COMMENT ON "OBSTACLES TO THE STUDY OF LAWYER-CLIENT INTERACTION: THE BIOGRAPHY OF A FAILURE"

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Brenda Danet and her colleagues have made a valuable contribution to identifying some of the problems that inhibit effective research by social scientists into lawyer-client interaction. The title, "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure" (hereafter referred to as "Biography"), is apt. The researchers tried diligently and at considerable cost to observe lawyers working with clients. Much to their surprise, they failed totally to do so. The Biography is a post-mortem. Considering why the research project failed brought to mind an important new publication by Lindblom and Cohen in which they observe:

> In public policy making, many suppliers and users of social research are dissatisfied, the former because they are not listened to, the latter because they do not hear much they want to listen to (1979: 1).

The Biography appears to reflect this reciprocal frustration. The authors failed to reach the lawyers they hoped to observe. I suspect one reason was that the lawyers approached had considerable difficulty understanding just what the social researchers were up to. I know that I do, reading their post-mortem.

The authors state that the purpose of their research was to learn about "questioning as a communicative process" (p. 907). Those are vague words which do not convey much meaning to me either as a lawyer or a social scientist. It reminds me of the husband who complains to the call girl that his wife "doesn't understand me." Every human relationship involves communicative processes. To get the attention of lawyers and their cooperation in social research, the first critical step is to define an issue that is meaningful to lawyers: an issue they can understand; an issue they care about; one they feel merits some investment of their time.

Two problems in much social science research particularly aggravate lawyers. One idea many social scientists seem to

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hold is that it is worthwhile spending a lot of time and money "immersing oneself in the data" without any clear hypothesis or fixed social objective other than, perhaps, "complete understanding," the organizing of complex materials into a simplified and rational model.

The idea that knowledge for knowledge's sake is worthy of support is laudable in the abstract. It is laudable at a university where pure research should be encouraged. It is laudable where there is some indication that the person immersing himself in pure knowledge has that creative spark which is likely to generate a work of genius or of synthesis, or at least an innovative breakthrough. But it is hard to justify to a practical lawyer who wonders why he should give up time and money, and potentially expose himself and clients to embarrassment or legal difficulty (a point I shall return to below) merely to gratify the curiosity of social researchers who have not proven themselves in advance as capable of such dramatic accomplishments. I do not know, but wonder, whether the authors anticipated and met this problem head on. If they did not, their failure was virtually predetermined by that fact alone.

The second problem they may have encountered is that lawyers and other non-social scientists (the concern expressed in the Lindblom and Cohen book indicates that it is a problem for some social scientists as well) find that a great deal of social science today belabors the obvious. The justification for social science is that it can tell us things that shake our unsystematic impressions; that it can confound the obvious. I may be unfair to the authors, but their articulation of their investigative topic suggests that they believed a lot of miscommunication occurred between lawyers and clients, poor questions and nonresponsive answers, and that they were seeking evidence to prove that lawyers and clients often did not listen well to each other. If that was an implicit hypothesis, it seems to me to be a trivial one that did not justify the project. If it was not, then both in the article and in their dealings with lawyers, they should have been much more explicit about what they were up to.

By coincidence, the same week I re-read the Biography, I found two apparent examples, in short reviews by Leonard Doob (1979: 6), of these two social science failings. They are worth reproducing because Doob, a distinguished psychologist, considers the two books he reviews to be praiseworthy, notwithstanding his implied disappointment with the modesty of their accomplishments. I have read neither book and it is

not my purpose in quoting these reviews to make any judgment about them. Rather, I am making a judgment about Doob's tolerance of what, if his words are to be believed, seem to me to be the limitations of both studies. Many lawyers and non-social scientists are losing patience with this kind of study, and researchers should know this in advance.

The first, a review of *Masculinity and Femininity* by Spence and Helmreich, portrays this study as an example of the genre of "immersion in the data."

