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SOME THOUGHTS ABOUT DEVELOPING CONSTRUCTIVE APPROACHES TO LAWYER AND LAW STUDENT DISTRESS

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What should we do about it? What, realistically, can we do about it? The study by Beck et al.[2] (Beck study) contains no late-breaking news. We have known for many years that some law students and practicing lawyers report high levels of distress. Lawyers are said to be disproportionately at risk for problems related to alcohol. Reports of lawyer unhappiness and of lawyers leaving the profession have been widely noted.[3] We also know that depression, fatigue, "burnout," and substance abuse can, and more than occasionally do, adversely affect the quality of services to clients.

Although the Beck study offers little that is truly new, and although at times its tone may be slightly hysterical, we should not ignore its message. We should search for constructive ways to reduce the incidence of lawyer and law student distress, because lawyer distress can result in harm to clients and because we have a responsibility to care for our fellow professionals. Developing constructive responses to problems of lawyer distress is quite difficult. We do not have a clear sense of either the actual dimensions or the actual effects of the problems. Moreover there are effective responses to some characteristics of both law practice and law schools that are obstacles to lawyer and law student distress.

I am not qualified to judge the Beck study as research in terms of technical, social science methodology. I do, however, advance some cautionary comments related to the study:

First, we should remind ourselves of the limitations of self-report survey data. This is especially so when the subjects making the reports are lawyers and law students who have been told repeatedly that they ought to be distressed, and for whom a part of their occupational cultures is the idea that one cannot be much of a law student or lawyer unless one is working very hard, under considerable time pressure, and in circumstances in which the risk of failure is reasonably high. Thus, I am not surprised that in this population there is self-reported distress.

The important question, which I do not understand the Beck study to even purport to answer, is the extent to which the reported distress of law students

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[2]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 (1996).

[3]The Report of At the Breaking Point, a National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services, American Bar Association (1991), [hereinafter "At the Breaking Point".]

and lawyers results in behavior that is harmful to self or others. My hypothesis is that the level of self-reported distress is likely to be higher than the actual incidence of self or socially harmful behavior resulting from stress of the types reported. Without knowing whether the self-reported personal distress has resulted in harmful behaviors and, if so, without knowing something about the incidence and seriousness of those behaviors, it is difficult to conclude that even very high levels of some types of self-reported distress warrant aggressive intervention.

The Beck study recognizes that it has not succeeded in usefully measuring the behavioral effects of self-reported distress and that "further research, conducted with even better instruments, may still find that lawyers are functioning at a high level of efficiency and ethical propriety despite high levels of psychological distress and alcohol-related problems."[4] While I doubt that an appropriate study could fail to show some correlation between very high levels of personal distress and ineffective professional performance, we don't now know enough to make a carefully considered judgment about the actual—as opposed to possible—impact of lawyer distress on lawyer health or job performance. Therefore we cannot ascertain the extent to which systemic change is necessary. We should remember that practicing law is inherently a difficult, stressful and demanding occupation. It is likely that very few lawyers would fail to report some levels of discomfort during at least some times in their careers.

My second cautionary comment about the Beck study is that we lack comparisons of self-reported lawyer distress levels with similar reports by members of truly analogous professions. I am not persuaded that the legal and medical professions are sufficiently analogous to make comparisons of levels of distress as between lawyers and physicians useful as a basis for prescriptions for the legal profession. While I recognize that some such comparative studies have been performed,[5] my hypothesis is that with the exception of some surgical specialists, emergency medicine specialists, and young residents undergoing the medical profession's barbaric trial by fatigue, most physicians have more control of their time, of the content and nature of their work, and of their patients than do most of their counterparts in the legal profession. This is not to say that being a physician is easy or free from stress, but only that being a conscientious lawyer is a very demanding and very stressful occupation in ways that are not analogous to the stresses of most medical practices[6].

I would be interested in knowing how the levels of self- reported personal distress in lawyer populations compare with levels of self-reported personal

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[4]Beck et al., *supra* note 2, at 60.

