

# The Invisible Hand

## When the Firm Becomes the Bully

K.R. Sawyer\*

*Dedicated to all those who have been bullied*

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### 1. Introduction

Most of us recognize a bully. A bully doesn't require a dictionary definition.<sup>1</sup> The bully in the home has the same attributes as the bully in the schoolyard, the bully in the workplace, the bully on the football field, and the bully in cyberspace. A bully trades in unfairness; unfairness directed at a target. The bully identifies the target, targets the target, and profits from the unfairness directed at the target. The bully can be an individual or it can be a mob. But a bully can also be a firm. When a firm becomes a bully, it adopts the same attributes and the same methods as the bully in the schoolyard; with one exception. The bullying firm bullies more invisibly than other bullies. The firm is constrained by statutes and codes that typically do not constrain the schoolyard bully. The bullying of the firm must be invisible to all except the target. The firm plays the invisible hand.

Whistleblowers, more than most employees, understand the invisible hand of the firm that bullies. In a 2001 study of US whistleblowing, Fred Alford concluded that

*“The average length of time between blowing the whistle and being fired was **about two years**. Little of this time was taken up with appeals. Rather, most time was spent waiting*

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\* Honorary Fellow, School of Historical and Philosophical Studies, University of Melbourne.  
kim.sawyer@unimelb.edu.au.

<sup>1</sup> Crawford(1999) discusses the etymology of the word bully, including its possible derivation from the Dutch word *broeder* meaning brother, and its use in various settings such as in the 18<sup>th</sup> century to mean pimp or villain, in the First World War as bully beef from the French *bouille*, and its more benign use in terms such as bully for you.

*for time to pass until management could adequately disconnect the act of whistleblowing from the act of retaliation.”*

The imperative of firms that retaliate against whistleblowers must be to disconnect the act of retaliation from the act of whistleblowing. One mechanism for disconnection is to delay the act of retaliation. Another is to make the retaliation as invisible as possible. Delaying the retaliation and disguising the retaliation are usually both used. Only the whistleblower connects the whistleblowing to the retaliation. The risk to the firm is then minimized. In this paper, I consider the invisible hand, the invisible response to the whistleblower.

Whistleblower legislation protects the whistleblower against retaliation that can be proved beyond reasonable doubt. Dismissal, demotion, and overt discrimination are penalized in most whistleblower protection statutes (see Moberly (2008)). For a retaliating firm, the obvious response to such penalization is to target the whistleblower as precisely and covertly as possible; that is, to put the whistleblower on a slow drip. Overt retaliation and covert retaliation have the same objective; to force the whistleblower out of the firm. But the invisible hand satisfies a further objective, to remain invisible from the law.

When an employee blows the whistle on a firm, they establish a standing different from that of other employees. The act of whistleblowing defines the whistleblower. As Rothschild and Miethe (1999) assert, the act of whistleblowing becomes the whistleblower's 'master status'. It is irreversible and its reputational effects are irredeemable. In blowing the whistle, the employee signals to their employer that they have a higher preference for risk. For the employer, it is not only the whistleblowing issue that matters. The risk that the whistleblower may re-offend also matters. As Sawyer, Johnson and Holub (2010) assert, the legitimacy of the whistleblower and the firm will tend to become negatively correlated. The whistleblower is now a special employee.

The negative correlation between the whistleblower and the firm will be stronger the more serious the wrongdoing, if the disclosure is external, or if there is no resolution. The negative correlation between the whistleblower and the firm means that whistleblowing becomes a contest between the credibility of the whistleblower and the credibility of the firm. Given regulatory risks, the invisible hand is the obvious strategy for the firm to adopt. With the invisible hand, the firm seeks to minimize the whistleblower and minimize the risk. Minimizing the whistleblower entails reducing their worth, both their self-worth and their worth estimated by others. The invisible hand has three advantages. First, it weakens the whistleblower. There are few individuals who can withstand relentless detraction and negativity. Secondly, by reducing the credibility of the whistleblower, the invisible hand reduces the credibility of the act of whistleblowing, thereby underwriting the reputation of the firm. And finally, it minimizes the risk of being detected by regulators.

The invisible hand is the obvious response of the retaliating firm to a whistleblower. In this paper, I consider this invisible response, and how it can be addressed. But first, in Section 2, a workplace bullying framework is developed; and in Section 3, the bullying of the firm discussed and suggestions for redress proposed.

## **2. Workplace Bullying**

Almost certainly workplace bullying has existed for centuries; certainly the slaves would attest to that. Yet it has been written about for only a few decades.<sup>2</sup> The term itself is contestable. In Anglo-Saxon countries it is called workplace bullying, in Scandinavia and Germany mobbing, and in French speaking jurisdictions harcèlement moral following the work of Hirigoyen (1998, 2001); see Lippel (2010). The study of workplace bullying has depended on some pivotal works of scholarship. Some cite the 1976 study of Carroll Brodsky, *The Harassed Worker*, as the first systematic study of workplace bullying (see Lipinski, Albright and Fenclau (2013)). Heinz Leymann wrote the first Swedish book on

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<sup>2</sup> Crawford (1999, p.87) summarizes the issue best “Consider the statement ‘everything changes but everything stays the same.’ One hypothesis for the current interest in workplace bullying is that as certain overtly aggressive behavior becomes more unacceptable in a culture, the manifestations of aggression are transformed from observable behavior to more subtle, less detectable, actions.”

the subject in 1986 followed by notable contributions in a series of papers listed in the references (Leymann and Kornbluh (1989), Leymann (1990), Leymann (1996) and Leymann and Gustaffson (1996)). And there have been other contributions by Bjorkqvist et al (1994), Randall (1997), Rayner (1997), Rayner and Hoel (1998). Whether the phenomenon is called workplace bullying, moral harassment or mobbing, there is agreement that it is a phenomenon of the modern workplace which entails the systematic mistreatment of an individual or individuals which generates a negative work environment (Lipinski et al (2013), Einarsen, Hoel, Zapf and Cooper(2011)). Lippel (2010, p.2) suggests that there is common acceptance of the following definition of workplace bullying

*“Bullying at work means harassing, offending, socially excluding someone or negatively affecting someone’s work tasks. In order for the label bullying (or mobbing) to be applied to a particular activity, interaction or process it has to occur repeatedly and regularly (e.g. weekly) and over a period of time (e.g. about six months). Bullying is an escalating process in the course of which the person confronted ends up in an inferior position and becomes the target of systematic negative social acts. A conflict cannot be called bullying if the incident is an isolated event or if two parties of approximately equal strength are in conflict.”*

This definition crystallizes most of the elements of bullying; the frequency of the bullying, the evolving bullying process and the negativity which results. But it does not reference the power imbalance between the bully and the one bullied; nor does it reference those who observe the bullying but do not intervene; the bystanders. For, as every whistleblower knows, it is the bystanders who underwrite bullying.

Einarsen, Hoel et al (2011) suggest that the interest in workplace bullying has appeared in waves. The first wave consisted of the insights of writers who based their writing on collective observations. Brodsky had interviewed over 1,000 individuals filing workers’ compensation claims, Leymann had worked as a family therapist and Adams was a journalist who colligated her observations in *Bullying at Work* (1992) and in BBC

documentaries (Einarsen, Hoel et al (2011, p.4)). The second wave was to correlate workplace bullying with other forms of conflict both within and outside the workplace; most notably the bullying of the schoolyard. Indeed, as Einarsen, Hoel et al (2011) suggest, the term mobbing was adopted from Lorenz (1968)'s book on aggression in schools.<sup>3</sup> Keashly and Jagatic (, p.33) provide a synopsis of various forms of hostile workplace behaviors, including workplace abuse, workplace incivility, ethnic harassment, and emotional abuse. Some workplaces are cauldrons for hostile interactions; and workplace bullying is one of the most hostile. It is not surprising that bullying and whistleblowing often occur together.

