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# Leader Groups in American Law

Max Rheinstein†

If one surveys the major legal systems of the world, he finds that each has been molded by a particular group of leaders. Private gentlemen of leisure and, later on, high-ranking officers of the administration left their imprint on the law of ancient Rome. Theologians like Islamic mullahs, Jewish rabbis, and Hindu Brahmins shaped the sacred laws of their secular communities. The law of England was made by the judges of the royal courts. European continental laws received their characteristic features through the work of learned scholars, from the days of Irnerius down to the Pandectists of the nineteenth century. Max Weber, who traced these influences on a worldwide scale,<sup>1</sup> called these shapers of the law the *Rechtshonoratioren* (*honoratiore*s of the law). In his inquiry into the roles played by judges and scholars in structuring the legal systems of England, France, and Germany, John P. Dawson speaks of the *Oracles of the Law*.<sup>2</sup> Such unfamiliar terms may be useful to describe so novel a concept. A common term like "leader groups" may easily evoke erroneous ideas. But I still prefer it, and the meaning with which it is used here will, I hope, emerge from the following discussion of familiar facts of American history.

Heinrich Triepel<sup>3</sup> in Germany and Karl N. Llewellyn<sup>4</sup> and Gerhard O. W. Mueller<sup>5</sup> in this country have shown that characteristic styles exist in legal systems as well as in art and literature. One would expect such differing patterns since creation, application, and development of law partake of the character of art. The style by which the legal art is characterized depends, just as in painting or in poetry, on the identity

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<sup>1</sup> M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Rheinstein ed. 1967).

<sup>2</sup> J. P. DAWSON, *ORACLES OF THE LAW* (1968), *reviewed*, Rheinstein, 18 *AM. J. COMP. L.* 447 (1970).

<sup>3</sup> H. TRIEPEL, *VOM STIL DES RECHTS* (1970).

<sup>4</sup> Llewellyn, *On the Good, the True, the Beautiful in Law*, 9 *U. CHI. L. REV.* 224 (1941).

<sup>5</sup> G.O.W. MUELLER, *COMPARATIVE CRIMINAL LAW IN THE UNITED STATES* (1970).

of the artists. The words of Rudolph Wiethölter recently reminded me of the diversity of legal styles: "We do not have to harbor any fear that members of the legal system will bring about a change of the social order. Quite the contrary, society is being stabilized and the status quo is maintained primarily by means of the law and the lawyers."<sup>6</sup>

As to Germany, this proposition may contain a grain of truth. For a considerable period it also would have been applicable to England. But it certainly does not apply to the United States or, to speak more correctly, to the present third phase of the legal development of the United States. In that development each of three successive phases is characterized by the leadership of a particular branch of the legal profession. The impact of these groups is shown so clearly that it provides a striking illustration of the general role of legal leader groups.

## I

The first phase of the legal development of the United States extends approximately to the Civil War. During this period the leading branch of the profession was the same as it had been in England, namely the judiciary. The law that was created by the lordly judges at Westminster was meant to serve the needs of the big landowners, of big business, and of the City of London. Until recently the common law of England had little interest in the needs of little people. Access to the administration of justice was impeded by the high cost. The spirit of the common law was conservative; the judges saw themselves as representatives of what has now come contemptuously to be called the Establishment.

Did any Establishment exist in the early period of the United States? It certainly did in the South where economic, political, and social power lay with the slave-owning planters of cotton and tobacco. Perhaps one could also find an Establishment in New York, Philadelphia, or Boston where a commercial community had begun to play an economically and politically significant role. However, the North and even more the Western frontier, as they continuously increased in population density and prosperity, were wide open geographically and socially. The society in these regions fluctuated and vacillated between the anarchic inclinations of the adventurers and the desire for a fixed order of those settlers of the cities and farms who had attained prosperity.

