the basis of reasoned principles to replace what he perceives to be the outmoded common law. Did Rantoul’s views win wide acceptance? Of what does “law” primarily consist today, statutes or court decisions?

5. Was the lawyer “order” abolished? Why not? Consider the argument in the next few excerpts, the famous analysis of American law and lawyers by Alexis de Tocqueville.

I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA


[(A) THE SOCIAL AND POLITICAL CONDITIONS OF AMERICA]

** ** The social condition of the Americans is eminently democratic; this was its character at the foundation of the colonies, and it is still more strongly marked at the present day.

** ** [G]reat equality existed among the immigrants who settled on the shores of New England. Even the germs of aristocracy were never planted in that part of the Union. The only influence which obtained there was that of intellect ** * . Some of their fellow citizens acquired a power over the others that might truly have been called aristocratic if it had been capable of transmission from father to son.

** ** In most of the states situated to the southwest of the Hudson some great English proprietors had settled who had imported with them aristocratic principles and the English law of inheritance. ** * . In the South one man, aided by slaves, could cultivate a great extent of country; it was therefore common to see rich landed proprietors. But their influence was not altogether aristocratic, as that term is understood in Europe, since they possessed no privileges; and the cultivation of their estates being carried on by slaves, they had no tenants depending on them, and consequently no patronage. Still, the great proprietors south of the Hudson constituted a superior class, having ideas and tastes of its own and forming the center of political action. This kind of aristocracy sympathized with the body of the people, whose passions and interests it easily embraced; but it was too weak and too shortlived to excite either love or hatred. This was the class which headed the insurrection in the South and furnished the best leaders of the American Revolution.

At this period society was shaken to its center. The people, in whose name the struggle had taken place, conceived the desire of exercising the authority that it had acquired; its democratic tendencies were awakened; and having thrown off the yoke of the mother country, it aspired to independence of every kind. ** * *


But the law of inheritance was the last step to equality. ** * It is true that these laws belong to civil affairs; but they ought, nevertheless, to be placed at the head of all political institutions; for they exercise an incredible influence upon the social state of a people, while political laws show only what this state already is. ** * . Through their means man acquires a kind of proternatural power over the future lot of his fellow creatures. When the legislator has once regulated the law of inheritance, he may rest from his labor. The machine once put in motion will go on for ages ** * . When framed in a particular manner, this law unites, draws together, and veste property and power in a few hands; it causes an aristocracy, so to speak, to spring out of the ground. If formed on opposite principles its action is still more rapid; it divides, distributes, and disperses both property and power. ** * . When the law of inheritance permits, still more when it decrees, the equal division of a father’s property among all his children, its effects are of two kinds: it is important to distinguish them from each other, although they tend to the same end.

As a result of the law of inheritance, the death of each owner brings about a revolution in property; not only do his possessions change hands, but their very nature is altered, since they are parcelled into shares, which become smaller and smaller at each division. This is the direct and as it were the physical effect of the law. In the countries where legislation establishes the equality of division, property, and particularly landed fortunes, have a permanent tendency to diminish. ** * *

Among nations whose law of descent is founded upon the right of primogeniture, landed estates often pass from generation to generation without undergoing division; the consequence of this is that family feeling is to a certain degree incorporated with the estate. The family represents the estate, the estate the family, whose name, together with its origin, its glory, its power, and its virtues, is thus perpetuated in an imperishable memorial of the past and as a sure pledge of the future.

When the equal partition of property is established by law, the intimate connection is destroyed between family feeling and the preservation of the paternal estate; the property ceases to represent the family ** * . The sons of the great landed proprietor, if they are few in number, or if fortune befriends them, may indeed entertain the hope of being as wealthy as their father, but not of possessing the same property that he did; their riches must be composed of other elements than his. Now, as soon as you divest the landowner of that interest in the preservation of his estate which he derives from association, from tradition, and from family pride, you may be certain that, sooner or later, he will dispose of it; for there is a strong pecuniary interest in favor of selling, as floating capital produces higher interest than real property and is more readily available to gratify the passions of the moment.
And now, after a lapse of a little more than sixty years, the aspect of society is totally altered; the families of the great landed proprietors are almost all commingled with the general mass. * * *

I do not mean that there is any lack of wealthy individuals in the United States; I know of no country, indeed, where the love of money has taken stronger hold on the affections of men and where a profounder contempt is expressed for the theory of the permanent equality of property. But wealth circulates with inconceivable rapidity, and experience shows that it is rare to find two succeeding generations in the full enjoyment of it.

* * *

It is not only the fortunes of men that are equal in America; even their acquirements partake in some degree of the same uniformity. I do not believe that there is a country in the world where, in proportion to the population, there are so few ignorant and at the same time so few learned individuals. Primary instruction is within the reach of everybody; superior instruction is scarcely to be obtained by any. This is not surprising; it is, in fact, the necessary consequence of what I have advanced above. Almost all the Americans are in easy circumstances and can therefore obtain the first elements of human knowledge.

