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Bench, Bar, and Legal Reform in the Nineteenth Century

No living legal system can remain static; change here, as elsewhere, is inevitable. American law from the Jacksonian era through World War I was no exception. John Adams, Thomas Jefferson, and other legal reformers of the late eighteenth century modified the inherited British legal order to eliminate all traces of monarchy, aristocracy, and any legal institutions, such as an established church and a standing army, that seemed incompatible with the republican societies they were creating. But beyond such innovations, American lawyers trod carefully. Cautious and piecemeal reform, not revolution, was the norm. American lawyers of the Revolutionary generation saw to it that the basis of legal systems in the new republic was to be the common law. They cherished this body of law as venerable and familiar, especially because it seemed an anchor of stability in a time of rapid social change.

Legal reform evoked ambivalent reactions from American lawyers. As heirs to the republican Revolution, they championed renovation of law and social institutions (e.g., abolition of imprisonment for debt and reduction of the catalogue of capital offenses). But, conversely, they did not want to move too fast. This ambivalence gave the internal impetus for law reform its cautious, sometimes reluctant, character.

The antebellum era was a time of unequaled reform. America's future, like the North American continent itself, seemed boundless, an infinite field on which to realize the dreams of republicanism, democracy, and reformed religion. Dazzled by this prospect and little restrained by the past, Americans seemed to proliferate endless ideas for reforming their society. Nothing in American society seemed to be immune from demands that it be new-modeled. Religion, government, education, care for society's outcasts, family life, personal health and hygiene, recreation, business practice were all vulnerable to criticism. In such a climate, law itself could not be exempt from the universal demand for reform. Law was also an instrument to realize many nonlegal reforms, such as the fight against Demon Rum.

But not everyone embraced change, especially when it seemed to affect their personal interests or beliefs, and so some Americans looked askance at demands for reform. As we might expect, lawyers were foremost among those skeptical of change, particularly when reform would have an impact on the law itself. Yet their resistance to innovation in the law imposed from the outside conflicted with their need to promote renovation from within.

Many aspects of the law's development in the nineteenth century were affected

by the crosscurrents of reform. The documents in this chapter first sketch the lawyer's place in American society, seen through the eyes of both lay people and lawyers themselves, since the image of lawyers had as great an impact on legal change as the role they actually played in society. Next we will review attacks on the common law itself, and lawyers' defensive reactions to that assault. Then we will review the mode of selecting judges, which provided a ready target for reformers' attentions.

Lawyers are not born; they are made, and the process of making them is accomplished by legal education. The methods of schooling future lawyers came under critical scrutiny. While lawyers monopolized all avenues of professional socialization, they had no ready-made formula for instructing those who would follow them. The evolution of legal education reflected ideological developments in the way that lawyers thought about the law. But those ideological currents in their turn reflected the way that lawyers perceived the law's relationship to the larger society. We conclude this chapter with turn-of-the-century lawyers' visions of the role of law in American life.

The Lawyer in American Society

The lawyer has been a by-word of notoriety in English and American society for at least four centuries. The attitudes of early Americans toward attorneys were ambivalent at best. Some seventeenth-century colonies prohibited lawyering altogether. It was to be expected in homogeneous colonies, like Connecticut, that were established as religious utopias, but it appeared in purely commercial colonies too. John Locke declared in the 1669 Fundamental Constitutions of Carolina that it is "a base and vile thing to plead for money or reward."[1] Quaker settlements discouraged litigation in favor of what is today called alternative dispute resolution. An early-eighteenth-century observer wrote back home about Pennsylvania: "They have no lawyers. Everyone is to tell his own case, or some friend for him. . . . 'Tis a happy country."[2]

But Americans in the eighteenth century discovered that lawyers were a necessary evil, as their societies and economies grew more complex, as homogeneous and close-knit towns gave way to heterogeneous, scattered communities, and as religious constraints on behavior weakened. Antilawyer animosity persisted, however. In 1765, Cadwallader Colden, the lieutenant governor of New York, complained to the Board of Trade that law practice in his colony was "carried on by the same wicked artifices that the Domination of Priests formerly was in the times of ignorance."[3] Yet the bar and the common law it administered survived the Revolution, emerging more powerful than ever. Despite the adverse public-relations climate in which lawyers seem doomed to labor inescapably, the legal profession has triumphantly weathered all attacks on it, emerging from each successive assault more firmly ensconced in the seats of power.

