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Recent Writing on Law and Happiness

*Richard Delgado**

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I. INTRODUCTION

Are lawyers happy? If not, what can they do about it? Is unhappiness an inherent risk in the practice of law—at least as carried out today?

Lately, these questions and ones like them have been very much in the public eye. A 2011 Gallup Poll asked Americans if they were happy and ranked the results state-by-state on a numerical scale.[1] Perhaps sensing a scoop, the *New York Times* displayed Gallup's information in the form of a map of the entire country showing happy states in a cheerful orange, middling-happy states in pale yellow, and glum or miserable ones in gray or black.[2] An accompanying article identified America's happiest man: a five-foot-ten, sixty-nine-year-old, Chinese-American, Kosher-observing Jew, married with children, and living in Honolulu.[3]

Drawing on a different set of studies, another *New York Times* writer concluded that those who waited longest to have sex and took the smallest number of partners were happier than their precocious or bed-hopping counterparts,[4] while a third analyzed whether Internet searching made one happy or unhappy.[5] (Answer: It depends.) On the other side of the Atlantic, England's Prime Minister David Cameron announced the creation of a national happiness index that would provide quarterly measures of how his countrymen were feeling about their lives.[6]

Not to be outdone, a number of legal writers, including Deborah Rhode,[7] Mary Ann Glendon,[8] and Anthony Kronman,[9] have weighed in with books on happiness and its opposite in the legal profession. Perhaps sobered by some of their findings, students at one top law school took things into their own hands and signed a pledge refusing to work for law firms that

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1. *See* Catherine Rampell, *America's Happiest Man*, N.Y. TIMES, Mar. 6, 2011, at WK3.

2. Matthew Bloch & Bill Marsh, *Mapping the Nation's Well-Being*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/interactive/2011/03/06/weekinreview/20110306-happiness.html?ref=weekinreview.

3. Rampbell, *supra* note 1 (describing Alvin Wong, America's happiest man).

4. Ross Douthat, *Why Monogamy Matters*, N.Y. TIMES (Mar. 6, 2011), http://www.nytimes.com/2011/03/07/opinion/07douthat.html?sq=Why%20Monogamy%20Matters&st=cse&adxnnl=1&scp=1&adxnnlx=1319050858-MyFTnJtT6USHFLz6LZPUNQ.

5. *See* Michael Cieply, *All That Logging in Makes Dropping out Much More Difficult*, N.Y. TIMES, Mar. 17, 2011, at C3.

6. So much, it seems, for the vaunted English stiff upper lip. *See* Roger Cohen, *The Happynomics of Life*, N.Y. TIMES, Mar. 13, 2011, at WK12.

7. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); Deborah L. Rhode, *Foreword: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217 (2008).

8. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994).

9. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

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overwork associates and make them miserable.[10] As though sensing a trend, the American Bar Association Journal devoted several pages of a recent issue to the "happiness movement,"[11] while two sections of the Association of American Law Schools ("AALS") weighed in with a joint session at its 2011 annual meeting on this very subject, drawing an overflow crowd.[12]

In short, people are talking about happiness and its opposite. *The Happy Lawyer: Making a Good Life in the Law*,[13] by Nancy Levit and Douglas O. Linder, thus arrives at a propitious moment when many lawyers, as well as ordinary citizens, are considering the hedonic quality of their work lives and what can be done to improve them.

Part II of this essay outlines the Levit and Linder book, paying particular attention to its treatment of topics that other books on the subject rarely cover, including the social-scientific and neurological foundation of happiness, as well as prescriptions for a happy life in the law. Part III critiques the book, while Part IV puts forward my own analysis of what the debate on lawyers' happiness needs to include in order to secure lasting gains.

II. *THE HAPPY LAWYER*, BY NANCY LEVIT AND DOUGLAS O. LINDER

The latest entry in the literature on the hedonic level of lawyers' lives, *The Happy Lawyer*, follows on the heels of earlier writing by Deborah Rhode,[14] Patrick Schiltz,[15] Mary Ann Glendon,[16] Anthony Kronman,[17] and Jean Stefancic and this writer[18] on the same general subject. With the most sustained treatment of scientific findings, including "positive psychology," neuroscience, and sociology of the professions,[19] the book has attracted well-deserved attention.

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10. *See* Becky Beaupre Gillespie & Hollee Schwartz Temple, *Hunting Happy: In Grim Times, a Search for Joy in Law Practice Gains Ground*, ABA J. (Feb. 1, 2011, 4:39 AM), http://www.abajournal.com/magazine/article/hunting_happy_in_grim_times_a_search_for_joy_in_law_practice_gains_ground/; *see also* Stephanie Francis Ward, *Pulse of the Legal Profession*, ABA J. (Oct. 1, 2007, 1:12 PM), http://www.abajournal.com/magazine/article/pulse_of_the_legal_profession.

11. *See* Gillespie & Temple, *supra* note 10.

12. The double session included talks by Deborah Rhode, Nancy Levit, Jean Stefancic, and this writer.

13. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010).

