LEGAL STUDIES RESEARCH PAPER SERIES
RESEARCH PAPER 08-36
November 12, 2008

Human Dignity and American Employment Law

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ESSAY

HUMAN DIGNITY AND AMERICAN EMPLOYMENT LAW

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I. INTRODUCTION

American employment law has been dominated by a belief system that embraces the idea of unfettered free markets and regards limitations on management authority with deep suspicion. Under this "markets and management" framework, the needs for unions and collective bargaining, individual employment rights, and, most recently, protection of workers amid the dynamics of globalization, are all weighed against these prevailing norms. The creation of New Deal labor and social legislation during the 1930s and the expansion of employment rights during the 1960s and 1970s provided tangible benefits to workers in terms of collective bargaining and minimum wage, safeguards against discrimination, and modest wrongful discharge protections. These gains have been under continuous and vigorous attack for several decades, however, to the point where today, the state of American employment relations is at a critical juncture.

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This essay is an attempt to advance the theme of human dignity in the workplace, rather than a claim to have written the "last word" on the topic. I hope that it will encourage others to draw from the ideas and sources contained herein to further their own work, and I welcome exchanges about how "dignitarian" principles can be applied to future employment law scholarship and advocacy.

For the sake of workers and organizations alike, we must rethink this dominant framework. Concerns about income, job security, and working conditions now cut across the socioeconomic spectrum. Consistent trends such as lower union membership levels, growing wealth inequality, and globalization of markets raise important questions about the well-being of everyday workers and their role in shaping the modern workplace. Despite the seeming abundance of potential legal protections for many American workers, effectuating one's employment-related rights can be a lengthy, expensive, and stressful undertaking. Legal process is costly and time-consuming for both employees and employers.

This essay posits that human dignity should supplant "markets and management" as the central framework for analyzing and shaping American employment law. Simply put, we need to reframe the intellectual and rhetorical debate over employment law and policy to focus on the dignity and well-being of workers. Illuminative on this point is the work of linguistics professor George Lakoff,[1] who has attracted considerable attention with his theories about how public issues are framed and discussed in the United States. According to Lakoff, "Frames are the mental structures that allow human beings to understand reality—and sometimes to create what we take to be reality."[2] These frames "facilitate our most basic interactions with the world—they structure our ideas and concepts, they shape the way we reason, and they even impact how we perceive and how we act."[3] Lakoff has urged progressives to communicate their basic values more effectively by framing issues in ways that resonate with stakeholders and the general public.[4]

Lakoff's ideas are equally applicable to employment relations. For too long, the ideas of unfettered free markets and management control have framed how we look at regulating the workplace. We must change that frame in order to build public support for stronger labor protections and better enforcement,

1. *See generally* GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION (2006) (discussing how progressives can better communicate their values to the American public).

2. *Id*. at 25.

3. *Id*.

4. *See id*. at 12. Lakoff's main vehicle for public dissemination of these ideas is the Rockridge Institute, a non-profit research and education center. *See* About Us—Rockridge Institute, http://www.rockridgeinstitute.org/aboutus.html (last visited Dec. 8, 2008).

and we can do so by making the case for human dignity in the workplace. Within such a "dignitarian"[5] framework, there is plenty of room for market-based competition, entrepreneurship, individual responsibility, and sound management prerogative. Furthermore, the call for dignity in the workplace is not a rallying cry for state ownership, runaway taxation, or regulatory micromanagement of the workplace. Rather, it is about promoting the complementary goals of healthy, productive, and socially responsible workplaces within a mix of robust private, public, and nonprofit sectors.

This argument needs to be developed and advanced, and so the discussion is organized as follows: Part II examines the dominant markets and management framework. Part III sets out the theoretical and policy considerations of an employment law framework grounded in individual dignity. The sources range from the writings of Enlightenment philosopher John Locke and the drafters of America's Declaration of Independence and the United States Constitution, to the more recent works of Carol Gilligan and Jean Baker Miller and the emerging fields of therapeutic jurisprudence, relational psychology, and occupational health psychology. Part IV applies these ideas to a small cluster of important employment law issues, including unions and collective bargaining, job security, workplace bullying, employment discrimination, dispute resolution, and globalization. Finally, Part V closes the essay by considering how worker dignity can become the dominant framework for American employment law.

II. MARKETS AND MANAGEMENT

Markets and management can be very good things. In their best light, markets remind us of the affirmative value of enterprise and entrepreneurship. Healthy competition can provide a variety of quality goods and services at reasonable prices. The transformation of ideas into tangible products, the dream of starting one's own business, and the building of a successful enterprise are all opportunities provided by a society that allows for free

5. "Dignitarian" is a term used by Robert Fuller in his examinations of dignity in our society, and I am happy to adopt it for this essay. *See generally* ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY (2006) [hereinafter FULLER, ALL RISE]; ROBERT W. FULLER, SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK (2003) [hereinafter FULLER, SOMEBODIES AND NOBODIES].

markets. Similarly, good management practices can lead to energized organizations, healthy and productive workers, and satisfied consumers.

Unregulated markets and unchecked management authority, however, can take us down a dangerous path. This has occurred in the United States, and the discussion below will explain these developments in relation to the workplace. Part A examines the emergence and effects of this dominant framework and Part B considers its confluence with the development of modern employment law and policy.

A. *Dominance of the Markets and Management Framework*

In the late 1990s, political economist and journalist Robert Kuttner wrote that America "is in one of its cyclical romances with a utopian view of laissez-faire."[6] A decade later, it is clear that this has been an awfully long romance. During the past quarter of a century, belief in a mixed economy that tempers the excesses, inequities, and uncertainties of the market with government regulation and a safety net has given way to the conviction that "[u]nfettered markets are deemed both the essence of human liberty, and the most expedient route to prosperity."[7]

It is clear, to borrow from Lakoff, that staunch supporters of the free market have succeeded in "framing" the debate.[8] Communications professor James Arnt Aune, examining "several rhetorical strategies of economic analysis" that have been deployed by free market defenders, concluded that defining "any object, person, or relationship as a commodity that can be bought or sold" has been a key to their success.[9] He used the term "economic correctness" to capture how free market rhetoric has come to dominate everyday political debate in America.[10] Along these lines, social commentator Thomas Frank has observed that "[t]o

6. ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 4 (1997).

7. *Id*. at 3.

8. *See supra* note 2 and accompanying text.

9. JAMES ARNT AUNE, SELLING THE FREE MARKET: THE RHETORIC OF ECONOMIC CORRECTNESS 36 (2001).

10. *Id*. at 4.

protest *against* markets is to surrender one's very personhood, to put oneself outside the family of mankind."[11]

Ironies abound, as it fairly can be argued that the very dominance of the markets and management framework has caused many workers to surrender their personhood, at least on the job. Political writer William Greider trenchantly described these realities of work in modern America:

> In pursuit of "earning a living" most Americans go to work for someone else and thereby accept the employer's right to command their behavior in intimate detail. At the factory gate or the front office, people implicitly forfeit claims to self-direction and are typically barred from participating in the important decisions that govern their daily efforts. Most employees lose any voice in how the rewards of the enterprise are distributed, the surplus wealth their own work helped to create. Basic rights the founders said were inalienable—free speech and freedom of assembly, among others—are effectively suspended, consigned to the control of others. In some ways, the employee also surrenders essential elements of self.[12]

Economist Julie Nelson has described evolution of economic discourse as a transformation from the organic to the mechanistic. Traditionally, economics was "about the provisioning of goods and services to meet our material needs," examining the ways "we manage our time and money so we can obtain groceries and shelter and thus 'keep body and soul together.'"[13] In contemporary discussions about economics, however, "it seems that body and soul grow ever farther apart," with "money, profits, markets, and corporations" serving as "parts of an 'economic machine,'" to the neglect of normative questions about ethics and morality.[14]

The economic machine imagery invoked by Nelson resonates with the emergence of the profession of management. The early twentieth century gave rise to this new profession, most notably via theories of "scientific management" championed by Frederick Taylor, a mechanical engineer and management consultant.[15] Analyzing productivity in America's burgeoning manufacturing sector, Taylor believed that management's inability "to set accu-

11. THOMAS FRANK, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY xiii (2000).

12. WILLIAM GREIDER, THE SOUL OF CAPITALISM 49 (2003).

13. JULIE A. NELSON, ECONOMICS FOR HUMANS 1 (2006).

14. *Id.*

15. RONALD L. FILIPPELLI, LABOR IN THE USA 60 (1984).

rate standards for each job" allowed workers to "manipulate their jobs and connive to set output levels far below their actual capacity."[16] Taylor's response was to use time-and-motion studies to determine what levels of productivity could be expected of factory workers and what wages they should receive. [17]

Leaders of organized labor protested Taylor's methods, claiming his techniques reduced workers to the status of machines.[18] However, those leaders lost this battle, as "[c]ompanies embraced time study with great enthusiasm," applying it to rationalize assembly lines and piecework payment.[19] In fact, organized labor was the lone dissenting voice on this question, as "[c]apitalists, managers, and Progressive reformers all embraced Taylor and his concepts."[20] The latter group included the likes of Walter Lippmann, co-founder of the *New Republic*, and, ironically, as we will see below, Louis Brandeis.[21] According to organizational behavior scholar Rakesh Khurana, scientific management helped to achieve "the triumph of management over labor, skilled craft workers, and foremen for control of the shop floor, providing ideological and cultural justification for that control."[22]

Today, management control remains a central priority for corporate America, and companies devote considerable resources to applying psychological methods to select, motivate, and manipulate workers.[23] As explained by leadership expert Joanne Ciulla, amid the expansion of the white-collar workforce, employers have applied "management techniques and organization theories honed during World War II," with the goal of "mold[ing] their employees into *their* image of a good corporate citizen."[24] These practices keep workers in line while improving the lot of high-

16. *Id*.

17. *Id*. at 60–61.

18. *Id*. at 61.

19. *Id*.

20. RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 96 (2007).

21. *Id*.

22. *Id*. at 95.

23. *See* JOANNE B. CIULLA, THE WORKING LIFE: THE PROMISE AND BETRAYAL OF MODERN WORK 110–16 (2000) (discussing how employers apply psychological principles to management practices).