In America there are but few wealthy persons; nearly all Americans have to take a profession. Now, every profession requires an apprenticeship. The Americans can devote to general education only the early years of life. At fifteen they enter upon their calling, and thus their education generally ends at the age when ours begins. If it is continued beyond that point, it aims only towards a particular specialized and profitable purpose * * *

In America most of the rich men were formerly poor; most of those who now enjoy leisure were absorbed in business during their youth; the consequence of this is that when they might have had a taste for study, they had no time for it, and when the time is at their disposal, they have no longer the inclination.

There is no class, then, in America, in which the taste for intellectual pleasures is transmitted with hereditary fortune and leisure and by which the labors of the intellect are held in honor. Accordingly, there is an equal want of the desire and the power of application to these objects.

* * *

It is impossible to believe that equality will not eventually find its way into the political world, as it does everywhere else. To conceive of men remaining forever unequal upon a single point, yet equal on all others, is impossible; they must come in the end to be equal upon all.

Now, I know of only two methods of establishing equality in the political world; rights must be given to every citizen, or none at all to anyone. For nations which are arrived at the same stage of social existence as the Anglo-Americans, it is, therefore, very difficult to discover a medium between the sovereignty of all and the absolute power of one man.

There is, in fact, a manly and lawful passion for equality that incites men to wish all to be powerful and honored. This passion tends to elevate the humble to the rank of the great; but there exists also in the human heart a depraved taste for equality, which impels the weak to attempt to lower the powerful to their own level and reduces men to prefer equality in slavery to inequality with freedom. Not that those nations whose social condition is democratic naturally despise liberty; on the contrary, they have an instinctive love of it. But liberty is not the chief and constant object of their desires; equality is their idol: they make rapid and sudden efforts to obtain liberty and, if they miss their aim, resign themselves to their disappointment; but nothing can satisfy them without equality, and they would rather perish than lose it.

On the other hand, in a state where the citizens are all practically equal, it becomes difficult for them to preserve their independence against the aggressions of power. No one among them being strong enough to engage in the struggle alone with advantage, nothing but a general combination can protect their liberty. Now, such a union is not always possible.

* * *

The Anglo-Americans are the first nation who, having been exposed to this formidable alternative, have been happy enough to escape the dominion of absolute power. They have been allowed by their circumstances, their origin, their intelligence, and especially by their morals to establish and maintain the sovereignty of the people.

* * *

[At the time before the American Revolution, the principle of popular sovereignty was not yet established.] * * * Intelligence in New England and wealth in the country to the south of the Hudson * * * long exercised a sort of aristocratic influence, which tended to keep the exercise of social power in the hands of a few. Not all the public functionaries were chosen by popular vote, nor were all the citizens voters. The electoral franchise was everywhere somewhat restricted and made dependent on a certain qualification, which was very low in the North and more considerable in the South.

The American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships and took possession of the state. Every class was enlisted in its cause; battles were fought and victories obtained for it; it became the law of laws.

A change almost as rapid was effected in the interior of society, where the law of inheritance completed the abolition of local influences.

As soon as this effect of the laws and of the Revolution became apparent to every eye, victory was irrevocably pronounced in favor of the democratic cause. All power was, in fact, in its hands, and resistance was
no longer possible. The higher orders submitted without a murmur and
without a struggle to an evil that was henceforth inevitable. The
ordinary face of falling powers awaited them; each of their members
followed his own interest; and as it was impossible to wring the power
from the hands of a people whom they did not detest sufficiently to
brave, their only aim was to secure its goodwill at any price. The most
democratic laws were consequently voted by the very men whose inter-
est they impaired; and thus, although the higher classes did not excite
the passions of the people against their order, they themselves accelerated
the triumph of the new state of things; so that, by a singular change,
the democratic impulse was found to be most irresistible in the very
states where the aristocracy had the firmest hold. The state of Maryland,
which had been founded by men of rank, was the first to proclaim
universal suffrage and to introduce the most democratic forms into the
whole of its government.

When a nation begins to modify the elective qualification, it may
easily be foreseen that, sooner or later, that qualification will be entirely
abolished. There is no more invariable rule in the history of society
for after each concession the strength of the democracy increases, and its
demands increase with its strength. The ambition of those who are below
the appointed rate is irritated in exact proportion to the great number of
those who are above it. The exception at last becomes the rule, conces-
sion follows concession, and no stop can be made short of universal
suffrage.

