

## Chapter 5

# Therapeutic Jurisprudence, Intellectual Activism and Legislation

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The contributions to this volume illustrate how therapeutic jurisprudence (TJ) has influenced substantive and procedural law and legal institutions. The phrase *ideas have consequences* strongly applies to TJ, where law professors, lawyers and judges, as well as scholars and practitioners from other fields, are actively applying psychological insights to legal and policy issues. These initiatives are now yielding suggested methodologies grounded in a TJ framework.

Within TJ circles, Wexler's "new wine" and "new bottles" analogy has become a popular way to describe TJ's potential role. He suggests that we "think of TJ professional practices and techniques as 'liquid' or 'wine,' and ... think of the governing legal rules and legal procedures—the pertinent legal landscape—as 'bottles'" (Wexler 2014: 464). In other words, the "wine" of the law is how lawyers and other legal stakeholders do their work. This may include lawyering tasks such as counseling clients, negotiating settlements and litigating claims. The "bottles" of the law are the legal rules that define rights, responsibilities and relationships, as well as the procedural structures and rules by which we address legal matters.

Despite the growing body of TJ-related work, I submit that both the "wine" and "bottles" of legislative drafting and the legislative process are among the more neglected aspects of TJ scholarship, commentary and practice. With notable exceptions, such as the work of health law and policy scholar Campbell (discussed below) (2010; 2012), the bulk of TJ activity has been outside of the

legislative forum. This chapter attempts to fill some of that void by proposing, discussing and applying a TJ methodology for engaging in legislative scholarship and advocacy.

First, I will sketch out a proposed methodology for TJ scholars and practitioners who are working in a legislative context, drawing heavily from the framework of intellectual activism that I developed in previous writings (Yamada 2010; 2016). Second, as an in-progress, illustrative case study, I will discuss my significant involvement in drafting and advocating for workplace anti-bullying legislation and engaging in public education initiatives concerning bullying and psychological abuse at work. Throughout this chapter, I will offer sidebar commentaries containing advice and lessons drawn from my policy advocacy work, as well as observations about how academic culture intersects with attempts to use scholarship for the purposes of law reform.

This chapter is grounded in American legislative settings, but I hope it will also resonate with colleagues from other countries. Furthermore, although scholars and graduate students in law and related disciplines constitute my main intended audience, I hope that practitioners who are engaging, or wish to engage, in policy-related work in an intellectual activist mode will find this useful.

### **A suggested TJ methodology for legislative scholarship and advocacy**

My preferred TJ methodology for legislative scholarship and advocacy is grounded in a concept of intellectual activism that was the subject of a recent law review article:

How can law professors, lawyers and law students engage in legal scholarship to inform and inspire law reform initiatives that benefit the public interest? How can we bridge the gap between academic analyses that sharpen our understanding of important legal and policy issues and practical proposals that test the application of these insights? How can we bring an integrated blend of scholarship, social action and evaluation into our professional practices?

I would like to explore these questions by invoking a simple concept that I call *intellectual activism*. Intellectual activism serves as both a philosophy and a methodology for engaging in scholarship relevant to real-world problems, putting the resulting prescriptions into action and learning from the results of implementation. In the legal context, intellectual activism involves conducting and publishing

original research and analysis and then applying that work to the tasks of reforming the law, legal systems and the legal profession.

The process starts with a foundational writing, usually a traditional law review article. This writing harnesses the requisite source materials, engages in legal and policy analysis and offers a prescriptive proposal for change. In turn, it serves as the basis for a variety of applied writings, such as proposed legislation and regulations, appellate and amicus briefs, policy papers, op-ed pieces, blog posts and multimedia presentations, as well as other forms of public education and advocacy. The process is ongoing, creating a cycle of scholarship, action and evaluation (Yamada 2016: 129).

In a happy coalescence of minds, this conceptualization of intellectual activism dovetails with the work of TJ-affiliated colleagues such as Campbell, Stobbs and Vols, who are also contemplating meta-level questions of how we engage theory, practice and advocacy. Campbell's TJ-informed health law and policy methodology (2010; 2012) includes law reform as an inherent, central component. Stobbs's three-part model for TJ research (2018) includes an inherent moral obligation to make TJ scholarship known to policy makers and legislators. Vols's model for TJ research (2018) is less directive but anticipates law reform and advocacy work as being a potentially desirable element of this process.

The TJ community has tended to err on the side of being non-directive whenever possible, especially when it comes to issuing mandates. As TJ begins to enter the mainstream of academic discourse, it is likely that more scholars will want to explore its philosophical underpinnings, without feeling obliged to propose and advocate for new or revised laws and public policies. Thus, while TJ should embrace law reform activities as part of its core essence, it should also create a receptive "big tent" for different approaches to scholarship, ranging from very theoretical to very practical. That said, a TJ perspective naturally focuses on how to fix inadequacies in the law, in that an assessment concluding that laws and policies are anti-therapeutic will very likely lead us to consider potential legal reforms. That inherent quality of TJ therefore helps to bridge gaps between theory and practice that have been well documented in critiques of legal scholarship and legal education (Yamada 2010a).