24. *Id*. at 108.

level managers.[25] John Kenneth Galbraith, in his last major writing, reminded us that in the modern corporation, "[m]anagement authority remains unimpaired, including the setting of its own compensation in cash or stock options," bolstered by "a corporate system based on the unrestrained power of self-enrichment."[26] Organizational psychologist Harvey Hornstein has used the term "*we*-boosting" to capture "how powerful, privileged members of some companies are providing themselves with preferential treatment to the detriment of other employees, their own firms, and society at-large."[27]

Meanwhile, our culture has celebrated leaders who rule by fiat and intimidation, conferring upon those who terminate workers an inexplicably perverse fame. For example, "Chainsaw Al" Dunlap was regarded as the savior of the ailing Sunbeam Corporation by severely cutting jobs and pitting stakeholders against each other, until it became evident that he had run the company toward bankruptcy.[28] "Neutron" Jack Welch was hailed for rescuing General Electric by eliminating some 130,000 jobs while managing in a way that was "criticizing, demeaning, ridiculing, [and] humiliating" to his employees.[29] Donald Trump regained some lost fame through his reality television show about corporate ladder climbing, *The Apprentice*, and in the process managed to popularize the phrase "You're fired!"[30]

B. *Harms Under the Markets and Management Framework*

If the practices underlying the markets and management framework were delivering the promised utopia, then there would be much less room for quarrel. However, the benefits of this approach are not being shared by all. Income inequality has grown

25. *See id*. (discussing corporate managers' post-World War II goal of "creat[ing] the kind of commitment that they had seen in the war effort").

26. JOHN KENNETH GALBRAITH, THE ECONOMICS OF INNOCENT FRAUD: TRUTH FOR OUR TIME 30 (2004).

27. HARVEY A. HORNSTEIN, THE HAVES AND THE HAVE NOTS: THE ABUSE OF POWER AND PRIVILEGE IN THE WORKPLACE . . . AND HOW TO CONTROL IT xv (2003).

28. *See* BARBARA KELLERMAN, BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS 129–42 (2004).

29. STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 85–87 (2008).

30. *Trump Sees Silver Lining*, CBS News, Nov. 23, 2004, http://www.cbsnews.com/stories/2004/03/31/national/main609576.shtml.

substantially over the past three decades, to the point where "the gap between rich and poor is bigger than in any other advanced country."[31] According to a 2006 National Bureau of Economic Research report, from World War II until the 1970s, the income share of the top decile (10%) held steady at just above 30% of the nation's total income.[32] That share has increased sharply during the past twenty-five years, however, reaching over 40% by the 1990s.[33] During the 1980s and 1990s, the top 0.1% of income earners enjoyed the strongest gains in income share, receiving over 7% of the total income by the end of the century.[34]

Figures drawn from the U.S. Bureau of the Census showing real income growth among families between 1979 and 2003 tell a similar story:

Bottom 20%: –2%
Second 20%: +8%
Middle 20%: +15%
Fourth 20%: +26%
Top 20%: +51%[35]

The top 5% ($170,100 and above) realized a 75% gain in real family income during that period.[36]

Insecurity and stress about jobs and the future cut across socioeconomic lines, reaching low-income and professional workers alike.[37] The human impact is best told through stories, such as Barbara Ehrenreich's chronicles of the challenges facing both working families who are struggling to make ends meet in the

31. *Inequality in America: The Rich, the Poor and the Growing Gap Between Them*, ECONOMIST, June 17, 2006, at 28, *available at* http://www.economist.com/world/displaystory.cfm?story_id=E1_SDVVJTT.

32. Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective* 3 fig.1 (Nat'l Bureau of Econ. Research, Workingpaper No. 11955, 2006), *available at* http://www.nber.org/papers/w11955.

33. *See id.*

34. *See id.* at fig.3.

35. *See* CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY 41 (rev. ed. 2005) (bar graph summarizing statistical data from Census Bureau).

36. *Id.*

37. *Compare* BETH SHULMAN, THE BETRAYAL OF WORK: HOW LOW-WAGE JOBS FAIL 30 MILLION AMERICANS AND THEIR FAMILIES (2003) (examining working conditions and compensation for individuals in low-wage jobs), *with* JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA (2001) (examining working conditions in the white-collar corporate sector).

low-wage workforce and unemployed professionals who are attempting to rebuild their self-esteem, careers, and incomes following layoffs.[38] Unfortunately, the increasing levels of income inequality summarized above, in addition to growing levels of income instability, support the palpable anxiety and despair evident in the subjects of Ehrenreich's reportage. A 2008 Economic Policy Institute study documented growing levels of income volatility as measured by "the share of working-age individuals who experienced a drop in family income of 50% or greater over a two-year period," with large spikes occurring during economic downturns and a generally upward trend between the early 1970s and the early 2000s, "peaking at nearly 10% in 2002."[39]

The everyday experience of work is delivering negative health consequences as well. A 1999 report on work-related stress by the National Institute for Occupational Safety and Health concluded that job stress is linked to higher levels of cardiovascular disease, musculoskeletal disorders, and psychological disorders.[40] The report also suggested a possible correlation between job stress and higher levels of workplace injuries, suicides, cancer, ulcers, and impaired immune function.[41] According to one insurance company study referenced in the report, "Problems at work are more strongly associated with health complaints than are any other life stressor—more so than even financial problems or family problems."[42]

In addition, the workplace subjects many workers to severe bullying and psychological abuse. Gary and Ruth Namie have defined workplace bullying as "the repeated, malicious, health-endangering mistreatment of one employee . . . by one or more employees."[43] In 2007, their non-profit Workplace Bullying Institute partnered with Zogby International pollsters to conduct the

38. *See* BARBARA EHRENREICH, BAIT AND SWITCH: THE (FUTILE) PURSUIT OF THE AMERICAN DREAM (2005) (reporting on the lives of the white-collar unemployed); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (reporting on the experience of working in full-time, poverty-level wages).

39. Jacob S. Hacker & Elisabeth Jacobs, *The Rising Instability of American Family Incomes, 1969–2004: Evidence from the Panel Study of Income Dynamics* 8 (Econ. Policy Inst., Briefing Paper No. 213, 2008), *available* at http://www.epi.org/content.cfm/bp213.

40. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 99-101, STRESS . . . AT WORK 11 (1999), *available at* http://www.cdc.gov/niosh/pdfs/stress.pdf.

41. *See id*.

42. *Id*. at 5 (citing STACEY KOHLER & JOHN KAMP, ST. PAUL FIRE & MARINE INS. CO., AMERICAN WORKERS UNDER PRESSURE TECHNICAL REPORT 13 tbl. 7 (1992)).

43. GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK 3 (rev. ed. 2003)

first comprehensive U.S. survey of workplace bullying.[44] Among the significant findings were that 37% of respondents had been subjected to workplace bullying at some point in their work lives and that 45% of bullying targets experienced stress-related health consequences.[45] Targets further responded that when they reported bullying, their employers either ignored the problem or made it worse 62% of the time.[46]

C. *Workers' Rights Under the Markets and Management Framework*

The general legal status of workers reinforces the model of unilateral management control. By the early 1900s, employment at will, that is, the right of an employer to discharge a worker for any reason or no reason at all, had become the presumptive employment relationship in the United States.[47] It remains so today. As Clyde Summers has observed, America, "unlike almost every other industrialized country and many developing countries," has adopted neither general protections against unfair dismissal nor even minimum periods of notice.[48] Such protections are reserved largely for union members working under collective bargaining agreements.[49]

1. Unions

Management resistance, even antipathy, towards unions is nothing new. Paul Weiler has reminded us, "For the last century management in the United States has been vigorously opposed to union representation, as much if not more so than management in any other industrialized nation."[50] The decades that followed the enactment of the National Labor Relations Act of 1935,[51]

44. *See* WORKPLACE BULLYING INST. & ZOGBY INT'L, U.S. WORKPLACE BULLYING SURVEY (2007), http://www.bullyinginstitute.org/zogby2007/WBIsurvey2007.pdf.

45. *Id*. at 1.

46. *Id*.

47. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67–68 (2000).

48. *Id*. at 65.

49. *See id*. at 85.

50. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 13 (1990).

51. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2000)).

which provides employees the rights to join unions and engage in collective bargaining, and the conclusion of World War II in 1945, saw the emergence of a tripartite structure of industrial relations, with less confrontational unions joining management and government as partners in workplace governance.[52] Although commentators disagree over whether this period constituted a social compact or "labor peace" between management and labor,[53] it is fair to say that it was short-lived.

The percentage of workers who belong to unions has declined sharply over the past fifty years. In the 1950s, just over a third of the American workforce was unionized.[54] That percentage fell to 24% in 1973 and to 12% in 2006.[55] Although there are many reasons behind the decline of organized labor, one of the major causes is the extreme level of sophisticated, aggressive, and generously funded anti-union activity on the part of many employers.[56] Labor researcher Kate Bronfenbrenner found that 75% of employers facing organizing drives hired anti-union consultants.[57] Employer retaliation against workers who support unionization is one of the most common violations of federal labor law.[58] When unions win representation elections, many employers successfully

52. *See* WEILER, *supra* note 50, at 7–12.

53. *Compare* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE, 290–91 (3d ed., rev. 1979) (opining that "acceptance of the union by the industrial firm and the emergence thereafter of an era of comparatively peaceful industrial relations" actually represented "Jonah's triumph over the whale"), *with* GREENHOUSE, *supra* note 29, at 75–79 (discussing the "social contract" that existed between management and labor, benefitting workers in terms of job security, wages, and benefits), *and* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 98–99 (2002) (criticizing the notion of a social compact and concluding that "[a]t best it was a limited and unstable truce, largely confined to a well-defined set of regions and industries").

54. COLLINS & YESKEL, *supra* note 35, at 81.

55. Barry T. Hirsch & David A. Macpherson, Union Membership, Coverage, Density, and Employment Among All Wage and Salary Workers, 1973–2007, http://unionstats.gsu.edu.

56. *See generally* GREENHOUSE, *supra* note 29, at 247–49 (detailing employer resistance to unions); Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75–89 (Sheldon Friedman et al. eds., 1994) (discussing employer resistance to unions and testing whether labor law reform will diminish that resistance); John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA Since the 1970s*, 33 INDUST. REL. J. 197, 197–99 (2002) (detailing the growth of anti-union consulting and strategizing in the United States).

57. GREENHOUSE, *supra* note 29, at 247 (citing Bronfenbrenner, *supra* note 56, at 80).

58. *See id.* at 247–48; *see, e.g.*, Tasty Baking Co. v. NLRB, 254 F.3d 114, 125 (D.C. Cir. 2001) ("It is well settled that an employer violates the NLRA by taking an adverse employment action, such as issuing a disciplinary warning, in order to discourage union activity.").

engage in bargaining tactics designed to defeat efforts to secure a first collective bargaining agreement.[59]

These anti-union tactics are aided by inadequate government enforcement of labor protections. In 2000, Human Rights Watch, an international non-governmental organization, issued a report on labor rights in America concluding, among other things, that "workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights."[60] In her frank assessment of the current state of federal collective bargaining law, Wilma Liebman, a senior member of the National Labor Relations Board, concluded, "Somewhere along the way, New Deal optimism has yielded to raw deal cynicism about the law's ability to deliver on its promise. The National Labor Relations Act, by virtually all measures, is in decline if not dead."[61]

2. At-Will Employees

The low union density in America means that most workers are not covered by collective bargaining agreements and presumptively are at-will employees. In terms of voice in the workplace, the typical at-will employee enjoys, at best, the ability to make requests of, or submit non-binding suggestions to, an employer.[62] Only the most fortunate individuals, notably those with special skills or in high-demand professional, athletic, or artistic vocations, possess the leverage to engage in individual negotiations over job security, compensation, and working conditions.

