

**LAWYER WELLBEING AS A CRISIS  
OF THE PROFESSION<sup>†</sup>**

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<sup>†</sup> This Article is dedicated to the memory of Timothy Coleman (1964–2015), an extraordinary lawyer and leader, a model of civility and professionalism, a devoted husband and father, and a greatly admired friend and mentor of so many in the bar. His tragic loss demands our self-reflection, and his memory, as his life, serves as an inspiration.

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## I. INTRODUCTION

The legal profession is in the throes of a mental health crisis. State bars across the country continue to be rocked by the tragic loss of their lawyers to suicide and accidental drug overdose. Recent studies have also shed further light on the severity and scale of lawyers' long-recognized struggles with depression, anxiety, substance abuse, and other indicators of psychological distress.<sup>1</sup>

The human cost of the crisis for lawyers and their loved ones cannot be overstated; without question, the premature loss of members of the bar to death and chronic disease is tragic for the affected lawyers and those who care for them. The grim data on the mental wellbeing of lawyers is also concerning given the dual role that the profession entrusts lawyers to play in protecting their clients' interests and in ensuring and strengthening the rule of law. Lawyers' degraded mental health fundamentally undermines their ability to deliver on those commitments. The American Bar Association's National Task Force on Lawyer Well-Being put it simply in its 2017 report: "To be a good lawyer, one has to be a healthy lawyer."<sup>2</sup>

But at what point, and in what sense, do preventable tragedies and risks to the quality of legal advocacy translate into a profession-wide crisis? At a high level, there are at least two possible approaches to answering this question.

The predominant one—what might be termed the consequentialist approach—is to stress the effects of poor health on legal practice.<sup>3</sup> This approach is exemplified by the Task Force report, which, besides expressing humanitarian concern about the toll that poor mental health takes on lawyers' lives and careers, emphasizes the negative consequences of lawyers' poor health for clients, employers, and society as primary "reasons to take action."<sup>4</sup>

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1. See *infra* Section II.A.

2. NAT'L TASK FORCE ON LAWYER WELL-BEING, AM. BAR ASS'N, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 1 (2017) [*hereinafter* NAT'L TASK FORCE], <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> [<https://perma.cc/NQ7R-8ZTU>].

3. See, e.g., Daniel S. Bowling, III, *Lawyers and Their Elusive Pursuit of Happiness: Does It Matter?*, 7 DUKE F. FOR L. & SOC. CHANGE 37, 45 (2015) ("[A] happy lawyer is a better lawyer and a more effective, ethical advocate for her clients."); Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 336–38 (2008) (explaining that law firms should care about their associates' unhappiness because it causes unproductivity, high attrition, and lesser performance; that law schools should care because healthier lawyers are better alumni; and that policymakers and society should care because unhappy lawyers "implicate at least a temporary misallocation of human capital and scarce legal education resources").

4. NAT'L TASK FORCE, *supra* note 2, at 8.

The report makes two main observations. First, the report asserts that as an economic matter, lawyer health is a form of human capital and a critical ingredient in competitive performance that affects the organizational success of public and private entities.<sup>5</sup> Impaired cognitive function means impaired lawyer performance, which, in turn, undermines the productivity and profitability of the enterprise. Second, lawyer wellbeing affects lawyer performance. Mental health problems compromise lawyers' ability to provide representation with competence and diligence.<sup>6</sup> The report argues that these economic and professional costs—in addition to humanitarian interests—demand a dedicated response from the profession. This line of argument is an important one. The commitments of lawyers and the sustainability of the legal profession are conventionally defined in terms of the obligations that lawyers owe to others—to clients, the courts, and the public; underscoring the serious consequences of lawyer distress helps establish self-care as a necessary predicate for ensuring lawyers can meet those obligations.

This Article, however, posits that another approach—what we term an intrinsicist approach—allows us to develop these insights beyond the consequences of poor mental health for the wellbeing of the individual lawyer or the quality of client representation. Instead, this approach emphasizes the relationship between lawyer wellbeing and modern legal practice, and illustrates how the conditions that give rise to poor mental health square with the values and priorities of the legal profession. Based on emerging research about the unfulfilled psychological needs that give rise to lawyer distress, we conclude that the suffering lawyer can be understood as a canary in the coalmine of the legal profession. That is those conditions identified by myriad studies as key contributors to individual lawyer distress also signal the deterioration of both our conception of the lawyer as a professional and our ideals of the law as a profession.

This Article proceeds as follows: In Part II, we provide an overview of the wellbeing crisis and the response. We then propose reenvisioning individual lawyer distress as a crisis of the profession itself, drawing on emerging empirical studies from the field of Self-Determination Theory (SDT) that show that this distress stems from the denial of lawyers' basic psychological needs. Part III, the heart of the Article, explains how this research provides a lens through which to perceive lawyer suffering in the context of professional identity—and in particular, how debilitating self-doubt, lack of autonomy, and diminished connectedness to others relate to core controversies that have unfolded within the profession over the decades, such as diminished training opportunities for young lawyers as trials disappear and the burdens of discovery multiply, the decline in lawyers' public

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5. *Id.*

6. *Id.* at 8–9.

commitments within an increasingly commercialized profession, and the deterioration of civility and professional decorum in legal practice. In Part IV, we build on the lessons of SDT and the perspective they provide on aspects of legal practice to offer some ideas for reform. We suggest that with participation by a range of stakeholders in the legal profession—who are invested in its wellbeing and are well-positioned to join in remedial efforts—real progress can be made through a proactive, values-oriented approach to improving lawyer wellbeing. Part V concludes with a brief summary.

Viewed through the lens of SDT, the particular facets of lawyer suffering reveal wellness as an issue that sits at the intersection of other fault lines within the profession. Fully addressing lawyer wellbeing thus requires a holistic reconsideration of the opportunities, expectations, and values that shape modern legal practice.

## II. THE STATE OF LAWYER WELLBEING

Lawyers are struggling. The full extent of the problem of mental health among U.S. lawyers is not known due to limited data and heavy reliance on self-reporting mechanisms,<sup>7</sup> but the available evidence reveals a profession in distress. To date, there has been a heavy emphasis on the problem as one that should be addressed at the individual level, or for its effects on client representation, but the conditions that give rise to lawyer suffering suggest it should be understood more broadly as a crisis of the profession that reveals a fundamental divergence of ideals and practice.

In section II.A, we summarize key research on the state of lawyers' mental health and focus on several recent studies that have helped inspire renewed efforts to address lawyer wellbeing. In section II.B, we describe the profession's response to date, situating recent efforts to assist lawyers struggling with mental health challenges within a movement dating back to the 1980s and highlighting recent initiatives aimed at engaging a range of stakeholders in promoting lawyer wellness. Though these initiatives are wide-ranging, they are largely motivated by the need to improve wellness at the individual level—through, for example, increased access to health-related resources and the accommodation of lifestyle adjustments.

In section II.C we propose a complementary perspective. Using recent SDT research, we identify connections between the unfulfilled psychological needs of lawyers and core deficiencies in legal practice. As we explain, each of these deficiencies has been recognized as a problem worthy of the bar's

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7. See Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 532 (2008) (noting the difficulty of obtaining precise data on the incidence of mental illness or substance abuse in the profession).

attention, even inspiring movements for reform. For the most part, however, they have been understood as separate and distinct from the issue of wellbeing. Our aim is to facilitate a shift in this perspective.

#### A. *The Data on Individual Wellbeing*

The need to improve the wellbeing of lawyers has become a spotlight issue within and outside the profession. In particular, the rate of known suicides has made lawyers' mental health impossible to ignore. Suicide is the third leading cause of death among attorneys, though it is the tenth leading cause among the general population;<sup>8</sup> according to the Centers for Disease Control and Prevention, from 1999 to 2007, lawyers were 54% more likely to commit suicide than people in other professions.<sup>9</sup> Snapshots are as startling as the statistics. In mid-2008, six lawyers in South Carolina committed suicide within an eighteen-month span; from 2010 through 2013, fifteen Kentucky lawyers took their own lives.<sup>10</sup>

Numerous high-profile lawyer suicides have prompted a public examination of the pressures particular to legal practice. In late 2018, Joanna Litt drew wide attention with her heartbreaking account of the work struggles that preceded the suicide of her husband, a prominent law firm partner, in a widely read op-ed in *The American Lawyer* titled "Big Law Killed My Husband."<sup>11</sup> The stress of legal practice has also been linked to high rates of substance abuse and cases of accidental overdose. In the summer of 2017, Eilene Zimmerman, the former spouse of a partner at a Silicon Valley law firm, penned a *New York Times* article on her investigation into the professional stressors that exacerbated her ex-husband's ultimately fatal drug

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8. Patrick Krill, *Why Lawyers Are Prone to Suicide*, CNN (Jan. 21, 2014), <https://www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/index.html> [<https://perma.cc/6S7T-ZFXG>]; see also Laura Gatland, *Dangerous Dedication: Studies Suggest Long Hours, Productivity Pressures Can Cause Serious Health Problems and a Higher Suicide Rate for Attorneys*, A.B.A. J., Dec. 1997, at 28, 28 (summarizing a study that found the suicide rate among male lawyers was twice as high as the general population).

9. Douglas Quenqua, *Lawyers with Lowest Pay Report More Happiness*, N.Y. TIMES: WELL (May 12, 2015, 2:42 PM), <https://well.blogs.nytimes.com/2015/05/12/lawyers-with-lowest-pay-report-more-happiness> [<https://perma.cc/J86G-2Y7B>].

10. Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN, <https://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html> (last updated Jan. 20, 2014) [<https://perma.cc/GR6Z-HH9J>].

11. Joanna Litt, *'Big Law Killed My Husband': An Open Letter From a Sidley Partner's Widow*, THE AM. LAWYER (Nov. 13, 2018), <https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow> [<https://perma.cc/WKV2-LQ3R>].

addiction.<sup>12</sup> In an article awash in tragic details was this one: Unable to sit up or retain consciousness, he still managed to dial into a conference call for work.<sup>13</sup>

Although research has long shown extraordinarily high rates of depression and substance abuse in the profession,<sup>14</sup> that data saw significant supplementation in 2016, with the publication of a study of 12,825 practicing lawyers commissioned by the ABA and the Hazelden Betty Ford Foundation in the *Journal of Addictive Medicine*.<sup>15</sup> Hailed as the first nationwide effort to capture wide-ranging health data about the legal profession, the study found that lawyers experience alcohol use disorders and mental health distress at a far higher rate and to a far greater extent than other professions.<sup>16</sup>

In the twelve months prior to the survey, 28% of responding lawyers struggled with depression—more than three times the rate of the general population<sup>17</sup>—and 46% of attorneys surveyed reported suffering depression at some point in their legal careers.<sup>18</sup> The study found that 19% of the surveyed lawyers were struggling with anxiety and 23% with stress.<sup>19</sup> The study also revealed troubling efforts at self-medication with alcohol and other drugs.<sup>20</sup> Between 21% and 36% of the respondents reported drinking at a level consistent with an alcohol problem, a rate roughly three to five times higher

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12. See generally Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES, July 16, 2017, at BU1.

13. *Id.*

14. Although the focus of this Article is the mental wellbeing of lawyers, the physical toll that arises from mental distress—including ulcers, high blood pressure, coronary artery disease, and hypertension—is also worthy of sustained attention. See generally Neil Schneiderman, Gail Ironson & Scott D. Siegel, *Stress & Health: Psychological, Behavioral, and Biological Determinants*, 1 ANN. REV. CLINICAL PSYCHOL. 607 (2005) (describing the long-term effects of chronic stress on physical health).

See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 876 (1999) (“Over 25% of North Carolina lawyers reported that they had experienced physical symptoms of extreme anxiety (including trembling hands, racing hearts, clammy hands, and faintness) at least three times per month during the past year.”).

15. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016) [hereinafter *ABA/Hazelden Betty Ford Foundation Study*].

16. *Id.*

17. DEBRA J. BRODY ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF DEPRESSION AMONG ADULTS AGED 20 AND OVER: UNITED STATES, 2013–2016, at 5 (2018), <https://www.cdc.gov/nchs/data/databriefs/db303.pdf> [<https://perma.cc/4KKS-HM26>] (“8.1% of American adults aged twenty and over had depression in a given two-week period.”).

18. *ABA/Hazelden Betty Ford Foundation Study*, *supra* note 16, at 51.

19. *Id.* at 46.