Personal preference concededly informs the methodology I am putting forth. My presumptive inclination in looking at the law includes (1) weighing how to improve it and (2) linking scholarship and social advocacy. My approach to intellectual activism represents a maturation process that grasps the significant potential contributions of scholarship toward changing the law. Furthermore, although my six years of full-time, public interest sector legal

practice before entering academe emphasized appellate litigation, my strong orientation as a legal scholar has been toward legislation and policy making. The latest major step of my evolution has been the incorporation of TJ into my worldview of law and legal scholarship. As I will explain below, this has been a rather recent development.

Schools of theory and practice have their respective cultures or sociologies, informed by values, belief systems and understandings of reality. I will not attempt to capture the breadth of individual stories of how people have been drawn to TJ, but suffice it to say that shared aspirations to make our laws and legal processes more humane have been chief among its attractions. Especially with this growing cohort in mind, I hope that the following commentary will provide some guidance to those who want to apply TJ to legislative settings.

### **A suggested TJ legislative methodology**

The TJ methodology for legislative scholarship and advocacy that I propose is presented in four major steps. In Step 1, we investigate the factual and legal realities of the public policy issue at hand, ultimately making a threshold decision on whether a legislative response is advisable and feasible. In Step 2, we craft, explain and defend the proposed legislative measure. In Step 3, we share this work with the world, including stakeholders who will hopefully support the proposed legislation. Finally, in Step 4, we evaluate our work and make revisions when necessary. References to TJ-specific policy perspectives and questions will appear throughout this section.

#### ***Step 1: Investigate factual and legal realities***

The investigation of the underlying realities that may support proposed legislation is a two-part process. The first part involves researching the psychological, social, economic and political conditions that inform our understanding of the problem or situation. Relevant source materials may include scholarly publications, statistical data, investigative reports and high-quality journalistic analyses and commentaries. At times, the existing research may be completely on point in terms of the topic being examined. In some cases, a TJ scholar may be able to conduct their own quantitative or qualitative research. On other occasions, it may be useful or even necessary to stitch together and synthesize sources to discern trends, patterns and prevalence and potential correlations or causes.

The TJ perspective ideally enters the picture at this earliest point. Without disregarding the importance of other policy concerns, considerations of

mental health and psychological well-being should receive significant attention. All relevant stakeholder impacts should be evaluated through this “TJ screen.”<sup>11</sup>

The second part examines the state of the law relevant to the given policy issue(s). This involves canvassing the legal landscape, identifying pertinent common law, statutory and regulatory law and constitutional law doctrine, informed by questions such as:

- What are the policy objectives for legal intervention in this realm?
- Do existing laws provide a potential remedy or solution to the issue or problem?
- Can litigation more effectively move existing law in the desired direction?
- Might new or revised administrative regulations obviate the need for a new or revised statute?
- Can processes such as public education and awareness achieve the desired ends without additional legal and policy intervention?

Of course, these questions are hardly limited to those operating in a TJ mode. The added, critical TJ aspect of this work is to ensure a focus on therapeutic versus anti-therapeutic experiences and outcomes. Accordingly, the following clusters of TJ-related inquiries are also central parts of the analysis:

- How do current laws encourage or discourage psychologically healthy processes for, and outcomes in, relevant law-related disputes, transactions and events? What does this assessment tell us about the potential therapeutic advantages of new legislation?
- What are the policy objectives for the proposed legislation? To what extent are psychological health and well-being important objectives for the measure under consideration? How do we balance the focus on therapeutic versus anti-therapeutic processes and outcomes against more traditional concepts of rights and economic interests? TJ’s founders have urged upon us that TJ should not be the sole lens for how we examine the law, but what weight should it carry?
- How do we weigh comparative stakeholder interests in therapeutic, psychologically healthy legal processes and outcomes? Is this a zero-

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11. Typical stakeholders may include individuals directly and indirectly affected by the legal and policy interests under consideration, as well as judicial, administrative and bureaucratic systems involved in effectuating rights or facilitating transactions enabled by potential legislation.

sum calculation or a potential “win-win” assessment? Is it possible to even articulate an overall societal interest in psychological well-being that overrides individual interests, or are we always making choices in defining rights and allocating resources—even in the purportedly idealized world of TJ?

- How do we apportion psychologically healthy outcomes among parties to legal disputes where one party has clearly acted wrongfully and the other has been the victim? What elements of moral judgment should enter the picture? This is an especially difficult calculus in criminal justice and interpersonal abuse situations. After all, TJ has been receptive to the interests of both victims and perpetrators, without imposing a legal or policy hierarchy among them. Legislation, however, often compels making such choices.
- In terms of legislative content, does the TJ-related problem or issue require a comprehensive solution, or might an incremental measure be of value? Along those lines, is it more or less therapeutic to draft an incremental measure with stronger chances of becoming law than a comprehensive measure that may meet greater opposition?

For those who would like a more formal, sequential approach that encapsulates many of the points above, Campbell’s 10-step “TJ framing process” for “addressing the role of emotions in health policymaking” (2012: 693) offers a valuable model adaptable to many areas of law. This framework starts with identifying the policy problem and proceeds to assess its emotional components and the role of policy in addressing them. It then presents a series of questions concerning the advisability of policy action, framed from both a TJ lens and other perspectives, such as economics and individual rights and weighing potential costs and benefits. Action and evaluation complete the process.