Generally, American society was colorful, tumultuous, anti-authoritarian, and passionately adverse to privileges of birth or status. This social climate was reflected in the spirit of the legal profession and consequently in that of the bench, the major part of which emerged

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<sup>6</sup> DER SPIEGEL, No. 32, 1969, at 99.

through popular election. Only reluctantly can one apply the term "jurist" or even "lawyer" to the large and heterogenous fold of the bench and bar in the period around 1840. The major part of its members were craftsmen of legal practice, and their training was that of craftsmen. The typical lawyer began his career as an apprentice in the office of an attorney, was used as a messenger boy, clerk, or office helper, watched the "master" in court, and copied more or less established forms of contracts, conveyances, and wills. In addition, he perhaps read the four volumes of the American edition of Blackstone's *Commentaries*. When he felt ready for the bar examination, which was not overly difficult, he made a first try and as many repeated efforts as necessary. After admission to the bar he practiced more or less ably, engaged in politics, and, once the necessary contacts with influential persons had been established, he ran for political or judicial office.

The law and its administration underwent a transformation from an esoteric art into a popular craft. But the astonishing fact is that the law did not become chaotic. Continuity with the common law of England was preserved even though the law had to be adapted to the needs of a rapidly developing country of different geographic, political, and social conditions. A great majority of the judges combined the technique of the common law, which they had acquired through practical observation and training, with the fine finger-tip sense for the needs of a given situation which they had developed through experience in political life. In addition, the members of the bar and the bench also comprised quite a few men who had received solid legal training in England and who, in one of the growing number of American colleges, had acquired the humanistic education that was required of the upper classes. John Marshall, Joseph Story, Lemuel Shaw, Roger Taney, Daniel Webster, and Rufus Choate are just a few outstanding examples. Such persons attained leadership through their intellectual superiority, through their ability clearly to express their thoughts in cultured English, and through their knowledge of the world, including the legal culture of the European continent.

The confluence of these various elements produced a judge-made law that often widely differed from the English model. The command of the binding effect of precedent was taken less seriously than in England, and legal thinking did not move exclusively along the channels of strict case analogy. Philosophical and technical concepts, at times of broad generality, came to be used. Decisions, especially innovative ones, tended to be justified by reference to principles of natural law or political theory. Both branches of the common law, the English and the American, were made essentially by judges. However, Amer-

ican judges were different from their English counterparts, and consequently the law that they created assumed a style which diverged from that of the law of England.

## II

With the victory of the increasingly industrialized North over the capitalist-agrarian South, American legal life entered the second phase, in which leadership shifted to a new group. As the land was opened and the growth of industry accelerated, the high financiers and industrialists became progressively more powerful. Positions on the bench became less attractive. Men of vitality and creative energy, attracted by the economy, devoted themselves to developing the resources of the country. For the legal mind of outstanding ability it became more attractive and rewarding to place himself at the service of business, and thus to occupy a leading position in the economy. Candidacy for judicial office was left to mediocre lawyers who were dependent on political bosses.

This change in the type of leaders influenced the character and operation of the legal system in two ways. Legal thinking, which until this time had been highly dynamic and creative, became more rigid. The law became conservative. Its style as well as its content was altered in the process. In a pattern similar to that which simultaneously evolved in England, precedents came no longer to be treated as evaluations of concrete sets of facts. Weight was given to those conceptual formulations that found expression in judicial opinions. The conceptualistic style of thinking of the German Pandectists had found its way into England through the Hanoverian university of Göttingen. American legal thought presented that very same trend toward conceptualism or, to use Weber's terminology, toward formal-rational thinking. The penetration of this method into American law at the turn of the century confirms Weber's thesis that formal-rational thinking is especially compatible with the economic system of capitalism. It results in a high degree of stability of judicial practice, in predictability of judicial decisions, and consequently in the possibility of long-range private economic planning of credit and investment.