Lemuel Shaw on Lawyering
1827

Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court believed that law is a science and that its practitioners have an exalted mission as guard-

ians of the American republican tradition. In this address to Boston lawyers in 1827, Shaw provided a rationale for professional resistance to the spread of popular democracy in the age of Jackson.

Let us then, gentlemen, proceed to consider the condition, the importance and utility of the profession of the law, in the actual situation and prospects of the United States.

* * *

In a free, representative government, founded upon enlarged and liberal views, designed to secure the rights, to promote the industry and to advance the happiness of a great community, and adapted to a high state of civilization and improvement, it is of the highest importance that there should be a body of men, trained, by a well adapted course of education and study, to a thorough and profound knowledge of the law, and practically skilled in its application, whose privilege and duty it is, in common with their fellow citizens, to exert a fair share of influence in the enactment of laws, and whose peculiar duty and exclusive occupation it is, to assist in the application of them to practice in the administration of justice, in its various departments.

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. . . As those who govern, claim not to exercise an inherent power, but simply to execute a delegated authority, created, regulated, and limited by law, there is no inconsistency in considering such authority as equally supreme, over those who exercise it, and those upon whom it operates. Whilst [free government] thus professes to derive its whole authority from the natural right and power of the people to provide for their own safety and happiness, and thus absolutely exclude the assumption of all arbitrary and extrinsic power, it guards with equal vigilance against the violence and encroachments of a wild and licentious democracy, by a well balanced constitution; such a constitution as at once restrains the violent and irregular action of mere popular will, and calls to the aid, and secures in the service of the government, the enlightened wisdom, the pure morals, the cultivated reason, and matured experience of its ablest and best members.

* * *

Our government, throughout its entire fabric, professes to be a free, representative government. It is peculiarly, exclusively, and emphatically a government of laws. The constitutions of the United States, and of the several states, with all their provisions and limitations, are regarded, and very properly regarded, as part of the laws. . . . To these fundamental laws, every individual citizen has a right to appeal, and does constantly appeal, in the discussion and establishment of his rights, civil as well as political. In an equal degree, they regulate and control the highest functions of government, determine the just sources and limits, and regulate the distribution of all powers, executive, legislative, and judicial. These principles may, at any time, be drawn in question before the tribunals of justice, and are subject to the same rules of judicial interpretation, with all other legal provisions. It is difficult to conceive of the vast extent, to which this consideration enlarges the field of American jurisprudence, and increases the functions, and elevates the duties and character of the American lawyer.

"If," says Sir William Jones, "law be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason." If such be the just character of the law, when regarded as a system of civil and criminal jurisprudence, how much more eminently does it maintain that character, when, in addition to these subjects, it embraces within its range, the whole science of political philosophy. Hence we daily witness, under the head of "constitutional law," a title hardly known in any other system of jurisprudence the profoundest discussions at the bar, and the ablest decisions from the bench, almost without the aid of precedent, because they involve questions, which have never before been raised, in which the principles of social duty, of natural and conventional obligation, are considered, distinguished, and applied, with that sagacity, reach of thought, and scientific skill, which can be derived only from a thorough and intimate acquaintance with the philosophy of the mind.

* * *

. . . I am aware that there are some persons who maintain, that the law is a system of artifical and technical rules, having little regard to principle, and that he is the best lawyer, who has the most tenacious memory, and who is most skilful and adroit in using the weapons furnished by these rules. Others again maintain, that natural justice is sufficient to settle all controverted questions, and that every case may be well settled upon its own particular equities. Both of these views are unquestionably partial and erroneous. Whilst the law is a science founded upon reason and principle, and no law can stand the test of strict inquiry which palpably violates the dictates of natural justice, yet it is also a system of precise and practical rules, adapted to regulate the rights and duties of persons in an infinite variety of cases, in which natural law is silent or indifferent, and yet where it is of the utmost importance that there should be a fixed rule.

Alexis de Tocqueville on Lawyers and Judges 1835

In 1835, the French visitor Alexis de Tocqueville offered striking observations on the actual workings of popular sovereignty, judicial power, and lawyers in the bumptious American democracy that so fascinated him. Tocqueville was astonishingly perceptive in his own time; do his remarks remain as relevant and valid for today's society?

Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one peculiar to the American magistrate, but it gives rise to immense political influence. In truth, few laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other, and none that may not be brought before a court of justice by the choice of parties or by the necessity of the case. But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force.

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Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.

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When we have examined in detail the organization of the [United States] Supreme Court and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed higher than any other known tribunal, both by the nature of its rights and the class of justiciable parties which it controls.

* * *

The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven Federal judges [of the United States Supreme Court]. Without them the Constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative power; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of the democracy. Their power is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law. The force of public opinion is the most intractable of agents, because its exact limits cannot be defined; and it is not less dangerous to exceed than to remain below the boundary prescribed.

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Democratic laws generally tend to promote the welfare of the greatest possible number; for they emanate from the majority of the citizens, who are subject to error, but who cannot have an interest opposed to their own advantage. The laws of an aristocracy tend, on the contrary, to concentrate wealth and power in the hands of the minority; because an aristocracy, by its very nature, constitutes a minority. It may therefore be asserted, as a general proposition, that the purpose of a democracy in its legislation is more useful to humanity than that of an aristocracy. This, however, is the sum total of its advantages.

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No political form has hitherto been discovered that is equally favorable to the prosperity and the development of all the classes into which society is divided. These classes continue to form, as it were, so many distinct communities in the same nation; and experience has shown that it is no less dangerous to place the fate of these classes exclusively in the hands of any one of them than it is to make one people the arbiter of the destiny of another. When the rich alone govern, the interest of the poor is always endangered; and when the poor make the laws, that of the rich incurs very serious risks. The advantage of democracy does not consist, therefore, as has sometimes been asserted, in favoring the prosperity of all, but simply in contributing to the well-being of the greatest number.

The men who are entrusted with the direction of public affairs in the United States are frequently inferior, in both capacity and morality, to those whom an aristocracy would raise to power. But their interest is identified and mingled with

that of the majority of their fellow citizens. They may frequently be faithless and frequently mistaken, but they will never systematically adopt a line of conduct hostile to the majority; and they cannot give a dangerous or exclusive tendency to the government.

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It is not always feasible to consult the whole people, either directly or indirectly, in the formation of law; but it cannot be denied that, when this is possible, the authority of law is much augmented. This popular origin which impairs the excellence and the wisdom of legislation, contributes much to increase its power. There is an amazing strength in the expression of the will of a whole people; and when it declares itself, even the imagination of those who would wish to contest it is overawed. The truth of this fact is well known by parties, and they consequently strive to make out a majority whenever they can. If they have not the greater number of voters on their side, they assert that the true majority abstained from voting; and if they are foiled even there, they have recourse to those persons who had no right to vote.

In the United States, except slaves, servants, and paupers supported by the townships, there is no class of persons who do not exercise the elective franchise and who do not indirectly contribute to make the laws. Those who wish to attack the laws must consequently either change the opinion of the nation or trample upon its decision.

A second reason, which is still more direct and weighty, may be adduced: in the United States everyone is personally interested in enforcing the obedience of the whole community to the law; for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own. However irksome an enactment may be, the citizen of the United States complies with it, not only because it is the work of the majority, but because it is his own, and he regards it as a contract to which he is himself a party.

In the United States, then, that numerous and turbulent multitude does not exist who, regarding the law as their natural enemy, look upon it with fear and distrust. It is impossible, on the contrary, not to perceive that all classes display the utmost reliance upon the legislation of their country and are attached to it by a kind of parental affection.

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In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause, which it is useful to investigate, as it may be reproduced elsewhere. . . .

Men who have made a special study of the laws derive from [that] occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.

The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of

intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but not very generally known; they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude. Add to this that they naturally constitute a body; not by any previous understanding, or by an agreement that directs them to a common end; but the analogy of their studies and the uniformity of their methods connect their minds as a common interest might unite their endeavors.

Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other men, are governed by their private interests, and especially by the interests of the moment.

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I do not, then, assert that all the members of the legal profession are at all times the friends of order and the opponents of innovation, but merely that most of them are usually so. In a community to which lawyers are allowed to occupy without opposition that high station which naturally belongs to them, their general spirit will be eminently conservative and anti-democratic. When an aristocracy excludes the leaders of that profession from its ranks, it excites enemies who are the more formidable as they are independent of the nobility by their labors and feel themselves to be their equals in intelligence though inferior in opulence and power.