Regardless of whether a “loose parts” approach or more formal assessment process is applied, ultimately, we must determine whether new legislation is desirable. If the answer is yes, then questions of crafting and structuring proposed legislation come next. They are explored under Step 2 below.

Before proceeding, though, this might be a good place to consider what it means to be inter-, multi-, cross- or trans-disciplinary (they are close variations on a theme)<sup>12</sup> in doing policy-related TJ research and scholarship. I need not persuade members of the TJ community that legal and policy analysis is, or at

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12. I will not attempt to parse out of the purported differences between these terms, as such an exercise would divert attention from the main tasks at hand. I use the term interdisciplinary in the rest of this chapter, but I am not wedded to it.

least should be, inherently inter-disciplinary in nature. After all, substantive law is largely the by-product of the insights and knowledge of many other disciplines, even if we do not always invoke specific disciplinary labels such as economics or sociology. With TJ, the linkages between law and branches of psychology and psychiatry are overt and especially significant, but other academic and professional disciplines are strongly influential as well.

The next-level consideration is how to best work in a sustained interdisciplinary mode:

The importance of incorporating interdisciplinary perspectives, in terms of both research and the formulation of proposed responses and solutions, cannot be overemphasized. Consider the case of many [American] legal scholars who identify with the label “interdisciplinary.” All too often, they do so by making forays into different academic and professional disciplines largely in the company of like-minded law professors, without creating sustained interactions with scholars and practitioners in those other fields. Sustained interdisciplinary interactions foster the kind of cross-fertilization that often deepens our understanding of societal issues and sharpens our ability to fashion complementary initiatives (Yamada 2016: 131-32).

In tweaking the noses of some of my legal academic colleagues, I offer a more substantive point. True inter-disciplinary work involves a genuine immersion in other disciplines, not merely swimming around the edges of the pool. It means reading books and journal articles in those disciplines. It means going to “their” conferences and workshops, perhaps as a comparative novice, while staying open to learning from others. For those based in law, it means understanding that the “Law and ...” perspective suggests a primacy not necessarily shared by those in other disciplines. Our colleagues may well think of their interdisciplinary world as being, to illustrate, “Psychology and ...”!

Fortunately, this openness to interdisciplinary exchange tends to come naturally to those in the TJ community. I realized this during my first extended exposure to this community in 2009, in the “TJ stream” of panels at the biennial Congress on Law and Mental Health, held that year at New York University School of Law. For a full week, I was in the global company of scholars, practitioners, judges and graduate students drawn from many disciplines, and the experience was electric. The presentations were informative and stimulating, and the exchanges between participants were rich, insightful and collegial. The cross-fertilization of information and ideas from multiple disciplines in that setting exemplified how TJ can inform our quest for better laws and public policies.

### *Step 2: Craft, explain and defend your potential legislative response*

The model of intellectual activism advanced here includes making recommendations for law reform, which in this context means proposed legislation. Legislative drafting is a different kind of animal than many other types of legal writing. It requires even more precise use of language than writing legal briefs and pleadings in litigation and a sharp and logical sense of organization. Compared to writing transactional agreements between private parties, it requires a predictive envisioning of how words regulate and shape behavior on a broader scale and how statutory provisions will be interpreted by courts and (where applicable) administrative agencies.

Thus, it would behoove drafters to study, where possible, the structure of statutes similar to that envisioned and to consult both general and jurisdictionally-specific (if available) legislative drafting guides, especially if they are novices to this type of writing. Furthermore, although it is beyond the scope of this chapter to provide comprehensive technical advice on bill drafting, the following points may be helpful, drawn from my experience:

- In legislation, every word counts. Superfluous verbiage, inconsistent use of terms, or “fluff” language can lead to unintended consequences and disagreements over the statutory interpretation. Lean and clear are much better than verbose and ambiguous.
- Key terms must be defined in the legislation itself. If not, it will be left to courts and agencies to interpret the meaning of those terms.
- How does the proposed law advance primary and secondary policy goals? With regard to TJ-related objectives, consider how the proposal promotes or frustrates therapeutic processes and outcomes.
- In creating new rights or responsibilities, imagine how the legislative language can be misappropriated or misinterpreted, perhaps even in ways that contravene the intentions of the proposed law and produce anti-therapeutic outcomes.
- Especially if the legislation creates relationships and scenarios likely to result in litigation, think about how procedural and evidentiary rules relate to proving or disproving claims.
- The eventual draft should be analyzed through a TJ lens, analyzing the potential therapeutic and anti-therapeutic impacts and comparing the legal status quo with the potential effects of the proposed statute, especially in assessing projected “before and after” impacts on major legal stakeholders.

Producing a first draft of a bill does not necessarily mean that it is ready for broader circulation to legislators and other policy stakeholders. To ensure that the draft is well crafted, it is advisable to circulate it to a trustworthy cohort of lawyers and other pertinent individuals for criticism and suggestions. The results of that feedback may prove useful and lead to important tweaks and revisions. In some cases, it can help to spot and address gruesome miscues or unintended consequences.

