these practices, they are significant factors in sustaining worker endurance of insulting supervision and working conditions.

For example, the female office workers about whom Roberta Goldberg writes were able to recapture a measure of self-esteem and pride through various informal means.[142] Although their bosses viewed their work as requiring little skill or intelligence,[143] the women thought of themselves as being knowledgeable and as performing functions essential to the operation of the office.[144] They also opposed their bosses in various ways. Since the jobs did not encourage a lifetime commitment, the women did not feel obliged to act as if they did.

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garbagemen in Ann Arbor, Michigan. E. WALSH, DIRTY WORK, RACE, AND SELF-ESTEEM (1975). Despite the racist structures which kept black "G-Men" in low-status jobs, *id.* at 18-19, they found internally-defined supports for their self-esteem within their work culture. *Id.* at 34. Indeed, many concluded that their jobs were relatively good ones for black men in a racist society. The jobs offered good pay and fringe benefits, short work days, and freedom from excessive supervision. *Id.* at 23-24. The workers achieved status within the group, which was more significant than status in the larger society, through speed and cleanliness, sharp eyes for salvageable refuse, rhetorical jousting, and critical assessment of the public they served. *Id.* at 33-42.

139. *See* S. TERKEL, *supra* note 109, at 350-51 (secretary feigns incompetence at the typewriter).

140. Work games are an important source of workplace "freedom." They tend to emphasize choice and de-emphasize compulsion. "On the one hand, they provide a way of absorbing hostility and frustration, diffusing conflict and aggression, and in general facilitating 'adjustment to work' [footnote omitted]. On the other hand, they tend to undermine managerial objectives, reduce productivity, and waste time." M. BURAWOY, THE POLITICS OF PRODUCTION 37 (1985).

Typists situated in pools play racing and synchronization games to break the monotony. B. GARSON, *supra* note 110, at 154-56. The jewelry workers with whom Nina Shapiro-Perl worked hummed in unison and threw jewelry at one another (an activity that reflected the women's assessment of their employer's product). Shapiro-Perl, *Resistance Strategies: The Routine Struggle for Bread and Roses*, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME, *supra* note 127, at 193, 200. Machine operatives paid on a piece rate basis commonly make a game out of reaching or exceeding their production quotas (the number of pieces they are expected to produce in a fixed amount of time). *See, e.g.*, M. BURAWOY, MANUFACTURING CONSENT 46-73 (1979). Whether workers hustle or dawdle depends on the ease with which they can beat the clock and earn bonus or incentive pay for going over the quota. *Id.* at 57; Shapiro-Perl, *supra*, at 198-99. Through pacing, the workers seem to be regulating their own output. Work groups may even put a ceiling on "overproduction" to prevent increases in the quotas. M. BURAWOY, MANUFACTURING CONSENT, *supra*, at 57-58. Employers are, of course, wise to these strategies and adjust the rates, but leave enough uncertainty about beating the rate to keep workers in the game. *Id.* at 87-92.

On the other hand, of course, the employer's techniques and even the workers' games also produce differences in status among workers and internalization of norms that facilitate worker exploitation. *See id.* at 64-65.

141. *See* S. TERKEL, *supra* note 109, at 34 (hotel switchboard operator answers with the name of employer's competitor).

142. *See* R. GOLDBERG, *supra* note 116.

143. *Id.* at 73.

144. *Id.* at 74.

Temporary positions were appreciated because they offered variety and the opportunity to skirt the rules.[145] In addition to the usual responses to objectionable working terms and conditions (asking for a raise or increasing one's skills through education),[146] opposition took the form of putting salt in coffee, reading the boss's mail to pick up useful information, covering glass windows to limit the scrutiny of supervisors, and jamming computers so that they would not work.[147]

The black hospital ward secretaries, on the other hand, responded to their mistreatment in a more formal, organized fashion. They were fortunate in that they were united by a network of kinship and friendship that supported not only social activities like parties and dinners, but also the training and initiation of new employees and an organized walkout.[148]

> Ward secretaries were *able* to act collectively because of the strength of their informal work-based social networks. These were the ties that carried their own understandings of their worth and the worth of the work they did. Social networks combined with on-the-job training helped make these understandings conscious and collective and provided bonds of trust strong enough to risk acting on them.[149]

Six years after the walk-out, however, the struggle continued as the ward secretaries coped with management usurpation of their training function, attempts to change their job title (to "ward support"), and the absence of opportunities for advancement.[150]

The young men of Elijah Anderson's study pursued yet a third approach.[151] They reacted to close surveillance and oppressive control in a more defiant way. Their resistance included poor attitudes and performance,[152] quitting (if they were not fired first),[153] "cussing the boss out" before departing,[154] and "ripping him off" thereafter if he refused to pay the wages the employees were owed.[155]

It should be apparent that conduct outsiders to the workplace (such as the courts deciding outrage cases) would consider deviant may be a reaction to abusive, unfair, and exploitative terms and conditions of employment. Pilferage, for example, can be a means of defying authority and checking excessive employer imposition. Workers resort to pilferage in order to retaliate against close or insensitive supervision and express their resentment of the status, power, and remuneration en-

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145. *Id.* at 63.
146. *Id.* at 134.
147. *Id.* at 91.
148. *See* Sacks, *supra* note 127, at 182-87.
149. *Id.* at 190.
150. *Id.* at 187-89.
151. Anderson, *Youth Employment*, *supra* note 3.
152. *Id.* at 75.
153. *Id.* at 76.
154. *Id.*
155. *Id.* at 77.

joyed by their superiors.[156] "Ripping off" goods and services frees workers by increasing their control over the work situation and their self-image.[157] It also adds to their social standing among the family, friends, and co-workers with whom they share tales of their exploits and the proceeds of the takings.[158]

The extent to which pilferage is tolerated depends on the norms and attitudes operating in the particular workplace and within the particular work group.[159] It is not uncommon for a work group to demand conformity with norms legitimating the taking of in-kind wages, to test and socialize new members in the mandated behavior, and to discipline those who refuse to comply.[160] The work group may also provide protection against exposure and support for cooperative or coordinated activities.[161] On the other hand, work groups can also effectively inhibit theft or forms of takings that are incompatible with other objectives.[162] Surprisingly perhaps, the responses of supervisors and employers to such conduct also vary. In some cases, "[s]upervisory personnel realize that worker compliance is more likely to be obtained by keeping a low profile and providing workers with unofficial bonuses in the form of extra break time and services or merchandise."[163]

Pilferage thus has an equivocal nature as a means of resistance. On the one hand, it functions in opposition to widespread norms regarding the ownership of private property. In addition, it provides the occasion for the exercise of ingenuity and cleverness and creates solidarity among workers. On the other hand, the informality of pilferage as a technique of opposition and resistance may render it compatible with the employer's interests. Elijah Anderson reports that in certain workplaces the young black employees he studied were not paid the minimum wage on the assumption that they would make up the shortfall by stealing.[164]

> A kind of wage-theft system operates, in effect, with the tacit approval of the employer. The employer is said to set the youth's wages low with the expectation that the youth will steal a certain amount in materials from the workplace. In order to make a decent "wage," the youth in turn steals. . . . The "self-fulfilling prophecy" is set in motion as the employer's expectations of the youth are met. Open to informal negotiation, unspoken and implicit, the arrangement lends itself to dis-

156. *See* Altheide, Adler, Adler & Altheide, *The Social Meanings of Employee Theft*, in CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS 90, 102-03 (J. Johnson & J. Douglas eds. 1978); R. HOLLINGER & T. CLARK, THEFT BY EMPLOYEES 79-88, 142-43 (1983).

157. *See* Altheide, Adler, Adler & Altheide, *supra* note 156, at 104, 123.

158. *See id.* at 103, 113-14.

159. *See id.* at 108-19.

160. *See id.* at 98-99, 100-02.

161. *See id.* at 101, 113.

162. *See id.* at 113, 123.

163. *Id.* at 112.

164. Anderson, *Youth Employment*, *supra* note 3, at 77.

agreements and fights between employer and employee.[165]

Rather than being a device the workers controlled, pilferage was a tool manipulated by the employers and as such posed a threat to the workers' job security that could be used against them at any time.

C. *The Contradictory Potential of Informal Culture*

The ambiguous quality of pilferage is similarly reflected in many of the informal cultural modes and mores on which low-status minority and female workers rely. The techniques of group and work culture have a dual potential. They can support either acquiescence and accommodation or resistance and liberation.[166] Some of the means by which workers oppose their bosses are inconsistent with their strong negative critique of abusive authority—they do not bring the message home to employers and supervisors that abusive conduct is improper and that it must stop. Clearly, economic and political forces limit the extent of worker defiance. Workers are also entrapped by the power of the conventional wisdom, which mutes the thrust of their objections to mistreatment on the job.

The accommodation that informal cultural defiance can produce is illustrated by the numerous techniques black workers use to conceal their true feelings, and to control their employers' access to information which if disclosed might be considered inconsistent with their subordinate status.[167] These practices are variations on a device known as "fronting." Fronting enables blacks to respond to racist insults and abuse with calm, quiescent behavior not expressive of their actual sentiments.[168] Its use may be mandated by compelling reasons like the necessity of keeping one's job.[169] Fronting appears to give black folks a measure of control over their intercourse with whites. It is an implicit rejection of white authority disguised as deference. It is a ruse. The white person is fooled.

> Whites do not typically notice when blacks front, since the mode—emotionally subdued—is one that whites consider normal, achieved as a matter of course in their cultural development through the habitual exercise of emotional self-restraint and repression. Consequently they are not aware of the conscious effort that blacks must make on a day-to-

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165. *Id.*

166. *See* C. WEST, *supra* note 19, at 120 (cultural processes can encompass both hegemonic and counter-hegemonic traits).

167. Judith Rollins, a sociologist, did domestic work herself and interviewed a number of female domestic workers and female employers of domestics. J. ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS (1985). The domestics reported making phony displays of ingratiating deference, *id.* at 163, lying to satisfy an employer's curiosity about their personal lives, *id.* at 165-66, accepting cast-off personal items that they did not want and promptly discarding them, *id.* at 190, 194, hiding their home or car ownership from an employer, *id.* at 196-97, and acting as if they were not intelligent, *id.* at 196.

168. T. KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 61, 125 (1981).

169. *Id.* at 124-25.