The third wave consisted of the cases that emerged as a result of the focus on workplace bullying (Einarsen, Hoel et al (2011, p.5)). For, once a phenomenon is identified and characterized, it is easier to classify new examples. Workplace bullying in the 1990's became such a phenomenon as to elicit reaction, over-reaction and activism, leading some union representatives to designate it as the most profound work environment problem of our time (Einarsen, Hoel et al (2011, p.6)).<sup>4</sup> While this statement is possibly over-reactive, those who have experienced bullying in the workplace understand the toxicity of the phenomenon and how difficult it is to redress. The fourth wave was to seek redress through anti-bullying policies, anti-bullying procedures and anti-bullying legislation. As Yamada (2010) described the movement for redress so eloquently

*“At times, seemingly modest indicators reveal that a social movement has reached a tipping point in terms of gaining public attention and support. In the case of the American grassroots campaign to enact legal protections against workplace bullying, two brief magazine articles published in July 2010 may have constituted such signs. On July 18, Parade magazine... ran a short piece inviting readers to vote yes or no on the question, ‘Should workplace bullying be illegal?’ ...93% of respondents voted yes... Three days later, Time magazine posted on its website an article examining the pros and cons of*

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<sup>3</sup> Rivers (2011, p.4) provides a different genesis of the term mobbing suggesting it was attributable to Heinemann (1973) and developed further by Olweus (1973) in a study of Scandinavian schools.

<sup>4</sup> As with the whistleblowing movement, the anti-bullying movement is now highly organized, comprising individuals and groups, websites, conferences, campaigns in schools, bullying awareness weeks, and continuing advocacy.

*enacting the Healthy Workplace Bill, legislation written by this author that creates cause of action for targets of severe workplace bullying... The internet site Yahoo! carried the story on its home page... within days, over 1,600 comments were posted to the two websites, many of which shared personal stories of being bullied at work and expressed support for the legislation.”*

The whistleblowing movement has had similar tipping points. In the United States, one tipping point was the conference on professional responsibility and the foundation of the *Government Accountability Project* in Washington.<sup>5</sup> Another was the introduction of the False Claims Act Amendments in 1986 by Senator Charles Grassley and Representative Howard Berman.<sup>6</sup> A third tipping point involved the Challenger disaster in 1986.<sup>7</sup> A fourth tipping point was the emergence of three significant whistleblowers in 2002, Sherron Watkins the Enron whistleblower, Coleen Rowley the FBI whistleblower, and Cynthia Cooper the WorldCom whistleblower. *Time Magazine* in its signature issue identified Watkins, Rowley and Cooper as their *Persons of the Year* and labelled 2002 the *Year of the Whistleblower*. Of course, there have been many other tipping points in the whistleblowing movement; in Australia, for example the two Senate inquiries into public interest whistleblowing in 1994 and 1995 were pivotal to the whistleblowing movement, as has been the publication *The Whistle* which has chronicled whistleblowing in Australia.<sup>8</sup> Tipping points measure the evolution of a movement; however for both the anti-bullying and whistleblowing movements the main tipping points have been the cases, because cases define the problem and how far we are from a solution. Table 1 provides schemata of the evolution of both the anti-bullying and whistleblowing movements.

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<sup>5</sup> See Nader et al (1972).

<sup>6</sup> See Sawyer (2011)

<sup>7</sup> The testimony of the whistleblower Roger Boisjoly was pivotal to the investigation of the shuttle Challenger disaster of January 1986.

<sup>8</sup> The two Senate reports are *In the Public Interest. Report of the Senate Select Committee on Public Interest Whistleblowing*. August 1994, The Parliament of the Commonwealth of Australia. *The Public Interest Revisited. Report of the Senate Select Committee on Unresolved Whistleblower Cases*. October 1995. The Parliament of the Commonwealth of Australia. *The Whistle* is the bi-monthly publication of Whistleblowers Australia and can be found at [http://www.bmartin.cc/dissent/contacts/au\\_wba/](http://www.bmartin.cc/dissent/contacts/au_wba/).

Table 1  
*A Tale of Two Movements*

<b>Anti-bullying</b>	<b>Whistleblowing</b>
<i>Wave 1</i> Brodsky(1976), Leymann(),	<i>Wave 1</i> Conference on Professional Responsibility Government Accountability Project
<i>Wave 2</i> Correlation with school bullying	<i>Wave 2</i> False Claims Act amendments
<i>Wave 3</i> New cases Activism	<i>Wave 3</i> New cases Activism
<i>Wave 4</i> Anti-bullying legislation Anti-bullying procedures	<i>Wave 4</i> Whistleblowing legislation Whistleblowing procedures

For complex phenomena like workplace bullying and whistleblowing, a logical question is whether a theoretical framework can be developed which defines a template for each. Both workplace bullying and whistleblowing depend on so many actors, interactions and context that they are unlikely ever to be fully prescribed, yet prescribe them we must.

As Crawford (1999) concedes

*“My experience suggests that workplace bullying is taken far more seriously if assessed on a case by case basis, being skeptical at times, each scenario having a host of interwoven factors (Adams and Crawford (1992)).”*

The same is true for whistleblowing. Indeed, in considering a theoretical framework for workplace bullying, the commonality with whistleblowing soon becomes apparent. Hitherto, the following theories of workplace bullying have been advanced, and in most cases they apply also to whistleblowing.

1. *The Leymann model*

In a series of papers but most especially Leymann (1993), Leymann contends that bullying is the product of a spreadsheet of problems of the organization- deficiencies in work-design, deficiencies in leadership, the target's exposed position, and low morale in the organization (see Einarsen, Hoel et al (2011, p.16)). Under this theory, if bullying exists and persists, it is an organizational not individual problem, and hypothetically there are organizational solutions. Einarsen, Hoel et al (2011, p.17)) cite evidence from studies in Ireland, Norway and Finland to support Leymann's theory, but equally cite evidence from Einarsen, Raknes and Matthiesen (1994) which suggests organizational factors explain only ten percent of the variance in the extent of workplace bullying. However, Einarsen, Hoel et al (2011, p.24)) also quote evidence from Rayner (1998) which tends to support the Leymann model

*“Rayner concluded that bullying prevails due to an organizational tolerance of such behavior. Ninety-five percent of the respondents in her study claimed that bullying was caused by the fact that bullies can get away with it and victims are too scared to report it.”*

Most who have been bullied in the workplace would agree. Bowling and Beehr (2006) provided evidence that workplace factors, rather than individual dispositions strongly determine workplace bullying. They conducted a meta-analysis on workplace harassment research written between 1987 and 2005. In sum, they identified one hundred and sixty-eight separate published and unpublished works, and included ninety in their analysis. Their conclusions distil the issue

*“The meta-analysis yielded some important findings concerning the potential causes and consequences of workplace harassment. It appears that characteristics of the work environment might strongly contribute to workplace harassment.”*

That bullying exists in a workplace suggests management is complicit; Brodsky (1976) terms this complicity “*a sense of permission to harass*” (see Matthiesen and Einarsen (2010, p.228) for a fuller discussion).