Consequently, in most non-union workplaces, the power to set internal employment policies, as well as compensation and benefits, remains largely in the hands of management, but is subject to compliance with regulatory standards. At larger companies,

59. *See* Logan, *supra* note 56, at 209–10.

60. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 8 (2000).

61. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 572 (2007).

62. For commentary on the free speech rights of workers, see generally BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE (2007); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1 (1998).

high-level executives establish broad parameters for employment relations, human resources offices administer personnel policies, and mid-level managers supervise and evaluate the work of subordinates. They are supported by in-house lawyers who provide advice, counsel, and litigation support.

Of course, at-will employees are not without labor protections and safeguards. In particular, the 1960s and 1970s witnessed the emergence of a large body of statutory, administrative, and common-law protections granting various employment rights to individuals. The most notable of these are the Civil Rights Act of 1964 and other employment discrimination laws, the Occupational Safety and Health Act, and various wrongful discharge claims grounded in contract and tort law doctrine.[63] The ongoing development of this body of law has resulted in greater safeguards against physical and dignitary harms, created several exceptions to the rule of at-will employment, and forged a modest safety net of wage and benefit protections.[64]

For most American workers, this somewhat unwieldy legal smorgasbord serves as their primary source of legal protections on the job. Although the creation of individual employment protections was spurred in part by civil rights advocacy backed by the solidarity of social movements, workers often must effectuate these rights in solitary fashion, pursuing stressful, lengthy, and expensive legal proceedings, typically without the benefit of large group or union support.[65] Modern employment litigation all too often encompasses the David versus Goliath scenario of an aggrieved worker and a small plaintiffs' law firm vying against a large company armed with an overstaffed team of attorneys.[66]

63. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 3–4 (3d ed. 2005).

64. *See* BARRY, *supra* note 62, at 46–54.

65. The experiences of plaintiffs in employment discrimination litigation underscore this point. *See, e.g.*, BARI-ELLEN ROBERTS WITH JACK E. WHITE, *ROBERTS VS. TEXACO*: A TRUE STORY OF RACE AND CORPORATE AMERICA (1998) (personal account by lead plaintiff in major racial discrimination case); Beth Ann Faragher, Faragher v. City of Boca Raton: *A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 417 (2005) (personal account by plaintiff in sexual harassment case that led to Supreme Court decision setting standards for employer liability); Ann Hopkins, Price Waterhouse v. Hopkins: *A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357 (2005) (personal account by plaintiff in sexual discrimination case that led to Supreme Court decision examining sex stereotyping).

66. *See supra* note 65.

Labor lawyer Thomas Geoghegan has captured well how the demise of labor unions has led to courts and administrative agencies serving as the primary venues for employment-related dispute resolution.[67] Whereas the grievance process in a union-management setting often contemplates a continuing employment relationship, or perhaps the re-establishment of one, legal process for most non-union workers is so imbued with anger, accusation, and expense that the parties only grow further apart, even if they move closer to a legal resolution of their differences.[68] Geoghegan concluded:

> [T]his tort-type legal system, which replaces contract, is a system that feeds on 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.[69]

Of course, the resolution of certain types of claims, such as actions for discrimination and harassment, may be unavoidably confrontational and emotional even in a labor-management style grievance and arbitration system. Nonetheless, Geoghegan's larger point about the human and economic costs of employment litigation holds true.

Although employers exercise considerable power in the individual employment rights regime, some leading disciples of the markets and management framework are deeply critical of these new protections. For example, Richard Epstein has defended employment at will as a proper manifestation of market forces.[70] He has characterized employment discrimination laws as an "assault" on common-law ideals and concluded that any social or economic benefits brought by these protections do not justify their costs.[71] Leading "tort reform" advocate Walter Olson has claimed that the new employment rights have "begun to stifle free expression, curb the sense of limitless possibility that characterizes the best jobs, and . . . actually subtract from the pleasing 'diversity' of

67. *See* THOMAS GEOGHEGAN, THE LAW IN SHAMBLES 18–26 (2005). Geoghegan is a practicing attorney and noted author of books and articles about the labor movement, workers' rights, and politics in America.

68. *See id*. at 26.

69. *Id*.

70. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

71. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 27 (1992).

which we hear so much today."[72] These objections have been entirely consistent with the broad anti-regulatory emphasis of free market rhetoric and policy.

3. Globalization

Globalization often is portrayed as a phenomenon so powerful and inevitable that mere mortals can only marvel at it and embrace it. Modern technologies, noted Thomas Friedman, who is perhaps the leading chronicler of developments in global trade and communication, "are making it possible not only for traditional nation-states and corporations to reach farther, faster, cheaper and deeper around the world than ever before, but also for individuals to do so."[73] Among the forces that have "flattened the world" are the World Wide Web, outsourcing and offshoring of work, and creation of global supply chains.[74]

But when it comes to workers, we have been here before. Operating under the banner of free trade, we see that globalization is driven by the old fashioned desire to expand profits by accessing new markets and reducing the costs of production and distribution, usually through technology and automation, vastly lower wages, and deregulated non-union workplaces.[75] These business practices have been aided by the very "flattening" forces so enthusiastically recounted by Friedman. American trade policy is deeply rooted in the markets and management framework.

This quality is most evident in the form of the North American Free Trade Act ("NAFTA"), effective since 1994, which was designed to facilitate the movement of goods between the United

72. WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 13 (1997).

73. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE xviii (rev. ed. 2000).

74. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 50–200 (rev. ed. 2006) (explaining "the ten forces that flattened the world").

75. This dynamic is captured well in WILLIAM M. ADLER, MOLLIE'S JOB (2000), an account of one factory job and the different people who held it as an employer moved its manufacturing operations from New Jersey to Mississippi and finally to Mexico. For general commentary describing the nature of globalization and its impact on workers, see SARAH ANDERSON ET AL., FIELD GUIDE TO THE GLOBAL ECONOMY (rev. ed. 2005) (providing an explanation of global economics, with special attention to impact on workers and consumers); WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 11–26 (rev. ed. 1998) (discussing overall practices of global capitalism).

States, Mexico, and Canada.[76] The evidence so far, according to an Economic Policy Institute report, indicates that while NAFTA has helped raise corporate earnings, it has contributed to job losses and income inequality in all three signatory countries.[77] Co-author Robert Scott found that in the United States, "NAFTA has contributed to the reduction of employment in high-wage, traded-goods industries, the growing inequality in wages, and the steadily declining demand for workers without a college education."[78]

NAFTA also has negatively affected the labor movement in the United States. Kate Bronfenbrenner documented that, in the wake of NAFTA, employers in mobile industries became increasingly likely to use threats of plant closings to oppose unionization drives.[79] Threats to move jobs to Mexico or Southeast Asia following a successful union campaign are much more likely to be taken seriously "in an auto parts plant, textile mill or telecommunications call center" than "in a nursing home, retail store, social service agency or hotel."[80] Consequently, in "the least mobile industries, such as health care and passenger transportation," the win rate in union campaigns where closing threats were made was around 60%, while in manufacturing, the win rate in union campaigns with closing threats was 28%.[81]

America also is exporting its anti-labor and anti-regulatory corporate practices. A study by John Logan found that American-style union opposition tactics are now being applied successfully in Great Britain.[82] One of America's largest anti-union consulting

76. *See* JEFF FAUX, THE GLOBAL CLASS WAR: HOW AMERICA'S BIPARTISAN ELITE LOST OUR FUTURE—AND WHAT IT WILL TAKE TO WIN IT BACK 10 (2006).

77. *See* Jeff Faux, *Introduction* to ROBERT E. SCOTT, CARLOS SALAS & BRUCE CAMPBELL, REVISITING NAFTA: STILL NOT WORKING FOR NORTH AMERICA'S WORKERS 1 (Econ. Policy Inst., Briefing Paper No. 173, 2006), *available at* http://www.epi.org/briefing papers/173/bp173.pdf; *see also* FAUX, *supra* note 76, at 30–48 (discussing the negative impacts of NAFTA).

78. Robert E. Scott, *NAFTA's Legacy: Rising Trade Deficits Lead to Significant Job Displacement and Declining Job Quality for the United States in* ROBERT E. SCOTT, CARLOS SALAS & BRUCE CAMPBELL, *supra* note 77, at 3.

79. Kate Bronfenbrenner, *Raw Power: Plant-Closing Threats and the Threat to Union Organizing,* MULTINAT'L MONITOR, Dec. 2000, at 24, *available at* http://www.multinationalmonitor.org/mm2000/00december/power.html.

80. *Id.*

81. *Id.*

82. *See* JOHN LOGAN, U.S. ANTI-UNION CONSULTANTS: A THREAT TO THE RIGHTS OF BRITISH WORKERS 16–20 (Trades Union Congress 2008), *available at* http://www.tuc.org.uk/extras/loganreport.pdf.

firms, the Burke Group, "has established an international division that operates in Canada, Mexico, South America, United Kingdom, Belgium, France and Germany, telling clients that it enjoys an international reputation for 'eliminating union incursions.'"[83] When China was considering adoption of ambitious labor reforms that would strengthen protections for workers, multinational corporations actively opposed provisions that would have "limited the use of temporary workers and required obtaining approval from the state-controlled union for layoffs."[84] Even though the law eventually enacted was a watered-down version of what was originally drafted, "lawyers representing some big global companies doing business [in China] complained . . . that the new law still imposed a heavy burden."[85]

Economist Joseph Stiglitz observed, "Labour policy has in many countries been subsumed under broader economic policies which, all too often, have come to be dominated by commercial and financial interests."[86] He added, "Those defending such interests have been successful in propagating the idea that policies which advance their interests benefit all—a new version of trickle-down economics which suggests that workers do not even have to wait long, or at all, to receive the benefits of these wise policies."[87] America has embraced these ideas and policies with great fervor, to the benefit of a few and at the expense of the many. It is well past time for us to look for a better way.

III. "DIGNITARIAN" THEORY FOR THE WORKPLACE

A focus on human dignity provides a more viable, sustainable framework for examining and shaping the law of the workplace. Such a focus can help us to define both rights and responsibilities that promote healthy and productive workplaces. It also can guide us toward developing legal safeguards for those who have been mistreated at work and a safety net for those who have lost their jobs.

83. *Id*. at 16.

84. Joseph Kahn & David Barboza, *China Passes a Sweeping Labor Law*, N.Y. TIMES, June 30, 2007, http://www.nytimes.com/2007/06/30/business/worldbusiness/30chlabor.html.

85. *Id*.

86. Joseph E. Stiglitz, *Employment, Social Justice and Societal Well-Being*, 141 INT'L LAB. REV. 9, 25 (2002).

87. *Id*.

