

## COMMENTARY: POLICY IMPLICATIONS

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The findings in "Lawyer Distress" are illuminating and, as the authors of this very important study indicate, distressing. They show that a high percentage of lawyers, relative to the general population, suffer from significant psychological disorder and disposition to alcoholism.

It is clear to me that members of the legal profession are obliged to take these findings seriously. I shall suggest below a few reservations about the analysis. Nevertheless, the important findings are established by empirical evidence so powerful that they can be ignored only through a wish not to believe. If the findings are accepted as a description of reality, the challenge is to work out sensible courses of action in response. The challenge is formidable.

The salient findings can readily be culled from the authors' discussion of the source data and their statistical significance. Those of us who are not quantitative social scientists should not be put off by the relatively technical character of this supporting discussion. The discussion provides the justification for treating the findings seriously -- a demonstration by the authors that the findings are indeed substantially accurate characteristics of the population to which they refer. It is clear that conservative criteria are used for identifying people who have personality disorders and alcohol problems. As the Beck article notes, respondents are included in the "in trouble" category only if statistically they are two standard deviations from the mean, *i.e.*, in the top 2.27% of the population that have these symptoms.<sup>2</sup> In nontechnical terms, this means these people were nearly "off the charts." By the same token, the percentage of the lawyer population "in trouble" would be higher still if a less conservative definition had been used. Personality disorders, as used in the study, include: (1) Somatization (meaning physical manifestations of distress); and (2) Obsessive-compulsive behavior. Feelings of personal inadequacy include: (1) Depression; (2) Anxiety; (3) Hostility; and (4) Paranoia.

The key findings concerning personality disorders among lawyers are as follows: (1) "Approximately 30% of the male lawyers score above the clinical cutoff for interpersonal sensitivity, 28% for anxiety, 25% for social alienation and isolation, 20% for depression, 20% for obsessive-compulsiveness, 13% for

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<sup>2</sup>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, 23 (1996).

paranoid ideation, 7% for phobic anxiety, and 7% for hostility."<sup>3</sup> (2) "Approximately 27% of female lawyers score above the clinical cutoff for interpersonal sensitivity, 20% for anxiety, nearly 20% for social alienation and isolation, 16% for depression, 15% for obsessive-compulsive, and 11% for hostility."<sup>4</sup> (3) "Another conclusion that can be drawn is that, overall, an alarming percentage of newly practicing lawyers are reporting a variety of significant psychological distress symptoms well beyond that expected in a normal population."<sup>5</sup> (4) When faced with working in a predominantly male-dominated field they [women lawyers] respond with anger rather than depression."<sup>6</sup>

The key findings concerning proneness to excessive use of alcohol are as follows: (1) 20% of all male lawyers evidently have *current* alcohol problems. For women lawyers the counterpart figure is about 10%.<sup>7</sup> (2) Approximately 70% of all lawyers are "reporting" a lifetime likelihood of alcohol problems.<sup>8</sup>

My reservations about the findings should now be stated. The principal point concerns the validity of comparing lawyers with the general population, rather than with a less inclusive population. In particular, lawyers could be compared with other subsets of the general population who have similar socio-economic demographics but who are in different lines of work. The authors make reference to doctors, which is the kind of comparison I have in mind. In the same vein, comparison could be made to people who have above average intelligence and usually at least a college education, and who are in vocations that are extremely competitive, impose heavy individual responsibility, involve complex criteria for evaluation of performance, and have wide variance in levels of achievement (hence, large opportunity for failure). In addition to doctors this would include business executives, entrepreneurs, financial analysts, college level academics, people in advertising and public relations management, artists, etc.

Such a different basis of comparison would, I believe, indicate that similar personality disorders and the proclivity to alcoholism are also manifested with "abnormal" frequency in these groups. This is not to say that lawyers are "normal" when compared with others in comparable lines of work, or that the problems found in this study do not justify systematic response. It is to recognize that there can be fallacy in using the general population as the frame of reference in comparing a group whose members have self-selected themselves into a highly competitive and emotionally "lonely" kind of work.

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 25.

<sup>5</sup>*Id.* at 45.

<sup>6</sup>*Id.* at 57.

<sup>7</sup>Beck et al., *supra* note 2, at 28-29.

<sup>8</sup>*Id.*

The "average American" is a useful standard of comparison in many demographic analyses, but perhaps not this one.

This said, the fact remains that lawyers evidently manifest, in substantially disproportionate numbers, serious personality problems and proclivity for alcohol abuse.

So what?

