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SEX, DRUGS, AND ROCK 'N' ROLL: SOME OBSERVATIONS OF LIFE ON A TRIAL TEAM

J.B. HEATON[†]

Many law professors and law students know little of what life is like on a high-stakes civil trial team. This short essay provides some observations on life in the war room. Hardly the stuff of the quiet law library, life on trial is often a mix of sex, drugs (well, mostly alcohol), and rock 'n' roll. I set out some ideas for why this is so, and the consequences for practice as a high-end litigator. While it can sometimes seem like being on trial is more like being on spring break, there are consequences to the permissive environment trial allows. Understanding them better and preparing law students better may improve the troubling state of mental health and substance abuse in law practice.

I. INTRODUCTION

“Have a good time all the time, that’s my philosophy, Marty!”¹

Most law professors have spent the vast part of their professional lives in the academy. As opposed to a professional field like medicine, there is very little “clinical” work in the job of most legal academics. While judicial clerkships abound, those who have worked in private practice often did so for a very short time in very junior roles.² Of that set, even fewer worked on litigation, and the percentage that worked on large, civil cases that went to trial is necessarily even smaller.³ As a result, many legal academics, even those that teach procedure and evidence, may have little experience with the way trial teams operate “in the field.”

From 1999 to 2017, I had the good fortune to be a lawyer at one of the nation’s top litigation “boutiques,” Bartlit Beck Herman Palenchar & Scott LLP. I joined immediately out of my law and graduate studies (including a finance Ph.D.), intending at that time only to work a few years and then find a job researching and teaching, probably at a law school. As such, and despite my long career there, I was always a bit of an outsider. The firm’s focus was on trials, and

Copyright © 2019. All rights reserved by J.B. Heaton and the *South Dakota Law Review*.

[†] J.B. Heaton, P.C., jb@jbheaton.com. This essay is dedicated to the artistry of the trial lawyers I was fortunate to work with at Bartlit Beck Herman Palenchar & Scott LLP from 1999-2017. Rock on.

1. This Is Spinal Tap (Spinal Tap Productions 1984).

2. For example, at the University of Chicago Law School in 2018-19, the four current (September 2018) Assistant Professors of Law have on average less than one year of private practice experience each, including summer associate positions counted as 0.25 years. The 34 members of the tenured academic faculty have 1.5 years each on average, though 14 have none.

3. This is necessarily so because litigation is only one of two major areas at BigLaw firms that take many future faculty members (transactional corporate practices being the other), and only a small subset of large, civil cases go to trial, especially over the short time period that future professors stay at law firms.

I was no natural trial lawyer. Indeed, because our practice was national in scope, and because the cases we handled were so large and often complex, trials could be multiple-week out-of-town affairs with long absences from family and friends, little sleep, and a lot of stress. I am pretty much a home body who loves a solid 8+ hours every night.⁴ But I was fortunate to go on a few trials during that time. I spent nearly two decades hearing the experiences of my colleagues, some of whom went on the same number of trials as I, some far more.

In a recent essay, Richard Posner asserts that “[p]ractical experience is vital to understanding and improving law, and suggests a need for law professors who base research on practical experience rather than on the social or natural sciences.”⁵ Agreeing wholeheartedly with that proposition, I asked myself: what would law professors (and law students) be surprised to learn about what “real-world trial lawyers” do? In other words, what observations could I share that might be illuminating, and, at the same time, were such that I had some thoughts about them beyond the sharing of anecdotes and war stories? It took only a minute to come up with the answer: sex, drugs (well, mostly alcohol), and rock ‘n’ roll on a trial team. As occurs too often in real life, I start with alcohol, then sex, and then move to rock ‘n’ roll.