Concededly, dignity is a somewhat abstract concept, despite its common presence in the modern language of human rights. The *New Oxford American Dictionary* defines dignity as "the state or quality of being worthy of honor or respect."[88] Political scientist Michael Zuckert identifies "the constituents of human dignity" as being "free, equal, rights bearing, capable of morality, and uniquely valuable or worthy."[89] In his broad-ranging examination of "dignity at work," sociologist Randy Hodson defines it as "the ability to establish a sense of self-worth and self-respect and to appreciate the respect of others."[90]

These definitions help us to understand the broader picture, but we need to illuminate more precisely the meaning and substance of dignity. Accordingly, Part A will examine the evolution of a traditional conceptualization of dignity rooted in Enlightenment philosophy and the founding of the United States. Part B will examine a new conceptualization grounded in positive rights and benefits, recognition of the power of private actors, and protections against discrimination. Finally, Part C will examine dignity in the light of emerging fields, such as therapeutic jurisprudence, relational theory, and occupational health psychology.

A. *A Traditional Conceptualization of Dignity*

The writings of Enlightenment philosophers, especially John Locke, along with historical writings and documents surrounding America's struggle for independence and adoption of a constitution, are central sources in our attempt to develop what might be called a traditional conceptualization of human dignity. This early understanding of dignity was shaped by three overarching precepts. First, dignity is grounded in an inherent right to be free of harm to one's person or property. Second, the government can be both a violator and protector of individual dignity. Third, unchecked power can lead to abuses of power.

88. NEW OXFORD AMERICAN DICTIONARY 477 (Elizabeth J. Jewell & Frank Abate eds., 2001).

89. *See* Michael Zuckert, *Human Dignity and the Basis of Justice: Freedom, Rights, and the Self*, 9 HEDGEHOG REV. 32, 45 (2007).

90. RANDY HODSON, DIGNITY AT WORK 3 (2001).

1. Freedom from Harm

John Locke held that all men existed in a "state of nature," in which everyone was in a "state of perfect freedom" and equality, with "no one having more than another."[91] In this state of equality, liberty, and independence, "no one ought to harm another in his life, health, liberty, or possessions."[92] Zuckert, a Lockean scholar, has credited Locke for giving us an understanding of natural equality that "embodied a notion of fundamental human dignity and demand for equality and the equivalent of human dignity in social norms."[93] These rights may be characterized as "negative" ones, meaning that the "duty in some person or persons other than the rights holder" is "merely to forbear from taking action in hindrance of the right or the rights-bearer."[94]

These notions of fundamental rights now intersect with more recently developed ideas about privacy and what has been termed the "right to be let alone." In 1890, the *Harvard Law Review* published a seminal article by Samuel Warren and Louis Brandeis, which asserted that American law must recognize a right to privacy grounded in tort law.[95] Paying primary attention to the growing ability of the press and modern communications technologies to delve into and make public the personal lives of private citizens, the authors reasoned that invasions of privacy now subjected individuals to "mental pain and distress, far greater than could be inflicted by mere bodily injury."[96] Accordingly, "[t]houghts, emotions, and sensations demanded legal recognition," which should be in the form of "the 'right to be let alone.'"[97]

91. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 118 (Everyman's Library 1986) (1691).

92. *Id*. at 119.

93. Zuckert, *supra* note 89, at 39.

94. *Id*. at 40.

95. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

96. *Id*. at 195–96.

97. *Id*. at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (Chicago, Callaghon & Company, 2d ed. 1988)).

2. The Role of Government

The second precept concerning traditional notions of dignity is a focus on the state as potential violator and protector of basic human rights. These core concerns about the state's proper role framed the political and intellectual substance behind the American Revolution and the creation of the United States Constitution. Thomas Paine's writings about the exercise of power by the British Crown over its colonial subjects helped to galvanize public opinion in favor of separation from Great Britain.[98] The "inalienable rights" of "life, liberty, and the pursuit of happiness" were enshrined in America's Declaration of Independence, authored primarily by Thomas Jefferson.[99] The Bill of Rights both encompassed a strong suspicion of central government as a potential transgressor upon fundamental rights such as freedom of speech and association, and it imposed a concomitant obligation on government to safeguard those rights.

3. Unchecked Power

The drafters of the U.S. Constitution also understood the corruptive and abusive potential of unchecked power, and the resulting document would incorporate two principles to address this concern. First, there would be a separation of powers between the legislative, executive, and judicial branches. As James Madison wrote in *The Federalist*, "[T]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[100]

Second, a system of checks and balances would exist between the branches to help prevent an abusive exercise of power by any single branch. On this point, Madison recognized the deeply human meaning of power, writing, "Ambition must be made to counteract ambition. . . . It may be a reflection on human nature, that such devices should be necessary to contro[l] the abuses of gov-

98. *See* CRAIG NELSON, THOMAS PAINE: ENLIGHTENMENT, REVOLUTION, AND THE BIRTH OF MODERN NATIONS 78–100 (2006) (recounting the publication of, and response to, COMMON SENSE).

99. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

100. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 8th prtg. 1977).

ernment. But what is government itself but the greatest of all reflections on human nature?"[101]

4. Assessing the Traditional Approach to Dignity

John Locke, the Founding Fathers, and Warren and Brandeis did not invoke the word "dignity" in their writings. They penned their words well before modern psychology had staked its claim as a core social science, and before concepts such as stress and trauma were named and comprehended.[102] Nonetheless, they grasped the essence of dignity: they understood that being human is as much an emotional experience as it is a physical one, that both physical and emotional injuries can cause great harm, and that power vested in large institutions can lead to harmful abuses.

This forward vision also had significant blind spots. Women were treated as second class citizens, socially and legally. There was little, if any, recognition of potential abuse of power by private and public actors, *operating as employers*, toward individual workers. America of the eighteenth and nineteenth centuries had little comprehension of workers' rights. Our original Constitution anticipated the continuation of slavery, and its primary author, Thomas Jefferson, was a slave owner. If workers were injured on the job and unable to work, they were simply promptly discharged.[103] When workers sued their employers for unsafe working conditions, courts routinely dismissed their claims, holding that they had assumed the risks of being injured.[104] In sum, this early idea of dignity was sound in concept, but less than comprehensive in its application.

101. THE FEDERALIST, NO. 51, at 348 (James Madison) (Jacob E. Cooke ed., 8th prtg. 1977).

102. The term "stress" was "'almost unknown outside of the engineering profession'" prior to the 1940s. CARY L. COOPER & PHILIP DEWE, STRESS: A BRIEF HISTORY 1 (2004) (quoting LIONEL R.C. HAWARD, THE SUBJECTIVE MEANING OF STRESS, BRIT. J. MED. PSYCHOL. 185, 185 (1960)); *see also* FIONA JONES & JIM BRIGHT, STRESS: MYTH, THEORY AND RESEARCH 5 (2001)). Psychological trauma has received intermittent attention, as [p]eriods of active investigation have alternated with periods of oblivion." JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 7 (1992).

103. *See generally* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC (2004) (discussing the history of workers' compensation law).

104. *See* Eugene Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality,* 25 HARV. L. REV. 129, 129–30 (1912) (discussing that in the absence of Workers' Compensation statutes, the financial burden of on-the-job injuries fell on the worker).

B. *A New Conceptualization of Dignity*

The term "dignity" itself began entering our political and social policy discourse with the formation of the United Nations and, in particular, the advent of the Universal Declaration of Human Rights, (the "Universal Declaration") both of which were strongly shaped by the appalling human rights abuses of World War II.[105] Article 1 of the Universal Declaration began with a statement that echoed John Locke: "All human beings are born free and equal in dignity and rights."[106] The Universal Declaration went on to articulate specific social and economic rights:

> Everyone . . . has the right to social security . . . the right to work . . . the right to equal pay for equal work . . . the right to just and favourable remuneration . . . the right . . . to join trade unions . . . the right to rest and leisure . . . [and] the right to a standard of living adequate for the health and well-being of himself and of his family . . . .[107]

Translated into legislative and programmatic language, the Universal Declaration went well beyond the mandates of American employment law, then and now, especially concerning the rights to a job providing a living wage and to vacation time. Nevertheless, these international developments would coincide roughly with the evolution of a new conceptualization of dignity in American law, which supplemented, rather than supplanted, the traditional one. In terms of employment law and policy, the new conceptualization arose out of three basic principles: First, the law should encompass certain "positive" rights or obligations, to be effectuated by the state and perhaps by private actors. Second, the law should recognize that private actors, as well as the government, could engage in abuses of power against individuals. Third, the law should protect individuals against serious infringements upon their dignity motivated by bias due to intrinsic characteristics such as race or sex.

105. Zuckert, *supra* note 89, at 32.

106. Universal Declaration of Human Rights, G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

107. *Id.* at 75–76.

1. New Rights

The first half of the twentieth century found workers receiving new rights that obligated employers and the government to provide them with tangible benefits. Workers' compensation was the first major development, providing a no-fault compensation system of payments to assist workers who were partially or fully incapacitated owing to work-related injuries.[108] During the 1930s, New Deal legislative initiatives provided minimum wage and overtime protections, the right to join unions and collectively bargain, and a Social Security system. These rights went well beyond the "negative" rights inherent in the traditional idea of dignity; they imposed obligations on other parties both to provide property in the way of wages and benefits and to engage in bargaining over compensation and working conditions.[109]

2. Private Actors

As industrial economies helped to fuel the power of large corporations and wealthy business magnates, it became increasingly evident that private actors exerted just as much control over an individual's life as did the government, and hence could engage in harmful abuses of power.[110] In this context, as well, workers' compensation and New Deal labor legislation helped to curb exploitation of workers by private employers. A few decades later, the enactment of employment discrimination laws and the judicial recognition of common-law contract and tort claims for wrongful discharge reflected a continuing recognition of the potentially abusive exercises of power by private employers.

During the 1950s, when organized labor was at its strongest level, John Kenneth Galbraith wrote that "private economic power is held in check by the countervailing power of those who are

108. *See* Wambaugh, *supra* note 104, at 130.

109. *See* Zuckert, *supra* note 89, at 47–48 (contrasting negative rights with new positive rights).

110. This was a central point of professor Lawrence Blades's seminal critique of the rule of employment at will, in which he observed "that large corporations now pose a threat to individual freedom comparable to that which would be posed if governmental power were unchecked." Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967).

subject to it."[111] Strong labor unions, he observed, exercised countervailing power by engaging in collective bargaining, a process that decided "the division of profits."[112] In this manner, the countervailing power held by organized labor in relation to private industry and the government served as a rough, industrial relations brand of checks and balances, furthering a shift in how power was sorted and distributed in the American workplace.

3. Status-Based Mistreatment

In practice, the traditional notion of dignity ignored the plight of slaves, women, and other marginalized groups, but the new conceptualization embraced these concerns. Social movements confronting discrimination against people of color, women, disabled individuals, and gays and lesbians have all contributed to our understanding of how entire groups of individuals can be denied dignity on the basis of an intrinsic characteristic. This recognition has manifested itself in federal and state employment discrimination statutes.[113] In fact, much of the American legal system's recognition of dignitary harm in the workplace is concentrated in discrimination law and the idea of protected class status.