> day basis to contain their emotions when working in what they regard as a racially hostile environment.[170]

In addition fronting serves as a critique of the emotional repression characteristic of privileged white culture. How else would white people ever expect an unemotional response to racist humiliation were their own emotions not thoroughly repressed? Black culture, on the other hand, allows for the expression of anger and the emotional harmony that catharsis can produce.[171]

Fronting is part of the insulation that protects black people from emotional damage at the hands of white people in authority. Choosing to mask or hide feelings makes the black person less vulnerable to emotional degradation. Bertram Doyle, a black man who was ambivalently concerned about racial harmony, *i.e.*, black cultural capitulation, identifies as a "source of conflict" the Negro who finds "great cause for merriment in contemplating the existing codes of etiquette."[172] The root of the sentiment is contempt.

> The person . . . has detached himself from the situation, has evaluated it critically, and needs to spend small emotional energy either in defending or decrying existing conditions. He may, or may not, be called upon to use the traditional forms. If he does use the forms, he plays at the practice, as at an amusing game. He feels no inferiority or superiority. And this, in the broadest sense, is the true emancipation of the Negro.[173]

Trudier Harris uses the term "masking"[174] in referring to this coping mechanism as it is employed by black female domestics in real life and in representational fiction:

> She can bow and scrape and say 'yes-um' until eternity if she separates the circumstances of her existence in the white woman's house from her conception of herself. If she maintains her cultural reference and believes in that reality, then the impositions that are made upon her will have less traumatic effect . . . .[175]

Fronting represents a challenge to white authority and has the potential to be the basis of transformative resistance because it is an implicit critique of, and a self-aware response to, the abusive conduct that prompts it. It is also a cultural mechanism that blacks create and sustain without white interference or control.

As a form of resistance and protection, however, fronting has limitations. The submissiveness that fronting presents is, to outward appear-

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170. *Id.* at 125.

171. *Id.*

172. B. DOYLE, THE ETIQUETTE OF RACE RELATIONS IN THE SOUTH: A STUDY IN SOCIAL CONTROL 168 (1937).

173. *Id.*

174. T. HARRIS, FROM MAMMIES TO MILITANTS: DOMESTICS IN BLACK AMERICAN LITERATURE 16 (1982).

175. *Id.*; *see also* J. ROLLINS, *supra* note 167, at 146.

ances, no different from that which acquiescence would produce. Moreover, given the exaggerated responses of whites to black self-assertiveness and the consequences that flow from black displays of aggression and anger,[176] blacks may not be exercising as much free choice in fronting as they may think they are. The antiauthoritarian aspects of fronting would produce more effective resistance if blacks could directly voice their anger and indignation at white abuse to white people and still keep their jobs.

While fronting keeps blacks silent, broadly disseminated notions of sex roles affect the seemingly oppositional behavior of workers of both sexes (and all races and ethnicities) in a way that makes class distinctions and the division of labor acceptable. Studies have shown that women factory operatives emphasize various aspects of the female role in family life in creating emotional and temporal space for themselves at work.[177] The jobs of some of these workers exploit characteristics that are associated with being a housewife and mother.[178] The economic need to earn a wage forces women to do such chores in connection with jobs outside of the home. Yet the similarity between at-home and outside-the-home duties may make the latter form of exploitation acceptable.[179] For example, the sexual division of labor was found to produce "contentment" among female workers at a poultry processing plant:

> While many see themselves as doing the messier and more difficult jobs, as compared to the men, they are able to accept that because of the fact that it is "women's work." Just as a housewife might see her own responsibilities as being perhaps more demanding and exhausting than those of her spouse, but accepting such a division of labor as natural, so too do the female workers reconcile themselves to the more demanding, difficult, and seemingly more disagreeable types of work. In one sense, there is a kind of pride in the fact that "women's work" is often more difficult and that female workers are more stoic than males in performing the harder jobs.[180]

Similarly, women workers " 'humanize' the workplace . . . [by] bringing family life into the industrial setting."[181] Through birthday parties, bridal and baby showers, retirement parties, the sharing of family picture albums, and the paying of condolences upon the death of family members, they link work to home.[182]

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176. T. KOCHMAN, *supra* note 168, at 43-45, 159.

177. *See, e.g.*, Lamphere, *supra* note 137, at 256-58; Benson, *supra* note 106, at 108-09; S. WESTWOOD, *supra* note 106, at 90-97, 111-28.

178. These characteristics are "service, submission, and the suppression of intellectual development." L. RUBIN, *supra* note 109, at 169.

179. *Id.*

180. Bryant & Perkins, *Containing Work Disaffection: The Poultry Processing Worker*, in VARIETIES OF WORK 199, 209 (P. Stewart & M. Cantor eds. 1982).

181. Lamphere, *supra* note 137, at 258.

182. *Id.* at 256-59.

On the positive side it can be said that by experiencing pride in performing valuable but unpleasant jobs that men do not do, the women are implicitly criticizing their (male) employers' assessment of the worth of certain kinds of work and advancing an alternative feminine notion of merit. Moreover, their efforts to connect their domestic and work lives stand in opposition to a male norm that the public and private spheres should be kept separate. On the other hand, women's reliance on the traditional domestic role of women to make menial work acceptable does not go very far in opposing employers' efforts to exploit their labor power.[183] These cultural mechanisms are not critical of the sexual division of labor[184] and furthermore suggest that men in general and not employers *per se* are the source of their exploitation as wage workers. Some working women, then, appear fettered by the prevailing views about women's proper role.

Low-status male workers engage in a comparable process of accommodation. The young men described in Ruth Horowitz's ethnographic study of life in a Chicano community in Chicago[185] were more explicit in their opposition to their working conditions and abusive authority, but they too ultimately accommodated them with the help of male values. The men in the community were bound by a "code of honor" which governed interpersonal relationships and set the standards for maintaining their manhood.[186] The "code" distinguished acts of respect and deference from acts of insult,[187] and prescribed what a man could do to reclaim lost honor.[188] Within this context, the young men had well-developed notions of what comprised a good job. "[F]reedom from strict supervision" was one of the requisites.[189]

> Independence is consistent with their image of themselves. Moreover, independence allows them to avoid experiencing lack of respect, which can be problematic to a man of honor. Youths are sometimes fired after lashing out at a supervisor (either verbally or physically) who has not demonstrated the proper respect in front of others. Most of the places they work have no grievance mechanisms.[190]

At the same time, good jobs were dirty and required the strength of

183. Westwood considers the emphasis placed on the traditional roles of women in oppositional work culture "collusive." S. WESTWOOD, *supra* note 106, at 22, 89. Says Westwood, "this culture fashioned by and for women was a contradictory whole: it resisted management control and the union hierarchy, but did so by using notions of femininity which colluded with a subordinate and domesticated version of woman . . . ." *Id.* at 88.

184. There are, of course, women workers who object to being required to do blatantly domestic chores in office and factory settings where their principal tasks are not domestic in nature. *See, e.g.*, R. GOLDBERG, *supra* note 116, at 71; E. CASSEDY & K. NUSSBAUM, *supra* note 120, at 25-39 (1983).

185. R. HOROWITZ, *supra* note 108.

186. *Id.* at 80-81.

187. *Id.* at 81-82.

188. *Id.* at 82-86.

189. *Id.* at 166.

190. *Id.*

a tough man.[191] "A 'real man' . . . need[ed] to get dirty in order to show that he works."[192] Consistent with this approach:

> White-collar jobs are viewed with some ambivalence. On the one hand, they may be evaluated as a "hustle," a good way of earning money because the employee is viewed as doing little. . . . On the other hand, white-collar jobs are hard to come by and striving for such a job is likely to bring failure.[193]

As an expression both of criticism and envy, the men derided white-collar jobs as being women's work.[194] The young men rated a job that allowed for peer group socializing or creative self-expression as among the better jobs because it gave a man a sense of importance.[195] Because such positions were rare, the men instead sought status and respect through involvement in peer groups and extended family relations based in the Chicano community.[196]

The attitudes of the young Chicano males presented by Horowitz seem less the product of a distinct Latino cultural heritage than of a generic Anglicized "machismo" shared by other low-status workers in America and Great Britain.[197] Their attitudes are similar to those Paul Willis analyzes in *Learning to Labour*,[198] an ethnographic study that explores why young English working class men seek working class jobs. Willis concludes that

> the brutality of the working situation is partially re-interpreted into a heroic exercise of manly confrontation with *the task*. Difficult, uncomfortable or dangerous conditions are seen, not for themselves, but for their appropriateness to a masculine readiness and hardness. . . .
>
> . . . [I]n the machismo of manual work the will to finish a job, the will to really work, is posited as a masculine logic and not as the logic of exploitation.[199]

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191. *Id.*

192. *Id.* at 167.

193. *Id.* at 166-67.

194. *Id.* at 167.

195. *Id.* at 168 (examples discussed were managing a bar and serving as a union shop steward).

196. *Id.* at 169-71, 224-25.

197. *See* D. HALLE, AMERICA'S WORKING MAN (1984). The white, male, blue-collar workers Halle studied employed the term "working man" in referring to themselves. *Id.* at 204. A "working man" is one who does dirty, dangerous, boring, closely supervised physical labor in a factory setting. The term represented both an expression of class consciousness and an assertion of the superiority of such work. *Id.* at 204-07. It was also a critique of overpaid, unproductive white-collar jobs. *Id.* at 205-07. Although the concept additionally implied a general acceptance of the sexual division of labor, Halle concluded that this is becoming less true. *Id.* 211-12. The men considered running one's own business, union organizing, and positions involving socializing (like police work) or no supervision (like truck driving) desirable jobs. *Id.* at 165-67. Unlike the Chicanos in Horowitz's book, however, the white male blue-collar workers enjoyed, to their way of thinking, a middle-class status with regard to their lives outside the workplace, *id.* at 51, which compensated for the "humiliations and restraints" of their employment. *Id.* at 295.

198. P. WILLIS, *supra* note 19.

199. *Id.* at 150-51.

Willis finds positive and negative aspects in this use of masculine superiority. On the one hand, it dignifies the workers' labor power and debunks the greater status given to mental tasks and credentials that promotes not efficiency but occupational stratification.[200] On the other hand, it encourages aggression, separates the working class along sexual lines, and produces a consensual affirmation of the division of labor.[201] The amount of freedom this generic "machismo" generates is further reduced by the use that the conventional wisdom makes of it. The outrage cases, for example, tout working-class "machismo" and tie it to the existing occupational hierarchy so as to justify the abuse of blue-collar males.[202] The pitch goes that they are tough, they can take it, and they should be proud of it.