Organizational factors are also important in the retaliation experienced by whistleblowers. Bjorkelo (2013, p.8) discusses the role of the organization in protecting its public appearance, a hypothesis first proposed by Goffman (1959). Such protective practices emphasize a commitment to the existing hierarchy rather than a commitment to natural fairness. As Bjorkelo (2013, p8) asserts

*”Thus, negative reactions in the form of singular or repeated retaliation (for example, workplace bullying) can also be a way to stop the content of the whistleblowing and thereby prevent the cost of a loss of public face for the organization.”*

Within an organization, the tolerance of retaliation against a whistleblower is consistent with the tolerance of workplace bullying. Both depend on the cultural spreadsheet of the organization; a spreadsheet which includes the history, the shared and unshared values, the aspirations of all parties and, in particular, the spreadsheet cell occupied by the bully. Bullying is never by chance.

## *2. Stress theory*

Bullying is a workplace’s stress test. Bullying is synonymous with stress, not just for the target but for all those around the target. Research into bullying often correlates with research into the target’s post-traumatic stress disorder (PTSD) that follows the bullying. And there is ample evidence of the PTSD. Matthiesen and Einarsen (2010, p.231) cite a number of studies that examine the PTSD, inter alia

*“In his 1992 report, the Swedish psychologist Heinz Leymann (1992) argued that PTSD probably was the correct diagnosis for approximately 95% of a representative sample of 350 targets of long-term bullying at work...A Danish study of 118 targets of severe*

*bullying revealed that 76% portrayed symptoms indicating PTSD (Mikkelsen and Einarsen(2002)).”*

Stress, particularly chronic stress, compounds with many health problems. Lipinski, Albright and Fenclau (2013, pp.23-24) document some of the problems that result from PTSD; from the obvious, anxiety and depression, to the less obvious effects on cognitive ability, the immune system and the cardio-vascular system.

Matthiesen and Einarsen (2010, p.231) reference a number of theories to explain why the target experiences PTSD. Janoff-Bulman (1992) attributes the PTSD to an inversion of the target's core beliefs in benevolence, meaning and self-worth. It is an inversion familiar to whistleblowers (Sawyer (2005)). Bullying, like whistleblowing, represents a shock to pre-existing values. Williams (1993) provides a theoretical framework for workplace trauma which suggests PTSD is mediated by personality type and by coping strategies. The target of bullying, like the whistleblower, has to learn how to survive. Bullying, like whistleblowing, is a psychological event; and stress is its measure.

There are two qualifications to this simple model of the bully-target and the stress imposed. First, as acknowledged by Einarsen, Hoel et al (2011, p.22), background stress is an important qualifier.

*“The high pace of change, the intensifying workloads, increasing work hours and uncertainty with regard to future employment that characterize contemporary working life in many countries influence the level of stress of both perpetrator and victim.”*

Presumably contemporary working life also influences bullying. For, uncertainty and change in the workplace pre-determine bullying and whistleblowing. It is not coincidental that both issues have emerged in the last thirty years.

Secondly, as recognized by Lipinski et al (2013,p.23), bullying affects the target's coworkers

*“Vartia (2001) suggests that those who witness the bullying of a coworker have reported significantly more stress than non-exposed workers.”*

Almost certainly there are spillovers to others, for example the target’s family.

Stress is a measure of both a bullying and a whistleblowing event. How a target survives and how a whistleblower survives depends on how they mitigate against stress. Bullying and whistleblowing are the extreme stress tests of the workplace.

### *3. The bully-target imbalance of power*

To understand bullying, it is necessary to understand the power of the bully and the powerlessness of the target; the imbalance of power. This imbalance is well summarized by Einarsen, Hoel et al (2011, p.10)

*“A central feature of many definitions of bullying is the imbalance of power between the parties (Einarsen, Raknes, Matthiesen and Hellesoy (1994), Leymann (1996), Niedl (1995), Zapf, Knorz and Kulla (1996)). Typically, a victim is constantly teased, badgered and insulted and perceives that he or she has little recourse to retaliate in kind (Einarsen (1999)). In many cases, it is a supervisor or manager who systematically, and over time, subjects subordinates to highly aggressive or demeaning behavior (Rayner, Hoel and Cooper (2002)). In other cases, a group of colleagues bully a single individual, who for obvious reasons finds it difficult to defend him or herself against this ‘overwhelming’ group of opponents.”*

The imbalance of power can emerge for various reasons. Predominantly, it is the organization’s hierarchical structure that determines the imbalance. For, unless there is a secondary reporting mechanism, the subordinate bullied by a supervisor has little redress; line management protects and reinforces the power of the bully in order to protect the hierarchical structure. As Bjorkelo (2013, p8) asserts in relation to whistleblowing

*“In line with such perspectives and frameworks on power, whistleblowing can be understood as a two-way process, where the reporting act represents a power attempt that may be overrun, accepted or retaliated against by the dominant coalition in the organization in question (cf. Near, Dworkin and Miceli (1993)).”*

But the power imbalance may emerge for non-hierarchical reasons. Why a bully and a target are matched depends on the psychology of the interaction. Some authors focus on the dyadic relationship, the specifics of the psychological interaction between the bully and target. Einarsen, Hoel et al (2011, p.21) crystallize the issue well

*“To focus on a potential clash or mismatch in terms of personalities and power may be as relevant as to focus on the pathological and deviant personality of the perpetrator or the victim. On a dyadic level we may also focus on the dynamics of conflict escalation and the dynamic transaction between the perpetrator and the victim in the course of the conflict.”*

To describe bullying as a form of transaction is almost certainly correct. It is a form of transaction, and the price is paid by the target.

There have been few systematic studies of bully-target dyadic matches. We can learn some lessons from the schoolyard. A study of schoolyard bullying by Veenstra, Lindenberg, Zijlstra, Winter, Verhulst and Ormel (2007) of a sample of 918 preadolescent Dutch children from 54 school classes identified over 13,000 dyadic relations. They examined the central questions as to *who bullies who* and *who is victimized by whom*. Their prior hypothesis was that bullies who are dominantly aggressive and accepted by their peer group are matched with targets who are not aggressive and rejected by their peer group; and this hypothesis was confirmed by the data. Their study provides a major insight into bullying in general (Veenstra et al (2007, pp.17, 18))

*“The self-proclaimed bullies are sensitive to and their goal is aroused by a person they can dominate, i.e. a person who is less aggressive and feels vulnerable and who is rejected by others, so that the risk of social disapproval is low....From the bully’s perspective, the major power advantage is indeed not a status advantage in the sense of social approval, but one in the ability to dominate.”*

From this and other evidence, we can surmise that bullying is about domination; and the target is selected because of the propensity to dominate. The intent of the bully is to disempower the target; the power of the bully and the power of the target are then negatively correlated.

In the workplace, the vulnerability of the target may arise for a number of reasons. The target is typically an outsider to begin with, and the bully’s purpose is to render them more of an outsider. Einarsen, Hoel et al (2011, p.18) express it succinctly

*“If perceived as a representative of a group or a category of people who are not approved by the dominant organizational culture, such employees may indeed be bullied without doing anything other than merely showing up at work (Archer (1999)).”*

The outsider in the workplace and the outsider in the schoolyard are not so different.

The vulnerability of the target may also be related to the 6<sup>th</sup> century Greek practice of scapegoating where one individual is implicitly chosen to purge the sins of the community (Rivers (2011, p.40)). How the scapegoat is selected depends on the sins to be purged. Certainly those sins are self-evident in whistleblowing; the whistleblower is the scapegoat for corruption. Einarsen, Hoel et al (2011, p.22) allude to the whistleblower when they discuss the attributes of the modern scapegoat as *“being too honest or unwilling to compromise.”* All whistleblowers understand the irony of being too honest in workplaces where codes of ethics and anti-bullying policies exist.

