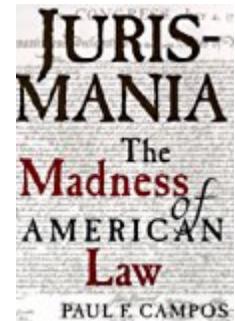




Paul F. Campos. *Jurismania: The Madness of American Law*. New York and Oxford, England: Oxford University Press, 1998. x + 198 pp. \$23.00 (cloth), ISBN 978-0-19-510785-2.

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## A Diagnosis of the Ailments of the American Legal System

Commentators have frequently taken note of the passage in *Democracy in America* where Alexis de Tocqueville contended that lawyers would inevitably exert significant influence in the American political system. As he argued: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.... The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.”[1]

Much less attention has been given, however, to the passage in which Tocqueville praised the influence of lawyers and legal reasoning, and where he concluded that, in the United States, “the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government.” As he argued: “[Legal counselors] oppose their aristocratic propensities to the nation’s democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its immense designs; and their habitual procrastination to its ardent impatience.”[2]

At the close of the twentieth century, analysts are increasingly inclined to confirm de Tocqueville’s predictions in regard to the continuing extent of the influence

of the legal profession, but to take issue with his assessment of the benefits of this influence. In *Jurismania: The Madness of American Law*, University of Colorado Law Professor Paul Campos has undertaken to identify, illustrate, and explain the ways in which lawyers, judges, and legal theorists have impoverished American politics and culture. “[I]ntended for the general reader whose experience of American law has made him or her wonder if there might not be something fundamentally wrong with a system of social coordination and dispute processing that ‘works’ in the way ours does” (p. viii), *Jurismania* contains a wide-ranging and provocative series of essays devoted to supporting the central claim that, “in its extreme manifestations, what Americans call ‘the rule of law’ can come to resemble a form of mental illness” (p. ix).

At its root, Campos argues, this illness consists of “an often irrational worship of rationality” and “a mania for giving reasons – a kind of widespread cultural syndrome that is the product of a neurotic goal. That goal is to rationally resolve social disputes that are not amenable to rational solution, but that those suffering from the syndrome have been acculturated to believe both must and can be resolved through the use of reason” (p. viii). Not the least of the various consequences of this phenomenon is that “the political and moral rhetoric of our public culture is plagued both by severe conceptual incoherence and by that dogmatic denial of any such incoherence a rationalist culture always elicits from its defenders” (p. ix).

Campos is at his best when he is detailing the various symptoms of this malady, which “manifests itself wherever the forms of cognitive dissonance that mark modern moral discourse are particularly acute” (p. viii). The reader is therefore treated to all sorts of colorful illustrations and observations (some of which are discussed at length and others of which are not), ranging from critiques of Ronald Dworkin’s analysis of *Roe v. Wade* and Martha Nussbaum’s interpretation of Nietzsche, all the way to commentaries on the risk-free shopping guarantee offered by Alfalfa’s Market in Boulder, Colorado and the code of conduct in effect at the public library in Campos’s hometown of Louisville, Colorado.

Among the more illustrative of these discussions is his analysis of the National Collegiate Athletic Association’s three-hundred-page regulatory code, which includes a stipulation that “[n]ewspaper clippings may be sent to a prospect, but may not be assembled in any form of scrapbook” (p. 7). According to Campos, this is a perfect example of a “sphere of human activity that is understood to be corrupt in some essential way” and “is therefore subjected to the most exquisite regulatory schemes, as if saturating the activity with juridical requirements will somehow transform its rotten essence into something rich and strange” (p. 10).

The next step is to undertake a diagnosis of the problem, and it is here that Campos makes his most important contribution, by introducing the concept of a “moral, social, and legal equilibrium zone” (p. 160) as a way of explaining why Americans are increasingly inclined to turn to law in the hope of resolving intractable social and political dilemmas. It is his contention that most important legal conflicts take place in equilibrium zones, where “powerful competing considerations can be adduced for holding a variety of views” but “such considerations can’t be refuted without recourse to some axiomatic ground of argument that others do not accept and that, precisely because it is axiomatic, cannot be argued for rationally” (p. 160). Campos makes it clear that his argument is not based on a commitment to “moral relativism” (p. 160). Rather it stems from a belief that “[m]oral debate in our public culture is at present in a state of almost total confusion” (p. 158) and that there are a number of issues (abortion would be a leading example, as would the current debate over physician-assisted suicide) in regard to which “we no longer have a widely shared sense of what it even means to call ... choices ‘right’ or ‘wrong’” (p. 158).

Were Americans willing to accept the existence of

“intractable ethical pluralism” (p. 160), Campos suggests, there would be few difficulties. The problem arises on account of the fact that all too many people “remain entranced by the rationalist conceit that matters of deep political conflict are usefully amenable to rational argument” (p. 41), and as a result, “the tacit ideology of American civic life has become burdened with the widespread delusion that something called ‘the rule of law’ can succeed where politics and culture fail” (p. 181). As a consequence, Americans are increasingly willing to defer the resolution of contentious issues to judges, who are left to “dispose of the most intractable social and political disputes by essentially arbitrary acts of fiat, while at the same time claiming their decisions are impelled by ‘the law’ or ‘our constitutional traditions,’ or ‘fundamental rights inherent in the concept of ordered liberty,’ or some similar magic phrase” (p. 41).

Having identified the symptoms and offered a diagnosis of the cause of the illness, Campos turns, finally, to prescribe a remedy. Although this closing section is the most provocative part of the book, it is also the chapter that is most in need of further development and clarification. After considering and rejecting the possibility that American law schools should “perhaps be abolished altogether” (p. 175), Campos eventually settles on a policy of “renunciation” (p. 188), which would seek to “break[] our addiction to solutions” by “renouncing the search for answers” (p. 189). According to this policy, judges who come across disputes that fall in equilibrium zones would be advised to acknowledge as much and simply decide these cases without giving any reasons for their rulings (p. 193). In Campos’s view, such a policy would not only strip away the pretense that legal reasoning is capable of resolving all matters, but it would also eliminate some of the dysfunctional behavior that is associated with maintaining this pretense (p. 192).

Campos’s proposal is, to say the least, provocative. And insofar as judicial reason-giving could be seen as the chief cause of the ailment of the American legal system, such a policy would likely contribute to the improved health of the system. But as Campos has demonstrated throughout the book, judicial reason-giving would appear to be best viewed as a symptom of an underlying phenomenon that stems from a deep-seated desire for rational resolution of political and social conflicts. As a result, it is not clear that his proposed policy would go very far toward addressing this root cause. Moreover, a complete accounting would have to give much more attention to the many obvious disadvantages associated with adopting such a policy.

This caveat having been noted, *Jurismania* is a spirited and insightful commentary that will force scholars and citizens alike to reconsider the extent to which contentious political and social disputes are amenable to legal resolution. Even those who may ultimately disagree with Campos' more provocative claims and proposals will benefit from a confrontation with his argument.

#### Notes

[1]. Alexis de Tocqueville, *Democracy in America*, Phillips Bradley, ed. (New York: Vintage Books, 1990), vol. 1, p. 280.

[2]. *Ibid.*, vol. 1, p. 278.

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