American Legal History – Russell

Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (1835; New York: Harper & Row, 1969), Vol. I, Chap. 8.

Chapter 8

WHAT TEMPERS THE TYRANNY OF THE

MAJORITY IN THE UNITED STATES

Absence of Administrative Centralization

The national majority does not pretend to do everything. It is obliged to use the magistrates of the townships and counties to execute its sovereign wishes.

I have previously made the distinction between two types of centralization, calling one governmental and the other administrative.

Only the first exists in America, the second being almost unknown.

If the directing power in American societies had both these means of government at its disposal and combined the right to command with the faculty and habit to perform everything itself, if having established the general principles of the government, it entered into the details of their application, and having regulated the great interests of the country, it came down to consider even individual interests, then freedom would soon be banished from the New World.

But in the United States the majority, though it often has a despot's tastes and instincts, still lacks the most improved instruments of tyranny.

In all the American republics the central government is only occupied with a small number of matters important enough to attract its attention. It does not undertake to regulate society's secondary concerns, and there is no indication that it has even conceived the desire to do so. The majority, though ever increasingly absolute, has not enlarged the prerogatives of the central

authority; it has only made it omnipotent within its own sphere. Thus despotism, though very oppressive on one point, cannot cover all.

Besides, however far the national majority may be carried away by its passions in its ardor for its projects, it cannot make all the citizens everywhere bow to its will in the same way and at the same time. The sovereign commands of its representative, the central government, have to be carried out by agents who often do not depend upon it and cannot be given directions every minute. Municipal bodies and county administrations are like so many hidden reefs retarding or dividing the flood of the popular will. If the law were oppressive, liberty would still find some shelter from the way the law is carried into execution, and the majority would not know how to enter into the details and, if I dare call them so, the puerilities of administrative tyranny. Indeed it does not even imagine that it could do so, for it is not entirely conscious of its own power. It is only aware of its natural strength, ignorant of how art might increase its scope.

It is worth thinking about this point. If ever a democratic republic similar to that of the United States came to be established in a country in which earlier a single man's power had introduced administrative centralization and had made it something accepted by custom and by law, I have no hesitation in saying that in such a republic despotism would become more intolerable than in any of the absolute monarchies of Europe. One would have to go over into Asia to find anything with which to compare it.

The Temper of the American Legal Profession and How It Serves to Counterbalance Democracy

Usefulness of inquiring what are the natural instincts of the legal temperament. Lawyers play a great part in a society struggling into existence. How the type of work in which they are engaged gives an aristocratic turn to their ideas. Chance circumstances that may prevent the development of these ideas. Ease with which the aristocracy joins forces with the lawyers. How a despot could make use of lawyers. How lawyers provide the only aristocratic element naturally able to combine with elements natural to democracy. Particular causes which tend to give an aristocratic turn to English and American legal thought. The

> *American aristocracy is found at the bar and on the bench. Lawyers' influence on American society. How their spirit penetrates the legislatures and the administration and in the end gives the people themselves some of the instincts of magistrates.*

Visiting Americans and studying their laws, one discovers that the prestige accorded to lawyers and their permitted influence in the government are now the strongest barriers against the faults of democracy. I think this result can be traced back to a general cause worth examining, because it might recur elsewhere.

For five hundred years lawyers have taken part in all the movements of political society in Europe. Sometimes they have been the tools of the political authorities, and sometimes they have made those authorities their tools. In the Middle Ages the lawyers' co-operation was invaluable in extending the domination of the kings; they have since striven hard to restrict that same power. In England they have become closely united with the aristocracy; in France they have proved its most dangerous enemies. Do lawyers, then, yield to sudden and temporary impulses, or are they more or less obedient, according to circumstances, to constantly recurring instincts natural to them? I should like to get this matter clear, for it may be that lawyers are called on to play the leading part in the political society which is thriving to be born.

Men who have made a special study of the laws and have derived therefrom habits of order, something of taste for formalities, and an instinctive love for a regular concatenation of ideas are naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy.

Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. The exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgment of the crowd. Add that they naturally form a *body*. It is not that they have come to an understanding among themselves and direct their combined energies toward one objective, but common studies and like methods link their intellects, as common interest may link their desires.

So, hidden at the bottom of a lawyer's soul one finds some of the tastes and habits of an aristocracy. They share its instinctive preference for order and its natural love of formalities; like it, they conceive a great distaste for the behavior of the multitude and secretly scorn the government of the people.