In certain circumstances, however, the liberating potential of the machismo that is more closely identified with Latino culture is realized, and it becomes a political force that defies co-optation. In an essay entitled *Myths, Rituals and Symbols in the Chicano Peasant Movement*,[203] Tomas Calvo Buezas describes the positive use of machismo by the Chicano farm workers movement to foster political activity aimed at improving working conditions. The machismo of which Calvo Buezas writes was grounded in Mexican cultural values, yet reflected the reality of the North American setting.[204] "Included in the complex range of meanings of machismo is a valuable cultural trait: the 'brave and aggressive response' of a man attacked and wronged."[205] Drawing on this trait, the movement's leaders and publications sought, and got, a "collective response" that Calvo Buezas labels " 'ethical machismo,' for it is a behavior legitimized by the belief that one is the victim of unjust treatment which violates freedom and human dignity."[206] Calvo Buezas argues that, although the basic function ("resistance to injustice") and meaning ("personal bravery") were preserved, the machismo of the farm laborers' movement was feminized in that it was non-violent, flexible, and open to compromise.[207] The goal was not "a passive integration that would subvert their cultural identity (assimilation-fusion); they wanted an active integration from the Chicano group ('macho-father') in a process that would result in an Anglo-Hispano society."[208]

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200. *Id.* at 151-52.

201. *Id.*

202. *See* notes 61-65 *supra* and accompanying text.

203. Calvo Buezas, *Mitos, rituales y simbolos en el movimiento campesino chicano*, 11 REVISTA ESPANOLA DE ANTHROPOLOGIA AMERICANA 259 (1981) (English translation on file with the *Stanford Law Review*); *see also* A. MIRANDE, THE CHICANO EXPERIENCE: AN ALTERNATIVE PERSPECTIVE 165-81 (1985) (a reassessment of machismo, casting it in a positive light).

204. Calvo Buezas, *supra* note 203, at 266.

205. *Id.* at 265.

206. *Id.* at 266.

207. *Id.* at 267-68.

208. *Id.* at 267.

D. *Conclusions and Implications*

As the creators of informal, local cultural mechanisms that include patterns of antiauthoritarian resistance, workers cannot be said to buy lock, stock, and barrel the dominant messages supporting authority and its excesses. The critique of supervision explicit in workers' discourse and implicit in much of their conduct is pointed and categorical. From the workers' perspective, the supervision they encounter reflects distrust and suspicion of their competency and honesty. They are isolated and constantly demeaned. Moreover, verbal aggression and coercion are used to push them to work harder or to keep them "in their place." Although not expressly racist, ethnocentric, or sexist, the control mechanisms reflect and reinforce negative assumptions about the workers' race, ethnicity, or sex. Moreover, to the extent that the various forms of oppression merge, the workers' critique expands in its scope and generality.

Compared with this strong critique, however, many of the practices by which workers respond to the treatment they receive from their superiors are ambiguous and equivocal. In some cases they promote resistance, and in others they produce acquiescence and accommodation. Moreover, the political message embodied in group and work culture is too informal and partial to counter effectively the sustained, relatively coherent world views regarding workplace supervision espoused by institutions like the schools, the media, and the courts. Thus workers remain susceptible to the explicit and pervasive support for the racial and sexual division of labor and the qualitative differences in the treatment of skilled versus unskilled workers that the dominant ideology offers. The workers themselves adopt or reinforce racist and sexist notions in coping with workplace oppression. Through cultural accommodations, workers of nearly every race, ethnicity, and sex can assert some measure of positive status, even in the face of group discrimination. Persistently held notions of white supremacy permit whites of both sexes to consider themselves better in some way than people of color, while patriarchy generates in males of every race and ethnicity a sense of superiority to women. At the same time, females take pride in doing "women's" work and minorities can boast of their masterful command of emotional disguises in dealing with a racist society. The resultant web of posturing reduces rebellion and reinforces hierarchy in the workplace.

The workers' negative critique justifies a full frontal attack on supervisory abuse. Although the informal cultural mechanisms explored above may not be aggressively antiauthoritarian, they do represent a potential challenge to employers, supervisors, and bosses. Willis argues that these mechanisms might be positively viewed as representing "the creative, varied, potentially transformative working out—not the suffering—of some of the fundamental social/structural relationships

of society."[209] As such, they are a starting point for a broader campaign to help workers liberate themselves from supervisory domination. The effectiveness of the informal cultures would be strengthened and broader political activity generated if the ideology disseminated from above lent greater acceptability and coherence to the negative critique. The Chicano farm workers movement, for instance, was supported by a nationwide boycott. The formal worker attack on overt racism and sexism (rather than authority *per se*) is sustained by the values and mechanisms that are a legacy of the civil rights movement.

The negative critique must, in essence, be turned into an integrated, consistent antiauthoritarian counterideology. This requires that the problem of abuse be generalized and its coercive nature exposed. Furthermore, real change in the workplace would seem to require an amassing of power, a countering of the coercive strength that abuse embodies and symbolizes. The next section looks at the structural significance of abuse with the aim of measuring its prevalence and its vulnerability to political attack.

III. Authoritative Abuse From a Materialist Perspective

Debunking the view that abuse is situational in nature, establishing that the harm it causes is quite substantial, and enhancing the coherence of the workers' critique all require a more objective assessment of the problem than the cultural perspective alone can provide. A structural analysis should also reveal that the workers discussed in Part II are inhibited by more than their own values and practices. Significant material constraints limit their critique and localize their resistance. Emotionally painful supervision on the job is a manifestation of the organization of work institutions and the configuration of the labor market.

The coercion that authoritative abuse represents nonetheless requires the warrant of a veneer of worker consent. Its use might accordingly be lessened and its structural foundations altered if the vibrant cultural resistance of the workplace could be enlarged into a highly visible social movement that forcibly proclaimed the opposition of minority and female workers at all levels to the many forms of supervisory harrassment they experience.

A. *The Role of Coercion in Controlling Workers*

Viewed in the grossest terms, the employment relationship is one of conflict. The employer attempts to maximize worker productivity and firm profitability, and the workers attempt to restrict their labor output and increase their wages. However much they struggle, to some extent all workers must obey the directions of their employers in order to keep

209. P. Willis, *supra* note 19, at 137.

their jobs. Economic coercion necessitates the employment relationship and furnishes the most basic and pervasive sort of worker control.[210] As Robert Hale suggested in his 1943 article, *Bargaining, Duress, and Economic Liberty*:[211]

> We do not have slave labor, but there are nevertheless compulsions which force people to work. . . . In our industrial society, an employee works in order to make a bargain with his employer and thus obtains the money with which to free himself from some of the restrictions which other people's property rights place on his freedom to consume.[212]

The wage dependency that compels workers to obey their employers' commands is but one in an array of mechanisms employers utilize to force or cajole workers to labor. These control devices vary in the extent to which they combine coercion and persuasion to extract obedience to workplace authority. Located at different points along the coercion/persuasion continuum are what observers of the labor force have termed "simple" and "bureaucratic" control.

The majority of the workers whose stories are recounted in the previous section were subject to "simple control."[213] "The essence of simple control . . . is the arbitrary power of foremen and supervisors to direct work, to monitor performance, and to discipline or reward workers. Almost by definition, the workers in such a system can have little job security."[214] Supervision under a scheme of simple control is close, direct, informal, and unstructured.[215] The supervisor functions much like an individual entrepreneur in directing operations.[216] Job assignments, wage rates, and termination decisions rest with the supervisor and are used to achieve compliance with her or his commands.[217]

Thus, simple control capitalizes on wage dependency by conditioning continued employment on subordinates' satisfying the demands of the boss. Work conditions generally lie within the unilateral control of the supervisor, and there is no higher authority that may be invoked by way of an appeal should the worker and the supervisor disagree. In a hierarchical context, the supervisor's power may not be absolute because there is oversight from above, but it may be quite broad with regard to a particular segment of the business.[218]

A scheme of bureaucratic control presents a sharp contrast.[219] Whereas simple control maximizes the possibilities for the exercise of

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210. *See* M. BURAWOY, THE POLITICS OF PRODUCTION, *supra* note 140, at 31.
211. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).
212. *Id.* at 626.
213. R. EDWARDS, CONTESTED TERRAIN 19 (1979).
214. *Id.* at 183.
215. *Id.* at 33.
216. *Id.* at 31-32.
217. *Id.* at 35-36.
218. *Id.* at 32.
219. *See id.* at 131.

arbitrary coercion, bureaucratic control seems to maximize the opportunities for the exercise of rationality in worker supervision. Bureaucratic control is a result of past labor/management struggles, particularly the industrial union movement which achieved momentum in the 1930's.[220] The chief components of bureaucratic control are the legacies of concessions negotiated by unions or unilaterally implemented by employers seeking to curb class conflict at that time.

"[B]ureaucratic control is embedded in the social and organizational structure of the firm and is built into job categories, work rules, promotion procedures, discipline, wage scales, definitions of responsibilities, and the like."[221]

> "Rule of law"—the firm's law—replaces "rule by supervisor command" in the direction of work, the procedures for evaluating workers' performance, and the exercise of the firm's sanctions and rewards; supervisors and workers alike become subject to the dictates of "company policy." Work becomes highly stratified; each job is given its distinct title and description; and impersonal rules govern promotion. "Stick with the corporation," the worker is told, "and you can ascend up the ladder." The company promises the workers a *career*.[222]

The operation of overt coercion in a scheme of bureaucratic control is diminished through explicit provisions governing job security, work assignments, promotions, and the pace and quality of work. These measures not only reduce the ability of employers to exploit workers' wage dependency with unrestricted production demands and threats of arbitrary dismissal,[223] but also limit the capacity of employers to shift the burden of economic downturns to labor through furloughs and discharges.[224] Although employers retain the right to discipline employees, exercise of the prerogative is restricted by the "good cause" standard and the procedures of the grievance process.[225] Furthermore, seniority systems dictate who will be protected from layoffs and who will be promoted.[226] Seniority systems also affect how an employer may define a job or its content.[227] All of these features lend a rigidity to bureaucratic control that makes it more costly than simple control.[228]

Various aspects of bureaucratic control, such as internal labor markets (which reward skill and seniority within the firm)[229] and quasi-legal

220. D. GORDON, R. EDWARDS & M. REICH, SEGMENTED WORK, DIVIDED WORKERS 179-82 (1982); S. BERGER & M. PIORE, DUALISM AND DISCONTINUITY IN INDUSTRIAL SOCIETIES 42-43 (1980); Gersuny, *Origins of Seniority Provisions in Collective Bargaining*, 33 LAB. L.J. 521-22 (1982).