> A notable effort to analyze statistically a "bewildering mass of data" supplied largely but not exclusively by white American high-school students who responded to a variety of paper-and-pencil questionnaires. Although this "progress report," which definitely is not bedtime reading, includes copious references to investigators who have focused upon the problem of sex differences, no clear-cut conclusions concerning the intriguing, perennial problem emerge other than the probability that most stereotypes of course are invalid and that distinctive personality traits are not always or consistently sex-linked.

The second review, of Klineberg *et al.*'s *Students, Values, and Politics*, suggests that the book belabors the obvious.

> A monumental, modest analysis—beautifully printed—of the replies to virtually every conceivable relevant political, moral, social, and educational issue embodied in a gigantic questionnaire (ca. 170 items). Cooperating were adequately large, representative samples (ranging from 191 to 1,100) of university students in eleven countries (Australia, Austria, France, Great Britain, Italy, Japan, Nigeria, Spain, Tunisia, United States, and Yugoslavia) during the years of the so-called revolt (1969-1970), as well as admittedly inadequate samples in France and the United States in 1970. Nothing sensational emerges other than a careful typology (conservative, democratic, progressive, revolutionary) as the basis for the cross-cultural comparisons; yet as a significant tool to comprehend precisely a generation as well as differences among nations at the time, this carefully assembled collection of data will be a valuable source book.

Lindblom and Cohen make a similar observation with their own constructive suggestion.

> We suspect that in one part of their minds many people engaged in [professional social inquiry] take it for granted that the normal or necessary way to solve any problem is to understand it. They do not systematically conceive of problem solving as other than an intellectual [such as an interactive] process (1979: 30 n.1).

They suggest that collaborative, interactive, "politically sensitive" problem solving is often more constructive.

One reason the research may have aborted is that the authors planned the research fully in advance. Perhaps in part to meet the excessively rigid requirements of their university's clinical research review committee, they tried to plan too comprehensively. They did not do enough interactive exploration with their lawyer subjects and potential client subjects of how the inquiry might go forward.

It is significant and ironic that the authors of Biography view themselves as "skeptical and oriented toward contributing

to general understanding of how things work in the world," and that it is "the stance of the social scientist . . . typically . . . to overturn received notions of how social arrangements work" (p. 908). This self-image may be part of the problem, because it does not accord with the image many lawyers have of social scientists. It also does not accord with my own image, which is somewhere between these two professional ideologies.

I am probably of a generation once removed from the authors of Biography. But I remember well, when I was in graduate school, the powerful hold that Talcott Parsons and "functionalism" had on a generation of social investigators. The ideology of social science in the early 1960's, influenced so greatly by the Parsons perspective, was anything but skeptical. Nor was much of the social science of that period very successful at contributing to a general understanding of how things worked in the world. Rather, then as now, there was a proliferation of taxonomies, of special vocabularies, and of gross oversimplifications of complex behavior that distorted more than clarified (see, e.g., Parsons, 1952).

Do not misunderstand me. I am not saying that the description above is a fully accurate characterization of social science, even during that earlier period. And certainly it is unfair to those who have practiced innovative and important social science investigation. My point is only that the authors of Biography seem to have an exaggerated sense of professional self-esteem. Since this is not a limitation that social scientists or the general public are going to allow lawyers to get away with in these post-Watergate days, I think it will help improve collaboration if social scientists will communicate a comparable degree of humility in their dealings with the legal profession.

I recognize that these remarks are at variance with the views of David Riesman (see, e.g., 1964a: 440). Thirty years ago, when Riesman's work was written, it was appropriate to chide lawyers for their narrow-minded condescension toward social science. However, intervening events have so changed things that Riesman's image of lawyers from that period has, perhaps, become a "coercive image" of its own,[1] distorting the true possibilities of collaboration.

Perhaps the most important reason the research described in Biography failed is that it underestimated the risks to the participants. The privilege of confidential communication

[1] A term used by Riesman (1964 b) in a later essay, "Law and Sociology," also worth reading.

between attorney and client denies to the adversary in a legal proceeding knowledge of the strengths and weaknesses of one's case. Litigation is combat. A lawyer is taught to fight tenaciously and resourcefully to advance his client's position at the expense of the opponent. It is, if unsettled, an elemental zero sum game.