* * *

(B) JUDICIAL POWER IN THE UNITED STATES, AND
ITS INFLUENCE ON POLITICAL SOCIETY

Confederations have existed in other countries besides America; I have seen republics elsewhere; the representative system of
government has been adopted in several states of Europe; but I am not
aware that any nation of the globe has hitherto organized a judicial
power in the same manner as the Americans. The judicial organization
of the United States is the institution which a stranger has the greatest
difficulty in understanding. He hears the authority of a judge invoked in
a tribunal of the United States, he may refuse to admit it as a
law without proceeding from a case, he clearly steps beyond his sphere and invades that of the legislative authority.

The second characteristic of judicial power is that it pronounces on
special cases, and not upon general principles. If a judge, in deciding a
particular point, destroys a general principle by passing a judgment
which tends to reject all the inferences from that principle, and conse-
quently to annul it, he remains within the ordinary limits of his
functions. But if he directly attacks a general principle without having a
particular case in view, he leaves the circle in which all nations have
agreed to confine his authority.

The third characteristic of the judicial power is that it can act only
when it is called upon, or when, in legal phrase, it has taken cognizance
of an affair. * * *

(Amerians have adopted these three judicial principles. Why, then
are their judiciaries regarded as more powerful than those of other
nations?) * * * The cause of this difference lies in the simple fact that
the Americans have acknowledged the right of judges to found their
decisions on the Constitution rather than on the laws. In other words,
they have permitted them not to apply such laws as may appear to them
to be unconstitutional.

I am aware that a similar right has been sometimes claimed, but
claimed in vain, by courts of justice in other countries; but in America it
is recognized by all the authorities; and not a party, not so much as an
individual, is found to contest it. This fact can be explained only by the
principles of the American constitutions. In France the constitution is, or
at least is supposed to be, immutable; and the received theory is that no
power has the right of changing any part of it. In England the constitu-
tion may change continually, or rather it does not in reality exist; the
Parliament is at once a legislative and a constituent assembly. * * * An
American constitution is not supposed to be immutable, as in France;
or it is susceptible of modification by the ordinary powers of society, as
in England. It constitutes a detached whole, which, as it represents the
will of the whole people, is less binding on the legislator than on the
private citizen, but which may be altered by the will of the people in
predetermined cases, according to established rules. In America the
Constitution may therefore vary; but as long as it exists, it is the origin
of all authority, and the sole vehicle of the predominating force.

* * *

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. 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. Those to whom it is prejudicial learn that means exist of overcoming its authority, and similar suits are multiplied until it becomes powerless. The alternative, then, is, that the people must alter the Constitution or the legislature must repeal the law. The political power which the Americans have entrusted to their courts of justice is therefore intense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice.

It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit.

I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanated was weak, and obeyed when it was strong. But the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice. It is true that, upon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that precise species of contest which is termed a lawsuit; and even when such a contest is possible, it may happen that no one cares to bring it before a court of justice. The Americans have often felt this inconvenience; but they have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous. 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.

[(C) American Laws]

[Tocqueville proceeds from a discussion of the judiciary to a discussion of American Laws.] The laws of the American democracy are frequently defective or incomplete; they sometimes attack vested rights, or sanction others which are dangerous to the community; and even if they were good, their frequency would still be a great evil. How comes it, then, that the American republics prosper and continue?

Democratic laws generally tend to promote the welfare of the greatest possible number. The laws of an aristocracy tend, on the contrary, to concentrate wealth and power in the hands of the 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.

Aristocracies are infinitely more expert in the science of legislation than democracies ever can be. They are possessed of a self-control that protects them from the errors of temporary excitement; and they form far-reaching designs, which they know how to mature till a favorable opportunity arrives. Aristocratic government proceeds with the dexterity of art. It understands how to make the collective force of all its laws converge at the same time to a given point. Such is not the case with democracies, whose laws are almost always ineffective or inept.

The means of democracy are therefore more imperfect than those of aristocracy, and the measures that it unwittingly adopts are frequently opposed to its own cause; but the object it has in view is more useful.

Let us now imagine a community so organized by nature or by its constitution that it can support the transitory action of bad laws, and that it can await, without destruction, the general tendency of its legislation: we shall then conceive how a democratic government, notwithstanding its faults may be best fitted to produce the prosperity of this community. This is precisely what has occurred in the United States.

No political form has hitherto been discovered that is equally favorable to the prosperity of 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. 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.

The common purpose which in aristocracies connects the interest of the magistrates with that of a portion of their contemporaries identifies it also with that of future generations; they labor for the future as well as for the present. The aristocratic magistrate is urged at the same time towards the same point by the passions of the community, by his own, and, I may almost add, by those of his posterity. Is it, then, wonderful that he does not resist such repeated impulses? And, indeed, aristocr-
cies are often carried away by their class spirit without being corrupted by it; and they unconsciously fashion society to their own ends and prepare it for their own descendants.