221. R. EDWARDS, *supra* note 213, at 131.

222. *Id.* at 21.

223. M. BURAWOY, THE POLITICS OF PRODUCTION, *supra* note 140, at 126.

224. *See* S. BERGER & M. PIORE, *supra* note 220, at 43.

225. *See id.* at 44.

226. *See id.* at 43.

227. *See id.* at 44.

228. D. GORDON, R. EDWARDS & M. REICH, *supra* note 220, at 200-02.

229. *See generally* M. BURAWOY, MANUFACTURING CONSENT, *supra* note 140, at 95-108.

governance mechanisms, ostensibly generate voluntary acceptance of authority by the work force. The workers appear to have choices with respect to their working conditions,[230] and the supervisors' ability to exercise arbitrary and discretionary power is apparently curbed.[231] The benefits dispensed on the basis of seniority "engender a commitment to the enterprise and its survival."[232] The provisions governing discipline and discharge operate in an impersonal way which lends the appearance of consensual legitimacy even to the use of coercion.[233]

Although the bureaucratic apparatus can be quite effective at managing conflict and at camouflaging the supervisor's power over her or his workers,[234] it does not prevent supervisory abuse from occurring, nor does it completely stifle worker resistance. The amount of discretion and authority a supervisor exercises varies with the organizational structure and her or his individual capabilities.[235] Supervisors who possess relatively little power and are insecure about their status are prone to manifest abusive techniques of direction and control.[236]

Thus, simple control represents a material, structural obstacle for workers contending with abuse on the job. Compared with the elaborately obscured coercion of bureaucratic control, the coercion of simple control, with its greater potential for supervisory abuse, is patently, and thereby more effectively, dispensed.

The workers' ability to check their supervisors' power over them is further decreased because the compulsions of simple control do not stand alone. They are typically compounded by other working conditions and the overall economic, social, and political status of those who labor where simple control is employed. Simple control is an inextricable component of what might be considered the worst jobs in the economy: those requiring the least skills and paying the lowest wages.

B. *Abuse and Secondary Sector Jobs*

Labor market segmentation theory is a useful starting point in attempting to establish a rough correlation between simple control on the one hand, and job categories and identifiable groups of workers on the other. The theory developed in the 1960's out of an effort by liberal economists to explain the perceived relationship between categories of work and work experience and the ascriptive characteristics of workers, particularly race. The theory considers not only the nature of

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230. *Id.*

231. *Id.* at 116-17.

232. *Id.* at 106.

233. *Id.* at 120; *see also* M. BURAWOY, THE POLITICS OF PRODUCTION, *supra* note 140, at 126.

234. *See* R. EDWARDS, *supra* note 213, at 145.

235. *See, e.g., id.* at 141 (at Polaroid, supervisor's room to maneuver is restricted by top-down management review); R. KANTER, *supra* note 120, at 167-73 (managers' power greatly affects supervisory style).

236. *See* R. KANTER, *supra* note 120, at 189-205.

supervision but also other aspects of a job such as pay, advancement, job security, occupational status, and quality of work.[237] Based on these criteria, it divides workers into three distinct, hierarchically related segments: at the top, the independent primary market which consists of white-collar supervisory and mid-level administrative personnel (such as salespersons, bookkeepers and personal secretaries), craft workers, and professionals; next, the subordinate primary market which is essentially composed of the traditional blue-collar manufacturing groups; and finally, the secondary market which contains unskilled and semiskilled unorganized workers.[238] In 1970, the primary sector was composed predominantly of white males,[239] while minorities and women were overrepresented in the secondary sector.[240]

Because of changes in the economy, particularly the expansion and further stratification of the business service sectors,[241] the decline in union membership,[242] and the partial lowering of color and sex barriers,[243] the segmentalists' categories do not accurately portray the contemporary division of the work force. The theory nonetheless retains descriptive power with regard to the secondary sector as the characteristics of jobs at the bottom of the hierarchy have remained virtually unchanged for roughly two decades.

The secondary market segment includes unskilled or low-skilled, nonunionized positions in manufacturing, consumer services, retail and wholesale trade, clerical work, and migrant agricultural labor.[244]

> What marks these jobs as secondary is the casual nature of the employment. The work almost never requires previous training or education beyond basic literacy. Few skills are required and few can be

237. S. BERGER & M. PIORE, *supra* note 220, at 17-18; R. EDWARDS, *supra* note 213, at 236 nn.3-4.

238. *See* S. BERGER & M. PIORE, *supra* note 220, at 17-21; R. EDWARDS, *supra* note 213, at 163-83. *See generally* D. GORDON, R. EDWARDS & M. REICH, *supra* note 220, at 190-227.

239. *See* D. GORDON, R. EDWARDS, & M. REICH, *supra* note 220, at 202.

240. *Id.* at 204-06, 209-10.

241. *See* Personick, *Industry Output and Employment Through the End of the Century*, MONTHLY LAB. REV., Sept. 1987, at 30, 32-33, 39-40. *See generally* Kasarda, *Urban Change and Minority Opportunities*, in THE NEW URBAN REALITY 33 (P. Peterson ed. 1985).

242. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 221-45 (1984) (attributing the decline in union membership to increased management opposition and reduced union organizing). In 1986, only 17.5% of all wage and salary workers aged 16 and over were union members. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 402 (108th ed. 1988).

243. In reference to women, see generally C. TAEUBER & V. VALDISERA, WOMEN IN THE AMERICAN ECONOMY 18-23 (U.S. Bureau of the Census Current Population Reports, Series P-23, No. 146, 1986); 1987 ECON. REP. OF THE PRESIDENT 218-25. Minority workers have also shown small gains in the white-collar category. For example, in 1970, roughly 8% of black employed civilians were professional and technical white-collar workers. THE SOCIAL & ECONOMIC STATUS OF THE BLACK POPULATION IN THE U.S.: AN HISTORICAL VIEW, 1790-1978 at 75 (U.S. Bureau of the Census, Current Population Reports, Special Series P-23, No. 80). In 1982 their percentage had increased to 11.8%. 1983 HANDBOOK OF LABOR STATISTICS 48. In 1973, 6.5% of Hispanic employed civilians were in the same white-collar category; by 1982 their number had risen to 8.5%. *Id.*

244. R. EDWARDS, *supra* note 213, at 167.

> learned. Such jobs offer low pay and virtually no job security. They are, in other words, typically dead-end jobs, with few prospects for advancement and little reward for seniority in the form of either higher pay or a better job. With little incentive to stay, workers may move frequently, and turnover in these jobs tends to be high. The only thing that a worker brings to a secondary job is labor power; the worker is treated and paid accordingly.[245]

Simple control is accordingly a salient aspect of secondary sector work. "[S]ince employers have little investment in matching workers and their jobs, they feel free to replace or dismiss workers as their labor needs change."[246]

Although secondary market jobs are considered marginal, not all of the employers of secondary market workers may be so characterized. Some of them are smaller concerns in highly competitive areas that adjust to fluctuations in demand by manipulating their work forces.[247] Others are stand-ins for larger firms in the core of the economy that, by subcontracting, hire secondary market workers.[248] The large firms are thereby able to circumvent potential union problems, to save on employee fringe benefits, and to arrange the manufacture of products that, because they are hard to standardize, generate difficulties in supervising workers. Furthermore, large firms that have escaped unionization or that maintain pockets of nonunionized workers are able to sustain secondary sector modes of operation.[249]

In lieu of union contracts and bureaucratic rules, secondary market workers are dependent on statutory protections to reduce wage dependency and to weaken the ability of employers to impose harsh working conditions unilaterally.[250] Unemployment insurance,[251] the minimum wage laws,[252] workers' compensation,[253] and income maintenance pro-

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245. *Id.* at 167-68.

246. *Id.* at 170.

247. *See* S. BERGER & M. PIORE, *supra* note 220, at 23; D. GORDON, R. EDWARDS & M. REICH, *supra* note 220, at 191.

248. *See* S. BERGER & M. PIORE, *supra* note 220, at 47; D. GORDON, R. EDWARDS & M. REICH, *supra* note 220, at 191.

249. D. GORDON, R. EDWARDS & M. REICH, *supra* note 220, at 200-02.

250. *See* M. BURAWOY, THE POLITICS OF PRODUCTION, *supra* note 140, at 125-26.

251. 42 U.S.C. § 503 (1982). The number of recipients of unemployment insurance has reached an all-time low. Uchitelle, *Jobless Insurance System Aids Reduced Number of Workers*, N.Y. Times, July 26, 1988, at A1, col. 4. The increase in part-time and temporary employment has reduced eligibility. *Id.*; *see also* S. LEVITAN & I. SHAPIRO, WORKING BUT POOR 107-08 (1988). Those who do receive compensation collect only 35% of their income for a maximum duration of twenty-six weeks. J. BICKERMAN, UNEMPLOYED AND UNPROTECTED 9 (1985).

252. *See* Fair Labor Standards Act of 1938, § 6, § 13, 29 U.S.C. § 206, § 213(a), (c), (g) (1982). The real value of the minimum wage has declined. "[T]he current standard of $3.35 an hour has not been increased since January 1981, even though consumer prices have risen 30 percent over this period." I. SHAPIRO, NO ESCAPE: THE MINIMUM WAGE AND POVERTY 1 (1987); *see also* S. LEVITAN & I. SHAPIRO, *supra* note 251, at 7-8. In 1986, most minimum wage workers were adults, two-thirds were women, and a disproportionately high percentage were black or Hispanic. I. SHAPIRO, *supra*, at 7. Exemptions (primarily affecting those engaged in the service industries and retail trade) and noncompliance with the law increase the number

grams[254] provide very limited financial assistance, however,[255] and do not directly address the day-to-day reality of workplace abuse.

