

EMPLOYMENT LAW AS IF PEOPLE MATTERED: BRINGING THERAPEUTIC JURISPRUDENCE INTO THE WORKPLACE

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I. INTRODUCTION

During the past twenty years, scholars and practitioners drawn to therapeutic jurisprudence (TJ) have produced a substantial body of work, ranging from law review articles and essays to thick anthologies and treatises.¹ Mental health law, criminal law, family law, and legal education have been focal points for examination under a TJ lens.² Employment law, however, has been conspicuously underrepresented in TJ-inspired scholarly and law practice literature.³ This Essay is built on the premise that employment law scholars and lawyers, as well as the

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¹ See, e.g., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION vii–ix (Dennis P. Stolle et al. eds., 2000) (exploring doctrinal and practice areas addressed by TJ scholars); DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE v–vi (1991) (compiling their own essays on TJ); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 17–18 (2008) (describing major developments in TJ); International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/> (last visited April 5, 2010) [hereinafter International Network Bibliography] (maintaining a regularly updated online bibliography).

² See PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at vii–ix (applying TJ in various legal contexts); WEXLER & WINICK, *supra* note 1, at v–vi (compiling essays on various TJ topics); THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver ed., 2007) (examining TJ concepts in various legal contexts).

³ See International Network Bibliography, *supra* note 1 (searching bibliography yields six works on employment law and three works on workers' compensation law).

public at large, would benefit from applying a TJ perspective to the law of the workplace, and it suggests some framing concepts to guide future research, analysis, and practice.

TJ, according to Professor David Wexler, a TJ co-founder, involves the “study of the role of the law as a therapeutic agent”⁴ by focusing “on the law’s impact on emotional life and on psychological well-being.”⁵ Professor Michael Perlin, another TJ pioneer, explains that TJ “recognizes that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or anti-therapeutic consequences and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while preserving due process principles.”⁶ TJ should not be the sole lens through which to examine law and legal practice; rather, it should complement other valid perspectives and theories.⁷

Employment law in the past quarter century has been largely divorced from considerations of its therapeutic and antitherapeutic consequences.⁸ In a recent article, I asserted that a “markets and management” mentality devoted to unregulated markets and unfettered management power has dominated American employment law and pol-

⁴ David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000) (quoting LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY]).

⁵ *Id.*

⁶ Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 408 (2000).

⁷ See Wexler, *supra* note 4, at 125 (“It is important to recognize that therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other ones.” (citing LAW IN A THERAPEUTIC KEY, *supra* note 4, at xvii)). At least one commentator urges TJ adherents to take a stronger position, arguing that TJ can transform the law and the legal system. See *Healing First!: Time for the U.S. Justice System to Get Less Mechanistic and More Compassionate*, RADICAL MIDDLE NEWSL. (Mark Satin ed.), Oct./Nov. 2008, http://www.radicalmiddle.com/x_wexler.htm (“The reason, I’m afraid, is that [David Wexler] and Prof. Freckelton and some other TJ spokespeople have persisted in making dismayingly modest claims for TJ . . . [,] claims that may make it more acceptable to the traditional adversarial and individual-rights-obsessed legal profession, which serves us oh-so-well, but at the heavy cost of muting- [sic] even crippling—TJ’s transformative potential.”).

⁸ See David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 547 (2009).

icy for the past quarter century.⁹ The decline of unionization, continued vitality of the rule of at-will employment, growing income inequality, and prevalence of abusive behaviors such as workplace bullying are among the consequences of this state of affairs.¹⁰ I urged that TJ should play an important role in developing a *dignitarian* framework for shaping the law of the workplace.¹¹

This Essay attempts to identify and clarify the role of TJ in employment law. The Essay targets legal scholars, practicing lawyers, and law students who are interested in applying TJ to employment law. Accordingly, the following questions guide the commentary:

- What concepts from psychology and other disciplines form a normative framework for a TJ perspective on employment law?
- How does a TJ perspective inform the way in which we examine and analyze employment law doctrine?
- How does TJ inform the practice of employment law with respect to representing employees or employers?
- How does TJ inform the resolution of employment disputes?
- What are the practical limits of legal regulation towards fostering psychologically healthy workplaces?

Part II identifies some normative frameworks—core ideas from psychology and other disciplines—that help when applying TJ to employment law and closes with observations for scholarly work. Part III examines TJ in the context of contemporary American employment law practice, including its application to a specific employment relations problem—workplace bullying. Finally, Part IV concludes with an invi-

⁹ *Id.* at 523.

¹⁰ *See id.* at 529–39 (discussing the negative aspects of a “markets and management” framework).

¹¹ *See id.* at 546–47 (discussing TJ’s role in developing a *dignitarian* framework for employment law).

tation to employment law scholars and practitioners to incorporate TJ into their work.

II. TJ AND EMPLOYMENT LAW: NORMATIVE FRAMEWORKS

The founders of TJ have been remarkably nondirective in terms of prescribing core concepts to frame the movement.¹² As Professor Susan Brooks noted, however, the lack of a normative framework creates the “genuine danger that many misguided ideas and programs will be passed off as ‘therapeutic.’”¹³ The dearth of such a framework also risks inviting a conceptual free-for-all in which theories are applied simply to fit individual circumstances. Therefore, in considering the application of TJ to employment law, it is appropriate at the outset to identify a core framework of concepts from psychology and other disciplines that inform the assessment. These concepts may be used to assess various issues such as: (1) substantive employment law, (2) resolution of employment disputes, and (3) lawyering skills useful to the practice of employment law.

A. *Big Frames: Industrial/Organizational Psychology, Occupational Health Psychology, and Organizational Behavior*

Two branches of psychology, industrial and organizational (I/O) psychology and occupational health psychology (OHP), and the broad field of organizational behavior (OB), provide an overarching framework for a TJ perspective on employment law. I/O psychology, which emerged early in the twentieth century, involves “the application of psychological principles, theory, and research to the work setting.”¹⁴ I/O

¹² See Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities*, 13 CLINICAL L. REV. 213, 216 n.11 (2006) (“Until now, therapeutic jurisprudence has neither embraced nor rejected any particular theoretical approach.”).

¹³ *Id.*; see also Robert G. Madden & Raymie H. Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, 18 TOURO L. REV. 487, 488-89 (2002) (“A normative framework shapes the way people conceptualize problems and the solutions they seek.” (citation omitted)).

¹⁴ FRANK J. LANDY & JEFFREY M. CONTE, *WORK IN THE 21ST CENTURY: AN INTRODUCTION TO INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY* 8 (3d ed., Wiley-Blackwell 2010).

psychology spans many topics, including training and development, performance evaluation, work-related stress, diversity, and organizational leadership.¹⁵ Although I/O psychology traditionally focuses on organizational needs and productivity, it includes among its constituencies a wide variety of employment relations stakeholders, including “business, industry, labor, public, academic, community, and health organizations.”¹⁶

The purpose of the new multidisciplinary field of OHP is to “develop, maintain, and promote the health of employees directly and the health of their families.”¹⁷ OHP concentrates on “work organization factors that place individuals at risk of injury, disease, and distress.”¹⁸ In regard to outcomes, OHP focuses on prevention, with more emphasis placed on “organizational interventions rather than individual interventions, such as counseling.”¹⁹ A considerable amount of OHP research is devoted to matters of workplace stress.²⁰

OB is defined as “the systematic study of the actions and attitudes that people exhibit within organizations.”²¹ It primarily examines “determinants of employee performance[,]” including “productivity, absenteeism, and turnover[,]” as well as organizational citizenship behaviors and employee job satisfaction.²² OB is a core course in most business management degree programs, but it draws heavily from disci-

¹⁵ *See id.* at 8-9.