Once the main draft feels complete, its likely beneficial effects should be examined in comparison to current law. It also would be very useful to anticipate and address potential policy criticisms. In some cases, it may be possible to refute such arguments completely. In others, it may be prudent to engage in a cost-benefit analysis of possible policy outcomes.

For many who are operating in an intellectual activist mode, most of Steps 1 and 2 will culminate in a foundational writing, such as a law journal article, scholarly monograph, or book. It will likely take shape as a policy analysis discussion, whose “usual structure,” as summarized by Minow, is to “present a problem; canvass alternatives; propose an evaluative scheme or method; [and] recommend [a] preferred solution” (2013: 66). The analysis, she adds, should be informed by “historical review, economic model, psychological research or evidence from other fields” (2013: 66). For TJ adherents, that analysis will be specially informed by psychological insights.

Some may question whether an exhaustively researched and lengthy publication in a traditional academic format is necessary or desirable. However, such an exercise may benefit the scholar even more than potential readers. This painstaking process, however laborious, helps to ensure that the proposed policy change is evidence-based and grounded in sound analysis. The resulting publication may be among the scholar’s least-read writings on this subject—demand for heavily footnoted journal pieces will always be limited—but it will help to render the writer an authority on the core substance. It will also provide source materials and prose that can be refined, simplified and broken down for shorter, more accessible writings and talking points intended for broader public consumption.

Some may also question the importance or necessity of spelling out, in detail, the main features of the desired legislative reform, including drafting a proposed statute or amendment. Many scholars settle for crafting an erudite journal article, book chapter, or monograph that analyzes a legal or policy problem and merely sets out general parameters of a solution. Instead, be responsibly bold. By embracing opportunities to draft the proposed legislation as the natural next step of your work, you can put yourself in a position to play

a lead role in law reform efforts. In fact, your proposed legislation may well become the model bill to which others react or respond.

The possibility of failure is a final reason why actual legislative drafting is an important step. Regulating human behavior, interactions and transactions in an anticipatory, predictive way through legislative language is hard stuff. It is possible that, even after exhaustively researching the legal and policy issue at hand and concluding that a legislative solution is desirable, earnest attempts at drafting a proposed statute will lead to the conclusion that this route is impracticable. This means either scaling back the proposal or abandoning it altogether, while revisiting other options. This realization may come only after extensive drafting efforts raise the challenges of translating policy objectives into legislative language.

### *Step 3: Share your work with the world*

As demanding as the research, writing and drafting work has been, there remains much to be done. The activism element of intellectual activism involves working with major stakeholders and others in an attempt to move the law in the desired direction. It also includes engaging in public education activities designed to enhance overall receptivity to the proposed legal reform. This work includes:

- Partnering with advocates and public officials to get the proposed legislation filed as a bill in relevant federal, state/provincial, or local legislative bodies and then engaging in grassroots organizing toward its eventual enactment;
- Translating the content of longer scholarly works into digestible, persuasive chunks for public consumption, including fact sheets, position papers, legislative testimony, op-ed pieces, blog posts and the like; and,
- Engaging in public education activities to spread the word about the importance of the proposed legislation.

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Especially for academicians, the roles of organizer, advocate and public intellectual may be unfamiliar ones. For most professors in full-time academic appointments, even those in professional disciplines such as law, psychology and business, scholarly publication is a primary end in itself, supplemented by associated activities such as conferences, seminars and addresses. A decision to become closely involved in public education and advocacy activities in

support of the proposed legislation may require developing new skill sets and reallocating time and resources.

Here are several considerations for those pondering these roles. First, consider how career goals and institutional priorities complement or conflict with an intellectual activist mode, especially if one holds an appointment at a mainstream university. At these schools, the continual output of traditional scholarship is likely to be more valued than advocacy, even when said advocacy advances the impact of scholarship. Put frankly, in terms of job security, the full-blown intellectual activist role is best undertaken by those in more secure tenured or long-term renewable contract positions who enjoy some flexibility in allocating their time and efforts outside of teaching responsibilities.

Second, recognize that there are compromises and trade-offs by operating in an intellectual activist mode. Members of the TJ community are likely to regard this work positively, but those whose worldviews are strongly shaped by traditional notions of academic culture and hierarchy may well regard the advocacy work as being an unwise sacrifice of energies that can and should be devoted to pure scholarship.

Third, a spirit of restless patience is advised. Legislation occasionally moves very quickly, especially when propelled by current events, but for the most part grinds on slowly. With cutting-edge ideas that have yet to fully enter the public conversation, proposed legislation can take time to gain favor, often requiring multiple legislative sessions to move through the process. A simple bill filing with a sole sponsor during a legislative session is a major first step. The next session, the bill may be reintroduced with multiple sponsors behind it. Maybe it even passes an initial legislative committee hurdle. During the next session, maybe it moves to a legislative floor vote. And so on.