The judges were helpful to capitalist employers not only in the style of their thinking but also in the contents with which they filled the legal system. Such active support was consistent with the temper prevailing among the American people. To them the country presented unlimited possibilities of space, of natural resources, and of chances, through personal and entrepreneurial initiative, rapidly to obtain unlimited wealth, or equally rapidly to lose it. Open the door

to the able, and woe to the unfortunate. He who was rolled over by the wave was lost. There was no room for a policy of social security or of help for the weak. The demand was for freedom to build up the country through courageous enterprise, and the judges answered that demand. John Roche has shown how well the content of the legal system corresponded to this trend of the times.<sup>7</sup> The leading position in the legal profession was occupied not by the judges but by the legal advisors of industry and finance who molded the law, both in content and form. Although from his vantage point as a French comparatist, Edouard Lambert believed that the period was characterized by the government of judges, in fact it was characterized by the government of general counsel.<sup>8</sup>

But the transformation of the method, the change from material-rational to formal-rational thinking, was also connected with the rise of a new group of co-leaders of the law, the academic teachers and scholars—the professors. Through them American law has been impregnated with traits which are well known in the classical professorial law of the European continent, especially Germany. They developed a trend toward clear concepts, consistent definitions, and systematic arrangement. The growth of the professorial influence in the United States is partly explained by the same factor that gave the continental European law its character of a book law, a professorial law. In the United States, as in eighteenth and nineteenth century Europe, an area of uniform culture has been split into a multitude of territories, each with its own law. And as in Europe, there has existed no superior court with the power to bring these separate legal systems into uniformity.

The task of preserving the basic unity of American law is served by such organizations as the National Conference of Commissioners on Uniform State Laws and the American Law Institute, and it is assisted by the personal contacts arising from the multitude of meetings of the American Bar Association. But the danger of American law being split up into fifty or more different compartments is being overcome more effectively by the university law schools and their professors. Until far into the nineteenth century the English system of apprenticeship training was the normal system of American legal education. But, building upon foundations laid in the eighteenth century, universities began the task of systematic legal education in the nineteenth century. Today, although some remnants of the apprentice system persist, and

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<sup>7</sup> Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103 (1963); Roche, *Entrepreneurial Liberty and the Commerce Power*, 30 U. CHI. L. REV. 680 (1963).

<sup>8</sup> E. LAMBERT, *LE GOUVERNEMENT DES JUGES* (1921).

part-time study at night school is not uncommon, the normal course of legal studies is attendance at a university law school. In many university law schools the students are drawn from the school's own geographic area, and the local law plays a major role in the curriculum. But nowhere is it taught exclusively. And what is taught in those great national law schools, the students of which are drawn from all parts of the nation? An attempt to teach the law of every jurisdiction not only would be impossible, it would be sheer nonsense. What must be cultivated is American law, which is a law that, as such, is in effect everywhere and nowhere. The curriculum necessarily must concentrate on those elements which are common to the laws of all the states. That means concentration on the common law tradition—on the principles and, above all, the method of common law thinking. In stressing these factors, present-day American legal education resembles European legal education of the eighteenth century and German legal education of the nineteenth.

For counsel and guidance the practitioners of the local courts look to the legal scholars. These scholars are united in a nationwide organization; many of them move from state to state. For all of them American law constitutes the subject matter of their scholarly and teaching activities. Because the professors are not only the teachers of the practicing branch of the legal profession but also the guides and advisors, American law, as actually practiced, has begun to assume some of the traits of a professorial law. It has tended toward systematization and occasionally toward creation of concepts of high abstraction. In these respects American law has acquired a certain resemblance to continental European legal systems.

The new professorial features have found significant expression in those comprehensive treatises, such as Williston on *Contracts*, Wigmore on *Evidence*, the works of Scott and Bogert on *Trusts*, and Davis on *Administrative Law*, in which American scholars, much in the manner of their continental European brethren, have presented major branches of the law. The new trend culminated in the American Law Institute's *Restatement of the Law* which attempted to distill the "true" common law out of the enormous mass of precedents and to present it in the manner of a systematically arranged code. In this gigantic enterprise it was natural that professors played the leading role. If the *Restatement* had achieved the effect it was hoped it would achieve, American law would have approached professorial law of European style. But the success has been limited. The practitioners, accustomed to the traditions of case law, were unwilling fully to submit to the new style. But the *Restatement* exists, and it has made an impact on the courts. More-

over, the large number of participating scholars and practitioners were strongly stimulated and influenced through the very process of its creation.