¹⁶ *Id.* at 9 (quoting from Society for Industrial and Organizational Psychology’s description of the role of an I/O psychologist); *see* Allan H. Church, SIOP Fellow, Soc’y for Indus. & Organizational Psychology, Inc., From Both Sides Now: The Impact of I/O Psychology, Society, <http://www.siop.org/tip/backissues/tipjul97/Church.aspx> (last visited April 5, 2010).

¹⁷ Lois E. Tetrick & James Campbell Quick, *Prevention at Work: Public Health in Occupational Settings*, in HANDBOOK OF OCCUPATIONAL HEALTH PSYCHOLOGY 3, 4 (James Campbell Quick & Lois E. Tetrick eds., 2003).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.* at 5 (explaining that globalization has increased competition among companies and decreased job security, which increases levels of stress experienced by workers).

²¹ STEPHEN P. ROBBINS, *ESSENTIALS OF ORGANIZATIONAL BEHAVIOR* 2 (8th ed. 2005).

²² *Id.*

plines such as “psychology, sociology, social psychology, anthropology, and political science.”²³

I/O psychology, OHP, and OB represent general fields of knowledge—not individual theories or ideas—and there is considerable subject-matter overlap among them. They should inform the formulation and implementation of employment law and policy. However, without a sharper focus, they do not form the kind of normative framework necessary for applying TJ to employment law. Thus, we must look at more specific concepts that may be rightfully utilized by one or more of these fields.

B. Human Needs

In a classic article published in 1943,²⁴ psychologist Abraham Maslow grouped human needs into the following categories, organizing them as a hierarchy. At the base are physiological needs such as food, clothing, shelter, and sleep, which are essential or central to our survival.²⁵ Next are safety needs such as personal health, physical security, and financial security.²⁶ Love needs for close human relationships comprise a third layer,²⁷ and esteem needs for belonging in society are the fourth.²⁸ Finally, self-actualization, the full realization of one’s potential, stands atop the hierarchy.²⁹ Although many have taken issue with Maslow’s conceptualization of human needs as a hierarchy,³⁰ considered as a whole, it is hard to quarrel with the assertion that these conditions are vital to a safe, secure, and meaningful life.

²³ *Id.* at 3.

²⁴ A.H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370 (1943).

²⁵ *Id.* at 372–76.

²⁶ *Id.* at 376–80.

²⁷ *Id.* at 380–81.

²⁸ *Id.* at 381–82.

²⁹ *Id.* at 382–83.

³⁰ See, e.g., Francis Heylighen, *A Cognitive-Systemic Reconstruction of Maslow’s Theory of Self-Actualization*, 37 *BEHAV. SCI.* 39, 45-46 (1992); Andrew B. Trigg, *Deriving the Engel Curve: Pierre Bourdieu and the Social Critique of Maslow’s Hierarchy of Needs*, 62 *REV. SOC. ECON.* 393, 397-99 (2004).

Work is essential to meeting these needs.³¹ The results of labor provide necessary and desired goods and services. Compensation for work allows individuals to pay for life's necessities and niceties. For individuals fortunate to be in positions that bring emotional satisfaction, work itself can be a rewarding activity, helping to fulfill higher-level needs.³²

By helping to facilitate and order work relationships, employment law can contribute to meeting basic needs. In this context, its most useful role is in setting statutory floors for compensation and working conditions. Labor standards covering living wage, minimum wage, overtime, and child labor help to provide compensation to pay for essential provisions and can safeguard workers from severe exploitation. Occupational safety and health standards help to provide a safe and secure workplace, and discrimination laws can protect people from dignitary harm. Labor laws can facilitate union formation and collective bargaining. Unions, in turn, can enter agreements that result in better wages, health care and retirement benefits, and safer workplaces.³³

The limits of employment law become more evident when trying to extend its reach beyond addressing basic physiological and safety needs. For example, it would be folly to devise a statute or regulation that attempts to mandate the design of jobs that nurture an individual's personal growth or self-actualization. This is best left to creativity, enterprise, negotiation, and individual skill. Enlightened employers may be able to develop job descriptions that provide for interesting, varied, and challenging work. In some instances, labor unions may be able to negotiate job duties that provide personal satisfaction in addition to a good wage.

³¹ See RICHARD DONKIN, *BLOOD, SWEAT & TEARS: THE EVOLUTION OF WORK* 238 (2001) (examining the relationship of Maslow's hierarchy of needs to work and employment relations).

³² See *id.*

³³ See Lawrence Mishel & Matthew Walters, *How Unions Help All Workers*, ECON. POL'Y INST., Aug. 2003, <http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf>.

C. Relational Psychology

Relational psychology holds that relationships, not the individual as an isolated self, constitute the primary basis of psychological development.³⁴ During the mid-1980s psychiatrist Jean Baker Miller took a lead role in developing relational psychology applications.³⁵ Miller started with the premise “that each person becomes a more developed and more active individual only as s/he is more fully related to others.”³⁶ When examining an individual’s psychological development, there are two questions to consider: First, “[w]hat kinds of relationships lead to the psychological development of the people in them?” Second, “what kinds of relationships diminish or destroy people, lead to trouble, and lead to what is eventually called ‘pathology’?”³⁷ Miller further posited that “at least five ‘good things’” happen to people in growth-fostering relationships:

- Each person feels a greater sense of ‘zest’ (vitality, energy).
- Each person feels more able to act and does act.
- Each person has a more accurate picture of her/himself and the other person(s).
- Each person feels a greater sense of worth.
- Each person feels more connected to the other person(s) and feels a greater motivation for connections with other people beyond those in the specific relationship.³⁸

³⁴ See generally CHRISTINA ROBB, THIS CHANGES EVERYTHING: THE RELATIONAL REVOLUTION IN PSYCHOLOGY (2007) (exploring the development of relational psychology).

³⁵ See generally Jean Baker Miller, *What Do We Mean by Relationships?*, 22 WORK IN PROGRESS 1 (1986), available at http://www.wcwoonline.org/pdf/previews/preview_22sc.pdf.

³⁶ *Id.* at 2.

³⁷ *Id.* In this context, pathology is best defined as “[a] departure or deviation from a normal condition.” See THE AMERICAN HERITAGE COLLEGE DICTIONARY 1001 (3d ed. 1997).

³⁸ Miller, *supra* note 35, at 2-3.