I have no intention of saying that these natural inclinations of lawyers are strong enough to bind them in any irresistible fashion. With lawyers, as with all men, it is particular interest, especially the interest of the moment, which prevails.

There are societies in which men of law cannot take a position in the world of politics analogous to that which they hold in private life; one can be sure that in such a society lawyers will be very active agents of revolution. But we need to inquire whether it is some permanent disposition or an accident which then leads them to destroy or to change. It is true that lawyers played a prominent part in overthrowing the French monarchy in 1789. We still need to discover whether they acted so because they had studied the laws or because they could not have a share in making them.

For five hundred years the English aristocracy put itself at the head of the people and spoke in its name; nowadays they support the throne and are the champions of royal authority. But the aristocracy still has instincts and inclinations peculiar to itself.

It is, moreover, important to be careful not to mistake isolated members of that body for the body itself.

Under all free governments, of whatever sort, one finds lawyers in the leading ranks of all the parties. The same remark also applies to the aristocracy. Almost all the democratic movements that have shaken the world have been directed by noblemen.

An elite body can never satisfy all the ambitions of all its members; if talents and ambitions are always more numerous than places, there are bound to be many who cannot rise quickly enough by making use of the body's privileges and who seek fast promotion by attacking them.

Hence, I do not claim that *all* lawyers will ever, or that most of them will *always*, prove supporters of order and enemies of change.

I do say that in a community in which lawyers hold without question that a high rank in society which is naturally their due, their temper will be eminently conservative and will prove antidemocratic.

When an aristocracy closes its ranks against the lawyers, it finds them to be enemies all the more dangerous, because although beneath it in wealth and power, their work makes them independent of it and the feel that their enlightenment raises them to its level.

Every time that the nobles have wished the lawyers to share some of their privileges, these two classes have found many things that make it easy for them to combine and, so to say, they find that they belong to the same family.

Equally I am led to believe that it will always be easy for a king to make the lawyers the most useful instruments of his power.

By nature there is much more affinity between lawyers and executive officials than between the former and the people, although lawyers have often overthrown the executive. In the same way, there is more natural affinity between nobles and the king than between nobles and people, although the upper classes of society have often combined with the others to fight against the royal power.

What lawyers love above all things is an ordered life, and authority is the greatest guarantee of order. Moreover, one must not forget that although they value liberty, they generally rate legality as far more precious; they are less afraid of tyranny than of arbitrariness, and provided that it is the lawgiver himself who is responsible for taking away men's independence, they are more or less content.

I therefore think that when a prince is faced by an encroaching democracy and he seeks to impair the power of the judges in his states and diminish the political influence of the lawyers, he is making a great mistake. He would injure the substance of authority by grasping at the shadow.

I have no doubt that he would have done better to bring lawyers into his government. Having entrusted to them a despotism taking its shape from violence, perhaps he might receive it back from their hands with features of justice and law.

Democratic government favors the political power of lawyers. When the rich, the noble, and the prince are excluded from the government, the lawyers then step into their full rights, for they are then the only men both enlightened and skillful, but not of the people, whom the people can choose.

If their tastes naturally draw lawyers toward the aristocracy and the prince, their interest as naturally pulls them toward the people.

Therefore lawyers like democratic government without sharing its inclinations or imitating its weaknesses, a double cause for their power through it and over it.

The people in a democracy do not distrust lawyers, knowing that it is to their interest to serve the democratic cause; and they listen to them without getting angry, for they do not imagine them to have any *arrière pensée*. In actual fact, the lawyers do not want to overthrow democracy's chosen government, but they do constantly try to guide it along lines to which it is not inclined by methods foreign to it. By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes; so he is the natural liaison officer between aristocracy and people, and the link that joins them.

The legal body is the only aristocratic element which can unforcedly mingle with elements natural to democracy and combine with them on comfortable and lasting terms. I am aware of the inherent defects of the legal mind; nevertheless, I doubt whether democracy could rule society for long without this mixture of the legal and democratic minds, and I hardly believe that nowadays a republic can hope to survive unless the lawyers' influence over its affairs grows in proportion to the power of the people.

This aristocratic character which I detect in the legal mind is much more pronounced still in the United States and in England than in any other land. This is not only due to English and American legal studies, but also to the very nature of the legislation and the position of lawyers as interpreters thereof in both these countries.