First, as regards alcohol, it is time that lawyers and judges recognize that abuse of alcohol is a serious endemic occupational hazard in our profession. This means, among other things, that:

(1) Lawyers individually must assume that they are at special risk of succumbing to excessive use of alcohol. It should be a professional duty to engage in self-examination in this respect and to establish the necessary procedures. Quite specific rules can be imagined. For example, airline pilots are prohibited from consuming alcohol less than twenty-four hours before a flight. Some lawyers impose a similar regime on themselves during trial or extended negotiations. Again, lawyers could be required to seek some kind of outside help, for example through Alcoholics Anonymous, if their average daily intake of alcohol equals or exceeds a specified amount, say the equivalent of three "shots."

(2) Law firms must assume that about 20% of their professional staff actually have significant problems with abuse of alcohol, either at present or in the foreseeable future. Law firms could, as part of firm policy, impose the kinds of restrictions mentioned above. Giving specific attention to substance abuse could be made a specific part of law firm partners' managerial responsibilities. Rule 5.1 of the Model Rules of Professional Conduct could be expanded, for example, to require firms to have procedures for detecting and responding to alcohol abuse.

(3) Lawyers could be required to have a channel for communication, within a firm or an association, from clients who detect what they perceive to be a lawyer drunk or hung over.

(4) Judges could be required to report apparent intoxication on the job, on the part of fellow judges.

(5) The disciplinary authorities could be directed to treat alcohol abuse as always an aggravating factor, and a serious one at that. Any lawyer found twice guilty of alcohol abuse could be suspended until proof of satisfactory rehabilitation.

(6) Most important, intensive and continuing education on the subject could be required. These days, the educational programs should also cover drug abuse.

If this constitutes a heavy agenda, comparison could be made to treatment of drunk driving in this country. Twenty years ago the prevailing sentiment was, "Well, anyone can have a couple too many." Today there is wider recognition that a "couple too many" results too often in people getting killed. A lawyer who has had a "couple too many" can kill a client's cause.

The findings in this study suggest that abuse of alcohol is not only a cause of professional malfunction but also a symptom of deeper personal problems among the lawyer population. This takes us to the findings about personality disorder.

Here again I begin with a reservation about the study, in this case perhaps a more serious one. The authors report an earlier study by Dr. Benjamin and other colleagues that

followed law students longitudinally to ascertain whether students entering law school were more distressed than the general population or if the distress occurred as a result of attending law school. The authors found that the prelaw students did not show significant elevations of psychological distress when tested in the summer prior to law school entry. Yet, within two months of beginning law school the students' psychological distress was found to be significantly elevated.<sup>9</sup>

The finding in the Benjamin study is taken as a beginning point in the present study. That is, the high proportion of personality distress among lawyers, particularly young ones, is considered to be a product of law school. The present study, which addresses people who have already become lawyers, assumes that this causal relation holds. Thus, the severe personality distress reported in this study is attributed to law school and not to predisposing characteristics of people who go to law school.

As indicated below, I am quite ready to accept that law schools and those responsible for them, including myself, need to address the problem of personality disorder openly and systematically. I regret to report that, without doubt, as a law teacher I have inflicted much more distress than I should have. This notwithstanding, I have tried over the years to modify my teaching techniques away from the "Professor Kingsfield" model to which I was exposed in law school.

However, I am extremely skeptical that the law school experience, as distinct from predisposing characteristics of the young people who come to law school, is *the* explanation for the widespread personality distress found among lawyers. My skepticism arises from a lifetime of observing and interacting with both law students and other young people. Put in general terms, law students seem to me to be more concerned than others with ordering conduct by rules, with treating people equally according to rules, with "injustice" in a more general sense, with verbal abstractions, and with systems of authority and people's places in such systems. A person with those sensitivities who grew up in Germany or Japan would probably feel right at home. A person with those sensitivities in this country would suffer chronic distress. It is my observation that people having these sensitivities are inclined, in disproportionate numbers, to come to law school because that is where attention focuses on rules, justice, order, and authority, such as we have them in our culture.

From another viewpoint, however, it is irrelevant whether the high levels of distress among lawyers are the product of predisposing "nature" or law school "nurture." The fact remains that law people have high levels of distress. To the extent that this condition is a product of existence prior to law school, as distinct

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<sup>9</sup>*Id.* at 4.

from the exposure in law school itself, then effective amelioration would be even more difficult to devise.

Hence, the question is what law schools can do. There is also a question of what law firms can do for young lawyers in the apprenticeship years. One thing is clear: For the present and foreseeable future, we lawyers should avoid our typical response to trouble situations, which is to impose lots of new rules. The phenomenon reported in this study is a complex phobic reaction to a regime dominated by rule-consciousness. It would be bizarre, although certainly not beyond imagination, that the profession would seek to deal with such a phenomenon through additional rules.

Rather, the appropriate response strategy should be investigative and experimental. The investigation should pursue more careful and systematic analysis of the psychological dynamics in legal education. The experiments should be modifications of technique in legal education. The conceptual structure of both inquiry and experiment should be: What kinds of competence should we seek to inculcate in young lawyers, and what kinds of dysfunction should we seek to overcome or ameliorate? That is, the strategy has to be both affirmative, "accent the positive," and exclusionary, "eliminate the negative."