Psychologists Linda Hartling and Elizabeth Sparks applied relational theory and Miller's "five good things" to the clinical work environments in which they practiced.³⁹ They stated that in workplaces with a relational culture, clinicians should experience:

increased energy for the work [they] are doing, empowerment to take action on behalf of [their] clients, increased clarity and knowledge about others and [them]selves in [their] work setting, increased sense of worth with regard to [them]selves and others, and a desire for more connection to others in these work situations.⁴⁰

However, those "working in situations that are moving in a nonrelational direction" were likely to "experience the opposite of the *five good things*": "1) diminished energy for the work [they] are doing, 2) feeling disempowered or stifled in [their] ability to take action on behalf of [their] clients . . . , 3) less clarity and more confusion about others and [them]selves, 4) diminished sense of worth, and 5) a desire to withdraw from or defend against relationships in these settings."⁴¹

Relational theory and core group theory capture the strong connections between the well being of individual workers and the overall success (of lack thereof) of organizations. Drawing on these bodies of work, the New Workplace Institute suggests asking eight questions to determine whether a workplace is psychologically healthy:

- 1) Is there a sense of zest, 'buzz,' and opportunity in the workplace?
- 2) Do employees feel they are valued and treated with respect and dignity?
- 3) Is the organizational culture friendly, inclusive, and supportive?

³⁹ See Linda Hartling & Elizabeth Sparks, *Relational-Cultural Practice: Working in a Nonrelational World*, 97 *WORK IN PROGRESS* 1 (2002).

⁴⁰ *Id.* at 169.

⁴¹ *Id.* at 169-70.

- 4) Is organizational decision making fair, transparent, and evenhanded?
- 5) Are diversities of all types welcomed and accepted?
- 6) Does the organization face tough questions concerning employee relations?
- 7) Are allegations of mistreatment of employees handled fairly and honestly, even when the alleged wrongdoers are in positions of power?
- 8) Are compensation and reward systems fair and transparent?⁴²

Here, too, we see the promise and the limitations of substantive employment law as a means of promoting healthy outcomes for workers. Questions one through four extend largely beyond the law, words such as *opportunity* (question one) and *inclusive* (question three) notwithstanding. Question five implicates employment discrimination law by referencing diversity, but it too extends into questions of organizational culture. Question six vaguely pertains to legal issues, as matters such as discrimination and compensation may be among the *tough questions*. Question seven directly relates to a host of possible employment disputes, especially whistle-blowing and retaliation matters, while question eight relates to wage, salary, and benefit systems.

Relational theory also implicates employment law in its procedural aspects. Labor lawyer Thomas Geoghegan provided that, whereas the grievance process in a union-management setting often contemplates a continuing or perhaps repaired employment relationship, resolution of employment disputes for the vast majority of workers who are not in unions can be so imbued with anger, accusation, and expense that the parties only grow further apart even if they move closer to a legal settlement of their differences.⁴³ Geoghegan concluded that “this tort-type legal system, which replaces contract, is a system that feeds on

⁴² Minding the Workplace, <http://newworkplace.wordpress.com/2009/07/20/nwi-eight-fold-path> (July 20, 2009, 12:12 EST).

⁴³ See THOMAS GEOGHEGAN, *THE LAW IN SHAMBLES* 18-26 (2005) (comparing the current tort-based system to old contract law in resolving employment claims).

unpredictability and rage. A white-hot, subjective tort-based system with the threat of ‘discovery’ replaces a cooler, more rational, contract-based one which was modest, and cheap, and kept us from peering, destructively, into one another’s hearts.”⁴⁴

Of course, certain types of claims, such as actions for discrimination and harassment may be unavoidably confrontational and emotional, regardless of venue. Nevertheless, Geoghegan’s larger point still holds: the resolution of employment disputes in America often leads to bitterness, acrimony, and fractured relationships between workers.

D. Trauma Theory

Abusive, malicious behavior can fracture core beliefs about human relationships and violate our sense of safety and security. Psychologist Ronnie Janoff-Bulman noted that victims of intentional, malevolent harm face unique and difficult psychological challenges:

Although the ruthlessness of the perpetrators may differ, survivors of intentional, human-induced victimization suddenly confront the existence of evil and question the trustworthiness of people. They experience humiliation and powerlessness and question their own role in the victimization. . . . These survivors are forced to acknowledge the existence of evil and the possibility of living in a morally bankrupt universe. The world is suddenly a malevolent one, not simply because something bad has happened to the victim but because the world of people is seriously tainted. Trust in others is seriously disturbed.⁴⁵

Janoff-Bulman titled her book *Shattered Assumptions* because the trauma process involves the shattering of three commonly held, fundamental beliefs “about ourselves, the external world, and the relation-

Geoghegan is a practicing attorney and noted author of books and articles about the labor movement, workers’ rights, and politics in America.

⁴⁴ *Id.* at 26.

⁴⁵ RONNIE JANOFF-BULMAN, *SHATTERED ASSUMPTIONS: TOWARDS A NEW PSYCHOLOGY OF TRAUMA* 78 (2002).

ship between the two”: “The world is benevolent, [t]he world is meaningful,” and “[t]he self is worthy.”⁴⁶

At work, malicious harm may be inflicted in the form of physical violence or severe forms of bullying and harassment. It may take the form of retaliation for reporting possibly illegal or unethical behavior. Termination of employment, especially if done with callous disregard for individual dignity or if perceived as grossly unjust, also may be a traumatic experience.

In addition, the experience of resolving an employment dispute can prolong and intensify the impact of traumatic work experiences on individuals.⁴⁷ A plaintiff in an employment dispute will have to repeat her story numerous times, possibly face cross examination in multiple proceedings, and have many parts of her life portrayed and questioned in excruciating detail. A case that does not settle may take years to resolve, making it difficult for parties to achieve closure and attempt to put the event behind them.

E. Social Work Principles

Susan Brooks, Robert Madden, and Raymie Wayne have suggested that social work concepts should serve as an overall normative framework for TJ.⁴⁸ Although this Essay posits that employment law requires accessing broader conceptual bases, insights drawn from social work are enormously important to understanding how to better serve clients. They can help develop and implement interviewing, counseling, and advocacy approaches that ultimately save careers and livelihoods, assist people through difficult times, enhance productivity and morale at work, and improve organizational performance.

⁴⁶ *Id.* at 6. These three core beliefs are remarkably compatible with Jean Baker Miller’s “five good things.” See Miller, *supra* note 35.

⁴⁷ See Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL’Y & L. 880, 881 (2000) (examining the “anti-therapeutic consequences of unnecessary delay in the resolution of tort claims” (citation omitted)).

⁴⁸ See Brooks, *supra* note 12, at 216-17; Madden & Wayne, *supra* note 13, at 488.

Professor Brooks divides social work principles into two categories: micro-level constructs and macro-level constructs.⁴⁹ Micro-level constructs “arise in one-on-one helping relationships,” and they can enable lawyers and law students to “become more self-reflective practitioners and be more skilled in approaching challenging clients and situations.”⁵⁰ These constructs also include the importance of engagement with clients, which covers not only developing initial rapport, but also “reflective listening, empathy, and diagnostic skills.”⁵¹

Lest terms from social work be *off putting* to lawyers who do not see themselves as social service counselors, it bears mention that the underlying skills are gaining popularity in the mainstream business world, albeit under labels such as *emotional intelligence* and *social intelligence*, which have been popularized by the writings of psychologist Daniel Goleman.⁵² Emotional intelligence refers to a cluster of abilities, including self-awareness, managing emotions, self-motivation and control, awareness of others’ emotions, and handling relationships.⁵³ Social intelligence means “being intelligent not just *about* our relationships but also *in* them.”⁵⁴ Many corporate leaders, human resources directors, consultants, and personal coaches have embraced these ideas, recognizing their importance to organizational and individual effectiveness.