20. *Id.* at 51.

than the general population<sup>21</sup> and significantly higher than rates indicated by previous research.<sup>22</sup> And, contrary to prior research, young attorneys in the first ten years of their practice reported the highest rates of problematic substance use.<sup>23</sup>

Though the Hazelden study was novel in its comprehensiveness, its findings were, for the most part, unsurprising. For decades, studies have revealed that lawyers are more likely to suffer depression than workers in any other profession, and at a rate several times that of the general population. More than two decades prior to the Hazelden study, researchers at Johns Hopkins University conducted a landmark study that examined 104 occupations for anxiety-related issues and found that, on average, lawyers experience depression at a rate 3.6 times that of professionals in other lines of work.<sup>24</sup> The data also revealed that lawyers suffer from the highest rate of depression among all professionals in the country (after adjustment for socio-demographic factors).<sup>25</sup> Additional studies revealed high rates of substance abuse and symptoms of psychological distress such as anxiety and social alienation.<sup>26</sup>

A second important 2016 study on alcohol, drug and mental health issues was conducted using data collected from approximately 3,300 students at fifteen law schools.<sup>27</sup> The ABA-sponsored Survey of Law Student Well-Being found that 17% of the respondents screened positive for depression,

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21. Patrick Krill, *The Legal Profession's Drinking Problem*, CNN (Feb. 6, 2016), <https://www.cnn.com/2016/02/06/opinions/lawyers-problem-drinkers-krill/index.html> [<https://perma.cc/8W5D-394Y>].

22. A 1990 study of 1,200 lawyers in Washington state found nearly 18% of lawyers who had practiced between two and twenty years and 25% of lawyers who had practiced for twenty years or more were problem drinkers. G. Andrew Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 241 (1990).

23. *ABA/Hazelden Betty Ford Foundation Study*, *supra* note 16, at 51.

24. See William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990).

25. Benjamin et al., *supra* note 22, at 234.

26. See *id.* at 240 (finding that 19% of 1,200 lawyers in Washington state suffered from depression); Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 2–3 (1995) (“Both male and female lawyers exhibit symptoms of distress, well beyond the norm, relating to such key areas as obsessive-compulsiveness, social alienation and isolation, interpersonal sensitivity, anxiety, and depression.”).

27. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 123–24 (2016). The study was administered with a grant from the ABA Enterprise Fund and was sponsored by the ABA Commission on Lawyer Assistance Programs, Law Student Division; Solo, Small Firm and General Practice Division; Young Lawyers Division; and Commission on Disability Rights. *Id.* at 118 n.5.

37% screened positive for anxiety, 27% screened positive for an eating disorder, 9% indicated that they had engaged in self-harm, such as cutting and burning themselves, and 6% reported seriously thinking about suicide in the prior twelve months.<sup>28</sup> As to substance use, 53% of respondents drank enough to get drunk in the prior thirty days, 43% binge drank at least once in the prior two weeks, and 22% binge drank two or more times in the prior two weeks.<sup>29</sup>

These findings, too, were unsurprising. Studies have long shown that distress in the profession begins early.<sup>30</sup> On matriculation, law students do not exhibit higher levels of psychological distress than the rest of the population.<sup>31</sup> But, as revealed by one frequently cited 1994 study, that changes within months of enrollment, with symptoms worsening dramatically as students progress through law school.<sup>32</sup> The study showed distress rose by 32% by the end of the first year, and 40% by the third year.<sup>33</sup> Relative to other students in high-stress professional programs, law students consistently rank at the very top for negative symptoms. Compared to medical students, for example, law students consistently exhibit significantly higher levels of stress and alcohol abuse.<sup>34</sup>

Other, smaller studies conducted before and after the ABA's 2016 study provide additional concerning data on the state of law-student health. A 2014 survey of Yale Law School students found that 70% of them—206 of 296 students surveyed—had mental health challenges during their time at law school.<sup>35</sup> Students of color and students from the lowest income brackets were

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28. *Id.* at 136–39.

29. *Id.* at 129.

30. See generally G. Andrew Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Amongst Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225 (1986) (reporting on a study of University of Arizona Law School students in first two years of legal practice) [hereinafter *Role of Legal Education*]; Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 526–27 (1998) (describing law schools as contributing to students' emotional dysfunction).

31. *Role of Legal Education*, *supra* note 30, at 240; see also David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61 (1994).

32. *Role of Legal Education*, *supra* note 30, at 240–41.

33. *Id.* at 246; see also Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEGAL WRITING INST. 229, 229 (2002) (quoting *Role of Legal Education*, *supra* note 30, at 240).

34. Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65, 69 (1985); Marilyn Heins et al., *Law Students and Medical Students: A Comparison of Perceived Stress*, 33 J. LEGAL EDUC. 511, 511–14 (1983); AALS, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 42 (1994).

35. JESSIE AGATSTEIN ET AL., YALE LAW SCH. MENTAL HEALTH ALL., *FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW SCHOOL* 14 (2014), [https://law.yale.edu/sites/default/files/falling\\_through\\_the\\_cracks\\_120614.pdf](https://law.yale.edu/sites/default/files/falling_through_the_cracks_120614.pdf) [https://perma.cc/Q8QG-BTSZ].



more likely to report mental health challenges but less likely to seek treatment than their peers.<sup>36</sup> In a 2017 poll of 886 Harvard Law School students (of approximately 1,990 law school enrollees), fully two-thirds reported experiencing new mental health issues since starting law school.<sup>37</sup> Of the respondents, 25% reported suffering from depression, 24.2% reported anxiety, and 20.5% indicated they were at a heightened risk of suicide.<sup>38</sup>

Forming the backdrop to this disturbing picture of law student and lawyer unwellness is evidence of lawyers' general dissatisfaction with their chosen career paths. It is well established that lawyers are, on the whole, unhappier than other professionals.<sup>39</sup> No end of informal survey data supports this view. A 2017 survey of 65,000 employees on workplace happiness, conducted by the jobs website CareerBliss, revealed that the associate attorney has the unhappiest job in America.<sup>40</sup> In a 2018 Gallup poll, only 23% of law school graduates said that their education was worth the cost, compared to 64% of graduates with doctoral degrees, 58% of graduates with medical degrees, and 42% of graduates with MBAs.<sup>41</sup> These are troubling indicators of a profession that has systematically disappointed the expectations of those who have committed to joining its ranks.

### B. *The Response to Date*

Much of the research and commentary on lawyers' psychological health can be understood as part of a long-running movement, tracing back to at least the 1980s, to address the increasingly conspicuous problem of lawyer

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36. *Id.* at 4.

37. Amanda H. Chan et al., *Wellness at the Law School: Promises to Keep and Miles to Go Before We Sleep*, HARV. CRIMSON (Mar. 29, 2018), <https://www.thecrimson.com/article/2018/3/29/lee-chan-savitt-wellness-at-law-school/> [<https://perma.cc/GW9Y-YX6J>].

38. *Id.*

39. See Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225, 268 (2011) (expressing a skeptical view of the conventional wisdom regarding lawyer dissatisfaction, based on a comprehensive review of survey data sets since the mid-1980s, but conceding that lawyers consistently manifest lower levels of job satisfaction relative to other occupations) (citing Glenn Firebaugh & Brian Harley, *Trends in Job Satisfaction in the United States by Race, Gender, and Type of Occupation*, 5 RES. SOC. WORK 87 (1995)); see also Schiltz, *supra* note 14, at 883 (reviewing three lawyer career satisfaction surveys).

40. Jacquelyn Smith, *The Happiest and Unhappiest Jobs in America*, FORBES (Mar. 22, 2013), <https://www.forbes.com/sites/jacquelynsmith/2013/03/22/the-happiest-and-unhappiest-jobs-in-america> [<https://perma.cc/CPY9-EYJ7>].

41. Zac Auter, *Few MBA, Law Grads Say Their Degree Prepared Them Well*, GALLUP (Feb. 16, 2018), <https://news.gallup.com/poll/227039/few-mba-law-grads-say-degree-prepared.aspx> [<https://perma.cc/3GFP-8PB6>].

wellbeing. Early efforts were largely dedicated to providing mental health resources and other assistance to struggling members of the bar.

In 1985, the American Bar Association House of Delegates adopted resolutions calling attention to substance abuse within the profession, including one urging state courts and local bar authorities to create and support peer support programs for attorneys recovering from alcohol abuse and other drug problems.<sup>42</sup> In 1988, the ABA created the Commission on Impaired Attorneys (later renamed the Commission on Lawyer Assistance Programs to reflect an expanded mandate) to assist bar associations around the country with developing programs to help lawyers struggling with alcoholism and in 1995 the ABA adopted the Model Lawyer Assistance Program.<sup>43</sup> In 1980, about half of all state bars had established a lawyer assistance program; by the end of the decade, all had done so.<sup>44</sup>

These wellbeing efforts have included the study of factors that contribute to poor mental health among lawyers. For example, local bar associations have examined a range of work and lifestyle features to better understand key sources of stress and dissatisfaction in legal practice. In 2002, the New York City Bar convened the Task Force on Lawyers' Quality of Life of the Association, which addressed a range of issues including the magnitude of law school debt, growing billable-hour expectations, declining partnership prospects, and other forces contributing to heightened stress levels among lawyers.<sup>45</sup>

A large, still-burgeoning body of literature on lawyer unhappiness has examined the causes of depression and malaise within the profession and put forward a variety of proposals for reform. The reform literature is broad. It comprises remedial, individually focused solutions such as stress management, clinical treatment, and the practice of mindfulness;<sup>46</sup> structural

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42. Nancy Blodgett, *Substance Abuse*, A.B.A. J., Oct. 1988, at 144.

43. Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 273 (1997).

44. Lynne Pregoner, *Substance Abuse Within the Legal Profession: A Symptom of a Greater Malaise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 308 n.13 (1993) (citing DONNA L. SPILIS, ABA COMM'N ON IMPAIRED ATT'YS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES I (1991)).

45. N.Y.C. BAR, REPORT OF THE TASK FORCE ON LAWYERS' QUALITY OF LIFE (2002) <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-of-the-task-force-on-lawyers-quality-of-life> [<https://perma.cc/2SUJ-H2RQ>].

46. See, e.g., Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 35 (2001); AMIRAM ELWORK WITH B. MARLOWE, STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL AND PROFESSIONAL SATISFACTION IN THE LAW (1997); Richard Delgado & Jean Stefanic, *Can Lawyers Find Happiness?*, 58 SYRACUSE L. REV. 241, 258 (2008); John P. Heinz, Kathleen E. Hull & Ava A. Harter, *Lawyers and Their*

solutions such as reformation of the business model of law firms and elimination of the billable hour, designed to address immediate psychological stressors;<sup>47</sup> and best practices for individuals facing the challenges inherent in legal practice, from adversarial interactions to client services to ethical conflicts.<sup>48</sup> As for the many educational campaigns that have been launched to address attorney wellness, these have generally converged around four major themes: increasing awareness of and lessening the stigma surrounding mental health issues, reducing lawyer reliance on chemical substances, facilitating greater access to physical fitness and mental health resources, and institutionalizing programming efforts to ensure sustained attention to lawyer wellbeing.<sup>49</sup>

The most prominent recent proposal for reform is the 2017 report issued by the National Task Force on Lawyer Well-Being shortly after the publication of the Hazelden study. Titled “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” the report sets forth global recommendations for reform, as well as specific recommendations directed to judges, regulators, legal employers, law schools, bar associations, professional liability carriers, and lawyer assistance programs “to shift the culture of the legal profession to one that is focused on well-being” and “to strengthen the legal profession in a way that assures the public has a justice system that is competent, fair and just.”<sup>50</sup> In response to the Task Force’s 2017 report, the ABA House of Delegates passed a resolution in early 2018 calling

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*Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 755 (1999); Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 335 (2007); Charity Scott, *Mindfulness in Law: A Path to Well-Being and Balance for Lawyers and Law Students*, 60 ARIZ. L. REV. 635, 635 (2018).

47. See, e.g., James J. Alfani & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress—the Law School Perspective*, 10 J.L. & HEALTH 61, 62–64 (1996); John A. Beach, *The Rise and Fall of the Billable Hour*, 59 ALB. L. REV. 941, 941 (1996); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1257 (1991).

48. See, e.g., Peter G. Glenn, *Some Thoughts About Developing Constructive Approaches to Lawyer and Law Student Distress*, 10 J.L. & HEALTH 69, 72 (1995); Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871, 889 (1999).

49. See, e.g., ANN M. BRAFFORD, AM. BAR ASS’N, WELL-BEING TOOLKIT FOR LAWYERS AND LEGAL EMPLOYERS (2018), [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lc\\_colap\\_well-being\\_toolkit\\_for\\_lawyers\\_legal\\_employers.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lc_colap_well-being_toolkit_for_lawyers_legal_employers.pdf) [<https://perma.cc/4RY6-PAKC>] (summarizing well-being initiatives recently launched by law firms, including the creation of wellness committees dedicated to health-related programming and increasing access to on-site psychological and physical fitness resources).

50. AM. BAR ASS’N WORKING GRP. TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 105 (2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/105.pdf> [<https://perma.cc/3FN8-UZNE>] (describing the objectives of the National Task Force’s 2017 report).

for all stakeholders to review the recommendations contained in the report.<sup>51</sup> And last fall, the ABA Working Group to Advance Well-Being in the Legal Profession launched a seven-point pledge asking legal employers to address substance abuse and mental health issues among lawyers in the workplace.<sup>52</sup>

Prior to the publication of the National Task Force's 2017 report, five state bars—Georgia, Indiana, Maryland, South Carolina, and Tennessee—had standing well-being or quality-of-life committees.<sup>53</sup> In response to the report's publication, at least ten additional state bars and state supreme courts have created wellness and quality-of-life task forces or special committees to address mental health and substance abuse issues in the profession.<sup>54</sup> Other

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51. *Id.*

52. *ABA Launches Pledge Campaign to Improve Mental Health and Well-Being of Lawyers*, AM. BAR ASS'N NEWS (Sept. 10, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/aba-launches-pledge-campaign-to-improve-mental-health-and-well-b> [<https://perma.cc/E7AE-FY6W>].

