

## Aristocrats of the Law

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# ARISTOCRATS OF THE LAW

LOUIS H. POLLAK\*

Tocqueville was not the first to discover that lawyers are better than people. He was not even the first observer—not remotely the first observer—to recognize that the *American* lawyer looms larger than life. I call to witness, for example, the words of James Kent, offered in 1794, forty years before Tocqueville's celebrated paragraphs on the role of the American lawyer which have so long been a special comfort to the members of our profession.

"A lawyer in a free country," said Kent, "should have all the requisites of Quintillian's orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils [*sic*], establish it by his laws, and correct it by his example."<sup>1</sup>

Why, then, our special attachment to Tocqueville? Some of the answer, I think, lies in his obvious sincerity. After all, he told us in the 1840 Preface to the second volume that he was sincere: ". . . it is because I am not an adversary of Democracy, that I have sought to speak of Democracy in all sincerity."<sup>2</sup> And, more than this, there is his manifest objectivity: A foreigner, the precursor of how many batallions of visiting cultural anthropologists, he studied our folk-ways with solicitous precision:

Men will not accept truth at the hands of their enemies, and truth is seldom offered them by their friends; for this reason I have spoken it.<sup>3</sup>

At all events, since he was demonstrably accurate in so many of his observations of the United States in the early decades of the nineteenth century, surely Tocqueville must have been right in what he said about the importance and integrity of lawyers. We would be churlish to argue the point.

Especially where there is so much confirmatory evidence: Indisputably, it was lawyers—and by and large the same lawyers—who both master-minded the Revolution and then drew the blueprints and dug the foundations for the new nation. They were not the only ones involved, of course: There was a celebrated Virginia farmer and surveyor-turned-soldier; there was a printer-turned-scientist from Phila-

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<sup>1</sup> GOEBEL, HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY 14-15 (1955).

<sup>2</sup> II TOCQUEVILLE, DEMOCRACY IN AMERICA vi (Longman's, Green & Co., 1875).

<sup>3</sup> *Ibid.*

delphia; a professional emigré and scathing polemicist who made the cause of insurrection a best seller; a Boston silversmith, the 191st anniversary of whose alarm and excursion we celebrated only yesterday. But much of the rhetoric, and almost all of the drafting and the building, were in the hands of lawyers: Hamilton; Wilson; Ellsworth; Jay—and those who followed: Marshall; Burr; Webster; Calhoun; John Quincy Adams; Story; Johnson; Taney and the rest. And more than their numbers and massiveness of impact, there was an essential solidarity of attitude, one might almost say of class, which linked those among them who were ideologically most disparate. Jefferson and Marshall, for instance, both learned their law from Chancellor Wythe. And remember the failing Adams, on July 4, 1826, muttering, "Jefferson still lives"—unaware that his great antagonist was also dying on the fiftieth anniversary of the Declaration.

But the concrete realization of Tocqueville's American aristocracy which I cherish most is the reminiscence of a little boy in the mid-1840's. The boy used to sit right behind his aged lawyer-grandfather at church. The boy was Henry Adams:

. . . as influences that warped a mind, none compared with the mere effect of the back of the President's bald head. . . . Before railways entered the New England town, every parish church showed half-a-dozen of these leading citizens, with gray hair, who sat in a main aisle in the best pews, and had sat there, or in some equivalent dignity, since the time of St. Augustine, if not since the glacial epoch. It was unusual for boys to sit behind a President grandfather, and to read over his head the tablet in memory of a President great-grandfather, who had "pledged his life, his fortune, and his sacred honor" to secure the independence of his country and so forth; but boys naturally supposed, without much reasoning, that other boys had the equivalent of President grandfathers, and that churches would always go on, with the bald-headed leading citizens on the main aisle, and Presidents or their equivalents on the walls. The Irish gardener once said to the child: "You'll be thinkin' you'll be President too!" The casualty of the remark made so strong an impression on his mind that he never forgot it. He could not remember ever to have thought on the subject; to him, that there should be a doubt of his being President was a new idea. What had been would continue to be. He doubted neither about Presidents nor about Churches, and no one suggested at that time a doubt whether a system of society which had lasted since Adam would outlast one Adams more.<sup>4</sup>

And one is tempted to add, as if to validate the text, that Henry Adams didn't become a lawyer and didn't become President.

But there is a part of Tocqueville's thesis—and the crucial part—which surely requires further scrutiny. "The people," Tocqueville told

<sup>4</sup> ADAMS, EDUCATION OF HENRY ADAMS 15-16 (1918).

us, "the people in the democratic states do not mistrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs."