C. *New Insights About Dignity*

The potential relationship between modern employment law and the two conceptualizations of dignity is informed by new theories and fields of inquiry, and emerging insights from psychology are of special significance. Accordingly, therapeutic jurisprudence, a movement launched in the 1980s by a small group of law professors and practicing attorneys, is the starting point for this exploration. In addition, the communitarian movement and a

111. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 118 (1952).

112. *Id.* at 137.

113. For just several examples of such statutory provisions, see 42 U.S.C. § 12112 (2000) (prohibiting discrimination against qualified disabled individuals in employment decisions); 42 U.S.C. § 2000e-2 (2000) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); N.J. STAT. ANN. § 10:5-12 (West 2002) (prohibiting employment discrimination on the basis of race, creed, color, national origin, or sexual orientation).

new look at the notion of countervailing power are relevant to our discussion.

1. Therapeutic Jurisprudence

Therapeutic jurisprudence, according to David Wexler, one of its founders, involves "the 'study of the role of the law as a therapeutic agent'" by "focus[ing] on the law's impact on emotional life and on psychological well-being."[114] It "regards the law as a social force that produces behaviors and consequences."[115] As explained by Michael Perlin, "[T]herapeutic jurisprudence 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."[116]

Therapeutic jurisprudence is welcomed evidence of the growing recognition of the importance of psychological insights to American substantive and procedural law.[117] Employment law has been largely invisible, however, in the developing scholarly and practice-related commentary on therapeutic jurisprudence.[118] Under a dignitarian framework, this would change dramatically, leading us to consider next what psychological theories should guide our analysis. This point merits a longer, separate examination, for possibilities abound. For now, let us recognize two emerging

114. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000) (quoting DAVID B. WEXLER & BRUCE J. WINICK, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996)).

115. *Id.* (citing WEXLER & WINICK, *supra* note 114, at xvii).

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

117. *See generally* Mark I. Satin, Note, *Law and Psychology: A Movement Whose Time Has Come*, 1994 ANN. SURV. AM. L. 581 (broad ranging survey of the interplay of law and psychology perspectives).

118. North American exceptions include Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811, 819–27 (1999) (applying therapeutic jurisprudence and preventive law principles to employment scenarios); Katherine Lippel, *Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation*, 22 INT'L J.L. & PSYCHIATRY 521 (1999). *See generally* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis B. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) (covering doctrinal and practice areas addressed by therapeutic jurisprudence); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008) (describing major developments of therapeutic jurisprudence).

fields—relational psychology and occupational health psychology—which yield especially useful and important insights.

a. Relational Psychology

Relational psychology holds that relationships, not the individual as an isolated self, constitute the primary basis of our psychological development.[119] Relational theory has its roots in the pioneering work of Carol Gilligan, most notably *In a Different Voice*, which continues to frame many discussions about gender differences in psychological growth and development.[120] Gilligan posited that, on the whole, women and men frame moral decisions differently: the female approach has an orientation of responsibility, which appears as "an injunction to care, a responsibility to discern and alleviate the 'real and recognizable trouble' of this world . . . integrat[ing] rights and responsibilities . . . through an understanding of the psychological logic of relationships";[121] the male approach has an orientation of justice, which appears "as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment."[122]

During the mid-1980s, psychiatrist Jean Baker Miller took a lead role in developing relational psychology applications. Miller set forth some basic tenets of relational theory, starting with the premise "that each person becomes a more developed and more active individual only as s/he is more fully related to others."[123] When examining an individual's psychological development, we should ask two questions. First, "What kinds of relationships lead to the psychological development of the people in them?" Second, "[W]hat kinds of relationships diminish or destroy people, lead to trouble, and lead to what is eventually called 'pathology'?"[124] According to Miller, "at least five 'good things'" happen to people in growth-fostering relationships:

119. *See* CHRISTINA ROBB, THIS CHANGES EVERYTHING: THE RELATIONAL REVOLUTION IN PSYCHOLOGY ix (2006). The story of how relational psychology developed is the subject of Christina Robb's treatise.

120. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

121. *Id*. at 100.

122. *Id*.

123. Jean Baker Miller, *What Do We Mean by Relationships?*, The Stone Ctr. for Dev. Servs. & Studies at Wellesley Coll. Colloquium 1, 2 (1986).

124. *Id*.

> 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.[125]

Much of the conversation about relational theory has been in the context of concerns specific to women. As important as these discussions are, we all benefit when relational theory enjoys more general application. In the employment realm, relational theory helps to explain how work can be a good or bad experience for anyone. For example, psychologists Linda Hartling and Elizabeth Sparks applied relational theory and Miller's "five good things" to clinical work environments in which they practiced.[126] In workplaces with a relational culture, clinicians stated they experienced

> increased energy for the work we are doing, empowerment to take action on behalf of our clients, increased clarity and knowledge about others and ourselves in our work setting, increased sense of worth with regard to ourselves and others, and a desire for more connection to others in these work situations.[127]

However, those "working in situations that are moving in a non-relational direction" were likely "to experience the opposite of the five good things": (1) diminished energy for the work we are doing, (2) feeling disempowered or stifled in our ability to take action on behalf of our clients, (3) less clarity and more confusion about others and ourselves, (4) diminished sense of worth, and (5) a desire to withdraw from or defend against relationships in these settings.[128]

Relational theory reminds us that our own sense of dignity is affected profoundly by the quality of our relationships with others. For all but the most misanthropic among us, it is difficult to imagine "life, liberty, and the pursuit of happiness" without strong social components. This is no less the case at work, where the "five good things" are main ingredients of a recipe for human

125. *Id*. at 2–3.

126. Linda Hartling & Elizabeth Sparks, *Relational-Cultural Practice: Working in a Nonrelational World* 1 (2002).

127. *Id*. at 3.

128. *Id*.

dignity in the workplace, whereas the five bad things cited by Hartling and Sparks can sabotage one's sense of security and belonging on the job. These qualities capture the strong connection between the well-being of individual workers and the overall success (of lack thereof) of organizations. A relational workplace is likely to be zestful and productive, whereas a non-relational workplace is likely to be depressed and underperforming.

b. Occupational Health Psychology

The purpose of the new multidisciplinary field of occupational health psychology ("OHP") "is to develop, maintain, and promote the health of employees directly and the health of their families."[129] According to industrial psychologists Lois Tetrick and James Campbell Quick:

> Key areas of concern are work organization factors that place individuals at risk of injury, disease, and distress. This requires an interdisciplinary, if not transdisciplinary, approach . . . across multiple disciplines within and beyond psychology. . . . Integration of these disciplines with a primary focus on prevention is the goal of occupational health psychology.[130]

OHP recognizes that the U.S. economy has experienced "a substantial shift in the number of jobs in various sectors, with fewer jobs in manufacturing and more jobs in service industries."[131] This has meant "that employees are potentially exposed to different occupational hazards, including psychosocial stressors in the work environment that have been linked to ill-health."[132] Here, we see how OHP's understanding of the changing workforce can inform future developments in employment law and policy. The main concern of the federal Occupational Safety and Health Act remains the prevention of physical injuries at manufacturing and construction sites,[133] but insights from OHP research help to make the case for

129. 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).

130. *Id.* (citing Lynne M. MacLean, Ronald C. Plotnikoff & Alwyn Moyer, *Transdisciplinary Work with Psychology from a Population Health Perspective: An Illustration*, 5 J. HEALTH PSYCHOL. 173, 175 (2000)).

131. *Id.* at 5.

132. *Id.*

133. *See* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 4–5 (4th ed. 1998) (observing that Congress focused on industrial accidents in weighing the need for federal workplace safety standards).

expanding the scope of our workplace safety and health standards.[134]

OHP is already having a salutary effect on discussions about dignity in the workplace. A new learned society, the Society for Occupational Health Psychology, has been formed to encourage OHP research and education.[135] The Society publishes a scholarly journal, the *Journal of Occupational Health Psychology*, and engages in international outreach to other scholars and organizations.[136] It also co-sponsors a multidisciplinary international conference on work, stress, and health with the American Psychological Association and the National Institute for Occupational Safety and Health, featuring presentations by scholars and practitioners.[137] All of these initiatives are contributing to a dialogue that can inform workplace governance and policy.

2. Communitarian Rights and Responsibilities

Advancing human dignity requires each of us to assume obligations in addition to claiming rights. This duality parallels the communitarian movement, which advocates for a new balance between individual rights and social responsibilities.[138] A basic tenet of communitarian thinking is that too many Americans have claimed rights for themselves while imposing growing responsibilities on the government.[139] According to sociologist Amitai Etzioni, the leading communitarian scholar and advocate, correcting the imbalance requires "a moratorium on the minting of most, if not all, new rights; reestablishing the link between rights and responsibilities; recognizing that some responsibilities do not entail rights; and, most carefully, adjusting some rights to the changed circumstances."[140]

134. *See* Tetrick & Quick, *supra* note 129, at 4.

135. *See* Society for Occupational Health Psychology–About SOHP, http://sohp.psy.uconn.edu/About.htm (last visited Dec. 8, 2008).

136. *See* Society for Occupational Health Psychology–Research Resources, http://sohp.psy.uconn.edu/Research.htm (last visited Dec. 00, 2008).

137. *See* Society for Occupational Health Psychology–Upcoming Conferences, http://sohp.psy.uconn.edu/Conferences.htm (last visited Dec. 8, 2008).

138. *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993). Etzioni's book is the seminal work outlining the parameters of communitarian thinking.

139. *See id*. at 4.

140. *Id*.

In the context of the workplace, Etzioni's claim that we have too many rights is debatable, but he makes a vital connection between rights and responsibilities. A dignitarian employment law framework should not be tantamount to placing a unilateral obligation upon employers to pay and treat their workers well. Workers who are compensated fairly and treated with dignity have a corresponding obligation to perform their jobs competently and ethically. When a worker consistently performs poorly, mistreats others, or acts unethically, then discipline or dismissal is entirely warranted.

3. "Hard" and "Soft" Countervailing Power?

Unfortunately, organized labor no longer holds the level of the countervailing power that it possessed when Galbraith invoked the term in the 1950s.[141] If we can reframe our view of employment relations to emphasize individual dignity, however, then two forms of countervailing power may emerge as a result. International relations authority Joseph Nye has articulated a theory of leadership built around the dual concepts of "hard power" and "soft power."[142] Hard power is that which "can be used to get others to change their position," such as "[p]olice power, financial power, and the ability to hire and fire."[143] Soft power involves getting "the outcomes one wants by setting the agenda and attracting others without threat or payment . . . rest[ing] on the ability to shape the preferences of others to want what you want."[144]

A dignitarian framework for employment relations could yield both hard and soft power on behalf of worker dignity. An energized labor movement and strengthened employment protections would deliver the hard power by using law, negotiation, and political leverage to advance the interests of workers. A dignitarian *culture* would exercise soft power by persuasively framing human dignity as a worthwhile objective that benefits all of society, in contrast to focusing on free markets and management control as ends in themselves.