[5]*E.g.*, Marilyn Heins, et al., *Law Students and Medical Students: a Comparison of Perceived Stress*, 33 J. LEG. EDUC. 511 (1983).

[6]I do not ignore the fact that, in recent years, economic and structural issues related to the delivery of health care have made the professional lives of physicians more stressful and, in many instances, less attractive and that some similar economic and structural challenges also face the legal profession.

distress among such people as law enforcement officers, investment bankers, professional athletes, clergy, politicians, or chief executives of business enterprises, as well as physicians. If the lawyers' levels of personal distress were considerably higher than the levels for these other occupational groups, I would be interested in further exploration of whether being a lawyer is inherently so stressful that we should radically redesign the profession by changing our expectations of lawyers.[7]

We ask a great deal of our lawyers. Lawyering is hard work, performed before an often unappreciative audience, requiring great attention to detail and requiring that some degree of sense be made out of muddled and even chaotic personal or business situations. And this work often must be performed in circumstances in which the applicable law is less than clear. Moreover, lawyers function as agents, in relationships in which the client/principal's decisions about the ends to be attained will control and where, even as to means, the lawyer/agent does not enjoy complete hegemony. Lawyers often act under terrible time pressures, often deal with unreasonable clients, nasty opponents, and indifferent bureaucrats. They work in a professional culture in which they are told that loyalty to clients is the highest value but that they also are officers of the court with commensurate responsibilities to society and third parties. Very often the lawyer's personal and economic needs conflict with the needs of their clients. Trial lawyers, litigators, and even transactional lawyers often operate in combative or potentially combative settings in which, according to the ideology of the profession, they are expected to zealously champion causes of their clients for which they may have little personal sympathy.

It is the client's cause, the client's interests, and the client's objectives that the lawyer is bound to advance and protect. Under the current economic realities, and under our current conceptions of lawyering, many lawyers realistically have little opportunity to meaningfully deliberate with the client in establishing the client's goals or objectives. Yale Law School dean Anthony Kronman recently wrote that "[t]he most demanding and also most rewarding function that lawyers perform is to help their clients decide what it is they really want, to help them make up their minds as to what their ends should be, a function that differs importantly from the instrumental servicing of preestablished goals."[8] However attractive this conception of lawyering might be, I suggest (as does Dean Kronman) that in too many instances this ideal is unattainable in contemporary law practice. We teach, perhaps too much, that lawyers should respect their clients' autonomy and that lawyers should protect their clients' rights to determine their own objectives. Parentalism is "out." Client autonomy and self-actualization are "in"—not merely as matters of the ethics of lawyering but also as a practical result of the economic nature of the

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[7]I recognize, of course, that Beck et al. did not intend to explore hypotheses such as these, and that Beck et al. are careful not to claim for their study any more than their data will support.

[8]ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 288 (1993).

attorney-client relationship. We should not lose sight of the fact that there is a relationship between a high degree of client autonomy and the extent to which the lawyer becomes a mere instrument of the client—a "hired gun." Thus lawyers, who generally speaking are smart, savvy, knowledgeable and thoughtful people, can become objectified in relation to their clients.

Service as such an agent is difficult. Service as such an agent with a responsibility to apply uncertain rules of law to often elusive facts is even more difficult. This is tough work. Are we really surprised that some people who do this work are obsessive-compulsive or slightly paranoid, or overly hostile and aggressive, or sometimes stressed nearly to the point of paralysis?

It is not surprising that there is measurable distress among lawyers. But in view of what we ask of our lawyers, it is, I think, a cause for celebration that so many lawyers perform so well for so long, that so many lawyers take pleasure and pride in their work, and that so many of them are good companions, good friends, good parents, good spouses and effective community leaders. Such celebration, of course, does not mean that we should ignore signs of lawyer distress. But it does mean that as we define the nature of the problem to which solutions should be devised, we should realistically assess what we want our lawyers to do and we should realistically determine what types of personal and intellectual characteristics we need in our lawyers. Perhaps we want our tax lawyers to be more than a little obsessive-compulsive. Perhaps we want our trial lawyers to be more than a little aggressive, or even hostile. In other words, perhaps we want, and even need, a profession in which at least some practitioners exhibit characteristics that are not within "normal" ranges.