Targets are also vulnerable because of an information asymmetry between the bully and others. The bully often perceives a weakness when others don't. It defines the special relationship between a bully and a target. Through bullying, the perception of the target is changed. Einarsen, Hoel et al (2011, p.25) label it as stigmatization

*“The process of stigmatisation may also alter the perception of the victim, which again may change how an organization tolerates, reacts to and manages a particular case of bullying.”*

The bully labels the target and shows everyone else the label.

Matthiesen and Einarsen (2010, p.214) identify nine categories of workplace bullying, following Zapf (1999). Those categories are dispute-related bullying, predatory bullying, scapegoating, sexual harassment, humor-oriented bullying, work-related stalking, bullying of workplace newcomers, judicial dereliction and retaliation against whistleblowing. In each of these categories of bullying, there is an imbalance of power which is realized in different forms of aggression, inter alia insulting jokes, rumours, ostracism, workplace overload and assault (Matthiesen and Einarsen (2010, p.218)). In most of these categories of bullying, the imbalance of power is localized to the bully and the target. In whistleblowing, the imbalance of power often becomes that between the whistleblower and the firm, the greatest imbalance of all.

How a power imbalance becomes a platform for bullying is one of the puzzles of bullying. Einarsen, Hoel et al (2011, pp.20) reference the conflict escalation model of Glasl (1982, 1984)

*“According to this model, conflicts are inevitable in organizations, and under certain circumstances even fruitful, contributing to innovation, performance and learning (de Dreu (1997)). However, if allowed to escalate, conflicts may turn into ‘office wars’ and become extremely harmful and destructive both on an individual as well as an organizational level.”*

No theory of workplace bullying can ignore the dynamics of the escalation of conflict, a dynamic which includes but is not limited to the interaction between the bully and the target. It is the potential for this spiral of conflict (Bjorkelo ( 2013, p.9) that underwrites most workplace bullying especially the spiraling chaos of a whistleblowing case.

#### *4. A comprehensive model*

A number of authors have formulated comprehensive models of workplace bullying, which subsume organizational and individual factors; see for example Einarsen, Hoel et al (2011, p.23) and Bowling and Beehr (2006, p.999). Matthiesen and Einarsen (2010, p.223) provide possibly the best representation, which can be summarized in terms of a layered approach with feedback effects

- The organizational tolerance of bullying
- The factors which inhibit bullying
- The propensity of the bully to bully
- The pre-disposition of the target to bullying
- The individual and organizational outcomes of the bullying
- The policy responses that result

Matthiesen and Einarsen (2010, p.222) note their schematic representation demonstrates the complexity of bullying, but even this representation simplifies the problem. Risk is not discussed and historical antecedents not referenced; and the bystanders are ignored. Bullying is a difficult problem to capture in a static framework.

The four theoretical frameworks, the Leymann model, stress theory, bully-target imbalance of power and the comprehensive model capture many of the determinants of bullying, without necessarily explaining some of the observed statistics. Matthiesen and Einarsen (2010) present a comprehensive review of those statistics and heuristics, inter alia

- The prevalence of bullying varies greatly across countries from 1% to 50% of workplaces, but this depends critically on the definition of bullying. Matthiesen and Einarsen (2010, p.221) state that

*“At an average, the statistically independent samples provided a prevalence rate of workplace bullying of 14.6% when the phenomenon of bullying is mapped across countries.”*

- The duration of bullying varies across workplaces and countries with most samples showing duration of between one and two years; for some targets appreciably longer.
- In most studies the distribution of targets is about one-third men and two-thirds women.
- There is no evidence that the target’s personality explains their bullying (Matthiesen and Einarsen (2010, p.224))
- The typical workplace bully protects their self-esteem through bullying, or bullies because of social incompetence or micro-political behavior (Zapf and Einarsen (2003)).
- Managers or supervisors are the most frequent bullies. As Einarsen, Hoel et al (2011, p.25) assert

*“While managers are involved as perpetrators in 50 percent of the cases in Norway, 80 percent of the cases in the UK involve a manager or supervisor bullying a subordinate.”*

- Organizational culture, changes in management and role conflict and ambiguity are all relevant in bullying.
- Target PTSD is the common outcome of bullying; in some studies up to 80% of targets experience PTSD.

But there is surprisingly little evidence as to what happens to the bully. Are they disciplined, protected or promoted? Most whistleblowers know the answer.

A bullying framework that is relevant to whistleblowing probably requires more than the frameworks discussed hitherto. In this brief exposition, we consider workplace bullying as a strategic game. A number of studies have considered bullying as strategic behavior. Ferris, Zinko, Brouer, Buckley and Harvey (2007) conceptualize bullying as an example of destructive leadership, concluding

*“Bullying by leaders can be construed as a form of organizational politics (Salin (2003)), in that leaders may employ bullying behavior as strategic attempts to manage impressions and influence others in order to maximize personal and/or organizational objectives”*

Olthof, Goossens, Vermande, Aleva and van der Meulen (2011) examine the strategic behavior of over 1100 Dutch children to ascertain whether they use bullying to achieve social dominance. Olthof et al (2011) found that bullying is dominance-oriented strategic behavior, consistent with the findings of Veenstra et al (2007) referenced earlier.

The extant studies, however, do not consider all aspects of the strategic game. Bullying is the art of one individual controlling another. The bully of the schoolyard controls through intimidation and humiliation. Bullying in the schoolyard is a basic form of bullying. Workplace bullying is usually more subtle. And it is this subtlety that makes workplace bullying so effective. The workplace bully seeks to control the workplace by controlling individuals in the workplace. Controlling the workplace underwrites the bully's employment contract. The employment contract of a typical employee is a portfolio of obligations and, just as an investor assigns different weights to assets within their portfolio, an employee assigns different weights to the obligations within their portfolio. The portfolio includes the specific duties of the job description, the implicit obligations to the employer, and an obligation relating to their interaction with other employees. Most

employees assign a high weight to their job description and to their obligations to their employer. Interactions with employees are secondary.

The bully sees their employment portfolio differently. The bully recognizes that the return on their portfolio is correlated with the returns on the portfolios of other employees. To maximize their own return, these correlations are relevant. The bully identifies some employees with returns negatively correlated with their own, and some employees with returns positively correlated with their own. The employees who are negatively correlated with the bully are threats, either because they are more competent than the bully; or because they will not obligate to the bully. The employees who are positively correlated with the bully are supporters, either because they have skills that complement those of the bully, or because they will obligate to the bully. The workplace bully maximizes the return on their own portfolio by managing the returns of others; that is, by minimizing the returns of their threats and maximizing the returns of their supporters. For the bully, other people's returns matter. And they must manage them. They become network managers.

As all whistleblowers know, the workplace bully is the network specialist, the whistleblower the network outsider. And, as all whistleblowers know, bystanders hold the key to the game. To characterize the game, we assume three sets of agents; the bully, the target and the bystanders. The bystanders can be co-workers, but they also can be other members of the firm, such as the supervisor of the bully. And they can be regulators external to the firm. To represent the strategic behavior of each agent, we consider a one-period model where each agent maximizes their expected status at the end of the period. This is analogous to the formulation used by an investor in maximizing the expected value of their end-of-period wealth (see Markowitz (1952)). We define the status of an agent at the end of the period,  $R_T$ , to comprise a portfolio of four components

- (1) The agent's control over workplace decision making.
- (2) The agent's control over workplace policy.
- (3) The agent's implicit contracts with other stakeholders of the firm.

