MARY ANN GLENDON

A NATION UNDER LAWYERS

HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY

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A Nation Under Lawyers

My friends, I'm here to tell you the lawyers won!

—Democratic Party chairman RON BROWN
to American Bar Association leadership
forum, November 1992[1]

Young Alexis de Tocqueville, journeying through the United States in 1831 and 1832, was struck by the pervasive, yet oblique influence of judges, practitioners, and legally trained officials. "I should like to get this matter clear," he wrote, "for it may be that lawyers are called on to play the leading part in the political society which is striving to be born."[2] A flourishing lawyer class, in his view, was just what the new republic needed. What other group was so well suited to keeping their fellow citizens aware of the eternal paradox that there can be no liberty without law? The legal profession would serve as a rudder for the democratic bark as she and her rowdy passengers set out on the perilous voyage of self-government.

What would a friendly observer like Tocqueville make, one wonders, of the diverse American legal profession of the 1990s? What are *we* to make of nearly 800,000 practitioners, judges, and teachers wielding more influence than ever, but rapidly shedding the habits and restraints that once made the bench and the bar pillars of the democratic experiment? What does it mean for our law-dependent polity that startling new attitudes about law and the roles of lawyers are emerging, not merely on the fringes of the profession but in traditional citadels like the Supreme Court, the American Bar Association, and the major law schools?

It was a sign of changing times when the late Grant Gilmore, a grand old man of law teaching, took the occasion of the legal academy's most prestigious lecture series in 1974 to scoff at the rule of law as a "meaningless slogan."[3] From the same platform where Benjamin Cardozo had once delivered classic lectures on the interplay of freedom and constraint in judging, Gilmore thumbed his nose, so to speak, at the words engraved on the portals of courtrooms and law schools across the nation: *Sub Deo et Lege*. "Ours is a government not of laws but of men," he declared. "It is only an occasional unreconstructed cold warrior who still proclaims the virtues of the rule of law." Gilmore was no rebel; nor did his views attract criticism from fellow academics. By 1974, legal educators from Cambridge to Palo Alto were preaching the rule of men, not law, with all the zeal of the boy prophet in Flannery O'Connor's *Wise Blood* proclaiming the Church of Truth without Jesus Christ Crucified.

If it were only in the legal academy that the rulemeisters had become restless, the political implications might be negligible. The 6,000 or so legal educators in the United States, after all, constitute less than 1 percent of the legal profession. But a new spirit is stirring among the country's 27,000-member judicial corps, too. That was plain in 1992, when three Supreme Court justices widely regarded as moderates claimed for the Court a more exalted role than any to which the original judicial activist, John Marshall, had aspired in his boldest moments. Chief Justice Marshall made history in 1803 by asserting judicial power to review legislative and executive action for conformity to the Constitution. But he never proposed, as did Justices Anthony Kennedy, Sandra O'Connor, and David Souter, that the Court's powers should include telling the country what its "constitutional ideals" ought to be.[4] Nor can one imagine Marshall proclaiming that the American people would be "tested by following" the Court's leadership.

Those extraordinary assertions were made in a case that was less notable for its result (substantially upholding a Pennsylvania abortion statute) than for the plurality's grandiose pretensions of judicial authority. Justice Kennedy, speaking to a reporter

that day, seemed to be carried away: he twice compared himself to Caesar at the Rubicon.[5] Turning over in their graves must have been judges like Oliver Wendell Holmes, Benjamin Cardozo, and Learned Hand, forceful intellects and personalities who had striven mightily to avoid even the appearance of judicial aggrandizement.