There is a correlation between secondary sector job holders and the membership of economically and politically vulnerable groups. Blacks, Latinos, women, teenagers, and undocumented immigrant workers continue to be disproportionately represented at the low end of the labor force.[256] A study done by the United States Commission on Civil Rights used the term "marginal jobs" to describe positions in the secondary sector.[257] A marginal job was one requiring three months or less of specific vocational training and paying less than the average wage in the area in which it was located.[258] Using this definition, the study reported that, in 1980, 21.6 percent of black females, 18.5 percent of Hispanic females, 13.9 percent of white females, 11.9 percent of black males, and 11.2 percent of Hispanic males, versus only 5.3 percent of white males, held marginal jobs.[259]

The discussion thus far illustrates that the authoritative abuse that minority and female low-wage, low status workers complain about, is to some extent a phenomenon of the economic structure. It is a manifestation of the coercion of simple control and the unregulated exploitation of secondary market working conditions. Subject to simple control and confined to secondary sector jobs, the workers described in the previous section rely on informal culture to protect themselves from the unilateral impositions of supervisors because there are no formal on-the-job mechanisms available to them. Viewed in their structural context, the oppositional aspects of the group and work cultures of unskilled and low-skilled minority and female workers become more explicable. History suggests that more subtle and expensive alternatives like bureaucratic control (whatever its absolute merits) will not be adopted by employers without worker struggle, and local cultural resistance alone seems no match for the coercion that simple control

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of workers paid less than the minimum wage. *Id*; S. LEVITAN & I. SHAPIRO, *supra* note 251, at 54-55.

253. *See generally* 1B A. Larson, *supra* note 17, §§ 42.20-.24 (1982 & Supp. 1983). *See also* Troost, *Workers' Compensation and Gradual Stress in the Workplace*, 133 U. PA. L. REV. 847 (1985) (student author) (claims not supported by physical manifestations of stress problematic for courts).

254. Federally supported categorical relief is provided through the Aid to Families with Dependent Children program (AFDC). 42 U.S.C. § 601 et seq. "AFDC payments leave most families in poverty." S. LEVITAN & I. SHAPIRO, *supra* note 251, at 100. AFDC and in-kind benefits provide only meager assistance to the working poor. *Id.* at 100-06. State general assistance or home relief laws may also provide some monetary assistance to those temporarily unemployed who are willing to work. *See, e.g.*, CAL. WELF. & INST. CODE § 18504 (West 1980); N.Y. SOC. SERV. LAW § 131 (McKinney 1983 & Supp. 1988); PA. STAT. ANN. tit. 62, § 432(3) (Purdon Supp. 1988).

255. *See* notes 251-254 *supra*.

256. *See* notes 237-240 *supra* and accompanying text.

257. U.S. COMMISSION ON CIVIL RIGHTS, UNEMPLOYMENT AND UNDEREMPLOYMENT AMONG BLACKS, HISPANICS, AND WOMEN 7 (1982).

258. *Id.* at 8, 61.

259. *Id.* at 8-9.

and secondary sector practices embody. As the cultural norms and practices of those who fill such jobs sustain structural abuse by generating "consensual" accommodation and acquiescence, they also create and expand the opportunities for ameliorating and reducing its harshness. This interaction between the structures of authoritative abuse and the human agents of cultural resistance is a key to escalating the attack on simple control at the secondary level.[260]

C. *The Dialectic of Authoritative Abuse and Cultural Resistance*

The consignment of minority and female workers to low-paying, insecure positions at the bottom of the labor market has been explained by reference to both cultural and material factors. Minority and female workers are said to be handicapped by a lack of market information, lower educational levels and job skills, partial commitment to the labor force, and poor work attitudes.[261] This theory, which attributes primacy to cultural factors, emphasizes the group origins of these traits and asserts that job segregation and secondary market working conditions are the response of a competitive market to the workers' poor "human capital,"[262] and to the competition that results from an overabundance of unskilled labor. The materialist or structural explanation, by contrast, argues that the characteristics ascribed to minority and female workers reflect a rational response to the discrimination and limited employment opportunities the groups face.[263] It finds fault with the demand side, not the supply side, of the labor market. The competing theories quite naturally support different policy initiatives. The cultural primacists would alter the workers with job training and education,[264] while the structuralists would create high-paying stable public service employment and redesign jobs to increase the number of "good jobs" as corrective measures.[265]

These explanations apply equally well to the interaction between supervisors and employees in workplaces characterized by secondary market operations. The resort to authoritative abuse can be justified by the need to control "bad workers" or "bad jobs" might be said to provoke worker oppositional behavior. As the discussion of work and group culture in the preceding section suggests, however, there is a more complex dialectical relationship between structure and culture.[266]

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260. *See* Willis, *Cultural Production and Theories of Reproduction*, in RACE, CLASS AND EDUCATION 108, 134 (L. Barton & S. Walker eds. 1983).

261. *See* Blau & Jusenious, *Economists' Approaches to Sex Segregation in the Labor Market: An Appraisal*, in WOMEN AND THE WORKPLACE 181, 185-88 (M. Blaxall & B. Reagan eds. 1976).

262. *See* Wachter, *Primary and Secondary Labor Markets: A Critique of the Dual Approach*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 637, 650-65 (A. Okun & G. Perry eds. 1974).

263. *See* D. GORDON, THEORIES OF POVERTY AND UNDEREMPLOYMENT 47-49 (1972).

264. *See* Wachter, *supra* note 262, at 675-77.

265. *See* D. GORDON, *supra* note 263, at 94.

266. Other theories positing a dialectical relationship between culture and employment structures are, of course, conceivable. For example, in his book *The Truly Disadvantaged*, Wil-

abuse and resistance. The "bad workers" are the victims of a "bad rap." "Bad jobs" do not simply produce "bad workers"; they require "bad workers." Employers can count on "bad workers" to produce and reproduce themselves via work and group culture. Furthermore, their seemingly "deviant" behavior facilitates their accommodation to "bad jobs" and is thereby functionally useful from the bosses' perspective. Although the jobs are "bad," they are often good enough (considering the constraints limiting the workers' options) for the workers to try to alter them through local cultural resistance. Rather than being mere cogs in a structuralist/functionalist machine, "bad workers" are engaged in a constant struggle with their employers to make "bad jobs" better.

While each view has some merit, both the cultural primacy and the structural explanations err as applied to supervision in positing a simplistic, one-dimensional relationship between culture and structure. Neither considers the role of cultural politics in shaping working conditions. The cultural primacy explanation makes a point in suggesting that positions in the employment hierarchy and the nature of work place control are contingent in some way upon individual or group behavior. Skill levels and work ethics, however, are not the only controllable factors dictating the status accorded a job, although it would serve employers' interests if the workers thought that were so. Even if, as the structuralist claim asserts, constraints beyond the control of the segregated groups largely account for their disproportionate confinement to the secondary sector, there might still be some room for critical cultural maneuvering and political initiatives. While the structuralist theory seems somewhat more sympathetic to the plight of the marginally employed, it, like the theory of cultural primacy, presupposes that any changes in their working conditions must proceed upon terms identified with the conventional wisdom (which is to say employer interests). Both fail to recognize that groups that have been excluded from full participation in the benefits of the economy are affirmatively attacking, through critical oppositional behavior, the dominant mores and struc-

liam Julius Wilson argues that "[g]hetto-specific culture is a response to . . . structural constraints and limited opportunities." W. WILSON, *supra* note 11, at 136. Reform efforts should thus be directed at changing the social and economic situation of the underclass and not its cultural traits. *Id.* at 138. At the same time, Wilson attributes underclass culture to "social isolation" which he defines as a "lack of contact or of sustained interaction with individuals and institutions that represent mainstream society." *Id.* at 60. This isolation is the product of the departure of middle class residents who once resided in segregated neighborhoods. They were not simply good role models; their greater economic and educational resources provided institutional stability to segregated communities. *Id.* at 137-38, 144. Wilson's analysis loses its dialectical quality when he argues that "changes in [the] social and economic situations [of the underclass] will bring about changes in behavior and norms." *Id.* at 138. His approach also differs from that employed in this article in that he ignores the positive critical aspects of underclass culture and does not view the underclass as the active agent of its own liberation.

tural constraints that assign their jobs to the lowest rank in terms of pay, prestige, and supervision.

"Class struggle [is] more than a dispute over wages and hours; it [is] cultural warfare at the highest level."[267] Through ideology, culture, and politics that originate and thrive locally workers critique and resist secondary market working conditions including supervisory coercion. Secondary market workers cannot be expected to forsake their consciousness of employer exploitation and coercion and be won over to the prevailing wisdom. Their mass mobilization depends first, upon the rejection of the argument that simple control and workplace abuse are mandated by objective economic concerns, and second, upon the proclamation that simple control and workplace abuse are the product of an ideology, culture, and politics to which the workers will no longer consent.

To be viable, culturally grounded grassroots activity attacking oppressive working conditions at the secondary market level must have a "counter-coercive" component. Class struggle is also a power struggle. Although the point is a crucial one, its exploration is beyond the scope of this article. If there were a shortage of workers to fill unskilled or low-skilled jobs, and if finding another job were a real rather than just a [theoretical] economic possibility,[268] those who are most victimized by the abusive supervision associated with simple control would have more economic chips to parlay for systemic change. In this respect the proliferation of entry-level service jobs and the projected decline in the number of youthful jobseekers is somewhat encouraging.[269] There is already a growing concern about workers who have dropped out of the labor force entirely.[270] The power dynamic between employees and employers should also be affected by the fact that, with the decline of the better-paying manufacturing sector, new job growth for white men has been concentrated at the low-wage end of the labor spectrum.[271]

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267. H. GUTMAN, *supra* note 104, at 36 (from introduction by I. Berlin). *See also* H. GUTMAN, WORK CULTURE & SOCIETY IN INDUSTRIALIZING AMERICA 67-76 (1976).

268. W. WILSON, *supra* note 11, at 100-04.

269. Kutscher, *Overview and Implications of the Projections to 2000*, MONTHLY LAB. REV., Sept. 1987, at 3, 6, 8-9; Silvestri & Lukasiewicz, *A Look at Employment Trends to the Year 2000*, MONTHLY LAB. REV., Sept. 1987, at 46, 59. To take maximum advantage of their growing numbers and labor force participation, black and Latino workers will need academic coursework beyond the high school level. Kutscher, *supra*, at 8; Silvestri & Lukasiewicz, *supra*, at 62-63.

270. See Lueck, *New York's Job Market: Why So Many Are Sitting Out*, N.Y. Times, Aug. 14, 1988, at F24, col. 1.

271. B. BLUESTONE & B. HARRISON, THE GREAT AMERICAN JOB MACHINE: THE PROLIFERATION OF LOW WAGE EMPLOYMENT IN THE U.S. ECONOMY 6, 21-22 (1986) (also in *National Goals: Employment and Poverty, Hearings before the Senate Committee on Labor and Human Resources*, 100th Cong., 1st Sess. at 123, 129, 144-45 (1987)). There is an assumption implicit in Bluestone and Harrison's study that a social problem will appear more significant, and the necessity for reform more pressing, if the problem affects whites as well as blacks, men as well as women, and the middle class as well as the working class and the poor. They are not alone is this regard. *See also* S. LEVITAN & I. SHAPIRO, *supra* note 251, at 4, 17-19, 50; W. WILSON, *supra* note 11, at 163. The assumption is racist, sexist, and class biased. *See also* D. BELL, *supra* note 14, at

Conditions beyond the confines of the workplace may even have relevance. It is possible that workers' calls for government intervention aimed at achieving both job and skills upgrading will receive a boost if the violence and destruction of the underground criminal economy which has absorbed some of the urban unemployed and the underemployed[272] cannot be curbed without massive militarist repression.