14. *See* Rhode, *Foreword: Personal Satisfaction in Professional Practice*, *supra* note 7.

15. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

16. *See* GLENDON, *supra* note 8.

17. *See* KRONMAN, *supra* note 9.

18. *See* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005).

19. *See infra* notes 32–36 and accompanying text (describing the role of neuroscience, positive psychology, and other scientific fields in studying human happiness).

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Like other writers, the authors begin by citing studies showing that lawyers are among the unhappiest professionals, ranking below physicians, dentists, and accountants. In fact, lawyers rank close to roofers—who clamber around on slanted building tops under the hot sun all day, all the while exposed to carcinogenic chemicals and in constant danger of falling.[20]

Chapter 1—entitled "Are Lawyers Unhappy?"—summarizes the familiar and dismal statistics, including high rates of drug usage, alcoholism, suicidal thoughts, suicide, and depression.[21] Many lawyers divorce.[22] Others dream of leaving the profession; every year over 40,000 do,[23] including many of the thirty-seven percent of associates who quit their jobs within the first three years.[24] Most lawyers urge their children not to become lawyers.[25] As many as seventy percent wish that they had chosen different careers.[26]

Does the law attract unhappy personalities, and could that be the reason for the epidemic of unhappiness in the legal profession?[27] The authors, like most other authorities, say no. Before entering law school, students were neither more depressive nor discontent than undergraduates in general.[28] Only after a few weeks or months in law school do they show signs of stress and discontent.[29] The authors draw comfort from the possibility that law school may be attracting students who seem superficially well-adjusted—neither happier nor unhappier than average—but are unhappiness-prone and do not manifest their unhappiness until they receive exposure to the study of law.[30] They are, in short, normal people with a latent but undeveloped propensity to be unhappy when placed in front of casebooks.

As with the figures on law-student unhappiness, the statistics are presented in a somewhat summary manner and without much effort to sensationalize or drive home their impact. Indeed, the authors at times seem to be minimizing their significance. For example, many of the more

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20. See *infra* notes 21–32 and accompanying text; STEFANCIC & DELGADO, *supra* note 18, at 51–52, 60 (citing a number of other such rankings related to the public's perception of lawyers).

21. LEVIT & LINDER, *supra* note 13, at 6–7, 28, 30, 80–81, 129–30 (discussing these and other kinds of pathology).

22. *See id.* at 11–13, 209–12 (citing high incidence of family and work-life balance pressures); STEFANCIC & DELGADO, *supra* note 18, at 67–68 (citing high divorce rate).

23. STEFANCIC & DELGADO, *supra* note 18, at 51; *see also* LEVIT & LINDER, *supra* note 13, at 5–6 (citing high turn-over rate).

24. LEVIT & LINDER, *supra* note 13, at 5 (citing high rate of attrition during the first three years of law practice).

25. *Id.* at x.

26. *Id.*

27. *See id.* at xi (speculating that this might be the reason).

28. *Id.* at 129–30.

29. *Id.*

30. *Id.*

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shocking reports appear in juxtaposition with other, usually smaller, studies reporting that a particular group of lawyers, such as University of Virginia graduates polled twenty years after graduation, were relatively content.[31] The reader who has sampled some of the literature about the current epidemic of unhappy lawyers will recall studies that the authors either missed or chose not to highlight.[32] One gains the impression that the authors believe the problem is neither severe nor systemic and will yield to science, common sense, and a good checklist of things to do.

Chapter 2, entitled "Happiness: A Primer," sets forth the latest word in happiness studies, mostly from the fields of psychology and neuroscience. One learns, for example, that happiness is associated with certain neurotransmitters, principally serotonin,[33] and with the activation of neurons in certain areas of the brain.[34] One learns, as well, that ingrained human strategies developed over centuries center around survival, food-gathering, and mating—not pleasure and enjoyment.[35] Evolutionary psychology, in short, finds little role for satisfaction or contentment as driving forces. In other words, nature does not care if we are happy or not, so long as we get sufficient food and reproduce in adequate numbers.[36]

Since people are nevertheless highly interested in being happy, the authors proceed to review the sorts of things that make us feel that way. Sex, music, and drugs, it turns out, do, if only for short periods[37]—as does exercise.[38] Falling in love, natural sunlight, and a few other experiences do so as well, mainly by increasing the supply of circulating dopamine and serotonin.[39] Oxytocin emerges during and after sex, especially for women, and inasmuch as it increases empathy, ought to make for a better lawyer.[40] (The reader can imagine the pick-up lines that could easily emerge from this piece of information.)[41]

How can one increase happiness, especially the kind lasting more than a few minutes or hours? Chapter 2 discusses studies showing that meditation and biofeedback are among the few reliable and low-cost avenues open to

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31. *Id.* at 4–5.

32. *See, e.g.*, STEFANCIC & DELGADO, *supra* note 18, at 47–70 (citing a host of studies supporting an even more dire interpretation than the one Levit and Linder draw).

33. LEVIT & LINDER, *supra* note 13, at 25–30 (discussing the role of dopamine, serotonin, and caffeine in regulating mood).