But the open hubris displayed by the Court's least flamboyant members was very much of a piece with thirty years of decision making in which conservative and liberal justices alike had regularly made light of the principle that the basic course of our society is to be charted by the people acting through their elected representatives. The ill-concealed authoritarianism of recent high court decisions even got under the skin of a leading academic advocate of expanded judicial power to reshape old statutes. Yale Law School's normally diplomatic Dean Guido Calabresi wrote in *The New York Times*: "I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting—the very opposite of what a judicious moderate, or even conservative, judicial body should do."[6]

Over the past three decades, strange new currents have been flowing, too, among the hundreds of thousands of practitioners who make up the backbone of the legal profession. In the Law Day rhetoric of bar association officials, exhortations to uphold the rule of law increasingly have given way to self-serving portrayals of lawyers as vindicators of an ever-expanding array of claims and rights. In two successive revisions of its rules of ethics, the American Bar Association has removed almost all language of moral suasion, abandoning the effort to hold up an image of what a good lawyer ought to be in favor of a minimalist catalogue of things a lawyer must not do. Conduct once strictly forbidden is now not only permitted but widely practiced. Lawyers' advertising, to take a well-known example, has been pronounced legal by the courts and ethical by the bar. Not all of its forms are as blatant as the bulletin one group of Chicago lawyers sent to their clients: "We are pleased to announce that we obtained for our client THE LARGEST VERDICT EVER FOR AN ARM AMPUTATION—$7.8 MILLION."[7] But when old-

line law firms began to hire marketing directors and public relations specialists, the rupture with former standards was even more dramatic. The ban on advertising, as we shall see, was but one strand in a great web of understandings that now hangs in shreds.

What does it mean when prominent law professors deride the rule of law, when judicial moderates openly disdain popular government, and when practitioners adapt ethical rules to fit changing behavior rather than orienting their behavior toward standards deliberately set high? These developments are instances of a far-reaching transformation of lawyers' beliefs and attitudes that has been quietly under way since the mid-1960s. Several radical propositions that were once but minor tributaries or countercurrents have achieved respectability and prominence, if not dominance, in mainstream legal culture: that we live under a rule of men, not law; that the Constitution is just an old text that means whatever the current crop of judges says it does; that all rules (including rules of professional ethics) are infinitely manipulable; that law is a business like any other; and that business is just the unrestrained pursuit of self-interest.

Lawyers themselves are confused by the enormous changes that have taken place in judging, practicing, and studying law over the past three decades. Those of us whose professional service spans that period know just how the hero in one of Louis Auchincloss's stories felt when "the basket in which for thirty years he had toted most of his legal eggs burst its bottom and dropped its cargo on the street."[8] The fact is that the unraveling of a familiar, elaborate network of institutions, habits, and attitudes caught the whole profession by surprise. As late as the early 1960s, no one seems to have envisioned any of it. The causes of the disarray, moreover, are so diverse, complex, and intertwined that our heads spun when we tried to make sense of what was happening. It was like unexpected turbulence in an ocean current; the sudden dispersion of a plume of smoke into a swirling cloud; Dionysus appearing at the gates of Thebes.

Caught up in the tumult, most lawyers regard the transfor-

mation of the profession with mingled excitement, apprehension, and bewilderment. Nearly every one of them welcomes the profession's increasing concern with social justice, its growing diversity, and the livelier atmosphere in law schools. In fact, what makes it all so perplexing is that most of the developments now stirring anxiety seem to be by-products or outgrowths of genuine advances. Judicial adventurousness did not seem objectionable when official segregation barred access to ordinary politics. Few who struggled to open the legal profession to women, Jews, and racial minorities dreamed that their ideals could harden into dogmas of political correctness. The tough-talking realism of Gilmore's generation was a refreshing change from the tendency of many of his predecessors to ignore the political and economic context of legal issues. It makes eminent good sense to treat law as, in certain respects, a business. (Abe Lincoln was not ashamed to admit it, why should we be?) Yet the fresh air that is now blowing through courtrooms, classrooms, and law offices seems to be carrying something intoxicating, even unhealthy.