Secondary market workers may also benefit from the assistance of more powerful actors who can supply the resources to support a sustained organizing effort and push for conciliatory reforms. And if the plight of those in the secondary sector and the resistance they can mount does not alone propel the issue of supervisory coercion into the spotlight of public affairs, the primary sector workers who also suffer from the abuses of simple control may be of aid to secondary market workers in their efforts to obtain attention. Some view the mistreatment of primary sector workers by employers and supervisors with considerable sympathy.

D. *Abuse and the Primary Sector Jobs*

The excesses of simple control are not confined to secondary market jobs. Coercive supervision has produced disquiet among employees in what the segmentalists considered the primary sectors of the labor force. Although it cannot be quantified or concretized in structural terms, the tort cases and commentary provide some evidence of this unrest among employees at the apex of the labor pyramid.

It is difficult to assess the level of abuse or concern experienced by those the segmentalists assigned to the subordinate primary sector. Subordinate primary employees hold unionized production or production-type jobs in manufacturing, transportation, retailing and wholesaling, and utilities.[273] Union contracts typically provide grievance mechanisms that purport to protect workers from unfair discipline and other supervisory mistreatment. Furthermore, workers may invoke the provisions of the federal labor laws if their employer's actions constitute a breach of the collective bargaining agreement,[274] or an unfair labor practice,[275] or if their union's representation in the grievance process is inadequate.[276] The outrage cases provide no barometer of the success of unionization in eliminating simple control and its abuses because there are so few decisions on the merits involving organized workplaces.[277] Federal law largely preempts the application of the tort

160-177. As an assessment of the political reality, however, it cannot be dismissed. *See* notes 291-317 *infra* and accompanying text.

272. *See, e.g.*, Anderson, *Youth Employment*, *supra* note 3, at 81-85; Daly, *supra* note 11, at B1, col. 3.

273. R. EDWARDS, *supra* note 213, at 171.

274. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1982).

275. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1982).

276. Labor Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 168(b)(1)(A) (1982).

277. *See, e.g.*, Blong v. Snyder, 361 N.W.2d 312 (Iowa App. 1984) (machine operator

of intentional infliction of emotional distress to claims arising out of conduct governed by its labor/management regulatory scheme.[278] There is some possibility that unions might nonetheless prove useful allies to insurgent secondary sector workers because of a desire to increase their membership rolls.

Given the enormous stratification of the white-collar labor force, the segmentalists' conception of the independent primary category which ranged from personal secretaries to professionals,[279] has little descriptive utility at this point. It seems reasonable to assume that the contemporary equivalent of the apex of the labor force would include fairly high-level managers, supervisors, and professionals. Their positions are attributable to their academic credentials,[280] and they also "foster occupational consciousness; that is, they provide the basis for job-holders to define their own identities in terms of their particular occupation."[281].

Uncontrolled supervisory coercion and threatened job security has become a source of increased conflict and tension for workers in this redefined primary independent category. Although bureaucratic control is more generally prevalent in the white-collar work environments,[282] some white-collar workers are subject to overt simple control.[283] Others are subject to simple control but do not know it until they are disciplined or discharged. At that point the employees discover that the handbooks and personnel manuals that provided the trappings of bureaucratic control do not establish rights that the employer will recognize or that the courts will enforce.[284]

The combativeness of white-collar workers with regard to their tenure and supervision is strikingly evident in the numerous cases and the barrage of commentary challenging the rules permitting the summary dismissal of at-will employees.[285] In addition, there are a fair number of outrage appeals involving high-level professional and management employees.[286]

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harassed after manipulating time cards upon supervisor's instructions); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977) (assembly line worker harassed because he stuttered).

278. *See, e.g.*, Truex v. Garrett Freightlines, 784 F.2d 1347 (9th Cir. 1985); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984); Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir. 1982).

279. R. EDWARDS, *supra* note 213, at 174.

280. *Id.*

281. *Id.* at 177.

282. *Id.* at 181-82.

283. *Id.* at 178-79.

284. *See, e.g.*, McCluskey v. Unicare Health Facility, 484 So. 2d 398 (Ala. 1986).

285. *See, e.g.*, Blades, *supra* note 31; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (student author); *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1940-41 (1983) (student author).

286. *See, e.g.*, Kirwin v. New York State Office of Mental Health, 665 F. Supp. 1094 (E.D.N.Y. 1987) (psychologist); Reed v. Signode Corp., 652 F. Supp. 129 (D. Conn. 1986)

Abuse at the primary independent level can take somewhat different forms than it does at the secondary market level. Employees who are accustomed to having autonomy over their work and authority over others might well suffer emotionally from a loss of independence and supervisory responsibilities.[287] Moreover, a lack of feedback on their performance or evaluations not based on the prevailing occupational norms might also be distressing.[288]

In other respects, the abuse dispensed in the upper stratum of the labor force does not differ from that heaped out below. For example, there is a similarity between the complaints black managers are voicing about subtle, evasive, exclusionary treatment and the complaints expressed by black secondary market workers. Compare the following statement of black managers' concerns with the quotation taken from Elijah Anderson's study of marginally employed black youth:[289]

> To get ahead, a person depends on informal networks of cooperative relationships. Friendships, help from colleagues, customers, and superiors, and developmental assignments are the keys to success. Outsiders, or people treated as outsiders (no matter how talented or well trained), rarely do as well. Black managers feel they are treated as outsiders, and because of the distance that race produces they don't receive the benefit of these networks and relationships. Few win bosses as mentors. Moreover, they rarely get the vote of confidence from superiors that helps them to move up step-by-step and allows them to learn the business . . . .[290]

The racial and sexual nexus may provide a point of linkage between secondary and primary sector workers. Although minority and female workers at all levels of the work force seem to suffer similar indignities, the abuse incurred by highly credentialed, virtually assimilated managers and professionals is more problematic in terms of the American ideal of equal opportunity. High-level employees may find lawsuits and lobbying for legislative safeguards attractive alternatives to cultural resistance and massive disruption. If their own self-interest could be tied to that of the minority and female workers who labor in the secondary sector, it may be possible to utilize the resources of the former to

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(general manager and division vice president); Wells v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1983) (director of hospital personnel); Rinehimer v. Luzerne County Community College, 372 Pa. Super. 480, 539 A.2d 1298 (1988) (community college president).

287. For a situation in which such suffering occurred, see Duerksen v. Transamerica Title Ins. Co., 189 Cal. App. 3d 647, 234 Cal. Rptr. 521 (1987) (tort claim dismissed).

288. Plaintiff alleged such distress in Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978) (tort claim dismissed).

289. *See* text accompanying note 126 *supra*.

290. Jones, *Black Managers: The Dream Deferred*, HARV. BUS. REV., May-June 1986, at 84, 89; *see also* G. DAVIS & G. WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM 5-6 (1985); Williams, *For the Black Professional, the Obstacles Remain*, N.Y. Times, July 14, 1987, at A16, col. 1; Campbell, *Black Executives and Corporate Stress*, N.Y. Times, Dec. 12, 1982, § 6 (Magazine), at 37. *See generally* Buckner, *Help Wanted: An Expansive Definition of Constructive Discharge Under Title VII*, 136 U. PA. L. REV. 941 (1988) (student author).

foster an expanded program of grass roots activism by the latter against the abuses of simple control.

E. *Conclusions*

The coercion that is a feature of simple control and secondary sector working conditions cannot but impact greatly on the minority and female workers who are subjected to it. They are highly dependent upon their wage income and their job mobility is limited. Lacking the protection of union contracts, bureaucratic rules, and legislative safeguards, these workers rely on an arsenal of informal cultural modes and practices in their struggle both to tolerate and to ameliorate the harshness of work life in the secondary sector. At this point, the front line of the battle against abuse is virtually hidden in the kitchens and stockrooms, and at the word processors and sewing machines. Only upheaval on a larger scale is likely to produce structural change. To enlist the resources and clout of primary sector allies and to generate substantial economic dislocation necessitating employer concessions, the workers will need a manifesto of their own, one that defends their cultural practices, asserts the legitimacy of their perspective, and proclaims their entitlement to nonabusive forms of supervisory oversight. The next section attempts to translate the cultural critique of minority and female secondary sector workers into a more formal legal denunciation of simple control.

IV. From Outrage to a Remedy for "Worker Harassment"

A. *Tort Law and Political Struggle to Combat Worker Harassment*

If there is to be a reduction in the abuse employed by those in authority in the workplace, it will most likely occur in conjunction with worker struggle that creates or exploits a political and ideological crisis and generates the necessity for compromise favorable to the workers' interest.[291] Informal local resistance alone is unlikely to be of more than marginal utility in the effort to curb and control practices that are embedded in the organization of economic entities and in the structures of the labor market. Change requires collective protest that exploits or creates material openings, disrupts the normal operation of important institutions, and attracts widespread attention. The object must be to build upon informal resistance, to universalize the conflict of the workplace, and to shift the focus of the dispute from the narrowly economic to the broadly cultural and political.

Given the source and magnitude of the problem, it should be clear that litigation is not *the* answer to authoritative abuse in the workplace. Since it is virtually impossible to determine how much of a role the law

291. Przeworski, *supra* note 19, at 55; C. Boggs, *supra* note 19, at 40-41, 57.

plays in maintaining and legitimating the coercive status quo,[292] it seems doubtful that merely modifying the law will have a significant effect on working conditions. Legal change is more a response to, than a product of, political ferment. Moreover, translating the demands of a movement into legalese tends to reduce their potency, while placing hope on the promise of reform through doctrinal manipulations of the common law does little but co-opt movement fervor. Premature "legalizing" of the conflict would interrupt the creative development of grassroots resistance and discourage the involvement of ordinary people (as opposed to legal elites) whose interest and commitment are required if lasting advances are to be achieved. Finally, causes of action are not the ideal structural response to unrestrained supervisory discretion; what is needed are mechanisms operating directly in the workplace and controlled by the workers themselves. Litigation is not a realistic channel of relief for workers who are still on the job. Additionally, the marginally employed are unlikely to wind up as plaintiffs in tort suits with sufficient frequency to make the threat of litigation an effective check on employer mistreatment.