53. *See* State Bar of Ga., *About Lawyers Living Well*, GABAR.ORG, <https://www.gabar.org/wellness/about.cfm> [<https://perma.cc/F3ZY-6V8V>]; Ind. State Bar Ass'n *Wellness Committee*, INBAR.ORG, <https://www.inbar.org/members/group.aspx?id=134020> [<https://perma.cc/S8SM-53EF>]; Md. State Bar Ass'n, *MSBA Health & Wellness*, MSBA.ORG, <https://www.msba.org/health-and-wellness/> [<https://perma.cc/EB8Q-DP26>]; *About—Attorney Wellness Committee*, LIVING ABOVE THE BAR, <https://www.livingabovethebar.org/about> [<https://perma.cc/H6AJ-DY78>]; Tenn. Bar Ass'n, *Attorney Well Being Committee*, TBA.ORG, <https://www.tba.org/committee/Attorney-Well-Being-Committee> [<https://perma.cc/B4XP-AL72>].

54. *See* Ala. State Bar, *Quality of Life, Health, and Wellness Task Force 2018-2020 Purpose and Scope*, ALABAR.ORG, <https://www.alabar.org/assets/2019/09/Quality-Life-TF-PS-19-20.pdf> [<https://perma.cc/SY2T-8CH8>]; Colo. Supreme Court Office of Att'y Regulation Counsel, *Colorado Task Force on Lawyer Well-Being*, COLORADOSUPREMECOURT.COM, <https://www.coloradosupremecourt.com/Current%20Lawyers/TaskForceWellBeing.asp> [<https://perma.cc/6SRA-KBZU>]; The Fla. Bar, *Special Committee on Mental Health and Wellness of Florida Lawyers*, FLORIDABAR.ORG, <https://www.floridabar.org/about/cmtes/cmtes-cm/cmte-cm500/> [<https://perma.cc/6K32-GYN8>]; Ill. Lawyer's Assistance Program, *Illinois Task Force on Lawyer Well-Being*, ILLINOISLAP.ORG, <https://illinoislap.org/about-lap/illinois-task-force-on-lawyer-well-being> [<https://perma.cc/8AFA-QP6L>]; Press Release, Commonwealth of Mass., Supreme Judicial Court Announces Steering Comm. on Lawyer Well-Being (Oct. 26, 2018) <https://www.mass.gov/news/supreme-judicial-court-announces-steering-committee-on-lawyer-well-being> [<https://perma.cc/EP2B-R5NY>]; N.C. Bar Ass'n, *Pathways to Wellbeing*, NCBAR.ORG, <https://www.ncbar.org/members/committees/professional-wellness> [<https://perma.cc/SAR7-EXLH>]; Vt. Bar Ass'n, *Vermont Commission on the Well-Being of the Legal Profession*, VTBAR.ORG, <https://www.vtbar.org/FOR%20ATTORNEYS/Vermont%20Commission%20on%20the%20Well-Being%20of%20the%20Legal%20Profession.aspx> [<https://perma.cc/Y4EE-VNGJ>]; *Report of the Virginia State Bar President's Special Committee on Lawyer Well-Being*, VSB.ORG, [https://www.vsb.org/docs/VSB\\_wellness\\_report.pdf](https://www.vsb.org/docs/VSB_wellness_report.pdf) [<https://perma.cc/2RVV-UUT9>]; Press Release, Supreme Court of Appeals, State of W. Va., *Supreme Court Establishes Task Force on Lawyer Well-Being*, COURTSWV.GOV, [http://www.courtswv.gov/public-resources/press/releases/2018-releases/March22\\_18.pdf](http://www.courtswv.gov/public-resources/press/releases/2018-releases/March22_18.pdf) [<https://perma.cc/Q6H6-K7ZB>].

states and some municipalities have created initiatives of their own. For example, Minnesota Supreme Court Chief Justice Lorie Skjerven Gildea spearheaded a one-day wellness conference earlier this year.<sup>55</sup> Schools, too, have gotten in on the action: Stanford Law School has launched a podcast called WellnessCast as part of its broader Law School Wellness Project,<sup>56</sup> the University of Chicago has implemented “Wellness Wednesday Programs” to help students develop healthy habits to carry into their practice as attorneys,<sup>57</sup> and in the spring of 2019, the University of Pennsylvania Law School became the first top law school to institute mandatory attorney mental health training for students.<sup>58</sup>

Some of the most powerful examples of steps taken to address lawyer wellbeing are not programs or initiatives developed by institutions but stories shared by individuals. Prominent lawyers have come forward with their personal struggles with substance abuse and mental health to draw industry attention to the challenges that lawyers too often combat in silence and isolation. Within the past year, Joseph Milowic, a partner at Quinn Emanuel Urquhart & Sullivan, LLP, provided a detailed account of his long struggle with depression in a widely read article in the *New York Law Journal*,<sup>59</sup> and on the *Legal Speak* podcast, Steven Wall, managing partner at Morgan Lewis & Bockius LLP, reflected on his lifelong battle with alcoholism.<sup>60</sup>

In his reflections, Wall summed up the troubling irony at the heart of modern legal practice. “The profession of law, in which we are called upon on a daily basis to solve the problems of others, rarely leaves time for us to

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55. Andy Steiner, *Lawyer Well-Being Emphasized at MN Supreme Court’s ‘Call To Action’ Conference*, MINNPOST (Mar. 4, 2019), <https://www.minnpost.com/mental-health-addiction/2019/03/lawyer-well-being-emphasized-at-mn-supreme-courts-call-to-action-conference> [https://perma.cc/AXH8-JWKH].

56. Stanford Law Sch., *WellnessCast*, LAW.STANFORD.EDU, <https://law.stanford.edu/media/wellnesscast> [https://perma.cc/B895-4ELP].

57. The Univ. of Chi. Law School, *Wellness Wednesday Programming*, LAW.UCHICAGO.EDU, <https://www.law.uchicago.edu/wellnesswednesdays> [https://perma.cc/K6WP-MU2Y].

58. Ashley Ahn, *Penn Will Be the First Top Law School to Require Attorney Mental Health Training for Students*, DAILY PENNSYLVANIAN (Dec. 9, 2018), <https://www.thedp.com/article/2018/12/penn-law-first-mental-health-well-being-attorney-upenn> [https://perma.cc/Z2EL-F2T5].

59. Susan DeSantis, *How Quinn Emanuel Partner Joe Milowic Plunged to the Depths of Depression but Inspired Other Lawyers to Believe in Themselves*, N.Y. L.J. (Mar. 28, 2019), <https://www.law.com/newyorklawjournal/2019/03/28/how-quinn-emanuel-partner-joe-milowic-plunged-to-the-depths-of-depression-but-inspired-other-lawyers-to-believe-in-themselves> [https://perma.cc/M6A5-ZMLQ].

60. *Big Law Leader Shares Struggles with Alcoholism, Challenges for Profession*, LEGAL SPEAK (May 18, 2018), <http://legalspeak.libsyn.com/big-law-leader-shares-struggles-with-alcoholism-challenges-for-profession> [https://perma.cc/G95R-82BQ].

deal with our own problems.”<sup>61</sup> Wall’s description alludes to a larger problem, that of minimization of the needs of the lawyer as a feature of legal practice.

We turn now to the implications of this development not only for the wellbeing of the lawyer but also for the health of the profession.

### C. *Reenvisioning Lawyer Wellbeing as a Crisis of the Profession*

As demonstrated above, much has been written about the direct causes of lawyers’ poor mental health as well as the manifold effects. To date, researchers have gathered substantial information on elevated stress, mental impairment, and substance abuse among law students and lawyers. Researchers have also collected information on the relationship between these various forms of distress and a range of correlates.<sup>62</sup> These correlates include everything from work-environment characteristics (e.g., area of specialty, size of firm) to individual personality traits and decision-making preferences (e.g., self-esteem, Myers-Brigg type).<sup>63</sup>

The magnitude of the crisis, however, calls on us to consider whether the crisis among lawyers reflects more broadly a crisis of the legal profession and, if so, how definite trends in the profession itself may be harming the ideals of the profession and identity of the professional. To that end, a different perspective is needed. We submit that developments in the field of psychology—namely, empirical studies guided by SDT—can provide us with that perspective.

Pioneered by psychologists Richard Ryan and Edward Deci in the 1970s, SDT has emerged as an important psychological framework for understanding human needs, values, and motivation and has spawned, among other things, a large and growing literature on workplace dynamics and professional fulfillment.<sup>64</sup> SDT posits that in order to thrive and maximize their positive

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61. *Id.*

62. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL’Y & L. 87, 105–20 (2008) (reviewing studies of correlates of lawyer dissatisfaction).

63. *Id.*

64. See Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOLOGIST 68, 68–69 (2000) [*hereinafter Self-Determination and Intrinsic Motivation*]; Edward L. Deci & Richard M. Ryan, *The General Causality Orientations Scale: Self-Determination in Personality*, 19 J. RES. PERSONALITY 109, 131–32 (1985). For an overview of each of these domains of SDT inquiry and how they can be used to understand professional character development, see Lawrence S. Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L.J. 168, 171–74 (2011). For an explanation of how SDT

motivation, which may come from extrinsic and in particular intrinsic sources, all human beings need to regularly experience (1) competence, (2) autonomy, (3) and relatedness to others.<sup>65</sup> More specifically:

[P]eople need to feel that they are good at what they do or at least can become good at it (competence); that they are doing what they choose and want to be doing, that is, what they enjoy or at least believe in (autonomy); and that they are relating meaningfully to others in the process, that is, connecting with the selves of other people (relatedness).<sup>66</sup>

These experiences are considered needs because they produce wellbeing in subjects, while a dearth of these experiences produces angst or low vitality.<sup>67</sup>

Guided by the tenets of SDT, over the last decade and a half, researchers Kennon Sheldon and Lawrence Krieger have conducted several empirical studies to assess the psychological needs of law students and lawyers.<sup>68</sup> Their work has attracted significant attention for its implications for the lawyer wellbeing movement.<sup>69</sup> Their longitudinal studies show that law school

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parameters and measures can be used to collect and analyze empirical data on the ethical, professional qualities and behaviors in lawyers and law students, see *id.* at 183–93.

65. *Self-Determination and Intrinsic Motivation*, *supra* note 64, at 68.

66. Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 885 (2007) [hereinafter *Longitudinal Test of Self-Determination*].

67. Lawrence S. Krieger with Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 564 (2015) [hereinafter *What Makes Lawyers Happy*].

68. *See id.* at 554; *Longitudinal Test of Self-Determination*, *supra* note 66; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 261 (2004) [hereinafter *Evaluating Changes in Motivation, Values, and Well-Being*].

69. We recognize and applaud those commentators who have begun drawing on SDT to reinforce particular practice recommendations, most notably the National Task Force on Lawyer Well-Being. *See* NAT'L TASK FORCE, *supra* note 2, at 15–17, 54–55 (relying on Krieger and Sheldon's research to formulate recommendations to address the lack of control lawyers have over their work and their resulting mental health problems); *see also* Anne Brafford & Robert W. Rebele, *Judges' Well-Being and the Importance of Meaningful Work*, 54 CT. REV. 60, 64 (2018) (arguing that the large body of evidence supporting SDT warrants "placing it at the center of well-being strategies for judges"); Quenqua, *supra* note 9, at A19 (citing Krieger and Sheldon's finding that the lawyers with public-service jobs report more happiness and situating the research within the broader lawyer wellbeing movement). We suggest, however, that SDT's insights into the underlying psychological components of lawyer suffering have more profound

students experience a precipitous decline in mental health correlated with a reduction in intrinsic motivation as they progressed through law school.<sup>70</sup> Sheldon and Krieger have concluded from the data that “all negative outcomes resulted from decreases in satisfaction of the fundamental needs for autonomy, competence, and relatedness to others after students entered law school.”<sup>71</sup> Similarly, their 2015 study of more than 6,200 lawyers across four states found that experiences of autonomy, competence, and relatedness to others most strongly predicted attorney wellbeing, while conventional markers of success, such as income, law review participation, law school rank, and partnership in a firm were weak predictors of wellbeing.<sup>72</sup>

We posit that this work and its approach to parsing the unfulfilled needs underlying lawyer distress provide important insights into the connection between the deterioration of lawyers’ mental health needs and several long-running debates regarding the development of the legal profession and the disappointments of legal practice. In the next part, we sample Sheldon and Krieger’s findings as to each of the SDT needs and consider how these findings could help inform a focus on wellbeing within the context of three such debates.

### III. PROFESSIONAL WELLBEING AS ROOTED IN LEGAL PRACTICE

Although SDT research has been specifically applied to lawyers as a group only relatively recently, its fundamental tenets and troubling findings regarding lawyers’ feelings of competence, autonomy, and relatedness loosely track certain long-running controversies within the law.