Fourth, embrace the messiness, subjectivity and deep humanity of being an activist and advocate. Academe has a natural appeal to those who like to control their environment, but this world can become too safe and insular. Legislative advocacy thrusts us into the real world of politics and people and it can be unpredictable, wrought with emotion and influenced by factors surmounting the logic and reason of a law journal article. But if we want to make a difference beyond those publications, then here is a golden opportunity. In the process, it is likely that we will meet people who will expand our worldview, teach us some lessons and remind us of the importance of our work.

Fifth, be open to compromise. Bills are likely to get tweaked and revised in the grind of the legislative process. If you are fortunate, you will be consulted on these changes as they are being deliberated upon. If so, it helps to be able to quickly identify how changing a few words or many provisions can alter the

core substance of proposed legislation and to be able to advise legislators and other stakeholders on the impact of such amendments. Quick responses are necessary; asking for a week to mull it over usually means foregoing the opportunity to provide input. And through it all, keep in mind that others will not necessarily regard this as “your” bill; it is a public document now and many stakeholders will have a say in how it fares.

Finally, keep in mind that in this context, your objective is not to “sell” TJ as a philosophical or ideological construct, but rather to change the law for the better. This means tailoring specific policy points to the matter at hand, explaining how the proposed legislation affects major stakeholders. It is not about justifying legal reform by urging that it is consistent with your conceptualization of TJ.

#### ***Step 4: Evaluate and revise as necessary***

Intellectual activism is a cyclical process that includes evaluation and, when necessary, revision. In the context of legislation, this includes:

- Weighing critiques of the proposed legislation, including suggestions for amending specific language;
- Considering whether changes in political realities or in social attitudes towards the subject matter possibly call for changes in the legislation itself; and
- Revisiting the effectiveness of advocacy and public education efforts.

If the legislative proposal has been enacted into law, then the evaluation process goes to the next level, examining how the new statute works in practice and analyzing whether it meets the desired policy goals. This is a longer-range process, as it likely will take time for a sufficient body of legal results to be available for review. Eventually, it will be appropriate to begin the process again with Step 1, assessing whether the law is performing well enough to preclude the need for additional legislative changes.

If a partial or substantially revised version of the original legislative proposal has been enacted into law, then it will be necessary to evaluate its effectiveness against the backdrop of the main policy goals. This analysis will, in turn, help to determine if amendments are called for and what type of advocacy efforts may be needed to enact them.

#### **The path toward healthy workplace legislation**

For some twenty years, I have been closely engaged in research and scholarship, legislative drafting and advocacy and public education activities

concerning workplace bullying, which can be defined as the targeted, repeated, health harming mistreatment of an employee by a supervisor or co-worker (Namie & Namie 2009). This work has included writing a steady stream of law review articles on the topic and drafting model anti-bullying legislation, popularly known as the Healthy Workplace Bill, which serves as the primary template for law reform efforts in the United States.

Although my work in this realm has largely followed the methodology of intellectual activism described above, I confess that it was not by design. I was unaware of TJ when I began this journey; I am among those whose work evolved in a “TJ-ish” direction before I encountered the TJ community of scholars and practitioners. My original legal scholarship about workplace bullying was informed by a politically liberal, pro-workers’ rights worldview, a naturally inter-disciplinary perspective toward analyzing legal and policy issues and a conventional problem-solution approach toward writing law review articles. These loose parameters marked the limits of any ideological or philosophical framework driving my work.

Among other things, I had assiduously avoided allying myself with any of the popular theoretical schools that attracted many liberal leaning and left-of-center legal scholars, such as Law and Society and various strands of Critical Legal Studies. While those groups have undoubtedly contributed much to the legal academy, I never felt sufficiently compatible with them in temperament or ideology so as to identify with them. TJ, by contrast, “clicked” for me at a time when I understood how much of my outlook on the law and legal systems was being profoundly shaped by psychosocial perspectives and insights.

Moreover, my knowledge of the psychology behind workplace bullying was limited, in terms of both clinical and organizational psychology, the two most relevant branches. I used psychological and organizational behavior research to help support my call for law reform, but looking back, I know that I stood on thin ground in terms of depth of understanding. As I describe later in this chapter, that has changed markedly over the years.

Thus, in my own career, I have done things a bit out of the conventional academic sequence, at least compared to some other contributors to this volume. Rather than discovering TJ first and then having it shape my scholarly work, my discovery and embrace of TJ would come some 17 years into my law teaching career and a whopping 23 years after my graduation from law school! Only in more recent years have I delved into questions of theory, philosophy and methodology, always with a significant TJ emphasis (e.g., Yamada 2009; 2010a; 2016). Today, these activities, affiliations and human connections have come together in a more coherent body of work and legal worldview, to the point where I believe that I have some insights and lessons worth sharing.

Many of these observations are very relevant to how TJ-affiliated scholars and practitioners may engage in legislative work.

### 1. Investigating the realities of workplace bullying

In 1998, I became familiar with the work of Gary and Ruth Namie, a husband-and-wife team trained in social psychology and clinical psychology, respectively, who were launching the Campaign Against Workplace Bullying, a North American initiative designed to engage in public education and advocacy concerning the destructive impact of workplace bullying. At the time, I was a pre-tenured law professor in the early stages of building a scholarly agenda grounded in employment law and workers' rights. Until my exposure to the Namies' work, I was not familiar with the workplace bullying, a term they imported from Great Britain. However, upon learning the basics, it immediately became clear to me that this was a significant but largely neglected workplace problem in America.