(4) The agent's end-of-period reputation inside and outside the firm.

The first two components, control over decision making and workplace policy, are self-evident. Implicit contracts are the set of relational contracts between the stakeholders of the firm; see Baker, Gibbons and Murphy (1997). Simon (1947) defined an organization as

*“The complex pattern of communication and relationships in a group of human beings. This pattern provides to each member of the group a...set of stable and comprehensible expectations as to what the other members of the group are doing and how they will react to what he (she) says and does.”*

(Baker et al (1997, p.23)).

As Blau and Scott (1962, p.6) assert

*“It is impossible to understand the nature of a formal organization without investigating the networks of informal relations and the unofficial norms as well as the formal hierarchy of authority and the official body of rules, since the formally instituted and the informal emerging patterns are inextricably intertwined.”*

(Baker et al (1997, p.24)).

Whistleblowers learn to understand the importance of implicit contracts. The negotiation of implicit contracts is what the bully understands best and the target the least. The bully is the implicit contract specialist.

End-of-period reputation is important to all agents; it determines their future cash flows and the terminal value of their wealth. Reputation is a signal of future net worth. Whistleblowers, in particular, come to realize that whistleblowing is a contest of credibility, a battle of reputations. More generally, a bully and a target engage in a contest in which their reputations are negatively correlated. It is the unwritten principle of bullying.

Control over decision making, control over policy, implicit contracts with other stakeholders, and end-of-period reputation represent the status portfolio for each agent. Different agents weigh the components differently. The bully places more weight on implicit contracts, or at least on some implicit contracts. The target places more weight on reputation determined by their contract with the firm. Targets, unlike bullies, are less likely to seek control of the workplace.

Each agent solves the following optimization problem

$$\begin{aligned} & \text{Maximize } E[R_T] && (1) \\ & S_1, S_2 \dots S_N \end{aligned}$$

where  $R_T$  represents their end-of-period status,  $E[R_T]$  is the expected value of that status and  $S_1, S_2 \dots S_N$  are  $N$  possible strategies employed to maximize that expected value.

Consider the optimizing decision for the bully, the target and the bystander.

### **The Bully**

For a bully, their implicit contracts with other stakeholders come first; it is a hierarchical portfolio. A workplace bully acts to maximize their expected status by maximizing the value of these contracts. Through the maximization of their implicit contracts, the bully maximizes control over workplace decision making and policy and, by implication, their end-of period reputation.

Perforce, the bully is behaving no differently from any other networker; they are competing for workplace sovereignty. The difference is that they see the network as an instrument for control. Implicitly, a bully conducts a strength weakness opportunity and threat (SWOT) analysis on the network. They are the network specialist. A bully typically identifies four types of individuals

- (1) A target who is either a threat to their dominance, or one who represents an opportunity for the bully to exercise and inform of their power.

- (2) An ally, an individual with whom the bully forms a strategic alliance. Strategic alliances are as important as targeting.
- (3) Bystanders who have no power, except their power of observation. For bullying to be effective, those bystanders who observe must maintain their silence.
- (4) Bystanders who have power over the bully; for example, the bully's supervisor, but also external regulators. For bullying to be effective, these bystanders must not get involved.

Bullying then is a complex interactive process with an objective of network control. It entails maximizing the value of the implicit contracts of the workplace network, maximizing the power imbalance with respect to a target, maximizing the value of information asymmetry in the workplace, and minimizing the probability of detection of the bullying. In sum, the objective of the bully is to ensure that only the target understands the bullying but without the power to redress it. Formally, the bully's optimizing problem (1) becomes

$$\text{Maximize } E[V(IC_T)] \tag{2a}$$

$$\text{Maximize } E[V(\text{Power Imbalance})_T] \tag{2b}$$

$$\text{Maximize } E[V(\text{information asymmetry})_T] \tag{2c}$$

$$\text{Minimize } \Pr[(\text{detection of bullying})_T] \tag{2d}$$

where  $V(IC_T)$  is the value of the implicit contracts at the end of the period,  $V(\text{Power Imbalance Target})_T$  is the value of the power imbalance between the bully and the target at the end of the period,  $V(\text{information asymmetry})_T$  is the value of the information asymmetry in the workplace, and  $\Pr[(\text{detection of bullying})_T]$  is the probability of detection of the bullying.

A bully then not only maximizes their control but also maximizes the information asymmetry in the workplace. Bullying has to be invisible to all except the target. Bullying involves two strategies, a strategy of dominance over the target and a strategy of precise and invisible bullying. Bullying is most effective when

- (1) Decision making in the workplace is discretionary, rather than codified.

- (2) The target is an outsider either because of inherent attributes or because of a workplace issue such as whistleblowing.
- (3) The bully has coalitions in place with other workers.
- (4) Information dissemination in the workplace lacks transparency.
- (5) There is workplace uncertainty due to excessive change, rendering bystanders unwilling or unable to speak up.

Workplace bullying is then more subtle than schoolyard bullying, with physical and verbal abuse far less likely than in the schoolyard. The workplace bully is more likely to invoke the smear and rumor, for bullying that is too visible is easier to identify. The bully reverts to a strategy of precise targeting, targeting one individual only, minimizing risk through invisible targeting, and making bullying appear to be consistent with competitive workplace practice. For the skilled bully, bullying is an art form.

### **The target**

A priori, a target is often the diametric opposite of the bully which explains why they are targeted. The target is typically not a networker; they maximize their status by maximizing their end-of-period reputation through their contract with the firm. Because of who they are, the bully has little empathy for the target and, at the end-of the period, the target has little empathy for the bully. The target has no coalitions in place; they rely on formal codes rather than discretionary decision making, and prefer transparency to limited information.

The target's objectives are antithetical to those of the bully. The target wants to minimize the power imbalance, minimize the information asymmetry in the workplace, and maximize the probability of detection of the bully. Formally, the target's optimizing problem (1) becomes

$$\text{Maximize } E[V(C_T)] \tag{3a}$$

$$\text{Minimize } E[V(\text{Power Imbalance})_T] \tag{3b}$$

$$\text{Minimize } [V(\text{information asymmetry})_T] \tag{3c}$$

$$\text{Maximize } \text{Pr}[(\text{detection of bullying})_T] \tag{3d}$$

where  $V(C_T)$  is the value of the explicit contract at the end of the period and, as before,  $V(\text{Power Imbalance Target})_T$  is the value of the power imbalance between the bully and the target at the end of the period,  $V(\text{information asymmetry})_T$  is the value of the workplace information asymmetry, and  $\Pr[(\text{detection by bystanders})_T]$  the probability of detection of the bullying. The target's optimization problem is the inverse of the optimization problem of the bully.

A target's best protection against bullying occurs when

- (1) Decision making in the workplace is codified rather than discretionary.
- (2) Coalitions of power do not exist.
- (3) The target has support from bystanders.
- (4) There is transparency in the dissemination of information.
- (5) There is certainty and stability in the workplace.

The problem for the target is that they are a respondent; they are compelled to respond to the bully. Unlike the bully who has learnt their skills over a long time, a target must learn new skills in a short time period; and usually they are skills for which the target does not have a comparative advantage. Bullying is a very asymmetric problem; the bully is on the front foot, the target on the back foot; the bully seeks to maximize the power imbalance, the target to minimize the power imbalance; the bully seeks to maximize information asymmetry, the target to minimize information asymmetry; the bully seeks to minimize the probability of detection, the target to maximize the probability of detection. It is a zero sum game. Every whistleblower knows the power of that asymmetry.

