

# WHY LAWYERS ARE UNHAPPY

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*[According to the authors of this article, the growing unhappiness of lawyers, particularly young lawyers, stems from three causes: (1) Lawyers are selected for their pessimism (or “prudence”) and this generalizes to the rest of their lives; (2) Young associates hold jobs that are characterized by high pressure and low decision latitude, exactly the conditions that promote poor health and poor morale; and (3) American law is to some extent a zero-sum game, and negative emotions flow from zero-sum games. ..*

*This article has been shared with practitioners as well as academics. It grows out of faculty seminars held at the Benjamin N. Cardozo School of Law in the fall of 1999, which included managing partners of several major New York Law firms, and in spring 2001, as well as a meeting of the New York Chapter of the American Bar Foundation in the spring of 2000. The theory of positive psychology framed the discussion.]*

## I INTRODUCTION: HAPPINESS AND THE LAW

As to being happy, I fear that happiness isn't in my line. Perhaps the happy days that Roosevelt promises will come to me along with others, but I fear that all trouble is in the disposition that was given to me at birth, and so far

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as I know, there is no necromancy in an act of Congress that can work a revolution there.<sup>1</sup>

Much attention has been paid recently to the disillusionment among lawyers. The New York City Bar Association, a leader among bar groups, has focused upon the lawyer's (especially young associate's) "quality of life". Its Task Force Report cites "unhappiness" among young lawyers and measures its impact. The implication and costs of this unhappiness are significant, as many bright attorneys grow disillusioned and cynical, with diminishing career opportunities. Unhappy associates fail to achieve their full potential at a cost to them, their firms, their clients, and even their families. Invariably many lawyers leave the law firm, and some the practice of law, prematurely, resulting in undesirable turnover, and a loss of talent to the profession.<sup>2</sup>

In this essay we suggest that much of the unhappiness of lawyers can be cured. It stems from three causes: (1) Lawyers are selected for their pessimism (or "prudence") and this generalizes to the rest of their lives; (2) Young associates hold jobs that are characterized by high pressure and low decision latitude, exactly the conditions that promote poor health and poor morale; and (3) American law is to some extent a zero-sum game, and negative emotions flow from zero-sum games. We acknowledge that while the first two causes have well-documented antidotes, the third, the zero-sum nature of law, may be a justifiable aspect of the profession; but even in this case we suggest promising ameliorative.

The phrase "quality of life" invites a closer look into how law and the legal profession are to be shaped in the future. There is little doubt that a dysfunctional legal profession will have a negative effect on the law itself, a realization that has led to a variety of prescriptions for the "malaise" afflicting the profession. But these tend to be bromides produced from within. We would like to offer a new perspective. We believe that psychology has the explanatory power to assist lawyers at this critical juncture.

The unhappiness and discontent of lawyers is well documented<sup>3</sup> and much lamented.<sup>4</sup> Since lawyers are members of a "public profession"<sup>5</sup> their dysfunction

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<sup>1</sup> Benjamin N Cardozo, *Letter to Elvira Solis*, Feb 15, 1933 (on file at the Benjamin N. Cardozo School of Law, Chutick Law Library) [hereinafter Cardozo Letter].

<sup>2</sup> Report of the Task Force on Lawyers' Quality of Life, 55 Rec. Ass'n B. N.Y. 755, 756 (2000) [hereinafter N.Y. Bar Task Force Report].

<sup>3</sup> See generally John Heinz et al., *Lawyers and their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L. J. 735 (1999); Patrick Schlitz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Michael Goldhaber, *Is the Promised Land Heaven or Hell?*, NAT'L L.J., July 5, 1999, A17.

<sup>4</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 13 (1993) (lamenting the "demise of the lawyer-statesman ideal"). Also see MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) [characterizing lawyers today as contentious litigators rather than impartial advocates].

<sup>5</sup> The public nature of a lawyer's work is at the core of Kronman's concern: "The idea of the lawyer-statesman stands for the value of public service and the virtue of civic mindedness associated with it", *supra* note 4, at 109. Even Kronman's critics do not challenge the public nature of the lawyer's role, only

entails societal, as well as personal, costs. Indeed, the creation of law itself is in one sense bound up with the health of judges, lawyers, legislators, and academics. But remedies for lawyer distress and the collective malaise of the profession are harder to identify. The attempts by lawyer groups, even distinguished ones like the New York City Bar, to address the issues seem self-serving and half hearted - driven more by public relations and economic concerns than objective study.<sup>6</sup>

Our belief is that the new field of “positive psychology”<sup>7</sup>(which seeks to cultivate human strengths, rather than focus on human weaknesses), offers coping strategies to reduce unhappiness,<sup>8</sup> and can be adapted successfully to the legal setting, in particular the large law firm. Our objective is to broaden the debate and to enlist support for more fundamental (but still practical) changes within the legal community. This essay will set out a series of findings derived from general research in the subject of learned optimism in order to move the inquiry in new directions and to offer suggestions for further research and study.

The nature of the legal profession, however, complicates our mission. One of the triggers for combating demoralization involves the avoidance of zero-sum situations. In law, such situations seem inevitable; they lie at the heart of our adversarial system of justice.<sup>9</sup> If we accept that the adversary model embraces important social values, displacing it may not be in our interest. If so, some degree of lawyer unhappiness may be unavoidable if we are to achieve societal goals. This raises the ironic possibility that lawyers can be made happier only at public expense. It also may be why lawyers have long been known for their saturnine personalities.<sup>10</sup> To para-

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his notion that private sector legal work does not have a public dimension. See Charles Silver & Frank Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L. J. 1443 (2000) (reviewing ARTHUR LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998)). The authors, in defending the public nature of the private sector practice, argue that private sector lawyers make “an enormous economic contribution to social welfare, include the welfare of the poor... [They] help our economy grow, producing jobs and making people's lives better” *Id* at 1479. Also see Deborah Arron, *Connection Gaps*, AMERICAN BAR ASSOCIATION JOURNAL, October 1999, 60.

<sup>6</sup> The Report, for example, refers to the “costly turnover” of associates. N.Y. Bar Task Force Report, *supra* note 2, at 756. The City Bar Task Force was led by members of New York's most distinguished and powerful law firms, who may not be the ones best suited to analyze the failure of law firms or to encourage new lawyers to become committed members of their communities.

<sup>7</sup> See MARTIN E.P. SELIGMAN, *AUTHENTIC HAPPINESS* (2002); Martin Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5 (2000); Alison Stein Wellner & David Adox, *Happy Days*, PSYCHOLOGY TODAY, May-June 2002, 32 (describing the overall goal of positive psychology as enhancement of our experience in love, work and play).