During my first conversation with the Namies, I learned that they had not yet started to explore the legal implications of workplace bullying for American employment law, and so I offered to do some research on potential legal protections for those who have been subjected to bullying at work. At the time, I happened to be weighing potential topics for my next law review article, which likely would be my final major piece of scholarship prior to my coming tenure application. I anticipated that the results of my research on the legal implications of workplace bullying would make for a good article.

By the late 1990s, researchers in psychology and organizational behavior were publishing studies on workplace bullying, mobbing and incivility sufficient to document the dynamics of these behaviors and their harmful effects on both targeted workers and organizations in general. These studies showed that severely bullied employees often experienced anxiety, depression and associated physical symptoms. Furthermore, organizations rife with work abuse might experience declines in productivity and morale and increases in absenteeism and attrition. European researchers produced many of the early, pioneering studies and analyses, but North American scholars were starting to enter the fray as well. I was able to incorporate a considerable amount of this research into my eventual law review article (Yamada 2000).

On the legal side, I started with a set of policy objectives for how American employment law should address bullying at work, including prevention, self-help for targets of mistreatment, compensation to targets and punishment of wrongdoers. I then hypothesized that the tort of intentional infliction of emotional distress (IIED) would prove to be the most relevant legal claim for those targeted by workplace bullying. I proceeded to research a roughly five-year span of IIED claims brought in US state courts by employees against their employers and co-workers for behaviors that could be labeled as workplace bullying. Unfortunately for many of these plaintiffs, the case law largely undermined my belief that IIED would be a viable legal claim to cover workplace bullying. State courts repeatedly rejected these claims, typically before trial on defense motions for summary judgment or dismissal.

Three predominant lines of reasoning appeared in decisions rejecting IIED claims for bullying-type behaviors. First and most frequently, many courts did not find that the mistreatment at work rose to a sufficiently severe and outrageous level to meet the requirements of the tort itself. Secondly, other courts did not find a sufficient level of severe emotional distress as a result of the behavior. Finally, some courts held that IIED claims against employers were preempted by the exclusivity clauses of state workers' compensation laws.

This is not to say that state courts rejected all of these IIED lawsuits. However, the most likely type of workplace-related IIED claim to survive pre-trial dismissal was grounded in factual allegations that included harassment grounded in protected class status, which in many instances would already be actionable under employment discrimination statutes. This suggested that those who could connect their claims to protected class status might have at least two viable, potential remedies, one in tort and the other in statutory civil rights laws, while those who could not do so would be left in a legal void.

In addition to researching workplace IIED claims, I looked at federal employment and labor statutes as potential sources of legal protections for bullying targets. For example, employment discrimination law was the most obvious candidate, especially hostile work environment doctrine covering harassment based on protected class status such as sex or race. The conclusion was obvious, namely, that bullying motivated by a target's membership in a protected class might be actionable under employment discrimination laws, but that

situations where the aggressor's motivation was unclear would fall outside the coverage of these statutes. Federal occupational and health laws offered even less potential coverage, strongly favoring prevention of purely physical injuries on the job and resulting in only fines, not compensation to the target. Labor and collective bargaining laws might protect covered workers who work together to address bullying at work, but America's low union membership rates meant that the vast majority of workers were not in an easy position to use these laws for such a purpose.

After writing up these and other findings, I concluded with a call for a new statutory cause of action that I dubbed "intentional infliction of a hostile work environment" (Yamada 2000: 524). I suggested that the desired legal protection should straddle a liability line between the tort of IIED and the modern definition of hostile work environment under American employment discrimination law. I proposed major provisions and statutory language for a comprehensive workplace anti-bullying statute along these lines, but I stopped short of drafting a complete proposed bill. I went on to defend the need for new legislation in view of the significant shortcomings in current employment protections, and I also addressed potential counterarguments, especially predictable claims that this measure would lead to excessive and frivolous workplace litigation.

I gathered this work together in the form of a law review article, "The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection," which the *Georgetown Law Journal* published in 2000 (Yamada 2000). It was the first comprehensive assessment of the American employment law implications of workplace bullying.

My proposed methodology for legislative scholarship and advocacy recommends drawing together research findings and policy recommendations in a foundational writing such as a journal article or book. The *Georgetown Law Journal* piece served that purpose for me. The article has been well received and it prompted a steadily increasing recognition of this topic among US legal scholars. To date it is the most frequently cited law review article on workplace bullying in both the legal literature and journals in other fields. It also turned out to be the first major inroad toward what has become a career-defining focus for my work.

## 2. Crafting, explaining and defending the Healthy Workplace Bill

The process of drafting a proposed statutory response to workplace bullying came in two stages, reflecting the tentativeness of a relatively new law professor who was unsure whether this work was ready for an audience beyond academe. As mentioned above, I concluded my initial article with a call for a comprehensive workplace anti-bullying statute, and I even went so far as to offer suggested language for major provisions. But at that point, I did not pull together my ideas in the form of a fully developed proposed statute.