Our goal in this part is to explore possible links between the inadequately satisfied needs of the practicing lawyer and the debates about both the substance of modern advocacy and the state of the legal profession. To date, research and analysis of lawyer wellbeing has largely spotlighted concrete variables that studies suggest contribute to lawyers’ stress and distress, from billable-hour requirements to regular adversarial confrontations.<sup>73</sup> These

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significance in allowing us to reconceptualize the problem of lawyer wellness and to relate that problem to larger, long-running trends in the legal profession.

70. As Krieger has explained, incorporating SDT measures into their studies allows for inquiry into the psychodynamics of the legal profession and insight into how choices and accomplishments, as well as demographic traits, influence lawyers’ values, purposes, satisfaction, and emotional health. Krieger, *supra* note 64, at 185.

71. *What Makes Lawyers Happy*, *supra* note 67, at 567 (summarizing findings from *Longitudinal Test of Self-Determination*, *supra* note 66).

72. *Id.* at 570–72, 617–19.

73. One significant exception is the extensive literature relating the mental health and self-esteem of law students to deficiencies in legal pedagogy. *See* discussion *infra* Section III.A.



variables, however, do not exist in a vacuum; they grow out of the broader customs and culture of legal practice. Here we look at how wellbeing—as expressed in the fulfillment of lawyers’ need for competence, autonomy, and relatedness to others—connects to three such conversations. These address the diminished training opportunities accorded to lawyers; the reduced professional independence enjoyed by lawyers; and the declining civility and decorum with which lawyers interact with one another, their adversaries, and the courts.

For simplicity, we have elected to examine each of the following professional controversies in loose connection with only one of the three SDT needs, rather than considering the possible interplay between those needs.<sup>74</sup> Our purpose is not to provide a technical analysis of whether and under what conditions SDT needs are fulfilled, or to draw affirmative conclusions from limited data, but rather to begin the work of incorporating emerging research regarding lawyers’ needs and wellness into broader discussions about the evolution and future of the legal profession. In this way, we seek to enhance those discussions and encourage consideration of lawyer wellbeing as a multidimensional rather than standalone issue—one that is implicated by and warrants serious address within other prominent movements in the law.

#### A. *Competence in the Context of Diminished Training Opportunities*

The need for competence “involves the importance of experiencing oneself as able and effective in dealing with the environment.”<sup>75</sup> People demonstrate this need by seeking out and mastering challenges, and through their enjoyment of these challenges and the experience of exercising new capacities.<sup>76</sup> Krieger and Sheldon observed in their 2015 study of lawyers that although those lawyers with jobs conventionally understood as high in “prestige” had substantially higher law school grades than any other group, they reported significantly lower satisfaction of the competence need than those lawyers with public service jobs and the lowest grades and pay.<sup>77</sup> The

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74. SDT research considers, for example, the interplay of autonomy and competence needs to analyze complex phenomena such as the finding that rewards contingent on performance are less detrimental to intrinsic motivation than rewards that are contingent on task completion. Edward L. Deci & Richard M. Ryan, *Self-Determination Theory*, in 1 HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 416, 418 (Paul A.M. Van Lange et al. eds., 2012).

75. Julia Schüler et al., *Implicit Need For Achievement Moderates the Relationship Between Competence Need Satisfaction and Subsequent Motivation*, 44 J. RES. PERSONALITY 1, 1 (2010).

76. Richard M. Ryan & Arlen C. Moller, *Competence as Central, but Not Sufficient, for High-Quality Motivation*, in HANDBOOK OF COMPETENCE AND MOTIVATION: THEORY AND APPLICATION 214, 218 (Andrew J. Elliott et al. eds., 2017).

77. *What Makes Lawyers Happy*, *supra* note 67, at 591.

study's authors concluded that "[t]his suggests a core dissonance between 'competence' as measured in law school (largely by grade performance) and a lawyer's ability to feel competent in actual law practice."<sup>78</sup>

That lawyer distress is attributable in any significant part to feelings of incompetence is troubling. Competence is, literally, the first rule of legal practice. Rule 1.1 of the Model Rules of Professional Conduct requires lawyers to provide competent representation that brings to bear "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>79</sup> From the standpoint of lawyer wellbeing, the problem of feared incompetence raises two possible problems: that of imagined lawyer incompetence and that of actual incompetence.

The issue of imagined incompetence and related concerns regarding stress and self-perception have attracted significant research in connection with law-student wellbeing and have spurred discussion of the role that law schools play in inculcating in students fears of failure, criticism, and humiliation, and indeed leveraging these emotions to stimulate competition.<sup>80</sup> Researchers have considered, for example, the negative social dynamics of the Socratic method, which remains the dominant method of teaching in law school classrooms.<sup>81</sup> Given the extensive information that is already available on the relationship between self-perception and legal education, we make only one brief observation on the subject of imagined incompetence: It is a problem that affects not only students and newly minted graduates but also experienced lawyers. That should raise questions about the psychologically damaging

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78. *Id.*

79. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

80. *See, e.g.,* Daisy Hurst Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 131 (2010) (describing law school as "an environment intolerant of fears, anxieties, vulnerabilities, and mistakes," which turns out "students who struggle with the complexity of law school, who are anxious about the responsibilities that come with being a lawyer, and who make mistakes or fear making them interpret these reactions as signs of inability or incompetence"); B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 647 (1991) (advocating techniques of stress inoculation to help students cope with the demands and fear instilled during their first year of law school); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 112–14 (2002) (summarizing empirical research on the impact of legal education on law students' motivation, goals and values); Lee Norton et al., *Burnout and Compassion Fatigue: What Lawyers Need to Know*, 84 UMKC L. REV. 987, 994 (2016) (connecting burnout and compassion fatigue among lawyers to deficiencies in legal education and training, including an emphasis on extrinsic motivation, "winning," and individual achievement); Richard Sheehy & John J. Horan, *Effects of Stress Inoculation Training for 1st-Year Law Students*, 11 INT'L J. STRESS MGMT. 41, 41–43 (2004) (reviewing literature of the anxieties and fears that feed law-student stress).

81. Sheehy & Horan, *supra* note 80, at 42.

demands of legal practice.<sup>82</sup> If competent, conscientious lawyers are suffering from feelings of inadequacy, then the work management practices and performance expectations by which we have become accustomed to assessing lawyer competence require recalibration.

There is a second possibility, one that has received less attention as an issue of wellbeing: The feelings of incompetence and work anxiety shown to afflict lawyers may reflect self-consciousness about actual deficits in their skills and knowledge—or more specifically, in the opportunities available to lawyers to effectively develop their skills and knowledge and put them into practice.<sup>83</sup> This could help explain Krieger and Sheldon’s 2015 finding that lawyers with high-prestige jobs (largely at elite law firms) reported lower satisfaction of the competence need than lawyers with public-service jobs.<sup>84</sup> In general, public-sector attorney positions tend to allow for earlier responsibilities and more substantive lawyering opportunities.

The proposition that lawyers, particularly private-sector trial lawyers, are not being educated and trained to adequately deliver competent representation has been a subject of debate for at least half a century.<sup>85</sup> Deficiencies in lawyer competence so disturbed Chief Justice Burger that in his now-famous 1973 Sonnett Memorial Lecture he declared that as many as half of all trial lawyers were incompetent.<sup>86</sup> Drawing on the changing demands of legal practice and “the vast changes in the complexity of our social, economic and political structure” he argued that legal specialization and certification programs were necessary to ensure competent trial advocacy.<sup>87</sup> Five years later, the ABA Section of Legal Education and Admissions to the Bar established a Task Force on Lawyer Competency, which defined lawyer competence as having

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82. See, e.g., John Lande, *Escaping from Lawyers’ Prison of Fear*, 82 UMKC L. REV. 485, 501–04 (2014) (“Lawyers’ fears generally involve interpersonal situations in which they are subject to evaluation of their performance and competence, resulting in fear of criticism, rejection, and defeat.”).

83. We refer not only to hard skills but also to qualities that are developed in the course of practice and which are essential to the professional identity of the lawyer, such as judgment and deliberation. See ANTHONY KRONMAN, *THE LOST LAWYER* 25, 41 (1993).

84. *What Makes Lawyers Happy*, *supra* note 67, at 591.

85. See Roger C. Cramton, *Lawyer Competence and the Law Schools*, 4 U. ARK. LITTLE ROCK L. REV. 1, 1–3 (1981); Nancy A. Strehlow, *Evaluating “Competency” Criteria: Toward a Uniform Standard of Lawyer Performance*, 59 WASH. U. L.Q. 1019, 1019–20 (1981) (acknowledging the debate over lawyer competency and legal education).

86. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973).

87. *Id.* at 239; see also Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1, 21 (1980) (“The law schools superbly prepare students in legal analysis and legal theory, but they have not performed well in teaching students how to translate those theoretical skills into practice.”).

three basic elements: “(a) certain fundamental skills; (b) knowledge about law and legal institutions; and (c) ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency.”<sup>88</sup>

Several decades later, the debate over the adequacy of legal education has not abated, but the nature of the problem appears to have undergone a shift. This is reflected in the rationale offered by the California State Bar Board of Trustees in 2014 in support of its unanimous recommendation to the state supreme court that students seeking bar admission be required to take fifteen units of coursework in practice-based experiential courses.<sup>89</sup> The Board reasoned that the need was driven largely “by the rapidly changing landscape of the legal profession,” in which “fewer and fewer opportunities are available for new lawyers to gain structured competency training early in their careers.”<sup>90</sup> This leaves young lawyers “without the solid foundation necessary to represent clients in a competent manner and with nowhere to turn to build that foundation.”<sup>91</sup>

Carefully considered, this is an extraordinary statement. There is nothing new about the push to incorporate practical, skills-based learning into the law school curriculum—but there is surely something novel, and alarming, about the proposition that these experiences are all the more urgent in law school because they are increasingly unavailable *even to the practicing lawyer*.

This growing scarcity of experience is harmful not only for lawyers’ professional development but also for the administration of justice. Trial experience itself is becoming scarce as trials vanish: In 2018, only 2% of federal criminal defendants went to trial (90% pleaded guilty and 8% had their

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88. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9 (1979). The Task Force also identified ten criteria in order to “give more specific content to the concept of legal competence”: information gathering, legal analysis, strategy formation, strategy execution, following through, practice management, professional responsibility, practice evaluation, training and supervising support personnel, and continuing attorney self-education. *Id.*

89. *See* STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE II FINAL REPORT 2 (2014).

90. STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 1 (2013).

91. *Id.*

cases dismissed).<sup>92</sup> In 2018, less than 1% of federal civil cases went to trial,<sup>93</sup> compared to 11.5% in 1962.<sup>94</sup> The trend of the disappearing trial can only deepen the erosion of trial skills, as a generation of litigators is denied the opportunity to develop the confidence and ability to take cases to trial—a critical component of effective representation.<sup>95</sup>

The same principle applies to appellate practice, as the rate of oral argument in many federal courts of appeals declines.<sup>96</sup> According to the Administrative Office of the U.S. Courts, in the twelve-month period ending in September 2018, the federal appellate courts held argument in only 6,302 of 33,672 cases decided on the merits, or 20.1%.<sup>97</sup> That's half the rate and (notwithstanding a significant increase in docket size) two-thirds the number of arguments held twenty years ago.<sup>98</sup> In some circuits, the argument rate now

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92. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (Jun. 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [https://perma.cc/QW5V-2EXT]; see also ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2018, tbl. D-4, (2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d4\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf) [https://perma.cc/7S38-SRCY].

93. U.S. COURTS, U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl. C-4, (Dec. 31, 2018), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2018/12/31> [https://perma.cc/F3CG-FRGC].

94. Terry Carter, *The Endangered Trial Lawyer*, ABA JOURNAL (Mar. 2, 2009), [http://www.abajournal.com/magazine/article/the\\_endangered\\_trial\\_lawyer](http://www.abajournal.com/magazine/article/the_endangered_trial_lawyer) [https://perma.cc/87CA-UYC3] (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004)).

95. See Edward D. McCarthy, *The Case of the Vanishing Trial Lawyer, and Why It Matters to All of Us*, BOS. GLOBE (May 8, 2018), <http://www.bostonglobe.com/magazine/2018/05/08/the-case-vanishing-trial-lawyer> [https://perma.cc/PDL9-N5VX].

96. Ross Todd, *Quiet Time? Oral Arguments Disappear in Federal Appeals Courts*, NAT'L L.J. (May 30, 2018), <https://www.law.com/nationallawjournal/2018/05/30/quiet-time-oral-arguments-disappear-in-federal-appeals-courts> [https://perma.cc/T76G-QU8R].

97. This is the latest twelve-month period for which statistics are available. U.S. COURTS, U.S. COURTS OF APPEALS—CASES TERMINATED ON THE MERITS AFTER ORAL ARGUMENTS OR SUBMISSION ON BRIEFS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2018, tbl. B-10 (2018) [*hereinafter* CASES TERMINATED AFTER ORAL ARGUMENT] [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b10\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2018.pdf) [https://perma.cc/33PJ-7TJM].