But even if some of our profession's measurable distress is appropriate and perhaps even desirable, we are not excused from seriously considering whether some of that distress can be ameliorated. Is the observed and reported distress an inevitable product of doing a tough job well, or is it evidence of systemic weaknesses in the ways people decide to become lawyers, are educated as lawyers, and in the ways they practice law? I suggest, without fully exploring, three of many ways in which we might constructively address problems of lawyer distress:

First, I think it might be useful for our profession to expand the scope of our inquiries as we develop norms for professional conduct. As we think about questions of professional ethics we most often think about "rights" and "duties." We use tools of our profession to carefully consider questions of lawyers' duties and clients' rights. We do not, however, often consciously consider the emotional or psychological effects of lawyer adherence to the resulting norms. Do we really know, or have we carefully thought about, the effects on lawyers themselves of rules of professional conduct instructing lawyers to exercise discretion with respect to the most problematic situations as, for example, the keeping of some client confidences, or in evaluating some types of conflict of interest situations? Do we really want to emphasize, to the extent we do, the value of client autonomy? Do our professional norms themselves lead us away form the model of meaningful deliberation described by Dean Kronman? I do not here suggest fully developed answers to these questions but observe only that grappling with questions such as these is not irrelevant to the challenge of addressing issues of lawyer distress.

Second, I suggest that we take seriously the recommendation of many practicing lawyers that we give significant attention—even in the academy—to questions of law practice management.[9] Most lawyers practice, at least some of the time, in groups. "Teams" of lawyers often address client matters. This means that for the individual lawyer there not only is a lawyer-client relationship but also several lawyer-colleague relationships, often hierarchical, sometimes complex and sometimes even competitive. I suggest that we have not done much more in our thinking and writing about the profession than to scratch the surface of an understanding of these collegial relationships. We have done little more than observe that many lawyers are not effective managers of work and that more attention should be paid to techniques of delegation, supervision, communication, feedback and training. My hunch, based on considerable experience in such group practice, is that ineffective collegial relationships are a cause of a significant portion of the reported lawyer distress. And this, I suspect, is a matter as to which we lawyers cannot heal ourselves. We need to seek insights and guidance from other disciplines if we are to improve this aspect of our professional lives.

Finally, I suggest we heed the suggestion of Lawrence Fox, one of the most thoughtful leaders of the bar, that we adopt as one of our primary values the idea that we should "take care of each other" not only by means of formal lawyer assistance programs but, more importantly, in our day-to-day interactions with colleagues and even with our opponents.[10] We are, in many respects, a highly individualistic and competitive profession. But without compromising legitimate client interests, we can not only act with mere civility, we also can be truly caring in our relationships with other lawyers.

Attention to these approaches to the problems can begin in the law schools. There is no inherent reason why the agenda of scholarship and teaching in the law schools cannot include substantial inquiry into the nature of the actual practice of law, including examination of the effect of rules of professional ethics and liability not only on the behavior but also on the feelings and mental health of lawyers. Moreover, although law faculties understandably resist the idea of courses or research projects in "law practice management," there is no particularly persuasive reason why systematic inquiry into the nature of group work in the legal profession should not become part of the academic agenda. As for the development of an ethic of lawyers caring for other lawyers, there is, of course, every reason to hope that attitudes and habits that would form

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[9] *See generally*, At the Breaking Point, *supra* note 3, at 14.

[10] Lawrence J. Fox, 1995-96 Chair of the American Bar Association Section of Litigation, articulated this idea very eloquently in an unpublished talk to the Class of 1996 of the Dickinson School of Law at the School's Second Annual Senior Speakers Dinner in April 1996. *See also*, Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. (forthcoming 1996). The simple but very powerful idea that lawyers have a responsibility to take care of one another on an individual, day-to-day basis is by no means obvious in the context of contemporary law practice.

the operative basis for such an ethic can be modeled, taught and reinforced in the law schools.