A year or so after the publication of my law review article, I realized that the drafting of a prototype, state-level workplace anti-bullying statute was a piece of unfinished business. I started where I left off, drawing upon the provisions I had already drafted and then building a full model statute around them. Because I wanted it to be ready for filing if state legislators could be identified as potential sponsors, for formatting purposes, I relied heavily upon a drafting guide prepared by counsel for the Massachusetts legislature and posted for public use.

Once I completed a draft that I felt sufficiently good about, I assembled a group of employment lawyers and employee advocates to provide feedback on it. Their comments, criticisms and suggestions proved to be very helpful. I incorporated many of them in preparing a draft that was now ready for more public circulation. The draft legislation proposed a new statutory tort, designed to provide a civil claim for damages for bullied workers who could show they were intentionally subjected to an abusive work environment that caused physical or psychological harm. It also provided employers with liability-reducing incentives to act preventively and responsively toward workplace bullying behaviors.

I began sharing the draft bill with a wider group of individuals who were part of America's then nascent workplace anti-bullying movement. Gary Namie of the Campaign Against Workplace Bullying dubbed it the "Healthy Workplace Bill" (HWB), and that name would stick. I discussed the major features of the HWB in a law review article that was part of an interdisciplinary symposium issue on workplace bullying published in the *Employee Rights and Employment Policy Journal* (Yamada 2004). The article also discussed successful efforts to enact protections against workplace bullying in

other nations, thereby underscoring the importance of America following suit.

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During my 27 years as a law teacher, I have delved into several areas of employment law and policy where I eventually made specific recommendations for law reform. For each topic, initial research forays into the legal literature led me to titles of law journal articles suggesting that my contemplated article would be unnecessary—or “preempted,” in law review vernacular—because I assumed the respective authors had covered the requisite ground and proposed solutions similar or identical to my ideas. To my great surprise (and relief), these authors chose not to fully canvass the underlying factual and legal realities and settled for more general criticisms or calls for changes in the law. In two of these areas—legal protections against workplace bullying and the legal implications of unpaid internships—the resulting voids allowed me to address the topics in much-needed depth and breadth, thus opening the door to work that would lead the way on specific law reform proposals (Yamada 2016).

In view of my experiences, I will offer some gentle prodding and encouragement: If you are working on a legal or policy topic and believe that you have a compelling idea for law reform, then go for it. Be responsibly bold, which in this context means doing the requisite research and hard thinking and then putting forth a complete, well-developed proposal for policy change. Where applicable, you should draft proposed legislation.

### 3. Sharing the HWB with the world

As a California resident, Dr Namie began circulating the draft of the HWB to potential state legislative sponsors. In 2003, he persuaded a California state legislator to introduce the HWB, marking the first time that a workplace anti-bullying bill had been introduced in a formal session of an American state legislature. This was the first in a succession of state and local legislatures to consider the HWB. Since then, variations of the HWB have been introduced in some 30 American state legislatures. However, as support for the legislation has grown, so has opposition from employers and pro-business lobbying groups. Consequently, as of 2017, the full HWB has yet to be enacted by an American legislature.

Nevertheless, recent years have yielded several successes and demonstrated growing receptivity to workplace anti-bullying legislation. Several states and localities—including California, Utah, Tennessee and Fulton County, Georgia (covering Greater Atlanta)—have enacted workplace anti-bullying laws that draw heavily on the template language of the HWB. Most of these measures involve requirements for employee training, education and policies concerning workplace bullying, rather than creating new legal causes of action. That said, legislative responses to workplace bullying have crossed from mere aspiration into reality. This progress has been spurred by grassroots organizing in the form of Healthy Workplace Advocates groups in many states, as well as by support from labor unions and civil rights groups (for more about these developments, see Yamada 2010b; 2013; 2015.)

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If engaging in scholarship about workplace bullying and the law puts me in an intellectual mode, then advocating for the statute I drafted and engaging in public education activities about workplace bullying puts me in an activist one. This work has included meeting with legislators and testifying at legislative hearings; drafting written testimony, fact sheets and letters to legislators; providing interviews to print, electronic and social media; and speaking at meetings, conferences and workshops. Compared to research and scholarship, these tasks have required different skill sets and an outward orientation.

In my case, this work came naturally. I was an activist before I grew into a scholar. As a volunteer and board member for various political, public policy and non-profit groups, I was able to hone my skills in drafting advocacy documents, organizing events and meetings and public speaking before non-academic audiences. In addition, before entering law school, I gained experience in newswriting as a department editor of my undergraduate newspaper and as a part-time news correspondent for local newspapers. These journalistic skills have proven extremely helpful in translating legal and policy concepts into understandable prose. (For those who are new to engaging in these writing and organizing tasks, I have provided titles of several very helpful books at the end of this chapter.)

An outward orientation is essential to building partnerships and networks. Let me share an example from my home state of

Massachusetts. In 2007, I gave a presentation about workplace bullying to several hundred union activists from the Service Employees International Union/National Association of Government Employees (SEIU/NAGE). I could tell that my talk was very well received, but I had no idea just how much until a few months later, when Greg Sorozan, president of one of the SEIU/NAGE local chapters, informed me that all of the affiliated union locals were bargaining over concerns about workplace bullying in their contract negotiations. Two years later, the Commonwealth of Massachusetts would agree to include a new contract provision about bullying and abusive supervision, covering some 21,000 state workers.