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Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more; they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.

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The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. If, then, they are led by their tastes towards the aristocracy and the prince, they are brought in contact with the people by their interests. They like the government of democracy without participating in its propensities and without imitating its weaknesses; whence they derive a two-fold authority from it and over it. The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation, because they do not attribute to them any sinister designs. The lawyers do not, indeed, wish to overthrow the institutions of democracy, but they constantly endeavor to turn it away from its real direction by means that are foreign to its nature. Lawyers belong

to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them. I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

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In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly 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.

The courts of justice are the visible organs by which the legal profession is enabled to control the democracy. The judge is a lawyer who, independently of the taste for regularity and order that he has contracted in the study of law, derives an additional love of stability from the inalienability of his own functions. His legal attainments have already raised him to a distinguished rank among his fellows; his political power completes the distinction of his station and gives him the instincts of the privileged classes.

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It must not be supposed, moreover, that the legal spirit is confined in the United States to the courts of justice; it extends far beyond them. As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution. The lawyers are obliged, however, to yield to the current public opinion, which is too strong for them to resist; but it is easy to find indications of what they would do if they were free to act. The Americans, who have made so many innovations in their political laws, have introduced very sparing alterations in their civil laws, and that with great difficulty,

although many of these laws are repugnant to their social condition. The reason for this is that in matters of civil law the majority are obliged to defer to the authority of the legal profession, and the American lawyers are disinclined to innovate when they are left to their own choice.

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The influence of legal habits extends beyond the precise limits I have pointed out. 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. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. 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. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

P. W. GRAYSON [pseud.]

"Vice Unmasked, an Essay: Being a Consideration of the Influence of Law upon the Moral Essence of Man . . ."

1830

The anonymous author of this diatribe reflected the tradition of popular hostility to lawyers. His condemnation was entirely negative, unlike both earlier and later examples of the genre, which offered constructive solutions to the problems presented by the stereotype of lawyers. Other critics would soon supply this defect, however, by proposing codification and an elective judiciary.

I have already sufficiently considered the demoralizing influence of law, as far as respects its own unaided operation, on the temper and principles of men. But I have yet to unfold another influence, of an entirely congenial stamp with the former, that operates, as I think, with wonderful force to inflame its mischievous power. It is that of a certain class of men, in short, we know by the name of lawyers, whom we find swarming in every hole and corner of society. I fear I shall present in them a picture of the seeds of depravity, at which philanthropy may fold her arms, in utter despair, and weep as though the cause of mankind were indeed irredeemably lost forever!

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Their business is with statutes, dictates, decisions, and authority. They go on, emptying volume after volume, of all their heterogeneous contents, till they become

so laden with other men's thoughts, as scarce to have any of their own. Seldom do their sad eyes look beyond the musty walls of authority, in which their souls are all perpetually immured. And now, as soon as their minds have come to be duly instructed, first, in the antique sophistries, substantial fictions, wise absurdities, and profound dogmas of buried sages, and then fairly liberalized by all the light of modern innovation, and of precious salutary change, do we see them step forward into the world, blown with the most triumphant pretensions, to deal out blessings to mankind. Now, indeed, they are ready to execute any prescription of either justice or injustice—to lend themselves to any side—to advocate any doctrine, for they are well provided with the means in venerable print. Eager for employment, they pry into the business of men, with snakish smoothness slip into the secrets of their affairs, discern the ingredients of litigation, and blow them up into strife. This is, indeed, but laboring in their vocation. For an honest lawyer, if, in strictness, there be such a phenomenon on earth, is an appearance entirely out of the common course of nature—a violent exception, and must therefore be esteemed a sort of prodigy.

Abject slaves of authority themselves, these counterfeits of men are now to be the proud dictators of human destiny, and withal the glittering favorites of fortune!

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Again we hear it urged in their favor, that from dire necessity they must be true to their clients, at whatever cost of principle to themselves—that this fidelity to their client, who consigns his dearest interests, it may be even liberty or life, to their official custody, sufficiently cancels all the claims of morality, and amply atones for every obliquity they may find it convenient to practice, in the faithful discharge of grave professional duty. By the force of this venerable custom of thought, we find it has really become a matter of conscience, of high professional honor, for these men of the law to go all lengths that are possible—snatch all advantages, too, in their crafty endeavors to gain even the most unrighteous ends of their clients. Nothing, indeed, is more common, at this time of day, than to hear them gravely extolled as patterns of excellence, for no other merit, than, merely, the cunning trick and devotion they show in the unconscientious cause of their client.