Regardless of the nomenclature used, these emotional skills, competencies, and qualities are no less valuable for lawyers. They make any lawyer, regardless of practice setting, a better colleague. They also render a lawyer more effective in working with clients. Consider the experience of a litigant in an employment dispute. It can be a miserable, stressful, and even fearful experience. There is usually a lot

⁴⁹ See Brooks, *supra* note 12, at 214-15.

⁵⁰ *Id.* at 215.

⁵¹ *Id.* at 221.

⁵² See generally DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995) [hereinafter EMOTIONAL INTELLIGENCE]; DANIEL GOLEMAN, SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS (2006) [hereinafter SOCIAL INTELLIGENCE].

⁵³ EMOTIONAL INTELLIGENCE, *supra* note 52, at 43. At least one former law school dean has recommended the incorporation of emotional intelligence concepts into the law school curriculum. See John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 323-26 (2008).

⁵⁴ SOCIAL INTELLIGENCE, *supra* note 52, at 11.

at stake, including one's livelihood, financial security, self-esteem, and reputation. A lawyer who understands what her client is experiencing may be in a better position to ask important questions and provide useful advice and counsel.

Macro-level constructs direct practitioners to look at systems and communities.⁵⁵ As an example, Brooks cites family systems theory, which "advocates studying the entire family in order to understand the individual members of the family," as an invaluable tool for comprehending the milieu facing individual clients.⁵⁶ Here, too, there are corresponding applications in the business world. Systems thinking, defined as "a way of seeing and talking about reality that helps us better understand and work with systems to influence the quality of our lives,"⁵⁷ is a useful tool for comprehending and working within organizations. Employment lawyers who understand both family and institutional systems are able to grasp the impact of work environments on employees and their families and to assess the interaction of employment law and policy within organizational cultures.

F. Public Health

Public health has been defined as "[t]he science and the art of preventing disease, prolonging life, and promoting physical health and efficiency" through community sanitation, disease control and prevention, hygiene education, and social provisions for individual health maintenance.⁵⁸ Correlations between job-related stress and negative health outcomes indicate there should be a stronger link between public health and employment law and policy. Bodies such as the National Institute for Occupational Safety and Health (NIOSH),⁵⁹ the World

⁵⁵ Brooks, *supra* note 12, at 215.

⁵⁶ *Id.* at 227.

⁵⁷ DANIEL H. KIM, INNOVATIONS IN MANAGEMENT SERIES: INTRODUCTION TO SYSTEMS THINKING 1 (Lauren Johnson & Kellie Wardman O'Reilly eds., 1999).

⁵⁸ MARY-JANE SCHNEIDER, INTRODUCTION TO PUBLIC HEALTH 5 (2d ed. 2006) (quoting public health pioneer Charles-Edward Winslow, C.-E. A. WINSLOW, THE EVOLUTION AND SIGNIFICANCE OF THE MODERN PUBLIC HEALTH CAMPAIGN 1 (1923)).

⁵⁹ See NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, STRESS . . . AT WORK 7-8 (1999), available at <http://www.bvsde.paho.org/bvsacd/cd49/stresswk.pdf>.

Health Organization,⁶⁰ and the International Labour Organization⁶¹ link job stress to higher levels of cardiovascular disease, musculoskeletal disorders, and psychological disorders. NIOSH reported possible correlations between job stress and higher levels of workplace injuries, suicides, cancer, ulcers, and impaired immune function.⁶² According to one insurance company study cited by NIOSH, “[p]roblems at work are more strongly associated with health complaints than are any other life stressor—more so than even financial problems or family problems.”⁶³

G. Summary

As the foregoing commentary illustrates, TJ offers countless possible applications to employment law scholarship and practice. This Essay discusses application of TJ to employment law practice in greater detail below, but at this juncture, a note to employment law scholars and researchers is appropriate. TJ and employment law provide a combination rich in scholarly possibilities. One of the few directives proffered by TJ—that we consider the therapeutic and antitherapeutic effects of substantive law, legal systems, and legal practice—opens the door to revisiting doctrinal law and legal procedure, developing new areas of inquiry, fashioning approaches to law reform, and working with practitioners to incorporate TJ insights into legal practice. It offers a needed counterpoint to the prevailing markets and management orthodoxy that all too often neglects the well being of workers and organizations.

III. TJ AND THE PRACTICE OF EMPLOYMENT LAW

Professor and TJ co-founder Bruce Winick articulated an ideal of a lawyer practicing in TJ mode:

⁶⁰ See 3 STAVROULA LEKA ET AL., PROTECTING WORKERS’ HEALTH SERIES: WORK ORGANIZATION & STRESS 8-9 (2004) (summarizing the health effects of work stress).

⁶¹ HELGE HOEL ET AL., INT’L LABOUR ORG., THE COST OF VIOLENCE/STRESS AT WORK AND THE BENEFITS OF A VIOLENCE/STRESS-FREE WORKING ENVIRONMENT 26-28 (2001), available at http://bravo.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—safework/documents/publication/wcms_118190.pdf (summarizing health effects of stress).

⁶² NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, *supra* note 59, at 11.

⁶³ *Id.* at 4 (citing a St. Paul Fire and Marine Insurance Company study).

Therapeutic jurisprudence has spawned a reconceptualization of the role of the lawyer. It envisions lawyers who practice their profession with an ethic of care, enhanced interpersonal skills, a sensitivity to their clients' emotional wellbeing as well as their legal rights and interests, and a preventive law orientation that seeks to avoid legal problems.⁶⁴

In view of the documented gaps between legal education and preparation for legal practice,⁶⁵ it is a refreshing twist that a movement founded by law professors bridges the gap between academic theory and legal practice. Furthermore, it is a blessing for employment law scholars and practitioners that colleagues in other fields of legal scholarship and practice have been exploring these connections for some time.⁶⁶ Thanks to them, lawyers and professors have the luxury of innovating without assuming the burden of starting from scratch.

Although applying the lessons of TJ to legal practice may make intuitive sense to some, this view does not represent the mainstream. As Professor Marjorie Silver advises readers in the preface to her volume on *Practicing Law as a Healing Profession*: "Beware. This book is subversive. It is a counter-culture book. It aims to subvert the legal profession's prevailing gladiatorial paradigm."⁶⁷ Nonetheless, it is my hope the following commentary serves as a welcome invitation to colleagues within the American Bar Association (ABA) who recognize the need to make changes in this vital field of practice.

⁶⁴ Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 2, at 342.

⁶⁵ Since 1992 at least three major blue-ribbon reports have addressed the gap between traditional legal education and the skills required for legal practice. *See generally* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992) [hereinafter *MACCRATE REPORT*]; WILLIAM ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007) [hereinafter *BEST PRACTICES FOR LEGAL EDUCATION*]; M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

⁶⁶ *See supra* notes 1, 2 for examples.

