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How Lawyers Lose Their Way: A Profession Fails Its Creative Minds (Duke University Press 2005)

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Abstract

This is an excerpt from How Lawyer's Lose Their Way: A Profession Fails Its Creative Minds. Professors Jean Stefancic and Richard Delgado use historical investigation and critical analysis to diagnose the cause of the pervasive unhappiness among practicing lawyers. Most previous writers have blamed the high rate of burnout, depression, divorce, and drug and alcohol dependency among these highly paid professionals on the narrow specialization, long hours, and intense pressures of modern legal practice. Stefancic and Delgado argue that these professional demands are only symptoms of a deeper problem: the way lawyers are taught to think and reason. They show how legal education and practice have been rendered arid and dull by formalism, a way of thinking that values precedent and doctrine above all, exalting consistency over ambiguity, rationality over emotion, and rules over social context and narrative.

Stefancic and Delgado dramatize the plight of modern lawyers by exploring the unlikely friendship between Archibald MacLeish, who gave up a successful but unsatisfying law career to pursue his literary yearnings, and Ezra Pound. Reading the forty-year correspondence between MacLeish and Pound, Stefancic and Delgado draw lessons about the difficulties of attorneys trapped in worlds that give them power, prestige, and affluence but not personal satisfaction, much less creative fulfillment. Long after Pound had embraced fascism, descended into lunacy, and been institutionalized, MacLeish took up his old mentor's cause, turning his own lack of fulfillment with the law into a meaningful crusade and ultimately securing Pound's release from St. Elizabeths Hospital. Drawing on MacLeish's story, Stefancic and Delgado contend that literature, public interest work, and

critical legal theory offer tools to contemporary attorneys for finding meaning and overcoming professional dissatisfaction.

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Chapter 4: Lawyers and Their Discontents

It was early in her second month as a new associate at Plimpton, Day, Regan, and Berringer, and Georgina Barras was already wondering whether she had not made a serious mistake. It was not just the long subway ride from her nicely appointed apartment on the other side of town, nor even the ten-hour days she found it necessary to put in to keep abreast of the work. It was more than that. She made a note to make a list sometime of all the things that were bothering her and think about it. But there was so little time, even for taking stock. Maybe she should have taken that job in the small firm, or the other one that they had offered her, as a top graduate of one of the nation's leading schools, doing public-interest work. But her student loans were so large—and her salary at the firm so high. She'd be able to pay off her obligations in just a few years, and maybe afford a down payment on that condo that she and her fiancé, Dan, had had their eyes on. Setting her face and turning on her computer, she sighed and started the new day.

Why are lawyers so discontented? How deep does that discontent run, and how much of it is attributable to formalism? If, as we suspect, a great deal is, then what is the solution? More training in legal ethics, as some authors suggest? New "myths" or self-understandings on the part of the legal profession? Less emphasis on managerialism and the bottom line? Does lawyers' discontent stem from their

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background or the existing traits (such as compulsiveness) that they bring to law school and the profession?[1]

Many other books have addressed law's discontents, including Walter Bennett's The Lawyer's Myth: Reviving Ideals in the Legal Profession (2001), Deborah Rhode's In the Interests of Justice: Reforming the Legal Profession (2000), Mary Ann Glendon's A Nation under Lawyers: How the Crisis in Legal Education Is Transforming American Society (1994), and Anthony Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession (1993), each offering a different interpretation of the problem.

Bennett searches for a new mythology that will enable legal education to join law with moral training and thus overcome ethical disquiet—the lawyer's secret fear that much of what he or she does is immoral.[2] For Rhode, lawyers' discontents stem from the pursuit of money and power—commodities that the average lawyer does not command in his or her own right but manages for others—at the expense of other values, including the public interest.[3] For Glendon, the problem is rapid social change leading to loss of faith in the common law heritage, coupled with "romantic judging" that has replaced respect for the rule of law. She also places the blame on realists such as Oliver Wendell Holmes for disdaining reason, morality, and tradition and replacing them with a pervasive cynicism.[4] (Many members of the public, too, believe that lack of ethics is the problem.) These tendencies feed a growing commercialization of law and a

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rise in litigation.[5] For his part, Kronman echoes Glendon's charge that postmodern teaching leaves students unmoored and uninspired. He also deplores the recent trend to managerialism in judging and the concomitant decline of the lawyer-statesman and wise counselor, especially in the large firm.[6] His solution as well entails a turn to the past in an effort to recapture classical ideals of wisdom and prudential judgment.