* * *

Can there be a more pitiable sight than that we are here constrained to behold? Quite certain it is, that the law, if it do not absorb all the talents and genius of the country, attracts, at least, the choice of it all, and leaves but little more than the refuse for other callings. What then is this sight?—genius putting itself to sale —the brightest intelligence of the land offering itself a loose prostitute to the capricious use of all men alike, for gold!

RUFUS CHOATE
"The Position and Functions of the American Bar, as an Element of Conservatism in the State . . ."
1845

Rufus Choate was a prominent and conservative Massachusetts Whig attorney. His 1845 address, delivered to the students of Harvard Law School, summed up most of the ideological strands of Whiggish conservatism in antebellum America.

rized or underground bar has been common in many societies; it crops up when the need for legal services outstrips the supply of legitimate lawyers. At any rate, there was a competent, professional bar, dominated by brilliant and successful lawyers ... in all major communities by 1750, despite all bias and opposition.

No law schools in the colonies trained these men. Particularly in the South, where there were no colleges, some young men went to England for training, and attended the Inns of Court, in London. The Inns were not law schools as such; they had "ceased to perform educational functions of a serious nature," and were little more than living and eating clubs. Theoretically, a man could become a counselor-at-law in England without reading "a single page of any law book." But the Inns were part of English legal culture; Americans could absorb the atmosphere of English law there; they read law on their own, and observed English practice.

The road to the bar, for all lawyers, was through some form of clerkship or apprenticeship. The aspiring lawyer usually entered into a contract with an established lawyer. The student paid a fee; in exchange, the lawyer promised to train him in the law; sometimes, too, the lawyer would provide food and lodging. Apprenticeship was a control device as well as a way of learning the trade. It kept the bar small; and older lawyers were in firm command. How much the apprentice learned depended greatly on his master.... [The first law schools] grew out of law offices which became so good at teaching that they gave up practice entirely....

THE NIMBLE PROFESSION

In 1850 there were, according to one estimate, 21,979 lawyers in the country. As we have seen, the number of lawyers grew very rapidly after the Revolution. In the last half of the century, there was even greater increase. The transformation of the American economy after the Civil War profoundly affected the demand for lawyers, and hence the supply. By 1880, there were perhaps 60,000 lawyers; by 1900, about 114,000.

The functions of the profession changed along with its numbers. The New York Code of Civil Procedure, of 1848, symbolized one kind of change.... The codes in turn dethroned the ancient pleading arts. The slow estrangement of the lawyer from his old and natural haunt, the court, was an outstanding fact of the practice in the second half of the century. Most lawyers still went to court; but the Wall Street lawyer, who perhaps never spoke to a judge except socially, made more money and had more prestige than any courtroom lawyer could.

The change of function reflected changes in the law itself. Life and the economy were more complicated; there was more, then, to be done, in the business world especially; and the lawyers proved able to do it. There was nothing inevitable in the process. It did not happen, for example, in Japan. The legal profession might have become smaller and narrower, restricted like the English barrister, or the brain surgeon, to a few rare, complex, and lucrative tasks. Automation and technological change posed dangers to lawyers, just as they posed dangers to other occupations. Social invention

constantly threatened to displace them. It was adapt or die. For example, lawyers in the first half of the century had a good thing going in title searches and related work. After the Civil War, title companies and trust companies proved to be efficient competitors. By 1900, well-organized, efficient companies nibbled away at other staples of the practice, too: debt collection and estate work, for example.

Nevertheless the lawyers prospered. The truth was that the profession was exceedingly nimble at finding new kinds of work and new ways to do it. Its nimbleness was no doubt due to the character of the bar: open-ended, unrestricted, uninhibited, attractive to sharp, ambitious men. In so amorphous a profession, lawyers drifted in and out; many went into business or politics because they could not earn a living at their trade. Others reached out for new sorts of practice. At any rate, the profession did not shrink to (or rise to) the status of a small, exclusive elite. Even in 1860, the profession was bigger, wider, more diverse than it had been in years gone by. In 1800, lawyers in Philadelphia came "predominantly from families of wealth, status, and importance." In 1860, a much higher percentage came from the middle class—sons of shopkeepers, clerks, small businessmen. In Massachusetts, too, in the period 1870–1900, there was an increase in the percentage of lawyers who were recruited from business and white-collar backgrounds, rather than professional or elite backgrounds, compared to the prewar period.