34. *E.g.*, *id.* at 24 (discussing the function of the left frontal cortex and hypothalamus in regulating mood and affect).

35. *See id.* at 21–22 (discussing the teachings of evolutionary psychology)

36. *Id.*

37. *Id.* at 27–30.

38. *Id.* at 30–31.

39. *Id.* at 28.

40. *Id.* at 28–29.

41. *Viz.*, "Come along with me, and I'll show you how to become a better lawyer."

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most of us to increase contentment, with exercise running a close third.[42] Looked at another way, being happy comes down "to three things: genetics" (some people acquire traits associated with a happy personality), "circumstances, and our own internal decisions and actions."[43] Therefore, happiness is not completely within our control, nor entirely outside of it.

Focusing on the part of happiness that is within our control, the authors conclude the chapter with the first of several checklists. Entitled "Six Keys to Life Satisfaction," the compendium is fairly general, containing items like security, autonomy, authenticity (being true to self), and relatedness (cultivating lots of friends and family).[44] Unsurprisingly, they do not offer much advice on how, for example, to become authentic. They do, however, warn insightfully of "[t]he hedonic treadmill," in which it takes more and more of a commodity—such as money—that once made us happy to sustain us at the original level.[45] Misers throughout the ages have fallen prey to this trap; hence, it is helpful to be reminded of it now.[46]

While the discussion in Chapter 2 is relatively broad and applies to a host of jobs and situations, Chapter 3, entitled "What Makes Lawyers Happy and Unhappy," is concerned specifically with the legal profession. And it turns out that lawyers are happiest when they are able to help someone else and when they receive positive reinforcement from colleagues and supervisors.[47] They are most unhappy when they are under pressure to work long hours,[48] feel under stress,[49] or receive the impression that their work is just a moneymaking business rather than a learned profession.[50] Lawyers dislike insecurity and working in an office with high turnover.[51] Incivility, which is increasingly common, and scorched-earth lawyering[52] bother many lawyers, as does the generally poor regard in which many of the public hold them.[53]

Chapter 4, "The Happiness Toolbox," explains how to increase the chances of being happy based on the studies and surveys that came before. The reader encounters a number of commonsense suggestions that one could glean from many a self-help book or a long talk with a minister or

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42. LEVIT & LINDER, *supra* note 13, at 30–31 (citing research at the University of Colorado).

43. *Id.* at 32–40.

44. *Id.* at 44–48.

45. *Id.* at 40–42, 71, 101, 189.

46. *See, e.g.*, GEORGE ELIOT, SILAS MARNER: THE WEAVER OF RAVELOE (1861) (describing a miser who accumulates money in a fruitless search for happiness).

47. LEVIT & LINDER, *supra* note 13, at 51, 68–70, 92–95, 110.

48. *Id.* at 53–55.

49. *Id.* at 76.

50. *Id.* at 56–58 ("Law is Becoming More of a Business, Less of a Profession").

51. *See id.* at 58, 71.

52. *Id.* at 58–60.

53. *Id.* at 64–67.

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school counselor, such as seizing control of as many features of one's life as possible,[54] avoiding upward comparisons ("Jody has argued four cases before the Supreme Court, I've only argued one"),[55] and cultivating relationships with one's colleagues and others.[56] The chapter also suggests identifying one's strengths and the sources that give one pleasure,[57] as well as finding a job that will enable one to satisfy one's social commitments.[58] The chapter concludes with boxed material and bullet points breaking down all of these suggestions into twelve easy-to-remember components.[59]

Chapter 5—on the law school years—ends with another set of suggestions but is tailored for students' uncertainties and frustrations.[60] The authors then turn to one of their more vivid and imaginative chapters.

Chapter 6, entitled "What Law Firms Can Do to Make Happier Lawyers," is curiously different both in character and content from the one on being a happy lawyer. This difference is intriguing, because it would seem that, if a given set of prescriptions were the ones that lawyers ought to follow in order to be happy, the ones that law firms ought to enact would look very similar. That is, the conditions that make lawyers happy would be the very ones—or at least their mirror images—that the law firms should be at pains to promote in the work environments of those lawyers, if they wanted to make them happy.[61]

And indeed, some of their suggestions, such as providing lawyers with as much autonomy as possible, also appear in the chapter on how individual lawyers can find happiness.[62] But others carry overtones of managerialism and are decidedly instrumental. These include "Encouraging a Positive Attitude"[63] (presumably toward the work) and "Show Them the Love."[64] Law firms should also aim to create a playful workplace, with rooms stocked with pool tables, a full-size mock courtroom, a rock-climbing wall, or basketball court where associates can let off steam.[65]

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54. *Id.* at 79–86 (dedicating a section to "Mattering Matters: The Joy of Feeling in Control").

55. *Id.* at 86–90.

56. *Id.* at 90–95.

57. *Id.* at 103–08.

58. *Id.* at 108–09.

59. *Id.* at 109–11 (listing twelve avenues to a satisfying career, complete with bullet points).

60. *Id.* at 112–59.