American law professors thus have become influential leaders of the law. In certain respects this influence has had consequences similar to those which professorial influence has had in Europe. However, in the United States the professorial influence has made itself felt in another direction, and this circumstance is due to the transformation undergone by the American legal scholars.

### III

The transformation of the attitudes of the legal scholars coincides with the transformation of the intellectual and political climate of the country. Conservative *laissez faire* is being replaced by a "liberal" social policy of active governmental interference in favor of groups which, under the system of *laissez faire*, had obtained but an unsatisfactory share of the affluence of the nation. The workers were the first group to obtain such attention, then the ethnic minorities, especially the Negroes, finally the "poor," whoever they may be.

The country was shaken profoundly by the Great Depression of 1929, which shattered the faith in the irresistible force of automatic progress. In Franklin D. Roosevelt's New Deal, the government intervened in the economic life of the nation in order to reestablish the shaken economy. Prior to this time, social scientists had propounded the idea that social reforms were necessary and that they had to be carried out through active governmental intervention. With the advent of the New Deal the implementation of this idea became politically feasible.

The legislative bodies appeared, at first, to be the natural carriers of the new policy. But two kinds of obstacles stood in the way. First, legislators inclined to proceed with social reforms met with the resistance of conservative judges who frustrated essential parts of social reform by declaring the pertinent laws unconstitutional. This judicial resistance was eventually overcome. But the second obstacle remained; in many cases legislatures were disinclined to initiate social reforms, even when such reforms were politically inevitable. For example, although the legislatures in general were willing to assist labor, Southern legislatures were unwilling to repeal racially discriminatory laws, even if such repeal was made necessary by the impact upon the United States of postwar world opinion.

Something had to be done and, since no one else was willing or able to do what had become inevitable, the courts had to step in to fill the

gap. The Supreme Court of the United States made the first strides, which were followed by the lower federal courts and ultimately by the state courts. The judicial tendency to give serious consideration to political values reemerged, and its reemergence was facilitated by the case law tradition. Judges working within the framework of case law must constantly search for analogies between the case at bar and the existing precedents. During the earlier part of the twentieth century the analogies were widely found in similarities of an abstract and conceptual character. But quite easily, or one might even say naturally, analogies may be discovered in the similarity of ideological value judgments. This method of legal reasoning had never been lost in American case law, even though it was temporarily pushed into the background. It became dominant again when it began to correspond to the ideas of the new legal leaders, the professors.

The last forty years have seen a dramatic rise of the professorial influence in the United States. It was strengthened when law teachers like Rutledge, Douglas, Frankfurter, Schaefer, O'Connell, and Traynor were called or elected to high judicial positions. At the same time the new leader group also became potent in legislation and administration. Professors began sitting on the committees charged with the preparation or reform of legislation, and when a professor sits on a committee he is likely to exercise a leading influence. In the administration as well as in government agencies, professors were called to policy-making positions which they would occupy for a number of years until they returned to their universities or became business lawyers.