98. In other words, the difference is not explained by the significant increase in the judicial workload, as the number of arguments held has significantly declined in absolute terms, from 10,215 in 1998. U.S. COURTS, U.S. COURTS OF APPEALS—APPEALS TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 1998, tbl. S-1 (1998), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/s01sep98.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/s01sep98.pdf) [https://perma.cc/57KF-D38M].

stands at only a little over 10%.<sup>99</sup> This is a loss for developing lawyers, as well as for the quality of the decision-making process and for the many litigants who are rendered judgments without the sense they were accorded their “day in court.”<sup>100</sup>

The California State Bar Board of Trustees formulated its concern and coursework recommendation from “the standpoint of regulatory policy” and with a pointed focus on public protection.<sup>101</sup> But others have honed in on the implications of diminished training opportunities for lawyers’ professional development and ability to enjoy a fulfilling legal practice. In a vivid speech delivered at Hofstra University School of Law in 2011, Michael Cardozo, then head of the New York City Law Department, lamented that “young lawyers who are fortunate enough to be employed are no longer getting in-depth on-the-job training and high level experience, making it difficult for them to fully develop as professionals until much later in their careers.”<sup>102</sup> Cardozo directed much of his attention to early on-the-job learning, expressing the concern that “the broad legal training and experience young attorneys used to receive; together with involvement in outside activities—which enabled them to grow into accomplished lawyers in their own right—is becoming a relic of the past.”<sup>103</sup> Specifically, few young lawyers enjoy one-on-one training or a high level of responsibility; they are instead “given discrete tasks and are placed on large teams, giving them little insight into the overall impact of what they are working on, and thus providing on-the-job training in a much more limited way.”<sup>104</sup>

This is a crucial backdrop for study findings that show lawyers are suffering from feelings of incompetence—a dramatic decline in training opportunities and, indeed, a sea change in what it means to practice law.

### *B. Autonomy in the Context of Diminished Professional Independence*

Autonomy is “rule by the self.”<sup>105</sup> It “concerns people’s universal urge to be causal agents, to experience volition, to act in accord with their integrated

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99. See CASES TERMINATED AFTER ORAL ARGUMENT, *supra* note 97.

100. AM. ACAD. OF APPELLATE LAWYERS, ORAL ARGUMENT TASK FORCE REPORT 3–7 (2015).

101. STATE BAR OF CAL., *supra* note 90, at 1.

102. Michael A. Cardozo, *The Future of the Legal Profession: The New York City Corporation Counsel’s Perspective on the Challenges and Opportunities Ahead*, 39 HOFSTRA L. REV. 795, 796 (2011).

103. *Id.* at 801.

104. *Id.* at 800.

105. Richard M. Ryan & Edward L. Deci, *Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?*, 74 J. PERSONALITY 1557, 1562 (2006).

sense of self (i.e., with their interests and values).”<sup>106</sup> In SDT terms, “[A]utonomy refers not to being independent, detached, or selfish but rather to the feeling of volition that can accompany any act, whether dependent or independent, collectivist or individualist.”<sup>107</sup> Krieger and Sheldon observed in their 2015 study that, as they had predicted, with increasing firm size, lawyers reported more external motivation for their work and less autonomy satisfaction, despite much larger incomes.<sup>108</sup>

Why might lawyers find their need for autonomy unfulfilled by legal practice? Thirty years ago, observing that “professional independence” was an umbrella term with several distinct meanings, Robert Gordon distinguished lawyers’ autonomy in setting the conditions of their work from their political autonomy.<sup>109</sup> The decline in lawyers’ professional independence in both of these senses might help account for their diminished sense of “rule by the self” and, in turn, their diminished wellbeing.<sup>110</sup>

The first and simpler of these forms of professional independence has already attracted a great deal of attention for its implications for lawyers’ mental health: the control lawyers enjoy over their conditions of work, or what psychologists term “decision latitude.”<sup>111</sup> Decision latitude refers to the number of choices a person has or perceives having.<sup>112</sup> As recognized in the

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106. Schüler et al., *supra* note 75, at 2.

107. *Self-Determination and Intrinsic Motivation*, *supra* note 64, at 74.

108. *What Makes Lawyers Happy*, *supra* note 67, at 596–97. Krieger and Sheldon’s three-year 2007 study, of students at two different law schools, also showed that students who enjoyed greater perceived “autonomy support” by faculty experienced less drastic declines in need satisfaction, a higher grade point average, better bar exam results, and more self-determined motivation for the first job after graduation. *Longitudinal Test of Self-Determination*, *supra* note 66, at 884–85. Autonomy support is understood to have three important facets: provision of choice, wherein the subject is provided maximum choice within the constraints of the task and circumstances; provision of rationale, wherein the subject is given an explanation where no choice can be provided; and perspective taking, wherein the authority communicates that the subject’s point of view matters. KENNON M. SHELDON ET AL., SELF-DETERMINATION THEORY IN THE CLINIC: MOTIVATING PHYSICAL AND MENTAL HEALTH, 33 (2003).

109. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 19 n.57 (1988). The self-regulatory nature of legal practice, as captured by Rule 5.4 of the Model Rules of Professional Conduct, is another important facet of professional independence, but is not a subject we address here. For a helpful overview of the various facets of lawyers’ professional independence, in relation to not only clients but also the state, third parties, and the courts, see Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602–21 (2013).

110. We note that SDT distinguishes autonomy from independence, insofar as “independence” might be construed as detachment or equated with being antagonistic to the community, but this is not the meaning we attribute to our use of “independence” here. *Self-Determination and Intrinsic Motivation*, *supra* note 64, at 74.

111. Seligman et al., *supra* note 46, at 34.

112. *Id.* at 44.

2017 report of the National Task Force on Lawyer Well-Being, research shows that workers with low decision latitude and high job demand are especially at risk for depression and physical health problems, such as coronary disease.<sup>113</sup> Noting that the work of junior associates at large law firms tends to fall within this low-decision-latitude, high-demand category, Martin Seligmann has compellingly argued that low decision latitude is a primary contributor to lawyers' unhappiness. He explains, "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>114</sup>

Indeed, many of the changes in the practice of the law that have diminished valuable training opportunities for young firm associates—including the growth of law firms and the disappearance of trials—have also transformed the quality and content of the work they do perform, with ramifications for the level of control they exert over their day-to-day tasks. As Deborah Rhode has written, "'Doing litigation' in the style to which many practitioners have become accustomed means endless cycles of scutwork."<sup>115</sup>

Perhaps the most problematic feature of scutwork is its sheer quantity, and the opportunity costs imposed by an around-the-clock work schedule. The billable hour has been described in the SDT literature as "the most autonomy-crushing mechanism imaginable."<sup>116</sup> Overwork, by way of the billable hour and commoditization of the minute, is endemic in the profession and has attracted more attention than any other feature of private practice.<sup>117</sup> A 2004 study by the American Bar Foundation found that the median number of hours reported for a typical work week was fifty, with about one-fifth of all new

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113. See NAT'L TASK FORCE, *supra* note 2, at 51 (citing J-M Woo & T. T. Postolache, *The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications*, 7 INT'L J. DISABILITY & HUMAN DEV. 185, 192 (2008)); Joan M. Griffin et al., *The Importance of Low Control at Work and Home on Depression and Anxiety: Do These Effects Vary by Gender and Social Class?*, 54 SOC. SCI. & MED. 783, 786 (2002)).

114. Seligman et al., *supra* note 46, at 34, 57.

115. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 301–02 (1998).

116. DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* 97 (2011).

117. See, e.g., Roy Strom, *Seeing Lawyers in Crisis, Some Blame the Billable Hour*, LAW.COM (May 19, 2019), <https://www.law.com/2019/05/19/seeing-lawyers-in-crisis-some-blame-the-billable-hour/?sreturn=20190508170836> [<https://perma.cc/242K-BZLS>]. See generally Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 267–91 (2000) (findings from a survey of 487 lawyers, concluding that increasing billable hours expectations gave rise to job dissatisfaction, stress and distress, shoddy work, attrition, degradation of ethical standards, and decline in mentoring).



attorneys working sixty or more hours a week.<sup>118</sup> That statistic reflects merely what is billed to the client—it does not include the hours lawyers spend on administrative tasks and other parts of the workday.<sup>119</sup> The problem of overwork is, of course, not unique to scutwork or the law firm setting. In January 2019, the *New York Times* covered Jack Talaska, a lawyer for the poor in Lafayette, Louisiana, who was at one point juggling 194 felony cases.<sup>120</sup> These were by definition high-stakes cases, involving felonies carrying sentences of ten years or more and clients facing life without parole.<sup>121</sup> Based on a workload study, the *Times* calculated that Talaska was handling the work of five full-time lawyers.<sup>122</sup>

It is widely recognized that this kind of workload is incompatible with happiness and sound mental health.<sup>123</sup> But recent studies, including but not limited to Krieger and Sheldon’s SDT research, offers simple, useful insights into the mechanics of why. Among other things, overwork limits lawyers’ sense of autonomy by restricting their ability to choose cases, pursue particular strategic approaches, or complement private representation with meaningful public service.<sup>124</sup> An American Bar Association survey on pro bono activity undertaken in 2016 showed that the vast majority of lawyers—four out of five—believe pro bono service is important, but only about half of the respondents engaged in such work that year.<sup>125</sup> The most commonly cited

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118. NALP FOUND. FOR LAW CAREER RESEARCH & EDUCATION & AM. BAR FOUND., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 33 (2004).

119. The unsustainability of lawyers’ work schedules contributes, in turn, to high churn. In a 2000 speech, Justice Stephen Breyer cited a study that found that two-thirds of associates leave large firms within five years, with “disproportionate” effects on women. Stephen Breyer, Assoc. Justice, U.S. Supreme Court, *The Legal Profession and Public Service* 5 (Sept. 12, 2000).

120. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES, Feb. 3, 2019, at A14.

121. *Id.*

122. *Id.*

123. See, e.g., Daniel Fish, *The Mental-Health Crisis in Law*, PRECEDENT (Mar. 6, 2018), <https://lawandstyle.ca/law/cover-story-the-mental-health-crisis-in-law> [<https://perma.cc/Y8ME-WZUA>]; Jonathan Koltai et al., *The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession*, 59 J. HEALTH & SOC. BEHAV. 20, 27 (2018) (finding that elite Canadian lawyers with high salaries suffer higher levels of depression and lower career-choice satisfaction, largely due to the hours they work); P. Afonso et al., *Impact of Working Hours on Sleep and Mental Health*, 67 OCCUP. MED. 377, 378–80 (2017) (finding higher anxiety and depression symptoms in 429 respondents reporting long working hours).

124. See Rhode, *supra* note 116, at 298, 300 (observing that the intensifying economic pressure of private practice and emphasis on the bottom line “squeezes the time available for pursuit of other professional values, such as mentoring and public service”).

125. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERVICE, *SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS* 6 (2018).

challenge to taking on such representation was lack of time<sup>126</sup>—a disturbing finding for a profession that explicitly directs its members to “devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>127</sup>

The problem of diminished lawyer autonomy is not just an outgrowth of scutwork and billables. As Gordon has observed, “Law firms commonly restrict the independence of their members in ways more direct than the creation of a set of working conditions and incentives that effectively preclude other involvements.”<sup>128</sup> Specifically, lawyers are routinely forbidden from using their degrees to contribute to public causes. As a result, lawyers enjoy diminished political independence and limited freedom to engage in service and leadership opportunities once thought essential to forging a meaningful career.

Political independence has served, at least historically, as an important ideal within the legal profession, and as the vehicle by which lawyers have engaged in work to advance the public interest. Rule 2.2 of the Model Rules specifically recognizes lawyers’ independence from clients in the role of advisor, mandating that “a lawyer shall exercise independent professional judgment and render candid advice.”<sup>129</sup> The ABA Model Code of Professional Responsibility was explicit, however, in its articulation of the value of professional independence *outside* the lawyer-client relationship, explaining that the lawyer’s obligation of loyalty to the client applies only in the discharge of professional duties and does not imply adoption of a personal viewpoint favorable to the client. Thus, the Model Code states the following:

While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.”<sup>130</sup>

The ABA Model Code is no longer in effect, but the baseline independence principle expressed in the rule remains important and influential in navigating the ethical and professional obligations of lawyers.<sup>131</sup>

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126. *Id.* at 20.

127. MODEL RULES OF PROF’L CONDUCT pmb1. (AM. BAR ASS’N 2018).

128. Gordon, *supra* note 109, at 61.

129. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2016).

130. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-17 (AM. BAR ASS’N 1980).