II. TRIALS AND BOOZE (ETC.)

A. HAVE YOU BEEN DRINKIN’?

Alcohol use is high among practicing lawyers:

Recently, the Hazelden Betty Ford Foundation and the American Bar Association collaborated on a study of substance abuse, depression and anxiety among America’s lawyers that is the most significant research of its kind. This landmark study gave us hard data that, in the end, support our many anecdotal accounts. The numbers tell us that lawyers drink. They drink a lot.⁶

What surprises many young lawyers on their first trial is that many people drink while they work. Not during the time in court (that I know of), but lawyers would drink after court and in preparation for the trial days. I first encountered this before Bartlit Beck, and even before graduate and law school. My job

4. To thrive at the firm, I developed two contributions. First, I brought in some big-time finance-oriented plaintiff-side cases that, fortunately for me, settled well. Second, I used my finance Ph.D. to help my colleagues tackle financial issues (like damages or event studies) and would often take the depositions of the expert economists and the like. Without these contributions, I would have been kicked out the door early, I’m sure.

5. Richard A. Posner, *Legal Research and Practical Experience*, 84 U. CHI. L. REV. 239, 239 (2017).

6. Sarah Cearley, PhD, LCSW, *The Latest Data on Lawyers, Drinking, and Mental Health*, 51 ARK. LAW. 48, 48 (2016).

between undergrad and grad/law school was with a litigation-support firm (many mergers later, its DNA resides somewhere inside Navigant Consulting, Inc.), where I worked for an expert witness on financial matters. My first experience in a trial “war room” was a fraudulent transfer case in Memphis, Tennessee, where Jenner & Block represented the litigation trustee (a Jenner & Block partner) against a bank that had lent money for a leveraged buyout of a firm that went bankrupt after the deal. I recall getting to the war room in mid-afternoon a couple days before the trial was to start. Those are days of hard work preparing for and conducting pretrial proceedings and getting ready for the opening of trial. To my considerable surprise, there were Budweiser cans in front of several of the attorneys, and we were offered a beer on our arrival. Drinking on the job! I thought this was pretty awesome (I was twenty-two after all), and it made trial seem more like a rock group’s recording session than serious nerd work. The case settled. I went to Graceland the next day and then flew home.

My first trial at Bartlit Beck was in 2003 in Des Moines, Iowa, and I was told it was pretty normal. The trial team always had alcohol available. What was on hand on a given trial depended, of course, on the preferences of the attorneys and staff on the team. Some liked vodka. Some liked gin and wine. I and few others had jumped on the bourbon bandwagon. There were beer drinkers, of course. The drinking was always pretty controlled before trial days. I don’t think you’d walk into the war rooms and think anyone was drunk. The rhythm of trial was essentially to prepare before a trial day, wind down a bit after the end of a trial day, and then get to work for the next trial day. It was in the last phase that the drinking would begin. I know from discussions with my friends at other firms over the years that Bartlit Beck was not unusual in its approach.

This can seem very strange to outsiders. My wife, a physical therapist before she became a full-time mom, was pretty astounded to hear this part of my job. It is hard to blame her. After all, drinking on the job can get you into trouble in many fields, like being on duty in the military, driving a school bus, commanding an oil tanker, or being a laborer for the National Park Service.⁷ For lawyers, there is a rule as well, but it’s a little more flexible. Rule 1.16(a)(2) of the Illinois Rules of Professional Conduct, following the ABA Model Rule, states that, after giving necessary notice and complying with any orders of a tribunal, “a lawyer shall not

7. See Uniform Code of Military Justice, 10 U.S.C.S. § 912 (“Any person subject to this chapter other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct.”); *Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 932 (6th Cir. 2000) (“Because the record demonstrates that plaintiff did not receive an assignment as a school bus driver because he was caught drinking on the job, no violation of the ADA occurred. We therefore affirm the judgment of the district court.”); *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1045 (D. Alaska 2002), vacated and remanded (Aug. 18, 2003) (“On March 24, 1989, Exxon’s co-defendant, Joseph Hazelwood, was in command of the *Exxon Valdez*. He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a nonalcoholic.”); *In re Claim of Allen*, 557 N.Y.S.2d 666, 667 (N.Y. App. Div. 1990) (“Claimant was employed as a laborer for the United States Department of the Interior, National Park Service. His employment was terminated following various incidents in which claimant allegedly made threatening remarks to his superiors and others at his place of employment. There were further claims that claimant drank alcoholic beverages on the job contrary to his conditions of employment.”).

represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"⁸ There's a lot of wiggle room in that rule.