141. *See supra* notes 111–12 and accompanying text.
142. *See* JOSEPH S. NYE, JR., THE POWERS TO LEAD (2008).
143. *Id*. at 29.
144. *Id*.

4. The Limits of the Law

Despite the dominance of the markets and management framework, there are signs that we may be ready for a significant, perhaps dramatic, shift in focus. For example, dignity-affirming practices are entering the realm of management education and decisionmaking. Multiple generations of experts on management practice have exhorted employers to treat workers with respect, to encourage employee input and feedback, and to create fair and respectful organizational climates.[145] Companies such as Southwest Airlines and Harley-Davidson have consciously refrained from or limited large-scale layoffs that hurt morale and productivity.[146] Some employers include prohibitions on workplace bullying and generalized harassment in their employment policies, even though the law does not require that they do so.[147] Every year, companies vie for recognition in the American Psychological Association's annual Psychologically Healthy Workplace Awards program, which highlights employers based on their commitment to employee involvement, health and safety, employee growth and development, work-life balance, and employee recognition.[148] On a broader scale, the tumult within the American and world economies that came to a head in 2008 has caused even ardent free market advocates to revisit longstanding objections to government regulation.[149]

The labor movement, despite ongoing union-avoidance tactics by employers and an unfriendly federal government, is showing signs of renewed life. In recent years, visible, successful organizing campaigns have added home health care workers, janitors, and even

145. *See, e.g.*, PETER F. DRUCKER, MANAGING FOR THE FUTURE 107 (1992) (stating that "partnership with the responsible worker is the *only* way" to succeed in today's knowledge and service economy); MARSHALL GOLDSMITH ET AL., GLOBAL LEADERSHIP: THE NEXT GENERATION 143 (2003) (urging organizations to "create an organizational climate that is respectful and fair"); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES 238 (1982) (stating that treating workers with respect is necessary for productivity and business success).

146. LOUIS UCHITELLE, THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES xi (2006).

147. *See* David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y 475, 496–97 & nn.112–13 (2004).

148. *See generally* PHWA–The Awards, http://www.phwa.org/awards (last visited Dec. 8, 2008).

149. *See, e.g.,* Michael Mandel, *Is It the Dawn of the Reregulation Era?*, BUS. WK., Sept. 18, 2008, *available at* www.businessweek.com/print/bwdaily/dnflash/content/sep2008/db20080917_918673.htm.

adjunct university professors to union ranks.[150] In 2007, union density increased over the previous year, albeit by only 0.1%, marking the first annual increase in over twenty-five years.[151] In the political arena, organizations such as Americans for Democratic Action, a union-friendly policy and advocacy group, are working closely with labor and community groups in the so-called "battleground" states to raise awareness of pocketbook issues among voters.[152]

By comparison, employment law, in and of itself, is a more limited device for shaping behavior in the workplace. The law cannot force organizations to care about the health and well-being of their employees, require workers to vote for union representation, or simply order everyone to be "nice" to one another. But, by safeguarding the rights of association and collective bargaining, the law can support greater employee voice, implement legal incentives for employers to act preventively in terms of mistreatment of workers though training and education, and provide a genuine safety net of benefits and support for unemployed workers. The law also can intercede when voluntary practices and "soft power" fail: if workplace behaviors become abusive and cause tangible harm, the legal system should require compensation and assistance. Some of these possibilities are explored in Part IV below.

IV. TOWARDS A "DIGNITARIAN" EMPLOYMENT LAW AGENDA[153]

To some extent, current American employment law encompasses both the traditional and new conceptualizations of dignity discussed above. From limited common-law protections against wrongful discharge, to an array of statutory provisions covering wages, discrimination, retaliation, unemployment compensation, and other matters, the law of the workplace acknowledges the right to be let alone and provides some tangible, affirmative bene-

150. NOW: Interview: Kate Bronfenbrenner on American Labor Unions, http://www.pbs.org/now/shows/250/unions.html (last visited Dec. 8, 2008).

151. Union membership rose from 12.0% to 12.1% between 2006 and 2007. *See* Hirsch & Macpherson, *supra* note 55.

152. *See generally* Americans for Democratic Action, http://www.adaction.org/pages/issues/economic-energy-amp-env.php (last visited Dec. 8, 2008).

153. The forthcoming commentary incorporates brief portions of a discussion in my recent review essay, David C. Yamada, *Dignity, "Rankism," and Hierarchy in the Workplace: Creating a "Dignitarian" Agenda for American Employment Law*, 28 BERKELEY J. EMP. & LAB. L. 305, 315–24 (2007) (reviewing FULLER, ALL RISE, *supra* note 5).

fits. However, as the discussion in Part II indicated, the dominance of the markets and management framework has rendered many of these protections much stronger in theory than in practice.

Fortunately we are not lacking in good ideas for positive change. Over the years, numerous scholars have offered constructive analyses of the broad sweep of modern employment law and policy, and many have concluded that both substance and procedure need fixing.[154] For example, Stephen Befort's comprehensive proposal for employment law reform includes enactment of an employment security statute, major amendments to labor and collective bargaining law, legal recognition of employee participation programs, and protections for the contingent workforce.[155] Ann Hodges has called for a twin emphasis on restoring the primacy of collective rights in the workplace and creating labor courts to consolidate and hear employment-related claims.[156] Ellen Dannin has advocated for strategies similar to those used by the civil rights movement to reclaim labor and collective bargaining law for workers.[157]

A comprehensive dignitarian agenda for American employment law would regard favorably many of these proposals, but it is not the purpose of this essay to review the entire body of work. Rather, it is worth examining several important areas of employment law against the backdrop of dignitarian theories and prin-

154. *See generally, e.g.*, ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006) (examining strategies for labor law reform); RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 56; WEILER, *supra* note 50 (examining the future of employment and labor law and workplace governance); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002) (recommending new international labor norms); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002) (calling for new vision of labor and employment law centered around a revival of the National Labor Relations Act); Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L. J. 601 (2005) (examining collective versus individual orientations and the multitude of employment claims and dispute resolution mechanisms); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (calling for a new psychological contract containing expectations of employability, training, human capital development, and networking opportunities).

155. *See* Befort, *supra* note 154, at 424–58 (containing detailed explanation of reform agenda).

156. *See* Hodges, *supra* note 154, at 622–23.

157. *See* DANNIN, *supra* note 154, at 1–15.

ciples described in Part III, to understand how to change the way we frame these issues.

A. *Unions and Collective Bargaining*

Strong, inclusive, and effective unions serve as an invaluable source of countervailing power in society and a necessary component for advancing a dignitarian agenda in the workplace. By conferring rights and voice to their members, unions can support a "justice orientation" and the "right to be let alone" at work, allowing a worker to do her job without undue interference.[158] Through collective bargaining, unions help to provide workers with the dignity of a living wage and the ability to pay for life's necessities.[159] They also can promote a sense of shared obligation to self and others, and they can help build a spirit of community among members.[160] In fact, American workers appear to be especially favorable to unions and other forms of employee representation that advocate for their interests without unnecessary confrontation and labor-management conflict.[161]

Union membership and the collective bargaining process typically result in better wages and benefits; one study concluded that union members enjoy a 28% wage and benefit compensation advantage over their non-union peers.[162] Union members also enjoy greater job security via provisions against wrongful discharge, accompanying due process rights, and improved working conditions.[163] The grievance resolution process, although sometimes contentious, provides workers with substantive and procedural

158. *See supra* Part III.A.1.

159. *See* LAWRENCE MISHEL WITH MATHEW WALTERS, HOW UNIONS HELP ALL WORKERS 15 (Econ. Policy Inst., Briefing Paper No. 143, 2003), *available at* http://www.epi.org/content.cfm/briefingpapers_bp143.

160. *See* Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 486 (1992) (affirming the value of unions by appealing to communitarian and relational feminist theory and practice).

161. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 182–83 (updated ed. 2006) (reporting on an extensive survey on employees' attitudes about participation in the workplace, which showed, among other things, strong public support for greater employee voice and representation in an atmosphere of cooperative, collegial worker-management relationships).

162. *See* MISHEL, *supra* note 159, at 1–2.

163. *See id.* at 11–14 (explaining the integral role unions play in disseminating information and assisting members in taking advantage of programs like unemployment insurance, workers' compensation, OSHA enforcement, FMLA leave, and FLSA compliance).

protections while striving to preserve employment relationships between employers and employees.

Unions are especially important to workers in industries and services where exploitation and low wages predominate. "Good jobs at good wages" is a popular phrase uttered by candidates for public office, usually referring to manufacturing jobs offering decent pay and benefits and safe working conditions.[164] But labor lawyer Beth Shulman has reminded us of how "good jobs" became that way:

> Today's "good jobs" in large-scale manufacturing were not always good. Working in a factory is hard work. It can be dirty and unsafe. At one time, it paid poor wages and had few benefits. But factory jobs became "good" jobs in this country when employers were forced to make them so through worker power in unions. This success also forced nonunion employers to change their wage and benefit packages to compete for workers.[165]

Today there is no shortage of jobs that provide low pay, few benefits, and harsh working conditions. The labor movement can and must play the same organizing, advocacy, and representational role for home health care workers, retail store employees, fast food servers, and others who find themselves in the low-wage sector of the workforce, as it has for manufacturing workers.[166]

Of course, like certain large corporations, some unions may abuse the power conferred by their numbers and resources and engage in very undemocratic behaviors.[167] Some do a terrible job at advocating for their members, some are corrupt, and still others engage in thuggish threats or, more rarely, actual commission of violence. Such practices are as inconsistent with the goals of dignity in the workplace as abusive employer behaviors. Nevertheless, the presence of bad unions does not negate the critical

164. *See, e.g.*, Michael Dukakis, 1988 Candidate for President of the United States, Speech Accepting Democratic Nomination (July 21, 1988), *in* N.Y. TIMES, July 22, 1998, at A10, *available at* http://www.nytimes.com/archives (select the "since 1981" date range, then search by title).

165. SHULMAN, *supra* note 37, at 10.

166. *See* JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, UNIONS AND UPWARD MOBILITY FOR LOW-WAGE WORKERS (2007), *available at* http://www.cepr.net/index.php/publications/reports/unions-and-upward-mobility-for-low-wage-workers/ (documenting positive impact of unions on pay and benefits to workers in low-wage occupations).

167. *See* Michael J. Goldberg, *In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 764–65 (2008).

importance of organized labor as a dignitarian force on behalf of working people.

