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IN DEFENSE OF LAWYERS

*Geoffrey C. Hazard, Jr.**

A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY. By *Mary Ann Glendon*. New York: Farrar, Straus, and Giroux. 1994. Pp. 331. \$24. .

In the title of her book, Professor Mary Ann Glendon¹ aptly appropriates a familiar self-congratulatory pronouncement: ours is a nation under law. In *A Nation Under Lawyers* Glendon presents us with a measured and thought-provoking assessment of the relationship between law, lawyers, and public policy in this country.

In its balance and sobriety, Glendon's analysis is in happy contrast with the tendentious denunciations and lamentations that have become standard fare in recent books about the legal profession.² Nevertheless, she ultimately portrays a profession in disarray, a disappointment and failure not only to the public but also to itself. Along the way she fashions pithy examples of our present condition, a number of which will be referred to below. In developing her thesis, Glendon departs from the critical technique commonly used when dealing with lawyers, which is to compare the deplorable present with an imagined past in which the profession was honorable, competent, diligent, public-spirited, and revered. One can find this imaginary version in writings as early as the fourteenth century in the Anglo-American tradition and in Cicero in the pre-Christian era.

Glendon does not romanticize the past. If there was some Golden Age of the profession — some state of grace from which we have since fallen — she does not attempt to identify it. This in itself makes the book a substantial contribution to the pursuit of a clear-eyed and coherent interpretation of the functions of the legal profession in this country in an historical perspective.

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1. Professor, Harvard Law School.

2. See DEBORAH L. ARRON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION* (1989); PETER M. BROWN, *RASCALS: THE SELLING OF THE LEGAL PROFESSION* (1989); SOL M. LINOWITZ AND MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); cf. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

Tocqueville first systematically noticed the salience of lawyers in the then-new American Republic.³ He saw the salience of lawyers as an inherent characteristic of the democratic form of government, wherever democracy might emerge, rather than as a phenomenon local to the United States. Thus, he assumed that the legal profession would have a similar role in the emerging independent countries of Latin America, in the liberal movement in pre-Bismarckian Germany, and in Canada after its constitutional autonomy was established in 1867. It turns out that Tocqueville erred in this estimate. In no other political system based on personhood equality and suffrage, whether in Canada or Western Europe or elsewhere, does the legal profession play anywhere near as prominent a role in the affairs of government and business as it does here. Be that as it may, Tocqueville proved correct in his assessment of the significance of the legal profession in this country.

Ever since, it has been common ground to everyone observing the American scene that law and legal process are a fundamental element of our political system. The reasons, stated simply, are that (i) lawyers have a licensed privilege to participate in the judicial process and (ii) the judicial process comprises an important component of the political system in this country. It follows that a coherent interpretation of American politics requires a coherent interpretation of the role of the legal profession — including not only lawyers but also judges.

The interconnection between the legal profession, the legal system, and the political order underlies the present book as well as Glendon's previous book, *Rights Talk*.⁴ In that earlier work Glendon explored and deplored the fact that, in contemporary American political discourse, claims of social interest are characteristically translated into claims of legal right. These claims require a lawyer to make the translation from political to legal rhetoric — into pleadings, proofs, legal contentions, constitutional arguments, and so forth. Their opponents then require an opposite number lawyer to present a countertranslation. Once the contentions have been advanced directly in court, a third lawyer, wearing a judicial robe, must settle upon an official translation. In an appeals court there are yet more lawyers wearing judicial robes. When the claimants advance their contentions in the legislature, still other lawyers — legal staff — draft the statutory language in anticipation of the arguments that will later arise in the courts, at which point lawyers for the disputing parties and lawyer-judges will again play their roles.

3. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-80 (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., Alfred A. Knopf 1960) (1835).

4. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

All this concerning such issues as whether parents should receive expensive special education for a child,⁵ whether an environment must be preserved for tiny fish,⁶ or indeed whether a child may come into being in the first place.⁷

Thus does law become politics. I do not mean that the administration of justice through the courts occurs in the same way as log-rolling in Congress or demagoguery in presidential and gubernatorial elections. Nor do I mean that it works in the same way as the bargaining done in local city councils or zoning boards or school boards. Nor do I mean that the judicial process works the same way as the bureaucratic processes of administrative agencies with which many Americans have become exasperated. Nor do I mean to suggest that all adjudication in our system is "political." Most adjudication, after all, involves fairly simple, indeed dull, application of familiar legal standards to routine fact patterns.

In saying that law becomes politics, I mean that politics involves questions of "who gets what" in our political-economy and that in our system, as Tocqueville noted, such questions become legal questions sooner or later. In becoming legal questions, the underlying issues are formulated in legal language, examined through the judicial process, and resolved by judge-lawyers. Often, the courts decide that the prior decisional authority — the legislature or the administrative agency or the local government board — could do what it did. Sometimes they conclude that the prior decisional authority could not do what it did. Approval or acquiescence by the judiciary, however, entails the exercise of nearly as much political authority as does judicial disapproval.