<sup>8</sup> See Martin Seligman, *Building Human Strength: Psychology's Forgotten Mission*, A.P.A. MONITOR, Jan 1998, 2; Barbara Frederickson, *What Good are Positive Emotions?*, 2 REV.GEN. PSYCHOL. 300 (1998).

<sup>9</sup> See generally John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN.L.REV.1271 (1973-1974); see also Paul Verkuil, *The Search for a Legal Ethic: The Adversary System, Liberalism and Beyond*, 60 SOUNDINGS 54 (1977). But see Robert Clark, *Why So Many Lawyers: Are They Good or Bad?*, 61 FORDHAM L.REV. 275, 296 (1992) [questioning the traditional emphasis on zero sum games].

<sup>10</sup> Peter Goodrich traces the saturnine personality of lawyers back to the Middle Ages. See Peter Goodrich, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW 1* (1995) (“The study of law has always traveled under the Sign of Saturn...”).

phrase Justice Cardozo, quoted above,<sup>11</sup> happiness may not be in a successful lawyer's life. Our prescriptions have to account for the connection between the goals of the legal system and the nature of its practitioners. Moreover, since research suggests that students may self-select the study of law because of their pessimistic tendencies,<sup>12</sup> we have to understand better the attraction of law to certain kinds of personalities.

Despite the caveats, we believe steps can be taken to improve the lives of lawyers. Moreover, even assuming lawyer pessimism has a social purpose, recognition of that fact may well facilitate deeper understanding by lawyers of their role in society. Even exercises in introspection can help to improve the quality of a lawyer's life.

## II DEFINING THE UNHAPPINESS PROBLEM

Practitioners have increasingly acknowledged that law is a profession in crisis,<sup>13</sup> and the crisis they speak of relates to the widespread disenchantment among even the most talented lawyers.<sup>14</sup> This undercurrent of dissatisfaction cannot be ignored or hidden by the many rueful jokes often told by lawyers about lawyers. Among practitioners responding to a 1992 poll, 52 percent described themselves as dissatisfied,<sup>15</sup> and many are retiring early or leaving the profession altogether.

In many cases, the problem is not financial. Associates at top firms can earn (with bonuses) up to \$ 200,000 per year in their first year of practice.<sup>16</sup> In the last decade, lawyers have surpassed doctors as the highest-paid professionals.<sup>17</sup> But financial

<sup>11</sup> See Cardozo Letter, *supra* note 1. Also see Andrew L Kaufman, CARDOZO (1998) for a comprehensive documentation of Justice Cardozo's many contributions to law and the legal profession despite (or conceivably because of) his saturnine nature.

<sup>12</sup> See Jason Satterfield et al., *Law School Performance Predicted by Explanatory Style*, 15 BEHAV. SCI. & L. 95 (1997).

<sup>13</sup> See Carl Horn, *Twelve Steps Towards Personal Fulfillment in Law Practice*, A.B.A L. PRAC. MGMT., October 1996, 36. See also texts cited *supra* in note 3.

<sup>14</sup> See Robert Kurson, *Who's Killing the Great Lawyers of Harvard?*, ESQUIRE, August 2000, 82. Kurson, himself a 1990 Harvard Law graduate describes the trend among his former classmates: "One after another, those who have left law, especially law firms, seem happy. Those who have not are suffering, or worse, resigned. They talk about losing themselves.... More vow to leave the law with the next infusion of cash or gumption", *Id.* at 84. see also Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2028 (1998) [hereinafter *Docile Lawyers*] (documenting the "psychological distress that so often accompanies a Harvard Law School education").

<sup>15</sup> See Michael Hall, *Fax Poll Finds Attorneys Aren't Happy with Work*, L.A DAILY, Mar. 4, 1992, at 3.

<sup>16</sup> The New York Law Journal reported that the firm of Wachtell, Lipton, Rosen & Katz gave year end bonuses of 100 per cent of base salary. Its first year associates earned \$200,000. See N.Y L.J., Dec.22, 1998, at 1. Another article found that from January 1, 2000 the Menlo Park, California firm of Gundersen, Dettmer, Stough, Villeneuve, Franklin & Hachigian paid a base salary of \$125,000, plus a "guaranteed minimum bonus" of \$20,000 and an additional "discretionary bonus" of \$5,000 to \$15,000 annually. See N.Y. L.J., Dec. 27, 1999, at 1 (Of course, this was before the demise of the dotcoms).

<sup>17</sup> We note, however, that the salary range among lawyers is wider than among doctors. See Aaron Bernstein, *Them That's Got Shall Get*, BUSINESS WEEK, July 28, 1997, at 16 reviewing ANDREW HACKER, MONEY: WHO HAS HOW MUCH AND WHY (1997) and reporting that lawyers are a diverse

recognition may just be a symptom of the problem. The recent pay increases at large law firms are themselves partially caused by lawyer dissatisfaction. The euphemistic "retention bonuses" are awarded to ensure that young associates extend their service beyond two or three years. Combating this desire to leave early is among law firms' highest priorities, since they can only recoup their investment in new lawyers over a longer period of time.<sup>18</sup>

In addition to being disenchanted, lawyers are "in remarkably poor health".<sup>19</sup> They are at much greater risk than the general population for depression, heart disease, alcoholism and illegal drug use. For example, researchers at Johns Hopkins University found statistically significant elevations of major depressive disorder ("MDD") in only three of 104 occupations surveyed.<sup>20</sup> When adjusted for socio-demographic factors, lawyers topped the list, suffering from MDD at a rate 3.6 times higher than employed persons generally.<sup>21</sup> The researchers noted the possibility that the work environments in these at-risk professions were conducive to depression. Further, they proposed that lawyers and secretaries - two of the three highest risk groups - have little autonomy and control, a factor that has been implicated in depression.<sup>22</sup> These studies confirm the hypothesis that lawyer unhappiness can lead to serious health and social problems that pose a threat to the legal profession.

Unhappy lawyers not only burden their families. Given their role in a public profession they can also injure their clients by failing to provide adequate representation.<sup>23</sup> Unhappiness and depression are intimately associated with passivity and poor productivity at work. Bar associations have the best data on these costs since lawyers who violate their clients' interests often become disciplinary problems. But formal recognition usually comes late in lawyers' careers, after a long period of unrecognized and unaddressed problematic behaviour. By that point, inadequate representation may already have caused irreparable injuries to clients and the legal

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group, with one third earning over \$100,000, but one quarter earning \$40,000 or less. See also Kimball Perry, *Hamilton County's Highest Paid Employees: They're Not Who You Think They Are*, CINCINNATI POST, Aug 10 1998, at 1A: "Lawyers and doctors dominate the list of highest paid employees... Of the top 30 salaries, four belong to doctors and 10 ten to lawyers".