⁶⁷ Marjorie A. Silver, *Preface* to *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 2, at xv.

A. TJ-Inspired Employment Law Practice

1. Plaintiffs' Counsel

Among popular areas of civil practice, representing workers in employment disputes may be second only to domestic relations law in terms of the challenges of dealing with a client's emotional, personal, and financial stakes. Workers rarely retain employment lawyers for periodic legal consultations when things are going well on the job. Instead, they typically seek legal advice when facing a crisis. The plaintiffs' employment lawyer often meets prospective clients after they suffer a significant setback, such as a pay reduction, demotion, or (most frequently) termination. Understandably, clients who have just been fired are often in a terrible emotional state and may not be thinking sensibly about their immediate situations.

Employment disputes often elevate quickly. Take, for example, the common scenario of a worker who, until recently, has a good or even excellent record of employment, with above-average performance evaluations and no record of serious discipline. Then something changes, such as a new supervisor entering the picture, and problems start to arise. Suddenly the worker finds herself in trouble, and before she knows it, she loses her job. Panicked, angry, and in shock, she looks for a lawyer to help her.

The plaintiffs' employment lawyer constantly works against the backdrop of such client experiences. This can be an emotionally and intellectually taxing area of legal practice. After hearing the client's story, the lawyer must quickly analyze the legal issues involved and the potential for obtaining relief. This may involve doing some legal research and going back to the client with more questions. The economics of legal practice are unkind to the lawyer who dawdles in this assessment, as fees drawn from this preliminary stage of legal representation usually will not pay the bills at the office or at home. During this time, a stressed and anxious client may be peppering the lawyer with e-mails or phone messages.

Lawyers practicing in this area call upon the skills of interviewing, factual investigation, counseling, and negotiation more frequently than the skills of formal advocacy. Similarly, qualities of listening and

empathy may have a tremendous impact on how clients experience the legal system and cope with their own situations. The skills of researching and understanding statutes, regulations, and cases are essential as well, but frequently the black letter law is only a general framing device for performing the other tasks of lawyering.

In terms of comprehending the backstory of a client's situation, the plaintiffs' employment lawyer is at a considerable disadvantage. She may be completely unfamiliar with her client's employer and perhaps even the client's vocation. Good interviewing and listening skills can fill in this factual context. An understanding of systems may help the lawyer learn about a particular place of employment and the relevant individuals and their relationships. Especially if a potential case involves many individuals, familiarity with core group theory may help a lawyer assess institutional relationships and shape proposals for settlement.⁶⁸

We sometimes think of problem solving as an important skill for lawyers advising large organizations and business concerns, but it is just as necessary for someone advising an individual client who faces a significant life challenge, such as the loss of employment. The emotionally and socially intelligent lawyer can help her clients work through some of these problems in light of their legal rights and obligations. This may include matters such as applying for benefit programs, obtaining counseling under an existing health insurance plan, or negotiating a severance agreement that smoothes the client's transition to future employment.

2. Employers' Counsel

For lawyers who represent employers, practicing in a TJ mode raises important questions of ethical obligations and professional roles in counseling and advising clients. Obviously the management-side

⁶⁸ See ART KLEINER, WHO REALLY MATTERS: THE CORE GROUP THEORY OF POWER, PRIVILEGE, AND SUCCESS (2003). Core group theory posits that every organization, large and small, has a core group that defines both mission and practice. *See id.* at 4. While people in top management positions are likely to be part of the core, this is not always the case. *See id.* at 23 (using organizational diagrams to show different types of typical core groups). A true core group often transcends, to some degree, strict lines of organizational structure and hierarchy.

employment lawyer has an unyielding ethical responsibility to provide competent advice concerning legal obligations and liability risks. But what are the lawyer's counseling responsibilities and options beyond that? After all, institutional clients, like individuals, often look to their lawyers for guidance that blends legal information with practical implications. Within this realm, the choices are many, and they are particularly compelling for lawyers drawn to practicing in a TJ mode.

Insights drawn from I/O psychology, relational psychology, and organizational behavior complement an understanding of legal and liability issues to help a lawyer advise a client about the full implications of its employment relations practices. These concepts can inform decisions about, for example, what to put in an employee handbook, how to deal with problems of sexual harassment, or how to set compensation and benefit levels. For some employers, human resources staff provide some of this knowledge. Even in these instances, a lawyer's awareness of how employment law connects with other organizational priorities makes her a better counselor, negotiator, and advocate.

Management-side employment lawyers have a tremendous opportunity to serve clients as problem-solvers. Here, too, the skills of interviewing, fact investigation, counseling, and negotiation are critically important, as well as an understanding of systems thinking and core groups. Furthermore, although an employer's lawyer typically will not deal with as many emotionally distraught clients as a plaintiffs' lawyer might see, qualities of emotional and social intelligence play a vital role in providing sound legal representation. Representing an institutional client may require working with a variety of individuals within an organization, including executives and managers at all levels, human resources officers, and rank-and-file workers. In workplaces that have union representation, a management lawyer often participates in grievance proceedings and collective bargaining negotiations.

Employers are always potential defendants in employment-related lawsuits. Consequently, their lawyers should adopt a preventive law orientation to practicing employment law. As Professor Susan Dacicoff explains, "[p]reventive law attempts to avoid or prevent litigation before it arises. As a lens, preventive law asks what measures can be

put in place to prevent future litigation or future legal problems.”⁶⁹ In an employee relations context, a lawyer “might assess a corporate client’s employee policies, procedures, manuals, and practices to assess whether the corporation has any potential exposure to harassment or discrimination suits,” followed by necessary revisions, in-house training programs, and periodic legal checkups.⁷⁰

In addition, a TJ-inspired lawyer may invite a client to consider broader questions about the relationships between employee relations practices, worker satisfaction and productivity, and liability exposure. For employers, the practice of preventing lawsuits begins well before an employee believes she has been mistreated or wronged. As Professor Daicoff states, “[p]reventive law would take the additional steps of anticipating and pre-empting opportunities for conflict, dashed hopes, unfulfilled assumptions, and damaged relationships.”⁷¹ For example, it is possible that workers who believe their employers treat them fairly and with respect may be less likely to bring a lawsuit, even if a situation arises that could merit legal action. The emerging body of literature on organizational justice, which examines “how individuals respond to perceived injustice or interpersonal offense in organizations,” may be instructive on this question.⁷² Of course, it is also possible that some workers will take advantage of an employer who they perceive as being generous and flexible.

3. Training Lawyers

i. Law School

For decades, conventional American legal education has remained grounded in the teaching of doctrine and the use of the case

⁶⁹ Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 16 (2006). In this article, Professor Daicoff outlines an approach to law and lawyering that incorporates “(1) collaborative law, (2) creative problem solving, (3) holistic justice, (4) preventive law, (5) problem solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation.” *Id.* at 1 (citations omitted).

⁷⁰ *Id.* at 16-17.

⁷¹ *Id.* at 17.