Could so innocent a trust in our profession ever have prevailed? Of course not. Let me take you back, before Tocqueville's time, to another Massachusetts scene. The time was 1788. The place was the ratifying convention called to consider the draft constitution. I read to you now from one of the anti-federalists, the Honorable Mr. Singletary:

These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, make us poor illiterates swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this constitution, and get all the power and all the money into their own hands, and then they will swallow up all of us little folks, like the great *Leviathan*, Mr. President. Yes just as the whale swallowed up Jonah. This is what I am afraid of. . . .<sup>5</sup>

There were, of course, voices other than that of Mr. Singletary; in the same ratifying convention there was Mr. Smith:

Mr. President, I am a plain man, and get my living by the plough. I am not used to speak in public, but I beg your leave to say a few words to my brother ploughjoggers in this house. . . .

Now, Mr. President, when I saw this Constitution I found that it was a cure for these disorders. It was just such a thing as we wanted. I got a copy of it, and read it over and over. I had been a member of the Convention to form our own state constitution, and had learnt something of the checks and balances of power, and I found them all here. I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution. My honorable old daddy there [pointing to Mr. Singletary] won't think that I expect to be a Congress-man, and swallow up the liberties of the people. I never had any post, nor do I want one. But I don't think the worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it. I don't suspect that they want to get into Congress and abuse their power. I am not of such a jealous make. They that are honest men themselves are not apt to suspect other people. I don't know why our constituents have not a good right to be as jealous of us as we seem to be of the Congress; and I think those gentlemen, who are so very suspicious that as soon as a man gets into power he turns rogue, had better look at home. . . .

Brother farmers, let us suppose a case, now: Suppose you had a farm of 50 acres, and your title was disputed, and there

<sup>5</sup> POLLAK, *THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY* (1966).

was a farm of 5000 acres joined to you, that belonged to a man of learning, and his title was involved in the same difficulty; would you not be glad to have him for your friend, rather than to stand alone in the dispute? Well, the case is the same. These lawyers, these moneyed men, these men of learning, are all embarked in the same cause with us, and we must all swim or sink together; and shall we throw the Constitution overboard because it does not please us alike? Suppose two or three of you had been at the pains to break up a piece of rough land, and sow it with wheat; would you let it lie waste because you could not agree what sort of fence to make. Would it not be better to put up a fence, that did not please everyone's fancy, rather than not fence it at all, or keep disputing about it until the wild beasts came in and devoured it? Some gentlemen say, Don't be in a hurry; take time to consider, and don't take a leap in the dark. I say, Take things in time; gather fruit when it is ripe. There is a time to sow and a time to reap; we sowed our seed when we sent men to the federal Convention; now is the harvest, now is the time to reap the fruit of our labor; and if we won't do it now, I am afraid we never shall have another opportunity.

The difference of view between Mr. Singletary and Mr. Smith is revealing, for it shows that neither man wholly trusted the "lawyers, these moneyed men, these men of learning." Even Mr. Smith said he and his fellow-townspople got along well enough without lawyers. But it also shows that one of them—Mr. Smith—trusted *law*, insofar as he could understand it. And this is important, especially when placed in juxtaposition with the words of James Kent, which I quoted at the outset of my remarks. I shall try to address myself to this juxtaposition.

James Kent, when he spoke of the "lawyer in a free country" ["of irreproachable virtue and goodness . . . well read in the whole circle of the arts and sciences"] was delivering his first lecture as the first Professor of Law at Columbia University. This lecture—antedating the first professorships of law at Harvard and at Yale—may be sentimentalized in retrospect as the starting point of the triumvirate of great university law schools which were to dominate legal education a century later. But the sentimentalization would be a gross distortion of the more important fact—which was that the great lawyer and judge was himself to be a pioneer in systematic instruction in law *primarily* in his role as commentator—the author of great books on law which were to be widely read—rather than as teacher. The actual fact was that Kent lectured for a couple of years; then stopped abruptly in order to enter upon his extraordinary judicial career; and then, a generation later, as ex-Chancellor, tried his hand at lecturing once again, but finally gave it up in favor of editing successive editions of his *Commentaries*. And so it was that, notwithstanding the brave professional ideal towards which, in 1794, Kent hoped to lead his students,

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<sup>6</sup> *Ibid.*

the systematic teaching of law at Columbia was not really to be undertaken until another half-century had elapsed—i.e., not until after the great Chancellor died. And, though the semblance of instruction was taking place at Harvard and at Yale from the second and third decades of the century onwards, very little of consequence happened—apart from the Story years at Harvard—until after the Civil War.