This simple matter of fact has long been understood by people in a position to know. Thomas Jefferson thought that John Marshall's decision in *Marbury v. Madison*⁸ was "political." Andrew Jackson thought Marshall's decision in the Indian lands case in Georgia⁹ was "political." Abraham Lincoln thought the *Dred Scott* case¹⁰ was "political." Theodore Roosevelt appointed Oliver Wendell Holmes to the U.S. Supreme Court in part to assure a supportive vote in antitrust litigation. Franklin Roosevelt tried to pack the Court. Ronald Reagan tried to appoint Robert Bork; George Bush succeeded in appointing Clarence Thomas; and Bill Clinton succeeded in appointing Ruth Ginsburg.

5. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

6. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. 5 U.S. (1 Cranch) 137 (1803).

9. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

10. 60 U.S. (19 How.) 393 (1857).

So how does the situation today compare with that of thirty years ago? Glendon's analysis puts that question in sharper perspective. Consider some of her observations:

- From today's vantage point, the sixties represent the good old days of the profession: "[I]n the early 1960s[,] . . . [i]n many ways we were exceptionally fortunate, entering the profession in a season of unusual prosperity and stability" (p. 88). Nevertheless, Glendon was not offered a job at a premier New York firm because, as a senior partner said, " 'I couldn't bring a girl in to meet [the chairman of a major corporation] any more than I could bring a Jew' " (p. 28).

- "[W]hat seems remarkable about the [old days] is not that lawyers often failed to live up to the ideals their leaders publicly professed, but that lawyers were so widely oriented for so long to a common set of ideals" (p. 35).

- A chief reason underlying the departure of the "elite law firm . . . from 'gentleman's' ethics . . . is the fact that the corporate clients themselves were undergoing fundamental changes" (p. 76).

- "Peacemaking, problem-solving lawyers are the legal profession's equivalent of doctors who practice preventive medicine. Their efforts are generally overshadowed by the heroics of surgeons and litigators" (p. 107).

- "*Brown v. Board of Education* [to my generation of lawyers[,] entering practice in the early 1960's[,] was a sign that law[,] and therefore we[,] could play a part in building a better society" (p. 155).

Glendon then sums up the situation today as she sees it, hearkening back to *Rights Talk*.¹¹

The dismal failures of many local authorities in dealing with racial issues became pretexts for depriving citizens everywhere of the power to experiment with new approaches to a wide range of problems that often take different forms in different parts of the country. Constitutional provisions designed to protect individuals and minorities against majoritarian excesses were increasingly used to block the normal processes through which citizens build coalitions, develop consensus, hammer out compromises, try out new ideas, learn from mistakes, and try again. Judicially ordained, top-down regulations are poor substitutes for local trial and error [p. 168]

From this conclusion Glendon moves on to a critique of contemporary legal education in Chapters Ten and Eleven. Her bill of particulars is trenchant even if familiar:

- Law professors today typically have little or no experience in law, misunderstand law practice, and do not like or appreciate either (pp. 217-18).

11. Glendon, *supra* note 4.

- The "crits" among legal academicians adhere to a political agenda that leads them to trash legal tradition without presenting serious alternatives (p. 214).

- Law-and-economics scholarship too often "achieve[s] the appearance of explanatory power by ignoring or assuming away messy facts . . ." (p. 210).

- Much contemporary legal scholarship consists simply of precious exchanges within the walls of the academy (p. 205).

Glendon's general argument is implicit rather than explicit. Nevertheless, the argument seems pretty clear: The courts, and particularly the Supreme Court, have put our legal system into a project of creating a nationally prescribed order at odds with heterogeneous local practices that would otherwise evolve from the grass-roots level. Worse, this wild ride of Mr. Toad is driven by the dilettantes of the higher academy.

As one of its many attractions, Glendon's presentation leads me to reflection rather than to mere agreement or rejection. From my viewpoint, virtually every observation she makes rings true. Lawyers who came of age before the sixties — or, at least the white male subset of them — will think she has it right. She has it right that Mr. Justice Brennan was an incorrigible optimist concerning the potential of law, particularly judge-made law, to redress injustice in our society.¹² She has it right that many current members of the profession loathe their work and what it compels them to do. Finally, she has it right that many legal academics are refugees from a world of practice that they consider socially idiotic and morally corrupt, but which they do not know how to change.

Yet there is an additional interpretation, but not necessarily a different one, of the same phenomena. It seems to me that *Brown*¹³ is pivotal in everything that has occurred in our legal system since 1954, and therefore many things that have occurred in our society since then. Perhaps I need to say at once that I believe *Brown* was a necessary decision. Perhaps it should also be said that virtually no academic or political personage today will say that *Brown* was not a necessary decision. Judge Bork stopped short of repudiating *Brown*, leaving him in a hopeless predicament: he criticized — as a usurpation of power — every politically activist decision of the Supreme Court except the one that was quintessentially activist. Nevertheless, we have not yet come to terms with *Brown*'s significance in our legal system.