It has not escaped popular attention that all is not well in the world of lawyers. The fact that lawyers figured prominently in the Watergate affair of the 1970s and in the savings and loan scandals of the 1980s threw a harsh spotlight on legal ethics. The no-holds-barred judicial confirmation battles over Robert Bork and Clarence Thomas touched off strident debates on the power and politicization of the judiciary. Critics have sounded alarms about hair-trigger litigiousness. The competitive frenzy that seized the profession in the takeover decade made it plainer than ever that the practice of law is subject to the same maladies that can afflict other profit-making activities.

Less noted by the public or lawyers themselves are the tectonic shifts that have taken place in lawyers' opinions and attitudes over the past thirty years. In that relatively short period, a significant reordering has been taking place in what lawyers believe, or profess to believe, about law and their own roles in the legal system. A major struggle is under way among competing ideas of what constitutes excellence in a judge, a prac-

titioner, a teacher or scholar of law. There has been a quiet revolution in how various types of legal work are valued and rewarded. This reshuffling of values is about the only thing the legal profession does not advertise. Yet, being systemic, it has far more serious implications for our law-dependent polity than any number of flagrant instances of misconduct by individual lawyers.

Changes in legal culture are widening the gap between what lawyers believe about law and government and what their fellow citizens believe. Only a few months before Grant Gilmore scornfully dismissed the rule of law as an empty formula, the nation had been embroiled in a grave constitutional crisis. On October 19, 1973, one man, armed only with the rule-of-law idea, had rejected a direct order from the President of the United States to cease using the courts to obtain tape recordings of White House conversations about the burglary of Democratic Party headquarters during the 1972 presidential campaign. As we now know, the firing of Watergate special prosecutor Archibald Cox was the turning point in the crisis of the Nixon presidency. When notified of his removal, Cox had issued a terse one-line statement: "Whether we shall continue to be a government of laws and not of men is now for Congress and the people to decide."[9]

A meaningless slogan? Hardly. On that occasion, as well as when he argued to Judge John Sirica that "happily, ours is a system of government in which no man is above the law,"[10] Cox tapped into deeply felt popular sentiments. Our legalistic traditions, in fact, made all the difference in the Watergate drama. In many other liberal democracies, the outcome would surely have been different. The foreign press was bemused at the fuss Americans made over the incident. But incorrigibly legalistic Americans were not prepared to be so blasé about the idea of government under law. More than the break-in at Democratic headquarters, more than the subsequent cover-up, it was the spectacle of a White House openly flouting the law that citizens found unsettling and alarming.

Cox's defiance of a lawless President excited widespread

Watergate Special Prosecutor Archibald Cox: "Whether we shall continue to be a government of laws and not of men is now for Congress and the people to decide." *(Photograph courtesy Harvard Law Art Collection)*

admiration. He was a steady, reassuring presence as affairs of state spiraled alarmingly out of control. Americans honor Cox for the same reason that generations of Englishmen have paid tribute to Lord Edward Coke, who instructed James I that even the sovereign must bow before law. A modern-day Coke in a button-down collar, Cox stood firm against the most powerful man on earth. When the lawyer President and his men (many of them lawyers) acceded, the nation breathed a sigh of relief. Cox had upheld, indeed personified, a cherished principle in the midst of moral turbulence.

But if Cox reflected the general mood of the country, it was Gilmore who more exactly mirrored the legal academy to which both he and Cox belonged. Many of the same professors who had applauded the downfall of Nixon exchanged knowing smiles when the "rule of law" was invoked. Like Gilmore, they fancied themselves tough-minded men and women who could live without naive "illusions."

There is a good case to be made, however, that Cox was more realistic than Gilmore. Surely no American adult needs to be told that we live under a rule of men in the sense that laws are made, interpreted, and administered by real men and women. Nor are Americans unaware that those men and women are subject to a tantalizing variety of temptations. Everyone realizes that attorneys may chisel and that judges may be unfair, in the same way they know that a preacher may lie or covet his neighbor's wife. But just as awareness of the frailties of clergymen has not significantly dampened Americans' persistent religiosity, their unsentimental appraisal of judges and lawyers has not, thus far, destroyed their attachment to the idea of a nation under law. The grass-roots legalism to which Cox had appealed was clear-eyed, hard-nosed, and stubborn.