The external relations of the bar were always vitally important. After 1870, there was another line of defense against competition: the lawyers' unions (never called by that name), which fought vigorously to protect the boundaries of the calling. The organized profession raised (or tried to raise) its "standards"; tried to limit entry into the field, and (above all) tried to resist conversion of the profession into a "mere" business or trade. In fact, lawyers did not incorporate and did not become fully bureaucratized. The bar was able to prevent the corporate practice of law. Large private law firms were able to compete with captive legal departments and house counsel staffs of large corporations. For the time being, at least, the private lawyer kept his independent status as a middle-class craftsman and entrepreneur. The lawyer's role in American life had never been too clearly defined. The practice of law was what lawyers did. This was a truth as well as a tautology. The upper echelons of the profession never quite succeeded in closing the doors against newcomers and outsiders. They dreamt of a close-knit, guildlike bar. They longed for the honor and security of the barrister. But because it was easy to pass in and out of the profession, their dream could never be fulfilled.

Alexis De Tocqueville, Democracy in America

Vol. I, 283–90 (H. Reeve trans., P. Bradley ed., F. Bowen rev., 1973) (1st ed. 1835).

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powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause, which it is useful to investigate, as it may be reproduced elsewhere....

Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude....

Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other men, are governed by their private interests, and especially by the interests of the moment.

In a state of society in which the members of the legal profession cannot hold that rank in the political world which they enjoy in private life, we may rest assured that they will be the foremost agents of revolution....

I am in like manner inclined to believe that a monarch will always be able to convert legal practitioners into the most serviceable instruments of his authority. There is a far greater affinity between this class of persons and the executive power than there is between them and the people, though they have often aided to overturn the former; just as there is a greater natural affinity between the nobles and the monarch than between the nobles and the people, although the higher orders of society have often, in concert with the lower classes, resisted the prerogative of the crown.

Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied....

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. If, then, they are led by their tastes towards the aristocracy and the prince, they are brought in contact with the people by their interests. They like the government of democracy without participating in its propensities and without imitating its weaknesses; whence they derive a two-fold authority from it and over it. The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without

irritation, because they do not attribute to them any sinister designs. The lawyers do not, indeed, wish to overthrow the institutions of democracy, but they constantly endeavor to turn it away from its real direction by means that are foreign to its nature. Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them. I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

This aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and in England than in any other country. This proceeds not only from the legal studies of the English and American lawyers, but from the nature of the law and the position which these interpreters of it occupy in the two countries. The English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decisions of their predecessors. In the mind of an English or American lawyer a taste and a reverence for what is old is almost always united with a love of regular and lawful proceedings. . . .

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly 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. . . .

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The influence of legal habits extends beyond the precise limits I have pointed out. 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. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. 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. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

NOTES AND QUESTIONS

1. Legal historian Robert Gordon summarizes the American bar's more recent evolution as follows.

> The period from 1870 to 1930 sees the rise of the corporate law firm, plaintiff's personal-injury practice and public-interest lawyering. The second period, 1930–1970 [witnesses] the new specialities emerging from the statutory and administrative innovations of the New Deal and the postwar political-economic order; and from the "rights revolution" of the 1960s and 1970s. [The third period, from 1970 to 2000, reflects major shifts in the size, composition, and structure of the bar]. In these years, the profession tripled in size and admitted women and minorities in significant numbers. Corporate law firms multiplied, grew to enormous size, and began to claim the largest share of total legal business. Personal injury practice entered the age of the mass-tort class action. Public interest "cause" lawyers added new constituencies and began to play a regular role in governance.... The ideal of a single unified profession receded as social distance and income differentials widened between its upper and lower tiers.[4]

Compare Friedman's and de Tocqueville's accounts of the early American legal profession with the contemporary bar described by Gordon and by the materials excerpted in Chapter I and Part B below. What have been the most significant changes in the practice of law during the last century?

4. Robert W. Gordon, "The American Legal Profession, 1870–2000," in *The Cambridge History of Law in America* (Christopher Tomlins & Michael Grossberg, eds., 2008).