131. *See, e.g.*, D.C. Bar Legal Ethics Comm., Formal Op. 231 (1992) (opining that a D.C. council member may participate in consideration of legislation affecting clients of his/her law

In its thickest form, the idea of the politically independent lawyer is well-captured by Gordon's description of the lawyer who, in accordance with the republican tradition, serves as a guardian of the law with a far-ranging set of commitments oriented toward the public interest, "both within and without the context of advising clients." Such a lawyer seeks:

[T]o repair defects in the framework of legality, to serve as a policy intelligentsia, recommending improvements in the law to adapt it to changing conditions, and to use the authority and influence deriving from their public prominence and professional skill to create and disseminate . . . a culture of respect for and compliance with the purposes of the laws.<sup>132</sup>

This concept of lawyers' professional independence is in decline, and its deterioration dovetails with what is perhaps the longest running lamentation within the profession—over the diminished role of the lawyer in championing the public interest. Perhaps most famously in a 1905 address to the Harvard Ethical Society, Justice Louis Brandeis explained that lawyers had lost respect in the eyes of the public because, in order to serve as "adjuncts" to elite corporations, they had given up their independence and obligation to use their powers to protect the people.<sup>133</sup>

Some eighty years later, Chief Justice Burger agreed. He observed that lawyers suffered from a "decline in public confidence" because they had repudiated their obligations to the public good, and in so doing, they had created a crisis of professionalism.<sup>134</sup> Of the many explanations that have been put forward for the reasons for this repudiation and the nature of the resulting crisis, Gordon provides a particularly compelling account. Though he cautions against nostalgic revisionism, he also notes that in modern times, because of economic, political, and cultural changes in legal practice, "the performance of public roles has devolved onto specialists in the public good, like

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firm, and citing a previous opinion relying on EC 7-17 to clarify the meaning of engaging in activity "during the course of the professional relationship").

132. Gordon, *supra* note 109, at 14. Gordon also describes a second archetype of the independent lawyer—the lawyer who is able to pursue client interests free of control imposed by the state. *Id.* We see this ideal as subject to less controversy.

133. Louis D. Brandeis, The Opportunity in the Law, Address Before the Harvard Ethical Society (May 4, 1905), in *BUSINESS—A PROFESSION* 313, 321 (1914).

134. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 62 (1984).

government and ‘cause’ lawyers.”<sup>135</sup> Meanwhile, “The ideal of the citizen lawyer as part of the calling of ordinary private lawyer . . . is in recession.”<sup>136</sup>

This recession, and the accompanying decline of the public-spiritedness associated with the archetype of the citizen-lawyer or lawyer-statesman, is not a recent phenomenon.<sup>137</sup> But Gordon recounts how the strictures of modern legal practice have contributed to its normalization. Until the late nineteenth century, he explains, “[E]ven lawyers with extensive and regular ties to business clients felt some freedom to take on public causes at odds with those of their clients.”<sup>138</sup> That has changed. Gordon notes that some private firms prohibit a range of activities:

[S]uch as pro bono activities or political causes or even just publishing law review articles, that might create a potential ‘business’ conflict—that is, not a properly disqualifying conflict of interest, but merely the risk of loss of business from having a firm member be perceived to adopt a policy position that one of the firm’s clients might not like.<sup>139</sup>

Firms do so unabashedly, although this practice violates “every conceivable traditional ideal of independence their profession has ever entertained.”<sup>140</sup>

Chief Justice Burger declared almost half a century ago, “Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that—there must be delivery and execution.”<sup>141</sup> Too many lawyers are

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135. Robert W. Gordon, *The Citizen Lawyer: A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1180 (2009) [*hereinafter* *Citizen Lawyer*].

136. *Id.*

137. A quarter century ago, Anthony Kronman argued that lawyers, judges, and legal academics are trapped in an “identity crisis of immense—if largely unacknowledged—proportions,” and traced this crisis to the demise of the professional ideal of the lawyer-statesman. A primary feature of the lawyer-statesman, in Kronman’s telling, is “public-spiritedness,” as reflected in active involvement in public affairs. KRONMAN, *supra* note 91, at 354. Kronman drew some of these ideas from a speech delivered by Chief Justice William Rehnquist students at the University of Chicago Law School on the role of legal education and legal practice in the demise of the lawyer-statesman ideal in American politics. See William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV J.L. & PUB. POL’Y 537, 537–57 (1986).

138. *Citizen Lawyer*, *supra* note 135, at 1189.

139. Gordon, *supra* note 109, at 61.

140. *Id.* at 61–62.

141. Warren E. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049, 1053 (1972).

being denied the time and freedom to make good on delivery and execution. Our system of justice is suffering as a result. And so are they.

C. *Relatedness in the Context of Diminished Civility*

Relatedness is described in the SDT literature as “the desire to feel connected to others,”<sup>142</sup> “the need to belong,”<sup>143</sup> and the need “for frequent, nonaversive interactions within an ongoing relational bond.”<sup>144</sup> SDT theory posits that this feeling of relatedness is necessary to function optimally; lack of attachments to others is linked to ill effects on health and wellbeing.<sup>145</sup> Krieger and Sheldon have considered the effects of both personal and professional contributors to experiences of relatedness. For example, greater satisfaction of the relatedness need accounts for much of the increased wellbeing of married subjects relative to lawyers without partners.<sup>146</sup> Provision of understanding, respect, and choices in the workplace—as opposed to top-down control—also appears to increase lawyers’ experiences of relatedness (as well as their experiences of autonomy and competence) and serve as a strong predictor of lawyer wellbeing.<sup>147</sup>

The data on lawyers’ need for relatedness to others confirms what we know from personal experience: Relationships are crucial to lawyers’ mental health, as they are to most human beings.<sup>148</sup> In recent years this basic point has begun to generate explicit interest in the issue of lawyer wellbeing from within the movement to improve civility within the profession.<sup>149</sup> The connection is intuitive and well-supported. The breakdown of professional decorum and the deterioration of lawyers’ mental and physical health have been traced to common sources of stress and pressure.<sup>150</sup> There is also a causal

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142. Edward L. Deci & Richard M. Ryan, *The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 231 (2000).

143. Jennifer G. La Guardia & Heather Patrick, *Self-Determination Theory as a Fundamental Theory of Close Relationships*, 49 CAN. PSYCH. 201, 202 (2008).

144. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995).

145. *Id.*

146. *What Makes Lawyers Happy*, *supra* note 67, at 615–16.

147. *Id.* at 618.

148. *Id.* at 621 (“The tenets of SDT established by decades of research in the general population appeared to apply without qualification to this large sample of legal professionals.”).

149. See Cynthia L. Alexander & G. Andrew H. Benjamin, *Civility Is Good for Your Health*, WASH. ST. BAR NEWS, Apr. 2011, at 34 (“Civility, then, is a value that benefits not only the community at large, but also each of us as individuals. Each time we treat an opposing counsel, a witness, an employee, or a stranger with courtesy and respect, we contribute to the cultivation of a culture of civility and we contribute to our own health and well-being.”).

150. Seligman et al., *supra* note 46, at 37; Michael H. Hoeflich, *Legal Ethics and Depression*, J. KAN. B. ASS’N, Sept. 2005, at 33, 35.

dynamic at play: An uncivil work environment can be expected to harm lawyers' wellbeing,<sup>151</sup> and conversely, unwellness may negatively affect lawyers' conduct in a way that contributes to an uncivil environment.<sup>152</sup> Though we are certainly not the first to point to the overlap between civility in the profession and lawyer wellbeing,<sup>153</sup> we note that real benefits may come of explicitly recognizing the connection between what are conventionally treated as two distinct realms. Among other things, underscoring this connection expands the civility discussion beyond the usual points of emphasis, such as misconduct between adversaries.

The civility movement is typically traced to Chief Justice Burger's 1971 remarks to the American Law Institute in Washington, D.C. There the Chief Justice memorably described civility as "the very glue that keeps an organized society from flying into pieces," and lamented that "lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice."<sup>154</sup> Chief Justice Burger devoted his remarks to the importance of civility in the resolution of litigation,<sup>155</sup> and the civility movement that has flowered in subsequent decades has similarly focused largely (though not exclusively) on interactions between legal adversaries.<sup>156</sup> Justice Sandra Day O'Connor became one of the earliest

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151. NAT'L TASK FORCE, *supra* note 2, at 15, 54 (citing studies tying incivility in the workplace to employee unwellness).

152. *Cf.* Martha Middleton, *Substance Abuse and Mental Health Issues Are a Growing Problem for the Legal Profession, Say Experts*, A.B.A. J., Dec. 1, 2015, at 1, 5 ("Substance abuse plays a role in 40 percent to 70 percent of all disciplinary proceedings and malpractice actions against lawyers."); John F. Harkness, *Lawyers Helping Lawyers: A Message of Hope*, 73 FLA. B.J. 10, 10 (1999) (reporting that addiction or mental disorder serves as a significant contributing factor in more than half of grievances filed against lawyers).

153. The American Inns of Court is a clear example of a successful effort to promote civility through an emphasis on relatedness and collegiality. Founded in 1980, the AIC allows its members to forge personal relationships that "enable values of professional civility to be transmitted in ways not otherwise available, particularly in areas characterized by numerous competing attorneys and ever-larger law firms." Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 539 (1994).

154. Warren E. Burger, *The Necessity for Civility*, LITIG., Winter 1975, at 8, 10 [hereinafter *Necessity for Civility*]; Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 83 FORDHAM L. REV. 1147, 1152 (2014) (expressing the worry that "[l]aw schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer's function.").

155. *Necessity for Civility*, *supra* note 154, at 10.

156. *See, e.g.*, NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER* 66–67 (2010) (tracing lawyer unhappiness to an "adversarial process [that] encourages actions that may be perceived as lies, delays, and mindless posturing to create room for negotiation"); *see also, e.g.*, Seligman et al., *supra* note 46, at 35. Marvin E. Aspen, *A Response to the Civility Naysayers*,

commentators to specifically accentuate the civility deficits particularly apt to arise out of adversarial contexts as threats to lawyer wellbeing when she warned, two decades ago, that the mental and physical wellness of lawyers is at risk in a world where we treat “litigation as war, argument as battle, or trial as siege.”<sup>157</sup>

The focus on discourtesy between adversaries is an understandable one: Many of the most egregious instances of bad behavior in the profession emerge in the context of contentious litigation or negotiations. The issue also draws attention because it raises some interesting intellectual and ethical puzzles about, for instance, the lengths to which zealous advocates may go to prevail in a dispute in accordance with their obligation “zealously to protect and pursue a client's legitimate interests, . . . while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>158</sup> These are also the instances most likely to make their way into the public eye by way of hearing transcripts, deposition videos, or disciplinary proceedings and sanctions.<sup>159</sup>

Similarly, codification efforts that have formed an important part of the civility movement reveal a general focus on decorum in the adversarial context. Today, most states have professionalism creeds,<sup>160</sup> including voluntary or mandatory civility rules to supplement existing professional rules that prohibit lawyers from engaging in discourteous conduct toward a tribunal

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28 STETSON L. REV. 253, 254 (1998); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950 (1995).

157. Sandra Day O'Connor, “Professionalism” 78 OR. L. REV. 385, 388 (1999).

158. See MODEL RULES OF PROF'L CONDUCT, *supra* note 128. For instance, in 1991, the Seventh Federal Judicial Circuit conducted a survey of approximately 1,500 attorneys and judges across three states that defined civility as “professional conduct in *litigation proceedings* of judicial personnel and attorneys” (emphasis added). *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 388–92 (1991). The survey revealed that almost half believed the profession had a civility problem, with responses detailing discovery abuse and other manifestations of a winning-at-all-costs mentality. *Id.* at 378, 86.

159. No doubt these episodes contribute to the public's poor opinion of lawyers. See Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701, 704 (2015). One of the most infamous examples of uncivil attorney conduct—Exhibit A in the legal incivility literature—is the YouTube video featuring a prominent lawyer who directs profanities and insults at opposing counsel during a deposition and threatens to fight the witness he is deposing. It boasts over one million views to date. *Texas Style Deposition*, YOUTUBE (June 27, 2007), <https://www.youtube.com/watch?v=ZlxmrvbMeKc> [<https://perma.cc/QCQ8-AYJ7>]; see also *Paramount Comm'ns v. QVC Network*, 637 A.2d 34, 52 (Del. 1994) (addressing the attorney's conduct *sua sponte* because he showed “an astonishing lack of professionalism and civility that is worthy of special note”).

160. Preston & Lawrence, *supra* note 159, at 707–08. Many of these creeds were established in response to the ABA House of Delegates' 1995 resolution encouraging bar associations and courts to adopt standards of civility, courtesy and conduct.

and require lawyers to treat all persons involved in the legal process with courtesy and respect.<sup>161</sup> Many of these creeds are primarily concerned with court practice and hence abuses of the litigation process, including in the course of discovery or motions practice; failure to respect the schedule and commitments of opposing counsel; and poor etiquette in negotiations, depositions, and hearings.<sup>162</sup>

But an emphasis on lawyers' mental health is proving a helpful basis for expanding the focus on adversarial interactions. This matters because the deficiencies in mutual respect and professional courtesy that give rise to mental health issues in the law are so obviously a broader phenomenon, one that encompasses interactions among colleagues, not merely between adversaries.<sup>163</sup> Data on this point abounds within the occupational literature. In an oft-cited 1999 study, workplace researchers Lynne Andersson and Christine Pearson defined workplace incivility as "low-intensity deviant behavior with ambiguous intent to harm the target, in violation of workplace norms for mutual respect."<sup>164</sup> As this definition suggests, "[i]ncivility can take much more subtle forms, and it is often prompted by thoughtlessness rather than actual malice."<sup>165</sup> An uncivil work environment, in turn, undermines employee concentration and productivity.<sup>166</sup> Indeed, merely witnessing incivility directed at colleagues can negatively impact employees' work experience, resulting in an increase in aggressive thoughts and a decrease in the observers' performance, creativity, and concern for colleagues' welfare.<sup>167</sup> Andersson and Pearson have also identified what they describe as incivility's "spiraling effect," wherein uncivil conduct triggers reciprocation and

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161. *Id.* at 715.

162. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 app. A (2017); CIVILITY GUIDELINES, CAL. ATTORNEY GUIDELINES OF CIVILITY & PROFESSIONALISM § 1 (2009); W. VIRGINIA STANDARDS OF PROF'L CONDUCT r. 3.4 (1997); UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY pmb. (2003); STANDARDS OF COURTESY AND DECORUM FOR THE COURTS OF WISCONSIN, 96-03 SCR 62.02 (1996).

163. *See, e.g.*, NAT'L TASK FORCE, *supra* note 2, at 54 ("Even seemingly low-level incivility by leaders can have a big impact on workers' health and motivation.").

164. Lynne Andersson & Christine M. Pearson, *Tit For Tat? The Spiraling Effect of Incivility in The Workplace*, 24 ACAD. MGMT. REV. 452, 457 (1999).

165. Christine Porath & Christine M. Pearson, *The Price of Incivility*, HARV. BUS. REV., Jan.-Feb. 2013, at 114, 115.

166. Christian Pearson et al., *Assessing and Attacking Workplace Incivility*, 29 ORGANIZATIONAL DYNAMICS 123, 124-30 (2000) (In a study of 775 workers asked about their experience as targets of uncivil conduct, more than one-fourth said they "lost work time avoiding the instigator"; more than one-half "lost work time worrying about the incident"; and more than one-third felt "their commitment to the organization declined.").

167. Christine L. Porath & Amir Erez, *Does Rudeness Really Matter? Effects of Rudeness on Task Performance and Helpfulness*, 50 ACAD. MGMT. J. 1181, 1181-82 (2007).



escalation between individuals, in addition to eroding norms for civil behavior within the wider organization.<sup>168</sup>

That said, incivility has many faces. It can be subtle and inconsiderate—or involve emotional aggression and abject mistreatment—again, within the workplace, not just in the courtroom or at the negotiating table. An informal 2016 survey showed that a startling 93% of responding lawyers at 124 American law firms have experienced bullying and a lack of respect in the workplace, with respondents citing egregious conduct such as “blocking the advancement of others and acting out” and “failing to share credit and failing to treat staff with respect.”<sup>169</sup> A 2019 survey by the International Bar Association found that bullying behavior and sexual harassment are rife in legal workplaces around the globe.<sup>170</sup> Of approximately 7,000 respondents in 135 countries, one-half of women and one-third of men reported being bullied at work.<sup>171</sup>

Civil litigation should not be an oxymoron. Whatever its form, incivility among lawyers and judges undermines the very premise of our collective identity as professionals committed to ensuring fairness, respect, and accountability in the face of injustice and abuse of power. It also does violence, unquestionably and unacceptably, to the sense of connection and belonging that is so critical to the lawyer’s mental health.

#### IV. PROPOSALS FOR REFORM

We have argued that addressing lawyer wellbeing requires more explicit consideration of the underlying psychological components of wellness, and have tied data on lawyers’ unfulfilled needs to troubling developments in modern legal practice. From this relationship emerges a mandate to generate creative solutions that address, at a high level but in concrete form, shortcomings in how we grow our professionals. Lawyer wellbeing cannot be treated as a standalone issue, to be addressed merely or even primarily through discrete, individual-level initiatives (however necessary), such as substance abuse programs and increased access to mental health resources. Nor can it be fully addressed through structural reforms (however well-advised), such as adjustments to billing and compensation practices to accommodate and encourage lifestyle changes. Wherever possible, solutions to the crisis should

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168. Andersson & Pearson, *supra* note 164, at 458–71.

169. David J. Parnell & Patrick McKenna, *Bullying, Lack of Respect, Me First, Law Firms Suffer the Behaviour they Tolerate*, LEGAL BUS. WORLD (Oct. 21, 2016) <https://www.legalbusinessworld.com/single-post/2016/10/21/Bullying> [<https://perma.cc/H2FK-Q8RP>].

170. KIERAN PENDER, INT’L BAR ASS’N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 8 (2019).

171. *Id.*

be dual-purpose, aiming not only to improve life for the individual lawyer but also to reaffirm the integrity of the law as a profession.

Some of those solutions are already underway, but much more can be done. Here we build on proposals that have already attracted attention within the thoughtful, burgeoning literature on lawyer wellbeing, as well as on ideas that have been offered in connection with problems that are not conventionally understood in wellness terms. We focus much of the discussion that follows on the role that the judiciary, law firm partners, and leaders in the bar can play in shaping the opportunities and expectations of legal practice. This is a deliberate choice, intended to reflect the reality of the highly hierarchical organization of the legal profession. Sweeping cultural shifts aimed at addressing the needs of lawyer wellbeing and the bar's deviation from its core values will require recognition and action from those charged with its oversight.

Our hope, however, is that our structured analysis of problems and potential solutions within the SDT framework will enhance the ability of all lawyers to diagnose, with specificity, the sources of their own discontent and distress and empower them to reclaim and seek fulfillment of their fundamental needs.

**Cultivating competence.** One of the central themes articulated in the Task Force on Lawyer Well-Being's 2017 report is that the need to "emphasiz[e] . . . well-being is an indispensable part of a lawyer's duty of competence."<sup>172</sup> We have pointed to research suggesting that the converse is also true: Promoting lawyers' competence, and expanding their access to opportunities that develop their competence, is indispensable to their long-term wellbeing. Leaders within the profession hold the keys to many of those opportunities, and all have a role to play in opening the doors to those rising in the bar.

Members of the judiciary are uniquely situated to respond to this mandate and to directly remediate some of the trends that have contributed to a shortfall of experiences inside the courtroom. That starts with face time. A study of federal district court judges found that in 2013, on average, the active district judge had only 423 hours of open court proceedings, which translates to less than two hours per judge per day in the courtroom.<sup>173</sup> And this number is declining.<sup>174</sup> The authors of the study, Professor Jordan Singer and District Court Judge William Young, describe the public harm that results from this decline in open court proceedings, as those proceedings "give vitality to the

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172. NAT'L TASK FORCE, *supra* note 2, at 2.

173. Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 566–67 (2014).

174. *Id.*

core characteristics of procedural fairness: litigant participation and voice, trustworthiness, and dignified and equal treatment of the parties.”<sup>175</sup> Moreover, there is harm to lawyers who have increasingly limited time to hone their advocacy skills in the courts.

The result is an artificial scarcity that disproportionately affects younger lawyers—a problem that some judges are working actively to address. For instance, seven of the federal judges sitting in the District of Massachusetts have adopted a standing order regarding “Courtroom Opportunities for Relatively Inexperienced Attorneys,” which encourages, “as a matter of policy,” the participation of inexperienced attorneys in all court proceedings, with supervision by more experienced attorneys as appropriate.<sup>176</sup> Similar movements are afoot in the appellate courts. In a recent task force report advocating for “resurrecting” argument in the federal circuits, the American Academy of Appellate Lawyers proposed widespread judicial adoption of formal initiatives like programs granting arguments in pro bono appeals, in addition to exhibiting greater receptivity to litigants’ requests to argue cases.<sup>177</sup> The Third Circuit is among those courts with such a program in place: It presumptively grants oral argument in all cases argued by appointed pro bono counsel, with an eye toward providing valuable experience to supervised law students and to young lawyers willing to take on pro bono cases.<sup>178</sup>

These efforts to date are significant and serve as a model for what might be possible with the affirmative commitment of the state and federal courts. The efforts are necessarily two-fold, involving both the affirmative inclusion of inexperienced members of the bar in the adjudication of their own cases and in the development of the law, and the deliberate reversal of general trends that shrink opportunities for all lawyers.

Judges are, of course, only one element in what should be a chain reaction to the current crisis. Law firm partners, in particular, have an obligation to create substantive opportunities for their young associates and to do so strategically and systematically. As some commentators have noted, by providing their associates meaningful roles and client contact from the start of a matter, partners position those associates not only to gain valuable experience but also to earn the trust required to overcome the reluctance of

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175. *Id.* at 567.

176. Paula M. Bagger, *How the Judiciary Is Helping Younger Lawyers Close the Experience Gap*, 19 COM. & BUS. LITIG. 23, 23 (2018).

177. AM. ACAD. OF APPELLATE LAWYERS, ORAL ARGUMENT TASK FORCE REPORT 3–10 (2015), [https://www.appellateacademy.org/publications/oa\\_final\\_report\\_10\\_15\\_15.pdf](https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf) [<https://perma.cc/4HL7-QBZ9>].

178. David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROC. 119, 132 (2012).

paying clients to place important proceedings in the hands of less experienced lawyers.<sup>179</sup> Young associates are too often simply assumed to lack the necessary legal experience to take on important roles, when in fact they have unique strengths and interests that should be identified and leveraged to the benefit of their clients and employers—and their own wellbeing.<sup>180</sup>

These are incremental actions, but conscientious, concerted efforts to put them into practice across the profession could make for a tremendous shift in culture—and, we believe, a measurable difference in the competence and thus wellbeing of lawyers. These actions will bear additional fruit if pursued with conscious awareness of the role that diminished opportunities play not only in lawyers' technical development as professionals but also, more specifically, in the fulfillment of their need for competence and, in turn, their health and happiness. This expanded perspective begins to make clear the breadth of possible approaches to improving lawyers' mental health—approaches that are not merely reactive, crafted to respond to the emergence of mental health issues among lawyers, but proactive and preemptive, developed with an eye toward encouraging an inclusive legal culture oriented toward growth opportunities that will benefit all lawyers, as well as those they seek to serve.<sup>181</sup> Commitments by an array of stakeholders to create and augment early training opportunities for lawyers may well prove as important a contribution to the project of lawyer wellbeing as any health awareness campaign.

**Encouraging autonomy.** The opposite of nurturing lawyers is stunting them. This happens not only when lawyers are denied the opportunity to develop new skills but also when they are thwarted from exercising agency over their work and, in their spare time, pursuing meaningful professional opportunities of their choosing. We have argued that this happens when lawyers are prevented from engaging in professional activities for fear of offending clients, and we also have highlighted data showing that many lawyers cannot even consider such engagements for lack of time.

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179. Deanne E. Maynard, *How Firms Are Grooming the Next Appellate Stars*, LAW360, (Jan. 5, 2018), <https://www.law360.com/articles/988312/how-firms-are-grooming-the-next-appellate-stars> [<https://perma.cc/2PHU-AVBQ>].

180. NAT'L TASK FORCE, *supra* note 2, at 33.

181. See Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 817 (2012) (describing varied reasons for lawyers and law students to extend their skills training, and noting that "lawyer well-being may encourage lawyers to develop certain values and competencies").

Overwork has been depicted, rightly, as among the most vexing problems in the mental health literature.<sup>182</sup> Also, all manner of proposals have been put forward for creating alternatives to the economic incentives structure that dominates the private sector<sup>183</sup> and overcoming the funding limitations that stretch government lawyers, particularly public defenders.<sup>184</sup> We suggest, however, that two shifts in perspective could help revitalize efforts to incorporate into the daily practice of the law the flexibility and freedom that is necessary to building a meaningful and purposive career.

First, unlike the subject of lawyers' competence, the harm done to lawyers' autonomy through overwork has been recognized primarily as a wellbeing issue, with an emphasis on its ramifications for lawyers' leisure and ability to conduct a personal life outside the office.<sup>185</sup> But less attention has been paid to overwork as harmful to lawyers' mental health when assessed in terms of its professional opportunity costs—that is, interference with their ability to devote time to public service and other meaningful commitments traditionally considered core to the lawyer's professional identity.

Solutions to the problem of overwork should reflect this nuance. If lawyers, on a mass level, are being denied the ability to take on work from which they can derive fulfillment and a sense of purpose reflective of their interests and values—within a profession that purports to be a primary force in assisting clients from all walks of life, rectifying injustices and championing social causes, and modeling the virtues of “deliberative

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182. Although we have chosen to address the harmful effects of overwork on lawyers' autonomy, we note that overwork is, from an SDT perspective, the ultimate wellbeing sinkhole. Overwork diminishes lawyers' sense of competence by precluding lawyers from adequately preparing for their cases and mastering the issues—and, as Anthony Kronman has put it, the increased length of the work day at corporate law firms contributes to a narrowing of interests and experiences outside the practice of law which is inconsistent with the breadth of experience necessary for the development of practical wisdom. KRONMAN, *supra* note 83, at 300–07. Also, overwork diminishes lawyers' relatedness to others by interfering with their ability to spend time with loved ones outside the office and to develop relationships with colleagues in the office.