Both English and Americans have kept the law of precedents; that is to say, they still derive their opinions in legal matters and the judgments they should pronounce from the opinions and legal judgments of their fathers.

An English or American lawyer almost always combines a taste and respect for what is old with a liking for regularity and legality.

This influences in yet another way the turn of lawyers' minds, and so the course of society.

The first thing an English or American lawyer looks for is what has been done, whereas a French one inquires what one should wish to do; one looks for judgments and the other for reasons.

If you listen to an English or American lawyer, you are surprised to hear him quoting the opinions of others so often and saying so little about his own, whereas the opposite is the case with us.

A French lawyer will deal with no matter, however trivial, without bringing in his own whole system of ideas, and he will carry the argument right back to the constituent principles of the laws in order to persuade the court to move the boundary of the contested inheritance back a couple of yards.

The English or American lawyer who thus, in a sense, denies his own reasoning powers in order to return to those of his fathers, maintaining his thought in a kind of servitude, must contract more timid habits and conservative inclinations than his opposite number in France.

Our written laws are often hard to understand, but everyone can read them, whereas nothing could be more obscure and out of reach of the common man than a law founded on precedent. Where lawyers are absolutely needed, as in England and the United States, and their professional knowledge is held in high esteem, they become increasingly separated from the people, forming a class apart. A French lawyer is just a man of learning, but an English or an American one is somewhat like the Egyptian priests, being, as they were, the only interpreter of an occult science.

The social position of English and American lawyers also has an equally great influence on their habits and opinions. The English aristocracy, always anxious to absorb all elements bearing any likeness to itself, has given lawyers a very large share of consideration and of power. Lawyers are not in the first rank of English society, but they are content with their standing. They are like a cadet branch of the aristocracy, and they like and respect the elder line without sharing all its privileges. So English lawyers unite the aristocratic

interests of the legal profession with the tastes and ways of the aristocrats with whom they consort.

Thus it is England above all that supplies the most striking portrait of the type of lawyer I am trying to depict; the English lawyer values laws not because they are good but because they are old; and if he is reduced to modifying them in some respect, to adapt them to the changes which time brings to any society, he has recourse to the most incredible subtleties in order to persuade himself that in adding something to the work of his fathers he has only developed their thought and completed their work. Do not hope to make him recognize that he is an innovator; he will be prepared to go to absurd lengths rather than to admit himself guilty of so great a crime. It is in England that this legal spirit was born, which seems indifferent to the substance of things, paying attention only to the letter, and which would rather part company with reason and humanity than with the law.

English law may be compared to the trunk of an old tree on which lawyers have continually grafted the strangest shoots, hoping that though the fruit will be different, the leaves at least will match those of the venerable tree that supports them.

In America there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore the lawyers form the political upper class and the most intellectual section of society. Consequently they only stand to lose from any innovation; this adds an interest in conservation to their natural taste for order.

If you ask me where the American aristocracy is found, I have no hesitation in answering that it is not among the rich, who have no common like uniting them. It is at the bar or the bench that the America aristocracy is found.

The more one reflects on what happens in the United States, the more one feels convinced that the legal body forms the most powerful and, so today, the only counterbalance to democracy in that country.

In the United States it is easy to discover how well adapted the legal spirit is, both by its qualities and, I would say, even by its defects, to neutralize the vices inherent in popular government.

When the American people let themselves get intoxicated by their passions or carried away by their ideas, the lawyers apply an almost invisible brake which slows them down and halts them. Their aristocratic inclinations are secretly opposed to the instincts of democracy, their superstitious respect for all that is old to its love of novelty, their narrow views to its grandiose designs, their taste for formalities to its scorn of regulations, and their habit of advancing slowly to its impetuosity.

The courts are the most obvious organs though which the legal body influences democracy.

The judge is a lawyer who, apart from the taste for order and for rules imparted by his legal studies, is given a liking for stability by the permanence of his own tenure of office. His knowledge of the law in itself has assured him already high social standing among his equals, and his political power as a judge puts him in a rank apart with all the instincts of the privileged classes.

An American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs.[FN omitted] He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves.

I am aware of a hidden tendency in the United States leading the people to diminish judicial power; under most of the state constitutions the government can, at the request of both houses, remove a judge from office. Under some constitutions the *judges* are *elected* and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked.

Besides, no one should imagine that in the United States a legalistic spirit is confined strictly to the precincts of the courts; it extends far beyond them.