61. For example, if research on lawyers showed that X was necessary to make them happy, it would seem that workplaces interested in making their workers happy should attempt to provide X.

62. *E.g.*, LEVIT & LINDER, *supra* note 13, at 102.

63. *Id.* at 182.

64. *Id.* at 194.

65. *Id.* at 197–99 (noting the example of Google).

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The authors point out that the new generation of lawyers places a high premium on spontaneity and creativity, so measures reflecting these values will pay off in greater loyalty, less attrition, and enhanced productivity.[66] For instance, firms can sponsor annual Family Fun Days at an amusement park or other venue.[67] They can also pay attention to such matters as the shape of offices, the color of paint on the walls, and the placement of mirrors and art work in strategic locations.[68] Outlooks onto green, leafy spaces are highly desirable.[69] Psychological research shows that all of these measures promote worker happiness and productivity.[70]

Like earlier ones, this chapter concludes with checklists that summarize its teachings—boiled down to nine prescriptions that firms can put into effect to ensure that their workers are as happy and productive as possible.[71] The reader with a good memory will recall that the list for individual lawyers contained twelve.[72]

After these chapters on happiness and the means for achieving it, the authors provide a section on lawyers' stories[73] and a short concluding meditation on striking a balance between what is reasonably achievable and one's ideals and hopes.[74]

Lawyers' stories (the subject of chapter 7) are strikingly downbeat for a book that, until then, had stubbornly emphasized the positive. One encounters stories of attorneys who are having trouble achieving the work–life balance the authors tout, including one who ruefully told them that the law has turned out to be "a jealous mistress."[75] Another respondent mentioned pressures to work harder and longer than she felt was humanly possible or good for her.[76] Others mentioned looking around, five years later, wondering where their youth and friends went.[77] Many complained of

66. *Id.* at 165–67.

67. *Id.* at 199.

68. *Id.* at 199–203.

69. *Id.* at 203.

70. *Id.* at 161–63.

71. *Id.* at 205–07.

72. *See supra* note 59 and accompanying text. Could a lawyer sue his or her firm on the ground that it was assigning work that made him unhappy? *See* Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. (forthcoming 2012) (observing that "[s]ome lawyers are so unhappy with conditions, work assignments or failures to promote them that they sue their firms for employment discrimination" but noting that these cases are hard to win).

73. *See* LEVIT & LINDER, *supra* note 13, at 208–31.

74. *See id.* at 232–42.

75. *Id.* at 209 (quoting Supreme Court Justice Story).

76. *Id.*

77. *Id.*

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too many billable hours, inflexible schedules, hypercompetitive environments, and rude lawyers on the other side.[78]

Interestingly, these are some of the very things the authors counsel against in their discussion of management practices.[79] Others pointed out how the long hours associated with law-firm work were hard on families and children, saying that the law firm is the most family-unfriendly workplace one can imagine.[80] Some quit for a nonlaw job or one as house counsel for lower pay.[81] A number mentioned that even when the work was not unremitting or soul-deadening, it often bothered their consciences, particularly when they found themselves representing a client such as a slimy developer who had created havoc in a town.[82]

Not all of the stories were downbeat. Some attorneys liked their work, including a number who had left law firms for solo or small group practice.[83] When asked what they liked about it, some lawyers cited the pleasure they derived from working with colleagues they respected and trusted.[84] Even though their jobs might bring them into contact with ill-natured judges, uncivil attorneys, and disgruntled clients,[85] these lawyers enjoyed working with office associates whose company they valued.[86]

As with most of the chapters in the book, the one on lawyers' stories concludes with a checklist. Work for the government or a small firm.[87] Stick it out—lawyers tend to be happier after ten or more years in the profession.[88] Do not enroll in a top-tier law school if happiness and a balanced life are important to you.[89] Be ready to change jobs.[90] Try to find colleagues whom you will like and trust.[91]

As though realizing that their book is in danger of trailing off into commonplace and platitude, the authors conclude with a short final chapter summarizing the philosophical aspect of their quest for a solution to the puzzle of happiness. Entitled "Seeking Happier Ground,"[92] the last chapter

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78. *Id.* at 211.

79. *See id.* at 160–207 (Chapter 6, entitled "What Law Firms Can Do To Make Lawyers Happier").

80. *See id.* at 209–12.

81. *Id.* at 225–28.

82. *Id.* at 221.

83. *Id.* at 231.

84. *Id.* at xi, 213–16.

85. *Id.* at 58–60, 214, 216 (discussing growing incivility); *id.* at 221 (discussing disgruntled clients).

86. *Id.* at 212–16.

87. *Id.* at 231.

88. *Id.*

89. *Id.* (noting that graduates of fourth-tier schools rate better in this regard).

90. *Id.* at 211–12, 226.

91. *Id.* at 231.

92. *Id.* at 232–42.