But *why* do lawyers drink on trial? I suspect there are four main reasons: stress, attempts to boost creative problem solving, boredom, and addiction.⁹

B. TRIAL IS STRESSFUL

Researchers have long studied the impact of work stress on alcohol use.¹⁰ While this research is not directly informative about an environment as specialized as a big-time, civil trial, there is strong evidence that work stress is associated with alcohol use for escape, and that this effect may be stronger where similarly-situated employees drink together, as is the case on a trial team.¹¹ Work-related alcohol use from stress is especially problematic for men, according to one survey of available studies.¹² This may be because men are less able to cope with stress than women, who may actually feel greater levels of stress than men do.¹³ For example, men are also more likely than women to use antidepressants after experiencing long-term job stress.¹⁴

C. TRIAL REQUIRES CREATIVE PROBLEM SOLVING

Trials are fast moving and surprisingly unpredictable at times, despite the overwhelming amount of pretrial disclosure required under, for example, the Federal Rules of Civil Procedure.¹⁵ The trial environment often calls on creative

8. Ill. Sup. Ct. R. Prof'l Conduct, R 1.16.

9. See *infra* Part II.B-E (explaining why stress, creativity, boredom, and addiction are the four main reason for drinking while working on trials).

10. See Leon Grunberg, Sarah Moore, & Edward S. Greenberg, *Work Stress and Problem Alcohol Behavior: A Test of the Spillover Model*, 19 J. ORG. BEHAV. 487, 487 (1998) (studying the responses to work-related stress that involve alcohol).

11. See Jack K. Martin, Paul M. Roman, & Terry C. Blum, *Job Stress, Drinking Networks, and Social Support at Work: A Comprehensive Model of Employees' Problem Drinking Behaviors*, 37 SOC. Q. 579, 579 (1996) (studying problem drinking and finding a role for job-based drinking networks).

12. Johannes Siegrist & Andreas Rödel, *Work Stress and Health Risk Behavior*, 32 SCANDINAVIAN J. WORK, ENV'T & HEALTH 473, 476 (2006).

13. For an interesting study in a very different trial context, see Michael E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 JUST. SYS. J. 396, 397 (2008) (finding that females experience more stress than males from service on a capital jury).

14. Karsten Thielen, Else Nygaard, Reiner Rugulies, & Finn Diderichsen, *Job Stress and the Use of Antidepressant Medicine: A 3.5 Year Follow-Up Study Among Danish Employees*, 68 OCCUPATIONAL & ENVTL. MED. 205, 209 (2011).

15. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 547-48 (2012) ("In theory, the discovery system of the Federal Rules is a branch of pretrial procedure that is designed to assist a litigant to prepare for trial, both by gathering evidence to support that litigant's case, and by ascertaining the positions and the likely evidence that the opposing party or parties might present were the case to advance to trial."); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 589 n.58 (1973) ("Of course, there will always be room for some surprise at trial. The impact of testimony in response to a new

problem solving skills.¹⁶ There is a long and ongoing fascination about the role of irrationality, madness, and a certain “letting go” in creative endeavors.¹⁷ Some research suggests that while alcohol consumption does not increase creativity, people believe it does, and that may in turn generate more creative solutions.¹⁸ At least sometimes, it may be that people drink to free their minds in hopes of finding a better path to a good answer for the next day’s challenge in court.