⁷² Karl Aquino et al., *Getting Even or Moving On? Power, Procedural Justice, and Types of Offense as Predictors of Revenge, Forgiveness, Reconciliation, and Avoidance in Organizations,* 91 J. APPLIED PSYCHOL. 653 (2006).

method. Students have been able to graduate and sit for a bar examination in any state having done scant applied legal work besides completing a legal writing course or two. This may be changing, albeit slowly. In 2005 the ABA House of Delegates adopted an accreditation standard that requires law schools to provide students with substantial opportunities to engage in “live-client or other real-life practice experiences.”⁷³ The ABA standard dovetailed with a series of well-publicized commission reports that call for substantial changes in the way law schools prepare law students for legal practice, with many recommendations centering on lawyering skills.⁷⁴ For example, the 1992 MacCrate Report identified ten fundamental lawyering skills that should be developed during law school and throughout a lawyer’s legal practice: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.⁷⁵

The ABA standards and various blue-ribbon committee recommendations carry great significance for the practice of employment law, where skills such as interviewing, counseling, and negotiation are as critical as the ability to parse a statute, regulation, or appellate decision. However, we remain stuck at a point where although the need for change has been well articulated and now somewhat legislated, the will to change from within the legal professoriate is largely absent. At least until the ABA puts some teeth into its new standard in reviewing law schools for re-accreditation purposes, the modest building up of clinical and legal writing programs seems about as far as the body will be will-

⁷³ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2009-2010 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302, 302(b) (2009), *available at* <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>; *see* AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2009-2010 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, at iv (2009), *available at* <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Preface.pdf>.

⁷⁴ *See* MACCRATE REPORT, *supra* note 65, at 135-41 (summarizing recommendations); BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 65, at 8-11 (summarizing recommendations); CARNEGIE REPORT, *supra* note 65, at 7-10 (summarizing recommendations).

⁷⁵ MACCRATE REPORT, *supra* note 65, at 138-40.

ing to go.⁷⁶ In the absence of more significant change, incremental but meaningful changes in the employment law and practice realm may include integration of case studies and interdisciplinary content into doctrinal courses, development of enhanced clinical and internship offerings, the addition of specialized courses (such as legal writing, dispute resolution, and organizational behavior courses for employment law), and more effective and individually tailored mentoring and counseling of students.

ii. *Continuing Legal Education*

Barring a tectonic shift in the way the vast majority of law schools deliver legal education, continuing legal education (CLE) programs may be the best venue for providing opportunities to learn about TJ and its potential role in legal practice. For employment lawyers, CLE programs emphasizing lawyering skills and incorporating pertinent information from I/O psychology, OHP, and organizational behavior may be especially useful to experienced lawyers. Ideally, these sessions would mix instruction with interactive exercises and simulations. This represents a significant departure from the usual panel discussion and lecture format of CLE program delivery, and it requires more planning for time allotments, facilitating roles, and organization than typical CLE fare.

For therapeutic jurisprudence, CLE remains a largely untapped resource. However, if done well and marketed creatively, these programs could be proverbial hot sellers, even in states where CLE is not mandatory. A TJ approach to employment law offers the possibility of pursuing a more rewarding, psychologically healthier mode of professional practice. The potential benefits may resonate more strongly with lawyers who understand the realities of the legal profession and who are open to making changes in their professional practice.

⁷⁶ The TJ community has taken advantage of that window of opportunity. See generally Symposium, *Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, 17 ST. THOMAS L. REV. 403 (2005) (collection of essays on TJ and clinical programs). For more about the possible role of TJ in meeting the ABA standards, see generally Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 403, 429 (2005).

B. TJ Applied: The Problem of Workplace Bullying

The destructive phenomenon of workplace bullying offers an excellent vehicle for applying TJ insights and perspectives in a practice context. Workplace bullying has been defined as “the repeated, malicious, health-endangering mistreatment of one employee (the Target) by one or more other employees (the bully, bullies).”⁷⁷ It may come in the form of a yelling and screaming boss who regularly inflicts high-decibel tirades upon an underling, or a supervisor who imposes excessive workloads on a subordinate and intentionally withholds resources that are necessary for her to succeed at her job. It also may occur in the way some workers sabotage the work and reputation of a co-worker by spreading lies and rumors about her performance and character.

In any of its many varieties, bullying hurts employees and organizations alike by causing psychological and physical harm to workers and sapping productivity from the workplace. Severely bullied workers may experience clinical depression, symptoms consistent with posttraumatic stress disorder, increased risk of heart disease, and other negative health effects.⁷⁸ Organizations rife with workplace bullying may experience reduced productivity and morale, and increased absenteeism and attrition.⁷⁹

Although many other nations have enacted legal protections against workplace bullying,⁸⁰ in the United States, targets of workplace bullying who seek legal relief must avail themselves of an amalgam of common law (such as tort law) and statutory claims (such as discrimina-

⁷⁷ GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 3 (2003).

⁷⁸ *See id.* at 55-58 (describing effects of workplace bullying on targets).

⁷⁹ *See* EMILY S. BASSMAN, *ABUSE IN THE WORKPLACE: MANAGEMENT REMEDIES AND BOTTOM LINE IMPACT* 137-49 (1992) (analyzing the costs of employee abuse); Christine M. Pearson et al., *Workplace Incivility*, in *COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS* 183-85 (Suzy Fox & Paul E. Spector eds., 2005) (examining potential consequences of workplace incivility).

⁸⁰ *See generally* David C. Yamada, *Workplace Bullying and the Law: Emerging Global Responses*, in *WORKPLACE BULLYING: DEVELOPMENTS IN THEORY, RESEARCH AND PRACTICE* (Stale Einarsen & Helge Hoel eds., forthcoming 2010) (summarizing legal and policy developments in Australia, Canada, France, Great Britain, the United States, as well as the European Union).

tion law) that oftentimes do not apply to their particular situations.⁸¹ Bullying situations can also be vexing for employers. In a contemporary employment relations context where legal rights and obligations often shape human resources practices,⁸² the absence of specific workplace bullying laws creates something of a gray area for employers.

The following three scenarios offer an opportunity to apply TJ principles to this significant problem.

1. Representing Individual Workers

Janet Choy, your potential client, believes she faces termination from her job as an administrative assistant at an accounting firm. Choy claims her boss, a partner at the firm, treats her abusively and unfairly by regularly yelling at her, criticizing her smallest mistakes, blaming her for his own mistakes, and belittling her in front of co-workers.

The human resources director warned Choy that she is in danger of being let go because she may not be a good fit for this partner, who needs an assistant who can work better under pressure. Choy claims to be experiencing severe stress and anxiety and believes she suffers from depression, even though she has no documentation from any health professional. As a single mother, she fears the loss of health insurance benefits for herself and her child.

Although Choy believes she is being harassed and discriminated against, your questioning yields no evidence of grounds for a discrimination lawsuit. You do believe, however, that if she gets fired, she may

⁸¹ For articles exploring potential employment law protections against workplace bullying, see David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 484-98 (2004) [hereinafter *Crafting a Legislative Response*] and David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 491-508 (2000).

⁸² An excellent example is how the law regarding sexual harassment and employer liability shapes employee education and training programs. See, e.g., Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 15-20 (2001) (examining the effect of United States Supreme Court rulings on sexual harassment cases on corporate employee training practices).

have grounds for a claim against her supervisor for intentional interference with contractual relations. However, this would be a difficult and costly case to pursue.