<sup>18</sup> In preparation of this article, the authors conducted a faculty seminar in Fall 1999 at Benjamin N. Cardozo School of Law which involved managing partners from major law firms. The focus was upon the early departure of young associates. See also N.Y. Bar Task Force Report, *supra* note 2, examining retention issues. In the "up or out" environment of the large New York Law firm, retention is a term of limited duration meaning, for many associates, from six to seven years rather than two to three.

<sup>19</sup> See Schlitz, *supra* note 3, at 873; see also Michael Quinn, *Reality Bites*, TEXAS LAW, Jan 31, 2000, at 63 reviewing Steven Keeva, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999); Michael Sweeney, *The Devastation of Depression: Lawyers Are at Greater Risk*, 22 BUSINESS LEADER, Mar-Apr 1998, at 11.

<sup>20</sup> See William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081 (1990) discussing findings based on interviews of 1,200 workers.

<sup>21</sup> The other two at risk occupations are teachers and counselors with a depressive rate of 2.8; and secretaries with a rate of 1.9, *Id.* at 1079.

<sup>22</sup> Eaton et al., *supra* note 21, at 1085-86 citing MARTIN E. P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH (1990).

<sup>23</sup> See John Harkness Jr., *Lawyers Helping Lawyers: A Message of Hope*, 73 FLA. B. J. 10 (1999) reporting that over half the grievances filed against lawyers have addiction or mental disorder as a significant contributing factor.

system<sup>24</sup>. The task, then, is to protect the public against harm by addressing potential problems before they rise to the level of disciplinary offences.

That said, we must remember that not all **lawyers are unhappy** or dysfunctional; indeed, many are very happy and highly functional.<sup>25</sup> And some may follow the course of Justice Cardozo, channelling their unhappiness into professional excellence or even perfectionism.<sup>26</sup> So we must be cautious in our conclusions. Law is, after all, a prestigious and remunerative profession and law school classrooms are full of fresh candidates. But in many respects that is the point. Some law students, as we will see in a moment, have selected law because of their pessimistic personalities and so they are at risk of depression when they become lawyers. Law schools are themselves a potential breeding ground for lawyer demoralization and that makes them - as well as law firms - candidates for reform. In these ways the relationship between positive psychology and law becomes a subject worthy of further study in the legal academy, as well as in the profession at large.

### III PSYCHOLOGICAL EXPLANATIONS FOR LAWYER UNHAPPINESS

Research in positive psychology suggests three principal causes of the demoralization prevailing among lawyers: (a) pessimism, (b) low decision latitude, and (c) the “zero-sum game” nature of the job. Each of these causes needs to be understood both on its own terms and in relation to the countervailing benefits each brings.

#### A Pessimism

“Pessimism” is a term emerging from a reformulation of learned helplessness theory, a theory first systematically articulated by researchers studying animal behaviour.<sup>27</sup> Pessimism is defined not in the colloquial sense: “seeing the glass as half full or half empty” but rather, as a pessimistic “explanatory style”. This is the

<sup>24</sup> This inadequacy of representation can take many forms. At the extreme, consider that high error rates in death penalty cases might be partially attributable to lawyer incompetence. See James Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, 6 (2000), available at <<http://justice.policy.net/jreport>> (visited Oct 5 2001) finding 68 per cent of cases reversed on appeal. The study also provides summaries detailing lawyer incompetence in capital cases throughout the country. *Id.* at appendix D.

<sup>25</sup> See Silver & Cross, *supra* note 5. The authors defend lawyers against charges of being members of a failed profession and cite the career of Arthur Liman, as a prime example, among many, of a lawyer who thrived in practice. See also ARTHUR L LINMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998). Even Mr. Liman, an unrepentant believer in the law and legal profession acknowledges problems of “rampant materialism” and other indicators of lawyer malaise. *Id.* at 358-60.

<sup>26</sup> See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1418 (1997) [supporting the view that being a workaholic and perfectionism are common inherent traits of lawyers]; see also Kaufman, *supra* note 11, at 53-61 documenting Justice Cardozo’s hard work to develop his skills as a lawyer.

<sup>27</sup> See generally J. Bruce Overmier & Martin Seligman, *Effects of Inescapable Shock upon Subsequent Escape and Avoidance Learning*, 63 J. COMP. & PHYSIOLOGICAL PSYCHOL. 28 (1967); Lyn Abramson, Martin Seligman & John Teasdale, *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49, 49-59 (1978).

tendency to interpret the causes of negative events in stable, global and internal ways: "It's going to last forever; it's going to undermine everything; it's my own fault".<sup>28</sup> Under this definition, the pessimist will view bad events as unchangeable. The optimist, in contrast, sees setbacks as temporary.<sup>29</sup> That crucial distinction is what connects pessimism to unhappiness.

Research has revealed, predictably, that pessimism is maladaptive in most endeavours: pessimistic life insurance agents make fewer sales attempts, are less productive and persistent, and quit more readily than optimistic agents.<sup>30</sup> Pessimistic undergraduates get lower grades, relative to their SAT's and past academic record, than optimistic students.<sup>31</sup> Pessimistic swimmers have more sub-standard swims<sup>32</sup> and bounce back from poor swims less readily than do optimistic swimmers.<sup>33</sup> Historical research even suggests that pessimistic world leaders take fewer risks and act more passively during political conflicts than their optimistic counterparts.<sup>34</sup> In the context of a military crisis and aggression by an adversary, such passivity can have devastating consequences.<sup>35</sup>

But while pessimists tend to be losers on many fronts, there is one striking exception: pessimists may fare better in law.<sup>36</sup> Research reveals a surprising correlation between pessimism and success in law school. The students of the University of Virginia School of Law, Class of 1987, were tested for optimism-pessimism with the Attributional Style Questionnaire ("ASQ"). The ASQ is a well-standardized self-report measure of "explanatory style" - one's tendency to select certain causal explanations for good and bad events. To date the ASQ has been administered to more than half a million American adults.<sup>37</sup> In the University of Virginia Law School sample, the students' performance was then tracked throughout law school as it related to their initial explanatory style. In sharp contrast to results in other

<sup>28</sup> See MARTIN E. P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* (2<sup>ND</sup> ed. 1992).