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reiterates their main findings but goes on to concede that even if one follows all of the rules and checklists and tries to make the best of it, one might still be an unhappy lawyer.[93] They reiterate that much of happiness or unhappiness lies outside one's control and that sadness is probably an inevitable concomitant of a lawyer's life.[94] Just as into every life a little rain must fall, into every career a little boredom must creep.[95] Law practice is often concerned with triviality and disappointment.[96]

The best path of happiness, then, lies with one's family and community.[97] In the realm of work, it lies with finding assignments that interest one,[98] align with one's values,[99] do not require leading an unbalanced life,[100] and permit meaningful human relationships and interactions.[101]

Their parting advice sounds a distinctly stoic note. We should savor small pleasures, such as finishing an appellate brief or clearing our inbox, writing a well-turned phrase, or receiving a client's compliment.[102] Scarcely moments of soaring emotion like Mozart completing a symphony. Their final words are "[b]ut as long as your work holds your attention, there's more than just hope for being a happy lawyer."[103] Again, not exactly a roaring endorsement.

Even though the authors seem to be lowering expectations and holding out hopes for, at most, a moderately contented life with a few ups and downs, their analysis is flawed because a lawyer's predicament is deeper than they concede. Consider, now, a few points of critique.

III. DEFECTS IN THE LITERATURE ON LAWYERLY HAPPINESS AND UNHAPPINESS

The Happy Lawyer has much to commend it—a bracing dose of science, including neuroscience, a number of down-to-earth lists of steps that one can take to increase the chances of being happy in his or her work, and a meaty collection of stories illustrating the good and the bad sides of a career in law. Yet, like much of the literature on lawyers' hedonic lives, it is both conceptually and descriptively deficient.

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93. *Id.* at 232–36.

94. *Id.* at 234–35.

95. *Id.*

96. *Id.* at 235 (noting that "not every task . . . can produce flow" and that one should not try to be happy one-hundred percent of the time).

97. *Id.* at 236–37.

98. *Id.* at 237–38.

99. *Id.* at 238.

100. *Id.* at 239.

101. *Id.* at 239–40.

102. *Id.* at 240.

103. *Id.* at 242. At other points, the authors take pains to cool expectations. *See id.* at 142 (suggesting that aspiring lawyers choose a "good enough" job and not search until they find a perfect one).

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A. *Misconceiving the Nature of Happiness and How It Arrives*

The authors approach the search for happiness frontally, as an ordinary good to be pursued and maximized. Many philosophers, however, believe that one cannot approach happiness in such a fashion—much less reduce it to a series of steps. Instead, happiness is an incidental product of a life well lived. As one put it, one needs to approach it sideways, like a crab.[104]

One can, of course, set out consciously to do things, like get sufficient sleep—the absence of which one knows will make one unhappy. Similarly, with ordinary pleasures and needs, like locating a good restaurant, it may make sense to do research and think strategically. The search for happiness itself, however, is not so simple. Aristotle even wrote that a person might not know whether he or she was happy until his or her life was nearly finished.[105] An entire literary genre, irony, is largely concerned with persons who set out, too singlemindedly, to seek happiness and instead found the opposite.[106]

Very possibly, this inability to seek out happiness directly accounts for the hedonic treadmill the authors note, in which it requires more and more of an item such as money or fame to sustain the level of happiness that an initial quantum of it is capable of bringing.[107] Since lawyers are apt to think in a linear fashion about many problems, they may be especially prone to this error. It is good to be reminded of this feature, and Levit and Linder do their readers a service by calling it to our attention. Strangely, however, the rest of their book ignores their own counsel.

B. *Two Category Mistakes*

1. Displacement—Thinking of the Problem in Favorite Terms

The literature on happiness promotion, although useful—even valiant—skirts oversimplification for two additional reasons. One reason is thinking of happiness in extrinsic terms. Many lawyers' complaints, including depression, stress, burn-out, divorce, and boredom, suggest that

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104. *Id.* at 237 (attributing the quote to John Stuart Mill). On the impossibility of seeking happiness too frontally, see ARISTOTLE, THE NICOMACHEAN ETHICS bk. I, at 17 (J.L. Ackrill & J.O. Urmson eds., David Ross trans., Oxford Univ. Press rev. ed. 1998) (c. 384 B.C.E.); 5 OXFORD ENGLISH DICTIONARY 433 (2d ed. 1989) (defining "eudemonism," or deserved happiness). Note, as well, that a type of short-lived happiness ("schadenfreude") can stem from taking pleasure at the misfortune of a rival.

105. *Compare* ARISTOTLE, *supra* note 104 (raising this possibility), *with* 1 SØREN KIERKEGAARD'S JOURNALS AND PAPERS 450 (Howard V. Hong & Edna H. Hong eds., trans., 1967) (observing that we are doomed to lead our lives forward but only to understand them in reverse—that is, in retrospect).

106. *See, e.g.*, O. HENRY, *The Gift of the Magi*, *in* THE BEST SHORT STORIES OF O. HENRY 137–41 (Bennett Cerf & Van H. Cartrell eds., 1994) (recounting the tale of two penniless lovers who try vainly to make the other happy).