To this brute fact must be added the conclusion that the law, at present, is very unclear as to whether social investigation of lawyer-client interaction can be deemed to have waived the privilege and thus provide an adversary the very access to one's confidences that may lose the case.

A third ingredient to lawyer skittishness is the sharp rise in client suits against attorneys for legal malpractice. Increasingly, lawyers are feeling the very sting some of their number have inflicted on physicians, architects, and accountants from determinations of negligence for errors of professional judgment or omission. Why should a lawyer assume even the small probability of an eventual malpractice suit as a consequence of allowing a social scientist to observe a professional consultation? While the probability is small, the cost of such a suit may be catastrophic.

If you think I exaggerate the risks, consider the experience of the investigators who tape-recorded grand jury deliberations in a federal court in Wichita in the 1950's. Theirs was a close call, described by Katz as follows:

> In 1954 a group of law professors and social scientists, with the approval of judges of the Tenth Judicial Circuit, recorded the deliberations of juries in six civil cases in the United States district court in Wichita, Kansas. The investigators did not inform the jurors that microphones had been concealed in the jury room. The litigants were also unaware of the research project, although their attorneys had consented to the recordings.
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> A year later the Internal Security Subcommittee of the Senate Committee on the Judiciary held public hearings in order to assess the impact of this experiment "upon the integrity of the jury system [which is protected by] the seventh amendment of the Constitution." These hearings led to the promulgation of a law which prohibited any recording of jury deliberations.[2]

What then can be done? The authors suggest that lawyers might be paid to participate. But a cautious lawyer, and good lawyers are trained to be cautious, would not be so easily enticed if a malpractice suit and loss of professional reputation were possibly at stake. The authors report that one of the lawyers they contacted made another suggestion; that the researchers indemnify him for any damages that might result

[2] For a full presentation of the Wichita Jury Recording Case, see Katz (1972: 67-109).

from an alleged breach of confidence (p. 913). They do not take his suggestion seriously, but it is worth thinking about. I wonder what Lloyds of London would charge for such insurance. It might be affordable.

Until the law is changed explicitly to permit social science access, under appropriately controlled circumstances, to attorney-client consultations without thereby waiving the privilege against revealing what was said in a legal proceeding, the next best thing is probably to seek a court order, in advance of the research, establishing such a rule within that court's jurisdiction.

In researching my book on lawyer-client interaction a dozen years ago (Rosenthal, 1974), I obtained an order from the New York State Supreme Court permitting me to examine the confidential records of the Judicial Conference of the State. A carefully framed petition, perhaps prepared in collaboration with the dean of a law school, a leader of a bar association, and a prominent judge from another jurisdiction, might obtain the court's consent to honor the privilege if the research is conducted in scrupulous compliance with the conditions set. The granting of such an order would substantially reduce the risks of a later contrary rule, even by a different court. To avoid the difficulties encountered in the Wichita case, the court order should be sought after publicized notice and a hearing in open court so that contrary views might be heard and addressed.

The authors imply that lawyers use the attorney-client privilege as an illegitimate excuse for noncooperation. I do not think that correct, at least not in all cases. The kind of social science the researchers wanted to undertake is intrusive upon people's privacy. While it is true that (as the authors of Biography state) "there have been hundreds of studies of doctor-patient communication, including many which relied primarily on observation," it is also true that many of these have been done with little regard for the rights or dignity of patient-clients, issues to which lawyers tend to give greater attention (see, e.g., Gray, 1975).

These remarks are offered as a supplement to the perspectives of the authors as to what went wrong. While they made mistakes, they showed daring, an absolutely sound appreciation of the importance of knowing more about what actually happens when lawyers deal with clients, and tenacity in not giving up in the face of early adversity. By generously writing this post-mortem and focusing their problem for broader consideration, they will, hopefully, spare future

investigators the same frustrations. In this way they will have snatched palpable success from the jaws of failure.

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