The English aristocracy is perhaps the most liberal that has ever existed, and no body of men has ever, uninterruptedly, furnished so many honorable and enlightened individuals to the government of a country. It cannot escape observation, however, that in the legislation of England the interests of the poor have often been sacrificed to the advantages of the rich, and the rights of the majority to the privileges of a few. * * *

In the United States, where public officers have no class interests to promote, the general and constant influence of the government is beneficial, although the individuals who conduct it are frequently unskilful and sometimes contemptible. There is, indeed, a secret tendency in democratic institutions that makes the exertions of the citizens subservient to the prosperity of the community in spite of their vices and mistakes; while in aristocratic institutions there is a secret bias which, notwithstanding the talents and virtues of those who conduct the government, leads them to contribute to the evils that oppress their fellow creatures. * * *

[(D) Respect for Law in the United States]

* * *

In the United States, except slaves, servants, and paupers supported by the township, 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.

** [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.

I am wrong, however, in saying all classes; for as in America the European scale of authority is inverted, there the wealthy are placed in a position analogous to that of the poor in the Old World, and it is the opulent classes who frequently look upon law with suspicion. * * * In the United States, where the poor rule, the rich have always something to fear from the abuse of their power. This natural anxiety of the rich may produce a secret dissatisfaction: but society is not disturbed by it, for the same reason that withholds the confidence of the rich from the legislative authority makes them obey its mandates: their wealth, which prevents them from making the law, prevents them from rendering it. Among civilized nations, only those who have nothing to lose ever revolt; and if the laws of a democracy are not always worthy of respect, they are always respected; for those who usually infringe the laws cannot fail to obey those which they have themselves made and by which they are benefited; while the citizens who might be interested in their infliction are induced, by their character and station, to submit to the decisions of the legislature, whatever they may be. * * *

[(E) The Temper of the Legal Profession in the United States, and How It Serves as a Counterpoise to Democracy]

* * *

Men who have made a special study of the laws derive from 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 which is 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. * * *

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.

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. But whenever an aristocracy consents to impart some of its privileges to these same individuals, the two classes coalesce very readily and assume, as it were, family interests.
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.

I am therefore convinced that the prince who, in presence of an encroaching democracy, should endeavor to impair the judicial authority in his dominions, and to diminish the political influence of lawyers, would commit a great mistake: he would let slip the substance of authority to grasp the shadow. He would act more wisely in introducing lawyers into the government; and if he entrusted despots to them under the form of violence, perhaps he would find it again in their hands under the external features of justice and law.

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 twofold authority from it and over it. The people in democratic dominions, and to diminish the political influence of lawyers, would commit a great mistake: he would let slip the substance of authority to grasp the shadow. He would act more wisely in introducing lawyers into the government; and if he entrusted despots to them under the form of violence, perhaps he would find it again in their hands under the external features of justice and law.

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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.

The French codes are often difficult to comprehend, but they can be read by everyone; nothing, on the other hand, can be more obscure and strange to the uninitiated than a legislation founded upon precedents. The absolute need of legal aid that is felt in England and the United States, and the high opinion that is entertained of the ability of the legal profession, tend to separate it more and more from the people and to erect it into a distinct class. The French lawyer is simply a man extensively acquainted with the statutes of his country; but the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science (since most of American law is based on judicial precedent)

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.

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.

I am aware that a secret tendency to diminish the judicial power exists in the United States; and by most of the constitutions of the several states the government can, upon the demand of the two houses of the legislature, remove judges from their station. Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.

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.

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 acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

Notes and Questions

1. It is the conventional wisdom that Tocqueville understood America better than most Americans before or since. Do you agree? Do his words still ring true? Why do you suppose that following the November 1884 congressional elections Newt Gingrich, newly-crowned Republican speaker-to-be of the United States House of Representatives, immediately advised his victorious colleagues to prepare for their coming legislative agenda by reading Tocqueville? Tocqueville was a French aristocrat, lawyer, and legislator who was sent to America to study penal reform. He proceeded to write a wide-ranging survey of American social and political life. For a short and penetrating analysis of his work, see Richard Hofstadter, Alexis de Tocqueville, in L. Kronenberger, ed., Atlantic Brief Lives 795 (1971). For the continuing validity of Tocqueville’s social and political observations see the remarkable reproduction of Tocqueville and Beaumont’s trip to America in Richard Reeves, American Journey: Travelling with Tocqueville in Search of Democracy in America (1982). Tocqueville believed that the world was moving in the direction of democracy, and that America was in the vanguard. He was not overwhelmingly pleased with what the future offered, and believed that modern pressures for equality would extinguish some excellence that the ancien régime had encouraged. Can you discern, from these excerpts, Tocqueville’s personal attitude toward American law and lawyers?

2. Your excerpts begin with Tocqueville’s views on the general social and political conditions in America. His major premise is that America seems to have moved furthest towards a classless society. What part did American law play in this movement? Would Tocqueville have approved of Thomas Jefferson’s efforts to do away with entail and primogeniture? Was Tocqueville correct when he predicted that either all Americans would come to have all rights or all but one man would have rights? Why or why not?