<sup>29</sup> See generally Lyn Abramson, Judy Garber & Martin Seligman, *Learned Helplessness in Humans: an Attributional Analysis*, in *HUMAN HELPLESSNESS: THEORY & APPLICATIONS* 3-35 (Judy Garber & Martin Seligman eds., 1980). CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, *HELPLESSNESS AND ATTRIBUTIONAL STYLE IN DEPRESSION* 53-59 (1981).

<sup>30</sup> See Martin Seligman & Peter Sculman, *Explanatory Style as a Predictor of Productivity and Quitting Among Life Insurance Sales Agents*, 50 *J. PERSONALITY & SOC. PSYCHOL.* 832, 837 (1986).

<sup>31</sup> See Christopher Peterson & Lisa Barrett, *Explanatory Style and Academic Performance Among University Freshman*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 832, 837 (1985).

<sup>32</sup> See Martin Seligman et al., *Explanatory Style as a Mechanism of Disappointing Athletic Performance*, 1 *PSYCHOL. SCI.* 143 (1990).

<sup>33</sup> *Supra* note 32.

<sup>34</sup> See Jason Satterfield & Martin Seligman, *Military Aggression and Risk Predicted by Explanatory Style*, 5 *PSYCHOL. SCI.* 77 (1994).

<sup>35</sup> *Supra* note 34. The two world leaders who were the subjects of this study were George Bush and Saddam Hussein. Their actions during the Persian Gulf Crisis were analyzed and rated on scales quantifying aggression and risk taking.

<sup>36</sup> See Satterfield et al., *supra* note 12, at 100-01. We note that the research findings of a pessimist profile were linked with success in law school and do not necessarily hold for success in law practice. We feel confident however, about extrapolating the research findings to the law firm setting since law firms select associates based on success in law school.

<sup>37</sup> See Satterfield et al., *supra* note 12, at 96. 97 per cent of the class was tested.

realms of life,<sup>38</sup> law students whose attributional style defined them as “pessimistic” actually fared better than their optimistic peers. Specifically, the pessimists outperformed more optimistic students on traditional measures of achievement, such as grade-point average and law journal success.

These data suggest that what is labelled as pessimism is not a detriment and may even be a virtue for lawyers. Pessimism encompasses certain “positive” dimensions; it contains what we call - in less pejorative terms - “prudence”.<sup>39</sup> A prudent perspective, which requires caution, scepticism and “reality-appreciation”, may be an asset for law or other skill-based professions. It is certainly a quality that is embraced in legal education. Prudence enables a good lawyer to see snares and catastrophes that might conceivably occur in any given transaction. The ability to anticipate a whole range of problems that non-lawyers do not see is highly adaptive for the practicing lawyer. Indeed clients would be less effectively served if lawyers did not so behave, even though this ability to question occasionally leads to lawyers being labelled as deal breakers or obstructionists.

The qualities that make for a good lawyer, however, may not make for a happy human being. Pessimism is well-documented as a major risk factor for unhappiness and depression. Lawyers cannot easily turn off their pessimism (i.e. prudence) when they leave the office. Lawyers who can see acutely how bad things might be for clients are also burdened with the tendency to see how bad things might be for themselves.<sup>40</sup> Pessimists are more likely than optimists to believe they will not make partner, that their profession is a racket, or that the economy is headed for disaster. In this manner, pessimism that might be adaptive in the profession also carries the risk of depression and anxiety in the lawyer's personal life.<sup>41</sup> The challenge is how to remain prudent professionally and yet contain pessimistic tendencies in domains of life outside the office.

## **B        *Low Decision Latitude***

A second psychological factor producing lawyer unhappiness is low decision latitude. Decision latitude refers to the number of choices one has or, as it turns out, one believes one has.<sup>42</sup> Workers in occupations that involve little or no control are at risk for depression and for poor physical health. An important study of the correlation of job conditions with depression and coronary disease used two dimensions: (1) job demands and (2) decision latitude. There is one quadrant particularly inimical to health and morale: high job demand combined with low decision latitude. Individuals with jobs in this quadrant had a much higher

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<sup>38</sup> See *supra* notes 30-32.

<sup>39</sup> Kronman also speaks of “prudence, or practical wisdom” as a virtue of the lawyer-statesmen. See Kronman, *supra* note 4, at 109.

<sup>40</sup> See Amiram Elwork, *Being Mr. or Mrs. Superlawyer Can Strain Family Relations*, NAT'L L.J., Aug 24, 1998, at C4.

<sup>41</sup> See Julie Stoiber, *That Outward Success Often Hides Stress Inside Local Lawyers*, PHILADELPHIA INQUIRER, Sep 18, 1995, at F1.

<sup>42</sup> See Seligman, *supra* note 28.

incidence of coronary disease and depression than individuals in the other three quadrants.<sup>43</sup>

Nurses and secretaries are the usual occupations falling in that quadrant, but in recent years, junior associates at major law firms have been added to the list. These lawyers often confront situations of high pressure combined with low decision latitude. Beyond the intense job demands of law practice, low decision latitude is also a frequently cited problem.<sup>44</sup> Associates often have little voice or control over their work, only limited contact with their superiors, and virtually no client contact. Instead, for at least the first few years of practice, many remain cloistered and isolated in a library (or behind a computer screen), researching and drafting memos.<sup>45</sup>

In these high-pressure, low decision latitude positions, the associates are likely candidates for negative health effects, such as higher rates of heart disease; and for higher divorce rates.<sup>46</sup> These same associates are, not surprisingly, candidates for early departure from law firms; they are therefore often the object of “retention bonuses”. Not surprisingly, many young lawyers who do leave firms early choose alternative legal careers, such as legal aid or assistant district attorney, where the pay is considerably lower but the decision latitude is considerably greater.<sup>47</sup>

#### IV REMEDIES FOR PESSIMISM AND FOR LOW DECISION LATITUDE

There are well-documented antidotes for the difficulty lawyers face because of their pessimism and low decision latitude. As to pessimism, the antidote is to enlist its opposite dimension: optimism. Optimism is the ability to dispute recurrent catastrophic thoughts effectively, and it can be learned.<sup>48</sup> “Flexible optimism” can be taught to both children and adults to enable them to determine how and in what situations one should use optimism and when to use pessimism.<sup>49</sup> The techniques of “learned

<sup>43</sup> See Robert Karasek et. al., *Job Decision Latitude, Job Demands and Cardiovascular Disease: A Prospective Study of Swedish Men*, 71 AM. J. PUB. HEALTH 694, 695 (1981).