<A>Formalism and Unhappiness

<P1>We believe that each of these impressive works captures only part of the situation, and that as the story of Archibald MacLeish and Ezra Pound shows, lawyers' unhappiness contains both a conceptual and a phenomenological dimension. The two are linked, the conceptual one having to do with the fetters that lawyers and judges place on their own method, the phenomenological one with the felt experiences of practicing under those limitations and in workplaces designed with them in mind. For us, MacLeish's predicament, like that of many lawyers today, has roots in an approach to law and legal practice known as legal formalism. In law, formalism is connected to the rule of precedent and conservative judging. In legal education, it manifests itself in the teaching of rules and doctrines at the expense of social analysis. Formalism exalts internal values, such as ironclad consistency over ambiguity, sterile rationality over multifarious interpretations, rigid rules over social context and competing perspectives.[7] In legal practice, it appears in the form of narrow specialization, hierarchical

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organization of the law firm, the relentless pursuit of billable hours, and elephantine briefs addressing every conceivable eventuality and line of authority.

Legal formalism finds counterparts in other disciplines, although we do not explore them in any great detail.[8] For example, in history it directs inquiry to wars and the careers and accomplishments of great men to the exclusion of the roles of immigrants, women, laborers, and ordinary people. In literary interpretation, it focuses attention on the text and its meaning, rather than on the author and the social setting in which the work was written. Formalism limits the intellectual independence of broadly educated lawyers, caring, patient-centered physicians impatient with HMO rules, and scholars in a host of fields who wish to think beyond disciplinary boundaries.[9] Formalism is the intellectual counterpart of the industrialization juggernaut that D. H. Lawrence deplored. Destroying the rhythm of life and the English countryside he loved, smokestacks, coal chutes, and damp mines cast a pall over the work and life of the English laborer.[10] Formalism, if carried to an excess, can numb, setting us up for takeovers, silent or overt, by bureaucracies, large corporations, or the state.[11]

Formalism does confer advantages. It reduces to routine that which should be routine.[12] It enables the rapid delivery of a product, such as the application of syllogistic reasoning to recurring situations falling under well-known rules.[13] But if taken to an extreme, it can draw all spirit out of work, robbing it of richness, detail, juice, and anything else that might render it sustaining. Even MacLeish, in

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midlife, deplored the "substitution [of] . . . the methods of scientific inquiry, carried over into the humanities," which he believed "destroyed the loyalties and habits of the mind" of a generation of professionals and scholars.[14] A competing approach, known as critical theory, entered law with the path-breaking work of the legal realists in the early years of the twentieth century. Scholars such as Karl Llewellyn, Lon Fuller, and Jerome Frank wrote that judicial reasoning was rarely determinate, that many cases allowed more than one right answer and that in selecting among the many available alternatives, courts and lawyers should be free to consider multiple sources of knowledge.[15] Today, we take those principles of legal thinking for granted, but at the time they were truly revolutionary. The unhappy MacLeish in his Harvard Law School career narrowly missed the full flowering of legal realism[16]—just as lawyers who enter law today are beginning to suffer from its gradual erosion. MacLeish, however, was doubly cursed, for in his undergraduate literary studies he received training in the ornate formalism of Victorian writing.[17] This is what the imagist Pound, who wielded words like a scalpel, detested in the younger man's writing.[18]

The succeeding sections survey the various types of unhappiness that lawyers suffer and the pathologies they exhibit. In doing so, they make a case, on both theoretical and psychological grounds, for critical theory as an antidote to the dissatisfaction gripping legal practice and education today (and maybe other professions as well).[19] Law tends to attract generalists—broadly educated young

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men and women with backgrounds in literature and the humanities who wish to devote their lives to the betterment of society. While not every law student is thus motivated, many are; these are the ones who most find law narrow, technical, and dull. After a semester or two, they lose interest in the dance of doctrine and Socratic games, and tune out.

Later, when they enter practice, they find big-firm life little better.[20] Even those who pursue public-interest careers find their longings unsatisfied. They encounter harried, time-pressured judges and court administrators, racist prosecutors and juries. They lose cases they know they should have won, win cases they realize they should have lost. Their clients lie to them all the time. After a few years, disillusion and burnout set in. Might it be that developing their own critique of social institutions and the role of law while in law school could stave off professional disappointment for these highly principled, broadly educated young humanist-lawyers, armoring them against psychological distress and professional burnout down the line?

Even the practitioner who works in a large law firm might gain from the realist approach. It can help the pressured young lawyer to understand the source of those pressures and whence they emanate.[21] He or she may then either make peace with those pressures, or develop means to counter them. Finally, the lawyer with a grounding in critical theory can assist the profession in advancing all the objectives that Kronman, Glendon, Rhode, and Bennett highlight, while attending

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to the neglected theoretical and social dimensions of legal work. Our counter-formalist analysis might prove useful as well to physicians complaining of bureaucratized, by-the-numbers medicine, academics laboring under regimes of excessive accountability, and other professionals squeezed by routinization, specialization, and loss of opportunities to display creativity and imagination on the job.

Now, it is time to look at an unhappy profession in greater detail. What do ABA studies and reports by journalists, sociologists, and lawyers themselves say about the hedonic level of lawyers' lives? What do we know about billable hours, inadequate opportunities for pro bono work, career pressures, addictive behavior such as drinking or drug taking, divorce, and suicide?

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