### **Bystanders**

But it is bystanders that determine the outcome of bullying, just as they determine the outcome of whistleblowing. Bystanders hold the balance of power since their intervention can vitiate the power of the bully. However, bystanders are typically risk minimizers; they trade-off empathy with the risk to themselves. Risk usually dominates. Risk minimization underwrites bullying; a bully bullies with the compliance of bystanders.

Bullying reveals the indifference of bystanders, an indifference which makes the difference; hence the need for external interposition.

Formally, the bystanders' optimizing problem (1) is

$$\text{Minimize Risk [V(C}_T\text{)]} \quad (4a)$$

$$\text{Minimize Risk [V(IC)}_T\text{]} \quad (4b)$$

$$\text{Minimize Risk [(bullying)}_T\text{]} \quad (4c)$$

where Risk [V(C<sub>T</sub>)] is the risk of the value of their explicit contracts, Risk [V(IC<sub>T</sub>)] is the risk of the value of their implicit contracts, and Risk [(bullying)<sub>T</sub>] is the risk of being bullied. Bystanders are hedgers; they minimize the risk of their end-of-period reputations. They are the reason external intervention is required.

To understand bullying then is to understand the exchange between the bully, the target and the bystanders; that is to understand a zero-sum game between two principal players who are perfectly negatively correlated and a group of observers. Bullying is not simply an example of competitive workplace behaviour, not the legitimate exercise of competing to maximize end-of-period reputation. What distinguishes bullying is its singularity. The bully-target exchange is singular; there may be coalitions around both of them but there is only one bully and only one target. Between the bully and the target there is a contract stronger than a normal implicit contract. What distinguishes bullying is an emphasis on control, not just of the ideas and policies of the workplace but also on the reputation of another individual. What distinguishes bullying is the need to minimize the intervention of others. Bullying is a crime of hate, albeit on a scale far less than most hate crimes. But the consequences of bullying are often more long lasting, reflecting the difficulty in having it recognized and redressed. Invisibility usually pays a dividend.

The objective of a bully is empowerment; to control the implicit contracts of the workplace, to reduce the reputation and threat of the target, to disguise the bullying within competitive practices and, preferably, to involve others so as to diversify away the

risk. For the bully, mobbing is desirable. Explicitly or implicitly, a bully devises strategies consistent with these objectives in order to bully as precisely and invisibly as possible. Those strategies revolve around devaluing the explicit contract (their contract with the firm) and their implicit contracts with all the other stakeholders of the firm. These are discussed in turn.

*1. Devaluing the explicit contract of the target*

If a bully is in a position of authority and if a target's contract is not specified exactly, it is relatively easy to devalue their contract. For example, a target's contract can be devalued by increasing their workplace load and widening the portfolio of tasks assigned to them, by not crediting their work, by excluding them from relevant information and by reducing their discretionary decision making. Whistleblowers often cite the imposition of excessive work, unsuitable work, and impediments to their workplace performance as the principal forms of retaliation; see Rothschild and Miethe (1999). The more discretionary and more arbitrary is contracting and decision making in the workplace, the more effective the strategy of devaluing the contract of the target. Bullies operate best in discretionary workplaces.

*2. Devaluing the implicit contracts of the target*

A bully is a network specialist; they maximize the value of their implicit contracts. For the bully, it is simple to employ strategies to devalue the target in the eyes of other stakeholders. In Table 2.2 of Keashly and Jagatic (2003) there is an analysis of the incidence of workplace aggression, referencing three studies, Robinson and Bennett (2000), Glomb (2002) and Keashly and Jagatic (2000). In that table, the variation in bullying techniques is represented, from the most benign of verbal abuse to the more serious of physical assault. The strategic bully will never engage in serious forms of aggression. Their preferred strategies, as whistleblowers can attest, are smearing, rumor and marginalization. If a bully has coalitions in place and if they are in authority, such strategies are likely to be effective. An example is rumor. Rumors are invisible; they are never written down. A rumor propagates itself; the source is not attributed and not accountable. A rumor is a form of trial where the target does not have the right of reply. It

is a trial where the onus of proof is reversed; the target is guilty until there is evidence to the contrary beyond the reasonable doubt of the rumor. With a rumor, a bully involves bystanders who do the work of the bully and diversify the risk of the bullying. Rumors are then a form of mobbing. Because a rumor necessarily excludes the target, it maximizes information asymmetry, maximizes the power imbalance and minimizes the reputation of the target. A rumor is one of the bully's main mechanisms; every whistleblower knows of its potency.

In sum, a model of workplace bullying has been developed which involves three players, the bully, the target and the bystanders who exhibit different optimizing behavior. Workplace bullying is a special form of bullying where the bully is constrained by the institutional constraints of the workplace. Necessarily, their behavior is more strategic than in other forms of bullying, as the model in equations (1) - (4) suggests. The objective of empowerment for the workplace bully is the same as that of the schoolyard bully; however the bullying must be more refined and certainly less visible. In whistleblowing, the bullying is even more refined as the firm joins in as the invisible hand.

### **3. The Invisible Hand**

Bullying and whistleblowing are often concomitant. The whistleblower is both the perfect threat and the perfect target for a bully. The whistleblower is independent; the bully requires obligation. The whistleblower is ethically assertive; the bully requires ethical passivity. The whistleblower is typically competent and an adherent of regulations; the bully is often dismissive of regulations and likes others to be incompetent or complementary. Unsurprisingly, bullying and whistleblowing co-exist. Indeed in most whistleblowing cases, bullying precedes whistleblowing. The bully perceives the threat, identifies the target and bullies the target. The target responds by blowing the whistle, on both the bullying and on wrongdoing. Whistleblowing usually reinforces the bullying. Retaliation against the whistleblower is simply a continuation of the bullying.

Enter the firm. When the firm supports the bully and not the whistleblower, the firm absorbs the culture of the bully. The firm becomes an adjunct of the bully, of the bully's bullying, and of the bully's wrongdoing. But the firm cannot bully like the workplace

bully. It is more constrained than the bully by the laws and statutes that proscribe bullying and proscribe retaliation against whistleblowers. The firm must bully using an invisible hand. Like the bully, the target and the bystanders, the firm has an objective function. The firm seeks to maximize the value of the firm. For a publicly listed firm that value is the residual value for shareholders; for a private firm the value for the principal stakeholders; and for an unlisted public organization such as a government body, NGO or eleemosynary corporation, it is the value for all stakeholders. But like the bystanders and the other players in the strategic game, the objective of the firm is also to minimize risk. The firm's risk function is more complex than that of an individual. The firm's risk function is a portfolio of risks which includes, but is not limited to, the risk to the firm's future value, the risk to its reputation, and the aggregate risk for the stakeholders including the risks of the bully, the target and the bystanders. Perforce, the firm must weigh up all these risks in its portfolio. When a whistleblowing problem emerges, the risks are often very high. Whistleblowing is the workplace's extreme stress test, not just for the whistleblower but also for the respondent to the whistleblowing and for the firm itself. Whistleblowing is about risk imposed on a firm; and the firm responds by minimizing that risk. Formally, the firm's optimizing problem is to

$$\text{Minimize Risk } [V_T] \tag{5a}$$

$$\text{Minimize Risk } [R_T] \tag{5b}$$

$$\text{Minimize Risk } [(Stakeholders)_T] \tag{5c}$$

where Risk  $[V_T]$  is the risk imposed on the value of the firm, Risk  $[R_T]$  is the reputational risk imposed, and Risk  $[(Stakeholders)_T]$  is the aggregate risk imposed on the firm's stakeholders. The firm seeks to minimize the three components of whistleblowing risk.