As things stand, law school instruction is still largely modelled on the Professor Kingsfield paradigm. Particularly is this true of instruction in the first semester, when exemplification has its deepest and most lasting effect. Indeed, the current system is as well modelled on the old Edward "Bull" Warren paradigm, also associated with Harvard, "[l]ook to the left, look to the right, one of you will not be here next June."<sup>10</sup> To an important extent legal education today still calls for this "boot camp" technique, except that we keep all the students.

Many law teachers express genuine concern about the brutalizing effects of the traditional method, and try to do something about it. Many conscientious law teachers no longer "do" the Socratic method or, worse, do it halfheartedly -- generating almost the same distress but without the educational effect. Most schools now have some version of small group instruction in the first year or first semester, designed to change the "impersonal" character of the law school experience. Many law schools now have "practice" oriented instruction, such as clinical education, trial and appellate moot court, and negotiation moots. Whether these reformatory efforts are well constructed is another question. Indeed, it is the question we must address.

However, it seems to me that efforts to ameliorate the distress inherent in present legal education, and actually to improve the educational process if possible, are impaired by unrecognized constraints and distracted by unacknowledged agendas. Hard facts and ugly issues must be confronted.

First, law practice is highly stratified. Indeed, law practice is as highly stratified as the socio-economic profile of our country, and not accidentally so. We think and talk of our society as a democracy, and indeed such it is in many

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<sup>10</sup>THE PAPER CHASE (Twentieth Century Fox 1973).

respects. Formal equality before the law and in civic relationships is a vital political premise of our culture. Yet our society is also radically differentiated in terms of incomes and, probably more important, privately held wealth. One percent of our population receives about 25% of the collective annual personal income.<sup>11</sup> These people are predominantly the entrepreneurs, managers, and supporting cast for the business enterprises through which most of the country's work is done. Excluding pension funds, barely more than one percent of our population owns half the wealth in private hands in this country, including financial assets and real property.<sup>12</sup> These people are predominantly the stockholders and bondholders of the business enterprises.<sup>13</sup> The pension funds are managed by members of the managerial class.

Taken together, these people, business managers, entrepreneurs, and "holders" are the most salient clientele of the legal profession. Only a relatively small percentage of our profession directly serves this population. Nevertheless, within the group of "corporate lawyers," broadly defined, there are enormous differences in status, technical skill and monetary rewards. Other sets of lawyers make their living by suing the managers and the holders, in such types of litigation as products liability, environmental pollution, stockholder and securities claims, etc. Others serve government agencies, which are largely engaged in peace keeping (administration of criminal justice) and regulating the managers and the holders. Other sets of lawyers handle family practice that deals with legal problems of this middle and upper-middle class, particularly residential real estate and divorce. That is, the economic demographics of our society are also the demographics of our legal profession.

Yet we approach legal education as though it is training for a unitary profession practicing in a democratic society. There are profound political explanations for this dysfunction and profound political necessities for continuing it as a methodology. But it gets in the way of clear thinking about legal education.

Second, and as a result of its economic structure, law practice is highly competitive. Indeed, compared with high level law practice, or even practice in the middle range, there are no callings more competitive except Wall Street finance (and we know how that is) and professional sports. The profession is intensely competitive in a narrow sense in most litigation and much transaction work. In many contexts, the competition is palpably political and ideological as well, *viz.*, the O.J. case. How should young players be prepared to deal with this kind of competition or deal with the fact that most of them will not have a chance even to try out for the major leagues?

I do not think it helps for law professors and other social critics to decry the situation and wish for a more humane world. Most people with a realistic perception of the world simply shrug at this kind of critique. Most law students

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<sup>11</sup>See EDWARD N. WOLFF, TOP HEAVY 7-13 (1995).

<sup>12</sup>*Id.* at 27-31.

<sup>13</sup>*Id.* at 77 (note 6.4).

are realists in this respect. From that perspective the message is a pipedream: Who actually believes there is any prospect that American society will be fundamentally changed by the time this generation of law students has come to maturity? So interpreted, the "humanist" message is one of complete despair and will only generate greater psychological depression.

Legal academics now are themselves in this same system. Law practice is stratified and intensely competitive. Therefore, legal education is stratified and intensely competitive. How does a law school maintain and improve its position in the stratified competition? The answer for most law schools has been to do more and better of what the competition does. These days, the competition believes that law has no inherent content. Hence law faculties do something else, such as economics or politics or poetry, often badly.

And there we are. If we can accept the findings of this study, however, we may be ready for the message given by the doctor at the end of *Goodbye, Columbus*, "[n]ow we are ready to begin."<sup>14</sup>

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<sup>14</sup>GOODBYE, COLUMBUS (Warner Bros. - Seven Arts Records 1969).