3. What about the established American political institutions Tocqueville describes? He suggests that the overriding principle in American politics is the “sovereignty of the people”? Can you discern what is meant by this phrase? Would you agree with Tocqueville that it was the aristocrats in Maryland who led the way toward universal suffrage? What relevance does Samuel Chase’s attitude toward universal suffrage have here?

4. What relevance does American judicial power have to the principle of popular sovereignty? Why doesn’t an American “turbulent multitude” regard law as its enemy? Or does one? Why is it, as Tocqueville observes, that in America the judiciary has more power than in other countries? How does it come about that in America nearly every political dispute sooner or later winds up in the courts? You are probably familiar with this phenomenon, but note that Tocqueville was describing it one and one half centuries ago.

5. What relationship is there between the prominence of judicial power in America and the prominence of American lawyers? Why is it that Tocqueville believes that the only true American aristocracy is the lawyers? Compare with Tocqueville’s views those of Alva Hugh Maddox, a Justice of the Supreme Court of Alabama, “Lawyers: The Aristocracy of Democracy or ‘Skunks, Snakes, and Sharks’?”, 29 Cumb.L.Rev. 323 (1998). How does one reconcile the idea that the American lawyers are aristocrats, the spirit of equality of Americans, and Tocqueville’s notion that Americans have a special veneration and respect for the law? Are Tocqueville’s observations on lawyers consistent with those of Honestus? Does he explain the anti-lawyer sentiment in America? Note that although Tocqueville suggests that while it is the special province of lawyers to be well-informed and sagacious, they also have a tendency to gravitate toward the centers of power, and can just as easily serve a monarchy as a democracy. Towards what center of power would Tocqueville suggest that American lawyers would eventually gravitate? Consider his comments on the inevitability of another American aristocracy.

As the conditions of men constituting the nation become more and more equal, the demand for manufactured commodities becomes more general and extensive, and the cheapness that places these objects within the reach of slender fortunes becomes a great element of success. Hence there are every day more men of great opulence and education who devote their wealth and knowledge to manufactures and who seek, by opening large establishments and by a strict division of labor, to meet the fresh demands which are made on all sides. Thus, in proportion as the mass of the nation turns to democracy, that particular class which is engaged in manufactures becomes more aristocratic.
But this kind of aristocracy by no means resembles those kinds which preceded it. * * * * To tell the truth, though there are rich men, the class of rich men does not exist; for these rich individuals have no feelings or purposes, no traditions or hopes, in common; there are individuals, therefore, but no definite class.

Not only are the rich not compactly united among themselves, but there is no real bond between them and the poor: Their relative position is not a permanent one; they are constantly drawn together or separated by their interests. The workman is generally dependent on the master, but not on any particular master; these two men meet in the factory, but do not know each other elsewhere; and while they come into contact on one point, they stand very far apart on all others. The manufacturer asks nothing of the workman but his labor; the workman expects nothing from him but his wages. The one contracts an obligation to protect nor the other to defend, and they are not permanently connected either by habit or by duty. * * *

The territorial aristocracy of former ages was either bound by law, or thought itself bound by usage, to come to the relief of its serving-men and to relieve their distresses. But the manufacturing aristocracy of our age first impoverishes and debases the men who serve it and then abandons them to be supported by the charity of the public. * * * *

I am of the opinion, on the whole, that the manufacturing aristocracy which is growing up under our eyes is one of the harshest that ever existed in the world; but at the same time it is one of the most confined and least dangerous. Nevertheless, the friends of democracy should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrates into the world, it may be predicted that this is the gate by which they will enter.


6. Tocqueville, and, for that matter, Robert Rantoul, suggest that the common law is essentially conservative. Is this correct? How do these two men divide over the value placed on conservatism? "Honestus" was a Boston merchant, Tocqueville a French Aristocrat. Do their different backgrounds lead to a different evaluation of American lawyers? As you read the cases on contracts, property, torts, and corporations which follow, and which are ostensibly American common-law decisions, see if you find "essentially conservative" results in the cases.

SECTION B. THE RISE OF THE "CLASSICAL THEORY" OF CONTRACTS

INTRODUCTION: The Colonial Background of American Law: Contracts, Property, and Torts

Twelve of the thirteen English colonies in North America were established in the seventeenth century, and Georgia, the last, was founded in 1732. The creation of a legal system—a mechanism, however rudimentary, for the adjudication of disputes and enforcement of authority—was an elemental need from the beginning. Each colony eventually provided local courts with jurisdiction over criminal and civil matters. Here trials were conducted, usually at the county level. The courts in the colony of New Jersey were typical. At the local level there was the Justice of the Peace, the inferior Court of Common Pleas (civil jurisdiction) and the Court of General Sessions of the Peace (criminal jurisdiction), as well as a few more specialized courts. There was a single Supreme Court of Judicature. The highest court, while it mainly dealt with appeals, was also a court of original jurisdiction in some instances, depending on the seriousness of the case. The Supreme Court of Judicature of New Jersey included a chief justice and four associate judges. Colonial trial courts, in many cases, sat with juries. At the lowest trial court level outside of New England were those presided over by justices of the peace, commissioners, and sheriffs where petty complaints were resolved, and local governmental administration implemented. In New England, township governments played that role.