<sup>44</sup> A recent American Lawyer article characterized the life of a big firm associate this way: “The partners [are] sadistic. The work? Mind numbing and pointless. There are all nighters in the library...16 hour workdays without seeing the sun...and the unrelenting, inhuman stress is just the prelude to divorce, illness, and maybe even brushes with psychosis”. Jim Schroder, *Midlevels, Money and Myths*, AMERICAN LAWYER, Oct 1999, at 67.

<sup>45</sup> See Robert Cosgrove, *Comment, Damned to the Inferno? A New Vision of Lawyers at the Dawn of the Millennium*, 26 FORDHAM URB. L.J 1669, 1684-5 (1999). This description applies primarily to young lawyers who join large, metropolitan law firms, but they are a significant subgroup of the profession.

<sup>46</sup> See Robert Carney et al., *Depression and Coronary Heart Disease: A Review for Cardiologists*, 20 CLINICAL CARDIOLOGY 196 (1997).

<sup>47</sup> The advantage of serving as a district attorney or legal aid attorney is the ability early on to have full responsibility for managing the case. We do not find it surprising that young associates who leave large law firms after a few years are likely to gravitate to these kinds of positions.

<sup>48</sup> See MARTIN E. P. SELIGMAN, *LEARNED OPTIMISM* (1998).

<sup>49</sup> SELIGMAN, *supra* note 48; see also MARTIN E. P. SELIGMAN, *THE OPTIMISTIC CHILD* (1995).

optimism”,<sup>50</sup> can teach lawyers to use optimism in their personal lives, yet maintain an adaptive pessimism in their professional lives. Flexible optimism can be taught in a group setting such as law firms. If firms are willing to experiment, we believe the positive effects on the performance and morale of associates in those firms could be significant.<sup>51</sup>

Learned optimism recommends that individuals employ a “disputing technique” to control their negative emotions. In the disputing technique, the lawyer first learns to identify catastrophic thoughts she has, and the circumstances under which they occur: “I’ll never make it to partner”, whenever a senior member of the firm fails to return her greeting. Then she learns to treat these thoughts as if they were uttered by a rival for her job, a third person whose mission is to make her life miserable. She then learns to marshal evidence against the catastrophic thoughts, “Even though he didn’t smile when I said “hi” this morning, he praised my brief in the meeting last week. He probably is on my side and was distracted by the big case he has to argue this afternoon”. Credible disputing of pessimistic thinking (unlike, say dieting) is self-maintaining because one feels better at the moment one does it.

As to the high pressure-low decision latitude problem, there is a remedy as well. We accept that pressure is an inescapable aspect of law practice. But high pressure itself does not seem to be the problem; rather, it is the combination of high pressure and low decision latitude that causes negative health effects. By modifying this dimension, lawyers can become both more satisfied and more productive. One solution is to tailor a lawyer’s day so there is considerably more personal control over work.<sup>52</sup> Some law firms have begun this process as they confront the unprecedented resignations of young associates,<sup>53</sup> and these efforts should be expanded. One need not regularize aspects of the fabled “summer associate” programs - where large firms compete shamelessly to show top students how wonderful legal practice is - in order to achieve gains in this regard.<sup>54</sup> Antidotes to associate malaise include more substantive training, mentoring, a voice in management, and earlier client contact - not expensive dinners or Cuban cigars. Those firms who understand the need to make these changes will benefit. Those who do not so respond, who instead simply throw money at the problem, will continue to see associates vote with their

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<sup>50</sup> See SELIGMAN, *supra* note 48.

<sup>51</sup> A firm could divide its associates (and partners, for that matter) into two groups, one of which was taught flexible optimism and the other not. The former group will, we predict, be markedly more productive both in terms of billable hours and years of service. We are willing to undertake this experiment and are in the process of identifying law firms to act as volunteers.

<sup>52</sup> Volvo solved a similar problem on its assembly lines in the 1960’s by giving its workers the choice of building a whole car as a group, rather than repeatedly building the same part. Similarly, a junior associate might be given a better sense of the whole picture by being introduced to clients, mentored by partners, and involved in transactional discussions.

<sup>53</sup> See Julie Flaherty, *14 Hour Days? Some Lawyers Say “No”*, N.Y. TIMES, Oct. 1999, at G1 who states that “At large law firms 44% of new associates leave within three years...” and that a major New York firm formed a committee to “figure out how to keep younger lawyers happy”.

<sup>54</sup> Summer associate programs are part of the problem, in a way, since they can create a false reality, one where the firm is portrayed as an entertainment centre rather than a work centre.

feet.<sup>55</sup>

The recent Task Force study by the New York City Bar addresses a few of these suggestions - for example mentoring - but it avoids others like a voice in management and early client contact.<sup>56</sup> These suggestions may be more difficult to implement within the traditional firm's structure, but the payoffs in morale and better performance of associates makes them worthy of further consideration. Moreover, research on the problem of decision latitude also tells us that the mere illusion of decision latitude has beneficial effects on morale. Perceived control can be just as effective an experimental condition as actual control.<sup>57</sup> This means that efforts to meet and communicate about problems can have beneficial effects. Establishing a committee on associate morale, coupled with surveys and interviews of young associates, is one way to accomplish this result. But since young lawyers are a highly sceptical group, they will be quick to challenge attempts at talk and no action. The result may be that over time practices inimical to these attorneys' welfare will dissolve under scrutiny.

A law firm can gain by learning more about associates' strengths and employing that knowledge to help shape the work environment. When a young lawyer enters a firm, he or she comes equipped not only with prudence and other lawyerly talents like high verbal intelligence, but with an additional set of unused signature strengths, such as leadership, originality, fairness, enthusiasm, perseverance, and social intelligence. As lawyers' jobs are crafted now, these strengths do not get much play, and when situations call for them, they do not necessarily fall to those who have the relevant strengths.

Law firms should discover the particular signature strengths of their associates.<sup>58</sup> Exploiting them could make the difference between a demoralized associate and an energized, productive colleague. A firm can produce higher morale by setting aside five to ten hours of the work week for "signature strength time", (i.e., a non-routine assignment that uses the signature strengths).<sup>59</sup> Over time, higher morale will translate into higher billing hours.

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<sup>55</sup> See *supra* note 53. Young lawyers are leaving law firms after three years (or when their loans are paid). But they may be going to high pressure jobs at lower salaries where they have more control, such as district attorney's offices or legal aid societies. See *supra* note 47. Of course, others opt for high pressure, high paying jobs in investment banking or in venture capital, where the burn out rate is high, but the rewards have, until recently, been greater.