The firm weighs these risks. It weighs the reputational risk in terms of regulatory risk vis à vis other risk. It weighs the short-term against the long-term. It weighs monetary risk against ethical risk. Most often the firm decides to minimize its risk by prioritizing the short-term over the long-term, the monetary over the ethical, and regulatory risk over the risk to the whistleblower. Most often the firm absorbs the culture of the bully by

- Rejecting the whistleblowing complaint (6a)
- Rejecting the complaint against bullying (6b)
- Minimizing the whistleblower relative to the respondent (6c)
- Minimizing the risk associated with minimizing the whistleblower. (6d)

The firm plays an invisible hand. And principally that has been the whistleblowing story. A bullying firm is more effective than a bullying individual for three reasons. First, the firm has the power to shift the imbalance between the respondent and the whistleblower by either

- (i) Promoting the respondent
- (ii) Promoting those associated with the respondent
- (iii) Demoting or maintaining the position of the whistleblower.

The bullying firm establishes a whistleblowing gap, a divergence between the career paths of the respondent and the whistleblower (Sawyer (2005)). Given the emergence of whistleblowing legislation, it is now less common for whistleblowers to be demoted, but very uncommon for whistleblowers to be promoted. Conversely, it is very common for respondents to be both protected and promoted. Measuring the relative status of the whistleblower and respondent one year, five years and ten years after the whistleblowing measures the whistleblowing gap and how well whistleblowers have been protected. Nearly always, whistleblowers are not protected and their loss is appreciable. Whistleblowers pay through the opportunities lost.

Secondly, the bullying firm is more effective than a bullying individual because it has discretionary power in relation to contracting and information. The employment contract is a set of financial options. For example, if an employee's performance is above a threshold, the employee may be compensated through promotion or remuneration. This is essentially a call option on employee performance. The employee may also receive bonuses generated by doing more tasks or by being given more discretionary authority. In an employment contract, the firm writes financial options based on the employee's

performance. Those options underwrite the control of the firm, and they underwrite the propensity to bully. Whistleblowing almost always reduces the value of the financial options of the employment contract. The firm has the power to reduce the value by exercising the options; that is, by closing out future promotions, future entitlements and future opportunities. This is a discretionary power that an individual bully does not have, and it is the most effective bullying of all. The bullying firm closes out the future options of the whistleblower.

The firm also bullies by restricting the flow of information to the whistleblower. Like a bullying individual, a bullying firm can exclude the whistleblower from relevant information, thus increasing the information asymmetry between the whistleblower and other stakeholders. The whistleblower is then exposed to an information gap. For the bullying firm, the whistleblower must become an outsider. And they usually do.

Finally, the bullying firm is able to limit the redress of the whistleblower, at least the redress within the firm. With workplace bullying, there is normally some possibility of redress through internal mechanisms. With whistleblowing, redress through internal mechanisms is more problematic, particularly if the whistleblowing exposes the firm's culture, or if it involves those significant in the firm's hierarchy. A recent case in anti-corruption hearings before the Independent Broad-based Anti-corruption Commission (IBAC) in Victoria, Australia illustrates the problem (Baker and McKenzie (2015))

*“IBAC heard this week that it took eight months for the Chief Financial Officer to sign off an internal 2010 audit that found the department's system of diverting millions of dollars into select ‘banker schools’ was unlawful and presented a high risk of fraud. Despite its serious findings, the audit went nowhere. In another case, Fairfax Media last year revealed that a Deputy Secretary of the Department had not acted on a secret report to him that revealed four of the department's top officials, including the Chief Financial officer had bought shares in a technology company chosen to build the ill-fated IT system.”*

The problem with internal inquiries is that those who inquire are often inquiring into themselves. And bullying firms, like bullying individuals, do not specialize in introspection.

The bullying firm therefore assumes an invisible hand strategy to reduce the whistleblower's status. In reducing the status of the whistleblower, the firm reduces the credibility of the whistleblowing and minimizes regulatory risk. The invisible hand consists of a series of actions which are protracted rather than immediate. The firm has time on its side; it has time when the whistleblower does not. The whistleblower is placed on a slow drip of retaliation. Each retaliatory action is sufficiently small. Each retaliatory action is precisely targeted. Each retaliatory action has a plausible alternative explanation, so that there is uncertainty as to motive. Each retaliatory action does not signal discrimination to an external party. The cumulative effect on the whistleblower is substantial, yet unobserved by all except the whistleblower. Only the whistleblower perceives the targeting. Only the whistleblower perceives the cumulative effect on them. It is a very effective strategy. The credibility of the whistleblowing is reduced without the retaliation being signaled to regulators. The firm then minimizes the regulatory risk of the whistleblowing and the retaliation.

The invisible hand strategy is the logical response to whistleblowing legislation and anti-retaliation statutes. Moberly (2008, p.977) discusses many of these statutes and remarks that they are a patchwork, gap-filled approach. The only Act which fully prescribes compensation for retaliation is the US False Claims Act.<sup>9</sup> But even the False Claims Act cannot prescribe for all forms of retaliation. The existence of whistleblowing legislation and anti-retaliatory statutes compels the firm to pursue the invisible hand strategy of retaliating by stealth. The invisible hand strategy has become and will continue to be the template of the firm exposed to whistleblowing risk. It is consistent with the response of firms which seek to mitigate regulation. For example, Averch and Johnson (1962) documented how firms respond to rate of return regulation. If a firm's profit to capital ratio is prescribed by regulators not to exceed a certain amount, the logical response of the regulated firm is to accumulate capital to preserve their total profits. Therefore, the unintended effect of rate of return regulation is excessive capital accumulation, the so-called Averch-Johnson effect. Regulation often induces unintended effects where firms behave to dilute the effects of the regulation. In the case of whistleblowing legislation and

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<sup>9</sup> See Sawyer(2011)

anti-retaliatory statutes, the rational response of the firm is to exclude the whistleblower from information, from decision making and from being an equal stakeholder in the firm; but to do so over a protracted period where the whistleblower must accept the conditions of their new contract with the firm. Their new contract is implicitly written to appreciably devalue their role. They are put on the slow drip of retaliation. And the strategy is particularly effective because there is no monitoring by regulators of the whistleblowing gap, the difference in the career paths of the whistleblower and the respondent over one, five, ten and more years. The whistleblowing gap, the measure of retaliation, is never measured and perhaps, given competitive labor markets and labor market mobility, it never will be. The bullying firm holds many aces.

How does a whistleblower respond to the invisible hand strategy? As in a workplace bullying problem, the whistleblower must solve the optimization problem

$$\begin{aligned} &\text{Maximize } E[R_T] && (1) \\ &S_1, S_2 \dots S_N \end{aligned}$$

where  $R_T$  represents their end-of-period status,  $E[R_T]$  is the expected value of that status and  $S_1, S_2 \dots S_N$  are  $N$  possible strategies employed to maximize that expected value. However, the strategies are no longer those adopted in equation (3a)-(3d). The whistleblower must adjust to the strategy of a bullying firm which has more power and control than that of an individual bully. The whistleblower, like all players in the strategic game, must maximize their information and minimize their risks; and recognize that it is their status external to the firm, rather than internal to the firm, that matters. Essentially, they must protect their future employment. Formally, their optimization problem is to

$$\text{Minimize } [V(\text{information asymmetry})_T] \tag{7a}$$

$$\text{Minimize Risk } [V(C_T)] \tag{7b}$$

$$\text{Maximize } [V(R_T)] \tag{7c}$$

where  $V(\text{information asymmetry})_T$  is the value of the workplace information asymmetry,  $V(C_T)$  is the value of the explicit contract at the end of the period, and  $V(R_T)$  is the value of (principally) their external reputation.