D. TRIAL IS OFTEN BORING

Despite its fast pace and stress, time on trial can also be really boring, especially for the underlings who get often ill-conceived assignments from lead lawyers who come to trial a bit less prepared than they should be. “Boring” does not mean “nothing to do.” There is always more to do than time to do it. Rather, researchers have

define[d] boredom as the aversive state that occurs when we (a) are not able to successfully engage attention with internal (e.g., thoughts or feelings) or external (e.g., environmental stimuli) information required for participating in satisfying activity; (b) are aware of the fact that we are not able to engage attention and participate in satisfying activity, which can take the form of either awareness of a high degree of mental effort expended in an attempt to engage with the task at hand or awareness of engagement with task-unrelated concerns (e.g., mind wandering); and (c) attribute the cause of our aversive state to the environment (e.g., “this task is boring”, “there is nothing to do”).¹⁹

That is a good statement of trial boredom: the activity—especially for lawyers laboring on tasks for others with no chance of appearing in court themselves—is not a satisfying activity. At such times, drinking numbs the boredom.

question, deviations from prior testimony, as well as many other factors may not be predicted through familiarity with the dossier.”).

16. Of course, there are many types of creativity, but scholars generally acknowledge one type to be creative problem solving. See Melody Milbrandt & Lanny Milbrandt, *Creativity: What Are We Talking About?*, 64 NAT’L ART EDUC. 8, 12 (2011) (describing creative problem solving as one category of theories of creativity); Irina Surkova, *Towards a Creativity Framework*, 34 SOC. & ECON. 115, 115 (2012) (developing a framework for creative problem solving).

17. See generally Berys Gaut, *Creativity and Rationality*, 3 J. AESTHETICS & ART CRITICISM 259, 259 (2012) (surveying irrationalist and rationalist conceptions of creativity and arguing for the rationalist conception); Richard Willgoss, *Creativity in Contemporary Art Music Composition*, 43 INT’L REV. AESTHETICS & SOC. 423, 425 (2012) (“A paradoxical messiness thus arises out of being reasonable when dealing with creativity in art.”).

18. See William M. Lapp, R. Lorraine Collins, & Charles V. Izzo, *On the Enhancement of Creativity by Alcohol: Pharmacology or Expectation?*, 107 AMER. J. PSYCHOL. 173, 173 (1994) (finding that alcohol did not impact creativity, though belief that alcohol had been consumed did). Of course, some works, such as those of Poe, are hard to imagine resulting from a clean and sober mind.

19. John D. Eastwood, Alexandra Frischen, Mark J. Fenske & Daniel Smilek, *The Unengaged Mind: Defining Boredom in Terms of Attention*, 7 PERSPECTIVES ON PSYCHOL. SCI. 482, 484 (2012).

E. ADDICTIONS DON'T BREAK FOR TRIAL

Last, but by no means least (it might be the most important reason of all), lawyers may show up to trial already addicted and abusing alcohol. Lawyers have a high incidence of alcoholism.²⁰ If you are a lawyer who is used to going home and knocking back 4–6 drinks a night, and you suddenly find yourself working in a single suite of a hotel room until 2 a.m. or 3 a.m. (or later) with your colleagues, it is a godsend when your colleagues are willing to join you in drinking. Not only do you not have to experience withdrawal (which can be dangerous), you don't have to sneak down to the hotel bar or raid the minibar in your room. To the contrary, you can fill your cup to the brim and enjoy.

Of course, we now live in a world where cannabinoids are legal in many states.²¹ For frequent users at home in a state like Colorado, a trial in a state that has not legalized cannabinoids presents special hazards.²² But stress can actually induce strong cravings, and addicts have to find a way to satisfy them.²³

Arguably worse than feeding a continuing addiction is the problem of relapse on trial. Lawyers who try to quit drinking may find the stress of trial—including the interpersonal stress that can spill into the open—too much to bear. Consistent with studies of the effect of stress on increasing prosocial behavior, many of us are all too aware of hearing that so-and-so, having been on the wagon for a while to his or her benefit, fell off on trial.²⁴

III. TRIAL AND SEX

Big-time civil trials often occur on the road. The best trial lawyers handle cases all over the country. At Bartlit Beck, many were proud of a map of the United States showing where the firm had handled cases (answer: most of the states). Alcohol is famous for loosening the inhibitions of course, and almost no one brings their spouse to trial.²⁵ But inappropriate (occasionally extramarital or intraoffice) relationships may develop for more than just reasons of intoxication. Stress, again, may be the real culprit. One interesting possibility based on

20. Debra S. Austin, *Drink Like A Lawyer: The Neuroscience of Substance Use and Its Impact on Cognitive Wellness*, 15 NEV. L.J. 826, 827 (2015) (“One study concluded that at least 15 percent of lawyers are alcoholics compared to approximately 10 percent in the general population.”).