Despite these limitations, common law claims of entitlement might be useful in enhancing local worker resistance and fostering broader movement activity.[293] Legal rhetoric which incorporates the lessons to be gleaned from the informal culture of workers could provide coherent rallying points around which the workers' struggle might be more broadly organized. Judicial assertions of the legitimacy of the workers' cause would supplement the positive assessment group mores and values already provide.[294] Even if invoked in a losing effort, legal claims, communicated in ways that are accessible to a lay audience, might be useful in spreading the word of resistance among otherwise isolated communities. Victories, however limited, should fuel optimism and generate greater local participation.[295] Touting the legal merits of informal worker challenges to authoritative abuse might even impel some elites to support the workers' cause.

Make no mistake about the claims being made here regarding tort law's utility. Tort law will not be the catalyst for worker organizing, nor will it prompt the restructuring of secondary market working conditions. Furthermore, a wholesale incorporation of the workers' perspective on abusive supervision into the law is not likely to occur anytime soon. The maxims of justice and fairness that the law selectively and

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292. *See* note 18 *supra*.

293. *See* Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 560 (1984); Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 242 (1982).

294. F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 12-14 (1979).

295. D. MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970, at 105-16 (1982).

narrowly disseminates do, however, affect the messages disseminated by other institutions. If the workers' counter-manifesto can be formulated with sufficient coherence in the legal context, similar expressions in other areas of conflict should follow. At the same time, it must be recognized that legal controversy is symptomatic of broader political and ideological struggle. Furthermore, any gains reaped in legal battles will not be sustained unless the successes achieved on the expansive political and ideological front are translated into enduring economic gains. There is accordingly no real contradiction in hoping for favorable case rulings and at the same time expecting little to come of them.

In this vein, then, litigation employing a variation of the tort of intentional infliction of emotional distress might be an adjunct of a movement led primarily by workers from the secondary sector. This would be particularly true if, rather than being a narrow cause of action curbing only extraordinary supervisory misconduct, it were an expansive one attacking the whole panoply of abuses that might be characterized as "worker" or "workplace harassment."[296]

B. *Building a Counter-Conventional Wisdom From the Workers' Critique*

Whether the goal is to give new content and meaning to the tort of outrage or to mobilize political activity, there must be a policy statement, a declaration of injustice, an inspirational counter-ideology, or a righteous, gripping, pro-worker response to the prevailing wisdom regarding authoritative abuse. It is possible to extract from the informal culture of workers an ideal of an entitlement to a harassment-free workplace that is sufficiently coherent and integrated to serve as a basis for judicial relief and as an agenda for broader activism.

The quest for freedom from abuse on the job is driven by the material conditions of those workers who are subject to coercive simple control. Whereas the courts in outrage cases consider workplace abuse an isolated, exceptional, situational phenomenon, the structural analysis of simple control and conditions in the secondary market attest that it is sufficiently concrete, widespread, systemic, destructive, and avoidable to warrant political and judicial reform. It facilitates the exploitation of politically and economically unorganized workers by accentuating their

296. The technical changes that would be required are much like those that confronted the courts when they rejected customary practice as the standard of due care in negligence actions, see The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932), and when they rejected the rule of *caveat emptor* which also emphasized the necessity of self-reliance in contracting. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). It is difficult to be more specific about the formalistic contours of the tort of worker harassment. In some quarters, a failure to propose a specific rule or right to cure a problem having a legal dimension is considered a failure to treat the law seriously. A doctrinal rubric that carries technical legal freight is not likely to have much impact on the aspirations and activism of ordinary folk. If the liberation strategy outlined above has merit, then the law is only useful to the extent that it captures, in a phrase or a concept, some aspect of the ordinary critical perspective of workers.

wage dependency and belittling the worth of their work so as to undermine their ability to demand better terms and conditions of employment. Moreover, it is a device of oppression that reproduces economic inequality by compounding racial, ethnic, and sexual prejudice. Finally, because it is so deeply embedded in the structures of the economy and ingrained in elitist ideology and law, only individual accountability on the part of employers and supervisors will assure that it is rooted out of the offices and shop floors.

The workers do not have and do not seem to need the benefit of a structural or systemic analysis to understand the material impact of the abuse they endure on the job. Their experiences generate an abiding, collective negative assessment of supervisory mistreatment. Their culture teaches them to challenge the legitimacy and the propriety of abusive authority, and allows them to indignantly proclaim that an employer or supervisor has "gone too far," "crossed the line," or "asked more of a worker than the salary she or he is paid can excuse." The test of inappropriate supervision is very inexact (although no more inexact than the outrageousness standard of Section 46), but there seems little doubt that slurs, insults, threats, ridicule, humiliation, exaggerated disparagement, orders compelling subservient behavior for its own sake, and insensitivity to the personal and social needs of workers receive severe condemnation.

The workers understand the necessity for alternative standards of competency, obedience, and loyalty. In the worker's view, conduct in conformity with the employer's demands is often unreasonable given their economic circumstances and their desire to transcend the material and ideological constraints that ensure their subordination. Employers are aware of this. When workers' "antiauthoritarian" attitudes and "deviant" actions reflect such rationality, they should not be the basis for discipline and harassment justified solely by some abstract notion of employer prerogatives. Yet workers are penalized for objecting to orders, for socializing on the job, and for otherwise subverting the dictates of workplace authority when they could not possibly do their jobs and maintain their self-respect if they did otherwise. Furthermore, employers and supervisors can out maneuver workers by invoking the conventional wisdom selectively, or by capitalizing on the "consent" that work and group cultures generate.

The quest for freedom from workplace harassment demands constant reference to the workers' critique. The critique must be brought to bear not only on the structural and ideological mechanisms that sanction abusive supervision, but also on the cultural devices by which workers adjust themselves to it. Magnifying the significance of the critique should serve as a reminder to workers that the accommodationist tendencies of group and work culture should be jettisoned whenever possible. The object of the enterprise to secure workplace freedom from harassment is not simply to replace the formal with the informal,

but to preserve and increase the transformative potential of the informal as a dynamic force on the local level. The political potential of the informal cultural modes of resistance depends not only upon their opposition to, but also upon their consciousness of the ways material conditions and the subtle operation of the prevailing wisdom can turn opposition into acquiescence.[297]

In order to protect minority and female workers fully, abuse that is justified by a worker's status, class, or color of collar must be considered on a par with harassment that is overtly racist and sexist. Workers victimized by supervisory conduct that explicitly manifests a racial, ethnic, national origin, or sexual animus have successfully invoked the tort of outrage,[298] but the courts have been reluctant to extend similar protection in cases of treatment of a more subtle sort, such as the close supervision and reprimands workers attribute to racism and sexism.[299] If the ascriptive categories were discrete, or if job segregation did not make comparisons impossible, or if the same sort of abusive conduct were not considered an acceptable feature of the working conditions of secondary market workers whatever their skin color or sex, then insisting that objectionable supervisory conduct be categorized as either the product of white supremacy or male patriarchy might be a fruitful exercise. The reality of the subordination of minority and female workers is otherwise, and the workers' critique reflects this reality. Moreover, the absence of a multidimensional anti-harassment challenge furthers employers' ability to avoid judicial regulations.

While linking racial and sexual harassment to "class harassment" would render covertly racist or sexist abuse more vulnerable, it may also have pragmatic political benefits. The availability of causes of action against racial and sexual harassment, a legacy of the civil rights movement, has generated expectations that other kinds of arbitrary and capricious employer behavior can be curbed. Protection against worker harassment should appeal to those who feel that their oppression has been ignored because of the attention focused on the claims of minorities and women. At the same time, however, minority and female workers should be wary of losing sight of their distinct economic, political, and cultural existences. While the resort to class represents a recognition of the commonality of poor working conditions across color and gender lines, it is also a deliberate maneuver necessitated by the limita-

297. *See* S. ARONOWITZ & H. GIROUX, *supra* note 16, at 105-06. *Cf.* H. GUTMAN, *Labor History and the "Sarte Question," supra* note 104, at 326, 341 (interviewer M. Merrill draws a distinction between "culture in the sense of tradition" which is static and "culture in the sense of consciousness" which is dynamic).

298. *See* notes 46-49 *supra* and accompanying text. The tort of outrage might be strengthened if there were an express acknowledgment of the borrowing of statutory standards. Reliance on statutory standards is a well-recognized practice in tort law. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 286-288(C) (1965) (governing the use of legislative provisions in determining negligence).

299. *See* note 52 *supra* and accompanying text.

tions that a strict racist/sexist categorization places on their ability to denounce the conduct of employers and supervisors (which, as far as the workers are concerned, remains racist and sexist at its core).

If the full implications of the workers' critique are considered, it appears that the idea of freedom from worker harassment contradicts the notion, touted by employers and accepted by courts, that the supervisory treatment accorded workers can vary with their sex, race, ethnicity, and class. For all of their masculine posturing, male employees no more deserve to be cursed than do female employees.[300] Blue-collar factory workers should not be required to tolerate harassing practical jokes from supervisors any more than white-collar office workers.[301] It is inappropriate to treat female employees as if they were "girls" even when they refer to themselves by such a term.[302] Moreover, it is wrong for employers and supervisors to scrutinize the conduct of young black employees for signs of thievery[303] or to hold their brash demeanors against them.[304]

Abusive behavior that is based on supervisors' supposed understanding of group modes and mores is improper, and not merely because the underlying assumptions may be erroneous.[305] It is also unacceptable because it penalizes workers for their cultural accommodations to hostile work and living conditions. Unless they receive something in exchange, workers should not be required to relinquish either their ability to adapt to work in a creative and critical way or the stamina they derive when they have succeeded. They should certainly not be disciplined for adaptive behavior that is dictated by the dynamics of the work setting. Sanctions attributable to the disparagement of their workplace norms and practices should be as subject to scrutiny as discrimination based solely on the supposed inferiority of the cultures of America's racial and ethnic minorities. Employers, not employees, must bear the onus for changing patterns of behavior in the workplace by altering the material factors that are characteristic of secondary market working conditions.[306] For example, if employers want employees to be more responsive to authority, employers must use incentives and not discriminatory punitive measures.

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300. *Compare* B. WILLIAMS, BLACK WORKERS IN AN INDUSTRIAL SUBURB 163, 172 (1987) (black factory workers assert masculinity by objecting to abusive language) *with* text accompanying notes 61-65 *supra*.