183. For a comprehensive exploration of how pro bono programs can be institutionalized and designed to create a sustained pro bono culture in law firms, even in times of economic recession, see Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2368–69 (2010).

184. See, e.g., Rachel Lippman, *Deal Reached to Reduce Missouri Public Defender Workloads*, ST. LOUIS PUB. RADIO (May 13, 2019), <https://news.stlpublicradio.org/post/deal-reached-reduce-missouri-public-defender-workloads#stream> [<https://perma.cc/3JG4-5G24>] (describing a settlement agreement between the ACLU of Missouri and the state's public defender system setting a maximum caseload for the state's public defenders and providing for new allocation of funds).

185. See, e.g., Fish, *supra* note 124 (“The problem is not the hours themselves. . . . It's that those hours make it difficult for lawyers to balance their work with their personal life.”).

judgment and public-spirited concern for the good of the law as a whole<sup>186</sup>—then the problem starts with the priorities of the bar.

For example, how we choose to accord recognition matters. Like most professions, the legal profession has its own tightly controlled system of gold stars, but ours is predicated on a narrow definition of what success looks like.<sup>187</sup> We too often measure “success” on a single axis, like billable hours, discounting the critical long-term investment that some lawyers choose to make every year in the name of the public good, including the development of the legal profession and community service.<sup>188</sup> Correcting this imbalance must start from law school, where law students’ conception of success takes shape,<sup>189</sup> and extend into practice. The data show lawyers want to do good, and law schools, law firms, and the courts must find ways to commend and encourage the translation of that desire into action. How we frame success in the law is itself a reflection of what kind of work we think matters. And those perceptions, in turn, affect lawyers’ ability—not just their willingness—to pursue fulfilling work.<sup>190</sup>

Second, lawyer wellbeing is not a primary feature in the literature on the state of lawyers’ professional independence, but it should be. Periodically there is a resurgence of interest in reviving the concept of the citizen-lawyer (or lawyer-statesman), who devotes energy to championing the public interest, independent of their representation of particular client interests.<sup>191</sup> As debates on the subject demonstrate, the relationship between professional independence and promotion of the public good is complex and raises many delicate questions: about the potential tension between the exercise of professional independence and client interests in certain circumstances, about the precise relationship between professional independence and the citizen-lawyer ideal, and about the best path toward renewing public confidence in

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186. KRONMAN, *supra* note 83, at 167.

187. Redefining success in the profession, using empirical data, is the overarching theme of Sheldon and Krieger’s 2015 study. See *What Makes Lawyers Happy*, *supra* note 67, at 624.

188. See generally Lawrence J. Fox, *Should We Mandate Doing Well By Doing Good?*, in *RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION* 251–53 (Lawrence Fox ed., 2007) (comparing extraordinary revenues per partner at the top 100 law firms to unimpressive pro bono metrics).

189. Daisy Hurst Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 130 (2010).

190. One of the more interesting and compelling arguments for mandatory pro bono is the one put forward by Lawrence Fox, who has pointed out that “there are many lawyers—particularly at large law firms—who would love to be ‘forced’ to do pro bono,” because it would allow them to engage in work that a hostile, revenues-focused practice setting prevents them from pursuing. See Fox, *supra* note 205, at 254.

191. See Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731, 1731 (2017) (reviewing BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016)).

the profession's service commitments.<sup>192</sup> This discussion would benefit from a more explicit consideration of the correlation between the decline in the citizen-lawyer ideal and the rise of the suffering lawyer.

Deborah Rhode, for example, has provided a compelling account of the professional malaise of lawyers "unhappy with the culture of the profession."<sup>193</sup> And she has offered an equally compelling account of the failure of law schools and the bar to make pro bono service an educational priority, rightly describing it as a "missed opportunity for both the profession and the public," and putting forth important ideas for reform, including more effective promotion of clinical opportunities in law schools and structural changes in the delivery of legal services.<sup>194</sup> The missed opportunities she describes should be widely recognized as a loss for not only society but also for lawyers' long-term health and happiness. And such proposals for reform should be recognized for their value in not only correcting deficiencies in legal services but also promoting meaningful work as part and parcel of a healthy and psychologically fulfilling legal practice.

**Modeling civility.** We have suggested that recognizing the role that civility plays in lawyers' wellbeing has had the benefit of expanding our conception of civility in the day-to-day practice of law. The wellbeing perspective also brings us closer to the macro-vision of civility's value eloquently articulated by Justice Anthony Kennedy in his concurring opinion in the 1993 case *Bray v. Alexandria Women's Health Clinic*: There he described "civility and mutual respect" as nothing less than "the essential preconditions for the orderly resolution of social conflict in a free society."<sup>195</sup> In remarks delivered a few years later to the American Inns of Court in Tulsa, Justice Clarence Thomas connected this vision of law's function to the special obligations of all lawyers: "Civility then is but the natural functioning of a legal profession in which we are all servants of that higher, nobler master, the constitution and the law."<sup>196</sup> This should affect the standards to which the profession holds itself not only in the courtroom or negotiating room but also in the office and at workplace events.

As the data shows, civility is important in all contexts in part because incivility ripples so widely, affecting not only its targets but also its witnesses,

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192. For a discussion of professional independence that touches on all of these issues, see Aziz Rana, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 *FORDHAM L. REV.* 1665, 1665 (2009).

193. DEBORAH L. RHODE, IN *THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 8–9, 26 (2000).

194. DEBORAH L. RHODE, *ACCESS TO JUSTICE* 19, 185–93 (2004).

195. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring).

196. Clarence Thomas, *A Return to Civility*, 33 *TULSA L.J.* 7, 11–12 (1997).

and poisoning not only discrete interactions but also the norms of practice. And because its effects are so outsized, uncivil conduct is particularly concerning where it involves an abuse of power—or its passive counterpart, the failure to appropriately use authority to ensure adherence to civility standards. Both serve as a reminder that the push to address civility, and the psychological harm that comes of an uncivil profession, must start at the top.

Incidents involving intemperate judges provide perhaps the clearest example of how the harms of discourteous conduct are amplified when inflicted by those in special positions of authority. As others have noted, external regulation of judges' demeanor is not an easy or straightforward task, as judges "are human and may occasionally display anger or annoyance," particularly in the face of stressors such as overcrowded dockets and misbehaving lawyers and litigants.<sup>197</sup> Rule 2.8(B) of the Model Code of Judicial Conduct requires judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity."<sup>198</sup> The courts cannot turn a blind eye to violations of this rule; judges have been and should be disciplined for making sexist and demeaning comments to counsel (sometimes in front of their clients and the jury),<sup>199</sup> for screaming at colleagues, clerks and staff,<sup>200</sup> and for humiliating victims and mistreating defendants.<sup>201</sup> And just as lawyers must consider how subtler expressions of incivility, in the form of unpleasantness and inconsiderate work management practices, affect their colleagues, judges, too, have an opportunity to raise the standard of conduct in their courtrooms by demonstrating incremental empathy and attention to the needs of others.

The judge's occupation of an office of public trust and position of authority makes action necessary: A judge who "berates or acts discourteously to those before him . . . abuses his power and humiliates those who are forbidden to speak back."<sup>202</sup> This is devastating to "public confidence in the independence, integrity, and impartiality of the judiciary."<sup>203</sup> But it is also a blow to the norms of a profession that looks to the judiciary to model the

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197. Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 328–29 (2012).

198. MODEL CODE OF JUDICIAL CONDUCT r. 2.8(B) (2014).

199. *See, e.g., Judge Shea Reprimanded for Intemperate Conduct*, FL. BAR NEWS (Apr. 1, 2013), <https://www.floridabar.org/the-florida-bar-news/judge-shea-reprimanded-for-intemperate-conduct> [<https://perma.cc/9BKZ-875K>].

200. *See, e.g., In re Judge Russell*, JD No. 1, 33–34 (Md. 2018).

201. *See, e.g., Richmond, supra* note 197, at 334–35.

202. *In re Brown*, 691 N.E.2d 573, 576 (Mass. 1998).

203. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (2014) ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").



fairness, objectivity, and respect for the individual that we expect of the law itself.

Responsibility for immoderate conduct also belongs to the bar. The December 2015 “proportionality” amendments to Rule 26 of the Federal Rules of Civil Procedure, for example, create particular expectations about how lawyers conduct themselves during the discovery process.<sup>204</sup> As amended, Rule 1 emphasizes the role that the parties, in addition to the courts, play in securing just, speedy, and inexpensive determination of every action, and was designed to require litigants to employ the “cooperative and proportional use of procedure.”<sup>205</sup> Similarly, Rule 26(b)(1) now requires that parties seek discovery “proportional to the needs of the case.”<sup>206</sup> The insertion of these provisions into the Rules highlights their importance for professional or collegial interactions in the bar and also provides for a built-in enforcement mechanism in the courts.

Likewise, Rule 5.1 lays at the feet of the partner and supervising lawyer responsibility for subordinates’ violation of the Model Rules of Professional Conduct, including various provisions that address (albeit in piecemeal fashion) baseline standards for courteous and nonfrivolous conduct.<sup>207</sup> The remaining half of Rule 2.8(B) of the Model Code of Judicial Conduct also provides a tool for the enforcement of these norms, as that rule directs judges not only to conform their own conduct to the highest standards of civility but also to “require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s direction and control.”<sup>208</sup>

These rules are not abstract propositions but clear mandates that both courts and counsel are obliged to follow. And that mandate, as a matter of professional responsibility, must carry into the halls of the workplace too, in lawyers’ treatment of colleagues and staff.

Ultimately, explicitly recognizing the role that feelings of relatedness play in the cultivation of a healthy legal practice may help lawyers and judges to reconceptualize civility as much more than a matter of deportment—namely, as a matter of professional identity. A broad understanding of what

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204. See Morgan Cloud, *Privileges Lost? Privileges Retained?*, 69 TENN. L. REV. 65, 73–74 (2001) (observing rule 26(b)(1) “is designed . . . to constrain the discovery conducted by lawyers”).

205. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment.

206. FED. R. CIV. P. 26(b)(1).

207. MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2018); see also Ill. Sup. Ct. Comm’n on Professionalism, *ABA Model Rules of Professional Conduct Applicable to Civility*, <https://www.2civility.org/wp-content/uploads/ABA-Model-Rules-of-Professional-Conduct-Applicable-to-Civility.pdf> [<https://perma.cc/KV38-KYW2>] (describing various model rules of professional conduct applicable to civility).

208. MODEL CODE OF JUDICIAL CONDUCT r. 2.8(B) (2014).

civility requires and what it accomplishes should, in turn, serve as the soil from which we grow all of our efforts to restore the profession. As Lawrence Fox, former chair of the American Bar Association Section of Litigation, has encouraged, lawyers should “take care of each other” in their day-to-day interactions with both colleagues and opponents.<sup>209</sup> We can expand on this concept, extending the “take care” ethos when it comes to young lawyers as an investment we are making in our own future—and as a mandate to raise up the next generation of lawyers with confidence in themselves and with pride and fulfillment in their identity as members of a values-based profession. Such practices and heightened awareness will enhance not only the order in courtrooms and the professional norms of practice but also lawyers’ mental health and the profession’s wellbeing.

#### V. CONCLUSION

What does it mean to practice law? The state of lawyer wellbeing reveals the answer is, for too many lawyers, a disappointing and even harmful one. Poor working conditions, from long hours to workplace hostility, are part of the problem, but they point to a larger failure in the profession’s commitment to putting its ideals into practice.

With this in mind, we have sought to expand the lens through which we understand the significance of lawyer distress. The health of lawyers reflects the health of the profession, and emerging data regarding the unsatisfactory fulfillment of lawyers’ psychological needs illuminate why. The conditions that contribute to lawyer distress are a reflection of what our profession values and prioritizes. Lawyers’ feelings of self-doubt, lack of autonomy, and reduced relatedness to others are outgrowths of a profession that has failed to foster in its members the sense of expertise, fulfillment and belonging that they need in order to thrive.

We have not purported to identify all of the conditions that contribute to lawyer distress, much less to analyze these through the lens of SDT. Instead, we have sought to underscore the benefits of deploying a structured framework for understanding this distress, and situating the problem of lawyers’ unfulfilled needs within the context of broader debates on reforming the profession—in particular, those concerning the training, professional independence, and civility of lawyers. We hope that this approach encourages expansive solutions that cut to the roots of the crisis and begin the work of restoring the relationship between the realities and ideals of legal practice.

At bottom, restoring wellness must start with reviving the concept of belonging and our perception of our profession as a noble calling—one which

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209. Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. 531, 546 (1996).

unites us as a community, of which we see ourselves as stewards, and in which we invest not merely for our own return on investment (whether measured by income, title, or accolade), but for coming generations. Such efforts are time-sensitive and essential, for it is now apparent that improving lawyer wellbeing is not merely a necessary foundation for quality representation. It is also a reflection of the bar's commitment to first principles of legal practice and a testament to the values that will shape the future of the legal profession.