Building a resurgent, grassroots labor movement will require a combination of energized and creative organizing, advocacy, and law reform efforts.[168] On the legal front, the leading proposal for federal labor law reform is the Employee Free Choice Act, ("EFCA") a bill that provides for streamlined employee selection of a union through signed authorization cards in lieu of a lengthy election campaign, mandatory arbitration when a new union is unable to negotiate a first collective bargaining agreement, and enhanced penalties for unfair labor practices.[169] Passage of EFCA would help to offset the considerable resources being devoted to defeat union organizing efforts and resist collective bargaining.[170]

Even as we support unionization and collective bargaining, we must understand that strengthening our employment protections will have to encompass both collective and individual interests. A strong labor movement is critical for advancing worker dignity, but even at labor's high water mark, union membership levels never came close to reaching half of the American workforce.[171] A tripling of the current labor union membership level would not make collective bargaining and union-management grievance systems the dominant form of workplace governance.[172] Those not covered by collective agreements still will need safeguards—grounded in individual employment rights—against mistreatment and unfair dismissal.

B. *Layoffs, Job Security, and At-Will Employment*

Few experiences undermine one's dignity like an involuntary job loss and a subsequent period of unemployment.[173] When

168. *See generally* Seth D. Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303 (2005–2006) (discussing the context of contemporary union organizing); Symposium, *Next Wave Organizing Symposium*, 50 N.Y.L. SCH. L. REV. 303 (2005–2006) (collection of articles and notes on new labor organizing tactics and strategies).

169. Employee Free Choice Act, H.R. 800, 110th Cong., §§ 2, 3, 4 (2007).

170. *See supra* Part II.C.

171. *See* Hirsch & Macpherson, *supra* note 55 (24.1% in 1979).

172. *See id*. (indicating that union membership was only 12.1% in 2007).

173. *See* NICK KATES ET AL. THE PSYCHOSOCIAL IMPACT OF JOB LOSS 37–48 (1990) (summarizing studies on the effects of job loss). *See generally* UCHITELLE, *supra* note 146, at 178–204 (2006) (examining the psychological impact of layoffs).

journalist Louis Uchitelle began researching his book about the consequences of job loss, he did not anticipate that he "would be drawn so persistently into the psychiatric aspect of layoffs," but he soon understood that "[t]he emotional damage was too palpable to ignore."[174] For the suddenly unemployed, "a layoff is an emotional blow from which very few fully recover . . . . The laid-off are cut loose from their moorings and rarely achieve in their next jobs a new and satisfactory sense of themselves."[175] Indeed, for a person who finds herself unemployed, self-esteem, self-confidence, and concerns about mortgage or rent payments and health insurance coverage can all come crashing together with brutal swiftness. Unsurprisingly, layoffs and subsequent periods of unemployment carry negative health consequences such as increased risk for cardiovascular disease, depression, and even suicide.[176]

Larger layoffs and individual terminations may be bad for employers, too, even if many are not cognizant of the effects. According to Uchitelle,

> [L]ayoffs damage companies by undermining the productivity of those who survive but feel vulnerable, as well as the productivity of those who are laid off and get jobs again. All lose some of the commitment, trust, and collegial behavior that stable employment or the expectation of stable employment normally engenders.[177]

Even individual terminations, if perceived as unfair by the workers who remain, can have negative effects on morale, loyalty, and productivity, as virtually anyone who has ever experienced such a situation can attest.

The human and organizational costs of job loss and layoffs do not lead to an easy legal or policy response. After all, most employers neither engage in arbitrary firings of productive employees nor relish the prospect of large-scale downsizing, and the

174. UCHITELLE, *supra* note 146, at 180.

175. *Id*. at x.

176. *See* KATES ET AL., *supra* note 173, at 51–55, 57–59 (discussing the impact of unemployment on physical and mental health and suicide rates); Sarah Moore et al., *Physical and Mental Health Effects of Surviving Layoffs: A Longitudinal Examination* 23 (Inst. of Behavioral Sci., Working Paper No. PEC2003-0003, 2003), *available at* http://www.colorado.edu/ibs/pec/pubs/wp.html (last visited Dec. 8, 2008) (concluding there is "strong evidence that large-scale layoffs often produce damaging psychological and physical effects on survivors' well-being").

177. UCHITELLE, *supra* note 146, at x–xi; *see also* Moore et al., *supra* note 176, at 24 (reporting "there is some evidence that companies who engage in mass layoffs experience declines in employee morale, commitment, and performance").

disadvantages of legally micromanaging employment decisions are considerable. In terms of safeguarding job security, it appears that the role of the law should be limited to protecting employees from unfair or unjust dismissal—in other words, terminations not supported by poor performance, economic necessity, or misconduct.

During the 1970s and 1980s, state courts began to recognize an array of wrongful discharge claims grounded in tort and contract law. Most prominent among these is the public policy exception to at-will employment, or "public policy tort," which prohibits an employer from dismissing a worker in violation of some established public policy, such as reporting for jury duty.[178] In addition, some courts have recognized implied-in-fact contractual protections based on company and industry practices, statements in employee handbooks, and verbal representations from supervisors.[179] Despite this growing list of recognized wrongful discharge claims, however, most non-union workers do not have general protections against unjust or unfair dismissal.[180]

Although sound model unfair dismissal statutes have been proposed,[181] only Montana provides broad statutory just-cause protections through its Wrongful Discharge from Employment Act,[182] and it is hardly a windfall for plaintiffs. Under the statute, "A discharge is wrongful . . . if it was in retaliation for the employee's refusal to violate public policy," contravenes an express provision of the employer's personnel policies, or "was not for good cause and the employee had completed the employer's probationary period of employment."[183] The statute limits compensatory damages to lost wages and benefits, permits punitive damages only in cases of fraud or malice, and precludes damages

178. *See* Daniele Marchesani, *A New Approach to Fiduciary Duties and Employees: Wrongful Discharge in Violation of Public Policy*, 75 U. CIN. L. REV. 1453, 1426 (2007).

179. *See* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 67 (2008).

180. *See id*. at 70–71.

181. *See, e.g.*, Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 371–76 (1994) (discussing protections and remedies under the Model Employment Termination Act).

182. MONT. CODE ANN. §§ 39-2-901 to -915 (2007).

183. *Id.* § 39-2-904.

for pain and suffering and emotional distress.[184] It also preempts other tort and contract remedies for wrongful discharge.[185]

The Montana statute precludes damages that are relevant to the psychological costs of unjust dismissals, and this is a severe limitation from the standpoint of therapeutic jurisprudence. Thus, even with the just-cause provision, it is understandable that Montana employers were the primary backers of the statute when it was under deliberation in the state legislature.[186] However, the Montana statute does hint at the possibility of a compromise—hopefully in a more balanced form—that provides at-will employees with broad protections against unfair dismissal, while limiting the risks of unpredictable damages that employers understandably fear.

More complicated is the question of how employment law should respond to large-scale layoffs. In some unionized settings, collective bargaining may address such contingencies.[187] For at-will employees who have little individual bargaining power with an employer, current options are very limited. Here is where the letter and spirit of a dignitarian framework for employment law could make a difference. In such situations, a combination of "hard power" by way of enacting just-cause protections that require the employer to demonstrate economic necessity, and "soft power" via a dignitarian culture that recognizes the damage wrought by layoffs and values job preservation, may help to reduce this business practice.

When layoffs and terminations are necessary, private and public transitional help should provide adequate unemployment benefits, job and psychological counseling, and health insurance for those who face unavoidable periods without work.[188] These programs should be easy to access and of sufficient duration and amount to serve as a genuine safety net. They should be complemented by support for retraining and further education, with the ultimate goal of facilitating an individual's return to work.

184. *Id.* § 39-2-905.

185. *Id.* § 39-2-913.

186. *See* Andrew P. Morriss, *The Story of the Montana Wrongful Discharge from Employment Act: A Drama in 5 Acts*, *in* EMPLOYMENT LAW STORIES 237, 252 (Samuel Estreicher & Gillian Lester eds., 2007); *see also* Porter, *supra* note 179, at 70.

187. *See* UCHITELLE, *supra* note 146, at 222.

188. *See* Yamada, *supra* note 153, at 319.

C. *Workplace Bullying*

Workplace bullying is a profound violation of the "right to be let alone," and its methods are many. It may come in the form of the 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 may be in the way of workers who sabotage the work and reputation of a coworker by spreading lies and rumors about her performance and character.

In any of its myriad forms, bullying hurts employees and organizations alike, causing psychological and physical harm to workers and sapping productivity from the workplace. Severely bullied workers may experience clinical depression, symptoms consistent with post-traumatic stress disorder, increased risk of heart disease, and other negative health effects.[189] Organizations with abusive work environments may experience reduced productivity and morale and increased absenteeism and attrition.[190]

Ample evidence of the dignitary harm caused by bullying comes from the targets themselves. 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."[191] One target reported feeling "'maimed'" and "'character assassinated,'" while others used terms such as "'beat-

189. *See* NAMIE & NAMIE, *supra* note 43, at 55–56 (describing effects of workplace bullying on targets); Loraleigh Keashly & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, *in* BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 31, 53–54 (Stale Einarsen et al. eds., 2003); *See generally* Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 EUR. J. OF WORK & ORGANIZATIONAL PSYCHOL., 251 (1996) (describing how mobbing at work can lead to post-traumatic stress disorder).

190. *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, Lynne M. Andersson, & Christine L. Porath, *Workplace Incivility*, *in* COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS 177, 183–86 (Suzy Fox & Paul E. Spector eds., 2005) (examining potential consequences of workplace incivility).

191. Sarah J. Tracy, Pamela Lutgen-Sandvik & Jess K. Alberts, *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20 MGMT. COM. Q. 148, 160 (2006).

en,' 'abused,' 'ripped,' 'broken,' 'scarred,' and 'eviscerated.'"[192] The bullying process was described alternatively as "a game or battle, nightmare, water torture, and managing a noxious substance."[193] In describing themselves, targets used terms such as "slave or animal," "prisoner," child with "an abusive father," and "heartbroken lover."[194]

Workplace bullying and related behaviors also reinforce entrenched social hierarchies and exclusionary practices. Management professors Robert Baron and Joel Neuman found that "increased diversity" is one of several factors that correlates positively to higher levels of verbal aggression, obstructionism, and workplace violence, the three major forms of aggression at work.[195] Industrial relations professors Suzy Fox and Lamont Stallworth reported that the "most striking finding" in their study of racial and ethnic bullying "was the ubiquity of bullying among the survey participants."[196] Regina Austin's analysis of labor market hierarchies concluded that supervisory abuse is most easily exercised over less-skilled, unorganized workers, a group in which people of color, women, young people, and undocumented immigrants are disproportionately represented.[197]

Although workplace bullying is common, hurtful, and costly, it often falls between the cracks of existing employment law.[198] For example, tort claims for intentional infliction of emotional distress grounded in allegations of bullying behavior are very difficult to win.[199] Employment discrimination law may offer an option, but only for those who can tie bullying behaviors to a

192. *Id*.

193. *Id*. at 159.

194. *Id*. at 159 tbl. 1.

195. Robert A. Baron & Joel H. Neuman, *Workplace Aggression—The Iceberg Beneath the Tip of Workplace Violence: Evidence on Its Forms, Frequency, and Targets*, 21 PUB. ADMIN. Q. 446, 459 (1998).