Lawyers, forming the only enlightened class not distrusted by the people, are naturally called on to fill most public functions. The legislatures are full of them, and they head administrations; in this way they greatly influence both the shaping of the law and its execution. Though the lawyers are obliged to yield to the current of public opinion carrying them along, it is easy to see indications of what they would do if they were free. While their political laws

are full of innovations, the Americans have only very reluctantly introduced slight changes into their civil laws, although many of these laws are utterly out of keeping with their social state. This is because the majority always has to turn to the lawyers concerning matters of civil law, and American lawyers, when free to choose, make no innovations. It is an odd experience for a Frenchman to hear American complaints about the conservative spirit of the lawyers and their prejudices in favor of everything established.

The influence of the spirit of the law spreads yet further beyond the precise limits I have indicated.

There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.

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.

The Jury in the United States Considered as a Political Institution

> *Trial by jury, which is one of the forms of sovereignty of the people, must be seen in relation to the other laws establishing that sovereignty. Composition of the jury in the United States. Effect of the jury system on the national character. Education it gives to the people. How it tends to establish the magistrates' influence and spread the spirit of the law.*

My subject having led me to discuss the administration of justice in the United States, I shall not leave it without speaking of the jury.

One must make a distinction between the jury as a judicial institution and a political one.

If it were a question of deciding how far the jury, especially the jury in civil cases, facilitates the good administration of justice, I admit that its usefulness can be contested.

The jury system arose in the infancy of society, at a time when only simple questions of fact were submitted to the courts; and it is no easy task to adapt it to the needs of a highly civilized nation, where the relations between men have multiplied exceedingly and have been thoughtfully elaborated in a learned manner.[FN omitted]

At the moment my main object is to deal with the political aspect of the jury, since any other course would divert me too far from my subject. But I will just say a couple of words about the judicial use of the jury. The English adopted that institution when they were a semibarbarian people; they have since become one of the most enlightened nations in the world, and their attachment to the jury system seems to have grown with their enlightenment. They have left their native land to spread all over the globe; in some places they have formed colonies and in others independent states; the main body of the nation has kept its king; several groups of settlers have founded powerful republics; but everywhere alike the English have extolled the institution of the jury.[FN omitted] They have established it everywhere or have hastened to reestablish it. A judicial institution which has thus throughout long centuries been chosen by a great nation and which has been zealously reproduced at every stage of civilization in every climate and under every form of government cannot be contrary to the spirit of justice.[FN omitted]

But let us leave this subject. To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.

By a "jury" I mean a certain number of citizens selected by chance and temporarily invested with the right to judge.

To use a jury to suppress crimes seems to me to introduce an eminently republican element into the government, for the following reasons:

The jury may be an aristocratic or a democratic institution, according to the class from which the jurors are selected; but there is always a republican character in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into those of the rulers.

Force is never more than a passing element in success; the idea of right follows immediately after it. Any government which could only reach its enemies on a battlefield would soon be destroyed. Therefore the true sanction for political laws lies in the penal ones, and where that sanction is lacking, the law sooner or late loses its power. For that reason the man who is judge in *criminal* trial is the real master of society. Now, a jury puts the people themselves or at least one class of citizen on the judge's bench. Therefore the jury as an institution really puts control of society into the hands of the people or of that class.[FN omitted]

In England jurors are taken from the aristocratic part of the nation. The aristocracy makes the laws, applies them, and judges breaches of them..... The whole thing is consistent, and England can properly be called an aristocratic state. In the United States the same system is applied to the whole people. Every American citizen can vote or be voted for and may be a juror. (See Appendix I, R.) The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail.

All sovereigns who have wished to drive the sources of their power from themselves and to direct society instead of letting it direct them have destroyed the jury system or weakened it. The Tudors sent to prison jurors unwilling to convict, and Napoleon had them chosen by his agents.

Obvious though these truths are, they are not universally appreciated, and one often finds Frenchmen still with only a muddled conception of the jury system. When the question is from what elements the list of jurors should be composed, discussion is limited to the enlightenment and capacities of those to be chosen, as if one was concerned with a purely judicial institution. But, in my view, that is really the least important aspect of the matter; the jury is above all a political institution; it should be regarded as one form of the

sovereignty of the people; when the sovereignty of the people is discarded, it too should be completely rejected; otherwise it should be made to harmonize with the other laws establishing that sovereignty. The jury is the part of the nation responsible for the execution of the laws, as the legislature assemblies are the part with the duty of making them; for society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters. This aspect of the matter, in my opinion, should always be the lawgivers' main preoccupation. All the rest is, so to say, frills.