Attention must be given to the impact of legal education on law students. The Beck study and its precursors tell us in language of the social scientists what law teachers know but often choose to avoid: some law students report significant distress in law school. It is likely that some of this personal distress both interferes with learning and results in habits of thought and in behaviors that are not conducive to successful and happy professional careers.

There is a useful body of literature suggesting some concrete ways which law faculties and law school administrations might ameliorate some law student stress. Two of the best articles on the subject were published in 1991 and 1992, one by Professor B.A. Glesner,[11] and another by my colleague Peter Kutulakis.[12] Each of these articles provides prescriptions for the reduction of law student stress that are of considerable potential utility. I do not choose here, however, to reiterate the Glesner and Kutulakis theses. Instead, I offer observations on characteristics of law schools in the 1990s that, in my judgment, make it difficult for law schools to respond effectively to the message of the Beck study.

Part of the larger problem of lawyer distress begins even before a student has his or her first taste of the now greatly diluted Socratic method: some men and women drift into law school by default. Many of these students have no informed interest in practicing law. Some of these students are ill-suited by temperament, personality or even intellect to effectively practice law.

American law schools as a group are not as selective as we might think. In recent years, approximately fifty percent of the nationwide law school applicant pool has been admitted to at least one law school. There is no consensus on a required pre-law curriculum that would cause college students to carefully consider whether they are suited for legal education. Although some law schools engage in what they describe as a multi-factor admissions analysis, taking into account such things as leadership ability, co-curricular activities, employment history and so forth, I suggest that most law school admissions decisions in most of our law schools are primarily responses to LSAT scores and undergraduate grade point averages. Thus, for college graduates who are reasonably verbally skilled, law school is a relatively accessible and socially respectable post-graduate activity that is attractive to those who reach their senior year in college without another clear career choice

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[11]B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627 (1991).

[12]Peter Kutulakis, *Stress and Competence: From Law Student to Professional*, 21 CAP. U.L. REV. 835 (1992).

and who want to extend their time in the environment of a school, an environment in which they have been comfortable and reasonably successful.[13]

While law schools always have welcomed students who enter law school with the intention to use their legal education in a career other then a traditional law practice, this is not the phenomenon I now describe. I mean to describe a different group of students who come to law school having given little or no prior thought to a career in law or otherwise, with little or no effective pre-law advising, and with little or no psychological, emotional or intellectual commitment to the enterprise. My point here is that as we measure personal distress among law students we should observe that it is likely that in every law school student body there is a significant minority of students for whom professional aspirations and professional ideals are secondary to the simple desire to extend the further process of maturation in the familiar and socially respectable environment of school. I hypothesize that levels of personal distress in law school might be higher among this minority of law students than among law school populations as a whole. I offer no proof of this beyond the statement of my own intuitive judgment. Moreover, I disclaim any intention to engage in "blame-the-victim" thinking. Instead I suggest that if my hypothesis is sound, the law schools—and the bar—might effectively reduce some of the incidence of law student distress by engaging in a systematic effort to improve both the quantity and quality of information provided to potential law students about the nature and demands of law school and about the various careers for which legal education is essential or useful.

Although much is being done in the law schools to provide *law students* with information about legal education and about the profession—all of which efforts are useful and should be multiplied and expanded— my point is that if law schools were to make even more "consumer disclosures" and if law schools were to even better educate *potential law students* about the profession, some people who would be quite unhappy in law school would be enabled to make more informed choices and would not simply drift into law school. Simultaneously, other people would choose law school on the basis of better information and thus would begin the process of life-long education with a greater sense of confidence and commitment.

A second factor which is a reason for law student distress (and for which remedies are not readily at hand) is the high cost of legal education. High tuition charges translate into student debt burdens that are disproportionately related to the likely economic rewards of law practice for most graduates in the first decade or so of law practice. Many law students graduate from law school with more than $40,000 in law-school related debt. Some come to law school with an additional $30,000 to $40,000 in undergraduate debt. The opportunities to borrow for both law school tuition and living expenses are almost irresistible. But burdened with loan payments of as much as $500 per month for ten years

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[13]Professor Mary Ann Glendon suggests that one of the impacts of such students on law schools is that law teachers have diluted their courses to satisfy these uncommitted students. MARY ANN GLENDON, A Nation Under Lawyers 199-203 (1994).

following graduation, some law students are unable to comfortably take lower paying but greatly satisfying jobs in the public sector. And others almost certainly recognize, mid-way through their law school careers, that the real earning capacity of most young lawyers is not sufficient to comfortably support large loan payments. Such students understandably might be demoralized and discouraged.