In *From Here to Eternity*, James Jones captured that attitude perfectly. Private Robert E. Lee Prewitt of Harlan County, Kentucky, is trying to make Mess Sergeant Maylon Stark of Sweetwater, Texas, understand why he won't give in to pressure

from higher-ups to join the regimental boxing squad. Prew says:

"Every man's supposed to have certain rights."

"Certain inalienable rights," Stark said, "to liberty, equality, and the pursuit of happiness. I learnt it in school, as a kid."

"Not that," Prew said. "That's the Constitution. Nobody believes that any more."

"Sure they do," Stark said. "They all believe it. They just don't do it. But they believe it."

"Sure," Prew said. "That's what I mean."

"But at least in this country they believe it," Stark said, "even if they don't do it. Other countries they don't even believe it."[11]

The conversation is pure Americana, right down to Prewitt's confusion of the Declaration of Independence with the Constitution, and Stark's naive jingoism.

How closely a country approaches the target of a rule of law, as Sergeant Stark might have told Professor Gilmore, depends on whether those who administer the laws "believe it" and on the degree to which they discipline themselves to "do it." The rule of law is no empty formula; it's a set of institutionalized, time-tested principles that are nothing if not realistic about human nature.[12] Toward the end of minimizing official arbitrariness and securing reasonably stable conditions for social and political life, it proclaims: that law is preferable to the use of private force as a means of resolving disputes; that executives, legislators, and judges are all subject to the law and are to be held accountable if they violate it; that official decisions must be grounded in preestablished principles of general application; and that no citizen can be deprived of freedom or goods except in accordance with due procedural safeguards.

Americans use the rule-of-law idea as a tuning fork to test not only the performance of their officials but also the quality of their society. So far, our nation's response to failures by those who administer the laws has been to change the officials, not to lower the standards. We are rightly fearful of dispensing with measures that have proved their worth in concrete historical circumstances. Most citizens understand that being ori-

ented toward an ideal like the rule of law does not guarantee conformity to it. But people also understand that, in the clutch, ideals reinforced by friends, teachers, colleagues, supervisors, and respected role models will often carry the day. In the end, Cox was the true realist, because, strange to say, legal ideals are an important component of American reality.

It is precisely because of the unique role of law and lawyers in American life that a significant advance of arrogance, unruliness, greed, and cynicism in the legal profession is of more concern than similar developments in, say, banking or dentistry. As Tocqueville noticed long ago: "In the United States the lawyers constitute a power which is little dreaded and hardly noticed; it has no banner of its own; it adapts itself flexibly to the exigencies of the moment and lets itself be carried along unresistingly by every movement of the body social; but it enwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire."[13] A breakdown in self-discipline among lawyers, then, cannot be without consequences for the wider society.

The legal presence that made such an impression on our nineteenth-century visitor is magnified many times today. With the expansion of commerce and the rise of big government, American lawyers wield influence in ways, and on a scale, that Tocqueville could scarcely have imagined. Twenty-three of our forty-one Presidents have been lawyers. At present, the majority of U.S. senators and nearly half the members of the House of Representatives have law degrees. Of the eighteen-member cabinet appointed by lawyer President Bill Clinton in 1993, thirteen were lawyers. For the first time, the President's wife is a lawyer, more visible than her predecessors in shaping policy. Lawyer-dominated legislatures and bureaucracies now extend their reach into every corner of contemporary American life—taxing, subsidizing, licensing, attaching conditions, granting dispensations, mandating or encouraging this and forbidding or discouraging that. The positions that lawyers occupy throughout the corporate, financial, and commercial worlds