<sup>56</sup> N.Y. Bar Task Force Report, *supra* note 2, at 761-762. The Report also recommends that law firms improve the training of new associates in substantive areas like transactional work. *Id.* at 767-68.

<sup>57</sup> See Ellen Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 J. PERSONALITY & SOC. PSYCHOL. 191 (1976); Martin Seligman, *Power and Powerlessness: Comments on "Cognates of Personal Control"*, 1 Applied & Preventive Psychol.: Current Scientific Perspectives 119 (1992).

<sup>58</sup> See <<http://www.psych.upenn.edu/seligman>> for identification of these and other strengths, and a self test. A law firm can develop an inventory of associate strengths by having associates take tests and assigning duties based on the results. At law schools, the strengths analysis can be used to give students and placement director's better sense of their career goals.

<sup>59</sup> In each of these cases, the five to ten hours an associate devotes to using his or her signature strengths should be considered part of the normal workload, whether or not this time produces billable hours. This

Some examples may serve to make the point. If an associate's strengths include leadership he or she could be assigned to associate committee work; or if it is social intelligence, he or she could be exposed to clients at an earlier stage. Originality might send an associate to the library to search out a non-obvious theory to an intractable legal problem. That may sound like the kind of duty all associates should assume; however, the idea of signature strengths is that some associates are indeed better suited to library work, and others to different roles at the firm, even though they must all have a commitment to legal analysis.

## V THE HARDER CASE: ZERO VS. NON-ZERO SUM GAMES

### A *Zero-Sum Games and Emotion*

A zero-sum game is a familiar occurrence. It is an endeavour in which the net result is zero. For every gain by one side, there is a counterbalancing loss by the other. A sports event is a zero-sum game, in that there must be winners and losers. A non-zero-sum game, in contrast, is an endeavour in which there is a net gain. Reading this essay is a positive-sum game: your exposure to new information does not mean someone else has forgotten an equivalent amount of information. Rather, there are gains on both sides: the reader learns something new, the authors disseminate their ideas, and so forth.

Robert Wright has recently argued that human civilization itself is moving in the inexorable, albeit bumpy, direction of more positive-sum games.<sup>60</sup> This is a particularly appealing vision, because it is likely that negative emotions (i.e. anger, anxiety, and sadness) have evolved from zero-sum games, and that positive emotions have evolved from non-zero-sum games. Wright argues that we have reached our present state of social development by harnessing non-zero interactions, and that as we have continued to evolve, non-zero-sum games have become more numerous and elaborate, and have produced collective benefits to society.

Wright explains his thesis through the use of the prisoners' dilemma, the classic zero-sum game. He reasons that mutual profit can even be achieved in situations like the prisoner's dilemma if two problems are solved: communication and trust.<sup>61</sup> If these conditions are obtained - stable, cooperative relationships emerge.<sup>62</sup> Wright's thesis has particular appeal to the legal profession. Much of the lawyer's relationship to his client, the court and even fellow lawyers is premised on estab-

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is similar to what happens when pro bono hours are calculated into an associate's work week. See N.Y. Bar Task Force Report, *supra* note 2, at 770. We believe that this use of time is a good investment that the firm will recover in more effective work - and longer tenures - of the associates involved.

<sup>60</sup> See ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* (2000).

<sup>61</sup> *Id.* at 340-41. See also RICHARD AXELROD, *AXELROD: THE EVOLUTION OF COOPERATION* (1984).

<sup>62</sup> See Wright, *supra* note 60. See also ROBERT WRIGHT, *THE MORAL ANIMAL* 327-44 (1994) [introducing the idea of evolutionary ethics].

lished, norm-based commitments. If these core values of the profession can move in the direction of non-zero status, the profession can also be benefited.

Barbara Fredrickson offers a related perspective by arguing that positive emotions - such as joy, amusement and interest - are broadening; they build social and intellectual resources.<sup>63</sup> By contrast, negative emotions narrow and restrict the social and cognitive environment. This reasoning has important implications for the structure of a job. To the extent that the job consists of zero-sum situations, one can expect the negative emotions - sadness, anxiety, and anger - to pervade the job. To the extent the job is leavened with positive-sum games, one can expect a positive outcome. This research supports the non-zero structure that Robert Wright perceives in society more generally, and it also highlights the particular dilemma of the legal job environment.

## **B      *The Adversary System as a Zero-Sum Game***

The adversary process, which lies at the heart of the American system of law, has long been viewed as a classic zero-sum game: in litigation, one side's gain often moves in lockstep with the other side's loss. Lawyers are trained to be aggressive and competitive precisely because they must win the litigation game. This training, because it is fuelled by negative emotions, can be a source of lawyer demoralization, even if it fulfils a social function. One problem with the adversarial paradigm, according to leading lawyers like Sol Linowitz, is that "the single-minded drive toward winning the competition ... will make these young lawyers not only less useful citizens ... but also less good as lawyers, less sympathetic to other people's troubles, and less valuable to their clients".<sup>64</sup> When the practice of law is tied up with a large number of zero-sum games, it will produce predictable emotional consequences for the practitioner, who will be anxious, angry and sad much of his professional life. But the adversary model is entrenched in the ethics of law.<sup>65</sup> The introduction of more non-zero-sum situations - for example, leaning in the direction of mediation rather than litigation - potentially decreases demoralization only at the cost of our system of justice. By understanding the values of the adversary system in terms of its zero-sum nature, we can assess alternatives that seek to soften competition with cooperation. Modifications to our legal system must be justified both in terms of an individual's well-being, and of our system of justice.

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<sup>63</sup> See Fredrickson, *supra* note 8. Her research further suggests that such positive emotions may hasten physical recovery from potential health risks caused by fear and anxiety. See also Barbara Fredrickson & Robert Levenson, *Positive Emotions Speeds Recovery from the Cardiovascular Sequelae of Negative Emotions*, 12 COGNITION & EMOTION 191 (1998).

<sup>64</sup> SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 107-08 (1994).

<sup>65</sup> The Code of Professional Responsibility has nine operative canons, the most central of which require a lawyer to preserve a client's secrets. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 4 (1980) require exercise independent professional judgment on behalf of a client, *id.* at Canon 5, and represent a client "competently", *id.* at Canon 6, and "zealously", *id.* at Canon 7. These canons embrace the client centered, adversarial model of justice.