107. See *supra* notes 44–46 and accompanying text (describing the hedonic treadmill).

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something structural is wrong with law or at least the way it is currently practiced. As many of these writers observe, law students start to be depressed and unhappy early in their careers—well before billable hours and the pressures of making partner set in.[108] After I published a book with Jean Stefancic on this subject,[109] older lawyers told us that the law was not always such a pressure-packed, unpleasant line of work. Only a few decades ago, it was a noble calling and a helping profession. One had plenty of time for reflection and thinking about the common good.[110]

This is not to say that today's woes stem from a single underlying cause—not even the excess formalism that we have allowed to creep into our work[111] or poor office management. But it seems important to be on the lookout for underlying factors that may be responsible for the current wave of problems. Urging an unhappy profession to work on extrinsic factors—like getting a lot of exercise, painting the walls a more cheerful color, taking more vacations, or socializing more with friends and family—is like applying a band-aid to a serious wound or trying to fix a problem by fixing another, easier one.[112] Despite their appreciation for science, Levit and Linder do not address some of the structural problems that may be making lawyers miserable and that are easy to name—the devaluation of all work, increased narrowness and specialization, encroachment of a business model, and, as mentioned, an arid formalism in which legal reasoning turns into a misleading kind of algebra.

2. Thinking of Happiness as a Means to Something Else

A second category mistake is especially prominent in the book's chapter on law-firm management and consists in thinking of happiness in means–ends terms and as an aspect of increased work productivity.[113] Any such approach emphasizing instrumental rationality is apt to prove self-defeating. In fact, the very emphasis on greater and greater productivity evidenced by billable hours and longer and longer briefs may easily be contributing to the current wave of discontent.[114] In the short run, providing the employees an occasional party or giving them passes to a nearby gym may earn gratitude and even increase productivity. But if the work continues to be pressured,

108. *See supra* notes 28–29 and accompanying text (noting this tendency).

109. *See* STEFANCIC & DELGADO, *supra* note 18.

110. *See* Richard Delgado & Jean Stefancic, *Can Lawyers Find Happiness?*, 58 SYRACUSE L. REV. 241, 249 (2008).

111. *See* STEFANCIC & DELGADO, *supra* note 18, at 33–71 (describing the role of formalism in lawyers' discontent).

112. Recall the frequently told story of the man who appeared to be looking for something underneath a streetlight one night. When his friends asked him if he had lost something, and if so, where, he replied that he had lost his watch in a different location, but it was easier to look under the streetlight because of the better illumination.

113. *See supra* notes 62–71 and accompanying text.

114. *See* STEFANCIC & DELGADO, *supra* note 18 (warning of this risk).

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repetitious, mundane, and carried out in a context of wheedling and incivility, the worker is apt to be unhappy again next week, and productivity will drop.[115]

Recently, the risks of linking happiness and productivity came to light when a reporter for a major magazine interviewed Martin Seligman, the hero and founding figure of the positive-psychology movement for which Levit and Linder express admiration.[116]

Seligman told the interviewer how he became interested in positive psychology, an approach that he pioneered and regards as a paradigm shift in the field of psychology.[117] The shift consists in a turn away from pathology and toward more positive emotions and goals.[118] Until then, psychology had followed the lead of Sigmund Freud, who focused on neuroses, psychoses, and other types of human malfunction.[119] Seligman believed that he had discovered a series of means—over 200—of becoming happy.[120]

Seligman recounted how he came to discover this paradigm shift. One day, he and another experimenter were subjecting two sets of dogs to a series of shocks.[121] One group of animals could get the shocks to stop by pressing a lever. The others could do nothing to avoid them. The first set came through the ordeal in good shape and was soon back to their normal tail-wagging selves. The second, however, had become neurotic. They "curled up in a ball" and whined, as though awaiting the next shock.[122]

For Seligman, the dogs had learned a kind of helplessness and were behaving much like humans who are depressed.[123] When these same animals confronted new challenges, even much simpler ones that they could easily

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115. *See* BARBARA EHRENREICH, BRIGHT-SIDED: HOW POSITIVE THINKING IS UNDERMINING AMERICA 8–12, 97, 149 (2010) (criticizing the happiness movement); *see also* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need To Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 396 (2009) (noting that the authors' goal is to make law students happier not by adjusting law school so that it is more humane, but by adjusting the students so that they will tolerate the dispiriting dullness more successfully).

116. *See* LEVIT & LINDER, *supra* note 13 at 35, 75, 105, 108, 146–47, 164, 233, 247 n.21, 248 n.26, 252 n.30, 257 nn.58, 60 & 63, 259 n.47, 267 nn.99 & 100, 270 n.37 (describing Seligman and his work); *see also* MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT (2002); Nancy Levit & Douglas O. Linder, *Happy Law Students, Happy Lawyers*, 58 SYRACUSE L. REV. 351, 356 (2008); Martin E.P. Seligman et al., *Why Lawyers are Unhappy*, 23 CARDOZO L. REV. 33 (2001).

117. *See* Gary Greenberg, *The War on Unhappiness: Goodbye Freud, Hello Positive Thinking*, HARPER'S MAG., Sept. 2010, at 23; *see also* EHRENREICH, *supra* note 115 (arguing that the happiness industry is overrated and unable to deliver on its promises).