Such scenarios can be time-consuming staples of a plaintiffs' employment lawyer's practice: A prospective client is in trouble at work, she believes she is being treated unfairly and illegally, and she seeks legal assistance to make things right. The lawyer may have to listen to a fairly lengthy, convoluted, and emotional explanation of a situation, often concluding that any legal claim at this juncture is a long shot and may not even exist if the person is fired. Many lawyers would explain this to Choy and then find a way to close the interview, suggesting she call if anything happens.

In fact, many plaintiffs' employment lawyers conduct scores of initial interviews with prospective clients, either in person or over the phone, for every one situation that leads to a formal retainer agreement.⁸³ Because many of these lawyers define themselves as litigators, they naturally are on the lookout for cases that could result in a lawsuit. Complaints about unfair treatment, discipline, or even termination usually are not the makings of a potential lawsuit unless they raise issues of discrimination or implicate one or more exceptions to the rule of at-will employment.⁸⁴ Without the decent prospect of a settlement or an award of damages, it may not be economically viable for a plaintiffs' lawyer to represent and advise an individual worker.

However, it also is possible that Janet Choy could benefit greatly from a lawyer's advice and counsel beyond the prospects of litigation. Choy appears to be a target of workplace bullying. Although, as previously noted, workplace bullying typically does not lead to a clear line of liability, it can inflict serious harm upon its targets, includ-

⁸³ Several years ago I attended an employment law conference where one of the speakers, a leading plaintiffs' employment attorney, stated he typically represents roughly one percent of the individuals who initially approach him for legal advice.

⁸⁴ Some common exceptions to the at-will employment rule include terminations in violation of public policy, express or implied contractual protections, and anti-retaliation provisions of employment statutes. *See generally* PEGGIE R. SMITH ET AL., *PRINCIPLES OF EMPLOYMENT LAW* 20-70 (2009) (explaining common exceptions to at-will employment); RICHARD A. BALES ET AL., *UNDERSTANDING EMPLOYMENT LAW* 53-82 (2007) (same).

ing the stress, anxiety, and depression reported by Choy. Especially in view of this gap in the law, bullying targets often must make some difficult decisions against some daunting realities. Targets who report their bullying experiences often find their employers either ignore the complaints or make matters worse. Targets of severe bullying are often fired or forced out of their jobs.

If Choy's lawyer is not well versed in the effects of workplace bullying, she may not understand the harm it can inflict on an individual target. This is where some of the nonlegal research on bullying can be enlightening. For example, a study by communications scholars Sarah Tracy, Pamela Lutgen-Sandvik, and Jess Alberts of how bullying targets perceived their experiences found that targets' narratives "were saturated with metaphors of beating, physical abuse, and death."⁸⁵ Targets reported feeling maimed, character assassinated, "beaten," 'abused,' 'ripped,' 'broken,' 'scarred,' and 'eviscerated.'⁸⁶ They described the bullying process alternatively as a "game or battle, nightmare, water torture, and managing a noxious substance . . ."⁸⁷ In describing themselves, targets used terms such as "slave or animal," prisoner, child with "an abusive father," and heartbroken lover.⁸⁸

Armed with this knowledge and practicing in a TJ mode, Choy's lawyer can help her navigate options in light of her legal rights, overall health, financial viability, and future employability. A lawsuit against her supervisor for intentional interference with contractual relations may take years to litigate, with no guarantee of a successful result. Especially in view of her mental health, Choy may be better off switching jobs than fighting; however, she is not completely free to walk into work the next day and resign. Choy may be facing choices or circumstances that implicate eligibility for unemployment insurance, family and medical leave, health insurance coverage (including mental health services), workers' compensation, and disability benefits.

⁸⁵ Sarah J. Tracy et al., *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20 MGMT. COMM. Q. 148, 160 (2006).

⁸⁶ *Id.*

⁸⁷ *Id.* at 159.

⁸⁸ *Id.*

Patient questioning by wise counsel may be required to help her sort through these possibilities, as these options relate directly to her employment status. Navigating the thicket of public and private employee benefit programs is a challenge for anyone; however, this process can be overwhelming for someone in an emotionally vulnerable state. In addition, Choy could benefit from mental health counseling. Her lawyer may suggest this possibility, adding that it may help to document any psychological harm caused by the bullying.

2. Representing Employers

Employers enjoy wide leeway in determining what to include in their in-house employment policies. They may choose to include only those matters required by law, or they may go beyond legal mandates. This representative scenario raises the question of whether an employee handbook should include a workplace bullying policy.

For example, your law firm represents the accounting firm that employs Janet Choy. Sandra Brown, the firm's human resources director, has reported numerous instances of workplace bullying. She has read about employers that include workplace bullying in their employee handbooks and asked the firm's managing partner, Bob Bolton, for his approval to do the same.

Bolton has asked you for your assessment about whether it would be advisable to include an antibullying policy in the employee handbook. He expresses skepticism about addressing bullying, saying that "this is about personality conflicts and thin-skinned workers, and some people just have to toughen up."

You are aware that in your state there is no statutory or common law remedy that directly addresses workplace bullying, and your legal assessment is that the firm faces a low risk of liability for these situations. In addition, your state supreme court has held that provisions in employee handbooks may be contractually enforceable, so including workplace bullying in the firm's handbook may confer legal rights to employees who face bullying behaviors.

Standard legal advice to Bolton would inform him of the low liability exposure for bullying situations and the risks of creating con-

tractual rights by including a bullying policy in the employee handbook. If Bolton asks whether the law requires him to include bullying in the employee handbook, the correct answer as of this writing would be no. Given Bolton's stated opinion on this topic, it is likely he will instruct Brown not to add such a policy.

A TJ approach to advising Bolton might take a different approach. Certainly his firm's lawyer has an ethical obligation to inform him of the low liability risk, the potential contractual obligations of adding bullying to the employee handbook, and to respond truthfully to Bolton's inquiry on whether the law requires such a policy. However, the firm's lawyer could also inform Bolton of some of the potential benefits of including a workplace bullying policy in the employee handbook and covering bullying in management training sessions.

This briefing might include a description of the costs of workplace bullying to an organization, information about growing concerns over bullying behaviors in office settings, and an explanation of how bullying directed at employees takes a toll on morale and productivity. If the lawyer is particularly knowledgeable about workplace bullying, she can borrow from the growing body of literature about bullying in the healthcare professions to explain to her client that abusive work environments have been shown to increase the risk of providing careless or unsafe patient care.⁸⁹ The lawyer can point out that similar mistakes in the accounting profession can be costly for client and accountant alike. In sum, the inclusion of a workplace bullying policy and educating employees about bullying will likely lead to a healthier organizational climate as well as a reduction in liability exposure.