### C *The Adversary System as a Social Good*

Social psychology has analysed the adversary system from the standpoints of fairness and satisfaction.<sup>66</sup> An accepted virtue of the common law, adversarial system of justice is that it leaves more control in the parties (through their attorneys). The civil law, accusatory system, on the other hand, places more control on the judge (or other decision-maker). Since control has a salutary psychological effect,<sup>67</sup> the adversary model is one expression of a satisfactory political system. By placing control in the individual over the state the adversary system reflects deeper values of liberalism and even natural justice.<sup>68</sup> In this way, the lawyer has a central role as a public servant, a preserver of the values inherent in our political structure, even when he or she is seemingly only arguing for a client's self-interest.<sup>69</sup> And since the days of Adam Smith, we have believed that self-interest serves the public interest.<sup>70</sup>

The psychological question is whether adversaries can be competitive without being pessimistic. The way adversariness is perceived by lawyers helps shape their character and encourages pessimistic behaviour. And sometimes competitiveness is unnecessarily combative. The Canons of Ethics emphasize "zealous" representation. But one can fairly ask, what does zealous representation add to competent representation?

This is not just a question of positive psychology. Justice Sandra Day O'Connor has asked why the profession envisions litigation as war.<sup>71</sup> The question is, can lawyers serve the adversary system without generating conflict on a personal level? Civility need not weaken the lawyer's commitment to the adversary system. In fact, a growing number of law schools and law firms now recognize the importance of instilling civility and teaching team-building skills.<sup>72</sup> Under this vision, it may be possible to retain the virtues of adversariness while discarding some of its negative dimensions.

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<sup>66</sup> See Thibaut et. al., *supra* note 9. See also SOCIAL SCIENCE IN LAW (John Monahan & Lauren Walker eds., 4<sup>th</sup> ed, 1998).

<sup>67</sup> See Judith Roden, *Density, Perceived Choice and Response to Controllable and Uncontrollable Outcomes*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 564, 576 (1976).

<sup>68</sup> See Verkuil, *supra* note 9, at 57-58.

<sup>69</sup> This is the proposition advocated by Professors Silver and Cross, *supra* note 5, at 1452; namely, that preserving private interests serves the public interest.

<sup>70</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) [Smith's invisible hand is the method whereby self interest is transformed into the public interest]; also see AMARTYA SEN, DEVELOPMENT AS FREEDOM 255-57 (1999) [employing Smith's invisible hand to reconstruct economics on a freedom rather than utility model].

<sup>71</sup> See Sandra Day O'Connor, *Professionalism*, 78 OR. L. REV. 385, 388 (1999). The "war" analogy is deeply imbedded in the litigation world, where dealings with other attorneys are described with terms such as "attacked" and "shot down".

<sup>72</sup> See Linda Kulman, *Redefining the American Lawyer: Ethics, Values and Personal Fulfillment*, US NEWS & WORLD RPT., Mar. 2, 1998, at 77.

We suggest that controlling the intensity of non-zero behaviour, like curbing the effects of pessimism in the earlier examples, can serve as a coping technique with positive health effects. Moreover, our initial description of the litigation experience emphasizes a largely limited, if not misleading, reality. The zero-sum effects of the adversary model, in terms of its “winner-take-all” mentality, usually occur where cases are tried to judgment - a small minority of cases.<sup>73</sup> Where settlements occur, both sides frequently have made wise choices that allow them to claim victory.

Outside of litigation, non-zero expectations can play an even greater role. As Dean Clark has noted, most lawyers are not litigators;<sup>74</sup> rather they are specialists in “normative ordering”.<sup>75</sup> The notion of normative ordering suggests a role that fits the lawyer-statesman ideal Dean Kronman seeks to revive. When lawyers assume these roles, cooperation challenges the virtue of competition. For example, Ronald Gilson has argued that business lawyers - the deal-makers - can create value in such a way as to eliminate the zero-sum problem altogether.<sup>76</sup>

#### **D Softening the Adversary Model Through “Cooperative” Litigation**

While we accept the social necessity for an adversary model, with its zero-sum implications, we also applaud efforts to separate the two concepts when possible. It has been proposed, for example, that the benefits of the adversary system can be expanded without zero-sum consequences. If litigation itself can be avoided, or our judge cantered system used in a back-up role, the client may still retain control over the outcome while increasing the probability of cooperative solutions. Here the work of Ronald Gilson and Robert Mnookin is instructive.<sup>77</sup> The authors propose, and later test, the proposition that selection of lawyers for their ability to cooperate allows clients to commit to “cooperative litigation” in situations where they would not cooperate directly. By engaging in a pre-litigation game, and using techniques

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<sup>73</sup> In terms of federal court caseloads, jury trials now constitute only 4.3 percent of criminal cases and 1.5 percent of civil cases. This has led some to question the “marginalizing” of the jury’s role. See William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Being Eroded*, N. Y. TIMES, Mar. 2, 2001, at 1.

<sup>74</sup> See Clark, *supra* note 9, at 281 citing Leonard Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 278 (1978) which find that less than 12 percent of 969 lawyers who participated in a survey reported they were litigators. While many lawyers like to call themselves litigators, those who regularly enter the courtroom and try cases to judgment are a small subset, especially in large law firms, where the stakes are often too high to take cases to judgment.

<sup>75</sup> Clark, *supra* note 9, at 281.

<sup>76</sup> See Ronald Gibson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253-55 (1984) [labeling those lawyers “transaction cost engineers”].

<sup>77</sup> See Ronald Gilson & Robert Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); see also Rachel Croson & Robert Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997).

from the prisoner's dilemma, the authors show that choosing lawyers with reputations for cooperation can produce positive litigation outcomes.<sup>78</sup>

This research complements our theory of the cooperative lawyer. We see a health effect through cooperation because of its non-zero characteristics; the Gilson/Mnookin hypothesis sees an economic effect. The combination of both effects has significant social promise. The notion of cooperation in a litigation context reinforces our views on positive health effects.<sup>79</sup> If the positive role of adversaries can be expanded, benefits would occur for society and the legal profession.

Finally, we note that the zero-sum dimension is not the whole story in litigation. While the ends may often be zero-sum, the means can encompass non-zero dimensions. Robert Wright raises the possibility of an "iterated" prisoner's dilemma where the same players begin to cooperate as they learn more about one another.<sup>80</sup> As applied to the litigation context, iteration might help extend ideas of cooperation into the adversary process, much as Gilson and Mnookin have sought to do. Some techniques already exist. For example, standstill agreements between potential litigants are used to permit settlement discussions to proceed on a cooperative basis, without fear of having concessions used later in a courtroom. Similarly, mandatory mediation provisions in contract disputes are designed to free up the parties to explore alternatives before litigation commences.<sup>81</sup> These examples confirm that cooperating within the normally competitive confines of the adversary system is an ongoing and established practice. In sum, there are many ways that cooperation can be incorporated into the adversary system so as to minimize its zero-sum effects, without jeopardizing the social values it serves.