The sources of law in each colony depended on local circumstances. The terms of royal charters were important, as well as the instructions from royal officials, provincial legislation (which, as we saw in the Parsons' Cause, required approval by royal ministers in London acting on behalf of the King), Parliamentary enactments, and local custom. The English common law was a basis of law in the colonies, though the wide variation of conditions in the colonies from the mother country inevitably meant that laws were adapted to local needs. As we have indicated, By 1760, when the colonists numbered about 1.5 million, lawyers were not important, and even thriving, order of professionals. They were fully aware of the variations in law, jurisdiction, and practices between the colonies and England, which were many. These differences they were also willing to exploit when it was to the advantage of a client.

In the mid-1750s Sir William Blackstone gave a series of lectures at Oxford on the history of English law. Between 1761 and 1765 he arranged them into a treatise of four volumes that were published as Commentaries on the Laws of England. You will soon read some excerpts from that work, and it is one of the most influential set of law books in English history. Its impact in the English colonies was extraordinary. Colonial lawyers sent for copies, and in 1771-72 a special edition was published in Philadelphia that quickly sold out. The Commentaries examined the totality of English law and offered lucid summaries based on Blackstone's readings of case and statutory law. While the colonists' grasp of common law was reasonably good in 1765, as also was the awareness of the differences between colony and mother country, after the publication of the Commentaries no lawyer could plead ignorance of the state of the law in England.

As indicated, though, if there were broad legal similarities between colonies and mother country, there were also profound differences. For settlers in the North American colonies, ever-present was the reality of
life on the fringes of a vast continent, far removed from English control and protection. Physical security was a more or less constant concern. From the beginning the colonists and native inhabitants clashed, and the further removed from coastal areas of settlement, the greater the dangers for settlers. England was not alone in its colonizing ambitions. The Spanish, from their foothold in Florida, had designs on Georgia; colonial coastal fortifications were a necessity in the young English colony. From the holdings they claimed stretching from Canada to Louisiana, the French freely navigated the Eastern interior along the Mississippi, where they entered into trade agreements and protective alliances with Native Americans. Brewing antagonisms in the trans-Appalachian Ohio River Valley between the British and the French erupted into armed conflict in 1754. The “French and Indian War” was the costliest war in English history up to that time, and it seemed only fair to the crown that the Americans should help pay for it, since they stood to benefit and shouldered none of the direct costs. The controversial decisions by the British ministry to impose new taxes and tighten up the collection of customs and revenue in the colonies through the Writs of Assistance, the Sugar Act of 1763, and the Stamp Act of 1765 were a direct consequence.

As we saw in the readings on the Writs of Assistance case and Thomas Hutchinson in an earlier chapter, these legal developments stimulated a decade-long patriot movement from which the British government never recovered.

Cultural and ideological differences between colonies and the mother country also were evident. The colonies did not arise from a feudal tradition, and there was no landed aristocracy or monarchy in the new world. Among white males at least, a rough equality existed in a land where farmers, merchants, tavern owners, blacksmiths, ironworkers, shoemakers, carpenters, and lawyers mingled. The contrasts between the make up of the provincial legislative assemblies and Parliament flowed naturally from this demographic fact. While the bulk of colonists were English, there were also settlers of German, Swedish, French, Portuguese, Italian, and Dutch descent.

There were also religious differences. In the mother country the established Protestant Church of England dominated, but in New England (except Rhode Island) it was the Puritan Congregational churches, the dissenters and nonconformists in the England of 1600, that constituted the establishment. In Southern colonies, like England, the established church was the Church of England. Still, none of the churches North or South wielded the same authority and legal jurisdiction over local affairs as did England's. Moreover, not every colony had an established church. Quakers were prominent in Pennsylvania, Catholics in parts of Maryland, New York and Pennsylvania, and Protestant Huguenot dissenters from Catholic France settled in the Carolinas. The Scots-Irish brought Presbyterianism to the piedmont of the Middle and Southern colonies. Jewish Synagogues were founded in Newport, New Amsterdam, Savannah, Charleston, and Philadelphia.

Protestant denominational practices and even beliefs were made yet more diverse during the Great Awakening beginning in the 1720s. America's first great religious revival. In stark contrast with the European continent and the mother country, by 1760 the hallmark of American religion was its variety joined with a general spirit of tolerance, at least by European standards. The great majority of colonial inhabitants were united by common Judeo-Christian precepts and beliefs, and these infused not only institutions, but also perceptions of law and law's purposes. There was little doubt about what constituted right values and behavior, and colonists brought these perceptions with them when serving on juries or as justices of the peace, sitting as judges, or serving in assemblies.