Where, then, was instruction in the law being carried out? To be sure, some few hundreds of lawyers were trained at the universities and at the proprietary schools—Judge Tapping Reeves at Litchfield, dating back to the 1780's, antedated all the rest—but the mass of American lawyers were educated as apprentices, or were self-educated. After all, until Kent wrote his *Commentaries*, the volumes of Blackstone on which Kent modelled his own were the standard fare of the American lawyer. Professor Boorstin tells us that "For generations of American lawyers from Kent to Lincoln, the *Commentaries* [of Blackstone] were at once law school and law library."<sup>7</sup>

So it may almost be said that the chief importance of Kent's professorship was *not* that he helped launch university instruction in law, but that it gave him the occasion for writing another book worthy of ranking with Blackstone.

But I suggested that Mr. Smith's remarks in the Massachusetts ratifying convention were a significant antidote to those of Kent. They are because—while showing that Massachusetts men could do quite well without lawyers—they go to establish the further point that, in the eighteenth and first half of the nineteenth centuries, an industrious layman might become his own lawyer. The Constitution, and Blackstone, were both, after all, written for laymen to read. If it was an important part of American Protestantism that any man could read and understand the Bible, so too it was at least as important a part of American public life that any man could learn the fundamentals of our legal institutions. In this way, as Tocquerville put it, great constitutional problems have become matters of "vulgar"—i.e., commonplace—public discussion. And in the same way, in many states—including Wisconsin, where we are gathered this evening—the untutored citizen could, a century ago, as a matter of right, practice law. (In Indiana, indeed, that right was written into the state constitution.) That, in all probability, only a small number actually took advantage of this "right" does not lessen its symbolic importance.

At all events, to the extent that membership in the bar was at least open to every man who, like Lincoln, would read his Blackstone and draw pleadings for a senior already established in practice, the aristocracy of the bar was open-ended.

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<sup>7</sup> BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3-4 (1941).

The rise of the great university law school has, in large measure, changed all this. To be sure, there are still a few men in practice and on the bench who travelled the older path—to mention two notable examples, Judge Van Voorhis, of the New York Court of Appeals, and Judge Rives, of the Court of Appeals for the Fifth Circuit. But, for the past one hundred years, the trend has been to a law-school educated bar. I say “one hundred years” because I date the transition from 1870, and the installation of Christopher Columbus Langdell as Dean of the Harvard Law School. For with his deanship began the case system.

Celebrating the case system may seem to be celebrating the obvious. It is hard, in retrospect, to realize that Langdell and his great protégé and colleague, James Barr Ames, made an intellectual revolution. But they did: by making lawyers direct themselves not to metaphysical constructs but to what, as Holmes put it, “courts do in fact,” the architects of the case system made it possible to turn the study of law into a genuinely intellectual inquiry. They made it possible to provide, in a university setting, what was prescribed in 1870 by the anonymous note writer in the *American Law Review*:

The object of a law department is not precisely and only to educate young men to be practising lawyers, though it will be largely used for that purpose. It is to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural science, or any other branch of thought.<sup>8</sup>

The anonymous note writer was, we are told, young Holmes.<sup>9</sup>

The case method has ever had its detractors. Consider, for example, the observations of Thorstein Veblen, writing in 1918:

The law school's inclusion in the university corporation has the countenance of ancient tradition, it comes down as an authentic usage from the mediaeval era of European education, and from the pre-history of the American universities. But in point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing. This is particularly true of the American law schools, in which the Austinian conception of law is followed, and it is more particularly true the more consistently the “case method” is adhered to. These schools devote themselves with great singleness to the training of practitioners, as distinct from jurists; and their teachers stand in a relation to their students analogous to that in which the “coaches” stand to the athletes. What is had in view is the exigencies, expedients and strategy of successful practice; and not so much a grasp of even those quasi-scientific articles of metaphysics that

<sup>8</sup> 5 AM. L. REV. 177 (1870). The prescription was not original with the note writer; it was quoted, with attribution, from a contemporary report made by Dr. E. O. Haven to the Trustees of Northwestern University.

<sup>9</sup> HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870 206 (1957).

lie at the root of the legal system. What is required and inculcated in the way of a knowledge of these elements of law is a familiarity with their strategic use.

The profession of the Law is, of course, an honourable profession, and it is doubtless believed by its apologists to be a useful profession, on the whole; but a body of lawyers somewhat less numerous, and with a lower average proficiency in legal subtleties and expedients, would unquestionably be quite as serviceable to the community at large as a larger number of such men with a higher efficiency; at the same time they would be less costly, both as to initial cost and as to the expenses of maintenance that come of that excessive volume and retardation of litigation due to an extreme facility in legal technique on the part of the members of the bar.<sup>10</sup>

But Veblen's point—the point that the bar was an instrument for the obfuscation of private controversies, and virtually nothing more—should, to the extent it had merit, have been not so much a criticism of the case method as a general indictment of the role played by our profession between the Civil and World Wars.