## VI THE ROLE AND RESPONSIBILITY OF LAW SCHOOLS

Law schools are both a source of the problem and a necessary part of the solution. The Socratic teaching method - employed especially in large, first-year classes - cultivates and encourages adversarial thinking by emphasizing zero-sum situations. The students' adversarial skills are honed by withstanding questioning from sceptical interrogators. In this respect, law school pedagogy differs from that of business schools, where cooperative projects and thinking are the rule in leading MBA programs.<sup>82</sup> Moreover, competition for grades, among a group who self selects law for its pessimistic qualities,<sup>83</sup> adds to the challenges. A Harvard law student argues

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<sup>78</sup> See Gilson & Mnookin, *supra* note 77, at 513.

<sup>79</sup> Gilson and Mnookin suggest that only certain lawyers will have reputations for cooperation. And that is a good start. But ultimately all lawyers would benefit from such a reputation, since cooperation makes lawyers themselves happier and more successful. *Id.* at 516. Litigators know better than any others the virtue of cooperation against the backdrop of litigation.

<sup>80</sup> See WRIGHT, *supra* note 60, at 342.

<sup>81</sup> We are mindful that some settings, for example the criminal process, make the prospect of standstill unlikely, but even there cooperation often achieves better outcomes through plea bargains and other negotiated arrangements.

<sup>82</sup> For example, the Wharton School of the University of Pennsylvania is known for its collaborative research projects which reward cooperation by grading the group level.

<sup>83</sup> See Satterfield et al., *supra* notes 34-35, and accompanying text.

that grade competition makes for docile lawyers after the first year of law school.<sup>84</sup> This makes the phenomenon of learned helplessness<sup>85</sup> relevant to life at our law schools. This relationship of success in classroom performance to the litigation model is rarely explored or explained in legal education. Yet the connections between the Socratic Method and the adversary system may well set the stage for the kinds of difficulties law students' later face as young associates, as well as their successes. We encourage further study into the relationships among teaching style, grading methods, and the pessimistic tendencies of law students.

The connection between law teaching and the demands of practice might be revealed early in the first year, rather than assumed. Such an explanation may not overcome embarrassing moments in the classroom, but it can provide an objective rationale for an experience that some now find alienating precisely because it seems unnecessary or even gratuitous.<sup>86</sup> At the least, explaining that their education serves certain social purposes gives students the illusion of control and also introduces them to the demands they will face in practice.

The subject of positive psychology and lawyer unhappiness deserves exploration in the academic setting. Offering law students a sense of what the lawyer's life demands can increase the feeling of control over their professional lives.<sup>87</sup> With this background, both academic and career choices can be made on a more intelligent and emotionally satisfying basis.<sup>88</sup> In fact, a survey of student strengths at this stage might have considerable value. Some students have talents for litigation, for example, while others lean in the direction of less confrontational forms of practice. Some have signature strengths of valour and originality, others of social intelligence and fairness.<sup>89</sup> These strengths have a real world dimension: they could be factored into the career placement function at law schools in order to provide a better fit between a first job and the talents of graduating students. Also, as indicated earlier, they could help in task allocation at law firms, both to secure more satisfactory assignments and to avoid the associate exodus that has been occurring after a few years in practice.

#### IV SUMMARY AND NEXT STEPS

The pervasive disenchantment among lawyers and the concomitant attrition rate among law firms can be remedied. The solutions will be found not by increasing compensation or perks, but instead by using more valuable, but less tangible re-

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<sup>84</sup> See Docile Lawyers, *supra* note 14, for a good discussion of what the author believes the quest for grades does to first year law students at Harvard Law School.

<sup>85</sup> See discussion *supra* note 23.

<sup>86</sup> See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League School*, 143 U. PA. L. REV. 1 (1994).

<sup>87</sup> See Rodin, *supra* note 67.

<sup>88</sup> The N. Y. Bar Association Task Force Report lends itself to academic study. But it can also be used by career planning officials to assist students in choosing their first job. See N.Y. Bar Task Force Report, *supra* note 1.

<sup>89</sup> See *supra* notes 58-59 and accompanying text.

wards. This will require changes in law firm culture - greater emphasis on positive-sum games and cooperation - as well as reforms at three levels: individual, firm-wide, and institutional. At the individual level, lawyers must first recognize that pessimism is maladaptive outside of work. Perhaps they then can learn to apply the techniques of flexible optimism in their private lives. At the law firm level, those members with the most power to effect change should actively participate in creating more decision latitude for junior associates. At the least, partners should create mentoring relationships with junior associates.<sup>90</sup> They should also delegate responsibilities and allocate tasks to junior associates that better speak to their signature strengths, thereby providing more control and decision-making power at an earlier stage in their development.

Third, at the institutional level, bar associations that foster and promote civility among their members are on the right track. Judges and counsel who encourage settlement and direct cases toward mediation may deserve credit for dampening the zero-sum nature of practice. The law schools also play an institutional role. They are the entry point to the profession and help shape the system. By assisting new lawyers to adapt to the demands of practice they can become agents for positive change. The goal is clear if elusive: create a psychologically healthier profession while honouring the essential role of lawyers as client representatives. These need not be incompatible objectives.

The prospect of a profession that better understands itself is not utopian. Our purpose has been to show that positive psychology offers techniques that can be fitted into existing programs. We suggest that by decreasing pessimism, increasing decision latitude, and leavening zero-sum games with a cooperative dimension, the practice of law can become healthier and no less profitable. Admittedly, this is a challenging agenda. But even if it cannot be fully realized, we have at least helped answer the question why **lawyers are unhappy** and we have suggested why they need not be in the future.

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<sup>90</sup> The Task Force recommends mentoring of new associates:

Identified issue: As firms have grown, collegiality has declined, especially among attorneys of different levels of seniority and in different departments. In the pressure to meet tight time deadlines or keep billable hours within budget, partners and senior associates tend to exclude junior associates from key discussions, making them feel as though they are not part of the team. These and other demands have also led to an absence of mentors available to associates.

N.Y. Bar Task Force Report, *supra* note 2, at 781-82.