It was colonial perceptions and needs, combined with the inheritances of law and custom from England and elsewhere in Europe, that dictated the development of law. Contract law in the colonies applied mainly to the exchange of title to land, and did not exist as a distinct branch of law. Contract law, as it developed in America in the nineteenth century, as you will soon understand, transformed to enforce speculative bargains made to secure future gains. A market economy based on competition requires the freedom to enter into such risking bargains, and to reap accordingly. The colonial economy was rural, agricultural, and pre-industrial. While it is the case that trade and commerce were important, market relations tended to be locally based, and in more remote areas subsistence agriculture and barter was the rule. An agreement might be concluded with a handshake or merely a verbal assurance. Its performance, written or otherwise, was immediate and not based on a future expectation. The community frowned upon idiosyncratic agreements that might threaten the peace or upset the social order. In this category were agreements whose terms suggested shabby dealing, or exploiting an advantage.

As you will see in Searight v. Calbraith, infra, juries gave voice to a community's values, and in cases involving contract disputes, they were expected closely to scrutinize the terms and exercise moral judgment regarding the appropriateness of damages for nonperformance. As you will see when you encounter White v. Flora & Cherry, in some cases courts of equity were called upon to enforce the contract's performance, which was most easily secured in the case of title to land.

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." With these words Blackstone captured the English common law's reverence for private property. Colonists carried these values with them to the New World, but circumstances here worked changes. For one, land was readily available, and simple devices for its ownership and transfer evolved. The complexities of English tenure were left behind when the first settlers crossed the ocean. In the absence of a class of legal professionals in the seventeenth century,
communities resorted to plain common sense and moral and pragmatic solutions to problems which arose concerning property and commerce. Thus towns regulated the quality and price of merchandise sold in markets, and forbade price gouging. Efforts were made in the middle and Southern colonies to regulate the quality and price of tobacco sold for export, knowing it would affect marketability abroad. This was simply viewed as part of the larger responsibilities communities had to maintain order and protect their inhabitants.

Nor were colonials free to use their property in ways that damaged others. Following the English common law as you will soon see set forth in Blackstone's tanneries, and other local industries that produced noxious odors or dangers were potential nuisances that were regulated. Colonial assemblies required tipping houses and taverns to obtain a license to operate, and sometimes stipulated standards of care for overnight guests. Again as you will later read in Blackstone, the law also accorded privileges, when those privileges served important community needs. Ferry owners, for example, operated with legislative grants of monopoly and could sue competitors for infringement. (Ferries were absolutely essential to travel and commerce in the colonies, where few roads existed.) While courts protected rights and privileges, the enforcement of regulations always presented a problem, for it was the informal local rule of colonial life, and not central governmental administration, that most distinguished the Americans from their English counterparts. In a community where no one was a total stranger, the persuasions and judgments of one's neighbors carried much weight, and it was difficult if not impossible to impose a regime of central planning and regulation.

As indicated earlier, in another area of property, inheritance, colonial patterns varied from the mother country. The English rule of primogeniture ensured that estates would be passed down to the eldest son on the death of the father. In this manner, land and family were perpetuated intact as the symbol of an aristocratic order. In the New England colonies, the law was changed to permit partible inheritance (splitting up the landed property) among the surviving spouse and children. In the Middle and Southern colonies, while primogeniture remained the law, it declined in importance as land owners used wills to provide for the distribution of property among their wives and children. The availability of land helped, of course, and colonies encouraged its settlement and development up to a point. These developments also grew from a decidedly more egalitarian attitude toward family and authority than existed in England—hardly surprising given that the opportunity permanently to relocate in the New World was one that attracted the middling ranks of society.

Property law in the colonies also took its measure from the possibilities as well as the limits of life in the New World. By 1750 a crude economy based on markets and production had begun to distinguish each of the regions, with ship building and fishing centering in the New England colonies, fur trade and crops in the Middle Colonies, and plantation-based production of tobacco, rice, and indigo in the Chesapeake and Carolinas. There were also challenges. Certainly the existence of an imperial and mercantile system of administration by the Crown prevented developmental and manufacturing interests from gaining a hold in local economies. No less a limiting factor was the prevailing moral system, rooted in religious orthodoxies and communitarian traditions that made little room for materialism. (Wealth won by hard work and thrift, on the other hand, was a just reward.)

Geography presented its own challenges. Colonial society was overwhelmingly agrarian; most people lived along the Atlantic coast and rivers, extending to the edge of a backcountry that was often hostile. Europeans came to the colonies seeking something—greater religious freedoms, opportunity, the prospect of land ownership, even escape. Africans were the great exception, the first of whom were forcibly transported to Virginia by Dutch ship as early as 1619. For all who successfully made the journey to the New World, the demands for security were great, and good security translated into good order and cohesion. The law of property, contract, and nuisance recognized these realities.