Consider, for example, two editorials which appeared in the first volume of the *Yale Law Journal* in 1892. This was twenty years after Harvard had begun the case system—but twenty years *before* Yale caught up with Harvard. In the first of these the student editor bemoans the newly sunken estate of a once-honored profession, now threatening to become only a camp-follower of the men of commerce and industry:

The transformation of professional life and its adaptation to the economic and social life of the time is an inexorable change. The industrial life of today is accentuated by a strong and efficient organization unknown half a century ago. Under its influence the traditional position of the lawyer has changed in the community. Then he was the leading figure of the neighborhood—a man of all-around culture, of public affairs versed in the best scholasticism of history, politics, life. Today the development of commerce is so gigantic as to threaten to make the lawyer only ancillary to the business man. While the usefulness of a profession depends on its moulding itself to the requirements of the time, there is much in the old time traditional lawyer, which, if lost, will be an irretrievable loss: the dignity and honor of learning; the love of the profession as a profession and not as a trade; the knowledge and the refinement of literature; and the avoidance of an exclusive specialism in those who play so large a part in shaping the practical affairs of society.<sup>11</sup>

Against this lament, let me counterpoise another *Yale Law Journal* editorial, in which the student editor offers the hope that at least the manners of a true aristocracy can be maintained:

<sup>10</sup> VEBLÉN, *THE HIGHER LEARNING IN AMERICA* 211-12 (1918).

<sup>11</sup> 1 *YALE L.J.* 31 (1892).

It is a melancholy but unfortunate truth that all lawyers are not gentlemen, and yet there is no walk in life wherein the highest instincts of perfect breeding and true manliness are more called for than in the hurrying rivalry and constant antagonisms of the working practitioner. The editors as they take up for the last time the stylus of admonition and the quill of legal reform would make an earnest appeal for a deep, true and consistent *esprit de corps* in our chosen profession. Remembering that this profession of ours is a much-maligned calling among the ignorant and the narrow, the object of much hatred among the unscrupulous and cunning, and much criticized of all men—each one of us ought to feel that he owes both himself and his brethren at the bar a solemn duty of absolute personal integrity and kindly sympathy and courtesy to all. Is it too much then to ask of the class that goes out this year from the time-honored halls of this ancient and honored institution to take these few simple words as a personal burden, to show the profession that Yale men in the law, as Yale men everywhere, are scholarly gentlemen and men of practical culture. And even though there are no mottos hanging on our office walls to guide us, yet let us each so live his professional life that at its close an appreciative brotherhood can feelingly say, as was said of one of the world's great souls, now pleading at a grander bar, "He was, praise God, a gentleman."<sup>12</sup>

The point is simply this. Although the criticisms voiced by Veblen, and by the *Yale Law Journal*, were overdrawn, both had the germ of truth. For the first half century, until after World War I, systematic university training in law—whether under the case method or otherwise—produced vocationalists first and foremost, and public men only secondarily.

It has been only in the past four decades that most law schools have begun to return to the recognition that above all law is a public calling. That recognition has forced law teachers to look beyond the limits of case analysis to those sister disciplines which can give us guidance as to how public decisions of great moment should be made. In short, what Yale and Columbia insisted upon from the thirties onward, and what has now become commonplace in every law school worthy of the name, is that the lawyer who rejects the insights of the economist, the psychologist, the political scientist and the historian, is not doing the work of the profession. To put the matter in the older terms which Mr. Singletary and Mr. Smith understood, such a lawyer is not a "man of learning." He has no place in what we always like to call a "learned profession."

Veblen's dyspepsia went beyond the method of legal education. He doubted the integrity of the profession. This is what he meant when he wrote, "With the main exception of law (and, some would add, of

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<sup>12</sup> *Id.* at 270.

Divinity?), the professional schools train men for work that is of some substantial use to the community at large."<sup>13</sup>

So, today, do most schools of law (and, so it would seem, do most schools of divinity). Today, more than ever before, it is the schools of law—the faculties and the law reviews—which are the centers of real legal endeavor: not just centers of codification, and of expert case analysis, but of the kind of thinking which underlies fundamental legal reform. Each of us can draw up his own catalogue of academic men who have placed their stamps on the public life of the nation. Two whom I especially revere—who moved from the university to the bench—were Felix Frankfurter and Wiley Rutledge. But, if I may be permitted to add another who is yet living, I would single out a man who stayed in his law school and built there a permanent citadel of intellectual strength. I am thinking of my own senior colleague, Arthur Corbin, who, deep in his seventies, *began* to publish the thirteen volumes which are helping to reshape the commercial law of the nation. Men like Corbin and Frankfurter and Rutledge are, I submit, today's aristocrats of the law. It is in their lives that Tocqueville's spacious view of our oft-grimy and sometimes noble profession is vindicated.

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<sup>13</sup> VEULEN, *op. cit.* *supra* note 10, at 207-208.