This is a problem to which there is no easy solution, particularly in the current environment in which too many law schools are literally chasing a declining pool of applicants. There are real economic effects associated with decisions by individual law schools to reduce enrollment. Smaller student bodies mean that fixed costs are spread over fewer students. Increased costs per student usually mean higher tuition charges. Short of engaging in successful efforts to obtain considerably more private and public support, and short of considerable reduction in faculty size, faculty compensation, or student services to reduce the cost push on tuition, it is difficult to see how law schools can effectively respond to the high debt load problem except, of course, by taking advantage of the economies of scale and enrolling truly marginal students simply to secure their tuition revenue.

Much of what law schools might do to alleviate law student distress and to better prepare students to cope with the demands of practice, must be done, if at all, by the law faculties, with support from law school administrations.[14] There are reasons to wonder, however, whether in the current environment of legal education even the best-intentioned law faculties can be very effective in this regard. In the culture of legal education the most pejorative phrase used to describe a law school is the phrase "trade school." In an age of high circulation journalism reporting "rankings" designed only to sell magazines, but which, nonetheless, become part of the currency of the profession, law schools with an internal culture in which teaching and attention to student needs are valued more than scholarship are at risk of falling down the reputational ladder. Respect and high regard are more readily given to law schools in which faculty scholarship (often of a highly theoretical nature) is valued more highly than attention to teaching or to students.

It is not, I think, much of an exaggeration to suggest that many law schools are faced with serious dilemmas as they define their missions and cultures because law faculties and deans receive very mixed messages from the media, applicants, college pre-law advisors, and the accrediting agencies. On one hand, they are told that respect and reputation are positively correlated with a high level of faculty scholarship, and, on the other hand, they are told that their first obligation is to educate professionally responsible lawyers. Moreover most law school deans and faculties know, at least privately, that for many—perhaps most—law teachers the greatest professional satisfaction is derived from effective and caring teaching. There are, unfortunately, only twenty-four hours in a day. It is difficult, if not impossible, for even the most concerned law teacher

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[14] *See* sources cited *supra* notes 11 & 12.

to respond to all of these messages. What priorities should be established? What balance should be maintained between scholarship, which is certainly a necessary predicate for good teaching, and the process of teaching and advising students which is at the core of the enterprise?

I am convinced, on the basis of experience as a teacher at five law schools, that it is possible to establish a law school culture in which the administration and faculty can work effectively to substantially reduce the level of unnecessary law student distress. I believe, however, that accomplishing this on any large scale among the law schools generally might require not only implementation of many of the suggestions of Professors Glesner and Kutulakis, but also that we abandon the ideas that all law schools should be fundamentally similar, built on the model of a large-enrollment major research center, and that all law schools should therefore be "ranked" on a single, universal scale.[15] Only then, I think, might our law schools truly be free to define their own missions with self-confidence. I am optimistic that if armed with that self-confidence, many law schools could and would operate in a manner that would reduce their student's distress, enhance their students' coping mechanisms, and better prepare their students for effective, healthy and happy careers in the demanding, but ultimately very satisfying work of helping people as well-educated lawyers.

Our law schools have paid a great deal of attention to study of the law. It is time that our law schools add to their agendas a more systematic study of lawyers and of the practice of law. It is time that we heed the messages warning us to pay more attention to the personal needs of law students and lawyers.

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[15]My colleague Laurel Terry suggests in a forthcoming essay that we should, if possible, establish an understanding that law schools choosing to serve as professional schools, with an emphasis on teaching, rather than serving as research-oriented graduate schools, should be evaluated and "ranked" among themselves. Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools"*, 100 DICK. L. REV. (forthcoming 1996).