118. Greenberg, *supra* note 117, at 23, 32.

119. *Id.* at 32.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

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have solved if they had applied their canine minds, they failed to rise to them. They instead cowered and shivered, having learned to be helpless.[124]

For Seligman, this was a revelation. Unhappy humans, too, might unlearn habits and behaviors that made them unhappy and prone to dwell on gloom and doom. This led him to a series of prescriptions, somewhat similar to Levit and Linder's checklists, designed to help people focus on the positive and thus become happier.[125]

Consider, however, Seligman's subsequent career and the lessons it may hold for lawyers. Early in his newfound celebrity, the CIA approached Seligman interested in finding out what his new psychological theory could teach them.[126] He spelled it out, only to learn later that the organization was using his teachings to interrogate prisoners. They found it a useful way to break down resistance and induce learned helplessness.[127]

A little later, the U.S. Army also approached Seligman, concerned about post-traumatic stress syndrome and soldiers who were breaking down from the pressure of repeat deployments to dangerous zones like Afghanistan and duties that included endangering civilians.[128] The Army wanted to know how to induce a more cheerful attitude among 1.1 million troops. He told the military, and it put Seligman's suggestion into effect as part of every soldier's basic training. The military is also using his approach to induce optimism in battlefield casualties, including amputees, under the theory that a grievously wounded soldier who is optimistic will walk sooner than one who is not.[129]

C. *Happiness and Desert: Have Lawyers Earned the Right To Be Happy?*

Discussion of the two category mistakes leads to a third reservation about some of the happiness literature, including *The Happy Lawyer*. Much of this literature assumes that lawyers doing ordinary law work deserve to be happy and that the main issue is how they can be so. But if lawyers do not deserve to be happy, the writers should be asking a different question—namely what we need to change about our work in order to feel good about it.

No one asks whether criminals are happy or proposes a twelve-step approach to being a happy axe murderer or philandering husband. And the reason is that we do not think that these people should be happy.

So, do lawyers deserve to be happy? Note that for much of the public, the answer is a resounding no. Lawyers rank near the bottom in public

124. *Id.*
125. *Id.* at 32–34.
126. *Id.* at 34.
127. *Id.*
128. *Id.*
129. *Id.*

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esteem in every list of job categories—below accountants, teachers, physicians, dentists, and even the military.[130] The public considers lawyers a contentious group who like nothing better than fighting and driving up the cost of any transaction.[131] Even legal commentators have noted that some of their principal tools include bluffing, blustering, lying, intimidating, and wheedling.[132] Lawyers' favorite argument is drawing the line—i.e., making things as unclear as possible in order to reap advantage from the confusion.[133] In the public's mind, they rank barely higher than automobile repossessors and mortgage-loan officers in integrity.[134]

Many lawyers believe that the public is simply mistaken or rates them low because it associates them with misfortunes like divorces or a citation for careless driving. Yet, physicians and dentists are also associated with misfortunes, and nevertheless the public holds them in high regard.

Any profession that is as unpopular as the law may find that a little soul-searching is in order. No one asks a concert violinist if he is struggling to find work– life balance. No one asks a social worker or inner-city school teacher if their office walls need painting a more cheerful color.

Recall a point we observed earlier and that a number of the happiness books mention as well—namely how law students, who at the time of admission seem completely normal, become morose and depressed a few months later.[135] Might it be because many of them are beginning to gain a sense of what their life's work will be like? If that work includes, essentially, destroying meaning—confusing a witness, tripping up an adversary in some small inconsistency, hitting the other side with unreasonable discovery requests, and applying legal rules that in many cases are slanted in favor of big corporations—this realization might well give pause, and with good reason.[136]

Naturally, lawyers are quick to think of a fellow lawyer, like Clarence Darrow, David Cole, or Barry Scheck, who defends justice and deserves to be

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130. *See* LEVIT & LINDER, *supra* note 13, at 64–68, 113 (describing opinion polls); STEFANCIC & DELGADO, *supra* note 18, at 51–53, 60 (same).

131. STEFANCIC & DELGADO, *supra* note 18, at 51–53, 60.

132. *See, e.g.*, Pierre Schlag, *This Could Be Your Culture — Junk Speech in a Time of Decadence*, 109 HARV. L. REV. 1801, 1816–17 (1996) (reviewing RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996)).

133. *See, e.g.*, Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 370–73 (1985) (describing the role of linguistic imprecision in slippery slope arguments).

134. STEFANCIC & DELGADO, *supra* note 18, at 51–52.

135. *See supra* notes 28–29 and accompanying text.

136. *See, e.g.*, Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and* Brown v. Board of Education *(Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 474–75, 479, 497–98 (2004) (discussing law's role in the intentional destruction of stories, by means of evidentiary and other rules, into disjointed fragments that even their authors do not recognize).

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happy and respected.[137] They can also think of times when they may have done something similar. But many lawyers (this writer included) suffer from the gnawing feeling that something is wrong, at a basic level, with the practice of law that requires attention. What might it be?