3. Drafting Legislation

The absence of clear protections against workplace bullying has led some scholars and advocates, including myself, to call for the enact-

⁸⁹ See generally Dianne M. Felblinger, *Bullying, Incivility, and Disruptive Behaviors in the Healthcare Setting: Identification, Impact, and Intervention*, FRONTIERS HEALTH SERVICES MGMT., Summer 2009, at 13 (presenting thematic articles and commentaries about workplace bullying in healthcare professions).

ment of antibullying legislation.⁹⁰ However, in order to have a therapeutic outcome, any such legislation must balance stakeholder interests and provide a fair remedy. The devil lies in the details, as the following scenario illustrates.

You are counsel to a state legislative committee that is considering a bill that would prohibit workplace bullying. The proposed legislation would allow a court to award damages to any employee who has been “subjected intentionally to a verbally offensive working environment that causes discomfort or distress.” Employers would be held strictly liable for any such behavior. You have been asked to prepare a memorandum analyzing the practical impact of the bill. Personally, you have experienced workplace bullying, and you left a previous job because of the bullying. All things being equal, you would be glad if your state enacted antibullying legislation.

A TJ perspective can be enormously helpful in designing and analyzing proposed public policy. In the case of this particular bill, there are therapeutic and antitherapeutic elements that are worth discussing. Currently, countless numbers of bullied workers seek assistance from employment lawyers, only to be told nothing can be done to help them. The mere introduction of a workplace bullying bill provides hope that a significant gap in contemporary employment law will be filled.

However, the particular language of this bill is troubling. As drafted, the bill crosses the line into regulating behaviors that are best left to being handled by the parties themselves. The bill creates a cause of action for anyone who has been “subjected intentionally to a verbally offensive working environment that causes discomfort or distress.” This opens the floodgates to allegations of bullying virtually any time someone is on the receiving end of unpleasant words at work. The bill would create a civility code that inhibits the honest and open resolution of differences. Facing strict liability under this proposed law, employers would have to micromanage employee interactions. Even if employers took extra care to prevent offensive speech, they would have no defense if one employee says something hurtful or offensive to another.

⁹⁰ See *NAMIE & NAMIE*, *supra* note 77, at 268-72 (“Targets facing unanimous opposition . . . do not stand a chance.”).

It is hard to imagine a more counterproductive, anxiety-producing scenario.

Legislative drafting can be challenging, but the contours of a more balanced workplace bullying bill can be readily identified.⁹¹ First, a workplace bullying bill should create a cause of action for those who have been subjected to severe workplace bullying that caused psychological or physical harm.⁹² However, a workplace bullying bill must set a fairly high standard for recovery, in order to ensure that weak or frivolous claims do not flood the courts.⁹³ A balanced workplace bullying bill should also provide reasonable incentives for employers to prevent this behavior and respond promptly and fairly when faced with allegations of bullying.⁹⁴ In addition, a good bill should not confuse workplace bullying with legitimate though sometimes difficult actions taken by employers, such as providing a negative employee evaluation in the event of poor performance.⁹⁵

A lawyer who advocates for workplace bullying protections may benefit by invoking public health implications. Workplace bullying is one of the most neglected public health concerns. In a 2007 national survey conducted by Zogby International pollsters in partnership with the Workplace Bullying Institute, thirty-seven percent of respondents reported having been subjected to workplace bullying at some point in their work lives, and forty-five percent of these bullying targets experienced stress-related health consequences.⁹⁶ Targets further responded that when they reported these behaviors, sixty-two percent of the time their employers either ignored the problem or made it worse.⁹⁷

The percentage of workers who experience bullying at work is comparable to the percentage of children who experience bullying at

⁹¹ See *Crafting a Legislative Response*, *supra* note 81, at 498-508 (outlining the Healthy Workplace Bill, which provides a cause of action for some forms of workplace bullying).

⁹² See *id.* at 498-501.

⁹³ See *id.* at 499-500.

⁹⁴ See *id.* at 501-03.

⁹⁵ See *id.* at 506.

⁹⁶ WORKPLACE BULLYING INST. & ZOGBY INT'L, U.S. WORKPLACE BULLYING SURVEY 1 (2007), <http://www.workplacebullying.org/res/N-N-Zogby2007.pdf>.

⁹⁷ *Id.*

school.⁹⁸ However, although some “[thirty-five] states have laws to deal with school bullying, harassment, and intimidation[,]”⁹⁹ as of this writing no state has enacted a workplace bullying statute. Those concerned with school bullying have had success characterizing the behavior as a public health problem, even to the point of creating an Antibullying Public Health Criteria Index, which researchers describe as “an ideal collection of the legal elements necessary for an effective bullying program.”¹⁰⁰ By contrast, workplace bullying lags behind school bullying as a recognized public health concern, despite its widespread and destructive impact on the health of workers.

C. Summary

Therapeutic jurisprudence has tremendous potential for informing, perhaps even transforming, the practice of employment law. The illustrations involving workplace bullying provide excellent examples. In the case of counseling bullied employees, lawyers can provide support and legal advice even when the law does not offer a clear remedy. In the case of counseling employers, lawyers can marshal the growing body of evidence concerning the harm wrought by workplace bullying to encourage their clients to adopt proactive responses, even in the absence of a legal mandate. In the case of law reform, a TJ perspective can help the crafting of, and advocating for, intelligent, fair, and responsive legislation.

Incorporating TJ principles into employment law practice offers the promise that lawyers can be happier and more fulfilled in their work and that clients can be more satisfied with the legal representation they receive. In some instances, TJ can promote the nurturing of productive and psychologically healthy workplaces. In a profession so wrought

⁹⁸ Jorge C. Srabstein et al., *Antibullying Legislation: A Public Health Perspective*, 42 J. ADOLESCENT HEALTH 11, 11 (2008) (reporting that as of 1998 approximately thirty percent of students in grades six through ten claimed to be a bully, a victim of bullying, or both).

⁹⁹ *Id.* at 13.

¹⁰⁰ *See id.* (“[W]e have selected (1) the definition of bullying, (2) the legislative recognition of the link of bullying to health or safety risks, (3) the prohibition of bullying, and (4) the acknowledgement of the necessity of antibullying prevention programs as the essential demonstration that an antibullying statute has been enacted within the basic framework of public health concern.”).

with unhappiness among its practitioners and battered by criticism from the public, this opportunity deserves embrace.

IV. AN INVITATION TO THE LATECOMERS' BALL

Over fifteen years ago, Professor Daniel Shuman urged that “[t]he promise of therapeutic jurisprudence is not likely to be fulfilled unless it breaks the chains of traditional mental health law scholarship and enters the mainstream of jurisprudential analysis.”¹⁰¹ These words should resonate strongly with employment law scholars and practitioners. A field of law in serious need of incorporating ideas that promote psychological health for workers and workplaces has been quite tardy in doing so.

I write as one of those latecomers. Although for the past decade, my work concerning workplace bullying has brought me squarely into the world of psychology and the effects of emotional trauma, I did not delve into the literature of TJ until it became clear to me that only a fool in my position would continue to avoid it. The proverbial light bulb having been switched on, I am delighted to be affiliated with this welcoming community of scholars and practitioners. In the process, it has become clear to me that opportunities for injecting TJ into the study and practice of employment law are abundant and promising. It is my hope that this Essay serves as an invitation to colleagues in academe and practice alike who can imagine the possibilities.

¹⁰¹ Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739, 758 (1993).