The new professorial influence took a direction different from that which professors had exercised in the preceding phases of American law. This change was caused by the transformation that occurred in the ideology and the methods of legal learning, and that transformation was, in turn, caused by the general change in the ideologies dominant in the nation. In addition, two special factors of American legal education explain the emergence of professors as protagonists of reform rather than defenders of the status quo. The first is the invention of a new method of instruction. Under the case method, the law is not presented through academic lectures which would require systematic organization and conceptual fixation. Instead, the opinions of appellate courts are discussed and subjected to trenchant critique. In this process one is not satisfied with conceptual analysis. Inevitably, one begins to search for the policy reasons by which the judges were moved, and one seeks to discover the ways in which life is actually being affected by the work of the courts. One learns to read between the lines, to look at the case as an attempt to resolve a conflict between divergent interests of

different groups. One tries to discover the reason why a judge has favored one group over another, or the manner in which he has sought to work out a compromise between them. One tries to predict what influence the decision is likely to have on economic or social reality. One learns that voluntaristic elements stand behind the alleged compulsion of the conceptualistic formulae—in other words, that judges have power. Thus comes the realization that judges, through their decisions, can influence the course of social life, can restructure society, can be social engineers.

The second factor of American legal education which explains the active role of professors in social reform is the interaction between American legal learning and the social sciences, which had been growing vigorously in the United States. This development first found expression in the sociological jurisprudence advocated by Roscoe Pound, and then, in a more radical way, in the realist movement of the 1930's. The interaction resulted from the admission practices of the leading law schools, which all began to require attendance at a college as a necessary preliminary to admission. In all colleges social studies became a necessary part of the curriculum. The familiarity with social science consequently acquired was carried over in law school into the critical discussion of cases. It was exercised in the classroom as well as in the study of the scholar. Integration of the social sciences with legal learning was vociferously demanded. Social scientists joined law school faculties. Teamwork by representatives of the two branches of learning was at times vigorously pursued. As social scientists worked toward objective insight into social reality, they discovered that the American Dream had not been as fully achieved as the public was inclined to believe. Sizable groups of the population had not reached full participation in the achievements of the Century of Progress. This realization caused many social scientists to become political "liberals"—advocates of social reform through government action. And for the representatives of the social science of law, the courtroom became the vortex of policy formulation.

As a result of the case method of legal education and the integration of law and social science, in the present third phase of American legal development the judges are more in need of professorial guidance than ever before. The case method bestows a peculiar character upon the work of the American legal scholar, namely an awareness that judging, especially appellate judging, involves creation of law. This awareness accounts for his primary interest in the possibilities of settling social conflicts and in thus establishing the good society upon the democratic pattern. Accordingly, the legal scholar devotes himself to the

monographic investigation of relationships between law and life. His research is legal fact research in which social science methods are used extensively. This kind of research cannot be performed by busy judges, who in their daily work have to deal with a great variety of problems. It requires the attention of specialists who have the time to become experts—in other words, the professors. American law consequently tends to become a professorial law, but a professorial law that differs widely from the European law that existed in the heyday of European professorial influence.

#### CONCLUSION

One who tries to understand the American law of today must know who its leaders are, by what ideas and ideals they are inspired, and in what ways they exercise their influence. What applies to the American law of the present also applies to the past phases of its development. Each of these periods had its own kind of leaders and consequently its own peculiar character. Understanding these facts and relationships opens up awareness of essential features of legal history. It also opens up awareness of essential characteristics of legal orders of different countries.

Comparative law can no longer be carried on in the method of comparing conceptual elements. Its method can only be functional. The comparatist must become familiar with the problems of social life and then must investigate the tools by which the world's different legal orders seek to solve these problems. He will also be interested in the results achieved with the various tools. He has come to recognize that law is not an autonomous phenomenon capable of being investigated in isolation from other social phenomena. He knows that law, with all its rules and institutions, is an aspect of social life, that it must be studied in its relationship to all the other aspects of a society's cultural climate. Particularly important is an understanding of the ideologies with which it is imbued. The task of the comparatist is to develop his feel for these relationships, to discover and to describe them, to disentangle the strands of the seamless web of social relationships. This arduous task is facilitated if, in the study of a particular culture, one interposes between the law and society the human beings who are the mediators between them. Of course, the leaders of the law are themselves determined by the structure of the society in question. Systematic observation of leader groups can thus be the bridge from which one can discover the relationship between a society's cultural climate and its legal order.