196. Suzy Fox & Lamont E. Stallworth, *Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the US Workplace*, 66 J. VOCATIONAL BEHAV. 438, 452 (2005).

197. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress,* 41 STAN. L. REV. 1, 37–42 (1988).

198. *See generally* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475 (2000) (examining the employment law implications of workplace bullying).

199. *See generally id*. at 493–509 (discussing claims of intentional infliction of emotional distress for workplace bullying).

protected class status.[200] Current occupational safety and health law is inapplicable to workplace bullying; in America, workplace safety standards and enforcement remain tethered largely to physical hazards.[201] In brief, there are many potential legal claims that may be brought for workplace bullying, but prospects for success are very dim.

Fortunately, there is growing public awareness of workplace bullying,[202] and with it greater interest in and receptivity to potential legal responses.[203] The leading option for legal reform is the Healthy Workplace Bill, model anti-bullying legislation which has been the main template for bills introduced in twelve state legislatures since 2003.[204] The bill is designed to provide relief and compensation to targets of severe workplace bullying who can demonstrate tangible harm and to encourage employers to act preventively and responsively with regard to these behaviors.[205] Another sound response would be to address the bewildering array of private and public employee benefit programs, including health insurance, workers' compensation, unemployment insurance, and disability benefits that individually and collectively fail to serve as an adequate safety net for people who are suffering

200. *See generally id*. at 509–15 (discussing application of discrimination law to workplace bullying).

201. *See id*. at 521–22 (discussing application of occupational safety and health law to workplace bullying).

202. For recent news coverage, see Alison Van Dusen, *Ten Signs You're Being Bullied at Work*, FORBES.COM, Mar. 24, 2008, http://www.forbes.com/health/2008/03/22/health-bullying-office-forbeslife-ex_avd_0324health.html (last visited Dec. 8, 2008); Etelka Lehoczky, *Agreeable, Pleasant? It May Hurt Your Career: Nice Workers More Likely To Get Pushed Around, Less Likely To Get Promoted*, BOSTON GLOBE, Nov. 21, 2004, at G6; Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES, Mar. 25, 2008, at D5.

203. *See generally* Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?*, 35 GA. J. INT'L & COMP. L. 53 (2006); Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247 (2008). For recent news coverage, see Wendy N. Davis, *No Putting up with Putdowns*, ABA J., Feb. 2008, at 16, *available at* http://abajournal.com/magazine/no_putting_up_with_putdowns/ (last visited Dec. 8, 2008); Beth Duncan, *Workplace Anti-Bullying Legislation: The Next Frontier?*, BNA'S SAFETY NET, Mar. 28, 2006, at 47.

204. I am the author of the Healthy Workplace Bill. For the bill text and an explanation of its provisions, see David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475 (2004). Information about the status of advocacy efforts to enact the Healthy Workplace Bill can be accessed at: http://www.healthyworkplacebill.org (last visited Dec. 8, 2008).

205. *See* Yamada, *supra* note 204, at 517–21 (containing bill text).

from psychiatric illness induced or exacerbated by mistreatment at work.[206]

D. *Employment Discrimination*

America's continuing struggles with issues of difference and inclusion reinforce the importance of discrimination law in developing a dignitarian legal agenda. Many thoughtful voices in the legal academy have written extensively on numerous aspects of employment discrimination law, and it is impossible to do justice to that body of work within the limitations of this essay. It is worth reiterating, however, that employment discrimination continues to raise some of the most challenging and disturbing questions in the workplace today.

At the same time, we also must avoid the temptation to equate protected class status with the whole of a dignitarian legal agenda, to the neglect of other pressing concerns.[207] For someone who deeply believes in the ongoing need for strong, enforceable protections against employment discrimination, I make this statement carefully. After all, discrimination at work persists, and so much of our understanding about mistreatment and exclusion has been informed by that experience. However, just as relational psychological theory, whose founders were inspired by feminism and the women's movement, enhances our overall understanding of human dignity, so can the lessons learned from employment discrimination law inform our broader comprehension of abusive behavior at work.

206. *See generally* David C. Yamada, Presentation at the Annual Meeting of the American Psychiatric Association, Workplace Bullying, Mental Illness, and Employee Benefits: The Frayed Safety Net (May 2006) (transcript on file with author) (discussing inadequate benefit coverage for targets of workplace bullying).

207. Although protected class status remains the dominant focus of legal scholarship on worker harassment and mistreatment, there appears to be a modest shift towards a broader perspective, especially in drawing connections between sexual harassment and workplace bullying. *See* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 3–4 (1999); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 73–75 (2001); Ann C. McGinley, *Creating Masculine Identities: Harassment and Bullying "Because of Sex"*, 79 U. COLO. L. REV. (forthcoming Dec. 2008).

E. *Dispute Resolution*

We must implement more humane, efficient, and procedurally fair ways of resolving employment-related conflicts. The current dispute resolution systems are expensive, time consuming, and emotionally battering for plaintiffs and sometimes for employers as well. As Ann Hodges has noted, "[T]he multitude of forums available for litigation results in multiple claims arising out of the same action, as well as tribunals deciding issues outside their expertise."[208] From the standpoint of therapeutic jurisprudence, this is a profoundly unhealthy way of resolving disputes.

There are promising proposals for reform. For example, for years scholars have been recommending the creation of labor courts that would serve as a single forum for resolving employment disputes, along the lines of systems used in other industrialized nations.[209] One specific possibility is the adoption of the type of employment tribunal system used in the United Kingdom, which starts with a conciliation process, followed by (if necessary) a hearing in which claims are initially heard by a three-person panel.[210] These procedural reforms would bring numerous advantages over the present system, including lower costs to litigants, potentially faster resolution, and consolidation of claims in a single forum.[211]

F. *Globalization*

The labor policy implications of globalization, even more so than employment discrimination, escape easy encapsulation. In fashioning a dignitarian agenda, however, we can begin with two overriding principles. First, American trade policy should adopt fair trade practices that respect workers and their communities and ensure provision of a living wage for producers of goods.[212] Second, instead of exporting our union-busting, anti-labor prac-

208. Hodges, *supra* note 154, at 604.

209. *See, e.g.*, *id.* at 622–25.

210. *See* Harthill, *supra* note 203, at 271 nn.118–19.

211. *See* Hodges, *supra* note 154, at 624.

212. This is the general intent behind the Trade Reform, Accountability, Development, and Employment Act, which is proposed legislation that would require a comprehensive review of American trade agreements and set labor standards, environmental protections, and safeguards for safety of the food supply. S. 3083, 110th Cong. (2008).

tices to other nations, America should import the spirit of human dignity that other members of the world community have embraced in shaping their systems of employment law. The examples are many: The International Labor Organization is playing a lead role towards establishing global labor standards.[213] The European Union couples together economic, social, and labor provisions in its supranational policies for member nations, in sharp contrast to America's emphasis on unregulated free trade.[214] Other nations have adopted or enacted specific protections against workplace bullying and related behaviors, motivated by dignitarian principles.[215]

V. PURSUING DIGNITY AT WORK

This essay has examined the markets and management framework, set out a theoretical foundation for a new framework grounded in human dignity, and discussed the application of dignitarian theory to some core employment law issues. By doing so, I hope it has contributed to the case for significant change. "Paradigm shift" may be the most overworked phrase in academic prose, but it is exactly what we need to reform the substance and procedure of American employment law. As a closing consideration, then, it is appropriate to examine how we can achieve that change.

First, we must remain steadfast and unapologetic in calling for dignity in the workplace, even at the risk of being labeled foolish or naïve. The mindset of what James Arnt Aune has labeled "economic correctness" often belittles those who dare question the sacredness of unregulated markets and management control.[216] In the face of likely criticism and even ridicule, we must make the case, without embarrassment, that workers should not have to check their dignity at the office or factory door.

Second, it is important to understand how we got to this place. The markets and management framework did not achieve dominance overnight or by accident. Its current, enduring incarnation has been the result of careful, patient, and intelligent intellectual spadework and political organizing. In 1964, following the

213. *See* Yamada, *supra* note 198, at 514–15.
214. *See id*. at 515.
215. *See generally id*. at 509–15.
216. *See supra* notes 9–10 and accompanying text.

landslide victory of Lyndon Johnson over Barry Goldwater in the presidential election, the conservative movement was flat on its back. However, conservative leaders from all sectors joined together to carefully and painstakingly plan a comeback that was cemented in 1980 with the election of Ronald Reagan, and to this day shapes legal, economic, and social policy debates.[217] Those of us who want to put American employment law and policy on a different path are well-advised to learn from their smart, concentrated efforts.

Third, just as the emergence of the markets and management framework was part of a broader political, social, and economic movement, the call for dignity at work cannot be made in a vacuum. One of the most articulate voices on this point has been Robert Fuller, a physicist and former president of Oberlin College, whose examinations of dignity in the context of hierarchy and rank have attracted national attention.[218] According to Fuller, the primary obstacle to building a dignitarian society is the persistent recurrence of "rankism," which may manifest itself as discrimination on the basis of constructs such as race, sex, or age, but also may be grounded in unnecessarily hierarchical relationships in our private, public, and civic institutions.[219] One of the genuine triumphs of Fuller's work is in teaching us that denials of dignity occur throughout society, and therefore call for connected rather than atomized responses.

Finally, we must work on crafting messages that persuade the general public and stakeholders in employment relations. George Lakoff wrote that "moral worldviews, visions, values, principles, frames, and language all come together in political arguments."[220] Terms such as therapeutic jurisprudence, relational

217. *See generally* SIDNEY BLUMENTHAL, THE RISE OF THE COUNTER-ESTABLISHMENT: FROM CONSERVATIVE IDEOLOGY TO POLITICAL POWER (1986) (chronicling the rise of the conservative movement); Lewis H. Lapham, *Tentacles of Rage: The Republican Propaganda Mill, A Brief History*, HARPER'S MAG., Sept. 2004, at 31 (detailing conservative communications and public education strategies); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM, at 38, *available at* http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html (examining pro-business direction of the U.S. Supreme Court); Lewis F. Powell, *The Powell Memo*, Aug. 23, 1971, *available at* http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html (influential memorandum by then-corporate attorney Powell, outlining a broad-ranging strategy for a conservative resurgence).

218. *See, e.g.*, Robert W. Fuller, *A New Look at Hierarchy*, LEADER TO LEADER, Summer 2001, at 6, *available* at http://www.breakingranks.net/scan/Leader.pdf.

219. FULLER, SOMEBODIES AND NOBODIES, *supra* note 5, at 6–7 .

220. LAKOFF, *supra* note 1, at 119.

theory, and occupational health psychology understandably do not resonate with the general public, so we need to translate these ideas into messages that reach people in legislatures, courts, administrative agencies, union halls, board rooms, and the media. This will not be easy, but at stake is nothing less than the well-being of millions of people who work for a living and those who depend on them.