21. See Melina Delkic, *Recreational Marijuana is Legal in These States—And Maine Might Be Next*, NEWSWEEK (Oct. 24, 2017), <https://www.newsweek.com/where-recreational-marijuana-legal-691593> (setting out seven states, including Colorado, that have legalized marijuana, along with the District of Columbia).

22. A frequent user of marijuana in a state, like Colorado, that has legalized marijuana cannot acquire marijuana legally in a state, like Florida, that has not legalized it.

23. See Nick E. Goeders, *Stress, Motivation, and Drug Addiction*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 33, 33 (2004) (examining stress-induced addiction and mechanisms that induce cravings).

24. See P. Belujon & A.A. Grace, *Hippocampus, Amygdala, and Stress: Interacting Systems That Affect Susceptibility to Addiction*, 1216 ANNALS OF THE N.Y. ACAD. OF SCI. 114, 114 (2011) (studying sources of stress-related relapse).

25. One exception was Fred Bartlit, who routinely did. But that's one of the perks you probably need your name on the door to get. And most of the rest of us were raising young families anyway.

intriguing research findings is that the stressful environment of trial could encourage sexual relationships through a tendency to promote prosocial “tend-and-befriend” behavior.²⁶ Other evidence suggests that stress leads to increased risk-taking, especially where powerful people feel vulnerable.²⁷ This is often a fair characterization of the state of affairs for trial lawyers in high-stakes cases, especially for more senior lawyers who may suffer career set-backs from a trial loss. The mix of alcohol, mutual support, and risk-taking proclivity can be a too-potent mix for some who are miles from home and family, sleep-deprived, and living in a hotel.

IV. TRIAL AND MUSIC

There is a bit of good news. Trial can be fun. Especially on Friday nights, people can let loose. I got turned on to some great tunes on trial.

V. CONCLUSION

But if you want to leave, take good care
 Hope you have a lot of nice things to wear
 But then a lot of nice things turn bad out there²⁸

There is a certain glamour in the life of the big-time trial lawyer. While that was never me, I witnessed it firsthand. The Fred Bartlits and Phil Becks of the country are necessary parts of the nation of laws we live in. They are superstars of a sort. Those of us fortunate to watch them work learn a lot.

But there is a dark side to the legal profession. And it may be a dark side the legal academy—light on real-world experience of private practice—might simply not understand. Depression, substance abuse, torn marriages: these are real. They have happened, they are happening, and they will almost certainly happen too often to those entering and in law school right now. Richard Posner, in the essay that motivated me to write this one, laments being “troubled by the fact that the faculties of the leading law schools are increasingly populated by refugees from the humanities or the social sciences.”²⁹ He recognizes, as do I, that these refugees bring great talents to bear in educating law students. But they know little of the world to which those students are heading.

26. See Bernadette von Dawans, Urs Fischbacher, Clemens Kirschbaum, Ernst Fehrs, & Markus Heinrichs, *The Social Dimension of Stress Reactivity: Acute Stress Increases Prosocial Behavior in Humans*, 23 *ASS'N FOR PSYCHOL. SCI.* 651, 658 (2012) (finding that stress triggers social approach, consistent with the “tend-and-befriend” hypothesis).

27. Jennifer Jordan, Niro Sivanathan & Adam D. Galinsky, *Something to Lose and Nothing to Gain: The Role of Stress in the Interactive Effect of Power and Stability on Risk Taking*, 56 *ADMIN. SCI. Q.* 530, 530 (2011).

28. Cat Stevens, *Wild World* (A&M Records 1970).

29. Posner, *supra* note 5, at 239.

I have no great ideas for how to improve the stress of trial and its consequences. To some extent, that's just life in the fast lane. But a little more time spent thinking about the problem is just the sort of thing we need to improve the happiness of those we send into the wild world of private practice.