12. "In many ways, Brennan dominated the Court during his long tenure through sheer energy, personality, and political savvy. . . . [He] had come 'to personify the expansion of the role of the judiciary in American life.'" P. 157 (quoting *Talk of the Town*, THE NEW YORKER, Aug. 6, 1990, at 27).

13. 347 U.S. 483 (1954).

At the base of the problem lies the fact that almost all of “us” — judges, lawyers, law professors, academicians in other disciplines, journalists, and most members of the higher literate class — treat *Brown* as an unexceptional product of the American legal process, rather than as a legal and political earthquake. Prior to *Brown* the Supreme Court had been activist. But it was activist occasionally rather than systematically; activist in enlarging the authority of the national government but in a substantively neutral way; and activist for the benefit of blacks only over the preceding twenty years and then only in limited degrees and stages.

It may help to imagine the legal situation as it stood immediately before *Brown*. The “separate but equal” doctrine of *Plessy v. Ferguson*¹⁴ provided the law. Under that doctrine, nominal equality in treatment of blacks — the country’s largest “insular minorit[y]”¹⁵ — satisfied equal protection under the Fourteenth Amendment. Our society was almost as segregated in 1954 as it had been for the previous fifty years. Finally, a very plausible argument existed that, given the separation of powers in the Constitution, a change in the *Plessy* rule could come only through Congress.¹⁶

What if the Court had decided *Brown* the other way? The issue of disparate treatment of blacks would have remained for Congress to handle, and Congress would probably have taken no action for years, perhaps decades, to come. After all, the threat of desegregation had long sustained the solidity of the South, which held the U.S. Senate in its grip through its exercise of the filibuster rule. In such a legal-political climate it becomes difficult to imagine how less radical claims could cogently be made in court. That is, national law would have continued to permit a state or locality to segregate blacks in school and other places of public accommodation, to systematically deny them the right to vote, to allow or require segregation in the workplace, to exclude them from juries, and to allow local criminal justice to function as it might. In such a legal order, how would national law have responded to the following contentions: an accused criminal is denied equal protection when he is not provided with a lawyer; a woman is denied equal protection when she is excluded from jury service on the basis of her sex; residents of a political community are denied equal protection when the structure of their legislative constituency falls materially short of “one man, one vote”; a political organization dedicated to political equality, such as the NAACP, is denied some kind of con-

14. 163 U.S. 537 (1896).

15. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

16. This, in fact, was one of the principal arguments by the defendant school boards in *Brown*. See 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 759, 811 (Philip B. Kurland & Gerhard Casper eds., 1975).

stitutional right when it cannot actively seek out “test-case” litigation; the prosecution may not introduce evidence obtained by means that violate the accused’s constitutional rights; and so forth?

Of course, in the years after *Brown* lawyers successfully asserted the foregoing claims and many more as well. Each of these claims, however, directly attacked a local rule that had been established, in Glendon’s words, by “the normal processes through which citizens build coalitions, develop consensus, hammer out compromises” (p. 68).

President Eisenhower had these normal processes in mind when he withheld his support for the Court’s decision in *Brown*. It was only after President Kennedy’s assassination in 1963 that Lyndon Johnson, a Southerner, marshalled a coalition to provide political support for the proposition that equal protection must be not merely nominal but real in some degree. It was with that support that the Supreme Court continued to be activist; that the practice of law became an inviting prospect for reformers; and that the tension between being a big firm lawyer and being dedicated to social progress through legal process evaporated. It was in that period, too, before the Vietnam War fell in on us, that many bright young people, later to become faculty members at leading law schools, acquired their understanding of the proper function of the legal process in this country. That function, as expressed by the Warren Court, was to bring about social justice.

Pursuit of social justice, or any other kind of justice, through legal process differs from its pursuit through majoritarian democracy. Government by lawyers involves different “conversations” — contentions, arguments, considerations, modes of decision, means of avoiding decision. Above all, it involves different final decisionmakers — primarily federal Justices and judges holding office for life.

This group of officials serves in a ministry exercising the “judicial power.” The ministry is recruited from a limited sector of the population (lawyers), uses a peculiar language (law talk), and allows the general public only indirect participation in its decision-making. Nevertheless, the judiciary has long sustained general political support. The explanation of how the judiciary, particularly the Supreme Court, successfully retains such support remains something of a mystery in American political science. The reflection inspired by Glendon’s book, however, suggests a general answer: The Supreme Court has demonstrated capability in maintaining the rule of law in our turbulent democracy. That capability matters above all to various influential minorities among our people — religious minorities, regional minorities, people of wealth, and others. It is that capability that many of the judiciary’s constituents have been

unwilling to undermine, even those who thought *Brown* a profound mistake.

Our society could not obtain the benefits that have flowed from *Brown* — primarily, but not exclusively, the moderation of invidious distinctions of the kind that Glendon encountered in her job interviews — without a corresponding change in the system of governance that had sustained the prior social order. Change required regular resort to the courts in political initiatives on behalf of minorities and the poor. The legal process simply held out a better chance of success than did the majoritarian political system. The resulting shift in the structure and process of government is indeed aptly entitled “A Nation Under Lawyers.”

Shift in another direction may now be in prospect.