The whistleblower must design a strategy which maximizes their possibility of being employed post-whistleblowing. An important component of that strategy is to identify whether the firm is retaliating, and identify it early. One strategy is to borrow from the red flag principles used in the Foreign Corrupt Practices Act (FCPA) of the United States. The FCPA, first promulgated in 1977, is designed to regulate the behaviour of US corporations conducting business outside the United States; in particular, to regulate their accounting transparency and their transactions with foreign governments. The FCPA is generally regarded as one of the most important anti-bribery laws. A key element of the FCPA is the use of red flags. A red flag is used to signal increased risk in transacting with a foreign entity. Some of those red flags are discussed by Brown (2010), *inter alia*,

- The foreign entity refuses to certify compliance with FCPA requirements.
- The foreign entity refuses to complete agent questionnaires regarding the interests involving foreign government officials.
- The foreign country has a reputation for corruption and bribery.
- Requests for commissions to be paid to a third party in cash or untraceable funds.

Red flags are signals of possible violations of the FCPA. They are effective signals for corporations who want to comply with the FCPA. Whistleblowers can learn from the experience of the FCPA. They need to adopt red flags of their own which signal retaliation. For example, the following red flags would signal retaliation

- The firm does not immediately deal with the whistleblowing
- The firm does not act on audit or internal inquiry
- The firm does not refer breaches of the criminal code to external authority

- The firm engages in any form of exclusion or devaluation (e.g. excluded from decision making, performance appraisal by the respondent, removal from committees)

Identifying retaliation through red flags is an important step for a whistleblower in identifying the firm's strategy. Restitution of their career necessarily entails both identifying and redressing the retaliation. And red flags are the first step in that process.

Conditional on retaliation being observed, the whistleblower has to consider redress. The invisible hand strategy of the firm renders redress difficult. There are four issues. First, because the firm's strategy necessarily invokes small and precise targeting, there is a question of the materiality of each retaliatory action. Referring a single retaliatory action to an outside body is unlikely to be successful. For example, it is problematic whether a whistleblower can obtain redress when a firm directs them to be appraised by the respondent. Yet post-whistleblowing, performance appraisals conducted by respondents often occur and are always prejudicial. Secondly, retaliation by stealth means the whistleblower must consider how long they remain at the firm before seeking redress. The longer the whistleblower remains, the more they are bound by the devalued terms of their new contract, rendering legal redress more difficult. A whistleblower has to trade-off their devalued role against the probability of successful redress. Ex ante, it is nearly impossible to determine the optimal point to seek redress. But the experience of most whistleblowers suggests the earlier the better. A retaliating firm is unlikely to reverse the retaliation without external intervention. Thirdly, a whistleblower often first seeks redress within the firm, without cognisance of the implicit contracts that bind the firm. It is often the case that a whistleblower appeals for redress to persons who are obligated to the retaliators. Through legal discovery, many whistleblowers have discovered that their internal appeals were pointless. The firm was simply too networked to deliver an independent judgment. Finally, in seeking redress from an external body, the whistleblower effectively admits to the cessation of their contract with the firm. Such an action is almost always irreversible unless the external body can direct the firm to restore

the whistleblower's contract. The US False Claims Act has such a provision where a court can direct a firm as follows

*“Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.”*

But redress of this form is rare.

The invisible hand of the firm compels a whistleblower to consider partnerships to counteract the power of the firm. Those partnerships include those coalitions with other employees and contractors, representations to lawyers, politicians and whistleblowing advocates, and briefings with journalists and whistleblowing exchanges such as Wikileaks. As noted in Sawyer (2014, p.1)

*“For a whistleblower, the search for a partnership becomes their dominant strategy. The whistleblower searches for a partner with whom their interests are correlated. The search is necessitated by the risk of failure in their employment contract; but the search is weakened by the risk of free riding on their whistleblowing. A whistleblower trades-off these risks to form a partnership.”*

Partnerships are usually imperfect substitutes for the restitution of the whistleblower's career. But they are often the only option.

Red flags, redressing the retaliation and forming partnerships are the main strategies used by whistleblowers to negate the strategy of a bullying firm. However, a whistleblower must also address the practical issues of protecting against

- (i) post-traumatic stress disorder (PTSD)
- (ii) the dilution of their credibility and
- (iii) the dilution of their financial options

Caught up in the vortex of whistleblowing, whistleblowers often fail to attend to such practical issues. The most successful and practical whistleblowers are those who identify the retaliation early, exit the firm and find employment in another firm. Those whistleblowers are able to protect their future without negating their past. Regrettably, such a response reinforces the efficacy of the invisible hand of bullying; and underwrites corruption.

What should be the regulatory response? Regulators must understand that every regulatory action induces a reaction from those who are regulated. They need to study the strategic behavior of firms rather than impose solutions that are designed for a compliant firm in an ideal world. The invisible hand strategy is the obvious strategy when legislation and statutes are too vanilla, that is, written without cognizance of the firms' reaction. Necessarily, regulators have to consider more subtle forms of regulation which incentivize whistleblowers and incentivize firms to protect them.

Clearly that subtle form of regulation involves a more systematic approach which continually evolves. Regulators, like firms, must behave strategically to

- (i) Educate firms that the maximization of firm value and minimization of firm risk require the protection of credible whistleblowers and the negation of bullying both before and after the whistleblowing.
- (ii) Educate firms of the correlation between bullying and corruption.

- (iii) Educate firms of the correlation between insignificant corruption and the more significant corruption which destroys firm value.
- (iv) Monitor whistleblowers post-whistleblowing for some years afterwards, without interfering with competition in the workplace.
- (v) Incentivize firms to be transparent about governance problems, including whistleblowing problems.

Rather than act as bystanders of last resort, regulators must begin to behave as strategic players, recognizing that corruption is a strategic game with many players. Regulators are going to have to grow an invisible hand of their own.

#### **4. Conclusion**

This paper has developed a model of workplace bullying based on the optimizing behavior of a bully, a target and the bystanders. The model implies that workplace bullies disguise their bullying so as to seemingly comply with anti-bullying statutes. Workplace bullying is different from that of the schoolyard; it is more precise, more subtle and more strategic.

Workplace bullying subsumes whistleblowing. When an employee blows the whistle, they initiate a process where the firm is now exposed to a new risk. The risk-minimizing firm has a choice whether to fully protect the whistleblower, or to absorb the ethics of the respondent to the whistleblowing. When a firm decides to underwrite the respondent, their optimal strategy is that of the invisible hand which is designed to inhibit the career of the whistleblower and induce their exit from the firm; without signaling that to a regulator. The whistleblower is placed on a slow drip. The best protection for a whistleblower occurs when an external regulator decides to act, and not ignore. But that occurs all too rarely and ignoring the whistleblower is a license for targeting. Regulators, like whistleblowers, must learn to become more strategic. They need to understand the invisible hand of bullying and grow an invisible hand of their own.

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