Private property and its uses were important everywhere in the English colonies. Blackstone's voice was readily heard across the Atlantic, and he might have been speaking directly to colonial lawyers and community pillars when he wrote that "the peace and security of individuals" is promoted by "steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner." If colonials grew accustomed to security in their property, they also recognized that there were limits to property's use. Perhaps the grandest limits of all were their own conflicting expectations.

Further Reading:
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Paul Finkelman and David Cohin, eds., Tucker's Blackstone, 1996
Robert A. Gross, The Minutemen and Their World, 1976
Kermit L. Hall, The Magic Mirror, 1989
Peter Charles Hoffer, Law and People in Colonial America, 2d ed., 1998
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SEARIGHT v. CALBRAITH
United States Circuit Court, District of Pennsylvania. 1796
21 Fed. Cas. 927.

(In February 1792, Mr. Searight sold Calbraith & Co. a bill of exchange (a negotiable piece of paper, like a check, which entitles the bearer to receive from a person or bank a certain sum of money) for 150,000 livres tournois [French units of currency]. The bill of exchange was payable in Paris, six months from the date of sale. Calbraith & Co. promised to pay £10,625 in Pennsylvania currency for the Bill of Exchange, on or after July 1, 1792. The agent of Calbraith & Co. presented the bill of exchange for payment at the appointed time in Paris. The bank which was to pay on the bill of exchange offered payment in "assignats" [French paper currency] "which, by the then existing laws of France, were made a lawful tender in payment of debts." Calbraith & Co.'s agent refused to accept the offered assignats, "declaring at the same time, that he would receive no other money than French crowns" [specie]. Following these events Calbraith & Co., which had not yet paid Searight for the Bill of Exchange, refused to do so. Searight then sued Calbraith & Co. for their failure to pay the £10,625. Calbraith & Co., in turn, sued Searight for damages because of the French bank's failure to pay in specie. There was apparently no explicit agreement regarding whether the French bank would pay in paper money or in specie.)

On the trial of the cause, evidence was produced, on both sides, to ascertain and fix the precise terms of the original contract, for the sale and purchase of the bill of exchange as to the knowledge and view of the parties, relative to the existence of assignats, or the law of France, making them a legal tender in payment of debts. And the great question of fact for decision, was, whether the parties contracted for a payment in gold and silver; or tacitly left the medium of payment, to the laws of exchange...

For Calbraith and Co. it was contended, that an express contract had been proved to pay the bill in specie; that the very terms of the bill import the same understanding of the parties; that however binding the law of France may be on cases between French citizens, or between American and French citizens, it did not affect contracts between Americans; that, in legal contemplation, there has been neither a payment, nor a tender of payment; and that Searight has sustained no damage, nor shown any right to recover.

Before IRVING, Circuit Justice, and PETERS, District Judge.

IRVING, Circuit Justice. * * The sole question is, whether the tender of assignats in payment of the bill, was a compliance with that contract? * *

* * *

Every man is bound to know the laws of his own country; but no man is bound to know the laws of foreign countries.

In two cases, indeed, (and, I believe, only in two cases) can foreign laws affect the contracts of American citizens: 1st. Where they reside, or trade, in a foreign country; and 2d. Where the contracts, plainly referring to a foreign country for their execution, adopt and recognize the lex loci. The present controversy, therefore, turns upon the fact, whether the parties meant to abide by the law of France? And this fact the jury must decide.

As to the damages, if the verdict should be for Searight, though it is true that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and interest; yet, in a case like the present, they may modify the demand, and find such damages, as they think adequate to the injury actually sustained.

PETERS, District Judge. The decision depends entirely on the intention of the parties, of which the jury must judge. If a specie payment was meant, a tender in assignats was unavailing. But if the current money of France was in view, the tender in assignats was lawfully made, and is sufficiently proved.

When the jury were at the bar, ready to deliver verdicts, the plaintiff in each action voluntarily suffered a nonsuit. It was afterwards declared, however, that in Searight v. Calbraith and Co. the verdict would have been, generally, for the defendants; and that in Calbraith and Co. v. Searight, the verdict would have been for the plaintiffs, but with only six pence damages.

Notes and Questions

1. "Livres Tournois" were French coins in use before the French Revolution of 1789. What effect would you have given the use of that term in the contract if you were a member of this jury, and you knew that the coins were no longer in use? By the way, what do you take to be the reason for the transaction in the case? Does the fact that at this time the political situations in both France (the creation in 1792 of the French Republic and the outbreak of the French Revolutionary Wars in Europe) and America (the experiment with the new national government) were somewhat uncertain help in interpreting the deal?