IV. TWO FEATURES THAT REQUIRE ATTENTION BEFORE LAW PRACTICE, IN GENERAL, CAN BE A SOURCE OF HAPPINESS

If, as argued above, it is difficult—if not meaningless—to try to seek happiness directly, it should be easier, at least, to do something about the features of one's life and work that render its practitioners unhappy.

A. *FORMALISM*

Since I have already written about one of the two, I'll merely summarize here: I think we have allowed our dominant epistemology—our mode of reasoning and argument—to become overly formalistic.[138] Formalism is an arid, abstract form of discourse that seeks precedent and authority at the expense of richness and human values.[139] The recent formalistic turn took place only a few decades ago, perhaps in reaction to legal realism and interdisciplinary teaching. It can easily accompany a form of office management that prizes regimentation, quantity, and discipline.[140] As I put it on another occasion, if you agree to think like a machine, someone is likely to come along and make you work like one.[141]

B. *LAW'S VIOLENCE*

A second troublesome feature—law's violence—is deeper and less susceptible to any sort of quick fix. Psychologists (although perhaps not Martin Seligman[142]) know that the purposeful kind of violence infliction—sadism and masochism—tends to make people unhappy.[143] Yet law is concerned with the infliction of violence of various kinds. These include originary violence;[144] the violence of orders, decrees, and punishment;[145]

137. Clarence Darrow represented John Scopes and many other unpopular clients. David Cole does much the same in contemporary civil-liberties and national-security cases. Barry Scheck founded The Innocence Project, which represents those wrongfully convicted of crime.

138. *See* STEFANCIC & DELGADO, *supra* note 18, at xi–xii, 33–47 (detailing this critique).

139. *Id.* at xi–xii, 33–46.

140. *Id.* at 56–57, 77–78.

141. *Id.* at 77–78.

142. Recall what he did to those dogs. *See supra* notes 121–24 and accompanying text.

143. *See, e.g.*, JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY 80–88 (Hazel E. Barnes trans., 1956) (describing "nihilation," the instinct to obliterate the self and that of others and turn them into their opposites, "nonselves").

144. *See* Jacques Derrida, *Force of Law: "The Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 1015 (Mary Quaintance trans., 1990) (describing "originary violence," in which law declared itself a force to be reckoned with and which preceded the search for justice).

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and narrative violence—the suppression of stories and narratives that the law does not want to hear.[146]

It also includes the everyday minor violence of legal tactics and moves such as bluffing, wheedling, exaggeration, obfuscation, and outright lying that Pierre Schlag has written about.[147]

Law students receive an exposure to some of these moves early in their careers. In civil procedure, for example, they learn that jurisdiction counts at least as much as having the merits on your side, and that cleverly choosing this court or that can hand your client a victory even before the other side gets a chance to put on their case.[148] In torts class, they encounter the deep-pocket rule,[149] the rule about placing liability on the best cost-avoider,[150] and other seemingly morally irrelevant concepts. In criminal procedure, they learn that the defendant almost always will aim for delay, since with the passage of time, witnesses may disappear and memories fade.[151] No wonder that highly principled students, steeped in the best ideas of Western civilization, who were so eager to wave their hands on the first day, fall silent and begin to look introspective a few weeks later. Take a look at their application essays, written just a short time earlier, if you have trouble seeing why they now look pensive.

Instead, a different group of students, somewhat smaller to be sure, become excited and start waving their hands. This group consists of those who knew that, at some level, law is, in fact, a cynical exercise and like it that way. This group is delighted to find an outlet for wheedling, cheating, bluffing, and taking small advantage. They have been doing it all their lives and perfecting it. Law school merely helps them take those skills to the next level and receive reinforcement for doing so.

This second group is going to be happy in legal practice, with or without deep breathing exercises, long vacations, or walls painted the right color. It is the first, much larger, group whose fate concerns this writer. For

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145. *See* Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (noting that law writes "on a field of pain and death"). Consider any injunction, award of damages, or criminal penalty, for example.

146. *See* Delgado & Stefancic, *supra* note 135, at 474 (describing the violence of destroying meaning or narrative coherence).

147. *See, e.g.*, Schlag, *supra* note 131, at 1816–17 (describing these and other common tactics).

148. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASE AND MATERIALS 71–198 (10th ed., Thomson Reuters 2009) (1968) (describing the rules governing selection of the proper court).

149. That is: Never sue someone who is judgment proof; this is pointless. Whenever possible, choose the defendant who is either insured or has adequate funds to satisfy the judgment.

150. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 250–51 (7th ed. 2007) (noting that this is a cardinal rule of the law of remedies, especially in the area of torts).

151. Delay, in short, almost always works in favor of the defense and rarely the prosecutor.

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they are the ones who are likely to be unhappy in law practice. Like Seligman's dogs, they—and we—may need to whine a little before pressing the button to gain release from our cages. Part of that process will entail thinking hard about the causes of lawyerly unhappiness. *The Happy Lawyer* and similar books are a good start—but more is needed, much of it starting from a very basic level.

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