So convinced am I that the jury is above all a political institution that I even look at it from that point of view when it is used in civil cases.

Laws are always unsteady when unsupported by mores; mores are the only tough and durable power in a nation.

When juries are reserved to criminal cases, the people only see them in action at long intervals and in a particular context; they do not form the habit of using them in the ordinary business of life and look on them as just a means, and not the only means, of obtaining justice.[FN omitted]

But juries used in civil cases too are constantly attracting some attention; they then impinge on all interests and everyone serves on them; in that way the system infiltrates into the business of life, thought follows the pattern of its procedures, and it is hardly too much to say that the idea of justice becomes identified with it.

For that reason, when juries are used only in criminal trials, the system is always in danger, but once introduced into civil cases, it defies both time and the assaults of men. If juries could have been wiped out from English mores as easily as from English laws, they would have succumbed entirely under the Tudors. Therefore it is the civil jury which really saved the liberties of England.

In whatever manner juries are used, they are bound to have a great influence on national character. But that influence is immeasurably increased the more they are used in civil cases.

Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

It spreads respect for the courts' decisions and for the idea of right throughout all classes. With those two elements gone, love of independence is merely a destructive passion.

Juries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself. That is especially true of juries in civil suits; hardly anyone is afraid that he will have to face a criminal trial, but anybody may have a lawsuit.

Juries teach each individual not to shirk responsibility for his own acts, and without that manly characteristic no political virtue is possible.

Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society.

Juries are wonderfully effective in shaping a nation's judgment and increasing its natural lights. That, in my view, is its greatest advantage. It should be regarded as free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate's efforts, the judge's advice, and also the very passions of the litigants bring within his mental grasp. I think that the main reason for the practical intelligence and the political good sense of the Americans is their long experience with juries in civil cases.

I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal.

The foregoing applies to all nations, but what follows especially concerns the Americans and democratic peoples in general.

I have said above that in democracies the lawyers, and the judges in particular, are the only aristocratic body that can check the people's movements. This aristocracy has no physical power but exercises its influence over men's minds. It follows that civil juries are the main source of its power. In criminal trials, when society is fighting a single man, the jury is apt to look on the judge as the passive instrument of social authority and to mistrust his

advice. Moreover, criminal cases turn entirely on simple facts easily within the range of common sense. On such ground judge and jury are equals.

But that is not the case in civil suits; there the judge appears as a disinterested arbitrator between the litigants' passions. The jurors feel confidence in him and listen to him with respect, for here his intelligence completely dominates theirs. It is he who unravels the various arguments they are finding it so hard to remember and takes them by the hand to guide them through procedural intricacies; it is he who limits their task to the question of fact and tells them what answer to give on questions of law. He has almost unlimited influence over them.

Is it still necessary to explain why arguments based on the incompetence of jurors in civil suits carry little weight with me?

In civil cases, at least when matters of face are not at issue, the jury is a judicial body in appearance only.

The jurors pronounce the decision made by the judge. They give that judgment the authority of the society they represent, as he gives it that of reason and of law.....

That judges of England and of America have an influence over the outcome of criminal trials such as French judges have never possessed. The reason for this difference is easily understood: civil cases have established the authority of the English or American judge, and he is merely exercising it in another field, not the one in which he acquired it.

There are cases, and they are often the most important ones, in which the American judge has the right to pronounce alone.[FN omitted] He is, then, for the time being in the position which is usual for a French judge, but his moral authority is much greater; memories of the jury still cling to him, and his voice has almost as much authority as that of the society represented by them.

Moreover, his influence extends far beyond the precincts of the courts; the American judge is constantly surrounded by men accustomed to respect his intelligence as superior to their own, whether he is at some private entertainment or in the turmoil of politics, in the marketplace, or in one of the legislatures; and apart from its use in deciding cases, his authority influences

the habits of mind and even the very soul of all who have cooperated with him in judging them.

Thus the jury, though seeming to diminish the magistrate's rights, in reality enlarges his sway, and in no other country are judges so powerful as in those where the people have a share in their privileges.

Above all, it is the jury in civil cases that enables the American bench to make what I have called the legal spirit penetrate right down into the lowest ranks of society.

The jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.

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