301. *See* text accompanying notes 61-65 *supra*; *see also* C. BRODSKY, *supra* note 1, at 10.

302. *Compare* S. WESTWOOD, *supra* note 105, at 24-25 (term used by female operatives to emphasize their solidarity) *with* E. CASSEDY & K. NUSSBAUM, *supra* note 120, at 26 (use of term by employers means that employees are not being taken seriously). *See also* J. ROLLINS, *supra* note 167, at 159-61.

303. *See* Anderson, *Youth Employment*, *supra* note 3, at 74; Altheide, Adler, Adler & Altheide, *supra* note 156, at 118.

304. *See* Anderson, *Employment Programs*, *supra* note 3, at 353-55.

305. *See* Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980).

306. *See* Anderson, *Employment Programs*, *supra* note 3, at 355.

The right to freedom from workplace harassment is concerned with preserving the peace of mind and emotional tranquility of workers by shoring up their economic security and reinforcing the power of their work and cultural alliances. The workers do not and cannot assess the propriety of supervision based on the amount of individual psychological harm it causes, as tort law does. The severe harm requirement of Section 46 insulates outrageous supervisory conduct from attack and penalizes those workers who, because of their own personal or social resources, have the strength to withstand abuse. Thus, the very collective cultural mechanisms on which secondary market workers rely in protecting themselves from supervisory mistreatment become the justification for the perpetuation of authoritative abuse. Furthermore, work and group culture teaches workers that they ought not internalize employers' standards of competency and become too dependent upon the approval of the boss. The emotional harm that results from ignoring these lessons should not be encouraged. Finally, condemning an employer's or supervisor's abusive behavior because of the emotional distress it causes carries with it the implication that severe distress was a reasonable reaction to the supervisor's or employer's conduct. The attack upon workplace harassment must proclaim the propriety of the more aggressive responses work and group culture generate. The emphasis must be on the conduct of the employer, not on the suffering and misery of the aggrieved workers. If their mental states are pertinent at all, anger, antipathy, and sullen contempt should suffice.[307]

The quest for freedom from workplace harassment must look beyond individual harm and address the collective injury that a work group in general may suffer as a result of supervisory abuse. As several of the outrage cases illustrate, a single strategy of tyranny and oppression may produce supervisory oversight that varies from worker to worker and produces different reactions.[308] The courts' extreme insistence on particularity ignores the fact that abusive supervision need not target a single employee but may affect the work group in general. For example, a group of flight attendants was harassed by passengers after their employer adopted the advertising slogan, "We really move our tails for you."[309] Yet they had no cause of action against their employer because none of them was the slogan's specific target. Work groups suffer collectively; they need to act collectively to counter employer exploitation; and they should be permitted to seek redress collectively.

The demand that work group and minority group attitudes and

307. *See, e.g.* Richardson, *supra* note 46, at 269, 275.

308. *See* notes 53-60 and 94-97 *supra* and accompanying texts.

309. Doyle v. Continental Airlines, No. 75-C2407 (N.D. Ill. Oct. 29, 1979) (discussed in Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 530 (D.D.C. 1981) and Shaffer v. National Can Corp., 565 F. Supp. 909, 915 (E.D. Pa. 1983)). It is impossible to obtain a copy of the opinion because the files of the case have been suppressed.

practices be considered in assessing the impropriety of supervision is not based on a simplistic assertion of cultural superiority. Young minority workers who are now angry and defiant may drop their emotional defensiveness when material conditions so warrant. Social activities recognizing the milestones of personal and family life (such as engagements, weddings, and birthdays)[310] may not be the only occasions on which women workers choose to socialize if they are free to do so. If the courts were to acknowledge the significance of work and group culture, those moments of autonomy and the small economic gains secondary market workers have been able to realize through informal action would be closer to being permanently theirs. Securing the existing tangible benefits of cultural resistance would not, of course, mean that the workers' struggle was over. Rather, it should lead to an expansion of the agenda for freedom in the workplace and prompt the development of innovations in the informal devices, including the modes of resistance, by which their struggle will escalate.

C. *Acknowledging the Interests of Other Allies and Dissidents*

Some aspects of the workers' critique of simple control should appeal to primary sector employees. In general primary sector workers complain about threats to their job security and unfairness in personnel decisions. These are also among the problems that low-status workers confront. Whistleblowers and those who have been summarily fired without just cause from primary independent positions are certainly entitled to a measure of protection.

The common ground low-status workers share with high-level white-collar employees is limited, however. The claims of supervisors and managers who have been stripped of authority over others or the perquisites of superior status are not particularly deserving of the sympathy of secondary market workers.

Moreover, focusing on the claims of those occupying jobs at the top of the occupational hierarchy would disserve the interests of secondary market workers by perpetuating the notion that job status and the quality of working conditions are inextricably connected. For example, many workers consider the bureaucratic model of supervision an appealing alternative to the harshness of simple control.[311] (Of course, bureaucratic devices seem preferable to the coercion of simple control only because they consolidate employer power behind a veneer of consent.[312] This hardly recommends them.) There is a tendency to associate the entitlement to bureaucratic safeguards with the skill levels and professional expertise characteristic of primary sector jobs. Thus, one organization devoted to upgrading the status and pay of domestic

310. *See* note 182 *supra* and accompanying text.
311. *See*, R. GOLDBERG, *supra* note 116, at 85-87.
312. *See* text accompanying notes 229-233 *supra*.

workers advocated the creation of job performance standards and training programs directed at specialization.[313] The idea that job security, reduced wage dependency, and articulated productivity requirements cannot be demanded for work that is widely thought to be unskilled must be debunked. The workers' critique of the division of labor must be highlighted with the aim of severing the connection between the conditions of employment and the nature of the tasks performed.[314]

It must also be recognized that individual workers can be victimized by their work groups with the aid and support of their supervisors.[315] Some employees will reject the accommodations of work and group culture and subscribe instead to the conventional wisdom regarding appropriate conduct by a subordinate.[316] Such nonconformity with group norms may be particularly objectionable to the work group if it threatens a form of resistance in which they are collectively engaged.[317] On the other hand, nonconformity might also represent a challenge to worker complacency and a greater threat to authority. An ideological stance in favor of the dissident would mean that the group should tolerate values that jeopardize its solidarity. The converse position would justify the suppression of minority perspectives. Neither choice is particularly attractive. The expressed goal of the movement with regard to intragroup conflict should be to enlarge the opportunity and responsibility of workers for creating their own participatory freedom in the workplace.

The idea of an entitlement to freedom from worker harassment as it is proposed here is only intended to be an organizing tool. It can do little more than lend coherence to the vision of antiauthoritarianism that is exemplified by the informal work and group culture of unorganized, low-skilled, low-paid minority and female workers. The acuity, originality, and dynamism of their workplace critiques cannot possibly be captured by a single static statement. Furthermore, any gains that overt political activity or tort litigation may produce must be maintained through continued resistance in the workplace. There must be

313. *See* Palmer, *Housework and Domestic Labor: Racial and Technological Change*, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME, *supra* note 127, at 80, 86. Other secondary market workers have invoked the term "profession" in describing the importance of their work and the amount of skill it requires. *See* L. ELDER & L. ROLENS, WAITRESS: AMERICA'S UNSUNG HEROINE 61, 64 (1985).

314. Furthermore, given the continuing efforts of employers to reduce the level of autonomy and expertise required for a broad range of jobs, it seems obvious that workers should not couch their demands for decent treatment in terms of their contributions to the profitability of the enterprise, a notion also associated with status distinctions. *See generally* R. HOWARD, BRAVE NEW WORKPLACE (1985). The effort to organize domestic workers was undercut by the influx of immigrant labor and the commercialization of housework and its removal from the sphere of the home. *See* Palmer, *supra* note 313, at 87-89.

315. *See* C. BRODSKY, *supra* note 1, at 147.

316. *Id.* at 36-43; *see also* B. WILLIAMS, *supra* note 300, at 162-65 (describing hostility between outspoken black workers and their older, passive Hispanic co-workers).

317. *See, e.g.*, Mundy v. Southern Bell Tel. & Tel. Co., 676 F.2d at 503 (11th Cir. 1982) (harassment follows withdrawal from expense account padding scheme).

constant local struggle that is an extension of the workers' everyday existences. The workers must take their critique as they live it and as it is (re)reflected in the counterideology that is disseminated from above, exploit the contradictions thereby created between the real and the ideal, and extend the vision of what it means to be free of abuse in the workplace through commonplace cultural activities and attitudes.

V. Epilogue

As a black person and a woman, I found it extremely difficult to accept the assumption advanced in the outrage cases that employer abuse and the emotional pain it causes workers are too subjective, ephemeral, trivial, and mundane to warrant judicial relief. Studies of the working conditions of minority and female workers who hold low-paying, low-status jobs and are subject to simple control confirmed my assessment of the inadequacy of the law's response to the supervisory mistreatment of subordinates. If the minority and female workers who experience abuse can, through informal cultural devices, make it sufficiently concrete and objective to denounce it, resist it, and cleverly subvert it, then the courts are without excuse. The analysis of simple control and secondary market working conditions adds weight to the workers' assessments. The courts' view of the inevitability of the status quo is not universally shared. The workers do not seem to be completely resigned to their fate as harassed subordinates, nor do they appear to be totally beaten down.

To the contrary, there is evidence of resistance everywhere. Two of my colleagues recently represented a group of black employees who work in another part of the university and who have been the victims of racial, sexual, and general harassment at the hands of a white male supervisor. The bureaucratic mechanisms of the university seemed incapable of providing them with much relief. Even threats of physical violence directed against one of the women did not produce an immediate response. My colleagues report that the employees resorted to informal mechanisms to make their work lives safer. They had a telephone grapevine by which they alerted each other of the movements of the supervisor, so that he would not catch them plotting against him, so that they could avoid contact with him, and so that they would know that he was gone for the evening and they had survived another day.

There is no adequate justification for society's abandonment of these workers. Their critique of their working conditions should have the benefit of a formal articulation at the highest levels of visibility and legitimacy, and the overt and covert resistance they are brave enough to mount on their own behalf should receive the support and sanction of those interested in justice in the workplace. The workers themselves have done, and will continue to do, the hard work. They have already conceptualized the problem and made it discrete. They have also sup-

plied alternatives to the traditional ways of evaluating the worth of jobs and encouraging maximum productivity. *Attention must be paid* to those whose endurance and struggle are so much the ordinary stuff of everyday life that they are too easily taken for granted.