But there was more to come. Greg Sorozan also asked the union's lobbyists to seek a sponsor for the HWB in the Massachusetts legislature, and a leading state senator agreed to file the bill for the 2009-10 legislative session. SEIU/NAGE has maintained its strong support of the HWB through subsequent sessions. During the 2017-18 session, we have over 45 legislative sponsors and co-sponsors.

#### 4. Evaluating efforts to enact the Healthy Workplace Bill

Even as efforts to enact comprehensive workplace anti-bullying legislation continue, evaluation has come in four ways. First, I have revisited the core policy goals for workplace anti-bullying legislation. As discussed above, I initially included punishment as one of the four major policy objectives. I no longer do so. I now regard prevention of workplace bullying and compensation to bullying targets as the primary policy objectives.

Second, the template version of the HWB has undergone several revisions, while retaining most of its core language. These changes have come about due to suggestions and criticisms of the bill's language from advocates, lawyers and legislative staff, as well as my own second (and third) looks at my handiwork.

Third, we have engaged in ongoing assessments of the effectiveness of our legislative advocacy efforts. This work has been based on incomplete information. Those who oppose the HWB have tended to voice their opposition quietly via private communications with legislators, rather than issuing public broadsides.

Fourth, we are now starting to look at the nascent histories of enacted laws that drew from the HWB template language, but fell short of adopting the full version. Eventually it may be possible to compare and contrast the effects of these varied laws, and we anticipate someday adding the impact of the full HWB into the mix, hopefully sooner than later.

### **Becoming genuinely interdisciplinary**

Experience has taught me that operating in a genuinely interdisciplinary manner means immersion in other disciplines. During the past decade, I have gained abundant raw knowledge and understanding about psychology, organizational behavior and human dignity studies. This expansion has been reflected in the conferences and workshops I participate in, the books and articles I read and my overall intellectual orientation. The accompanying work has been deeply engaging and career defining. This includes a growing body of work beyond the law and legal affiliations. Here are some examples:

- I have maintained a blog that has attracted over one million page views and some 1,600 subscribers since its launch in 2008 (Yamada, *Minding the Workplace*) and has been identified by multiple social media sites as a leading workplace psychology blog;
- I worked closely with the American Psychological Association's Center for Organizational Excellence to create a resource webpage on workplace bullying, including suggested books, articles and social media sites, as well as an animated educational video that can be used as an employee training and education tool;
- I joined Dr Maureen Duffy as a co-editor of a two-volume, interdisciplinary book set, *Workplace Bullying and Mobbing in the United States*, featuring the work of over two dozen contributors (Duffy & Yamada 2018); and,
- I serve on the board of directors of Human Dignity and Humiliation Studies, a global, non-profit network of scholars, practitioners, activists, artists and students dedicated to advancing human dignity and reducing the experience of humiliation.

In addition, in July 2017, I joined with several dozen members of the TJ community at the International Congress on Law and Mental Health in Prague in the Czech Republic, to launch the new International Society for Therapeutic

Jurisprudence. My association with the TJ community has grown into a deeply meaningful affiliation and a treasured source of friends and colleagues. These connections have enriched me personally and intellectually.

## Conclusion

The methodology for legislative scholarship and advocacy described here can take years, even decades, to cycle through. Such is the nature of law reform. In putting forth this process, I have made the major, yet (I believe) safe assumption that those of us who identify with the TJ community are committed to our work for the long term. We know that the hard slog of changing the law for the better is not for dilettantes. Our association with this community helps to renew and enlighten us, not to mention sustains us when spirits flag. Despite the inevitable frustrations of working to change our laws and legal systems for the better, we are blessed to have these opportunities and to engage in work that renders our labors a genuine calling. I hope that the ideas I have shared here contribute positively to how we go about that work.

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### Additional reading

My 2016 law review article, “Intellectual Activism and the Practice of Public Interest Law” (cited above), goes into greater depth about the practice of intellectual activism. I first discussed intellectual activism in a 2010 law review article, “Therapeutic Jurisprudence and the Practice of Legal Scholarship” (also cited above). These and my other articles listed in the reference list can be freely accessed from my Social Science Research Network page available at: [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=506047](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047).

Since 2008, I have been writing a blog, *Minding the Workplace*, which serves as my interdisciplinary platform for commentary about work, workers and workplaces, with emphasis on workplace bullying, worker dignity,

organizational psychology and employment law and policy. It may be accessed at: <https://newworkplace.wordpress.com>.

In addition, I happily recommend the following books, each of which helps us to understand the linkages between research, scholarship, advocacy and social action:

Badgett, M.L. (2016). *The Public Professor: How to Use Your Research to Change the World*, New York: New York University Press.

Bobo, K., Kendall, J., & Max, S. (2010). *Organizing for Social Change: Midwest Academy Manual for Activists*, 4th edn, Orange Co., CA: Forum Press.

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